

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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ALKAI Consultants, LLC) ASBCA Nos. 56792, 56954
)
Under Contract No. W911S8-06-C-0007)

APPEARANCE FOR THE APPELLANT: Mr. Riley D. Evans
Chief Operating Officer

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
Peter F. Pontzer, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Appellant appeals from the deemed denial of its termination settlement proposal (ASBCA No. 56792) and the subsequent contracting officer's decision denying the proposal in part (ASBCA No. 56954). The Board previously converted the termination for cause of appellant's contract to one for the convenience of the government. *ALKAI Consultants, LLC*, ASBCA No. 55581, 09-1 BCA ¶ 34,058 (*ALKAI I*). The Board held a hearing on ASBCA Nos. 56792 and 56954 on 17 and 18 November 2009. Only quantum issues are before us.

The government has objected in its post hearing filings to exhibits A-3 and A-4 (Bd. corr. ltrs. dtd. 4, 23 Dec. 2009; gov't br. at 8 ¶ 27). Appellant offered exhibit A-3 in evidence on the second day of the hearing. A prehearing order required that documents be exchanged no later than the day before the hearing. The presiding judge admitted the exhibit, but held the record open so that the government might submit rebuttal exhibits. The record was otherwise closed at the end of the hearing. (Tr. 2/65, 72-73, 233-34) The government subsequently submitted rebuttal exhibits G-3 and G-4, which were received in evidence (order dtd. 11 Dec. 2009). The government argues that it was prejudiced by the belated offer of exhibit A-3. In our opinion, allowing the government to submit rebuttal exhibits subsequent to the hearing sufficiently cured any prejudice arising from appellant's failure to identify the exhibit at an earlier date. On 16 December 2009, appellant submitted proposed exhibit A-4. The government objects to the admission of this exhibit on the ground, *inter alia*, that it is untimely. We agree that appellant has not shown good cause to admit this exhibit after the record was closed.

FINDINGS OF FACT

1. On 3 April 2006, the government awarded appellant the captioned firm fixed-price, commercial items contract in the amount of \$98,765. The contract Schedule includes two items: Item No. 0001, cleaning the #1 digester for a price of \$97,765, and Item No. 0002, providing a Contract Manpower Report for a price of \$1,000. The Schedule does not include hourly rates for direct labor hours. (R4, tab 1 at 1, 3)¹

2. The contract includes FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS (SEP 2005), which contains the following termination for convenience clause:

(l) Termination for the Government's convenience.

The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(R4, tab 1 at 13)

3. Modification No. P00001 terminated the contract for cause on 17 July 2006. The modification stated that appellant had completed 40% of the work on Item No. 0001 and reduced the price of that work to \$39,106. The modification terminated the requirement for Item No. 0002, resulting in a revised total contract price of \$39,106. (R4, tab 2)

¹ Record citations are to the record in ASBCA No. 56792 unless otherwise indicated.

4. On 8 June 2007, appellant submitted a termination settlement proposal on Standard Form 1436, Settlement Proposal (Total Cost Basis), to the contracting officer, who evidently received it on that day. The gross proposed settlement amount was \$396,841 and the net payment requested was \$357,735, allowing for a prior payment of \$39,106. Appellant certified the termination settlement proposal in accordance with the Contract Disputes Act (CDA), 41 U.S.C. § 605(c)). (R4, tab 5 at 56, 58)

5. On 22 January 2009, the Board issued its decision in *ALKAI I*, converting the termination for cause to one for convenience. The Board concluded:

[A]ppellant has established that it was excusably delayed by the combination of the unexpectedly high petroleum content of the digester, which a reasonable bidder would not have anticipated and which required it to change its method of performance, and the government's failure to cooperate by making additional drying beds available....

09-1 BCA at 168,426. The Board also found that appellant had completed “most of the work” (*id.*, 09-1 BCA at 168,425, finding 28).

6. On 18 April 2009, appellant appealed from the deemed denial of its termination settlement proposal. The appeal was docketed as ASBCA No. 56792.

7. On 20 May 2009, appellant submitted a revised termination settlement proposal (sometimes “the TSP” or “the revised TSP”). The gross proposed settlement amount was \$448,262 and the net payment requested was \$409,547. Appellant removed \$45,604 in legal and related costs from the proposal because they were the subject of an application for fees and costs in connection with *ALKAI I*. Appellant added \$97,025 for settlement expenses incurred in 2009 or to be incurred in the future. Appellant reduced the amount of prior payments by \$391 from \$39,106 to \$38,715. (App. supp. R4, tab 701 at 1, 4) The government agrees that the correct amount of the credit for prior payments should be \$38,715 (finding 10).

8. On 2 July 2009, the Defense Contract Audit Agency (DCAA) issued an audit report on the original termination settlement proposal (supp. R4, tab 196, 01).

9. On 15 July 2009, the contracting officer issued a final decision in which she determined that appellant was entitled to a gross settlement amount of \$160,268 and a net amount of \$59,659 (Supp. R4, tab 200). Appellant's timely appeal from the 15 July 2009 decision was docketed as ASBCA No. 56594, and consolidated with ASBCA No. 56792.

10. The government's position at hearing and in its post hearing brief is that appellant is entitled to a net payment of \$176,159 plus Contract Disputes Act (CDA) interest from 8 June 2007, the date of submission of the original termination settlement proposal. The government calculates this amount as follows:

Category	Cost
Direct Material	\$ 1,288.00
Direct Labor (includes fringe + G&A)	\$ 75,167.00
Other Costs (includes subcontractors)	\$ 94,757.00
Subtotal	\$ 171,212.00
Profit at 10%	\$ 17,121.20
Additional Settlement Expenses	\$ 26,541.00
Subtotal	\$ 214,874.20
Prior Payments by Government to ALKAI	(\$ 38,715.00)
Subtotal	\$ 176,159.20
CDA Interest (starting June 8, 2007)	
Total to ALKAI	\$ 176,159.20

(Gov't br. at 41; *see also* ex. G-1) We address each of these categories in turn.

11. Direct Material

The amount of \$1,288 for direct material is the amount claimed by appellant. There is no dispute about this amount. (App. supp. R4, tab 701)

12. Direct Labor

In preparing its TSP, appellant divided direct labor into three tasks: task 1, in scope work, task 2, out of scope work, and task 3, appeal and settlement expenses. Tasks 1 and 2 totaled \$124,993 and task 3 totaled \$98,920, for a total for the three tasks of \$223,913. Appellant carved out \$23,194 from task 3, which it claimed as settlement expenses, leaving a balance for direct labor of \$200,719. It claimed this amount as direct labor on line 2 of the TSP. (R4, tab 5 at 58, 66; app. supp. R4, tab 701)

The government accepted all of the hours for tasks 1 and 2 (ex. G-1). The government considered the hours identified with task 3 to be recoverable in part as settlement expenses and otherwise unallowable costs of prosecuting a claim against the

government. We make findings relating to task 3 below under the heading for settlement expenses.

Appellant priced direct labor hours using its Standard Fee Schedule. The Standard Fee Schedule sets forth its commercial or standard rates for a particular year (*see, e.g., ex. A-3 at 4*). These rates include labor cost, general and administrative expense (G&A) and profit (*ex. A-1 at 2, first ¶ 1; tr. 1/67-68*). In contrast, DCAA calculated direct labor hour costs in its audit by using the actual hourly rates employees were paid and adding a fringe rate of 13% and a G&A rate of 106%. DCAA did not include profit in direct labor costs. (*Tr. 2/123-25, 128*)

Mr. Webster was appellant's project manager for the contract. We use his labor as an example of the difference in methodology. Mr. Webster's standard rate in 2006 was \$165. He worked 422 hours on tasks 1 and 2. Applying the standard rate, appellant claimed \$69,630 for his time. Mr. Webster's hourly pay in 2006 was \$48. With fringes of \$6.37 and G&A of \$57.81, the cost to appellant was \$112.18. The cost to appellant for 422 hours, at \$112.18 per hour, was \$47,340. In order to arrive at \$69,630, one must add profit of 47% to \$47,340. (*Tr. 1/111; R4, tab 14 at 209; supp. R4, tab 196, 01 at 7*)

Appellant prepared its proposal for the contract using the Standard Fee Schedule. The parties dispute whether appellant submitted a copy of the Standard Fee Schedule to the government at that time. The contract did not reference the Standard Fee Schedule or the rates contained in it. Weighing the evidence, we find that appellant did not submit a copy of the Standard Fee Schedule with its proposal. (*R4, tab 1; 55581 R4, tab 74; exs. G-3, G-4; tr. 2/69*)

Appellant has not questioned the hourly labor costs, fringes, and G&A rate of 106% for 2006 used by DCAA. We find that the cost of direct labor including mark-ups other than profit was \$75,167 as contended by the government. (*Ex. G-1; tr. 1/91, 143, 2/123, 130*)

13. Other Costs Including Subcontractors

The following table shows the Other costs which appellant claimed in the TSP, which DCAA questioned, and which the government has agreed to:

Cost Element	Claimed	Questioned	Gov't Agreed
Auto Expense	\$ 4,747	\$ 1,226	\$ 3,521
Subcontracts	92,625	7,708	84,917
Equipment	6,319		6,319
Billing/Admin.	1,000	1,000	
Total	\$ 104,691	\$ 9,934	\$ 94,757

(Supp. R4, tab 196, 01 at 9; app. supp. R4, tab 701, line 5, which deletes an amount of \$39,656 claimed under this category in the original TSP)

Appellant claimed auto expense based on a rate of 60 cents per mile. DCAA used a rate of 45 cents per mile. There is no proof that appellant incurred cost of 60 cents per mile. With respect to subcontract expense, the questioned \$7,708 represents interest payable to subcontractor Cowlitz Clean Sweep (CCS). Subsequent to submission of the original TSP, where the amount of \$7,708 first appears, appellant entered into a settlement agreement with CCS which states that appellant will pay CCS any amounts allowed by the government for its work including interest. Appellant has not shown that interest due CCS is separately recoverable. Finally, the billing/administration expense of \$1,000 represents Item No. 0002 of the contract, providing a Contract Manpower Report. Appellant did not deliver this report, the requirement for which was deleted by Modification No. P00001. Direct labor would include any costs incurred before it was deleted. We find that Other costs were \$94,757 as contended by the government. (Supp. R4, tab 196, 01 at 9-10, tab 203)

In the TSP, appellant separately claimed G&A at a rate of 15% totaling \$15,035 (reduced from \$20,983) on nonlabor costs. The DCAA auditor concluded that G&A for 2006, to which these costs relate, was fully accounted for in the 106% rate applied to labor. Appellant's accountant testified that the labor in the company carried all of the home office overhead. We conclude that appellant has not proved that it is entitled to the amount of \$15,035. (App. supp. R4, tab 701, line 6; tr. 1/104-05, 113, 124, 2/139)

14. Profit

In its TSP, appellant did not claim a separate amount for profit. Appellant stated that profit was included in direct labor, which, as we found above, was based on appellant's Standard Fee Schedule. DCAA did not include profit under direct labor. The government argues that the rate should be 10%. Appellant asserts that to arrive at its Standard Fee Schedule, it includes a profit figure of approximately 50% (app. br. at 34). We find that 10% is a reasonable profit figure under the circumstances of this appeal.

15. Settlement Expenses

The following table shows the settlement expenses which appellant claimed in its TSPs and which the government has agreed to:

Cost Element	Original TSP	Increase	Revised TSP	Gov't Agreed to
Third party consult. & legal	\$ 6,310	\$ 9,033	\$ 15,343	\$ 14,544
ALKAI employees	23,194	77,030	100,224	11,999
ALKAI expenses		442	442	
Estimated future costs		10,520	10,520	
Total	\$ 29,504	\$ 97,025	\$ 126,529	\$ 26,543

(R4, tab 5 at 60, sched. E; app. supp. R4, tab 701 at 1, 3 (sched. E), 5; ex. G-1 at 2-3) The discrepancy between the total of \$26,541 in the government's chart in its brief (finding 10) and the total above of \$26,543 (gov't br. at 32 ¶ 146) is not explained although it probably results from rounding.

Third party legal and consultant costs principally included costs for Mr. John J. Reed, an accountant who prepared appellant's original and revised TSPs. They also included an amount of \$1,300 for fees of James Nagle, Esq., appellant's attorney in *ALKAI I*. The government accepted all of these costs except for \$800 which was identified as "Estimated Future" in the original TSP.² (App. supp. R4, tab 701 at 5; ex. G-1 at 2-3; supp. R4, tab 196, 22m.1; tr. 1/62, 64, 68, 80-81)

The costs for ALKAI employees in the original TSP, totaling \$23,194, consisted of \$21,074, representing assistance to Mr. Reed at ALKAI's standard rates for various employees, and \$2,120, representing 4 hours for "Estimated Employee Future". The government accepted 185.50 hours of assistance, but calculated the amount due based on actual employee labor rates, added fringe benefits and G&A of 106%, resulting in a total of \$11,999. Appellant's accountant calculated G&A at a rate of 137% for 2007, when some of these expenses were incurred. We find based on the testimony of the DCAA auditor that a rate of 106% should be used for both 2006 and 2007. (Ex. G-1 at 3; supp. R4, tab 196, 22m.1; tr. 2/172, 193-95)

The additional amount of \$77,030 in the revised TSP consists of 472 hours of work performed between 11 February 2009 and 7 May 2009. The work included preparing a narrative of the government's actions which resulted in increased costs at the

² In the government's brief it states that it disallowed the costs of \$1,300 for Mr. Nagle rather than the \$800 (at 33 ¶ 149). The calculations in the AWP appear, however, to delete \$800. We are satisfied that is correct, given that Mr. Nagle assisted with preparation of the original TSP (tr. 1/55).

contracting officer’s request, assisting Mr. Reed, and meeting with the DCAA auditor. Appellant calculated the amount of \$77,030 using its standard rates of between \$150 and \$175 per hour. Appellant has not provided the Board with cost data relating to this effort. (App. supp. R4, tab 701 at 6-7) The government has not accepted any of these costs (ex. G-1).

We find that incurring costs to prepare a narrative requested by the contracting officer, revise the original TSP in light of the Board’s intervening decision in *ALKAI I*, and meet with the DCAA auditor was reasonable in principle. We further find that claiming \$77,030 for this work was unreasonable. Among other things, the revisions to the original TSP were minor (*see* finding 7) and Mr. Reed was doing the accounting work, which the government has agreed to compensate.

Given these considerations, we find in the nature of a jury verdict, based on the audited cost data relating to ALKAI’s employees in 2006 and 2007, that appellant should recover \$6,000 as settlement expenses in connection with its employees’ work on the revised TSP and related matters in 2009. Appellant has not shown a basis for recovery of the balance of the \$77,030.

Appellant has not provided back-up for the expenses of \$442. It has not established that the future estimated costs (\$10,520) were incurred subsequent to submission of the revised TSP or at any time.

In summary, we find that appellant incurred reasonable settlement expenses as follows:

Cost Element	
Third party consultant and legal	\$ 14,544
ALKAI employees	17,999
Total	\$ 32,543

DECISION

The FAR 52.212-4 termination for convenience clause in the contract provides for recovery of two monetary amounts: “a percentage of the contract price reflecting the percentage of the work performed” and “reasonable charges...[that] resulted from the termination” (finding 2).

Percentage of the Contract Price Reflecting the Percentage of the Work Performed

The first monetary amount depends upon the contract price and the percentage of the work performed. The contract price at award was \$98,765. Modification No. P00001

reduced the price to \$39,106 in conjunction with the termination for default and deleted Item No. 0002. (Findings 1, 3) In *ALKAI I*, appellant established that it was excusably delayed and required to change its method of performance because of the unexpectedly high petroleum content in the digester. In addition, the government failed to cooperate by making additional drying beds available when the unexpectedly high petroleum content became known. Appellant is entitled to an adjustment of the contract price because of these factors. It also proved that it had completed most of the work, not 40% as asserted by Modification No. P00001. (Finding 5)

We must, therefore, determine what the adjusted contract price should be. As described in the findings, the government's approach to calculating fair compensation was to calculate cost and reasonable profit for the work which was performed (gov't br. at 41; gov't reply br. at 14, finding 10). In effect, the government adopted a total cost methodology for adjusting the contract price. Appellant argues that it should be able to recover its commercial or standard rates for its labor hours, resulting in a substantially higher adjusted contract price. It points to FAR 49.201, which states that a "settlement should compensate the contractor fairly for the work done" and that "[c]ost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation" (app. br. at 18).

We conclude that under the circumstances here, where an adjustment to the contract price is required, where the costs relating to that adjustment are not easily segregated from those of the base work, and where most of the work was performed, we should adopt the government's cost based methodology. The results of that methodology best represent "a percentage of the contract price reflecting the percentage of the work performed." We need not concern ourselves for purposes of these appeals with factors which might be present in other cases, such as an unrealistic bid or increased costs for which the contractor was responsible. Insofar as appellant's argument is concerned, we are not persuaded that appellant's commercial or standard rates, which are not incorporated in the contract, represent fair compensation. (Findings 1, 5, 12, 14)

Our findings above resolve the remaining issues relating to the first monetary amount. Appellant is entitled to \$188,333 (\$171,212 for direct material, direct labor and other costs plus profit of \$17,121), less payment received, under the first prong of the termination for convenience clause. (Findings 11-14)

Reasonable Charges That Resulted From the Termination

The Termination for Convenience clause states that the contractor may also recover reasonable charges it "can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The

Contractor shall not be required to comply with the...contract cost principles for this purpose.” Reasonable charges resulting from a termination include settlement expenses.

The government recognized in its calculations that the cost of preparing the TSPs was recoverable. We increased the amount due for that effort from \$26,543 to \$32,543. Appellant has not proved that it is entitled to any other amounts under this heading. (Finding 15)

The commercial items termination for convenience clause does not state whether or not profit is payable on the reasonable charges resulting from the termination. In the absence of other guidance, we follow FAR 49.202(a) which states that profit is not allowed on settlement expenses.

CONCLUSION

Allowing for the prior payment to ALKAI of \$38,715, appellant would be entitled to \$182,161 (\$188,333 + \$32,543 - \$38,715) plus CDA interest from 8 June 2007 until paid. It is unclear whether appellant has been paid the amount of \$59,659 to which the contracting officer said it was entitled in her 15 July 2009 final decision (finding 9). Accordingly, we sustain the appeals in the amount of \$182,161 less any amounts which may have been credited to appellant since the final decision plus CDA interest on the principal from 8 June 2007 until paid.

Dated: 24 June 2010

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)
I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

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. 56792, 56954, Appeals of ALKAI Consultants, LLC, rendered in conformance with the Board's Charter.

Dated:

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