ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TMS Envirocon, Inc.	)	ASBCA No. 57286
	)	
Under Contract No. F44600-01-C-0029	)	

APPEARANCE FOR THE APPELLANT: Neil S. Lowenstein, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION TO DISMISS

At issue is the government's motion to dismiss which has been fully briefed by the parties. We grant the motion, except as to eight of eleven direct cost items.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. F44600-01-C-0029 was awarded to appellant TMS Envirocon, Inc. (TMS) as a small business HUBZone set-aside in the total amount of $3,229,283 on 28 September 2001 for the replacement of all drinking water piping, including water mains, service connections, valves and hydrants at specified areas on Langley Air Force Base, Virginia (R4, tab 1). TMS then entered into a subcontract in the amount of $2,850,000 with International Technology Corporation (ITC) on 15 October 2001. ITC was a designated mentor to TMS under the Department of Defense Mentor/Protégé program and the contract work was subcontracted to ITC on a "turnkey" basis so that TMS could obtain ITC's expertise and experience. (App. supp. R4, tab 571; decl. of Mehul S. Shah, TMS president, ¶¶ 1-2, 5-6) ITC commenced contract performance on 17 October 2001, but filed for bankruptcy in January 2002 and the subcontract was assigned to Shaw Environmental, Inc. (Shaw) by the United States Bankruptcy Court for the District of Delaware (R4, tab 249 at 64; Shah decl. ¶¶ 7-8).

Beginning on 23 April 2002, and continuing through 11 September 2002, TMS notified the contracting officer of 170 differing site conditions allegedly encountered by

Shaw (R4, tab 243 at 2422-29). The government issued Modification No. P00002, suspending work effective 6 September 2002, and Modification No. P00003, lifting the work suspension effective 17 October 2002 (R4, tab 3). TMS submitted two change order requests to the contracting officer seeking an equitable adjustment on behalf of itself and Shaw for the work suspension. The first was a letter dated 11 November 2002, seeking $133,805 and a contract extension of 40 days; the second was a letter dated 27 January 2003, seeking a cost balance of $22,164 (bringing the total costs to $155,969). Both letters asked the contracting officer to review attached documents and expressed the hope that "this meets with your approval." Neither letter requested a contracting officer's final decision and the 11 November letter did not include a Contract Disputes Act (CDA) claim certification. (R4, tab 249 at 637-42) By a letter dated 21 August 2003, the contracting officer advised TMS that she had adjusted its combined change order requests for the work suspension to $83,858.57, but that funds were not available and that TMS could submit a revised REA at the completion of the project (R4, tab 249 at 644). TMS responded on 6 January 2004 that it would not accept an $83,858 adjustment and "reserv[ed] the right to revisit and/or file a claim at a later date" (*id.* at 645).

Beginning on 19 November 2002, and continuing through 17 February 2003, TMS notified the contracting officer of another 20 alleged differing site conditions (R4, tab 243 at 2429-30).

By a letter to TMS dated 30 May 2003, Shaw summarized the status of the project as follows:

> As you are aware, this project has been one that has been subject to constant changes, delays, work stoppages and disruptions since the outset. Many issues remain unresolved. The project schedule, work sequencing and execution do not reflect the original as-bid conditions. While we understand that many of these issues may have been unavoidable and perhaps necessary, Shaw did not reasonably anticipate them on this fixed-price contract.

(R4, tab 243 at 2474) Shaw's letter went on to identify $435,988 in changes that had been submitted and were pending approval, $190,613 in changes that were to be submitted, an estimated $1,320,000 in extended field and home office support costs, and $750,000 in delay, disruption and change impacts that it was evaluating (*id.*).

By a letter to the contracting officer dated 30 July 2003, TMS, in turn, complained about the "multitude of outstanding changes, changed, and differing conditions encountered" and the "significant increases in time and the cost of performance of the contract work because of the delays, disruptions, and indecisions." It advised that the

rough magnitude of the estimate of the impacts for Shaw and TMS was "$2.5M to $3.5M." (R4, tab 243 at 2476)

TMS notified the contracting officer of two more alleged differing site conditions in July 2003. This is a total of 192 differing site conditions, not 193 as stated by the government, the difference owing to reservation of item 190 by TMS. (R4, tab 243 at 2430) On 29 August 2003, Shaw left the jobsite, leaving TMS to complete the project (R4, tab 241; Shah decl. ¶ 10).

A total of 18 modifications were issued to the contract, increasing the price to $4,262,938 and extending the completion date to 8 September 2004 (R4, tabs 2-19). TMS states, and the government does not disagree, that project work was completed on 6 November 2004 (app. opp'n at 5). According to the declaration of Mr. Shah, the contracting officer acknowledged that TMS was being impacted and that the government was obligated to compensate it for those impacts. Mr. Shah states that the government encouraged TMS to wait until the end of contract performance to submit its claims at which time they would be mature and final. (Shah decl. ¶¶ 11-17) He also states that TMS relied upon the government's assurances that it could submit its claims after contract completion and that it was not until TMS had completed performance that the government gave any indication that it would not honor its assurance (*id.* ¶ 18). Mr. Shah further states that "[b]y the end of the project (but not before then), it became apparent that the overall impacts to and results of performance caused by Government's multitude of key acts and omissions...constituted...a 'cardinal' change to/from the Contract requirements" (*id.* ¶ 23).

The 2004 Request for Equitable Adjustment (REA)

On 17 March 2004, Shaw submitted to TMS an REA in the amount of $2,403,325 through 30 September 2003 (app. supp. R4, tab 401 at 1 and table 7-2). Shaw stated that, as demonstrated in the REA, it had experienced a "vast number of design changes, disruptions due to differing site conditions and work stoppages, government directions to resequence work, delays in approval of contract modifications, delays in obtaining funding and restrictions of access to substantial areas of work" (R4, tab 241 at 2401). It requested that TMS forward the REA to the government "as soon as possible to expedite resolution of all outstanding issues" (*id.* at 2397). Despite Shaw's request, TMS did not pass the REA on to the contracting officer because some work was still ongoing and TMS wanted to submit an '"all inclusive' REA" that would reflect all of its costs (R4, tab 249 at 9).

On 9 August 2004, Shaw filed suit against TMS and its surety in the United States District Court for the Eastern District of Virginia (R4, tab 249 at 9). On 9 September 2004, TMS submitted Shaw's REA to the contracting officer. The cover letter stated that

"TMS takes no position as to the merits of the proposals therein," but that the REA appeared to be submitted in good faith and that TMS was submitting it to the government at Shaw's request for "review, comment, and negotiation." TMS advised that it had added its "proposal/estimate" for markups and attached a summary sheet computing the total REA to be $3,197,210. TMS did not certify the REA and did not request a contracting officer's final decision. (App. supp. R4, tab 561) The REA was received by the contracting officer on 15 September 2004 (R4, tab 249 at 48).

The contracting officer denied the REA for lack of certification by TMS (app. supp. R4, tab 564). By a letter dated 14 March 2005, TMS advised the contracting officer that Shaw was the real party in interest and that it took no position on the REA, but provided the REA certification required by DFARS 252.243.7002(b) and requested an opportunity to discuss and/or negotiate the REA (app. supp. R4, tab 565). Thereafter, the REA was summarily denied in its entirety by a letter dated 15 November 2005 which stated it was the contracting officer's final decision (R4, tab 249 at 62).

TMS filed a protective law suit from the contracting officer's 15 November 2005 decision on 12 November 2006 in the United States Court of Federal Claims seeking the value of the 2004 REA, $2,403,325, plus its apparently revised mark-ups, bringing the total to $3,098,644.17 (app. supp. R4, tab 574, ¶ 20). The complaint in that law suit states that the 2004 REA was not a CDA claim (*id.* ¶ 11). On 1 May 2007, following early neutral evaluation during which TMS indicated it intended to submit a new claim to the contracting officer, the suit was dismissed without prejudice at the request of the parties for lack of subject matter jurisdiction (app. supp. R4, tab 579; Shah decl. ¶ 32). Mr. Shah states that he understood the government would fairly "evaluate and consider" a revised submission by TMS (Shah decl. ¶¶ 32, 33).

On 26 September 2008, TMS and Shaw reached a settlement of Shaw's 2004 REA pursuant to which TMS and its surety paid Shaw $790,000 and Shaw assigned to TMS all of its rights, claims and interests in its REA (R4, tab 249 at 64-68).

On 8 March 2010, TMS submitted a revised REA to the contracting officer, this time seeking $2,439,512. It did not contain a CDA claim certification. The cover letter stated:

> Time is of the essence for your evaluation of this proposal. Since there has already been much discussion regarding related issues, we believe it is appropriate that prompt negotiations of our proposal be initiated, and accordingly request that the undersigned be contracted upon receipt hereof to coordinate the same.

> Because time is of the essence, please be advised that if such coordination is not made within the next 14 calendar days, we must presume lack of intention on the government's part to do so, and will thereafter move forward to request a Final Decision....

(R4, tab 249 at 1, 29)

The 2010 REA seeks "compensation in connection with Shaw's March 17, 2004 REA..., plus additional compensation for additional job costs incurred by TMS because of the multitude of circumstances for which the Air Force is responsible" (R4, tab 249 at 11). It stated that Shaw's proposal had been submitted as an REA and "not as a request for a final decision under the CDA" (*id.* at 10). Based upon the 26 September 2008 settlement with Shaw, TMS requested the "Reasonable Value" of Shaw's 17 March 2004 REA, computed to be $1,684,739 (R4, tab 249 at 19-24, 29; Shah decl. ¶ 25.a.). The certification provided is that required by DFARS 252.243.7002(b) for an REA (R4, tab 249 at 34).

The REA included another six cost items that total $754,773 (R4, tab 249 at 25-29). The first item seeks $78,452 for extra work associated with tie-in service connections (R4, tab 249 at 26,910). The REA explains that, by letters dated 18 February 2002 and 16 May 2002, TMS had advised the contracting officer that the specification clarification requiring it to install service connections from the main line valves to within five feet of the various buildings was contrary to the contract requirements and would result in extra costs. Neither of the letters specified any amount due and neither requested a contracting officer's final decision. (R4, tab 249 at 25-26, 896, 901-02) By a letter dated 19 June 2002, the contracting officer directed TMS to perform the tie-in work, as TMS had indicated in its 16 May 2002 letter it would do "in the interest of customer satisfaction" (R4, tab 249 at 901, 905). According to the REA, TMS "mobilized a service tie-in crew (including an independent and licensed plumber) to perform this extra work" (R4, tab 249 at 26).

The second item seeks $39,756 for TMS's portion of costs incurred as a result of the work suspension that occurred between 6 September 2002 and 17 October 2002. The REA explains that Shaw's portion of the suspension of work costs ($120,099) was included in the "reasonable value" of the Shaw 2004 REA. (R4, tab 249 at 26)

The third is for extended, time-related site overhead costs computed to be $114,562 for 692 days due to "differing site conditions, changes, and extra-contractual weather delays." It does not seek extended overhead for the 22 days of delay associated with the initial access/lay-down area, addressed in Modification No. P00001, or 39 days related to the suspension of work addressed in Modification No. P00003. (R4, tab 249 at

26, 920) TMS states that the claimed overhead "arises from the same circumstances as and is derivative of its entitlement to the Shaw REA" (app. opp'n at 24-25).

The fourth item is for inefficiency. TMS seeks $370,213 resulting from its supplementation of "Shaw's field installation effort by providing additional craft labor and production equipment." (R4, tab 249 at 27, 933) TMS states that, "[l]ike its claim for extended time-related overhead, TMS's entitlement to recover its inefficiency costs, $370,213, also arises from the same circumstances as and is derivative of its entitlement to the Shaw REA" (app. opp'n at 24-25). According to Mr. Shah's declaration, extended site overhead costs and inefficiency costs are the types of costs the government represented would be negotiated and resolved at the end of the project (Shah decl. ¶¶ 25.d. and f.).

The fifth consists of 11 unpaid direct cost items allegedly resulting from changes occurring during the time period 7 March 2003 through 17 September 2004, which total $39,589. Three of these relate to events that occurred before 31 March 2004 and represent a total of $15,602 in costs. (R4, tab 249 at 946) On 7 March 2003, TMS discovered three additional fire hydrants on Durand Loop and two additional fire hydrants on Worley Road that had to be demolished at costs of $2,238 and $1,492, respectively, and so notified the contracting officer by letters dated 8 April 2004 (R4, tab 249 at 963-69). On 29 March 2004, TMS was prevented from demolishing fire hydrants as scheduled because water mains had not been decommissioned, incurring $11,872 in costs, and so notified the contracting officer on 1 April 2004 (R4, tab 249 at 947-51). The remaining eight incidents for which direct costs are claimed occurred between 19 April 2004 and 17 September 2004 and total $23,987 (R4, tab 249 at 946).

The sixth seeks $112,201 in REA preparation costs (R4, tab 249 at 27-28; Shah decl. ¶ 25). According to Mr. Shah, these costs were incurred in the preparation of the 2010 REA in anticipation of negotiations, without knowing the government did not intend to negotiate with TMS (Shah decl. ¶ 25.g.) It appears from the invoices provided that the claimed attorneys' fees and costs were incurred beginning on 11 June 2009 and continuing through 29 January 2010, and that the claimed consulting fees and costs were incurred beginning on 2 July 2009 and continuing through 9 February 2010 (R4, tab 249 at 1032, 1048, 1049). TMS has not allocated any of the REA preparation costs among the REA claim items.

By a letter dated 30 March 2010, received by the contracting officer on 31 March 2010, TMS noted that it had heard nothing from the government and presumed there was a lack of intention to coordinate a discussion about the REA. The letter went on to state:

> Accordingly, we hereby convert the REA and the proposal bases and amounts therein to claims, and request the

> Contracting Officer's Final Decision respecting those claims pursuant to the Contract Disputes Act [CDA].

The letter stated that the total amount claimed was $2,439,512 and provided a CDA certification. (R4, tab 249 at 1073-74; compl. ¶ 7) The claim was denied on 20 April 2010 (compl. ¶ 8), and an appeal filed at the Board on 16 July 2010.

DISCUSSION

The government's motion to dismiss asserts that we lack jurisdiction over this appeal because the underlying claims accrued more than six years before TMS converted the 2010 REA into a CDA claim and requested a contracting officer's final decision in a letter dated 30 March 2010, received by the contracting officer on 31 March 2010.

The CDA provides that a claim must be submitted to the contracting officer within six years after it accrued. 41 U.S.C. § 7103(a)(4)(A). Accrual of a claim means the date when all events that fix liability and permit assertion of the claim, with occurrence of some injury, were known or should have been known. FAR 33.201; *The Boeing Company*, ASBCA No. 57490, 12-1 BCA ¶ 34,916 at 171,672. We are to examine the legal basis of independent and distinct claim items to determine when liability is fixed. *See Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,476-77. The date liability is fixed is dependent upon the nature of the claim. *Id.* at 165,475-76. However, the exact date of accrual need not be determined if the appellant knew or should have known of the claims more than six years before they were submitted to the contracting officer. *See Robinson Quality Constructors*, ASBCA No. 55784, 09-1 BCA ¶ 34,048 at 168,395-96.

TMS first argues that the Board should defer ruling on the motion to dismiss pending a hearing on both the motion and the merits of the appeal under Board Rule 5(a), in part because the government has conceded that not all of the TMS claims can be dismissed. TMS subsequently clarified that it did not seek a separate jurisdictional hearing, and oral argument on the government's motion to dismiss was held on 3 April 2012. TMS further argues that the government's motion is "misplaced or alternatively premature" because the statute of limitation is an affirmative defense that does not go to the jurisdiction of the Board.

The government points out that its concession relates only to eight unresolved direct cost items that did not accrue more than six years before the claims were filed. As to the rest of the claims, the government correctly argues that the submission of a claim within the six-year CDA statute of limitations is a condition of our jurisdiction, mandating dismissal of TMS's claims for lack of jurisdiction if they are untimely, subject to equitable tolling. *Boeing*, 12-1 BCA ¶ 34,916 at 171,680 (concluding that *Henderson*

v. Shinseki, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *rev'd*, 131 U.S. 1197 (2011) and *Cloer v. Secretary of Health and Human Services*, 654 F.3d 1322 (Fed. Cir. 2011) (en banc) did not abrogate *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009), *cert. denied,* 130 S. Ct. 3503 (2010)). *See also Systems Development Corp. v. McHugh*, 658 F.3d 1341, 1345-47 (Fed. Cir. 2011) (affirming our dismissal of an appeal based upon claims submitted to the contracting officer more than six years after accrual in *Systems Development Corp.*, ASBCA No. 56682, 10-2 BCA ¶ 34,579). Thus, we turn to an examination of when the TMS claims accrued and whether they are barred by the statute of limitations.

The 2004 and 2010 REAs

The government contends that the TMS claims arising under the Shaw 2004 REA accrued on or before 17 March 2004 when Shaw quantified its claims in its REA. TMS responds that the claims did not accrue until project completion on 6 November 2004, at the earliest, because the government deflected discussion of possible claims with assurances the issues would be addressed at the end of contract performance. Its argument is contrary to precedent. The TMS claims accrued when TMS knew or should have known of the events giving rise to liability. FAR 33.201; *Boeing*, 12-1 BCA ¶ 34,916 at 171,672. Although there is evidence that TMS knew or should have known of its claim earlier than 17 March 2004 (for example in May 2003 when Shaw summarized the status of the project or July 2003 when TMS identified the rough magnitude of various impacts), for purposes of the present motion, it is sufficient for us to conclude that TMS knew, or should have known, of its claim when Shaw submitted its REA to TMS on 17 March 2004.

Based predominately upon allegations made in the Shah declaration that the contracting officer acknowledged liability and encouraged TMS to wait until the end of contract performance to submit its claim, TMS contends the statute of limitations should be equitably tolled. Under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), TMS must show that it was "induced or tricked" by the government's conduct into allowing the six-year deadline for submission of its CDA claims to pass. We do not perceive the alleged government actions here to be of such a nature. *See Bernard Cap Co.*, ASBCA No. 56679 *et al.*, 10-1 BCA ¶ 34,387 at 169,800-01, *aff'd*, 409 Fed. Appx. 347 (Fed. Cir. 2011) (general assurances to review and/or reconcile payment records not sufficient to satisfy standards for equitable tolling applied "sparingly and under limited circumstances"). On the contrary, the record shows that, after the contract was completed on 6 November 2004, TMS was not "induced or tricked." When Shaw filed suit against it on 9 August 2004, TMS submitted Shaw's REA to the contracting officer on 9 September 2004. When the REA was denied for lack of certification, TMS certified in under DFARS 252.243.7002(b) and when the REA was denied again on 15 November 2005 in what purported to be a contracting officer's final decision, TMS filed a protective

law suit in the Court of Federal Claims on 12 November 2006, where the case was dismissed for lack of subject matter jurisdiction on 1 May 2007. In the course of that litigation, TMS indicated it would submit a new claim to the contracting officer. TMS then settled Shaw's lawsuit on 26 September 2008, but it was not until 8 March 2010 that TMS submitted a revised REA to the contracting officer, which it converted to a CDA claim on 30 March 2010. As is apparent, TMS did not miss the statutory deadline because the government tricked it into waiting until contract performance was complete. Rather, TMS failed to act diligently in preserving its contract claim rights. *Bernard,* 10-1 BCA ¶ 34,387 at 169,801.

TMS next argues that its 8 March 2010 submission was a CDA claim and met the statutory time requirements. The argument ignores the fundamental requirements necessary to establish a proper CDA claim. *See* 41 U.S.C. § 7103; FAR 2.101. To be a valid CDA claim for money, there must be a written demand made as a matter of right that seeks a sum certain. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1542 (Fed. Cir. 1996). The written demand must provide adequate notice of the basis and amount of the claim and a request for a final decision. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). Additionally, claims over $100,000 must be certified in accordance with 41 U.S.C. § 7103(b)(1), although a curable defect in the certification does not deprive the Board of jurisdiction, so long as it is corrected before a decision is entered. 41 U.S.C. § 7103(b)(3); *see* FAR 33.201; *Eurostyle Incorporated*, ASBCA No. 45934, 94-1 BCA ¶ 26,458 at 131,654.

The cover letter to the 8 March 2010 submission states that it is an REA proposal and gives the government 14 days within which to coordinate negotiations, absent which TMS would move forward and request a contracting officer's final decision. In the face of such an unequivocal statement, we will not infer, as TMS suggests we should, that the REA was requesting a final decision. Further, the REA did not contain a CDA claim certification. Finally, to the extent there could possibly be any doubt, by its 30 March 2010 letter, TMS specifically converted the REA into a CDA claim, provided a CDA certification and requested a contracting officer's final decision. The 8 March 2010 REA was not a CDA claim.

The 17 March 2004 Shaw REA that TMS submitted to the contracting officer also was not a CDA claim. TMS specifically acknowledges this reality both in paragraph 11 of the complaint filed in the protective law suit at the Court of Federal Claims and in the 8 March 2010 REA which states that the Shaw REA was "not...a request for a final decision under the CDA." Further, when TMS submitted the Shaw REA to the contracting officer on 9 September 2004, it did not adopt the Shaw REA as its own and assert it as a matter of right. Instead, it sought "review, comment and negotiation" of the REA at Shaw's request. Moreover, the "proposal/estimate" TMS provided for its markups was not a sum certain. *See J.P. Donovan Constr., Inc.*, ASBCA No. 55335,

10-2 BCA ¶ 34,509 at 170,171, *aff'd*, No. 2011-1162, 2012 WL 1326634 (Fed. Cir. Mar. 27, 2012) (amount demanded in claim cannot be subject to qualifying language). And, finally, the REA did not contain a CDA claim certification.

The Additional Six Claim Items in the 2010 REA

To the extent the installation of service tie-in connections item and the TMS costs of suspended work may be distinct and independent, they were not CDA claims either. The letters dated 18 February 2002 and 16 May 2002 that TMS relies upon regarding the tie-in service connections did not seek a sum certain and did not request a contracting officer's final decision. The TMS suspension of work item is based upon costs that were first requested in letters dated 11 November 2002 and 27 January 2003. The 11 November 2002 letter did not include a CDA certification. Neither of the two letters requested a contracting officer's final decision and neither contained anything from which the requisite request can be implied. To the contrary, the letters simply expressed the hope that the requests would meet with approval. That these were not CDA claims is further confirmed by the 6 January 2004 letter in which TMS rejected an $83,858 adjustment for the suspension of work and specifically reserved its right to "file a claim at a later date."

Next, as TMS itself has explained, the items for extended time-related site overhead and inefficiency included in its 8 March 2010 REA arise from the same factual circumstances that formed the basis of the Shaw 17 March 2004 REA and are derivative of it. As such, they are not independent and distinct claims. In any event, Shaw's 30 May 2003 letter to TMS summarized the difficulties being encountered, quantified changes that had been and would be submitted and estimated its extended overhead, and delay, disruption and change impact costs. The 30 July 2003 letter that TMS, in turn, sent to the contracting officer similarly summarizes the multitude of changes and differing site conditions and the increase in time and costs due to delay and disruption, the magnitude of which TMS estimated was "$2.5M to $3.5M." Accordingly, it follows that the extended overhead and inefficiency claims were known and foreseeable to TMS during the course of contract performance, at which time the six-year statute of limitations began to run. *See Robinson*, 09-1 BCA ¶ 34,048 at 168,396.

With respect to the 11 direct cost items, TMS states only that the government has acknowledged the items are timely (app. opp'n at 25). Its statement is wrong. The government contends and the record supports the conclusion that three of the claim items accrued more than six years before they were submitted to the contracting officer as CDA claims on 31 March 2010. The remaining eight claim items are valued at a total of $23,987.

In sum, except for eight direct cost items, TMS's claims relating to the project work were not submitted to the contracting officer within six years after they accrued and we have no jurisdiction to consider them. 41 U.S.C. § 7013(a)(4)(A); *Boeing*, 12-1 BCA ¶ 34,916 at 171,680.

REA Preparation Costs

Remaining is the claim for REA preparation costs which were incurred beginning in 2009. The costs of professional and consultant services are unallowable if they are incurred in connection with the prosecution of a claim against the government. FAR 31.205-47(f)(1). Contract administration costs, on the other hand, are "presumptively allowable if they are also reasonable and allocable." *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1549 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (en banc). In evaluating the costs claimed, we are to examine the objective reasons the costs were incurred to determine whether they are contract administration costs or costs incidental to the prosecution of a claim. Costs incurred for the "genuine purpose of materially furthering the negotiation process" should normally be viewed as contract administration costs, even if negotiations ultimately fail and a claim is filed. *Bill Strong,* 49 F.3d at 1550; *States Roofing Corp.*, ASBCA No. 55504, 10-1 BCA ¶ 34,360 at 169,688.

In this case, the REA preparation costs were not incurred until many years after the contract work had been completed. TMS asserts that these costs were incurred in anticipation of negotiations on the 2010 REA. The record establishes that such an expectation was unreasonable. First, there were no on-going negotiations between the parties on the Shaw 2004 REA. Indeed, despite numerous requests by TMS, there is no evidence that there had ever been any negotiations whatsoever on it. Moreover, TMS advised the contracting officer that it would convert its 8 March 2010 REA into a CDA claim if the government did not coordinate negotiations within 14 days. We conclude that the costs incurred in preparation of the 8 March 2010 REA were incurred as the first step in litigation and not for the genuine purpose of materially furthering the negotiation process. *See R.L. Bates General Contractor Paving & Assocs.*, ASBCA No. 53641, 10-1 BCA ¶ 34,328 at 169,550, *aff'd*, 423 Fed. Appx. 996 (Fed. Cir. 2011); *AEI Pacific, Inc.*, ASBCA No. 53806, 08-1 BCA ¶ 33,792 at 167,284.

Even if that were not so, we have concluded that we have jurisdiction over only eight items, valued at $23,987. These are small direct cost items which could not have required any appreciable legal or consultant work. The amount claimed for REA preparation is $112,201. This is more than four times the claimed value of the direct cost items. In these circumstances, the REA preparation costs clearly are not reasonable and allocable to the eight direct cost items. *Bill Strong*, 49 F.3d at 1549.

CONCLUSION

The government's motion to dismiss is granted, except as to the eight direct cost items that were submitted to the contracting officer before the six-year statute of limitations had run.

Dated: 18 June 2012

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 57286, Appeal of TMS Envirocon, Inc., rendered in conformance with the Board's Charter.

Dated:

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