ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
L-3 Communications Corporation	)	ASBCA No. 54920
	)	
Under Contract No. F33657-01-D-2077	)	

APPEARANCE FOR THE APPELLANT: Roy A. Klein, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
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OPINION BY ADMINISTRATIVE JUDGE FREEMAN ON
THE GOVERNMENT'S MOTION TO DISMISS AND ON
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

L-3 Communications Corporation, Link Simulation & Training Division (Link), appeals the denial of its claim for government breach of the Awarding Orders clause of a multiple award indefinite quantity contract. The government moves to dismiss for lack of jurisdiction. Link moves for summary judgment on the basis of an inspector general's report. We deny both motions.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTIONS

1. On 5 July 2001, Link and the government entered into the captioned contract for acquisition by delivery order of aircraft training devices and related services. The contract was one of eleven similar contracts entered into by the government with qualified suppliers under the Air Force TSA II program (R4, tab 1 at 1-6, 53-54; compl. and answer, ¶ 4).

2. The contract included, among other provisions, the FAR 52.233-1 DISPUTES (DEC 1998) clause and the Air Force FAR Supplement 5352.216-9001 AWARDING

ORDERS UNDER MULTIPLE AWARD CONTRACTS (MAY 1996) – ALTERNATE II (MAY 1996) clause. The Awarding Orders clause stated in relevant part:

> (a) All multiple award contractors shall be provided a fair opportunity to be considered for each order in excess of $2,500 pursuant to the procedures established in this clause, unless the contracting officer determines that:
>
> (1) The agency's need for the services or supplies is of such urgency that providing such opportunity to all such contractors would result in unacceptable delays;
>
> (2) Only one such contractor is capable of providing the services or supplies at the level of quality required because the services or supplies ordered are unique or highly specialized;
>
> (3) The task or delivery order should be issued on a sole source basis in the interest of economy or efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity pursuant to the procedures in this clause to be considered for the original order; or
>
> (4) It is necessary to place an order to satisfy a minimum guarantee.
>
> (5) The task or delivery order is set aside for small business.
>
> (6) The task or delivery order is to fulfill a Foreign Military Sales (FMS) requirement for which the FMS country has directed the source.
>
> (b) Unless the procedures in paragraph (a) are used for awarding individual orders, multiple award contractors will be provided a fair opportunity to be considered for each order using the following procedures:

(1) The Government will request that each multiple award contractor submit their technical and/or managerial approach, if necessary, and cost/price proposal in response to the Government's work statement.

(2) The response may be presented to the Government either orally or in writing.

(3) The Government will issue orders based on an assessment of the technical and/or managerial approach, proposed total cost/price, past performance, and other factors as determined appropriate in making awards under this paragraph.

(c) Under the provisions of the Federal Acquisition Streamlining Act of 1994, 10 U.S.C. 2304(c) (Public Law 103-355), a protest is not authorized in connection with the issuance or proposed issuance of an individual task or delivery order except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract under which the order is issued.

(d) For this contract, the designated task or delivery order ombudsman is the Center Competition Advocate . . . . The task or delivery order ombudsman is responsible for reviewing complaints from multiple award contractors and ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders in excess of $2,500, consistent with procedures in the contract. However, it is not within the designated task or delivery order contract ombudsman's authority to prevent the issuance of an order or disturb an existing order.

(R4, tab 1 at 29, 46)

3. On 14 August 2002, the government issued a request for order proposal (RFOP) for a delivery order for support and development of F-15 training devices. The performance period for the order, including a "ramp-up" period and nine annual one-year option periods, was 1 January 2003 to 31 December 2012. (R4, tab 34 at 1, 3, 16, 61)

4. The RFOP stated that "[t]his is a best value task order selection," and that "[t]his may result in an award to a higher rated, higher priced offeror, where . . . the

Order Award Authority (OAA) reasonably determines that the technical superiority and/or overall business approach of the higher priced offeror outweighs the cost difference" (R4, tab 34 at 52).

5. The RFOP specified three "evaluation factors" for award. These were (i) technical/management (to include proposal risk), (ii) past performance within TSA II delivery orders, and (iii) cost/price. The RFOP stated that "The evaluation factors other than cost or price, when combined, are significantly more important than cost or price; however, cost/price will contribute substantially to the selection decision." (R4, tab 34 at 52-53)

6. For the cost/price factor, the RFOP stated that: "[t]he offeror's Price/Cost proposal will be evaluated for award purposes, based upon the total price proposed for basic requirements (basic award period) and all options." One required component of the proposed price was hourly rates for specified categories of labor in Table B of the RFOP for performing major modifications, developing new devices, and providing reliability and maintainability improvements. (R4, tab 34 at 38-44, 56, 68-69, 77-78)

7. The RFOP stated that, for evaluation purposes, the proposed Table B hourly rates were to be multiplied by the corresponding government estimated hours in the Table to arrive at a total price for the Table B hourly rate work. (R4, tab 34 at 38-44, 56)

8. On 30 September 2002, Link submitted its technical and cost/price proposals for the F-15 training device delivery order (R4, tabs 26-29). The F-15 aircraft manufacturer (The Boeing Company) and three other TSA II contractors also submitted proposals. Boeing received the highest technical score. Link received the second highest technical score. (R4, tab 6 at 17)

9. The source selection ("integrated product") team rated all five offerors "acceptable" for past performance. The team did not evaluate levels of acceptable past performance of the individual offerors, and advised the OAA that "Past Performance [is] Not A Discriminator for Award." (R4, tab 6 at 19)

10. Link's total evaluated price was $68,804,370. Boeing's total evaluated price was $100,236,520. (R4, tab 20 at 7) The source selection team "closed the gap" between the Boeing and Link prices by substituting certain nonbinding contractor estimated man-hours in the parties' technical proposals in place of the Table B government estimated man-hours in the total evaluated price (R4, tab 6 at 26-27, tab 20 at 8).*

* The Table B hourly rate work using the specified government estimated man-hours was approximately 50 percent of both the Boeing and Link total evaluated prices (R4, tab 6 at 24; tab 20 at 7).

11. This substitution was labeled a "Quantified Risk Analysis" in the source selection team's briefing to the OAA with the stated rationale that "there exists [sic] significant risk factors with the proposed [technical] approaches that are reflected in the technical scores, and that also appear in the form of cost information throughout the proposals, but are masked in the total evaluated price (TEP)" (R4, tab 6 at 26-27).

12. In his Order Assessment Report, the OAA accepted the source selection team's Quantified Risk Assessment and its recommendation of a "best value" award to Boeing on the basis that the non-binding contractor estimated man-hours in the technical proposals "provided a more realistic view of potential future costs for the program [than the total evaluated price]." (R4, tab 20 at 7-8; tab 24) The OAA concluded his report as follows:

> The results of this Quantified Risk Assessment considerably closed the gap between the two cost proposals and even reflected an overall cost savings with the Boeing Company proposal over the life of the delivery order.
>
> **Summary**
>
> Based on my assessment of both proposals in accordance with the specified evaluation criteria, it is my decision the proposal submitted by the Boeing Company offers the best overall value to the government in technical superiority, quality, and risk at a reasonable and realistic price. Award should be made to The Boeing Company.

(R4, tab 20 at 8)

13. On 27 November 2002, the contracting officer awarded the F-15 training device delivery order to Boeing (R4, tab 18).

14. By letter dated 19 December 2002, Link notified the government that the award to Boeing did not comply with the requirements of the RFOP and requested the government to issue a temporary stop work order until a proper evaluation was completed (R4, tab 22). The government refused (R4, tab 23).

15. On 28 May 2004, Link submitted a certified claim to the contracting officer under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. The claim was in the amount of $2,131,579 for government breach of the Awarding Orders clause of the TSA II contract in awarding the F-15 training devices delivery order to Boeing. (R4 tabs 11-15) The claimed amount consisted of $377,985 for employee severance and

relocation costs, $1,567,112 for lost profits, and $186,482 for the delivery order proposal preparation costs (R4, tab 15 at 5).

16. On 21 October 2004, the Inspector General, Department of Defense issued a report on the award to Boeing. This report (the IG Report) concluded that the government "did not effectively conduct its technical/management evaluation and used a questionable methodology to evaluate past performance to support its decision to award The Boeing Company the task order . . . ." (IG Report at 5)

17. With respect to the technical/management evaluation, the IG Report stated that the Air Force (i) failed to "effectively" use the "Delphi Technique" to develop evaluation criteria, (ii) failed to appropriately use the Delphi Technique to evaluate proposals, (iii) lowered technical/management ratings for weaknesses that did not relate to the subfactor evaluation criteria, (iv) lowered technical/management ratings for the same weakness under multiple subfactor criteria, and (v) lowered technical/management ratings for weaknesses that had been resolved through evaluation notices. (IG Report at 6, 9, 15)

18. With respect to the past performance evaluation, the IG Report stated that "The methodology used to assess past performance effectively made it a nonfactor in the award decision because offerors with outstanding past performance and no prior performance received equal ratings." (IG Report at 17)

19. With respect to the "Quantified Risk Assessment" in the cost/price evaluation, the IG Report stated:

> The cost comparison, based on cost numbers taken from the offerors' proposals that were applied to the approach suggested by the offerors , showed the total Boeing cost at [redacted] versus [redacted] for L3 Communications. However, the differences in the suggested approaches of the offerors (necessary items versus desirable items) make the comparison of little value. *Furthermore, both the chairman of the selection team and the order award authority stated this cost comparison that was not done in accordance with the RFP was not a factor in the decision to award the task order to Boeing.* (emphasis added)

(IG Report at 19)

20. The IG Report also included an eight page Air Force letter dated 20 September 2004 providing a detailed rebuttal of the specific findings in a draft of the Report. Paragraphs 21-24 below are excerpts, illustrative of the detail of the rebuttal.

21. With respect to the IG finding of inappropriate use of the Delphi Technique to evaluate the technical/management factor, the Air Force responded in part:

> . . . . The Air Force agrees that the Delphi Technique was not used precisely as identified in the audit and developed by the Rand Corporation. However, the procedures used were in accordance with the described procedures outlined in the TSA II User's Guide and the RFP. The basis for the evaluation and ultimate decision by the Task Order Award Authority in no way deviated from the evaluation approach set forth in the RFP and in accordance with the Air Force Source Selection Guide (March 2000) and regulatory guidance for awarding orders under multiple award contracts. Further, while the evaluation technique and modifications to the Delphi Technique in its limited use in the source selection process could be improved upon, the audit report itself produces no findings or recommendations that demonstrate the procedures specified in accordance with the Air Force Federal Acquisition Regulation Supplement (AFFARS) 5352.216-9001, Awarding Orders Under Multiple Award Contracts, were not followed, nor that there was any arbitrariness in the way ratings were assigned. Further, by demonstration in the report itself, even had the explicit Delphi Technique been used in its entirety, there is no basis to conclude that the outcome of the evaluation and decision made would have been different. Perhaps the biggest "failure" in the Air Force approach was simply one of inappropriately citing a technique that was not used in its purest form, that is, the Delphi Technique. However, not having followed such a technique
> does not render the entire process that was employed, and clearly spelled out in the RFP, invalid.

(IG Report at 34)

22. With respect to the IG Report finding of lowered ratings for (i) weaknesses unrelated to evaluation criteria, (ii) same weakness under multiple subfactors, and (iii) weaknesses resolved through evaluation notices, the Air Force responded in part:

. . . . The report cites a weakness in the TFE-21 section that was considered a risk to the L-3 Concurrency approach. The report does not specify the weakness under discussion, but it is believed to be Number L1, which addresses L-3's failure to include appropriate hardware changes in the TFE-21 conversion. The evaluation team considered the L-3 approach to concurrency, as exemplified in their TFE-21 conversion proposal, to be too focused on software and lacking in appropriate hardware changes. Because excess reliance on software solutions complicates concurrency changes, this approach jeopardizes L-3's ability to meet the 60-day concurrency window. This specifically falls under the third element of the Concurrency criterion.

. . . .

. . . . The report criticizes the Air Force for downgrading different aspects of L-3's technical proposal for a single weakness. It should be noted that all offerors were evaluated this way; when a single weakness affected more than one criteria of any offeror's proposal, the weakness was considered under all criteria. This is not inappropriate, in that a flaw that would affect different areas of a contractor's performance should be recognized to present a risk to all the affected areas.

The report takes exception to an evaluator lowering ratings under Concurrency, Commonality, and Baseline Requirements because L-3 had not taken timely steps to enter into ACAs and states that ACAs should be evaluated only under Concurrency. The Air Force disagrees. The RFP explicitly addressed the ACA process in the Proposal Preparation Instructions (PPI) and Evaluation Criteria related to Concurrency. For Commonality, the PPI stated, "The lack of an ACA or other satisfactory method of acquiring data could legitimately cause a weakness in Commonality." The evaluation criterion includes identification of the necessary data and an approach to obtaining and interpreting the data. ACAs are also directly related to a number of items under Baseline Requirements, such as configuration management and threat system data bases. The use, non-use, or failure to

> timely pursue ACAs affect all three areas differently, with consequences that must be assessed to arrive at an accurate measure of a proposal's quality and likelihood to meet the Air Force's needs.
>
> . . . .
>
> . . . . The report assumes that any response to an evaluation notice (EN) resolves the weakness. This is not the case. An EN is issued when the evaluator does not have adequate information to complete the evaluation. If the response to an EN provides adequate information for the evaluator to complete the evaluation, the EN is closed. Closure of an EN does not mean that the information provided resolved the related weakness.

(IG Report at 34-35)

23. With respect to the IG finding that the methodology used to evaluate past performance made past performance a "nonfactor," the Air Force responded in part:

> . . . . The Air Force agrees that the methodology used to evaluate past performance, essentially an "acceptable vs. nonacceptable" methodology, did not allow discrimination among offerors with acceptable past performance.
>
> In this case, all offerors received the same past performance rating because no offerors had an unacceptable past performance history. The evaluation methodology was structured to recognize bad past performance. In retrospect, the Air Force realizes that allowing more granularity in the past performance ratings would achieve a more precise means of differentiating among the offerors in the past performance area. However, even if qualitative differences among past performance ratings had been employed for offerors with acceptable past performance, no past performance ratings assigned would have outweighed the technical merits of the selected offeror's proposal who also had acceptable past performance.
>
> The past performance evaluation methodology was included in the draft RFP posted for offeror comment. If any

> prospective offeror objected to the evaluation scheme, exception should have been taken before the RFP was issued.

(IG Report, at 36)

24. With respect to a statement in the IG Report that the Air Force OAA "did not have reliable information to support the 'best value' decision to award Boeing a 10-year task order for [redacted] versus awarding the task order to L-3 Communications for [redacted] a difference of $31.4 million," the Air Force responded in part:

> . . . . [T]he Basis for Award in the RFP stated that the Air Force would award to a higher priced offeror if the technical superiority of the proposal outweighed the cost difference. The [OAA] adequately justified the trade-off of cost and performance.
>
> "Total evaluated price" is a source selection term referring to the outcome of an evaluation; it is not the value of the resultant contract. In the case of the F-15 order, the cost/price evaluation included estimates that are not binding amounts on the order. If the estimates are excluded from both cost proposals, the values of the orders associated with both proposals are [redacted] for L-3 and [redacted] for Boeing, a difference of $10,576,852.
>
> . . . . The Air Force disagrees with the report conclusion that the evaluation was flawed. The report cites flaw in the application of the Delphi Technique. That the Air Force did not follow a technique defined by the IG after the evaluation was completed does not mean that the evaluation conducted in accordance with the RFP was flawed. We have adequately demonstrated that the evaluation criteria stated in the RFP were followed, and that all offerors were rated consistently in accordance with the stated criteria. . . . .

(IG Report at 36-37)

25. By final decision dated 10 November 2004, the contracting officer denied Link's claim in its entirety (R4, tab 2). This appeal followed.

DECISION

A. The Government's Motion to Dismiss

The government moved to dismiss the appeal on 6 January 2006 on the ground that Link's claim was in substance a protest of the award of a delivery order that is prohibited by statute, regulation and paragraph (c) of the Awarding Orders clause of the contract. *See* 10 U.S.C. § 2304c(d), 41 U.S.C. § 253j(d), FAR 16.505(a)(8) (currently FAR 16.505(a)(9)) and SOF, ¶ 2. Link argues that the government's motion, filed 11 months after the appeal, is untimely. It further argues that it is pursuing a claim for breach of contract under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, and not a bid protest.

Although Board Rule 5 states that jurisdictional motions should be filed "promptly," the rule has hortatory effect only. A motion challenging jurisdiction may be raised at any time. *Hamill Manufacturing Company*, ASBCA No. 20926, 78-1 BCA ¶ 13,088.

On the merits of the motion, we agree with Link. The same actions of the government in awarding a delivery order under a multiple award indefinite quantity contract may theoretically be grounds for both a "protest" seeking to cancel or modify the award and a "claim" for damages for breach of the Awarding Orders clause of the contract. These are separate and distinct forms of relief with "protests" governed by FAR Subpart 33.1 and "claims" by FAR Subpart 33.2. The statute, regulation and contract clause prohibit only protests. Link's certified claim for money damages for breach of the Awarding Orders clause does not seek to cancel or modify the award made. The denial of that claim by the contracting officer is within our jurisdiction under the CDA, FAR Subpart 33.2 and the FAR 52.233-1 DISPUTES (DEC 1998) clause of the contract.

In *Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 at 157,786-87, we held that we had CDA jurisdiction over a claim for breach of a fair opportunity to compete clause in a multiple award indefinite quantity contract where the contractor was given the opportunity to bid on only 26 of the 51 orders awarded. The government distinguishes *Community Consulting* from Link's claim on the ground that Link alleges only that specified evaluation criteria were not followed, and not that it was entirely denied an opportunity to bid. This is a distinction without a difference. There is as much a denial of a fair opportunity to be considered for award where the government does not follow the specified evaluation criteria as where it fails to solicit a bid. The government's motion to dismiss is denied.

B. Appellant's Motion for Summary Judgment

As a preliminary matter we consider Link's objection to the exclusion of the IG Report from the appeal (Rule 4) file pursuant to the government's 20 January 2006 request. Rule 4(e) provides for the exclusion of documents submitted by either party for the appeal file on the opposing party's request for reasons stated. Such exclusion, however, is without prejudice to the document being offered in evidence at hearing pursuant to Rule 20, or at settling of the record pursuant to Rule 13. At this stage of the appeal, Link's offering of the IG Report in evidence is premature. Exclusion from the Rule 4 file, however, does not preclude consideration of the IG Report as a supporting document for Link's motion for summary judgment to the extent the Report alleges facts that would be admissible in evidence. *Janice Cox d/b/a Occupro Ltd.*, ASBCA No. 50587, 01-1 BCA ¶ 31,377 at 154,931 (Note 1); *Ben M. White Co.*, ASBCA No. 36496, 89-1 BCA ¶ 21,432 at 108,008.

On the merits of the motion, Link relies solely on the IG Report and argues that "[t]he Air Force cannot raise a genuine issue of material fact sufficient to defeat Link's claim because the Government itself (the Inspector General, DoD) already has investigated the Air Force's conduct in issuing the F-15 order and concluded, *inter alia*, that the Air Force '**did not effectively conduct its technical/management evaluation and used a questionable methodology to evaluate past performance**' (emphasis added)." (App. mot. at 8)

The Report potentially supports Link's claim that there was a breach of contract, but it also is inconsistent in that respect. For example, after noting that the chairman of the selection team and OAA had stated that the cost comparison in the "Quantified Risk Analysis" was not done in accordance with the RFP, the Report goes on to accept at face value their further assertion that this cost comparison was not a factor in the award decision – an assertion that is contradicted by the OAA's Order Assessment Report. *See* SOF, ¶¶ 10-12, 19.

Whatever weight we may ultimately give to the IG Report, it is not an administrative adjudication and has no preclusive effect. *See United States ex rel. Milam v. The Regents of the University of California*, 912 F. Supp. 868, 880 (D. Md 1995) (report of HHS Office of Research Integrity). Moreover, it includes the Air Force rebuttal of its findings. Neither the Report nor the rebuttal (as provided to the Board) are sworn documents. We have quoted the rebuttal extensively in the Statement of Facts. It is sufficiently detailed to raise genuine issues of material fact regarding the allegations in the Report. *See* SOF, ¶¶ 20-24. Summary judgment on the basis of the Report is therefore precluded. *MIG Corp.*, ASBCA No. 54451, 05-2 BCA ¶ 32,979 at 163,384-85. Link's motion for summary judgment is denied.

Dated: 27 July 2006

MONROE E. FREEMAN, JR.
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. 54920, Appeal of L-3 Communications Corporation, rendered in conformance with the Board's Charter.

Dated:

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