

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
)  
The Sherman R. Smoot Corp. ) ASBCA No. 52261  
)  
Under Contract No. N62477-94-C-0028 )

APPEARANCES FOR THE APPELLANT: John H. Young, Esq.  
General Counsel  
  
Christopher L. Grant, Esq.  
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Robert C. Ashpole, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES  
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

In January 1999, the contractor (Smoot) submitted a \$296,210 claim under the captioned building renovation contract for extended overhead costs allegedly arising from floor layout changes respondent ordered in two contract modifications. Smoot timely appealed the contracting officer's (CO) May 1999 final decision denying the claim in its entirety. Respondent moves for summary judgment. Smoot replied to the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 3 May 1996, the Navy awarded Smoot a contract at the fixed price of \$19,073,139 for renovation of designated buildings at the Washington Navy Yard. Ten percent of \$19,073,139 was \$1,907,314 for application of the change order rate provision described in SOF ¶ 2. (ASBCA 52145, R4, tab 2 at 2, 4)

2. Page 3 of the contract award, block 12, provided:

Your proposed Modification/change order percentage rates are hereby incorporated as a material part of the contract as follows:

|                                    |     |
|------------------------------------|-----|
| Field Overhead                     | 10% |
| Prime's Overhead on Subcontractors | 6%  |

|                              |    |
|------------------------------|----|
| Prime's Home Office Overhead | 4% |
| Prime's Profit               | 6% |

The above rates will be applied to the direct costs of all (additive and deductive) contract modifications with a cumulative total value of up to 10% of the original contract award amount. Exercising options by modification to the contract is not included in the cumulative total . . . . Any modifications exceeding 10% of the original contract amount will be negotiated in accordance with FAR Part 15, DFARS Part 215, and any other applicable Federal regulations.

The "Field Overhead" line on the accompanying "PRICE EVALUATION" sheet had an asterisk, providing:

\* Field overhead will be evaluated as a percent mark-up and NOT a direct cost to the change proposal. Field overhead costs cover indirect costs incurred on this project that are chargeable only to this contract and include costs incurred at the jobsite incident to the performance of the work, such as the costs of superintendence, timekeeping, clerical work, engineering, job site supervision, project manager, superintendent, general foreman, CQC staff, field engineer, secretaries, change order estimators/negotiators, tool shed keeper, temporary facilities, . . . supplies, . . . temporary protection and/or maintenance, dust control, . . . clean-up, progress reports, equipment, superintendent's truck, truck for clean-up, and fringe benefits for supervisory and administrative personnel. [Emphasis in original.]

(ASBCA 52145, R4, tab 2 at 5, 13)

3. The CO's 26 August 1997 letter to Smoot regarding proposed Modification No. A00177 stated: "It is our understanding that all changes identified since invoice #4 schedule update through schedule update of August 2, 1997 are covered." The CO requested more detailed information about the costs incurred as a result of the delays with respect to personnel, office trailers, radios, telephones, vehicles, dewatering, small tools, office equipment, and other costs. (Spengler aff., ¶ 9; app. ex. D)

4. The CO's 6 October 1997 letter to Smoot stated: "You submit that your rate for extended overhead is \$8,500 per day. However, based on a preliminary analysis by this office, we estimate a daily rate of \$4,100 per day. We feel that this rate is fair and reasonable." (Spengler aff., ¶ 10; app. ex. E)

5. Unilateral Modification No. A00177 of 10 March 1998 provided:

This modification includes the extended overhead costs associated with extending the contract completion date by 51 calendar days, to and including 29 April 1998 and is issued in addition to the amount of overhead previously paid for under contract changes negotiated to date . . . . The amount previously paid:

|                            |                     |
|----------------------------|---------------------|
| Field Office Overhead      | \$ 33,539.00        |
| Home Office Overhead       | \$ 14,757.00        |
| Overhead on Subcontractors | \$ 65,252.00        |
| <u>TOTAL</u>               | <u>\$113,548.00</u> |

This total will be deducted from the final negotiated amount of this change . . . . The indirect costs for the remaining unsettled changes will be negotiated as part of this change, excluding profit, labor burden and bond premium . . . . As a result of the above, the total contract price is hereby increased by \$80,000.00 . . . .

(App. ex. C)

6. On 26 March 1998, the CO issued unilateral Modification No. A00178, directing Smoot to perform layout changes to the contract (R4, tab 4 at 2). According to Smoot, at the time of issuance of Modification No. A00178, Smoot was projected to substantially complete the project by 6 May 1998. The changes in that modification in the floor layout became the critical path of construction. (Spengler aff., ¶ 7)

7. Substantial completion was established and the project was accepted by the Navy on 6 July 1998 (R4, tab 4 at 2). The work of Modification No. A00178 was completed on 14 August 1998. It was necessary for Smoot to maintain its forces on the jobsite throughout that extended period. (Spengler aff., ¶ 7)

8. Smoot's 18 August 1998 letter to the CO stated why it rejected proposed bilateral Modification No. A00197 for a "total negotiated settlement [of] \$201,965.74 for the work described under Modification A00178":

The attached contract modification contains the direct costs of performing the change . . . . The enclosed document does not make provision for the costs related to extended overhead that was expended to perform this work.

(R4, tab 4 at 4)

9. On 21 January 1999, Smoot submitted, in two essentially identical letters, an uncertified \$296,210.00 claim (R4, tab 6), and a certified, \$349,827.00 claim (R4, tab 4), to the CO to recover alleged direct and indirect costs incurred from 30 April to 14 August 1998 for the floor layout changes ordered in Modification Nos. A00178 and A00197. Of that \$296,210 amount, Hess Mechanical's subcontract claim alleges \$3,778.20 for "[e]xtended home office overhead using the Eichleay algorithm" without proof that such modifications caused stand-by of uncertain duration. C. J. Coakley Co.'s and Mona Electrical's subcontract claims included "extended overhead" not further identified as home office or field overhead. Smoot's claim sought to recover indirect costs, stating:

The direct costs for the layout changes were provided by a unilateral modification issued by the Navy on September 29, 1998, in the form of Modification A00197 (incorporating Proposed Change Order 166 and/proposed bilateral modification A00178).<sup>1</sup> This claim requests a

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<sup>1</sup> The reason for the unilateral modification was that the Contractor was unwilling to execute the "Contractor's Statement of Release" because the proposed modification did not include extended conditions from April 30, 1998 to August 14, 1998, which are the subject of this request.

final decision for the extended costs incurred by the Contractor as a result of the Navy directed layout changes. . . . In this claim, Smoot is seeking to reclaim the costs of maintaining its presence at the jobsite during the extended period. [Footnote in original.]

(R4, tab 4 at 1-2)

10. The CO's 26 May 1999 final decision denied in its entirety Smoot's claim for \$296,210.00, which the CO said "was certified by you on 21 January 1999" (R4, tab 5). Smoot's 28 September 1999 letter to the Board clarified that the claimed amount is \$296,210.00. We deem that the \$296,210 claim has been certified.

11. Smoot has always construed the percentage provision cited in respondent's motion to refer to scope-related costs, not to extended time of performance costs. According to Smoot, in Modification No. A00177 and the events leading up to it, the Navy modified that percentage provision. (Spengler aff., ¶ 8; app. ex. C)

## Contentions of the Parties

Movant argues that, based on its proposed undisputed material facts, Smoot's claim must be denied as a matter of law because (1) extended overhead costs are not recoverable for additive change orders, Modification Nos. A00178 and A00197; (2) Smoot has not alleged that it was on stand-by so as to recover extended home office costs; and (3) Smoot has no basis to avoid the contract provision requiring overhead cost recovery on change orders at pre-negotiated percentage rates.

Smoot argues that, based on its proposed additional material facts, the Navy has modified or waived the contract clause that set percentages for Smoot's field overhead, subcontract overhead, and home office overhead costs, by negotiating and paying Smoot's actual extended overhead costs in Modification No. A00177 and its attendant correspondence. Movant argues in reply that Smoot did not address stand-by as a necessary element of Eichley damages, and so movant is entitled to judgment thereon.

## DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). There are disputed material facts with respect to whether, with respect to Modification No. A00177 and its antecedent correspondence, respondent waived or modified the percentage rates for change orders specified in the contract award sheet (SOF ¶¶ 3-5, 11), and whether contract Modification No. A00197 included or excluded field overhead, Smoot's overhead on subcontractors, and Smoot's home office overhead (SOF ¶¶ 8-9). Movant's proposed undisputed material facts do not show, when Modification No. A00197 was issued, that the cumulative value of prior modifications did not exceed \$1,907,314 so that the prescribed change order percentage rates applied to Modification No. A00197 (SOF ¶¶ 1-2).

There are two acceptable methods to reimburse a contractor for home office overhead costs incurred by reason of a contract extension to perform additional work, depending upon the circumstances: (1) a fixed percentage mark-up of the direct costs incurred, and (2) a constructive daily rate derived using the Eichley formula. *See C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 671-72 (Fed. Cir. 1992); *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1581-82 (Fed. Cir. 1993). Stand-by of uncertain duration is a required element of proof only of Eichley extended home office overhead. *See Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1058 (Fed. Cir. 1993).

Of Hess' subcontract claim, \$3,778.20 is expressly labeled "[e]xtended home office overhead using the Eichley algorithm" without proof that Modification Nos. A00178 and A00197 caused stand-by of uncertain duration (SOF ¶ 9). Despite such label, Smoot could

be entitled to all or some portion of that \$3,778.20 as home office overhead costs by a percentage mark-up, without regard to, or proof of, the Eichleay element of stand-by of uncertain duration.

We deny the motion for summary judgment.

Dated: 26 January 2001

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur

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

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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. 52261, Appeal of The Sherman R. Smoot Corp., rendered in conformance with the Board's Charter.

Dated:

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