

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
The Boeing Company) ASBCA Nos. 57549, 57563
)
Under Contract Nos. W911W6-05-2-0006)
FA8808-04-C-0022)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

The Boeing Company (Boeing) appeals two contracting officer's decisions finding Boeing liable for increased costs incurred (or to be incurred) by the government as a result of Boeing's unilateral simultaneous changes in its cost accounting practices at two business segments. Boeing contends that at both segments the increased cost changes were offset by simultaneous decreased cost changes. The government contends that each accounting practice change must be analyzed separately for its increased cost impact on the government and that the Federal Acquisition Regulation (FAR) expressly prohibited the offset of decreased cost changes against increased cost changes for determining the increased cost changes impact on the government. The parties have submitted the appeals for decision on entitlement only and pursuant to Rule 11 without oral hearing (Bd. corr. ltrs. dtd. 22 June, 4 September, 5 September 2012). We sustain the appeals.

FINDINGS OF FACT

1. On 1 January 2005, Boeing put into effect three unilateral financially significant changes to its established cost accounting practices at its Philadelphia segment. These changes were documented in a revised Cost Accounting Standards

Board (CASB) Disclosure Statement for the Philadelphia segment dated 21 October 2004 (ASBCA No. 57549 (57549), R4, tab 1). The individual cost impacts of these changes on the government's CAS-covered contracts¹ at that segment were respectively decreased costs of \$790,000 and \$289,000 for two of the changes, and increased costs of \$1,477,000 for the third change. The aggregate cost impact on the government of all three changes was an increased cost of \$398,000. (57549, R4, tab 15; Stips. ¶¶ 2, 4)²

2. On 1 January 2005, Boeing also put into effect six unilateral financially significant changes to its established cost accounting practices at its El Segundo segment. These changes were documented in a revised CASB Disclosure Statement for the El Segundo segment dated 1 November 2004 (ASBCA No. 57563 (57563), R4, tabs 2-3). The individual cost impacts of these changes on the government's CAS-covered contracts at that segment were decreased costs of \$3,724,000, \$1,916,000, \$1,293,000 and \$260,000 for four of the changes and increased costs of \$1,136,000 and \$206,000 for two of the changes. The aggregate cost impact on the government of all six changes was a decreased cost of \$5,851,000. (57563, R4, tab 16 at 9-10; Stips. ¶¶ 1, 3)

3. The cost impact increases and decreases resulting from the 1 January 2005 accounting changes at Philadelphia and El Segundo were calculated by Boeing on the affected CAS-covered contracts and subcontracts at each segment. All of the CAS-covered contracts and subcontracts used to calculate the impact costs included the FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998) clause and all were entered into before 1 January 2005. (Stips. ¶¶ 5, 6, 7)

¹ CAS-covered contracts are those contracts subject to the cost accounting standards prescribed in 41 U.S.C. §§ 1501-1506 and implementing regulations thereunder.

² On 12 April 2005, Boeing put into effect a fourth accounting practice change at its Philadelphia segment that had a decreased cost impact in the amount of \$11,932,000 on the government's CAS-covered contracts at that segment (57549, R4, tab 15 at 2; Stip. ¶ 2). Boeing, however, is not contending that this change should be included in the aggregate cost impact of the 1 January 2005 simultaneous changes (app. br. at 7 n.1).

4. The statutory provisions for price adjustments in CAS-covered contracts for increased costs paid by the government as a result of changes in a contractor's cost accounting practices are set forth in 41 U.S.C. §§ 1502(f)(2) and 1503(b) in relevant part as follows:

§ 1502 Cost accounting standards

....

(f) **Implementing regulations.** – The [CAS] Board shall prescribe regulations for the implementation of cost accounting standards prescribed or interpreted under this section. The regulations shall be incorporated into the Federal Acquisition Regulation and shall require contractors and subcontractors as a condition of contracting with the Federal Government to –

....

(2) agree to a contract price adjustment, with interest, for any increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices or a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

§ 1503 Contract price adjustment

....

(b) **Amount of adjustment.** – A contract price adjustment undertaken under section 1502(f)(2) of this title shall be made, where applicable, on relevant contracts between the Federal Government and the contractor that are subject to the cost accounting standards so as to protect the Federal Government from payment, in the aggregate, of increased costs, as defined by the Cost Accounting Standards Board. The Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government, as defined by the Board, on the relevant contracts subject to the price adjustment unless the contractor

made a change in its cost accounting practices of which it was aware or should have been aware at the time of the price negotiation and which it failed to disclose to the Federal Government.

5. At all times relevant herein, the CAS Board regulations at 48 C.F.R. § 9903.306 entitled “Interpretations” stated in pertinent part:

(a) Increased costs shall be deemed to have resulted whenever the cost paid by the Government results from a change in a contractor’s cost accounting practices...and such cost is higher than it would have been had the practices not been changed....

....

(e) An adjustment to the contract price or of cost allowances pursuant to the Cost Accounting Standards clause...may not be required when a change in cost accounting practices...is estimated to result in increased costs being paid under a particular contract by the United States. This circumstance may arise when a contractor is performing two or more covered contracts, and the change...affects all such contracts. The change...may increase the costs paid under one or more of the contracts, while decreasing the costs paid under one or more of the contracts. In such case, the Government will not require price adjustment for any increased costs paid by the United States, so long as the cost decreases under one or more contracts are at least equal to the increased cost under the other affected contracts....

6. Prior to 8 April 2005, the Department of Defense agencies having primary responsibility for enforcing the CAS statute and regulations interpreted the statute and regulations as allowing the offset of decreased costs of one accounting practice change against increased costs of a different accounting practice change where the changes in the cost accounting practices were made simultaneously. Thus, the October 1990 Contract Administration Manual of the Defense Contract Management Command (DCMC) expressly stated that: “Within a segment, several accounting changes may be combined for offset purposes as long as they have the same effective date” (57549, app. supp. R4, tab 19 at 7144). The exact same statement also appeared in the Defense Contract Audit Agency (DCAA) Contract Audit Manuals dated July 2002, July 2003, January 2004, and

January 2005 (57549, app. supp. R4, tab 31 at 526, tab 32 at 532, tab 37 at 589, tab 40 at 655).

7. Effective 8 April 2005, FAR Part 30 – Cost Accounting Standards Administration, was amended to add Section 30.606 “Resolving cost impacts.” Section 30.606(a)(3) stated in relevant part:

(3) In resolving the cost impact, the [cognizant Federal agency official] –

....

(ii) Shall not combine the cost impacts of any of the following unless all of the cost impacts are increased costs to the Government:

(A) One or more unilateral changes.

70 Fed. Reg. 11743, 11758 (March 9, 2005).

8. On 3 November 2010, the government contracting officer assigned to the Philadelphia segment prepared a memorandum “to document the proposed strategy to settle the cost impact associated with the 2005 accounting changes made at Boeing Philadelphia.” This memorandum included among other things the following:

Prior to 2005, the impact of all of the accounting changes would be considered and netted together in determining if the Government paid increased costs in the aggregate. If these rules were applicable, no contract adjustments/cost recoveries would have been pursued since the Government did not pay increased costs in the aggregate as a result of the 2005 change. However in April, 2005, the FAR requirements of how to calculate cost impacts changed. FAR 30.606 governs how cost impacts are resolved and prohibits combining the cost impacts of unilateral changes, unless all of the cost impacts represent increased costs to the Government. Therefore, the one unilateral change which produced increased costs requires contract adjustment and cannot be netted against the changes which produced a decreased cost.

(57549, R4, tab 19 at 2)

9. By final decision dated 9 December 2010, the contracting officer for the Philadelphia segment determined that Boeing was indebted to the government for the single 1 January 2005 increased cost accounting change at that segment in the amount of \$1,477,000 plus interest of \$629,663.27 (57549, R4, tab 20). This decision was appealed and is docketed as ASBCA No. 57549.

10. By final decision dated 14 December 2010, the contracting officer for the El Segundo segment determined that Boeing was indebted to the government for the two January 2005 increased cost accounting changes at that segment in the total amount of \$1,341,840 plus interest in the amount of \$319,427 (57563, R4, tab 32). This decision was appealed and is docketed as ASBCA No. 57563.

DECISION

Boeing contends that 41 U.S.C. §1503(b) expressly allows offset of simultaneous increased and decreased cost changes in accounting practices for purposes of price adjustment on CAS-covered contracts where it states that: “a contract price adjustment undertaken under Section 1502(f)(2)...shall be made...so as to protect the Federal Government from payment, in the aggregate, of increased costs...” (emphasis added). The government argument that FAR 30.606(a)(3) is to the contrary and dispositive of these appeals is without merit. The regulations applicable to a contract are those in effect at the time the contract was executed. *Essex Electro Engineers, Inc.*, ASBCA No. 46047, 94-1 BCA ¶ 26,457 at 131,651 (“our decision is based on the statute and regulations in effect at the time the contract was executed”). FAR 30.606(a)(3) was effective on 8 April 2005 (finding 7). All of the CAS-covered contracts used to calculate the cost impacts of the 1 January 2005 cost accounting practice changes at both the Philadelphia and El Segundo segments were executed prior to 1 January 2005 (finding 3) and therefore we need not interpret FAR 30.606(a)(3) in deciding these appeals.

The government contends that the 2005 FAR Part 30.6 revisions “merely incorporated the June 2000 revisions to CAS § 9903.201-6” (gov’t br. at 16). This is not correct. There is no provision in 48 C.F.R. § 9903.201-6 or any other regulation prior to 8 April 2005 prohibiting the combination of two or more simultaneous accounting practice changes to determine the aggregate cost impact of the changes on the government at the segment where the changes were made. The government also contends that the word “change” (singular) in 41 U.S.C. § 1502(f)(2) and in 48 C.F.R. § 9903.201-6 means that any individual increased cost change in a cost accounting practice is the basis for a price adjustment on CAS-covered contracts without any offset for simultaneous decreased cost changes in other cost accounting practices. Boeing argues that the words “accounting practices” (plural) in the same sentence as “change” mean the contrary. We find neither textual argument persuasive. Both the statute and

regulations (that is, 48 C.F.R. § 9903.306 (finding 5)) applicable to these appeals are silent as to offset of simultaneous increased and decreased cost accounting practices changes for purposes of the specified price adjustment.

However, prior to 8 April 2005, the “guidance” in the manuals of the DCMC and DCAA expressly stated that “[w]ithin a segment, several accounting changes may be combined for offset purposes as long as they have the same effective date” (finding 6). Moreover, the government contracting officer for the Philadelphia segment acknowledged in her 3 November 2010 memorandum that: “Prior to 2005, the impact of all accounting changes would be considered and netted together in determining if the Government paid increased costs in the aggregate” (finding 8). On this record of the “guidance” and established practice of the government agencies primarily responsible for enforcing the cost accounting standards statute and regulations, we conclude that Boeing could properly combine the 1 January 2005 cost accounting practice changes at each segment for purposes of computing the aggregate cost impact to the government of the changes at that segment. *See Ball Corporation*, ASBCA No. 49118, 00-1 BCA ¶ 30,864 at 152,359 (“We look to this history ‘not as a controlling interpretation but rather as valuable evidence of the thinking of knowledgeable persons both in Government and in industry as to a reasonable construction of’ the applicable regulations”) (quoting *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA ¶ 18,415 at 92,420).


We sustain the appeals on entitlement to the extent of our conclusions above. We remand the appeals to the parties for settlement of quantum consistent with this decision.

Dated: 6 September 2013



MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



ELIZABETH M. GRANT
Administrative Judge
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 Nos. 57549, 57563, Appeals of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals