

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
DynCorp) ASBCA No. 49714
)
Under Contract No. DAKF04-91-C-0072)

APPEARANCES FOR THE APPELLANT: Richard O. Duvall, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Army has moved for reconsideration of the Board's opinion in the captioned appeal, *DynCorp*, ASBCA No. 49714, 21 June 2000. The basis for the motion is the Army's contention that finding of fact no. 4 (finding 4) is inconsistent with a statement elsewhere in the Board's opinion. Finding 4 states "We find that at least some of the costs were allowable under the contract if not barred by the Major Fraud Act and related regulations."* The statement which the Army identifies as inconsistent is in the Decision portion of the opinion, under the heading ALLOWABILITY OF THE COSTS: "Pursuant to FAR 31.201-2 costs must be reasonable and allocable. These issues are to be determined on quantum." As a remedy, the Army seeks the modification of finding 4 by either deletion of the sentence from finding 4 quoted above or changing "some of the costs were allowable" to "some of the costs *may be* allowable." *DynCorp* argues that the motion is an attempt to relitigate entitlement. It further asserts that the motion lacks substantive merit insofar as it raises a question as to whether the costs were a benefit to the contract.

We see no conflict between the two statements. It is too well-established to belabor here that at least some damage must be shown before a party can prevail on liability or, in Government contracting terms, entitlement:

* FAR 31.205-47(e)(3) generally limits recovery of proceeding costs to 80 percent.

Of course, evidence on damages or quantum is not totally excluded, because there must be *some* evidence of damage to support a finding on liability. But that limited evidence on damages is not of the quantity, quality, or precision necessary to support a judgment in precise sum; it is only sufficient to demonstrate that the issue of liability is not purely academic; that some damage had been incurred. [Italics in the original]

Cosmo Construction Company v. United States, 451 F.2d 602, 605-06 (Ct. Cl. 1971).

In finding 4 we found that some damage had been incurred, thereby rendering the issue of Government liability under the Major Fraud Act more than “purely academic.” In the ALLOWABILITY OF THE COSTS section we acknowledged that our review of the evidence as to the reasonableness and allocability requisites was limited to that which is necessary for entitlement only. We adjudge our action in so doing to be appropriate and consistent with normal practice in bifurcated proceedings. *Cf. Cosmo Construction, supra*. We decline, therefore, to modify *DynCorp*. After consideration of the Army’s motion, we affirm our opinion.

Dated: 31 August 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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. 49714, Appeal of DynCorp, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals