ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Imaging Science Technologies	)	
X-Ray Imaging Division, Inc.	)	ASBCA No. 52497
	)	
Under Contract No. N39998-96-C-5019	)	

APPEARANCE FOR THE APPELLANT: Mr. Richard L. Scully
President

APPEARANCES FOR THE GOVERNMENT: Edmund A. Miarecki, Esq.
Associate General Counsel
Andrew L. Fechhelm, Esq.
Assistant General Counsel
Defense Contract Management Agency
Fort Belvoir, VA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
PURSUANT TO RULES 11 AND 12.3

At issue in this appeal are termination for convenience costs claimed by appellant which were rejected by the termination contracting officer. Appellant elected to proceed under the Board's Rule 12.3 accelerated procedures. The parties agreed to submit the appeal on the record pursuant to Board Rule 11 and both filed initial and reply briefs. For the reasons stated, we deny the appeal.

SUMMARY FINDINGS OF FACT

On 17 June 1996, the Department of the Navy awarded Contact No. N39998-96-C-5109 to appellant Imaging Science Technologies X-Ray Imaging Division, Inc. to research and develop a dry process, non-silver x-ray film at a total estimated cost of $993,871 (R4, tab 1).

The contract incorporated FAR 52.216-11, COST CONTRACT - NO FEE (APR 1984) and FAR 52.232-22, LIMITATION OF FUNDS (APR 1984). Under clause H-1, LIMITATION OF LIABILITY - INCREMENTAL FUNDING, the contract was incrementally funded and the amount available for payment was limited to $500,000. (R4, tab 1) The limitation was increased to $650,000 by Modification No. 2, effective 27 March 1997 (R4, tab 10).

Clause H-3, OVERHEAD CEILING (ALL BURDENS), provided that "[i]n no event will a fringe benefit rate over 24% and a G&A rate over 17.48% be approved by DCAA or by the Procuring Contracting Officer for purposes of provisional payments or final approved rates for this contract."

Pursuant to clause F-1, DURATION OF CONTRACT PERIOD, the contract was to "continue in effect during the period ending **thirty (30) months** after contract award, unless terminated in accordance with other provisions herein." (Emphasis in original) FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (MAY 1986), was incorporated by reference. (R4, tab 1)

Appellant submitted its first proposal in the amount of $1,404,000 to the Navy for dry process x-ray film on 2 June 1995 in response to an informal request that had been initiated because appellant's president is the owner of an x-ray film patent (app. br. at 2 and ex. A; Gov't br. attach. 3). The proposal included a fee of four percent of the total cost (Gov't br. attach. 3).

A formal Request for Proposal (RFP) was issued by the Navy on 10 April 1996. It required appellant to identify any costs incurred for work performed prior to submission of the proposal. (R4, tab 2) Appellant submitted another proposal, this time in the amount of $999,026, in response to the RFP on 16 May 1996. The proposal did not include any amount for bid and proposal costs incurred in the preparation of either of the two proposals, did not include a fee, and proposed Program Director Benefits at 24%, a total of $12,000, and $148,652 for general and administrative (G&A) expenses. (R4, tab 3) The Government did not direct appellant to remove the fee from its proposal (Gov't br. attachs. 1, 2, interrog. 12).

Appellant asked Mr. Robert G. McIntosh to assist it with the contract negotiations. In a letter dated 23 May 1996, Mr. McIntosh referred to the Program Director Benefits charge as overhead and provided a G&A rate of 17 percent. The letter explained that "[t]he proposal asks for a 24 percent overhead rate and a G&A rate of 17 percent (much less than currently allowed rates for Imaging Science Technologies)." Mr. McIntosh went on to advise the contracting officer that he believed appellant would "accept a clause in the contract that would limit the G&A and Overhead costs to those proposed." The letter further stated that "the contract type proposed is a cost (no fee) contract." (R4, tab 4)

The Pre-Negotiation Position and Analysis memorandum prepared by the Government's contract negotiator states that the proposal was audited by the Defense Contract Audit Agency (DCAA) and that DCAA had commented that the 24% fringe benefit (indirect) and the 17.48% G&A rates were low, but recommended that the rates be accepted and that a clause placing a ceiling on the rates be included in the contract (R4,

tab 5 at 14-15). The negotiator followed the DCAA recommendation: clause H-3 limits the fringe benefit rate to 24% and the G&A rate to 17.48% (R4, tab 1). As to the lack of a fee, the memorandum observed that "the company is utilizing this [procurement] to further develop their patent process in hopes of future commercial and government applications. Therefore, it has been determined that a Cost Contract, exclusive of fee, is most suitable for this effort." (R4, tab 5 at 9) This too was implemented. The contract was a no fee cost contract subject to FAR 52.216-11 and clearly states: "FEE (0%)." (R4, tab 1)

By a letter dated 10 February 1998, appellant was advised that the Government did not intend to provide additional funding beyond the $650,000 limitation and that the contract was terminated for the convenience of the Government, effective 11 February 1998 (R4, tab 14). At the time of termination, appellant had incurred $649,931 in costs (R4, tab 13). There is no evidence in the record that appellant notified the contracting officer of any potential cost overrun.

On 5 November 1998, appellant submitted to the contracting officer a termination settlement proposal seeking $22,409 for office, utility and insurance costs, accounting and indirect costs, and G&A (R4, tab 16). A revised proposal seeking $145,425 was submitted on 16 February 1999. It sought bid and proposal costs totaling $44,182, a seven percent fee in the amount of $38,355, insurance, office rental and utility costs at $1,430 a month for 10-1/2 months, a total of $15,015, and additional fringe benefit and G&A expenses, a total of $47,873. (R4, tab 20)

On 4 August 1999, the termination contracting officer gave appellant notice that the Government had determined that the contract should be settled for $650,000 (R4, tab 21). Appellant responded on 13 August 1999, expressing its disagreement with her determination and enclosing another copy of its 16 February 1999 revised settlement proposal (R4, tab 22). On 27 September 1999, the contracting officer issued a final decision awarding appellant $69 on its $22,409 termination settlement proposal, making no mention of its revised proposal. She concluded that the Limitation of Funds clause barred payments in excess of $650,000. (R4, tab 23) Appellant responded on 4 October 1999 that its settlement proposal was in the amount of $145,425, not $22,409, and requested a corrected final decision (R4, tab 24). In a letter dated 14 October 1999, the contracting officer offered a variety of reasons for her decision not to consider the information contained in the revised proposal and concluded that: "The Limitation of Funds Clause would have barred payment of any additional costs in excess of $69.00. The issue of whether you requested reimbursement of $22,409.00 or $145,425.00 in settlement expense costs is therefore irrelevant because both are in excess of $69.00." (R4, tab 25) The Government has not asserted that we lack jurisdiction over any of the termination settlement costs claimed in the revised proposal. Based upon the contracting

officer's 14 October 1999 letter, we find that she considered these costs to be barred by the Limitation of Funds clause.

This appeal followed and appellant elected to proceed under Rule 12.3, asserting that the total amount claimed was under $100,000 because it had included the claim for increased fringe benefits and G&A as an alternative in the event we denied either the claim for bid and proposal costs or the claim for a fee. The Government did not object to proceeding under Board Rule 12.3, and appellant's brief shows a deduction to the total amount claimed "to comply with Accelerated Procedure" (app. br. at 6). We find that appellant has conceded that its recovery, if any, is limited to $99,999. Additionally, appellant has reduced the amount sought for bid and proposal costs to $34,233 and, pursuant to an agreement reached between the parties during discovery, appellant has withdrawn its claim for office utilities, previously claimed at $40 per month.

Appellant did not come forward with any evidence supporting the number of hours it claimed were required for its president to prepare its proposals. Instead, it relied solely upon its complaint and brief.

As to office rental, appellant's answer to the Government's Interrogatory No. 13 states that it is claiming $250 for rental for 3440 Tyncastle, #101, Hwy 184, Banner Elk, NC on a "renewable yearly verbal basis" (Gov't br. attachs. 1, 2). However, appellant also produced a copy of a one year lease at a monthly rate of $250 for Century 21 Building, Hwy 184, North Carolina commencing 1 January 1996, which was signed by the lessor, but not by the lessee (Gov't br. attach. 5). Appellant did not provide satisfactory evidence of insurance costs for the 10-1/2 month period at issue (Gov't br. attach. 6).

The DCAA audit report of appellant's incurred costs indicates that its actual fringe benefit (indirect) rates were 10.76% for 1996 and 14.28% for 1997/98 and that its actual G&A rates were 67.63% for 1996 and 22.15% for 1997/98. It questioned fringe benefit costs for both 1996 and 1997/98. (R4, tab 18)

DISCUSSION

The Limitation of Funds clause limits the Government's obligation to reimburse costs in excess of the $650,000 liability established by contract clause H-1. *See Arbiter Systems, Inc.*, ASBCA Nos. 47403 and 47404, 97-2 BCA ¶ 29,183 *aff'd*, 178 F.3d 1311 (Fed. Cir. 1998) (Table), *cert. denied*, 527 US 1003 (1999); *Hughes Aircraft Corporation*, ASBCA No. 24601, 83-1 BCA ¶ 16,396. Appellant has the burden of establishing that the cost overruns it seeks were not reasonably foreseeable and that it was impossible to obtain advance approval and funding from the contracting officer. *See RMI, Inc. v.*

United States, 800 F.2d 246, 248 (Fed. Cir. 1986). The Termination clause provides that the cost principles found in Part 31 of the FAR are to apply.

Bid and Proposal Costs

Appellant asserts that it incurred $34,233 in bid and proposal costs, consisting of an alleged number of hours required for its president to prepare the two contract proposals at an hourly rate of $50, plus a 7.65% payroll tax. It further asserts that all of this work was accomplished before the Government issued the final RFP on 10 April 1996. (App. br. at 3) Entitlement is based upon FAR 31.205-18, INDEPENDENT RESEARCH AND DEVELOPMENT AND BID AND PROPOSAL COSTS.

Appellant's claim for bid and proposal costs fails for three reasons. First, the costs are barred by the LIMITATION OF FUNDS and LIMITATION OF LIABILITY clauses of the contract. Second, appellant's reliance upon FAR 31.205-18 is misplaced. Appellant incurred all of these alleged costs prior to submission of its 16 May 1996 contract proposal, but did not include them in the proposal as required by the RFP. Thus, the costs were known to appellant and the fact that the contact contains no provision for reimbursement of these costs does not establish unconscionability. Third, appellant did not provide any evidence of these costs, relying instead upon the allegations contained in the complaint, which it simply repeated in its brief. *See Burbank Sanitary Supplies, Inc.*, ASBCA No. 43477, 93-1 BCA ¶ 25,397.

Contract Fee

Appellant seeks a fee of seven percent of its total direct costs (a total of $38,355) under the weighted guidelines, DFARS 215.404-71-2, PERFORMANCE RISK, and FAR 15.404-4, PROFIT, subparagraphs (a)(2) and (3) (app. br. at 4). The claim fails for a number of reasons. First, the contract was subject to FAR 52.216-11, which states in paragraph (a): "The Government shall not pay the Contractor a fee for performing this contract." The contract itself specifically stated "FEE (0) %." Second, the fee is barred by the LIMITATION OF FUNDS and LIMITATION OF LIABILITY clauses of the contract. Third, DFARS 215.404-71-2 simply provides a profit factor guideline for the contracting officer in evaluating the contractor's degree of risk and FAR 15.404-4 (a)(2) and (3) provide the policies for establishing the profit or fee portion of the Government's pre-negotiation objective in price negotiations based upon cost analysis. These provisions do not mandate the payment of profit. Here, appellant (and its representative) proposed a cost (no fee) contract and the contract negotiator determined that a no fee contract was suitable. Accordingly, in light of the above, it is irrelevant whether the fee appellant now proposes is fair and reasonable.

Insurance and Rental Costs

Appellant asserts that it relied upon a 30 month contract, which would have expired on 16 December 1998, and incurred insurance costs of $1,140 per month and office rent at $250 per month for 10-1/2 months (app. br. at 5). This aspect of appellant's claim also fails. First, the costs are barred by the LIMITATION OF FUNDS and LIMITATION OF LIABILITY clauses. Second, clause F-1 of the contract specifically stated that the term was 30 months, "unless terminated in accordance with other provisions herein." FAR 52.249-6 was incorporated into the contract and is the provision used to terminate it. Third, appellant did not provide any evidence of the claimed insurance and rental costs, relying again upon the allegations contained in the complaint, which it again simply repeated in its brief. *See Burbank Sanitary Supplies, supra.* The information obtained by the Government during discovery and attached to the Government's brief is insufficient to support the insurance and rental costs claimed. Further, as to the claimed rental costs, the evidence is conflicting at best. Finally, appellant did not establish estoppel, of which detrimental reliance is the final element. *See, e.g., USA Petroleum Corp. v. United States*, 821 F.2d 622, 625 (Fed. Cir. 1987).

Fringe Benefit and G&A Rates

Appellant's claim for the difference between the contract rates and its actual rates for fringe benefits and G&A was asserted as an alternative to its claims for bid and proposal costs or for a fee. Inasmuch as we found both to be without merit, we address its alternative claim for $47,873 for increased indirect and G&A costs. Although only the G&A rate exceeded the contract rate specified by clause H-3, appellant asserts that both the indirect and G&A rates were "artificial and arbitrary" and that the costs it claims are allowable under FAR 16.104, FACTORS IN SELECTING CONTRACT TYPES, 16.301-3, LIMITATIONS, and 52.216-7, ALLOWABLE COST AND PAYMENT (app. br. at 6). Appellant cannot prevail on this claim. First, the costs are barred by the LIMITATION OF FUNDS and LIMITATION OF LIABILITY clauses. Second, clause H-3 of the contract specifically limited the fringe benefit rate to 24% and the G&A rate to 17.48%. The rates are not arbitrary. They are the rates that were proposed by appellant, accepted by the Government and agreed to by appellant in clause H-3. Third, the FAR provisions relied upon by appellant do not require a different result. FAR 16.104 merely provides a list of the factors the contracting officer should consider in selecting and negotiating the contract type. FAR 16.301-3 simply limits the circumstances under which cost-reimbursement contracts can be awarded. FAR 52.216-7 was not incorporated into the subject contract. In any event, FAR 52.216-7(a) only authorizes payments in accordance with the terms of the contract. And while subparagraph (d)(3) does authorize the making of agreements for final indirect cost rates, such agreements cannot "change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for [the] contract." FAR 49.303-4, ADJUSTMENT OF INDIRECT COSTS, is applicable to terminated cost-reimbursement contracts only if the contract contains FAR 52.216-7.

CONCLUSION

Appellant has not established entitlement to the termination costs it claims. The appeal is denied.

Dated: 2 May 2000

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

I concur

EUNICE W. THOMAS
Administrative Judge
Acting 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. 52497, Appeal of Imaging Science Technologies X-Ray Imaging Division, Inc., rendered in conformance with the Board's Charter.

Dated:

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