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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Lockheed Martin Aeronautics Company	)	ASBCA Nos. 63149, 63150
	)	
Under Contract No. FA8615-16-C-6048	)	

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DECISION OF ADMINISTRATIVE JUDGE PROUTY
ON THE GOVERNMENT'S MOTION TO COMPEL[1]

The government has filed a motion to compel discovery, which appellant, Lockheed Martin Aeronautics Company (LM), naturally opposes. On November 2, 2022, we conducted a status conference to discuss the matter and we informed the parties of the general outlines of this decision – partially granting and partially denying the motion – which we detail more below.

PRELIMINARY AND GENERAL MATTERS

I. Good Faith Efforts to Resolve the Dispute

Before addressing the merits of the government's motion to compel, LM raised the issue of whether the government meaningfully complied with the Board's requirement that the parties attempt, in good faith, to resolve the discovery

[1] This decision was originally issued to the parties as a Board Order on November 14, 2022. In recognition of the contracting bar's desire for published, precedential opinions on discovery matters from the Board, we re-issue it here, with minor, non-substantive edits, as a three-judge, precedential decision.

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dispute before seeking recourse through a motion to compel. *See* Board Rule 8(a). LM argues, not unpersuasively, that its discussions with the government were far from concluded: government counsel had sent a single letter to LM complaining of its discovery responses and, in return, LM provided its own letter explaining its view of its discovery obligations and a supplemental discovery response. It was at this point that, to LM's surprise, the government filed its motion to compel. (*See* app. opp'n at 15-17)

We are of the opinion that, in the circumstances here, the government's effort *just* met the threshold requirement for good faith negotiations. The government argues that it was clear that there were some issues that the parties would never agree to, which is true enough. But there were other issues that would have benefited from more discussion, such as the government's unreasonable objection to a rolling production by LM (more on this shortly). The best practice is to continue to negotiate over matters that can be resolved so that the Board is presented with the most limited dispute reasonably possible if, and when, a motion to compel is filed. In any event, on the facts presented here, we are persuaded that the subjects in contention, that will not likely be resolved between the parties, are more significant than those that would have benefited from further good faith negotiations, and that it is more practical to decide the discovery disputes now than to send them back to the parties for more discussions. To be clear, though, it would have been better for the government to have worked longer with LM to eliminate more issues in contention before going to the Board, and if we should form the opinion that future attempts to negotiate reasonable resolution of discovery disputes are more *pro forma* than good faith, we will have no compunction in denying future motions to compel out of hand.

II. The Unpersuasive Nature of General Objections

As is relatively commonplace in our experience, LM provided a list of general, "boilerplate," objections to preface its response to the government's first set of discovery demands. Though litigants often do this as a matter of course, it does not actually accomplish much, if anything: we are of the view, like many of the federal courts which have considered the matter of late, that a general objection, lacking the specificity required by Fed.R.Civ.P. 33 (b)(4) (interrogatories)[2] or Fed.R.Civ.P. 34(b)(2)(B) (document production), is of no real effect. *See, e.g., Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 185-86 (N.D. Iowa 2017) (citing multiple

[2] The Board, of course, has its own rules and is not bound by the Federal Rules of Civil Procedure, but we find them to be helpful in resolving discovery disputes. *See Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920 (noting that while the Federal Rules "do not apply to the Board as an administrative tribunal, we can look to them for guidance, particularly in areas our rules do not specifically address.").

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cases); *Fischer v. Forrest,* 14 Civ. 1304, 1307 (PAE) (AJP), 2017 WL 773694, at *3 (S.D.N.Y. Feb. 28, 2017) (criticizing use of "meaningless boilerplate" objections).

Thus, the government objects to LM's use of general objections – both at the beginning of its responses and within some of its responses to specific discovery requests. Because we presume that LM recognizes these objections to be relatively meaningless (typically, it couches its responses as stating "notwithstanding these objections") we read its discovery responses with the understanding that, unless it provides a specific objection and explains what documents are being withheld, it is, in fact, providing[3] all[4] responsive documents. If that is not the case, we will expect it to amend its responses.

We also note that we expect LM to produce all responsive documents, rather than all documents it deems "relevant," which is a modifier that LM appears to have included in its statements promising production. To be sure, one objection to a discovery request is that it seeks information not relevant to the dispute, in which case the objection should be made with specificity. Applying a separate, unexplained "relevance" filter based upon a litigant's own unarticulated view of the case is not permissible.

III. An Extension of Time to Produce Documents and a Rolling Production are Reasonable

In modern discovery of complex cases like the one presented here, with a large number of electronic documents to be searched and reviewed, the Board's presumptive 45-day discovery response deadline for document production, *see* Board Rule 8(c)(3), is often inadequate, to say the least.[5] The parties usually understand this and negotiate a reasonable time period for compliance with the discovery requests. Oftentimes, this

[3] As further discussed below, we understand that, at the time of the status conference, no documents had yet been provided. That, of course, makes this discussion effectively prospective. But to be clear, we do not expect LM to be able to make a number of its specific objections until it has an opportunity to actually review its responsive documents prior to producing them to the government. It would be impossible, for example, for it to produce its privilege log before its attorneys had the opportunity to review the documents which might be privileged.

[4] One of LM's general objections emplaced in its specific responses to government discovery requests is that the word "all" is ambiguous (*see, e.g.,* gov't mot., ex. 3 at 4 (Response to Document Production Request No. 1)). To be charitable, that is an unpersuasive objection.

[5] This is not a criticism of the Rule, which also provides that the deadline may be made shorter or longer by the Board, as appropriate. *See* Board Rule 8(c)(3).

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includes "rolling production" so that the requesting party can begin the onerous task of reviewing documents before the entirety of the production is complete.

The government is unhappy with LM's promise to provide a rolling production here, insisting that it is entitled to a single production at a specified date (*see* gov't mot. at 8-10). Perhaps the problem lies with the fact that LM was unable, in September, to provide a firm date for its production, just as it was unable to do so during the status conference, although the first batch of documents appears to be expected in a matter of days at this point. In any event, this is an issue that would have benefited greatly from a constructive discussion between the parties beforehand, but we will step in and resolve it at this point: LM is hereby ORDERED to provide to the government, within one week of the receipt of this order, its best estimate of when its document production will be complete. Notwithstanding the government's odd position regarding rolling production, LM will also produce documents in a rolling fashion to allow the government to begin its review earlier and thus mitigate any delays here. LM, as appellant, has every incentive to act with celerity in its production, and we imagine that such was always its counsel's intent. We expect that the government will agree with LM's reasonable proposals and we remind it that the government faces its own challenges in producing documents for LM and that a productive relationship on mutually agreed upon extensions of time is in each party's interest.[6] We also remind the parties that, as we discussed during the status conference, if they appear to be acting in good faith to meet their discovery obligations, but matters take longer than was expected during the initial status conference when the schedule was first established, we will extend the schedule as necessary to avoid prejudicing either side.

IV. Signatures on Discovery Responses

As part of an approach that included raising everything it could possibly fault LM for in its discovery responses[7], the government noted that counsel had not signed the discovery responses and that a signature by an LM representative avowing the accuracy of its responses, while being attached to the original response, was not attached to the supplemental response (gov't mot. at 34-37). This is all correct. It is also small potatoes. In any event, Board Rule 8(c)(1) does require that answers to interrogatories be "signed under oath;" thus LM must remedy this omission for the supplemental response within a reasonable period. The Board's rule is silent as to the signature of counsel on discovery responses, but since objections are made by counsel, as opposed to the representative who avers to the truth of the response, we consider it

[6] While the government may file a motion to compel (after significant good faith discussions) if the extension proposal is plainly excessive, we do not expect that to be the case.

[7] The government advised that it did this so that it would not be coming back to the Board repeatedly once it decided to file a motion to compel.

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to be a proper practice to require the signature of counsel at the conclusion of discovery documents. Counsel for LM shall remedy this minor omission as well: a short, signed note purporting to append counsel's signature to the prior discovery response will be more than adequate to satisfy this obligation.

SPECIFIC CHALLENGES TO DISCOVERY RESPONSES

We now turn to the specific discovery responses challenged by the government:

Document Production Request No. 13

The government asked for a copy of a particular subcontract that LM had with Raytheon. LM responded by stating that, in addition to its general objections, it objected because the government already had a copy of the document. It ended by stating that, "[n]otwithstanding the above and without waiving its general and specific objections" it would "produce relevant, non-privileged documents that it believes are responsive to the Government's request." (*See* Production Request No. 13[8])

Government counsel informed LM that it did not possess a copy of the document and thus needed it (*see* gov't mot., ex. 4 at 2-3). In response, LM stated that it had never said it would not produce all non-privileged responsive documents (*see id.*, ex. 6 at 2).

To us, it is relatively plain that the response in LM's letter was LM's way of saying that it would, in fact, produce the document without using a simple, direct declarative sentence to say so. There is no reason, then, to compel this production, though this issue could have been avoided had the parties been more straightforward in their communications.

Request for Admission No. 6

Request for Admission (RFA) No. 6 seeks to have LM admit that its operating profits and operating margins for 2019 and 2020 were those that were reported in Lockheed Martin Corporation's annual report for 2021.[9] LM objected, incorporating

[8] The government has reproduced LM's initial response to its discovery requests and attached it as Exhibit 3 to its motion to compel. For ease of citation, we will simply refer to the individual discovery requests and responses by citation to the numbered discovery request in that exhibit without referencing the exhibit number.

[9] Lockheed Martin Corporation is the parent corporation of appellant, but the portion of the annual report cited is directly concerned with the appellant's business segment (Request for Admission No. 6).

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its general objections, a relevance objection, and also stating that the terms "Appellant," "operating profit" and "operating margin" were vague. It further averred that the referenced annual report was the best proof of its contents and then reproduced the table and one-paragraph introduction from the report that were plainly the basis of the RFA. (Request for Admission No. 6)

The government contends that LM has not actually answered the RFA, and it is correct, to an extent. First, let us be clear that "Appellant" is not even close to a vague term: it is LM, the party that brought these appeals, and we cannot take that objection seriously. As to the meanings of "operating profit" and "operating margin," those are words used in LM's own document from which this RFA came. Presumably, LM knows what they meant, though it is certainly free to add caveats to its response to this RFA, limiting the admission to the meaning of those terms as used in the cited document. With respect to relevance, we imagine that company-wide profit, while not dispositive, to be sure, could easily have *some* bearing upon our evaluation of reasonable profit for the contract at issue here – or at least be argued to be relevant. It appears reasonably worth knowing.

In any event, LM's response does not actually answer the question, which was not whether the annual report made those representations, but whether they were accurate. LM is hereby ORDERED to provide a response to this RFA which addresses this question.

Request for Admission No. 7

In RFA 7, the government proposed a definition of the term "operating margin" and asked LM to agree that it was correct. LM did not respond to this RFA, asserting that "operating margin" was a vague term, that it was irrelevant, and that the RFA sought a premature legal conclusion. (Request for Admission No. 7)

Again, we are presented with a misuse of the word, "vague," by LM. The whole point of the RFA is to define "operating margin" as that term was used by LM, itself, (making it anything but vague) and ask if LM agrees. That is relevant to the dispute here for the same reason that RFA 6 is, and is not a legal conclusion, but a lexigraphic one. LM is hereby ORDERED to respond.

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Interrogatory No. 1

This interrogatory sought a list of all individuals with knowledge of the allegations in the complaint and requested that LM "identify" them, which the government defined earlier in its interrogatories as stating the individual's name, current or last known business affiliation and title, and current or last known address and phone number. LM responded with a list of individuals, provided their job titles during the "relevant" time period, provided a general LM address for all of them, and directed the government to make no contact with them, except through LM counsel. (Interrogatory No. 1)

The government expressed its view that LM could not prohibit it from contacting former employees, and asked that LM identify which employees were former employees and which remained employed by LM so that the government could comport itself appropriately (gov't mot., ex. 4 at 3-4). In response, LM announced it had amended its response to include that information (*id*., ex. 6 at 3). In its opposition to the motion to compel, LM further states that *all* the former employees on the list (without identifying them) had agreed to representation by LM's counsel, so it was a moot point (app. opp'n at 25).

We do not share the government's skepticism that LM has secured the cooperation of its former employees (*see* gov't reply at 13), and the record in the motion is not clear about exactly what supplemental information LM provided the government after its initial response to the interrogatory, but if LM has not yet responded in full to this interrogatory request, regardless of whether it represents them, it is hereby ORDERED to provide a response that includes information about which employees have retired or separated from LM.

Interrogatory No. 4

In this interrogatory, the government provided:

> For each and every Request for Admission that Appellant has denied, in whole or in part, identify each and every fact and document that supports such denial, and identify all persons with knowledge of such facts. Appellant may respond under each individual Request for Admission.

(Interrogatory No. 4). LM objected (*id*.), the government raised it as an issue in its demand letter (gov't mot., ex. 4 at 4), and LM responded with a list of 14 employees "with knowledge of facts provided in the response to the Requests for Admission." This response did not specify which of the employees had information about which RFA. (*Id*., ex. 6 at 6-7)

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The government contends that its interrogatory requests specificity for which individuals were involved with each separate RFA (gov't mot. at 17-18); LM responds that it answered the interrogatory as written (app. opp'n at 26).

Prefacing the interrogatory with "*For* each and every" (emphasis added) makes clear to us that the interrogatory required a list of individuals involved for each separate RFA and we are unimpressed by LM's argument otherwise – just as we are sure LM would be if the shoe were on the other foot. LM may certainly respond with its list of individuals and an annotation of which individuals were involved in denying which RFA, but its current response is inadequate. LM is hereby ORDERED to give a response that explains which individuals were involved in which RFAs that it denied.

Interrogatory No. 5

The government essentially requested that LM specify which documents in its document production were being provided in response to which document request. LM objected to the request as unduly burdensome, but also stated that it would identify the documents as they were produced. (Interrogatory No. 5) We are satisfied with LM's response, which, while objecting, does promise to comply as the document production moves forward.

Interrogatory Nos. 8-11

The first pair of interrogatories we discuss in this section are contention interrogatories in which the government asks LM to "[i]dentify and explain in detail each and every basis for Appellant's assertion that the definitized prices under the [Singapore Contract[10] for Interrogatory No. 8, and the Korea Contract for Interrogatory No. 9] are unreasonable." (Interrogatory Nos. 8-9)

In both instances, LM provided a relatively terse response that left the government wanting, but it had its reasons. For Interrogatory No. 8, after a statement of mostly rote objections, and a more pertinent one that the request was premature, LM responds:

> Lockheed Martin has already identified the following bases for the Government's unreasonable unilaterally definitized

[10] These two appeals involve the price definitization of separate contracts to modify F-16 fighter aircraft for the Republic of Singapore and the Republic of Korea. We refer to these contracts herein as the Singapore Contract and the Korea Contract.

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> final price from Lockheed Martin's 22 January 2020[11] (R4, Tab 5):
>
> [A]ny settlement must contain a reasonable price agreed to by both parties using clear and transparent logic. Lockheed Martin struggles to understand the Government's position on cost reasonableness in the areas of the Raytheon Modular Mission Computer (MMC) production subcontract and estimate-to-complete (ETC) decrement, resulting in excessive challenge to the remaining program.
>
> Moreover, Lockheed Martin asserts that the Government's unilateral definitization modification contained only the Government's bottom-line prices. It did not state or explain all of the disallowed and/or decremented costs. Therefore, Lockheed Martin maintains the Government's final price unreasonably disallowed and/or decremented Lockheed Martin's reasonable costs including but not limited to those identified above.

(Interrogatory No. 8)

The response to Interrogatory No. 9 was slightly different:

> Lockheed Martin has already identified the following bases for the Government's unreasonable unilaterally definitized final price from Lockheed Martin's 22 January 2020[12] (R4, Tab 11):
>
> Lockheed Martin respectfully requests that the Government gives Lockheed Martin an opportunity to submit an initial FFP position that reflects a fair and reasonable FFP settlement position. Lockheed Martin struggles to understand the Government's position on cost reasonableness due to the excessive challenge to the remaining program. If actuals and firm fixed material pricing through November 2019 were fully recognized by

[11] LM is referring here to its January 20, 2020 settlement offer for the Singapore Contract.

[12] Lockheed is referring here to its January 20, 2020 settlement offer for the Korea Contract.

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> the Government as previously indicated, then it appears that the final settlement offer challenges the remaining estimated cost-to-program completion by 49.5%. It is not reasonable to expect that after 3+ years of program execution, Lockheed Martin could execute contractual requirements flowed down from the Defense Acquisition Program Administration LOA by cutting such a significant amount of remaining cost.
>
> Moreover, Lockheed Martin asserts that the Government's unilateral definitization modification contained only the Government's bottom-line prices. It did not state or explain all of the disallowed and/or decremented costs. Therefore, Lockheed Martin maintains the Government's final price unreasonably disallowed and/or decremented Lockheed Martin's reasonable costs including but not limited to those identified above.

(Interrogatory No. 9)

Thus, in each instance, LM referred the government to a short statement in a previous document and then provided a relatively short, but broad critique of the government's pricing approach.

Interrogatories Nos. 10-11, the second pair we discuss here, are similar contention interrogatories to the first set, in which the government asks LM whether it "contend[s] that the Government utilized unreasonable factor values, Cost Estimating Relationships ("CERs"), or indirect rates in definitizing the [Singapore Contract for Interrogatory No. 10, and the Korea Contract for Interrogatory No. 11]? If so, identify and explain each and every basis for that contention." (Interrogatory Nos. 10-11)

After its statement of objections, LM's response to each was identical:

> Lockheed Martin maintains that during price negotiations the parties did not agree upon all factor values and/or CERs. During negotiations, the parties had relied on a forward pricing rate agreement in effect at that time. Lockheed Martin believes that the parties had agreed on indirect rates.
>
> In any event, the Government's unilateral definitization modification contained only the Government's bottom-line prices. It did not state or explain the

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> Government's utilization of factor values, CERs, or indirect rates. As such, Lockheed Martin maintains that the Government's final price unreasonably disallowed and/or decremented Lockheed Martin's reasonable costs including but not limited those calculated and/or affected by factor values, CERs, and/or indirect rates.

(Interrogatory Nos. 10-11).

Again, these are relatively terse responses to relatively broad interrogatories. Nevertheless, in both instances (that is, both pairs of interrogatories), we are satisfied with LM's responses at this point. To be sure, we agree with the government's argument that the government has a right to know the specific factual bases for appellant's claims (*see* gov't mot. at 6), but this is early in the litigation and LM and the government have only recently come to agreement on redactions to the government's price negotiation memorandums (PNMs), which are foundational to the CO's determination of the definitized prices (*see* app. opp'n at 27-28). Hence, prior to that agreement, nobody on the LM side beyond its attorneys had access to the PNMs, which would significantly hinder LM's ability to determine what it found wrong with the government's analysis. LM has stated that it will supplement its responses as discovery goes on and it has the opportunity to review the PNMs and we find its current responses acceptable in that light. Without deciding it, we find it highly likely that if LM were to rest on its current responses until the hearing, it would sharply limit the case it could present, which would not likely be in its best interest.[13]

Interrogatory No. 13

Interrogatory No. 13 seeks LM's bases for entitlement to costs above the not to exceed (NTE) price of the contract. In connection to that broader question, it asks that, if LM is alleging a change to the scope of the contract, it provide details about that change. (Interrogatory No. 13) The government has subsequently explained that, as a legal matter, it does not believe that, a contractor can seek definitization above the NTE price unless there is a change in the contract (gov't mot. at 25). LM objects to this interrogatory and states that it has, time and time again, explained to the government why it is entitled to the amount of money it seeks and appears to dispute being bound by the NTE price under the circumstances. To the extent that the government is seeking a legal memorandum explaining its basis for seeking an amount

[13] If LM were to wait until the very end of discovery to provide a substantially more fulsome response to these requests and the government can persuade the Board that it has prejudiced it from conducting the discovery necessary, we would consider re-opening discovery, but, again, we presume that is not going to happen.

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greater than the NTE price, LM refuses, arguing it to be an onerous task under the circumstances. (Interrogatory No. 13)

We agree with LM that it is not compelled to provide a legal memorandum to the government or to provide it purely legal conclusions in its responses to interrogatories. On the other hand, the government is entitled to know the bases of LM's claims. Presumably, that information lies within LM's claim, previously presented to the CO and, given the long negotiation history between the parties, we suspect the legal issues have long been aired out. As we stated in the conference call, to the extent the interrogatory can be read, in part, as a request to LM to state whether it believes there has been a change to the contract justifying exceeding the NTE rate, the government is entitled to know whether it is making that argument and its factual bases, and we hereby ORDER LM to supplement its response as appropriate. But to be clear, just because LM responds to this particular question does not reflect its (or the Board's) necessary agreement with its underlying premise regarding the effect of the NTE figures.

Interrogatory Nos. 14-15

In these interrogatories, the government seeks to have LM characterize whether the offers it made to resolve these matters during negotiation were "unreasonable" (Interrogatory No. 14 was for the Singapore Contract, while Interrogatory No. 15 was for the Korea Contract). LM does not take the bait, and insists that they were merely negotiating positions, offered to avoid the government's unilateral imposition of its own prices (Interrogatory Nos. 14-15).

We are not persuaded by the government's assertion that LM failed to meaningfully answer these interrogatories just because it refused to entertain what LM would probably consider to be a false dichotomy. This was an objection the government would have better left unmade.

Interrogatory Nos. 22-23

These two interrogatories sought details about the "estimate at completion" (EAC) that LM used for its Singapore and Korea contracts respectively. Despite some dubious objections, LM provided a relatively comprehensive response with one glaring set of exceptions: the interrogatories sought the identity of individuals responsible for producing the estimates and of "management involved in approving assumptions;" LM provided neither. (Interrogatory Nos. 22-23) After the government objected, LM provided the name of a single manager for each contract as "A manager involved in approving assumptions in the estimate-at-completion analysis" (gov't mot., ex. 6 at 8-9).

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The government objects to this response, arguing that it does not fully answer the interrogatories. We agree. In response, LM argues that the request would "encompass hundreds of managers," making it disproportionate to the needs of the case. LM further requests that the matter be remanded to the parties to work out a compromise (app. opp'n at 31).

We confess to being naifs when it comes to understanding how LM's EAC process works. At first blush, we cannot see how there would be so many people involved, but it is certainly possible that we misunderstand things. In any event, providing a single manager for each contract is as plainly insufficient as requiring hundreds of names would be excessive. Thus, the motion to compel on these interrogatories is GRANTED to the extent that we expect LM to produce more names to the government, but we direct the parties to meet and confer so that they may jointly come to agreement upon the contours of a reasonable response. The government is reminded that obtaining an excessively long list of names is of no value to it, in and of itself, since the point of the interrogatory is presumably to decide upon who to depose. Hence, we will be unlikely to grant the government further relief on this issue if we are persuaded that LM is providing all names that could reasonably lead to discoverable information.

Interrogatory Nos. 24-25

These two interrogatories (for the Singapore and Korea contracts, respectively), were premised on a statement about the EAC process included in Lockheed Martin Corporation's 2021 annual report:

> Identify and explain the basis for any "updates to the Corporation's estimate-at-completion analyses," including "assumptions made by management," under the [Singapore/Korea] Contract between January 1, 2018, and the present. *See* Lockheed Martin Corporation, *2021 Annual Report* at 64.

(Interrogatory Nos. 24-25) LM's substantive objection is that the government is well aware of the changes to the EAC analysis that proceeded from January 2018 until at least 2020 due to its being informed as much through LM's various offers and counter-offers during their negotiations. It also objects because this interrogatory seeks information beyond LM's control. (*Id*.) In its response to the motion to compel, LM argues that the language from the annual report that generated these interrogatories came from a letter attached to it by its auditor, Ernst and Young, an outside party (app. opp'n at 32).

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We have reviewed the relevant pages of the LM annual report (*see* gov't reply, ex. 4 at 71-73) and tend to agree with LM that these are generalities about how cost estimates are made and amended, not specific to the contracts at here, although surely LM provided EACs for the contracts at issue to Ernst and Young.[14] If EACs have changed over time for the contracts at issue here (and a review of other interrogatory responses, including the tables in LM's response to Interrogatory Nos. 21-22 indicate that they have), that is, however, information that appears relevant to the use of EACs to determine a reasonable definitized cost, and the government is entitled to it. We do not order LM to obtain information from Ernst and Young, but it is hereby ORDERED to provide the requested information (or refer the government to specific documents which contain the information) about changes in the EACs for the contracts and what the bases of the changes are.

Interrogatory No. 27

In this interrogatory, the government asked LM to provide the bases for its contention that the government had not permitted it to negotiate with Raytheon for the "MMC Contract." LM made its usual objections, but also responded substantively, referring to five particular documents of which it was aware that, it said, demonstrated the government's refusal to permit said negotiation. (Interrogatory No. 27)

The response to this interrogatory seems straightforward and responsive enough, but the government avers that the documents were not identified in enough particularity for it to find them and that it might not possess them anyway, thus LM should produce them (gov't mot. at 30-31). This, LM has promised to do in its production (app. opp'n at 32-33). This is another instance where the government has not taken "yes" for an answer and instead we find ourselves typing when the parties should have been talking. There is no need to compel here because the discovery will be produced.

Interrogatory Nos. 29-30[15]

Both interrogatories seek the bases for LM's challenging the particular profit rate [redacted] that the government imposed on the Singapore and Korea contracts respectively. LM responded that, until its recent receipt of the PNMs, it had no direct knowledge of the profit rate the government had applied in its price definitization

[14] The contracts are of a value on the order of a billion dollars, which is significant even for as large a company as LM.

[15] The government's motion (*see* gov't mot. at 31), like its "meet and confer letter" (*see id.*, ex. 4 at 10), referred to these as Interrogatory Nos. 30-31, when it was plainly referring to nos. 29-30 – a mistake it remedied in its reply brief (*see* gov't reply at 21).

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decisions, but that, in any event, it had provided what it felt to be a reasonable profit in its certified claims: [redacted] LM expressly stated that its answers were subject to supplementation. (Interrogatory Nos. 29-30)

These responses did not satisfy the government, but they should have. We have looked at LM's certified claims for the two contracts, and each contains an extensive discussion of how they generated their "reasonable profit" rates (*see* R4, tab 13 at 16-36 (Singapore); R4, tab 14 at16-34 (Korea)). The government seems to argue that, notwithstanding LM's expression of what a reasonable profit should be, it has not explained why the government's lower numbers are not reasonable, too. We disagree. Inherent in LM's analysis is that the profit explained in its claims is the proper profit and that anything less is unreasonable. Although it might (indeed, should) have said so more directly, we are satisfied with its answer here. Naturally, if LM has other reasons for its challenges to the reasonableness of the government's [redacted] profit rate, it must supplement its discovery responses if it wishes to advance them at the hearing, but, for now, its response is adequate.

Interrogatory Nos. 34-36

This trio of interrogatories focuses on one aspect of LM's justification of its profit rate as seen in its certified claim for the Singapore Contract: its assertion that certain actions it took achieved cost reductions, justifying their consideration as a factor justifying its proposed profit under the Weighted Guidelines method contained in the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) section 215.404-71-1(a) and discussed in particularity in DFARS 215.404-71-5 (*see* R4, tab 13 at 19, 32-35).

Interrogatory No. 34 asks LM to identify the amount of cost savings it realized in using the "Agile methodology for Software Development" and the basis for such a figure (*see* Interrogatory No. 34) – a matter touted in its claim (R4, tab 13 at 33). Interrogatory No. 35 asks LM to identify "the amount in cost reductions [it] achieved under the Singapore Contract as of the present date by reducing/eliminating excess or idle facilities; investing in new facilities to provide better asset utilization and improved productivity; and, adopting process improvements in order to reduce costs for its customers," as well as the bases for any such figure (*see* Interrogatory No. 35), a matter also raised by LM's claim (R4, tab 13 at 33-34). Finally, Interrogatory No. 36 seeks the amount saved "by engaging in cost analyses and negotiating with suppliers" and the basis for that figure (*see* Interrogatory No. 36), which was raised by LM's claim as well (R4, tab 13 at 34).

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In substantively identical responses to all three interrogatories LM declined to provide a figure quantifying its alleged cost reductions, arguing, *inter alia*, that "cost reduction" is a vague and overbroad term (it is not in this context), that the government possesses this information, and that it "has provided its basis for its cost efficiency factors" (*see* Interrogatory Nos. 34-36). This is not an adequate response to the interrogatories and LM seems to admit as much, only making a conclusory statement that it had adequately responded to the interrogatories and that, alternatively, the government had not addressed this matter in good faith (app. opp'n at 35).

It appears evident to us that LM's cost reductions have never been reduced to a quantitative figure and that LM is reluctant to admit this. It should do so now (if we surmise correctly). Thus, LM is hereby ORDERED to supplement its response to these interrogatories by either providing quantitative figures detailing its cost reductions associated with the three identified cost reduction actions specified in its claim, along with its bases for these figures. If it cannot do so, it should simply own up to it and state as much. If there is a third approach, in which LM can give some quantitative estimate as to the money it has saved, even if it is inexact, it should provide that information and its bases. Whatever the case, simply providing the current non-answer is inadequate.

Interrogatory Nos. 38-41

These interrogatories are identical in form to Interrogatories Nos. 34-36, except that they apply to the Korea Contract. LM's responses were effectively identical as well. (Interrogatory Nos. 38-41). It should be no surprise that we come to the same conclusion: LM is hereby ORDERED to supplement its response to these interrogatories by either providing quantitative figures detailing its cost reductions associated with the three identified cost reduction actions specified in its claim. If it cannot do so, it should simply own up to it and state as much. If there is a third approach, in which LM can give some quantitative estimate as to the money it has saved, even if it is inexact, it should provide that information and its bases. Whatever the case, the current non-answer is inadequate.

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CONCLUSION

For the reasons discussed above, the government's motion to compel is partially granted and partially denied. Any complaints the government may have regarding LM's compliance with this order must first be subject to a meaningful good faith discussion before being raised again to the Board.

Dated: January 19, 2023

J. REID PROUTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

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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. 63149, 63150, Appeals of Lockheed Martin Aeronautics Company, rendered in conformance with the Board's Charter.

Dated: January 19, 2023

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals