ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lear Siegler Services, Inc.	)	ASBCA No. 54449
	)	
Under Contract No. F41689-01-C-0029	)	

APPEARANCES FOR THE APPELLANT: Daniel B. Abrahams, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
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Tedd J. Shimp, Esq.
Senior Trial Attorney
MAJ Teresa G. Love, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant Lear Siegler Services, Inc. (LSI) has filed a timely request for reconsideration of the Board's 11 April 2005 decision awarding summary judgment for the government and denying the appeal. *Lear Siegler Services, Inc.*, ASBCA No. 54449, 05-1 BCA ¶ 32,937. Familiarity with that decision is presumed. Appellant argues that the Board's decision contains clear errors of law and fact in improperly denying a price adjustment for increased costs of a defined benefit health plan occasioned by inflationary increases in health insurance costs. Appellant stated that the case presented the following question to the Board: "Does anything in the language or purpose [of] the FLSA/SCA Price Adjustment clause prohibit an SCA-covered contractor from receiving a price adjustment for increased health insurance costs merely because that contractor is compelled to adopt a predecessor's *bona fide* defined-benefit health plan?" (app. mot. at 5). Appellant requested that the motion be referred to the Senior Deciding Group for decision.

The government has opposed the motion on the grounds that the issues were fully and adequately considered in the Board's decision and no new basis for reconsideration has been offered. The government argues that "the true question is whether the SCA Price Adjustment clause *allows* a contractor to receive a price adjustment for increased costs incurred outside of any enforceable SCA requirements, given the circumstances of

the case" (gov't resp. at 4; emphasis in original). The government stated that there was no compelling need for this properly-decided case to be submitted to the Senior Deciding Group for reconsideration.

The Chairman has determined that the issues presented by the motion are not of such unusual difficulty, significant precedential importance, or dispute within the normal decision process as to justify referral to the Senior Deciding Group. *AEC Corporation, Inc.*, ASBCA No. 42920, 03-1 BCA ¶ 32,071 at 158,488, n.1.

Appellant asserts that it was required to accept the existing terms and conditions set out in the former collective bargaining agreement (CBA) and that the effect of the Board's decision is to unilaterally require the contractor to convert a defined benefit plan to a defined contribution plan to get a price adjustment under the Service Contract Act of 1965, 41 U.S.C. § 351 *et seq.* Appellant also argues that the Board made errors in its statement of facts in failing to conclude that appellant was entitled to a price adjustment on the basis of a mutual understanding at the time of contracting that adjustments would be granted for increases in wages or fringe benefits without distinction between defined benefit plans and defined contribution plans. Appellant's statements of alleged errors of fact, with two exceptions, are not presented with reference to specific Board's findings, but appear to go to the Board's conclusions.* Alternatively, appellant maintains that the evidence is sufficient to require denial of summary judgment for determination of factual disputes concerning "the overwhelming predominance of defined-benefit plans" (app. mot. at 18, n.18) and the existence of a course of dealing by which LSI's additional costs were compensable (app. mot. at 25, n.23).

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* Appellant first notes the Board's reference to "*a single prior instance* of its receipt of a price adjustment for the increased costs of providing defined benefits" (05-1 BCA at 163,174; emphasis added) when in fact there were dozens of price adjustments made monthly that LSI received under its five-year contract (app. mot. at 25). The Board considered an instance a contract and finds it fallacious for appellant to maintain that continued adjustments under one contract amounted to the course of dealing it had the burden of proving. Appellant refers to its "knowledge of other contractors who received similar adjustment" (*id.*) without specific evidence thereof. As the government has pointed out, appellant is only "again arguing without any new evidence" (gov't resp. at 19). Second, appellant cannot maintain that it was error for the Board to find that appellant did not give notice at the time of award that it expected to receive an adjustment by stating that the government was on notice of the potential for a claim because of the Price Adjustment clause (app. mot. at 25).

Upon reconsideration, the Board will not modify its decision in the absence of a compelling reason, *e.g.* newly discovered evidence which could not have been discovered in time to present in the original proceeding. *Sunshine Cordage Corporation,* ASBCA No. 38904, 90-1 BCA ¶ 22,572 at 113,277. Reconsideration is not intended to allow the moving party to reargue its positions. *M. Bianchi of California,* ASBCA No. 36518, 95-1 BCA ¶ 27,340 at 136,252; *Debcon, Inc.,* ASBCA No. 45049, 94-1 BCA ¶ 26,345 at 131,034. Grounds for granting reconsideration are newly-discovered evidence or errors of fact or law that the Board failed to consider in reaching its underlying decision. *NMS Management, Inc.,* ASBCA No. 53444, 04-1 BCA ¶ 32,415 at 160,460.

We held that the increased costs of furnishing health and welfare benefits to appellant's union employees did not result from a change in the CBA at the beginning of the renewal period or from a change in the scope of benefits to be provided. The increase was occasioned by inflationary changes in health insurance costs and appellant's determination to continue to provide the benefits in the CBA rather than their equivalent benefits. It did not result from the requirement to comply with the applicable wage determination, *i.e.* the CBA. 05-1 BCA at 163,173. We have not found this conclusion to be in error. Appellant has mischaracterized the Board's decision in seeking reconsideration. The increase that was the subject of appellant's claim did not involve LSI's predecessor's CBA, but was an increase at the beginning of the first option year from appellant's base year Settlement Stipulation with the union entered into after award of the contract.

We have also not found error in our determination to grant summary judgment as a matter of law. Appellant did not present evidence in support of its position that could create a genuine issue of material fact. Appellant maintains that it is significant that defined-benefit plans are widespread and argues that the Board has made an unsupportable artificial distinction between contractors who offer defined benefit plans and those who offer defined contribution plans in denying price adjustments for increased benefit costs (app. mot. at 18-19). Since appellant was required to accept the terms and conditions set out in its predecessor's CBA without knowledge of the costs of providing the defined benefits, appellant argues that it had no opportunity to offer an equivalent cash benefit and no obligation to do so if it could have (app. mot. at 27). It does not follow, however, that the Price Adjustment clause applies to grant a price adjustment for increased costs. Under the regulatory scheme of the SCA, the alternative of providing equivalent benefits must be considered in determining whether SCA requirements as opposed to other factors caused an increase in the costs of fringe benefits. *See* 29 C.F.R. 4.163(j); 05-1 BCA at 163,172. Neither the facts of the number of defined-benefit plans nor appellant's alleged expectation of a price adjustment at the time of award are material to the issue that was before us for decision. In addition, there was insufficient evidence to infer the existence of a course of dealing that might support appellant's interpretation of the Price Adjustment clause.

The Board previously considered all of the record evidence and appellant's arguments and finds nothing in appellant's motion that warrants change in our original decision. We have concluded on review of the record that our conclusions are correct. Accordingly, we affirm our original decision denying the appeal.

Dated: 14 October 2005

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54449, Appeal of Lear Siegler Services, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals