ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Cellular Materials International, Inc.	)	ASBCA No. 61408
	)	
Under Contract Nos. HR0011-10-C-0054	)	
HR0011-10-C-0117	)	
N00014-13-C-0201	)	
W57HZV-10-C-0148	)	
HR0011-14-C-0034	)	

APPEARANCE FOR THE APPELLANT: Mr. Doug Long
CEO

APPEARANCES FOR THE GOVERNMENT: Arthur M. Taylor, Esq.
DCMA Chief Trial Attorney
Michael T. Patterson, Esq.
Trial Attorney
Defense Contract Management Agency
Chantilly, VA

OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a government claim arising from the difference between the billing rates of appellant, Cellular Materials International, Inc. (CMI), and final rates established by the contracting officer (CO). The parties have cross moved for summary judgment. The Board grants the government's motion and denies appellant's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The following facts are undisputed or uncontroverted.

This appeal arises from five contracts performed by CMI, including the above-referenced representative contract awarded by the Defense Advanced Research Projects Agency on April 28, 2010 (the Contract). The Contract provided for payment of cost plus a fixed fee in the estimated total amount of $4,428,863 and included, among other clauses, Federal Acquisition Regulation (FAR) FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002). (R4, tab 1 at 2, 23)[1]

[1] When citing the Rule 4 file, we reference the .pdf page number for the digital version of that document.

Pursuant to the requirements of this clause, CMI submitted final indirect cost proposals for fiscal years 2010 – 2014 ((gov't statement of undisputed material facts (GSUMF) ¶¶ 6-9 (citing gov't mot. at exs. G-2 to G-6)). Initially, the Defense Contract Audit Agency (DCAA) informed CMI that its proposals were low risk and would not be audited (GSUMF ¶ 16; R4, tab 9 at 6). But after receiving this notice, CMI revised its 2010-2014 proposals to add $425,000 ($85,000 per year) in general and administrative (G&A) costs for a consultant, Mr. Haydn Wadley (*id.*; GSUMF ¶ 10). In addition to his purported work as a consultant, Mr. Wadley was CMI's largest shareholder, owning up to about 39% of the shares during this period[2] (GSUMF ¶¶ 4, 10, 16; gov't mot. at ex. G-1).

DCAA thereafter performed an audit and issued a report questioning all $425,000 in consultant costs. DCAA stated that the "contractor was not able to provide invoices or other support to include sufficient detail as to the time expended and nature of the actual services provided by the consultant." It also stated that Mr. Wadley had not been paid for some of the services. (GSUMF ¶ 14 (citing R4, tab 8 at 6))

On August 22, 2017, the CO issued a final decision unilaterally establishing final indirect cost rates and asserting a demand for payment of $511,119, which included the $425,000 for Mr. Wadley (R4, tab 9). The CO concluded that "CMI has not provided sufficient evidence of the nature and scope of the service furnished such that incurrence, allowability, [and] allocability of these costs can be determined ..." (R4, tab 9 at 7).

After CMI filed a timely appeal, it produced to the government various documents, including 31 canceled checks, that resulted in the government agreeing that CMI had made $219,583.23 in payments to Mr. Wadley and that these payments were allowable costs. The parties were also able to resolve the portion of the dispute that did not relate to Mr. Wadley, which amounted to an additional $86,119. (GSUMF ¶¶ 16 n.5; compl. ¶¶ 6-8)

The amount that remains in dispute is $205,416.57 (GSUMF ¶ 22; compl. ¶ 7). In support of this amount, CMI has provided the government 27 promissory notes executed each month from October 2012 to December 2014 in which CMI promised to pay Mr. Wadley the amount of $7,083.33, for a total amount of $191,249.91. The notes do not provide for interim payments or contain a date for repayment, other than to state that they are payable five days after demand (R4, tab 6; GSUMF ¶¶ 21- 22). As an explanation, Les Gonda, President and Chief Executive Officer of CMI, and Mr. Wadley, in a joint affidavit, state that Mr. Wadley did this "due to his belief in the future potential of CMI" (R4, tab 10). Mr. Wadley has not demanded payment (GSUMF ¶ 20).

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[2] The contracting officer's final decision also states that Mr. Wadley was Chairman of CMI's Board of Directors (R4, tab 9 at 7).

CMI also represented to the government that it issued checks to Mr. Wadley totaling $14,166.66 in December 2011 and September 2012 that remain uncashed (GSUMF ¶ 22; R4, tab 5 at 1).

While the parties largely agree on the facts, they disagree as to the conclusions that should be drawn from CMI's production of the unpaid promissory notes. CMI has not responded to the government's contentions with respect to the uncashed checks and we consider this issue to have been abandoned.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (citing FRCP 56(c)). When considering a motion for summary judgment, the Board's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249. Conclusory statements and mere denials are not sufficient to ward off summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The fact that both parties have moved for summary judgment does not mean that the Board must grant judgment as a matter of law for one side or the other. Rather, the Board must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *Id.* at 1391.

FAR 52.216-7 (DEC 2002) provides:

> (b) Reimbursing costs.
>
> (1) For the purpose of reimbursing allowable costs..., the term costs includes only—
>
> (i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;
>
> (ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs *incurred, but not necessarily paid*, for—
>
> ***

> (F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts...

(Emphasis added) In sum, at the interim billing stage, FAR 52.216-7(b)(1) provides, among other things, that allowable costs are costs that have been paid, as well as costs that have been incurred but not paid and not delinquent.

The contractor is required to submit a final indirect cost rate proposal. FAR 52.216-7(d)(2)(i). The rates it proposes "shall be based on the Contractor's *actual cost experience* for that period." FAR 52.216-7(d)(2)(ii) (emphasis added). The government contends that "actual cost experience" is synonymous with "actually paid" and because CMI has not made any payments on the promissory notes, these costs are not allowable (gov't br. at 12-13).

FAR 31.001[3] provides that "actual costs means... amounts determined on the basis of costs incurred, as distinguished from forecasted costs..." The FAR does not provide further guidance as to when a cost may be considered to have been incurred and when it is merely forecasted.

The U.S. Court of Appeals for the Federal Circuit has considered when costs are incurred, albeit not in the context of a dispute involving FAR 52.216-7. In *SUFI Network Services, Inc. v. United States*, 785 F.3d 585 (Fed. Cir. 2015), the court considered a lawsuit seeking recovery of attorney fees after the contractor prevailed on claims at the Board. The dispute required the court to interpret a contingency fee agreement between the contractor and its attorneys to determine when attorney fees were incurred for purposes of calculating interest on those fees. *Id.* at 592-93. The fee agreement provided that the attorneys were entitled to their fees only after recovery from the government. The Federal Circuit cited Black's Law Dictionary to define incur as meaning "to suffer 'a liability or expense.'" *Id.* at 593 (citing Black's Law Dictionary (7th ed. 1999)). The court held that because the contingency - recovery from the government - had not occurred when the attorneys performed their work, then the contractor suffered no liability or cost and the costs were not incurred at that time. *Id.*

In *McCulloch v. Secretary of Health and Human Services*, 923 F.3d 998 (Fed. Cir. 2019), the court considered the meaning of costs "incurred in any proceeding on [a Vaccine Act] petition." *Id.* at 1002 (citing 42 U.S.C. § 300aa-15(e)(1)). In the underlying proceeding in that case, the parties agreed on the amounts to be paid and the

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[3] FAR 52.216-7(a)(1) provides that the government will make payments to the contractor in amounts determined by the contracting officer to be allowable under FAR subpart 31.2. Definitions applicable to FAR part 31 are set forth in FAR 31.001.

trial court issued a judgment of the merits. Subsequently, a special master awarded amounts to cover the future costs of a guardianship that had to be established under Florida law as a condition of receiving the payments required by the merits judgment. *Id.* at 999. These costs included various tasks and fees, such as an annual premium on a bond. Relying on Black's Law Dictionary, the court held that:

> [i]n ordinary usage, ... to 'incur' expenses means to pay *or become liable for* them. In one common usage, a person becomes liable for yet-to-arise expenses at the time of undertaking an obligation to pay those expenses if and when they arise. *See Liability*, Black's Law Dictionary (10th ed. 2014) (defining liability as the state "of being legally obligated or accountable," through civil or criminal penalties).

Id. at 1003 (citation omitted). The Federal Circuit held that future guardianship expenses that were not yet due were, nevertheless, incurred because their payment was a precondition for continued receipt of compensation granted in the judgment. *Id.* at 1003.

The *McCulloch* court cited an earlier Federal Circuit opinion that reached a somewhat different conclusion. In *Black v. Secretary of Health & Human Services*, 93 F.3d 781, 785-86 (Fed. Cir. 1996), the court considered a case where the plaintiffs contended that they "faced the near-certain prospect" of suffering future expenses for which they would be entitled to payment under the Vaccine Act. *Id.* at 785. The court held that "[i]n ordinary usage. . . to 'incur' expenses means to pay or become liable for them; the term does not refer to any and all expenses that may ultimately be traceable to a particular event." *Id.* As an example, the court stated that a patient released from the hospital after treatment of a broken leg would have incurred the hospital expenses to that point but would not have incurred expenses for subsequent rehabilitation treatment. *Id.* at 785-86.

In *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776 (1999), *aff'd* 249 F.3d 1337 (Fed. Cir. 2001), the Court of Federal Claims considered the meaning of actual costs in the context of fraud counterclaims filed by the government. In that case, the contractor represented that its claim was based on actual costs. The court found, however, that the claim was based on purchase orders to subcontractors so that it sought, for example, payment for materials that the contractor never received and for which it never received invoices. *Id.* at 785. Relying on the FAR 31.001 definition of "actual costs" discussed above, the court held that a cost is incurred "when a person becomes legally bound to pay." *Id.* at 801. The court recognized that at some future date the contractor might become liable for some of the unbilled costs, but rejected the contention that such a future cost could be considered an actual cost. *Id.* at 803.

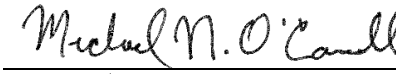
These decisions illustrate the fact intensive nature of determining when costs are incurred. Collectively, they demonstrate that a future expense must be more than merely likely or probable to be an incurred cost. In *McCulloch*, the Federal Circuit held that the plaintiffs had surmounted this test because they had demonstrated that liability had "attached" by virtue of the Court of Federal Claims judgment. *McCulloch*, 923 F.3d at 1002-03.

It is undisputed that more than nine years after execution of the first note, Mr. Wadley has not demanded payment, and that the notes require Mr. Wadley to make a demand before payment is due. Even if the Board were to assume that there is a "near-certain future prospect" that Mr. Wadley will demand payment, he has refrained from doing so. CMI's liability to pay has not attached because Mr. Wadley has not taken the action necessary to trigger CMI's obligation. Or, to use the Court of Federal Claims' formulation, CMI is not legally bound to pay until Mr. Wadley demands payment. Accordingly, for purposes of FAR 31.001 and 52.216-7(d)(2)(ii), the Board holds that the consulting costs at issue are not incurred costs but are best described as "forecasted costs." Thus, the contracting officer correctly determined that these costs are not allowable.

CONCLUSION

The government's motion for summary judgment is granted. Appellant's motion for summary judgment is denied. Accordingly, the remaining disputed portion of the appeal is denied.

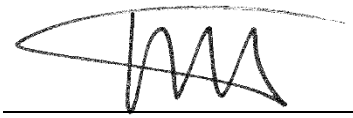
Dated: December 27, 2021



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

(Signatures continued)

I concur



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

I concur

OWEN C. WILSON
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. 61408, Appeal of Cellular Materials International, Inc., rendered in conformance with the Board's Charter.

Dated: December 28, 2021

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