



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 18, 2008

CBCA 53

ALL STAR METALS, LLC,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

William M. Dozier of Vandeventer Black LLP, Norfolk, VA, counsel for Appellant.

Janis P. Rodriguez, Office of the Chief Counsel, Maritime Administration, Department of Transportation, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **McCANN**.

SOMERS, Board Judge.

Background

On September 10, 2004, the United States Department of Transportation, Maritime Administration (MARAD or the Government), awarded a contract to All Star Metals, LLC (All Star Metals or contractor) to dismantle, recycle, and dispose of the vessel DONNER. Appeal File, Exhibit 10. The contractor agreed to accept delivery and custody of the vessel “as is where is” and to tow the vessel to the contractor’s facility for dismantlement. *Id.*, Exhibit 1(a). The contract provides that the contractor shall “receive title to all property to be dismantled or demolished that is not specifically designated as being retained by the Government.” *Id.* at 25. Generally, title vests with the contractor immediately upon the

issuance of the notice of award, and contractors frequently sell items from the vessel as part of the recycling process. Transcript at 65.

In this case, after contract award and prior to removal of the vessel from MARAD's facility at the James River Reserve Force located at Fort Eustus, Virginia, MARAD decided to remove two 40 millimeter (mm) twin gun mounts and two 40 mm quad gun mounts from the vessel.¹ Appeal File, Exhibit 10; Transcript at 10. On October 24, 2004, the contracting officer asked All Star Metals to provide a cost proposal so as to permit MARAD to procure the four gun mounts. MARAD requested two quotes -- one for the cost associated with assisting the agency in removing the gun mounts prior to the vessel's departure from the fleet, and a second for the cost of temporarily storing the mounts at All Star Metals' facility until transport could be arranged. In response, All Star Metals declined to provide a quote in response to MARAD's request, and suggested that once the vessel arrived at its facility in Brownsville, Texas, All Star Metals would be willing to discuss the status of the mounts. *Id.*, Exhibit 10.1. On October 29, 2004, the contracting officer informed All Star Metals that the Government had decided to remove the gun mounts from the vessel at MARAD's facility. The contracting officer told All Star Metals to request an equitable adjustment for the gun mounts. *Id.*

On December 5, 2004, All Star Metals submitted an invoice to the contracting officer for \$81,200 based upon an appraisal that it had obtained from Beltrone & Company, a company that evaluates military artifacts. Appeal File, Exhibit 3. The appraisal valued the twin gun mounts at \$30,000 and the quad gun mounts at \$50,000. The appraisal included an evaluation report which incorrectly identified the gun mounts as "two naval single-mount 40 mm gun assemblies with accompanying domes, as well as the two naval twin-mount 40 mm gun assemblies. . ." and wrongly noted that "the assemblies are complete with the original gun barrels which have been de-militarized." *Id.*

At the hearing held in this matter on February 27, 2008,² Arthur Beltrone, the president of Beltrone & Company, testified on behalf of the appellant as an expert in the area of the evaluation of historical military artifacts, specifically concerning provenance, scarcity, and condition. After asserting that the errors in his appraisal were merely typographical errors, Mr. Beltrone agreed that the gun mounts at issue were indeed twin and quad gun mounts. Transcript at 56.

¹ A twin mount has one mount or foundation with two gun barrels. A quad mount has two foundations with two gun barrels on each foundation. Transcript at 91.

² Although Judge Eileen P. Fennessy presided over this case at the hearing, she is currently on extended leave. A new panel member has been assigned to the appeal.

Next, Mr. Beltrone explained the steps that he generally undertook to determine the ultimate value of historic artifacts. The criteria that he used in making his estimate were the condition of the artifact, availability in the market, potential use, and provenance, which he defined as the ability to identify where the items specifically came from. Transcript at 27-28, 50. Here, because Mr. Beltrone had never before appraised a naval gun mount,³ he physically examined the naval gun mounts, contacted colleagues in the field, and obtained estimates of the value of land-based single 40 mm guns. These estimates ranged from \$5000 to \$10,000 each. Finding no comparable naval guns, Mr. Beltrone extrapolated a value for the naval guns by starting with the estimates he had obtained for the value of land-based guns, but increasing the value based upon his determination that the mounts obtained from the DONNER had considerable historical value, were rare, and had the potential for both full restoration for static display and/or cannibalization for parts. *Id.* at 32-44. Mr. Beltrone's appraisal did not factor in the cost to remediate⁴ the guns or to transport them. *Id.* at 57-58.

The Government obtained its own estimates of the value of the gun mounts. Initially, in March 2005, the Government obtained an estimate from Ward Brewer.⁵ This estimate, referred to as the "Brewer" estimate, concluded that the market value for the single gun mounts would not exceed \$2500 and the value of the twin mounts would not exceed \$4000, due to the poor condition of the guns. Appeal File, Exhibit 2. The detailed report states in part:

The mounts are in poor condition with the barrels cut in two and the breeches cut out. Further lowering the value is the fact that the ends of the barrels are not available in the mounts we examined. The damage to the mounts make them unacceptable as indoor museum display pieces and they are best used as replacement mounts for missing weapon systems onboard other

³ Naval gun mounts are significantly larger than similar mounts used on land-based equipment. Transcript at 33-34.

⁴ Remediation involves the preparation of a completed gun mount for display to the public in a museum or a public setting, as compared to restoration back to its original status. Transcript at 101.

⁵ The record contains no information whatsoever about Mr. Brewer's background. However, to the extent that the contracting officer relied upon the Brewer estimate for his final decision, and because appellant did not object to its inclusion in the appeal file, examining the relevant portions of the estimate for this decision is helpful.

museum ships. There are only a handful of ships requiring such mounts (our ships are among those) and taking into consideration the amount of restoration the mounts will require, no museum would pay more than \$1,500 for a dual mount, or \$1,750 for a quad mount system -- even though much needed and useful for outdoor display on the ships. It should also be noted that several of the mounts have been previously stripped by the US Navy and the USS Kidd. The mounts, unlike their more expensive and fully restored counterparts do not pivot or traverse. This is undesirable when considering the purchase of a weapon system and, again, lowers the value of these mounts.

Id. On September 16, 2005, the contracting officer offered All Star Metals \$13,000, the maximum sum under the best case scenario presented under the Brewer estimate.

In response, All Star Metals resubmitted its invoice for \$81,200, and, by letter dated November 30, 2005, requested a final decision. By final decision dated March 31, 2006, the contracting officer granted All Star Metals an equitable adjustment of \$13,000. All Star appealed the final decision by letter dated June 26, 2006. Subsequently, the Government paid All Star Metals \$13,000 on November 21, 2006, and paid interest in the amount of \$1243.28 on December 26, 2006. The record does not disclose how the Government calculated the amount of interest paid.

At the hearing, the Government did not call Mr. Brewer, who had prepared the initial appraisal, but instead proffered Joseph Lombardi as an expert witness. Mr. Lombardi, a marine surveyor and consultant from Ocean Technical Services, had experience in preparing appraisals of the value of naval gun mounts because he had previously been involved in negotiations for the purchase and sale of naval gun mounts, including 40 mm mounts from the vessel CABOT. Transcript at 70-73. Mr. Lombardi testified that he had rendered opinions previously concerning a ship component's historic value. *Id.* at 76-77. Mr. Lombardi, as the chairman for the Preservation for the Historical Naval Ships Association, had provided consulting services related to the inspection, movement, and disposal of historic ships, as well as the historical valuation as it relates to insuring ships. *Id.* at 81-86.

Mr. Lombardi compared the condition of the DONNER gun mounts unfavorably to those of the CABOT. Unlike the DONNER, the CABOT had been designated as a historic landmark. Even so, its two twin gun assemblies only sold for \$3500 each and its single quad mount gun assembly sold for \$4500. Transcript at 110-11. Unlike those of the DONNER, the CABOT's gun mounts were complete and intact, including the gun barrels, and they had not been demilitarized as the DONNER's had. *Id.* at 148-49. The sale price for the twin

gun mounts included components that were not present on the DONNER gun mounts. *Id.* at 110-11. Remediation of the complete 40 mm quad mount gun assembly from the CABOT cost \$24,000. *Id.* at 109-10. Mr. Lombardi noted that the potential uses for these gun assemblies (weighing thirteen thousand pounds for the twin mount and twenty-four thousand pounds for the quad mount) are generally limited to the historic community, museums, and museum ships. These organizations do not generally purchase such equipment; the National Defense Reserve Fleet frequently donates the equipment to these institutions. Appeal File, Exhibit 6. Mr. Lombardi concluded that the gun mounts had value only as scrap metal.

Discussion

Valuation of Gun Mounts

The parties agree that the only issue to be resolved in this appeal is whether All Star Metals is entitled to additional compensation under the contract for the gun mounts removed by the Government. Both parties rely almost exclusively upon expert testimony.

As noted above, appellant's expert witness, Mr. Beltrone, a military artifact historian, relied upon the same methodology that he typically used in valuing all military artifacts, Mr. Beltrone determined that the value of the gun mounts is determined primarily by the scarcity of the artifact and the provenance attached to the artifact. He believed that the fact that the gun mounts were known to originate from the DONNER enhanced their historic value.

Not surprisingly, the Government disputes Mr. Beltrone's conclusions, pointing out that Mr. Beltrone failed to consider the extremely poor condition of the gun mounts, the fact that the size and weight of the gun mounts would impact upon a buyer's transportation costs, and that the buyer would incur additional costs to restore and remediate the guns for use as a display. The Government contends that Mr. Beltrone's evaluation contains significant inaccuracies which highlight his unfamiliarity with large weaponry. In addition, the Government disputes All Star Metals' unsupported assertion that it had a ready market for the gun mounts. The Government asserts that the testimony of its expert, Mr. Lombardi, correctly noted that the DONNER did not receive historical designation, the gun mounts were in poor condition, and the gun mounts would need to be transported, restored, and remediated before they could be used in any museum display, rendering the gun mounts essentially without value.

In deciding a case involving conflicting expert witness testimony, we are not obligated to adopt any particular conclusion or opinion reached by an expert witness. *Reflectone, Inc.*, ASBCA 42363, 98-2 BCA ¶ 29,869, at 147,829 (citing *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1325 (Fed. Cir. 1987)). Indeed, we are free

to reject expert testimony which we find intrinsically unpersuasive. *Id.* (citing *Granite Construction Co. v. United States*, 962 F.2d 998, 1006 (Fed. Cir. 1992); *Gulf Contracting, Inc.*, ASBCA 30195, et al., 90-1 BCA ¶ 22,393, at 112,521 (Board not bound by expert testimony and may substitute its own common sense)). And we are justified in choosing one expert opinion over another unless the evidence is inherently improbable or discredited by uncontrovertible evidence. *Id.*; *Cochran Construction Co.*, ASBCA 40294, 90-3 BCA ¶ 23,239, *aff'd*, 937 F.2d 624 (Fed. Cir. 1991) (Table).

Based upon our analysis of the opinions offered in the expert witness reports and testimony, we have afforded more weight to the Government's expert witness' conclusions. Mr. Beltrone, appellant's expert witness, had no experience with evaluating naval gun assemblies. Furthermore, he provided inaccurate descriptions in his written appraisal and failed to address the condition of or potential use for the gun mounts. Mr. Beltrone did not consider the weight, size, and potential transportation costs that a buyer would incur. Finally, Mr. Beltrone did not consider the costs of remediation or restoration. By contrast, Mr. Lombardi considered all of these factors in his analysis.

Based upon the above, we conclude that All Star Metals has not established that it is entitled to any additional compensation for the gun mounts. Accordingly, we reject appellant's claim.

Interest

All Star Metals seeks additional interest under the Contract Disputes Act (CDA) from December 4, 2004, which is the day that it submitted its initial invoice for \$81,200.⁶ The Government disputes All Star Metals' claim for interest from that date, asserting that the initial invoice did not equate to a CDA claim. Instead, the Government contends that All Star Metals' entitlement to interest did not begin to accrue until November 20, 2005, the date upon which All Star Metals submitted its claim and requested a final decision. The Government's position is correct.

Section 605(a), of title 41, United States Code, as implemented by Federal Acquisition Regulation subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). The submission of a claim

⁶ As noted above, the Government paid interest on the \$13,000 previously paid to All Star Metals.

initiates the disputes process and begins the running of interest. *See* 41 U.S.C. § 611 (2000). The submission of an invoice, without more, does not rise to the level of a claim under the CDA. Under the facts of this case, the matter did not become a formal claim until All Star Metals submitted its request for a contracting officer's final decision on November 20, 2005. *Fru-Con Construction Corp.*, ASBCA 53544, et al., 05-1 BCA ¶ 32,936, at 163,155, *modified to clarify award*, 05-2 BCA ¶ 33,082. At that point, CDA interest began to run.

Decision

For the reasons stated above, All Star Metals' appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

R. ANTHONY McCANN
Board Judge