ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DynCorp	)	ASBCA No. 53098
	)	
Under Contract No. DAKF04-91-C-0072	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS ON THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPELLANT'S CROSS MOTION FOR SUMMARY JUDGMENT

This appeal was taken when the parties did not negotiate a settlement after our decision on entitlement. *DynCorp*, ASBCA No. 49714, 00-2 BCA ¶ 30,986, *aff'd on reconsid.*, 00-2 BCA ¶ 31,087 (hereinafter "*DynCorp I*" and "*DynCorp II*"). The parties have agreed to file cross motions for summary judgment on the issue of the allocability of the disputed costs. Appellant's cross motion also seeks summary judgment on the reasonableness of its claimed costs and the portion of the costs incurred defending the corporation (as distinguished from its employees). We deny the Government's motion and grant appellant's motion as to allocability. We deny appellant's motion as to reasonableness and the costs of corporate defense.

Preliminary Matters

In *DynCorp I* the Government had investigated allegations of wrongdoing under the contract. DynCorp had incurred proceeding costs (attorneys' fees and related expenses) defending itself and its employees in the process. The Army denied recovery of those costs because, *inter alia*, the conviction of a DynCorp employee resulted and, under the FAR, an employee conviction made the costs unallowable. We concluded that the Major Fraud Act of 1988, Pub. L. No. 100-700 ("the Fraud Act"), which amended 10 U.S.C. § 2324, did not bar recovery of proceeding costs unless DynCorp was convicted or penalized under the Fraud Act. We found the implementing FAR regulation, which barred costs if there was an

employee conviction, to be in conflict with the Fraud Act. We returned the matter to the parties for negotiation of quantum. In *DynCorp II* we affirmed our factual finding that "at least some of the [proceeding] costs were allowable" (Appendix 1, finding 4), while withholding judgment on the allocability and reasonableness of specific costs beyond that necessary to find entitlement in a bifurcated proceeding.[1] This appeal ensued when the parties did not negotiate quantum and a contracting officer's decision was issued.

After filing this appeal the parties agreed to file cross motions for summary judgment, believing that negotiation of quantum would be possible once allocability was decided (16 February 2001 Telephone Conference Memorandum). After receipt of the Army's motion, appellant objected to the Army's argument therein that the Fraud Act's amendment of 10 U.S.C. § 2324 required proceeding costs to be treated only as indirect costs. If so, the Army argued, *DynCorp I and II* were decided in error. Appellant contended, and the Army did not deny, that the issue was germane only to entitlement. Accordingly, the argument was struck from the Army's brief in this appeal and resubmitted as a motion under FED. R. CIV. P. 60(b) in the entitlement appeal (ASBCA No. 49714), which was reinstated thereafter. We denied the Army's motion, holding that the Fraud Act did not preclude recovery of proceeding costs as direct costs in *DynCorp*, ASBCA No. 49714, 21 May 2001 ("*DynCorp III*").

The parties stipulated to the first four findings of fact in *DynCorp I*, with the exception of the last sentence of finding 4. The Army has submitted only one additional proposed finding, which is a reiteration of finding 5 in *DynCorp I*. Appellant, on the other hand, has submitted a lengthy Statement of Material Facts (APFF), consisting of some 152 proposed findings. We do not consider the bulk of the proposed findings, some of which are directed to the issue of reasonableness, to be essential to disposition of the motions. Assuming, *arguendo*, that some of the proposed findings are material to the issue of reasonableness, we have declined in the past and decline here to resolve that issue in a motion decision for reasons articulated below. Accordingly, we reproduce the findings from *DynCorp I*, which we consider undisputed for purposes of the motions, as Appendix 1. In addition, we find the facts laid out below to be both material and undisputed.[2]

STATEMENT OF ADDITIONAL UNDISPUTED FACTS

The following facts are solely for the purpose of resolving the motions.

1. From an accounting perspective, DynCorp's Fort Irwin operations were treated as a separate segment of the company. That segment held only Contract No. DAKF04-91-C-0072. The Fort Irwin division of DynCorp had its own Government approved accounting disclosure statement. DynCorp has billed all of its fees and costs in accord with that disclosure statement. (APFF 119; Army resp., APFF 119; app. ex 2, Declaration of Elizabeth Novak (Novak decl.))

2. The costs at issue were incurred and paid by DynCorp's home office. In accordance with DynCorp's accounting practices, the costs were allocated to the Fort Irwin segment. DynCorp has not been reimbursed for any of the costs. (Novak. decl.)

3. On or about 10 October 2000 a contracting officer's decision denying in its entirety appellant's claim of $755,929.05[3] was issued by the contracting officer, Marcia L. Cruz. There had been no negotiation of costs by the parties. The decision stated, in pertinent part:

> Simply stated, the costs incurred by DynCorp to provide no-cost legal representation to all DynCorp employees who were interviewed during the investigation, are not properly allocable to the Fort Irwin Contract. This is because there was no discernible benefit received by the Army as a result of DynCorp's decision to provide these services. Our position is supported by the decision of the U.S. Court of Appeals for the Federal Circuit in Caldera v. Northrup Worldwide Aircraft Services, Inc., 192 F.3d 962 (Fed. Cir. 1999), which was decided after the hearing in this case; and by the decision of the Armed Services Board of Contract Appeals in Boeing North American, Inc., ASBCA No. 49994, Jun. 8, 2000, 00-2 BCA ¶30,970.
>
> We have considered the DynCorp response to this argument, as expressed in its Opposition to the Army Motion for Reconsideration, but respectfully disagree that Northrup is materially distinguishable from this case, and with the balance of your argument on this issue. In view of the parties' diametrically opposed and apparently irreconcilable positions on this issue, we do not believe that further discussion or argument is warranted; rather, it will only delay needlessly the submission of the dispute to the Board for decision. Accordingly, I hereby deny the DynCorp quantum claim, in the amount of $755,929.05, for reimbursement of attorneys fees and costs allegedly incurred to provide legal representation for DynCorp employees interviewed by government investigators in connection with the investigation of fraud in the performance of the DynCorp contract to provide base operations support to Fort Irwin.

An appeal was filed on or about 17 October 2000. (APFF 151, 152; Army resp., ¶¶ 151, 152; app. mot. ex. 1)

4. Appellant has filed the declaration of its Director of Regulatory Compliance, Elizabeth Novak, who does not opine as to reasonableness of costs. She is a certified public accountant not currently practicing as such. According to Ms. Novak, DynCorp allocated the proceeding costs in accordance with CAS 402 and 403, and the FAR. Its practices in this regard have been disclosed in its CASB Disclosure Statement since 1996, and are in accordance with generally accepted accounting principles. (Novak. decl.)

RELEVANT STATUTES AND REGULATIONS

Prior to enactment of the Major Fraud Act of 1988, 10 U.S.C. § 2324, "Allowable costs under defense contracts," provided at ¶ (e)(1), in relevant part, for the disallowance of the following contract costs:

> (C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing a false certification).
>
> . . . .
>
> (N) Except as provided in paragraph (2), costs incurred in connection with any civil, criminal, or administrative action brought by the United States that results in a determination that a contractor has violated or failed to comply with any Federal law or regulation if the action results in any one of the following:
>
> (i) In the case of a criminal action, a conviction (including a conviction pursuant to a plea of nolo contendere).

Pub. L. No. 99-145, § 911, 99 Stat. 682-83 (1985); Pub. L. No. 100-456, § 832, 102 Stat. 2023 (1988).

10 U.S.C. § 2324 was amended by the Fraud Act, which imposes penalties for fraud in the procurement process. The penalties include fines and imprisonment. 18 U.S.C. § 1031. While not amending 10 U.S.C. § 2324(e)(1)(C), the Fraud Act amended 10 U.S.C. § 2324(e)(1)(N) and other sections of 10 U.S.C. § 2324 to read as follows, in pertinent part:

> (b) AMENDMENTS TO TITLE 10. - Section 2324 of title 10, United States Code, is amended -
>
> (1) in subsection (e) -

(A) by striking out subparagraph (N) and inserting in lieu thereof the following:

"(N) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k)";

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2); and (2) by striking out subsection (k) and inserting in lieu thereof the following:

"(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).[4]

"(2) A disposition referred to in paragraph (1)(B) is any of the following:

"(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

"(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

"(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

"(D) A final decision by the Department of Defense -

(i) to debar or suspend the contractor;

(ii) to rescind or void the contract; or

(iii) to terminate the contract for default; by reason of the violation or failure referred to in paragraph (1).

"(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a

disposition described in subparagraph (A), (B), (C), or (D).

. . . .

"(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

"(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) [the FAR].

"(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

"(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

"(l)(1) In this section, the term 'covered contract' means a contract for an amount more than $100,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

"(2) In subsection (k):

"(A) The term 'proceeding' includes an investigation.

"(B) The term 'costs', with respect to a proceeding -

"(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding and

"(ii) includes -

"(I) administrative and clerical expenses;

"(II) the cost of legal services, including legal service performed by an employee of the contractor;

"(III) The cost of the services of accountants and consultants retained by the contractor; and

"(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers and employees to such proceeding.

"(C) The term "penalty" does not include restitution, reimbursement or compensatory damages."

. . . .

(d) Regulations.-The regulations necessary for the implementation of . . . section 2324(k)(5) of title 10, United States Code (as added by subsections (a) and (b))-

(1) shall be prescribed not later than 120 days after the date of the enactment of this Act; and

(2) shall apply to contracts entered into more than 30 days after the date on which such regulations are issued.

[Quotation marks in original]

The FAR included the following provision on allocability at all times relevant to this appeal:[5]

31.201-4 **Determining allocability.**

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it —

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

The FAR provision implementing 10 U.S.C. § 2324, FAR 31.205-47 COSTS RELATED TO LEGAL AND OTHER PROCEEDINGS, inserted the parenthetical phrase "(including its agents or employees)" in delineating when costs are unallowable. The relevant portions of FAR 31.205-47 in effect on the date of award of the contract are set out below:

31.205-47 Costs related to legal and other proceedings.

(a) Definitions.

. . . .

"Proceeding," includes an investigation.

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees) are unallowable if the result is -

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct.

(3) A final decision by an appropriate official of an executive agency to:

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract, or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation;

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the

outcomes listed in subparagraphs (b)(1) through (3) of this subsection (but see paragraphs (c) and (d) of this subsection);

DECISION

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. This principle also applies in the case of cross-motions for summary judgment. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990). However, on cross-motions "counsel are deemed to represent that all relevant facts are before the [Board] and a trial is unnecessary." *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982).

The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976). Where the movant has the burden of proof his showing must be sufficient that no reasonable trier of fact could find other than for the movant. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 FRD 465, 487-88 (1984).

More than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. *Id*. Even so, summary judgment may be denied if "there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 255.

The Army's Motion

The essence of the Army's argument is that no benefit was conferred upon the Government as a result of DynCorp undertaking its defense and the defense of certain employees when the Government investigated allegations of wrongdoing by DynCorp and its employees. According to the Army, the allocability of the proceeding costs incurred by DynCorp is dependent upon the establishment of a benefit pursuant to FAR 31.201-4, *supra*. DynCorp raises various counter-arguments, the most persuasive of which is that the

Army's position vitiates provisions of the Fraud Act regarding the recovery of proceeding costs.[6]

The Army relies on *Caldera v. Northrop Worldwide Aircraft Service, Inc.,* 192 F.3d 962 (Fed. Cir. 1999) (*Caldera*). That case involved costs incurred defending a wrongful discharge lawsuit filed by employees who claimed they were fired because they refused to participate in fraud against the Army in connection with an Army contract. An Oklahoma state court in a jury trial found for the employees and the verdict was upheld on appeal. The contracting officer had reimbursed Northrop's legal costs until after the verdict, when Northrop filed an additional claim for $139,000. The contracting officer not only denied the claim but sought reimbursement of costs paid theretofore. An appeal was taken to this Board, which allowed recovery of the costs as necessary to the overall operation of the business pursuant to the criteria of FAR 31.201-4(c). *Northrop Worldwide Aircraft Services, Inc.,* ASBCA Nos. 45216, 45877, 98-1 BCA ¶ 29,654. The Court in *Caldera* disagreed, finding that the jury's verdict, which it construed as a finding that the employees had been terminated in retaliation for refusing to defraud the Government, collaterally estopped Northrop from arguing that Northrop had not engaged in fraudulent behavior. *Caldera,* 192 F.3d at 971-72. It then went on to hold:

> . . . It is established that the contractor must show a benefit to government work from an expenditure of a cost that it claims is "necessary to the overall operation of the [contractor's] business." *See FMC v. United States,* 853 F.2d 882, 885 (Fed. Cir. 1988); *Lockheed Aircraft Corp. v. United States,* 179 Ct. Cl. 545, 373 F.2d 786, 793-94 (1967). [Footnote omitted] The Board erred in failing to make a determination of whether or not [Northrop's] defense of the Oklahoma lawsuit benefited the government. We can discern no benefit to the government in a contractor's defense of a wrongful termination lawsuit in which the contractor is found to have retaliated against the employees for the employees' refusal to defraud the government.

Id. at 972.

Although the Court applied the FAR 31.201-4 "benefit" test in *Caldera*, we do not conclude the Court's decision is controlling precedent in the instant appeal. First, the Court did not interpret the Fraud Act, and thus was not confronted with the same issue as we are here. The Fraud Act, and its amendment of 10 U.S.C. § 2324, manifest the Congressional intention that contractors be reimbursed 80 percent of their legal expenses when proceedings initiated by the United States or a State do not result in a conviction or equivalent. 10 U.S.C. § 2324(k); *DynCorp,* ASBCA No. 49714, 97-2 BCA ¶ 29,233 at 145,430 (on cross motions for summary judgment). *Caldera* did not involve proceedings

initiated under the Fraud Act by the United States or a state, while this appeal involves a Federal fraud investigation covered by the Fraud Act.

Caldera also involved a disposition against Northrop. No such disposition is involved here. In *DynCorp I* we held that a disposition against the contractor, not its employee or employees, was necessary to bar otherwise allowable proceeding costs. Our decision is thus consistent with *Caldera* in this important respect.

The Army also relies on our decision in *Boeing North American, Inc.*, ASBCA No. 49994, 00-2 BCA ¶ 30,970, another case arising from a third party lawsuit. Our holding in that appeal is also distinguishable. There, citing a 1988 DAR Committee Report to implement the Fraud Act, we found the costs were not allocable because they came within "the 'guiding principle' in the federal agency implementation of the Major Fraud Act of 1988, that federal agencies should not pay for the results or consequences of contractor wrongdoing." *Id.* at 152,848. Because the legal costs were incurred as a result of a lawsuit in which contractor violation of Federal laws and regulations was an "integral element," we discerned no benefit to the Government and found the costs not allocable. *Id.* In *DynCorp I* we found only wrongdoing by a contractor employee, not the corporation, and found the proceeding costs at issue were not barred under the Fraud Act. Thus, *DynCorp I* left the "guiding principle" intact.

The Army's argument, taken to its logical conclusion, is that whether or not *Caldera* and *Boeing* are distinguishable, FAR 31.201-4 requires a benefit or other equitable relationship, and none has been shown. We find the argument unpersuasive. As stated *supra* and discussed further under DynCorp's motion, we construe the Congressional intent in enacting the Fraud Act as placing limits on recovery of proceeding costs, but allowing such costs unless there was a conviction or equivalent. Congress recognized that costs would be incurred in defending against Government investigations such as the one here. *See* S. REP. NO. 100-503, *infra*. Yet Congress restricted allowability only where there was a conviction or equivalent, while imposing an overall limit of 80 percent. We think it inconceivable that the Congress would have enacted the Fraud Act, and the policy therein of allowing proceeding costs where there was no conviction or equivalent, unless it saw a benefit to the Government. We consider that Congressional intention to be controlling here. "Regulations cannot trump the plain language of the statutes, and we will not read the two to conflict where such a reading is unnecessary." *Robbins v. Bentsen,* 41 F.3d 1195, 1198 (7th Cir. 1994). We do not read the two as in conflict here. "Benefit," as used in FAR 31.201-4 and its predecessor regulations, has been described as "an extremely slippery concept." *Lockheed Aircraft Corporation v. United States,* 375 F.2d 786, 795 (Ct. Cl. 1967). The concept embraces both the distribution of costs among cost objectives (*e.g.,* commercial and Government business; multiple Government contracts), and policy considerations. *Id.* at 794-797. The distribution concept is satisfied here because the costs were incurred under one contact and allocated to that contract pursuant to company policy as direct costs consistently with the Fraud Act. *See DynCorp III.* The policy concept is satisfied by the Congressional intent discussed above, which effectively mandates how the

Fraud Act is to be implemented and administered with regard to the allowability of proceeding costs. Accordingly, the Army's motion is denied.

DynCorp's Motion

Allocability

Appellant has cross-moved for summary judgment, arguing *inter alia*, that the Army's interpretation "undermine[s] the clear intent of Congress." App. cross mot. at 25. We agree. In addition to reasons articulated in addressing the Army's motion, we also look to the legislative history of the Fraud Act, which includes the following:

> Under current federal law, government contractors are permitted to bill the government for the cost of expenses incurred in fraud proceedings, as an element of contract cost, unless there is a conviction, civil judgment, or a decision to suspend or debar the contractor. See 10 U.S.C. 2324(e)(1)(C); 48 C.F.R. 31.205-47 (1987)

S. REP. NO. 100-503 at 4, U.S.C.C.A.N 5972. Thus, the Congress expressly recognized that under the then-existing FAR, which included the "relative benefits received or other equitable relationship" language, proceeding costs were recoverable under Federal contracts unless there was a conviction or other finding of contractor wrongdoing. Congress initially intended to impose a bar in the case of an indictment or equivalent, which it equated to probable cause,[7] and to limit costs to those recoverable under the Equal Access to Justice Act. *Id.* at 4-5, 5972-73. What emerged, however, was a statute that kept in place the conviction or equivalent test, with refinements such as 10 U.S.C. § 2324(k)(5)(C), *supra*, and limited recovery of costs to 80 percent. We conclude the Fraud Act makes 80 percent of proceeding costs allowable unless they are not allocable and reasonable. We have rejected the Army's "benefits" argument with respect to allocability, as outlined above. It is undisputed that the proceeding costs were incurred to defend an investigation related solely to performance of the subject contract (Appendix 1, finding 2). We conclude that this meets the requirement of FAR 31.201-4(a), costs "incurred specifically for the contract." We hold the proceeding costs are allocable to the contract. *See also DynCorp III*, holding it was proper for DynCorp to treat the proceeding costs as direct costs. We grant DynCorp's motion with respect to allocability.

Reasonableness

DynCorp also moves for summary judgment on the reasonableness of the proceeding costs, arguing "[n]o meaningful argument exists that it was unreasonable . . . to retain counsel . . . and defend the corporation . . . . [or] that such costs are other than ordinary business expenses." (App. Consol. Opp. at 34, 35) In this regard, FAR 31.201-3 provides:

> No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.

Where the movant in a summary judgment proceeding has the burden of proof, as DynCorp does here, its showing must be such that no reasonable trier of fact could find other than for the movant. *Calderone v. United States, supra.* We have been given no opinion by anyone other than a DynCorp employee and no comparative data as to the reasonableness of the specific costs. The lone affidavit does not address reasonableness and the evidence from the entitlement proceeding on reasonableness is limited. *See DynCorp II.* We conclude DynCorp has not met its burden of persuasion. Moreover, the Army asserts it has not had an adequate opportunity for discovery on the issue of reasonableness and that judgment for DynCorp would, therefore, be inappropriate. *Burnside-Ott Aviation Training Center v. United States,* 985 F.2d 1574 (Fed. Cir. 1993). DynCorp's motion is denied as to reasonableness.

The Costs Attributable to Defending the Corporation

As we understand this part of DynCorp's motion, it is based on the inartful wording of the contracting officer's decision from which this appeal is taken, to wit: "Accordingly, I hereby deny the DynCorp quantum claim, in the amount of $755,929.05, for reimbursement of attorneys fees and costs allegedly incurred to provide legal representation for DynCorp employees." (App. ex. 1) DynCorp argues that only $146,208.92 of the $755,929.05 claim is for payment of fees to outside counsel for representation of employees. Thus, contends DynCorp, we should grant summary judgment on the remaining $609,720.13. We disagree. In addition to the fact that we have withheld judgment on the reasonableness of the claimed costs, we find DynCorp's argument totally without merit. The contracting officer denied the entire claim. The inartful language does not change that simple fact. DynCorp's motion is denied on that issue.

Summary

The Army's motion is denied. DynCorp's motion is granted with respect to allocation of the proceeding costs and otherwise denied.

Dated: 19 June 2001

CARROLL C. DICUS, JR.
Administrative Judge

Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] In an entitlement, or liability, proceeding "evidence on damages [need only be] sufficient to demonstrate that the issue of liability is not purely academic; that some damage had been incurred." *Cosmo Construction Company v. United States*, 451 F.2d 602, 605-06 (Ct. Cl. 1971).

[2] Although we issued an Order specifically directing the parties to provide citations to the support on which both affirmative proposed findings and the opposition thereto were based, the Army has opposed appellant's proposed findings without such citations of support. The Army's Response instead treats appellant's Statement of Material Facts as a complaint and its Response takes the form of an answer. Some of our Additional Undisputed Facts are based on well-supported proposed findings of appellant which are opposed by the Army without citation to supporting contrary evidence.

[3] We are unable to determine with certainty whether this amount reflects the 80 percent limitation in the Fraud Act.

[4] Such dispositions are referred to hereinafter sometimes as "conviction or equivalent."

[5] The provision has been in the FAR since its inception and existed in the predecessor DAR in the same form in Part 15 thereof.

[6] Unlike *DynCorp I*, we are not confronted here with a regulation that was created as part of the agency implementation of the Fraud Act. FAR 31.201-4 precedes the Fraud Act by many years. *See* RELEVANT STATUTES AND REGULATIONS, *supra*. Thus, the benefits test advocated by the Army does not raise the question of whether

FAR 31.201-4 is a "permissible construction" of the Fraud Act under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The question is whether FAR 31.201-4 is an independent bar to recovery of proceeding costs under the Fraud Act. We think not.

[7] "It is the committee's belief that where the fraud investigation was reasonably founded, that is, based on probable cause, the contractor should not be permitted to pass along the costs of the defense to the government . . . The return of an indictment or information provides an objective measure of probable cause." S. REP. at 5, U.S.C.C.A.N. at 5973.

APPENDIX 1

FINDINGS OF FACT

1. Contract DAKF04-91-C-0072, for various base support services at Fort Irwin, was awarded to appellant, DynCorp, on 25 September 1991. The contract was a cost-plus-award-fee contract for a base period and four option years. All four options were exercised. The amount of the contract at award was $195,003,822. The contract contained the clause at FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991), under which the allowability of costs is to be determined pursuant to Subpart 31.2 of the FAR and the terms of the contract. The contract incorporated by reference the clause at FAR 52.233-1 DISPUTES (APR 1984). (R4, tab 1; tr. 1/172)

2. Commencing in 1992 the Army Criminal Investigation Division (CID) began investigating allegations[*] of criminal activity related to contract performance and involving DynCorp and its employees. Investigated were, *inter alia*, allegations of fraud involving vehicle maintenance (ex. A-1), fraudulent use of Government gasoline credit cards (Joint Rule 4 file (JR4), tab 5), and recording of false data by a DynCorp employee, Larry Marcum (JR4, tab 4). Investigative responsibility was turned over to the cognizant Assistant United States Attorney (AUSA) and the Federal Bureau of Investigation (FBI) (tr. 3/27).

3. During the period relevant to this appeal, pursuant to 8 Del. Code § 145(a), (c), Delaware corporations were required to pay legal costs incurred by employees in the successful defense "on the merits or otherwise" of an investigation brought about "by reason of the fact that he is or was a[n] . . . employee . . . of the corporation[.]" *Id.* at (a). Similarly, DynCorp's bylaws required DynCorp to pay its employees' legal costs if the costs are reasonably incurred when an employee is threatened with suit or prosecution by reason of employment where the employee had no reasonable cause to believe that the challenged conduct was unlawful (exs. A-6, -14).

4. Cheralyn Cameron, an attorney with DynCorp met the CID agent in charge of investigating the early allegations. The CID agent opposed allowing DynCorp corporate counsel to advise the employees. (Tr. 1/207, 2/167) Thereafter, outside counsel was employed to represent the corporation and employees who were under investigation (tr. 1/209-10). Several law firms were employed in this fashion (tr. 1/210, 221). DynCorp

[*] The parties have raised the issue of whether there was more than one investigation conducted. As our resolution of the appeal does not require us to decide that issue, nothing in this decision should be construed as supporting either party's position as to whether there was more than one investigation.

has a corporate policy on retaining outside counsel (ex. A-7). The policy was followed in dealings with outside counsel in matters relevant to this appeal. (Tr. 1/222-30, 235-36) We find that at least some of the costs were allowable under the contract if not barred by the Major Fraud Act and related regulations.

5. The AUSA declined prosecution as a result of the investigations except in the case of Mr. Marcum, who entered into a plea agreement on 17 March 1994 under which he pled guilty to unauthorized access to a Government computer in violation of 18 U.S.C. § 1030(a)(3) (R4, tabs 9, 11). No civil or criminal lawsuits were filed against DynCorp as a result of investigating the various allegations (tr. 2/24-25).

6. Appellant submitted a certified claim in the amount of $755,929.05 by letter of 23 January 1996, seeking reimbursement for "legal costs incurred in connection with this investigation" (R4, tab 31). The legal costs incurred in connection with representation of Mr. Marcum were not submitted (tr. 1/184-85). The claim was denied in a contracting officer's decision dated 29 March 1996 (R4, tab 36). An appeal was filed on 2 April 1996 (R4, tab 37).

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. 53098, Appeal of DynCorp, rendered in conformance with the Board's Charter.

Dated:

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