ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Walsky Construction Company	)	ASBCA No. 52772
	)	
Under Contract No. F65503-90-C-0021	)	

APPEARANCE FOR THE APPELLANT: David M. Freeman, Esq.
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Anchorage, AK

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON THE GOVERNMENT'S MOTIONS TO DISMISS
AND FOR SUMMARY JUDGMENT

The Department of the Air Force (Government) has moved to dismiss certain elements of a convenience termination claim filed by Walsky Construction Company (appellant) on the grounds of lack of jurisdiction. It has also moved for summary judgment on other claim elements. Appellant has opposed both motions, and the parties have submitted briefs. We grant the Government's motions to the extent indicated below.

STATEMENT OF FACTS FOR PURPOSES OF MOTIONS

1. On 25 May 1990, appellant was awarded this contract to repair the roof on Building No. 1306 at Eielson Air Force Base, Alaska, as well as install certain fire protection equipment in the building. On 24 July 1990, 60 days after contract award, but before appellant performed any significant work at the job site, the Government terminated the contract for default. Appellant timely appealed the termination for default to this Board.

2. On 7 September 1990, the Government entered into a takeover agreement to complete the contract with appellant's performance bond surety, Safeco Insurance Company of America, also known in these proceedings as General Insurance Company of America ("surety/prime" or GICA). Work was to begin in June 1991.

3. GICA and appellant entered into a subcontract for appellant to perform the balance of the contract work. This arrangement was specifically referenced in the takeover

agreement. In the takeover agreement GICA authorized the Government to communicate directly with appellant but insisted on timely notification of all communications. (R4, tab 1 at P00002) GICA also allowed the Government to issue a number of unilateral change orders directly to appellant, but the record reflects that bilateral supplemental agreements to the contract were executed by the surety as contractor. The contract work was completed in August 1991.

4. On 30 July 1993, this Board issued a decision converting appellant's termination for default into a termination for the convenience of the Government. *Walsky Construction Co*., ASBCA No. 41541, 94-1 BCA ¶ 26,264. On 9 February 1994, the ASBCA denied the Government's motion for reconsideration. *Walsky Construction Co*., ASBCA No. 41541, 94-2 BCA ¶ 26,698. On 17 July 1994, appellant applied for attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504. The Board issued a decision on entitlement for appellant and remanded the quantum for negotiation. *Walsky Construction Co*., ASBCA No. 41541, 95-2 BCA ¶ 27,889. The parties could not agree on quantum and the Board subsequently issued another decision, awarding appellant fees and expenses in the amount of $64,001.35. *Walsky Construction Co*., ASBCA No. 41541, 96-1 BCA ¶ 28,258. (R4, tabs 4, 5, 8, 10, 11)

5. In 1993, GICA filed a number of claims with the contracting officer on behalf of appellant as its subcontractor under the takeover agreement, and upon their denial filed timely appeals to this Board on behalf of appellant. One such claim was for alleged constructive acceleration of work during 1991, performed by Sampson Steel Company, a subcontractor of appellant under the takeover agreement. GICA's appeal of the denial of this claim was docketed as ASBCA No. 46954. Pursuant to a settlement agreement executed by GICA and appellant in September 1994 and the contracting officer in February 1995 and incorporated into the contract as Modification No. P00013, it was agreed to settle a number of GICA's claims and "to dismiss ASBCA No. 46954 without prejudice, so that Walsky Construction Co. may pursue it as part of its termination for convenience settlement proposal" (app. R4 supp., tab 110 at 134). Pursuant to the parties' agreement, the Board dismissed the appeal without prejudice by Order dated 6 September 1994.

6. By letter dated 19 October 1994 and pursuant to the Board's decision converting the default termination to a termination for convenience, the contracting officer notified appellant that the contract was terminated for the convenience of the Government.[1] (R4, tab 19) On or about 29 December 1994, appellant submitted a certified termination for convenience settlement proposal to the contracting officer for decision. The proposal requested an additional payment of $633,151. On 18 April 1995, appellant amended the termination settlement proposal. Insofar as pertinent, appellant increased its request for settlement expenses but reduced the overall amount requested to $600,473. (R4, tab 14)

7. Appellant's amended termination for convenience settlement proposal included the following costs:

1. $72,020 for constructive acceleration for work performed by appellant during 1991 while appellant was GICA's subcontractor pursuant to the takeover agreement with the Government;

2. $11,019 for constructive acceleration for work performed during 1991 by Sampson Steel, a subcontractor of appellant while appellant was GICA's subcontractor pursuant to the takeover agreement with the Government (*see* finding 5);

3. $44,774 for legal fees relating to appellant's litigation with Sampson Steel for a differing site condition encountered during appellant's performance as GICA's subcontractor pursuant to the takeover agreement with the Government;

4. $6,541 for legal fees incurred by appellant to negotiate the takeover agreement with GICA;

5. $6,972 for reversal of deductive Modification No. P00006, executed in 1991 by the Government and the surety while appellant was the subcontractor under the takeover agreement;

6. $1,883 for extra airfare paid by appellant's representatives, much of which appears to have been incurred while appellant was the subcontractor under the takeover agreement;

7. $6,419 for eight-inch pipe purchased by appellant prior to its contract being terminated;

8. $26,680 for legal fees and expenses incurred by GICA, the takeover surety, and paid by appellant;

9. $4,214 for appellant's extra superintendent and job mobilization costs;

10. $52,592 for appellant's unabsorbed home office overhead cost from 24 July 1990, the date appellant's contract was terminated, to 1 June 1991, the date appellant began work at the job site as GICA's subcontractor pursuant to the takeover agreement;

11. $92,888 for appellant's extended equipment "standby" costs from 25 July 1990, the day after appellant's contract was terminated, through 31 May 1991, the day before appellant began work at the job site as GICA's subcontractor pursuant to the takeover agreement;

12. $120,786 for legal fees related to Board proceedings challenging the default termination under ASBCA No. 41541;

13. $44,394 for termination settlement expenses for accounting and legal services;

14. Interest pursuant to the Contract Disputes Act.

(R4, tab 14) A significant portion of appellant's termination proposal –– items (1) through (6) –– involved costs that it incurred as a subcontractor under the takeover agreement. There is no contemporaneous documentary evidence of record showing that GICA, as prime contractor, submitted or endorsed any of these subcontractor requests while they were pending before the contracting officer, with the exception of the Sampson Steel claim above.

8. On 26 January 1995, the contracting officer forwarded appellant's termination settlement proposal to the Defense Contract Audit Agency (DCAA) for an audit. The contracting officer also forwarded appellant's amended termination settlement proposal to the DCAA. The DCAA completed its audit in June 1995. The Government promised negotiations on appellant's termination proposal pending its internal legal review, but as far as appellant was concerned this legal review was not timely in coming, and negotiations were being unduly delayed.

9. On or about 21 December 1995, appellant filed suit in the United States Court of Federal Claims, contending that there had been a deemed denial of the termination settlement proposal by the contracting officer. On 4 March 1998, the Court dismissed appellant's suit, concluding that there was no dispute and no negotiation impasse between the parties and thus it lacked jurisdiction under the Contract Disputes Act. Appellant appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the dismissal in a nonprecedential opinion on 11 January 1999. (R4, tabs 12, 13)

10. The parties sought to negotiate appellant's claimed termination costs in April 1999 but could not agree on the amounts owed to appellant. On 21 May 1999, the Government issued a unilateral contract modification, P00016, in the amount of $61,955.71, which reflected the Government's view of appellant's entitlement. (R4, tab 1 at P00016) On 15 February 2000, the contracting officer issued a decision under the DISPUTES clause, denying any costs not already paid and demanding $5,491.33 for an overpayment. (R4, tab 59) On 15 May 2000, appellant appealed from the contracting officer's decision. ASBCA No. 52771 relates to the Government's claim for $5,491.33; ASBCA No. 52772 relates to appellant's termination settlement proposal. Appellant filed the appeals in its own name. As far as this record shows, appellant did not seek or otherwise obtain the sponsorship of its appeals from GICA, the surety/prime, at this time.

11. In response to the Government's motion to dismiss herein, appellant provided an affidavit from the surety dated 23 May 2001, roughly 90 days before the scheduled hearing, to the effect that it currently and retroactively sponsored all of appellant's actions. The

surety, however, did not seek to enter a notice of appearance and/or to substitute itself as contractor in the appeals.

12. The contract contained the standard clause entitled DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), FAR 52.249-10. Insofar as pertinent the clause provided as follows:

> (c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

The contract also contained the standard clause entitled TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) ALTERNATE I (APR 1984), FAR 52.249-2. Insofar as pertinent the clause provided as follows:

> (f) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (e) above:
>
> (1) For contract work performed before the effective date of termination, the total (without duplication of any items) of--
>
> (i) The cost of this work;
>
> (ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and
>
> (iii) A sum, as profit on (i) above . . . .
>
> (2) The reasonable costs of settlement of the work terminated, including--
>
> (i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;
>
> (ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

> (iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

DECISION

I. JURISDICTION

1. Subcontractor Claims

The Government contends that under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601 *et seq*., we are without jurisdiction of the costs claimed by appellant as a subcontractor under the takeover agreement. Appellant, as moving party, has the burden to establish that we have jurisdiction of all elements of its claim.

Under the CDA, our jurisdiction is limited to claims of the Government and a "contractor" under the contracts prescribed by the Act. A contractor is defined as "a party to a Government contract other than the Government," 41 U.S.C. § 601(4). Such an entity is not a subcontractor, whose contractual relationship is with another contractor and not with the Government. It is thus well settled that generally subcontractors may not prosecute claims against the Government on their own behalf under the CDA. Their claims are brought and sponsored by the contractor, the party in privity with the Government. *Erickson Air Crane Co. v. United States*, 731 F.2d 810 (Fed. Cir. 1984). Indeed, we have so held under this very contract. *General Insurance Company of America*, ASBCA Nos. 46368, 46376, 46377, 46378, 46954, 95-2 BCA ¶ 27,872 (motion denied to substitute subcontractor Walsky for surety/prime as appellant).

In *Thomas & Sons Building Contractors, Inc.*, ASBCA No. 51577, 00-2 BCA ¶ 31,086, we recently held that the Board does not have jurisdiction under the CDA over that portion of a terminated contractor's claim arising out of its performance as a subcontractor under a takeover agreement because a subcontractor does not have privity of contract with the Government. We stated as follows at 153,490:

> In the absence of prime contractor sponsorship, we do not have jurisdiction to consider any portion of appellant's claim arising from its role as a subcontractor. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983).

We find the Board's decision controlling here.[2] Hence, with the exception of the subcontractor claim of Sampson Steel,[3] appellant must show that the surety/prime properly sponsored the subcontractor claims on appeal in order for us to retain jurisdiction of these claims.

Appellant has not made such a showing. There is no evidence of record showing that GICA timely filed or timely sponsored the notice of appeal to this Board. The general rule is that a prime contractor's sponsorship of an appeal should occur within the appeal period. *See Door Pro Systems, Inc.*, ASBCA No. 34114, 87-3 BCA ¶ 19,997.

We have reviewed the cases cited by appellant and believe they are factually distinguishable. We are not persuaded that the surety, as prime contractor, appropriately sponsored the subcontractor claims in this appeal so as to confer jurisdiction of these claims on the Board. We dismiss without prejudice the subcontract claims, including any and all claims that may have been asserted for the balance of the contract price,[4] which accrued while appellant was performing as subcontractor under the takeover agreement. See finding 7, *supra*, elements (1), (3), (4), (5) and (6) to the extent the claimed costs were incurred by appellant as the subcontractor.

2. Convenience Termination Expenses

The Government contends that we have no jurisdiction over appellant's claim for convenience termination expenses ($44,394) since the precise amount now claimed was not submitted to the contracting officer for decision. The Government's position is not correct. The record shows that appellant's termination claim to the contracting officer, as amended, sought the requested termination expenses. Hence, we have jurisdiction over this aspect of appellant's claim. The amount of recovery, if any, is a matter of proof.

II. SUMMARY JUDGMENT

The Government seeks summary judgment on a number of elements of appellant's termination claim over which the Board has jurisdiction. The law governing summary judgment is familiar. As we recently stated in *Elam Woods Construction Company, Inc.*, ASBCA No. 52448, 01-1 BCA ¶ 31,305 at 154,545:

> Summary judgment is properly granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact [citations omitted].

1. Post-Termination Unabsorbed Overhead

The law is well-settled over many years that post-termination unabsorbed overhead is not recoverable in a termination claim. *See Nolan Brothers, Inc. v. United States*, 437 F.2d 1371 (Ct. Cl. 1971); *J.W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053; *Chamberlain Manufacturing Corp*., ASBCA No. 16877, 73-2 BCA ¶ 10,139; *Technology, Inc.*, ASBCA No. 14083, 71-2 BCA ¶ 8956. While a contractor has a reasonable contract

expectation that its continuing home office costs will be absorbed by the performance of the contract work and the contract price to be paid thereunder, that remains a reasonable contract expectation so long as the contract is open and the work is to be performed. Once the Government terminates performance of the contract work by default or convenience the basis for this expectation no longer exists, and the contractor's continuing home office overhead costs must be absorbed by work on other contracts. *See generally* RISHE, GOVERNMENT CONTRACT COSTS at 23-19 (1st ed. 1984). This is a risk voluntarily assumed by every Government contractor when the contract provides for Government termination rights. We have reviewed the cases cited by appellant which provide limited exceptions to the general rule precluding recovery of these costs, but we are not persuaded that they apply under these circumstances. While it is true that under the regulations, certain termination costs may be recoverable if the contractor used reasonable effort to discontinue them after termination but was unable to do so, FAR 31.205-42(b), home office overhead costs do not fall into this category because they are costs required to maintain the ongoing business and perforce, are not subject to discontinuation. *Joint Venture G.C.D.-E Lykiardopoulos & J. Lydakis & Asphaltiki, S.A.,* ASBCA No. 47285, 97-1 BCA ¶ 28,976. *See also Nolan Brothers, Inc.*, *supra*, at 1389.

Appellant's claim for post-termination unabsorbed overhead cost is denied and the Government's summary judgment motion is granted to this extent.

2. Post-Termination Standby Equipment Cost

We have found authority to support the recovery of reasonable standby or idle equipment costs after the effective date of termination under certain circumstances. *See Nolan Brothers, Inc., supra* at 1386. *Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 87-1 BCA ¶ 19,622, *modified on other grounds*, 88-1 BCA ¶ 20,499. *See also* FAR 31.205-42(b). On this record the Government, as moving party, has failed to persuade us that appellant is not entitled to recover such costs as a matter of law. The Government's motion for summary judgment is denied.

3. Legal Expenses to Defend Against Default Termination

The Government contends that as a matter of law appellant may not recover under the convenience termination clause for any unreimbursed legal expenses that were incurred in Board proceedings to defend against the default termination. We agree.

The termination clause provides for the recovery of reasonable costs to settle the terminated work including legal expenses "reasonably necessary for the preparation of termination settlement proposals and supporting data" (finding 12). The legal expenses sought here do not fall within this category. Nor can they be reasonably considered as costs to settle the termination of subcontracts, as otherwise provided in the clause. To the extent that the Board's EAJA award did not fully reimburse appellant for all legal fees incurred, we conclude that the balance may not be recovered under the termination for convenience

clause. Appellant's claim for these costs is denied and the Government is granted summary judgment to this extent.[5]

CONCLUSION

The Government's motions are granted to the extent indicated. The portions of the claim that have been dismissed for lack of jurisdiction are dismissed without prejudice, given our view that a proper claim from a proper party has yet to be filed with respect thereto.

Dated: 6 August 2001

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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

NOTES

[1] This notification was merely administrative in nature. Its purpose was to effectuate the Board decision overturning the default, and to start the clock towards the administrative settlement and close-out of the contract. We reject appellant's contention that its contract was reinstated for other than the limited purposes above.

[2] We are mindful that our Board has held that a surety's claim for excess costs for which the contractor is liable, may be included in a contractor's termination claim. *D.E.W. and D.E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-1 BCA ¶ 29,385 at 146,056, claim item (C). However *D.E.W.* did not involve the assertion by the appellant of any subcontractor claims, and thus did not involve the jurisdictional question under the CDA before us here. Similarly, the other cases cited by appellant are distinguishable insofar as they do not involve the assertion by an appellant of subcontractor claims under the CDA.

[3] We need not decide whether the subcontractor claim of Sampson Steel is properly before us in this appeal since this claim was already properly before us under ASBCA No. 46954, which was dismissed without prejudice at the request of the parties (finding 5), and may be reinstated on request. Hence, this element of appellant's claim is dismissed as duplicative.

[4] See appellant's complaint in ASBCA No. 52772, ¶¶ 14, 17.

[5] Given our disposition of this aspect of the claim we need not address the Government's other contention that the claim is also barred by the doctrine of *res judicata*.

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. 52772, Appeal of Walsky Construction Company, rendered in conformance with the Board's Charter.

Dated:

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