ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Grumman Aerospace Corporation	)	ASBCA No. 46834
	)	
Under Contract No. F04606-86-C-0122	)	

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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON MOTION FOR RECONSIDERATION

The Air Force (AF) seeks reconsideration of our decision in *Grumman Aerospace Corporation*, ASBCA No. 46834, 05-2 BCA ¶ 33,084 (*Grumman II*), which denied a number of AF claims in the amount of $6,007,771.[1] The AF asserted five claims; it seeks full reconsideration on one claim, and reconsideration in part on two others. We address the AF's contentions below. Familiarity with our prior decisions is presumed.

[1] In *Grumman Aerospace Corp.*, ASBCA Nos. 46834 *et al.*, 03-1 BCA ¶ 32,203, *aff'd on recon.*, 03-2 BCA ¶ 32,289 (*Grumman I*), we denied ASBCA No. 51526 and sustained ASBCA No. 48006 in part. In *Grumman Aerospace Corp.*, ASBCA No. 48006, 06-1 BCA ¶ 33,216 (*Grumman III*), we granted, in part, appellant's quantum claim.

I. Claim for Data-Gathering Flights

The Board denied the AF's claim for damages to fly certain sorties on appellant's behalf to gather data to debug or troubleshoot appellant's MC OFP. The AF seeks reconsideration, contending that the Board's decision was unsupported by the evidence and the law.

We do not believe that the AF has demonstrated any legal error. The AF seeks to recover its flight costs as breach of contract damages (resp't br. on entitlement and quantum at 78) for appellant's failure to timely deliver the MC OFP in accordance with the contract's engineering milestones.[2] RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) provides as follows:

> § 351. Unforeseeability and Related Limitations on Damages
>
> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

[2] These costs are not recoverable under the contract's INSPECTION OF SUPPLIES – FIXED-PRICE -- ALTERNATE I (JUL 1985) clause, FAR 52.246-2, because the clause did not apply to the contract line items pertaining to the MC OFP. *See* Section E, Inspection and Acceptance, E-2 (R4, tab 1 at 35). In addition, the claimed costs were not incurred by the AF to inspect or test appellant's work in accordance with the contract, but rather to provide data to appellant to debug its work. In fact, the AF suspended all inspection and testing pending these data-gathering flights for appellant.

These principles have been adopted in the Federal Circuit. *Old Stone Corp. v. United States*, No. 05-5059, 2006 U.S. App. LEXIS 12972 (May 25, 2006); *Landmark Land Co., v. F.D.I.C.*, 256 F.3d 1365, 1378 (Fed. Cir. 2001).

Accordingly, in order to prevail the AF had to show that appellant had reason to foresee, at the time of contract award, that data-gathering flights to assist appellant would be a probable result of its failure to timely deliver the MC OFP. The AF made no such showing. As such, we believe the AF's claimed damages were not foreseeable. For this reason alone, the claim was properly denied.

The AF also argues that the Board's decision was erroneous in that it failed to consider that the AF flights "were caused by Grumman's seriously deficient OFP software, not by any problems with the SINU" (mot. at 11-12). The Litton and Honeywell SINUs were government furnished property (GFP), and we held in *Grumman I* and *Grumman II* that they were not reasonably accurate, complete and suitable for their intended use. Specifically, we concluded in *Grumman I*:

> These Government-furnished standard inertial navigation units were almost in a constant state of design flux between 1988 and 1990, and there were considerable problems with their standardization and use. Appellant did not cause these problems, nor did appellant have any contractual basis to expect such problems from this GFP.

(*Id*. at 159,210) We held that SINU-related problems contributed to flight test delay (*id*.). *See also Grumman II* at 163,996.

The AF contends in its motion that "there is no evidence in the record (with the possible exception of STR 539) that the SINU problems Grumman encountered caused any of the specific Category 1 or 1A STRs (which were the reason for the suspension of flight testing and the reason that the Air Force flew 'data gathering' sorties for Grumman)" (mot. at 13).

The AF is incorrect. There is evidence of record linking priority STRs and SINU problems. This evidence is contained in the very document cited by the AF to support its motion. For example, the Oram letter dated 17 August 1988, enclosure 3 at page 3, identifies priority STRs 457 and 497, Category 1, Flight Critical, as follows:

Hardwardware [sic] Problem (Status Code *C)

Priority	STR#	DESCRIPTION
1	457	MC'S DON'T RECOGNIZE SINU IN ATT MODE
1	497	LITTON SINU ALWAYS STAYS IN ORIENT MODE

(R4, tab 339) Also Enclosure 3, page 1 includes Category 1, STR 539, "SINU BUS FAIL AFL AT SINU POWERUP" (*id.*). We find that there were priority STRS caused by SINU problems -- for which the AF was responsible as the provider of the GFP -- that contributed to the suspension of integrated flight testing.

The AF has shown no error in our finding that many of the data-gathering sorties reported problems with the operation of the SINUs. Indeed, upon our review of the record on reconsideration, we find additional instances of documented SINU problems during the data-gathering flights. (*See, e.g.*, AF R4, tabs 1989, 1990, 1998, 1999, 2005, 2020, 2043) During this period, the parties held a "SINU SPLINTER MEETING" on 6 February 1989, at which they addressed various problems with the GFP SINU for which the AF was responsible, including the following:

> Correction of Honeywell SINU[.] Incorrect I01 DCM Refresh Rate
>
> . . . .
>
> Grumman Has An Immediate Need For The I01 Correction Which Affects F-111A System Flight Performance.
>
> Mode and Timing Differences. . . . Bath Mode Differences Cause Crew Confusion – Specification Change Pending
>
> Cold Start Air Align Problems
>
> . . . .
>
> Incorrect True Heading and Wander Angle Inconsistency During Cold Start Air-Align Occurred With Litton S/N STD0079 During Flight Test.

> In Air Power –Up Anomalies with S/W Mode Toggling and Azimuth Swings. This Occurred In Flight with Honeywell SINU S/N STD0053.

(GAC R4, tab 1493 at GAC 0003327, 0003330, 0003331)

We believe that the AF's attempt to minimize the impact of the SINU problems for which it was responsible is unsupported by the record and remains unpersuasive.

We also note that problems cited by the AF relating to backup functionality were not solely attributable to appellant. In *Grumman I*, we concluded:

> [W]e believe that appellant had the design discretion to delete backup functions in the computers and to reduce redundancy to insure compliance with memory reserve requirements. We believe that the AF, in a number of letters and meetings, impermissibly interfered with appellant's design discretion in this respect.

(*Id*. at 159,204)

The AF suggests in its motion that we should infer that those documented sortie summaries that fail to mention SINU problems were flown to address problems for which appellant was solely responsible. Whether or not this was true was for the AF to prove as part of its claim. It did not do so. As the claimant here, the AF was obligated to adduce credible evidence that the claimed data-gathering flights or flight hours were logged to address problems for which appellant was solely responsible. The AF had the burden to prove the fundamental facts of liability, causation and damages. *See Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (*en banc*). It did not meet this burden. The contracting officer -- who prepared this claim -- did not have the technical knowledge necessary to credibly address this issue. We reaffirm that his testimony was not persuasive in this respect. The AF claim was also properly denied on this ground.

The AF ascribes error to that portion of our decision in *Grumman II* that combined the number of data-gathering flights with the number of flights against the test plan for purposes of ascertaining whether the AF incurred any additional flight costs beyond those contemplated by the contract. The AF contends, *inter alia*, that the Board made an erroneous "decision finding that, under the contract, 'data-gathering' flights were the same as flight testing sorties" (mot. at 7).

The AF is incorrect. The Board did not make a finding in its decision that these flights were the "same". We are mindful that there were data-gathering flights and flights

against the test plan, and these flights were not identical. We agree with the government, however, that the number of flights flown by the AF is not determinative under the AF claim. As the AF sought to quantify its claim by flight hour, a more relevant quantum approach would be to compare the total number of flight hours contemplated by the government preaward and those it actually incurred. This information is not of record, and therefore we part with this aspect of our analysis in *Grumman II*, and modify our decision accordingly.

In sum, we have reconsidered our decision and made additional findings as appropriate. For reasons stated, we affirm the denial of this claim.

II. Extended Contractor Support

The AF contends that the Board erred, in part, in denying its claim for extended contractor support, specifically for costs incurred under the VERAC/Ball contract, in the amount of $884,611, for work performed in March, 1988 through May, 1989 for which Grumman was responsible. In support of the motion, the AF contends that the Board failed to consider testimony of Ball's lead engineer and certain Ball-generated documents that showed that Ball personnel performed work in this period related to the data-gathering flights.

We agree with the AF that this evidence shows that Ball personnel performed work within this period related to data-gathering matters, but that is all it shows. This evidence does nothing to prove the AF claim. Indeed, one of the Ball memoranda cited in the AF motion, dated 23 March 1989, addresses SINU problems for which we find the AF was responsible as the provider of this GFP:

> **Event/Sortie Memo**
>
> This memo lists events that are Not Ready due to deficiencies in OFP 39.
>
> . . . .
>
> 2-10 to 2-16
>
> [A]fter GPS-I operation on several sorties, **the SINU has had larger than expected drift rates**. Grumman says that the problem may be due to data latency caused by the Honeywell output rate. As a minimum, the navigation flight test should be tried with the Litton SINU (version 8 is required if weapon delivery will be done) or a corrected Honeywell SINU.

. . . .

> TFR:
>
> Two major problems have been identified (orientation and continued flight control responses to a SINU that is "Off") **which are believed to originate from the SINU**. We believe these are serious safety of flight issues needing resolution prior to TFR events other than altimeter override events and 83% violation warning checks. Some TFR ground check issues (problem reports 69 and 96) also imply potential inflight impacts.

(Emphasis in bold added) (R4, 2nd supp. tab 2335.114) We also find that a Ball "Problem Report", dated 28 October 1988 at page 2, documents various SINU problems: "SINU seems to have been in irreversible distress"; "toggling could be a result of the SINU's inability to support Nav status"; "[o]ur analysis of these data indicates possible software problems both in the Honeywell SINU and in the F-111A/E AMP GNC OFP (version 37a)." (R4, tab 1204 at 117) The AF failed to show that it's claimed VERAC/Ball costs were solely the responsibility of Grumman.

We also reaffirm that the AF failed to cite credible evidence in support of its quantification of the claim, that is, that 90% of the VERAC/Ball contract costs incurred by the AF between March, 1988 and May, 1989 were attributable to Grumman wrongdoing. The AF did not show that the contracting officer who prepared this claim was personally involved with the negotiation, execution and/or administration of the VERAC/Ball contract. We reaffirm our conclusion that the contracting officer's testimony was uncorroborated hearsay in this regard, and was not persuasive.

In sum, we have reconsidered our decision, but the AF has not shown that the Board erred in denying this claim.

III. Extended/Additional Program Management

The Board denied the AF's extended program management claim for the period March, 1988 through May, 1989, in the amount of $2,289,701. The AF contends that we erred in part, insofar as we failed to consider the salary and related support cost for Mr. Ben Alsop in the amount of $44,745, who performed work as an AF employee related to trouble-shooting appellant's MC OFP during this period (mot. at 18, 19).

We have reviewed the evidence cited by the AF. We reaffirm that the evidence falls short of establishing the AF claim in entitlement and quantum. Much of the evidence cited by the AF in the motion involves Mr. Alsop's work with code optimization and memory reserve. However as we held in *Grumman I*, the AF was in part responsible for the claim related to backup functions and memory reserve. The AF did not show that Mr. Alsop's activities during this period were solely attributable to appellant.

Moreover, Mr. Alsop did not testify that he spent all his working time during this period addressing MC OFP problems for which appellant was responsible. It was only the contracting officer who opined to this effect, years after this work was performed and without the benefit of any credible payroll documentation. We reaffirm our conclusion that the contracting officer's testimony in this respect was hearsay and not persuasive.

In sum, we have reconsidered our decision, but believe the AF has not shown error in the denial of this claim.

CONCLUSION

We conclude that our decision denying the AF claims is supported by the record and the law. We affirm our decision, as modified herein, sustaining this appeal.

Dated: 9 June 2006

JACK DELMAN
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

RICHARD SHACKLEFORD
Acting 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. 46834, Appeal of Grumman Aerospace Corporation, rendered in conformance with the Board's Charter.

Dated:

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