

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Abt Associates Inc.) ASBCA No. 54871
)
Under Contract No. RAN-C-00-03-00010-00)

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OPINION BY ADMINISTRATIVE JUDGE PEACOCK
ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This appeal involves a claim for additional “war risk” insurance cost incurred by appellant under the referenced contract for health care services in Iraq. Appellant has moved for partial summary judgment. We deny the motion.

FINDINGS OF FACT
FOR PURPOSES OF MOTION

1. On 30 April 2003, the United States Agency for International Development (USAID or government) awarded the referenced cost-plus-fixed-fee (CPFF) contract to Abt Associates (Abt or appellant) for "Health System Strengthening in Post Conflict Iraq." The estimated cost plus fixed fee at the time of award was \$43,818,278. The original completion date was one year following the date of award. Subsequent modifications extended the period of performance to 30 November 2004. The contract required Abt to assess the then-existing health care system in Iraq, and based on that assessment, provide training, medicines, equipment and health information/education needed to improve public health services in the country. (Compl. & answer at 1; R4, tab 1 at 1-2)

2. The contract included FAR 52.228-3, WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT) (APR 1984) and AIDAR 752.228-3, WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT). These clauses required appellant to provide workers' compensation insurance in accordance with the Defense Base Act (DBA), 42 U.S.C. § 1651. Unless a waiver is obtained, the DBA requires that U.S. Government contract employees performing work outside the United States or Canada must receive workers' compensation benefits for injury or death sustained in the course of their employment. The DBA provides for uniform benefits, limitations on eligible beneficiaries, and maximum payments without regard to safety risks that may be unique to the place of performance. These benefits also apply to injuries or death caused by acts of war pursuant to the War Hazards Compensation Act (WHCA), 42 U.S.C. § 1701. *See* FAR 28.305(c). The contract required Abt to purchase the requisite insurance from designated insurance firms. (R4, tab 1 at 28, 30)

3. The contract also incorporated FAR 52.216-7, ALLOWABLE COST AND PAYMENT (FEB 2002) (the Allowable Cost clause). Paragraph B.6 of Part I – THE SCHEDULE of the contract stated that “The U.S. dollar costs allowable shall be limited to reasonable, allocable and necessary costs determined in accordance with [in pertinent part, the Allowable Cost clause].” (R4, tab 1 at 2, 28) The Allowable Cost clause in turn incorporated the cost allowability provisions of FAR 31.2 as in effect on the date of award. FAR 31.201-2 list factors to be consider in determining allowability. These factors include the reasonableness and allocability of the cost, the terms of the contract and any limitations set forth in FAR 31.2. With respect to reasonableness, FAR 31.201-2 states in part:

31.201-3 Determining reasonableness.

(a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. . . . No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

(b) What is reasonable depends upon a variety of considerations and circumstances, including—

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

(2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and—

(4) Any significant deviations from the contractor's established practices.

4. FAR 31.205-19, INSURANCE AND INDEMNIFICATION, as in effect on 30 April 2003 states in pertinent part:

(a) Insurance by purchase or by self-insuring includes coverage the contractor is required to carry, or to have approved, under the terms of the contract and any other coverage the contractor maintains in connection with the general conduct of its business. . . . The amount of insurance costs which may be allowed is subject to the cost limitations and exclusions in the following subparagraphs.

(1) Costs of insurance required or approved, and maintained by the contractor pursuant to the contract, are allowable.

(2) Costs of insurance maintained by the contractor in connection with the general conduct of its business are allowable, subject to the following limitations:

(i) Types and extent of coverage shall follow sound business practice, and the rates and premiums must be reasonable.

. . . .

(vi) Costs of insurance on the lives of officers, partners, or proprietors are allowable only to the extent that

the insurance represents additional compensation (see 31.205-6).

5. FAR 31.205-6, COMPENSATION FOR PERSONAL SERVICES, addresses fringe benefits, as follows:

(m) *Fringe benefits.* (1) Fringe benefits are allowances and services provided by the Contractor to its employees as compensation in addition to regular wages and salaries. Fringe benefits include, but are not limited to, the cost of vacations, sick leave, holidays, military leave, employee insurance, and supplemental unemployment benefit plans. Except as provided otherwise in Subpart 31.2, the costs of fringe benefits are allowable to the extent that they are reasonable and are required by law, employer-employee agreement, or an established policy of the Contractor. [Emphasis added]

6. Various indirect cost rate ceilings were incorporated into the contract including a maximum ceiling on fringe benefits of 42% of staff salaries (R4, tab 1 at 3-4).

7. With respect to appellant's staff, the contract incorporated AIDAR 752.7007 PERSONNEL COMPENSATION (JUL 1996) which stated in paragraph (a) that "Direct compensation of the Contractor's personnel will be in accordance with the Contractor's established policies, procedures and practices, and the cost principles applicable to this contract."

8. Abt's cost proposal detailed benefits provided to eligible employees, including health and welfare, leave, worker's compensation, retirement and death and disability benefits. Appellant's death, accident and disability benefits generally provided for maximum benefits per employee of \$250,000 for each of the following: group term life insurance, accidental death and dismemberment (AD&D) and business travel accident (travel) insurance. In addition, supplemental life insurance could be purchased by employees in amounts of up to 3 times their annual base salaries. (R4, tab 3 at Employee Benefits Summary at 1, 16) The costs of the benefits are recorded by appellant as indirect costs and collected in its fringe benefits cost pools (Tremblay decl. at ¶ 5).

9. At the time of contract award, Abt's AD&D and travel insurance coverages were subject to war risks exclusions in the corresponding policies. These exclusions denied coverage to appellant's employees who might be injured or killed while traveling to or working in Iraq. (Tremblay decl. at ¶ 6)

10. Abt was aware prior to award of the contract that its standard AD&D and travel insurance policies were subject to the war risks exclusion and unsuccessfully attempted to secure commercial insurance coverage for these risks. Coverage was denied because of then existing United Nations and United States sanctions against Iraq. Appellant alternatively requested prior to award of the contract that USAID provide indemnification under Public Law No. 85-804 to protect appellant from claims for injury, death, or property damage associated with performance in Iraq. (Tremblay decl. at ¶ 8)

11. To comply with the contract, Abt's employees were urgently needed in Iraq in May-June 2003 but appellant expressed serious concerns about their safety (Tremblay decl. at ¶ 8). On 26 May 2003, the USAID contracting officer (CO) informed Abt that, irrespective of the outcome of the pending indemnification request, the contract would be terminated for default if appellant declined to send its employees into Iraq. (R4, tab 16; Tremblay decl. at ¶ 8)

12. On 29 May 2003, the CO rejected appellant's request for indemnification and stated:

Given the recent lifting of the United Nations sanctions against Iraq, you can further explore the possibility of insurance coverage beyond the areas covered under the Defense Base Act. If you find carriers willing to propose additional coverage, please provide proposed costs of such coverage to the cognizant USAID Contracting Officer at that time for review and consideration. I cannot predict the outcome of such a review, but USAID will consider the matter if and when presented for consideration.

(R4, tab 36)

13. Sanctions against Iraq were substantially lifted by the United Nations and United States on 22 May and 27 May 2003, respectively. Effective on 28 May 2003, appellant purchased war risk travel and AD&D insurance under its pre-existing insurance policies with Zurich-American Insurance Group (Zurich) on a limited one-month-at-a-time basis for specified employees traveling to Iraq or Kuwait. The average premium was \$5,075 per month per employee for \$250,000 coverage. (Tremblay decl. at 9; R4, tabs 18, 34)

14. By letter dated 6 June 2003, Abt informed the CO of the purchase of the insurance and premium amounts and "respectfully request[ed] contracting officer approval for cost allowance and reimbursement" (R4, tab 18 at 1). The letter also stated

that appellant was continuing to search for more competitive rates and increased coverage of \$500,000 (*id.* at 2).

15. In June 2003, Abt solicited quotations from other insurers. Effective 1 July 2003, appellant contracted with AIG Life Insurance Company (AIG) to provide blanket accident insurance, which included war risk coverage for Abt employees performing the contract in Iraq. Abt's previous war risk policy with Zurich was cancelled. The AIG policy provided for coverage that was ten times the annual salary of each covered employee to a maximum of \$1,000,000. (Tremblay decl. at ¶ 11)

16. By letters to the CO dated 6 November 2003 and 24 February 2004, Abt again requested "approval" of the additional insurance coverage (R4, tab 19 at 3, tab 22 at 1-2).

17. On 23 May 2004, the CO advised appellant that its request for reimbursement of "war risk insurance" will not be allowed unless specific approval was given by the Contracting Officer during negotiation of the award" (R4, tab 10 at 1). The letter also referenced appellant's entitlement to recover the cost of DBA insurance in accordance with the contract clauses requiring Abt to maintain such insurance (*id.*).

18. On 10 August 2004, Abt submitted a certified claim to the CO in the amount of \$631,899.33 (plus interest) for unreimbursed premium costs associated with the additional war risk insurance purchased (R4, tab 11).

19. The CO denied the claim in a final decision of 3 October 2004 and this timely appeal followed.

DECISION

Appellant alleges that there are no genuine issues of material fact that the war risk insurance costs incurred were allowable under FAR 31.205-19 and otherwise reasonable. Abt contends that CO approval is not a prerequisite to allowability and, if it were, the CO's disapproval was "unreasonable and should be disregarded" (app. memo. at 7). To the extent that the government challenges the amount of the costs claimed, Abt considers that this is a question of "quantum" that can be resolved by the parties on remand. The government argues that there are genuine issues of material fact regarding the reasonableness of the costs incurred. It contends that it needs additional time to conduct discovery, in particular to evaluate factual questions bearing on the reasonableness factors enumerated in FAR 31.201-3. Moreover, the government maintains that the additional war risk insurance costs in dispute were not incurred pursuant to appellant's established practice or in the general conduct of its business. Accordingly, USAID maintains that the costs required the "approval" of the contracting officer in order to satisfy the allowability limitations established in FAR 31.205-19.

Summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *U.S. Ecology, Inc. v. United States*, 245 F.3d 1352-55 (Fed. Cir. 2001); *Elekta Instrument S.A. v. O.U.R. Scientific International, Inc.*, 214 F.3d 1302, 1307 (Fed. Cir. 2000); *Information Systems and Networks Corp.*, ASBCA No. 46119, 96-1 BCA ¶ 28,059. We consider that genuine issues of material fact exist that preclude summary disposition of this appeal.

First a determination that costs are “reasonable” for allowability purposes is an overall conclusion based on consideration of *all* the factual circumstances relating to incurrence of the costs in question, including the amount incurred. FAR 31.201-3 expressly refers to the “nature *and amount*” (emphasis added) of the cost in assessing reasonableness. Accordingly, we are disinclined at this juncture in the case to bifurcate so-called “quantum” issues for later resolution by the parties.

More significantly, the current record raises factual issues concerning whether “approval” of the additional insurance coverage was a prerequisite to allowability under FAR 31.205-19. Whereas appellant is correct that approval is not a prerequisite to allowability under FAR 31.205-19(a)(2), the applicability of paragraph (a)(2) necessitates examination of appellant’s contemporaneous business practices to assess whether the insurance was “maintained by the contractor in connection with the general conduct of its business.” The government is entitled to conduct discovery on that issue which we cannot resolve by summary judgment on the record before us. To the extent that the insurance was not so maintained, allowability of the costs turns on whether they were “required or approved” in accordance with FAR 31.205-19(a)(1). In our view, there are factual issues concerning the parties’ contemporaneous actions, understandings and intent prior to and during performance of the contract that bear on their interpretation of which paragraph was controlling.

In this regard, it should also be noted that appellant on the one hand argues that the insurance costs are direct costs (and directly allocable) to the contract because the insurance “was purchased specifically for the Contract, and would not have been incurred ‘but for’ the circumstances prevailing in Iraq” (app. memo. at 33). On the other hand, Abt implicitly argues that it was an established business practice to buy the additional coverage viewing it as replacement coverage necessitated by the exclusion under its standard policies. This raises the issue of whether an initial series of insurance purchases after award of a contract for a unique specific purpose can be considered to have been made “in connection with the general conduct” of Abt’s business under FAR 31.205-19 or qualifies as an “established” policy within the meaning of FAR 31.205-6(m) and/or 31.201-3.

The broad allowability of “fringe benefits” is inapposite. FAR 31.205-6(m) provides for their general allowability “[e]xcept as otherwise provided.” The government maintains that FAR 31.205-19 otherwise provides for unallowability of the war risk insurance costs in dispute in the circumstances of this case.

Without further development of the record, we are also unable to assess the alternative issue raised by appellant that the contracting officer’s failure to approve the purchase of the additional war risk coverage was unreasonable.

The motion is denied.

Dated: 1 March 2006

ROBERT T. PEACOCK
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. 54871, Appeal of Abt Associates Inc., rendered in conformance with the Board's Charter.

Dated:

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