ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
General Dynamics Corporation	)	ASBCA No. 56744
	)	
Under Contract Nos. N00421-05-C-0110	)	
W52H09-09-C-0012	)	

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

General Dynamics Corporation (GD or appellant) has timely moved for reconsideration of our decision of 21 June 2011 in which we determined that GD's use of intra-year pension fund returns violated Cost Accounting Standard (CAS) 412. *General Dynamics Corp.*, ASBCA No. 56744, 11-2 BCA ¶ 34,787. GD does not request reconsideration of the substantive rationale for our determination. Instead, appellant maintains that the Board procedurally should have retained oversight of the appeal while remanding "quantum" to the parties for resolution and issued a stay of our decision on "entitlement" until the "quantum" aspects of the case have been settled or adjudicated. The government has filed an opposition to appellant's motion.

GD's motion is grounded in an incorrect assumption regarding the scope of the Administrative Contracting Officer's (ACO) final determination of CAS 412 noncompliance (FDN), the resulting appeal therefrom and the Board's underlying decision. Appellant's misassumption may in part have been induced by an inaccurate sentence in the Board's decision which we clarify and correct herein.

The ACO's FDN, dated 17 November 2008, stated that appellant was not in compliance with CAS 412 and directed appellant to cease using the intra-year returns. It further requested GD to submit a cost impact proposal in accordance with FAR 52.230-6 within 60 days. Notably, the ACO's FDN contained no government estimate of the cost impact of the noncompliance. (R4, tab 19) However, the Defense Contract Audit Agency (DCAA) audit report relied on by the ACO estimated that the noncompliance would result in additional costs to the government totaling $52,842,000 during the periods in dispute covering September 2004 through 2009 (R4, tab 8 at 2).

On 16 January 2009, appellant submitted its estimate of the cost impact of the noncompliance to the ACO alleging that impact to be "approximately" less than $4.2 million (app. supp. R4, tab 48). The record fails to disclose any further actions taken with respect to this submission by either party.

GD appealed the ACO's FDN on 12 February 2009 (R4, tab 19).

In the Decision portion of its Opinion, the Board stated, "Although quantum is not before us for decision, the contracting officer's final decision estimates that the differences during the 2004-2009 period in dispute result in increased costs to the government totaling approximately $55 million." *General Dynamics Corp.*, 11-2 BCA ¶ 34,787 at 171,217. The sentence contains three errors. First, the ACO issued a FDN not a "final decision" as such. Second, the FDN contained no estimation of the cost impact of the noncompliance. DCAA, not the ACO, authored the estimate. Third, DCAA's estimate of the cost impact was $52,842,000 not "approximately $55 million." The Board hereby corrects the misidentification of the FDN as well as the misattribution and misstatement of the estimated impact of the noncompliance. To that extent our opinion is modified and corrected. The salient point from the standpoint of CAS 412 compliance, however, was not the precise amount or source, as between DCAA or the ACO, but the perceived "distortive" impact of the noncompliance, albeit solely from a government perspective. As briefed in connection with the summary judgment motions, the distortive effects of the use of the noncompliant intra-year rates were not expressly argued or challenged by appellant.

Neither party questions our jurisdiction to decide the discrete and independent issue of noncompliance. Indeed we have assumed jurisdiction in a number of cases involving FDNs spanning several decades and it is now well established despite the absence of formal final decision language, cost impact estimates or monetization of a demand in a sum certain. The rationale supporting jurisdiction has been explained in detail and need not be repeated here. *E.g.*, *Systron Donner, Inertial Div.*, ASBCA No. 31148, 87-3 BCA ¶ 20,066 (analyzing prior precedent, the interrelation of the statutory, regulatory and contractual CAS frameworks and clauses with Contract Disputes Act requirements); *McDonnell Douglas Corp.*, ASBCA No. 26747, 83-1 BCA ¶ 16,377 at 81,419-22, *aff'd in part and rev'd in part on other grounds*, 754 F.2d 365 (Fed. Cir. 1985) (Board has jurisdiction to decide the

respective rights of the parties even though no monetary relief is sought); *Litton Systems, Inc., Guidance and Control System Div.*, ASBCA No. 37131, 94-2 BCA ¶ 26,731; *Litton Systems, Inc., Guidance & Control Systems Div.*, ASBCA No. 45400, 94-2 BCA ¶ 26,895 (FDN constituted government claim as the final written position and decision "seeking as a matter of right, the adjustment or interpretation of contract terms"); *Aydin Corp.*, ASBCA No. 50301, 97-2 BCA ¶ 29,260 (failure to agree as to *either* the noncompliance determination or cost impact may constitute a discrete justiciable dispute under CAS provisions); *see also General Electric Co.*, ASBCA No. 36005 *et al.*, 91-2 BCA ¶ 23,958, *aff'd*, 987 F.2d 747 (Fed. Cir. 1993).

CAS-related issues may properly fall within our jurisdiction in several ways depending in part on the situs of the funds in dispute, which party has asserted a claim regarding an alleged noncompliance and/or for return of the funds, and/or whether the cost impact of the alleged noncompliance has ripened into a dispute/claim after exhaustion of the contractually prescribed steps for measurement of the cost impact. Resolution of "quantum" in the case of a CAS noncompliance is detailed in the contractual CAS-related clauses and regulations. Information essential to determining the "quantum" of the cost impact is in the first instance in the possession of, and best estimated by, the contractor. This is true even though the government may possess substantial audit and other cost data prior to the determination of noncompliance. Thus, the contractual framework requires appellant to initiate the process by submission of a cost impact statement detailing the effect of the noncompliance across the universe of the contractor's relevant contracts. In this case, appellant submitted a cost impact statement to the ACO on 16 January 2009. The record does not reveal any further actions by either party, much less a claim or appeal, regarding the proposal.

Instead, the dispute and appeal in this case concern solely whether the government's determination of noncompliance was proper. Because the measurement of the cost impact has never been before us for decision and is not within the scope of this appeal, it would be improper to remand "quantum" to the parties. Moreover such a remand is unnecessary because the methodology for resolving the cost impact is already prescribed in the contract and has been initiated by appellant. Should the parties in fact be unable to reach a resolution after undertaking this process, their dispute may provide the foundation for a future appeal.

None of the "remand" cases cited by appellant involve the contractual and regulatory process for administering the CAS. We need not speculate regarding cases where *both* the issues of noncompliance and cost impact are ripe for decision on appeal. Nor need we hypothesize under what circumstances the Board, in its discretion, may bifurcate the noncompliance dispute and "remand" the details of computing cost impact to the parties following a finding of noncompliance in instances where *both* issues are properly justiciable. *See AM General LLC*, ASBCA Nos. 53610, 54741, 06-1 BCA ¶ 33,190, *vacated in part on recon.*, 07-1 BCA ¶ 33,498 ("final decision" asserting noncompliance and

monetary claim; Board initially concluded contractor failed to comply with CAS 418 and remanded quantum to parties with instructions to contractor to submit cost impact proposal rather than decide price adjustment issue based on DCAA calculations in the record; Board vacated its determination of noncompliance on reconsideration); *cf. Eastman Kodak Co.*, ASBCA No. 51326, 01-2 BCA ¶ 31,533 (where CO issued a "final decision" asserting a monetary claim for refund of pension costs, Board remanded "quantum" for negotiation after finding government entitlement to refund), *aff'd*, 317 F.3d 1377 (Fed. Cir. 2003); *but cf. Astronautics Corporation of America*, ASBCA No. 49691, 99-1 BCA ¶ 30,390 (where CO "final decision" asserted noncompliance and monetary claim and where noncompliance was substantially conceded by contractor, Board addressed and denied claimed government adjustment).

The Board hereby modifies and corrects the sentence discussed above. It further reemphasizes that the cost impact of the noncompliance is not within the scope of the appeal. Having decided the sole issue before us, we deny appellant's motions to "remand" "quantum" or "stay" our decision relative to the noncompliance.

Dated: 3 November 2011

ROBERT T. PEACOCK
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. 56744, Appeal of General Dynamics Corporation, rendered in conformance with the Board's Charter.

Dated:

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