ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
AM General LLC	)	ASBCA No. 53610
	)	
Under Contract Nos. DAAE07-89-C-0998	)	
DAAE07-95-C-R021	)	
DAAE07-96-D-X001	)	

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO STRIKE

AM General LLC (AM General) moves for reconsideration of the Board's decision in *AM General LLC*, ASBCA Nos. 53610, 54741, 06-1 BCA ¶ 33,190. Since we did not decide ASBCA No. 54741 which involved AM General's offset claim, our discussion herein relates only to ASBCA No. 53610.

In its reply to the government's response to its motion for reconsideration, AM General attached a declaration from "an expert in cost accounting and practical application of CAS 418" (app. reply at 15). The government moves to strike the

declaration and corresponding sections of AM General's reply (app. reply at 15-16) on several grounds. We agree with the government and grant its motion to strike.

Background

1. We issued our decision in *AM General LLC* on 2 February 2006. In that decision, we denied AM General's motion for summary judgment based on numerous defenses contending that AM General was exempt from the application of Cost Accounting Standard (CAS) 418, and that the government, the United States Army, Tank-Automotive and Armament Command or TACOM, had elected not to apply CAS to the High Mobility Mutipurpose Wheeled Vehicle (HMMWV) contracts. We granted the government's cross-motion for summary judgment as to entitlement holding that AM General's single manufacturing overhead pool was not homogenous in accordance with the requirements of CAS 418. We remanded the appeal to the parties for determination of the quantum of adjustment.

2. On 10 March 2006, attorneys from a different law firm (Jenner & Block LLP) filed a Notice of Appearance as co-counsel for AM General. Also on 10 March 2006, new counsel filed a motion for reconsideration of the Board's 2 February 2006 decision (Mot. for Recons.). That motion, having been filed within 30 days from the date of receipt on 8 February 2006 by AM General of the Board's decision, was timely. The motion stated that "AM General does not seek reconsideration of that portion of the Board's decision denying AM General's Motion for Summary Judgment" (Mot. for Recons. at 1, n.1).

3. By letter dated 13 March 2006, the Board directed the government to file its response by no later than 17 April 2006. The government filed its response on 10 April 2006 (gov't resp.). Thereafter, the Board by letter dated 14 April 2006 advised counsel for AM General that "[i]f appellant elects to file a reply, please do so by no later than 15 May 2006."

4. On 15 May 2006, AM General filed its reply. Appended to its reply brief was "Declaration of James W. Thomas in Support of Appellant's Response to the Government's Reply to Appellant's Motion for Reconsideration" (Thomas Declaration).

5. In a section of its reply entitled "The Government's Arguments In Response And the Board's Analysis of CAS 418 Are Inconsistent With The Accounting Practices Of Many Contractors And, If Confirmed Here, Would Require Numerous Burdensome And Costly Accounting Changes," AM General referred to James W. Thomas as "an expert in cost accounting and the practical application of CAS 418," and referred to the contents of the declaration in its arguments (app. reply at 15-16).

6. On 25 May 2006, the government filed a Motion to Strike the Thomas Declaration (Motion to Strike). By letter dated 30 May 2006, the Board directed AM General to "show cause by no later than 13 June 2006 why the declaration should not be stricken." The letter advised the government that pending a ruling, it need not address the contents of the Thomas Declaration in its sur-reply to AM General's reply.

The Thomas Declaration

7. The Thomas Declaration states that he is a certified public accountant licensed in Virginia and the District of Columbia. He earned his accounting degree from Pennsylvania State University. (Thomas Declaration at 2) He has spent his entire 23-year professional career in government contract accounting. His declaration states that he was retained by counsel for AM General "to offer my opinions – from the perspectives of industry practice and of cost accounting as a discipline – on the portion of the Board's opinion finding that AM General's manufacturing overhead pool is nonhomogeneous and, therefore, noncompliant with Cost Accounting Standard ('CAS') 418." At the time he was retained, he was a partner with PricewaterhouseCoopers LLP, and was the leader of the firm's Aerospace and Defense Advisory Services sector. (*Id.* at 1)

8. According to Thomas, what qualifies him to render his opinions in his declaration is that, as leader of the Aerospace and Defense Advisory Services sector at his firm, his specialty is government contracts "with a focus on advising clients on the adoption and implementation of cost accounting methods that are compliant with the requirements of CAS, including CAS 418" (Thomas Declaration at 2). Thomas' declaration also states that he has "frequently advised clients on the application of the criteria set forth in CAS 418 for establishing homogeneous indirect cost pools," and he has provided expert testimony on CAS and Federal Acquisition Regulation accounting matters on "several occasions" (*id.* at 2). In addition, Thomas states that he has regularly taught courses regarding accounting requirements and practical application of CAS, including CAS 418, to government and contractor attendees, clients and employees of PricewaterhouseCoopers (*id.* at 3).

9. Thomas opines that his reading of the Board decision is that "the Board's application of the homogeneity requirements of CAS 418 is not consistent with CAS 418, or with industry's application of those requirements" (*id.* at 5). His opinion that AM General's accounting practice was consistent with CAS 418 was said to have been derived from his recent tour of AM General's manufacturing site, his review of diagrams and pictures of the facility relevant to the appeal, his interview with AM General management personnel who were present during the relevant period, his consideration of AM General's accounts and indirect cost allocation methods and his reading of certain DCAA audit reports (*id.* at 3). Thomas opines that contractors subject to CAS 418 frequently have indirect cost pools "that group costs for allocation over a single

allocation base even though the pool contains the costs of individual . . . activities that are used in the performance of only certain of the contracts contained in the base over which the pool is allocated" (*id.* at 5), and this is particularly true where the contractor, as AM General, "is producing similar, although not identical, products for both government and commercial markets" (*id.* at 6).

10. Thomas' declaration states that CAS 418 does not require that a cost pool consist of similar activities, and that a requirement to allocate each activity separately or by class of customers is not practical in a manufacturing environment and would require extraordinary administrative effort and expense (*id.* at 6). The declaration also opines that the Board's decision is inconsistent with CAS 418 because the Board undertook no analysis of the factors set out in CAS 418-50(b) and that the Board improperly relied on the illustration set out in CAS 418-60(d) (*id.* at 8-9).

The Government's Motion to Strike

In support of its Motion to Strike, the government relies on Board Rule 13(b) which it argues "prohibits the receipt of proof into evidence once an appeal is ready for decision." The government points out that this prohibition applies to cases submitted on cross-motions for summary judgment as well. To the extent the Thomas Declaration constitutes new evidence, the government acknowledges that receipt of new evidence in connection with a timely motion for reconsideration is discretionary with the Board. (Mot. to Strike at 3)

Relying on *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1012 (2003), the government contends further that "AM General relies upon Mr. Thomas' declaration as expert testimony," and since "interpretation of CAS is an issue of law," "[t]he Board should not consider expert testimony in interpreting how CAS 418 should be applied to the undisputed facts of this case" (Mot. to Strike at 4). Lastly, the government says that it would be prejudiced if we were to allow AM General "to submit this expert testimony for the first time . . . as part of its Reply brief" (Mot. to Strike at 5).

AM General's Opposition

AM General opposes the Motion to Strike and argues that "CAS interpretation is not the thrust of the Thomas Declaration." It maintains that "[t]he legal issue as to 'the proper interpretation' of CAS 418 is not what the Thomas Declaration is about." (App. opp'n at 1, 2) AM General argues that the Thomas Declaration explains "as a practical matter how CAS is applied in day-to-day business" (app. opp'n at 1) and offers opinion "about the effects of the Board's decision from the 'perspective of industry practice and cost accounting as a discipline'" (app. opp'n at 2). It argues further that "the

Federal Circuit has never ruled that expert testimony concerning the practical application or effects of cost accounting concepts is improper, any more so than it has declared out of bounds testimony in engineer, architecture, or a host of other nonlegal disciplines" (app. opp'n at 1-2). It adds that even if the Board were to construe any portion of the Thomas Declaration as legal interpretation, it should not strike the entire declaration (app. opp'n at 4, n.2).

With respect to the government's contention that it will be prejudiced because it has not been given any opportunity to present testimony from its own expert to assist the Board with resolving the proper interpretation of CAS 418, and because the Government has had no opportunity to depose Mr. Thomas, AM General's answer is that "the government remains free, and has plenty of time . . . to proffer a rebuttal affidavit on industry practice, so long as it is consistent with the admonition of *Rumsfeld v. United Technologies*" (app. opp'n at 4). Quoting from *G.M. Co. Manufacturing, Inc.*, ASBCA No. 5345, 60-2 BCA ¶ 2759, AM General also disputes that the contents of the Thomas Declaration comprise "new evidence," and maintains that it is merely "in support of the argument on reconsideration and in confirmation of the evidence already in the original record" (app. opp'n at 4).

DECISION

In exercising our discretion on whether to receive new evidence on reconsideration, we consider, among other factors, (1) the kind of evidence being offered; (2) its availability at the time the record was closed and (3) whether the opposing party has been prejudiced by the delay in presenting such evidence. *Canadian Commercial Corp.*, ASBCA No. 17187, 77-2 BCA ¶ 12,758 at 61,981; *Madison Park Clothes, Inc.*, ASBCA No. 4234, 61-1 BCA ¶ 3054 at 15,808.

The Kind Of Evidence Being Offered

From the credentials offered in his declaration, we conclude that Thomas was called upon to provide his opinion solely because of his expertise in government contract accounting and in CAS 418 in particular. Despite AM General's argument to the contrary, the Thomas Declaration on its face covers far more than how industry applies CAS 418. Rendering an opinion that the Board's application of the homogeneity requirements of CAS 418 is not consistent with CAS 418, that the Board's decision is inconsistent with CAS 418 because it undertook no analysis of the factors set out in CAS 418-50(b) and that the Board improperly relied on the illustration set out in CAS 418-60(d) requires, in our view, first, an interpretation of CAS 418, and second, an opinion with respect to what is the proper interpretation of CAS 418. Rendering an opinion as to the proper interpretation of CAS 418 clearly runs counter to the admonition

set out in *Rumsfeld v. United Technologies Corp.*, 315 F.3d at 1369:

> The views of the self-proclaimed CAS experts, including professors of economics and accounting, a former employee of the CAS Board, and a government contracts accounting consultant, as to the proper interpretation of those regulations is simply irrelevant to our interpretative task; such evidence should not be received, much less considered, by the Board on the interpretive issues. That interpretive issue is to be approached like other legal issues – based on briefing and argument by the affected parties. [Footnote omitted]

Availability Of The Evidence At The Time The Record Was Closed

Leading up to the Board decision issued on 2 February 2006, both parties litigated the issues in accordance with the Board's Rules. Rule 13(a), "Settling the Record," provides that "the record upon which the Board's decision will be rendered consists of documents furnished under Rule 4 and 12, *to the extent admitted in evidence"* and other enumerated items**.** Rule 13(b) provides that "[e]xcept as the Board may otherwise order in its discretion, *no proof shall be received in evidence* after completion of an oral hearing or, in cases submitted on the record, *after notification by the Board that the case is ready for decision."* (Emphasis added)

AM General filed its motion for summary judgment on 14 October 2004 (Motion Papers No. 1). On 22 December 2004, the government filed its opposition to the motion and filed simultaneously, a cross-motion for summary judgment (Motion Papers No. 2). The Board notified AM General counsel by letter dated 3 January 2005:

> On 23 December 2004, the Board received the government's opposition to your motion for summary judgment and its cross motion for summary judgment. Please file your response to both by no later than 18 February 2005. Thereafter, the government will be given the opportunity to reply to your response. The record will then be closed for decision.

As indicated in our principal decision, AM General replied to the government's opposition and filed an opposition to the government's cross-motion (Motion Papers No. 3). This was followed by the government's reply to AM General's opposition to the government's cross motion, filed on 14 April 2005 (Motion Papers No. 4). Both parties were advised by the Board that upon filing by the government of its reply to Motion Papers No. 3, the record would be closed for decision.

This brings us to Board Rule 28(a), "Decisions," which states, in part, that "[d]ecisions of the Board will be made *solely* upon the record, as described in Rule 13" (emphasis added). As the government points out, the rule prohibiting the receipt of proof once an appeal is ready for decision applies to cases submitted on cross-motions for summary judgment as well. *See NI Industries, Inc.*, ASBCA No. 34943, 92-2 BCA ¶ 24,980 at 124,506 (affidavit appended to motion for reconsideration that repeats legal opinion and argument and did not qualify as "newly discovered evidence" merits no further consideration).

In treating various matters gleaned from depositions and interrogatory responses not offered into evidence pursuant to a Board Order settling the record as "improper argument" to be disregarded in reaching the Board's decision, we said in *USD Technologies, Inc.*, ASBCA No. 87-2 BCA ¶ 19,680 at 99,616; *aff'd on other grounds*, 845 F.2d 1033 (Fed. Cir. 1988) (table):

> Briefs pursuant to Rules 11 and 23 represent the parties' opportunity to argue the merits of the case based on evidence in the record; they are not to be used as vehicles for introducing new evidence.

See also United Technologies Corp., ASBCA No. 25501, 86-3 BCA ¶ 19,171 (lists and charts submitted with the government's post-hearing brief purporting to interpret, amplify and correct evidence presented at hearing stricken).

AM General contends that the contents of the Thomas Declaration are not new evidence but rather evidence "in support of the argument on reconsideration and in confirmation of the evidence already in the original record" (app. opp'n at 4). We disagree. First, AM General has not pointed to where in the original record the evidence (substantive contents of the Thomas Declaration) exists. Second, if such evidence exists, AM General has not explained why it did not reference such evidence but chose to provide a declaration from one who had no connection with the case until recently. Moreover, Thomas' declaration that he only recently toured the site and interviewed AM General's management personnel who were present during the relevant period undermines this argument.

The issue of whether AM General's single-pool method of allocating manufacturing overhead complied with CAS 418 had been the subject of the parties' discussions since 1995. After AM General appealed the CO's final decision in 2001, the government presented the issue to the Board by cross-motion for summary judgment (Motion Papers No. 2 dated 22 December 2004). AM General responded by opposing the government's cross-motion (Motion Papers No. 3 dated 18 February 2005). Evidence

with respect to AM General's facility, its accounts and indirect allocation methods, and affidavits of AM General's management personnel during the relevant period were available at or prior to the time AM General responded to the government's cross-motion for summary judgment.

In opposing the government's motion to strike, AM General listed by bullet points a litany of consequences that can flow from the Board's decision from "the perspectives of industry practice and cost accounting as a discipline." Such evidence, even if relevant, could have been presented and argued in AM General's opposition since the government laid out, in its cross-motion for summary judgment, precisely why it considered AM General's accounting practice to have been in violation of CAS 418 and asserted that to comply with CAS 418, a "Three Tiered Method" was needed. (Motion Papers No. 2 at 42-50)

We said in *Rainbow Valley Corp.*, ASBCA No. 11691, 69-1 BCA ¶ 7655 at 35,519-20:

> An opportunity to the losing party to offer additional evidence that it could easily have adduced earlier and have another 'bite at the apple' after it has received an adverse decision is not to be granted lightly. *Madison Park Clothes, Inc.*, ASBCA No. 4234, 61-1 BCA ¶ 3054. As a matter of fairness the losing party should not be permitted to wait until after it receives an adverse decision before offering evidence that it could easily have presented before the adverse decision was rendered, except for the most compelling reasons.

Whether The Government Has Been Prejudiced By the Delay In Presenting the Thomas Declaration

The issue AM General has created here cannot be resolved by simply affording the government the opportunity to proffer a rebuttal affidavit on industry practice. In its motion to strike, the government says that it will be prejudiced also because it had "no opportunity to depose Mr. Thomas" (Mot. to Strike at 5). While Thomas is entitled to base his opinion on facts and data that had not been admitted into evidence (*see* Fed. R. Evid. 703), deposition of Thomas may lead to other challenges to the underlying facts and data upon which Thomas based his declaration. We note that AM General is not without trepidation on what the government's rebuttal affidavit might say. It cautions that the affidavit must be "consistent with the admonition of *Rumsfeld v. United Technologies"* (app. opp'n at 4). Thus, it has already reserved for itself the right to challenge the government's rebuttal affidavit if one were to be filed. This can quickly escalate into an extensive re-litigation of the appeal. *Gelco Builders & Burjay*

Construction Corp. v. United States, 369 F.2d 992, 1000 at n.7 (Ct. Cl. 1966) ("Litigants should not, on a motion for reconsideration, be permitted to attempt an extensive re-trial based on evidence which was manifestly available at time of the hearing."); *Pacific Contact Laboratories, Inc. v. Solex Laboratories Inc.*, 209 F.2d 529, 533 (9th Cir. 1953) (sustaining district court's exercise of discretion denying receipt of new evidence "not offered until after new counsel had been substituted by appellants at a time when . . . appellants had already had their day in court.").

CONCLUSION

To allow the Thomas Declaration would require us to ignore the rules under which both parties had litigated the case up to this point, and would require the government to deal with evidence which it had not had to deal with before. This delay in presenting Thomas' Declaration is unfair and prejudicial to the government. We have considered whether any part of the Thomas Declaration could be received in evidence at this late stage of the proceeding, and have concluded that none of it could be salvaged without prejudicing the government. According, in exercising our discretion, we grant the government's Motion to Strike.

Dated: 21 August 2006

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 53610, Appeal of AM General LLC, rendered in conformance with the Board's Charter.

Dated:

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