ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
U.A. Anderson Construction Company	)	ASBCA No. 53452
	)	
Under Contract No. F02601-91-C-0050	)	

APPEARANCE FOR THE APPELLANT: H. Randall Bixler, Esq.
Cape Coral, FL

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
Robert P. Balcerek, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD
ON THE GOVERNMENT'S MOTION TO DISMISS AND MOTION TO STRIKE

By letter dated 16 July 2001, the Board gave notice that it had docketed the quantum appeal presented by appellant U.A. Anderson Construction Company after the parties were unable to agree on the amount owed appellant for idle construction equipment costs under our decisions in *U.A. Anderson Construction Company*, ASBCA No. 48087, 99-1 BCA ¶ 30,347, *aff'd on reconsid.*, 99-2 BCA ¶ 30,565. Familiarity with those decisions is presumed. In docketing the appeal, we directed appellant to provide a statement of costs in the nature of a complaint. The Government has moved to dismiss appellant's complaint for failure to state a claim upon which relief can be granted. The Government has also moved to strike certain allegations of the complaint that refer to the parties' negotiations on remand. Appellant has opposed the motions.

The Government argues that the appeal should be dismissed because appellant has calculated idle construction equipment costs on the basis of rates published by the U.S. Army Corps of Engineers (Corps) and rental rates, but failed to allege the existence of an agreement to use predetermined rates. The Government maintains that appellant has failed to state a cause of action because the cost principles in FAR Part 31 require proof of actual ownership costs or an agreement to use predetermined rates. Appellant's position is that ownership costs were incurred and are evidenced in its subcontractor's books and records which are available to audit, but the Corps schedule is an acceptable pricing method and there is reason to use it in this appeal.

A motion to dismiss for failure to state a claim should only be granted when it appears beyond doubt that no set of facts can be proven in support of the claim which would entitle a party to relief. *Grant Thornton, LLP*, ASBCA No. 52006, 00-1 BCA ¶ 30,680;

Dennis Anderson Construction Corp., ASBCA Nos. 48780, 49261, 96-1 BCA ¶ 28,076. We are required to assume that all well-pled factual assertions are true and make all reasonable inferences in favor of the appellant. *New Valley Corporation v. United States,* 119 F.3d 1576, 1580 (Fed. Cir. 1997).

FAR 31.105(d)(2)(i) provides, in pertinent part:

> (i) Allowable ownership and operating costs shall be determined as follows:
>
> (A) Actual cost data shall be used when such data can be determined for both ownership and operations costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records. When such costs cannot be so determined, the contracting agency may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment.

FAR recognizes the Corps schedule in the following provision:

> (B) Predetermined schedules of construction equipment use rates (*e.g.*, the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment.

FAR 31.105(d)(2)(i)(B). FAR thus makes mandatory the use of actual cost data from a contractor's accounting records that can determine the costs and authorizes a contracting agency to specify a particular predetermined schedule of use rates. The general rules governing recovery for contractor-owned equipment are not applied where a different computation method is stated in the contract or modified in negotiations by the parties. *Cf. C.L. Fairley Construction Co., Inc.,* ASBCA No. 32581, 90-2 BCA ¶ 22,665 at 113,870, *aff'd on reconsid.,* 90-3 BCA ¶ 23,005. Where there is no evidence of actual ownership costs or predetermined equipment use rates, recovery for equipment idled by delay has been denied. *Union Boiler Works, Inc.,* ASBCA No. 49131, 97-2 BCA ¶ 29,178, *aff'd sub nom. Union Boiler Works, Inc. v. Caldera,* 156 F.3d 1374 (1998); *Adventure Group, Inc.,* ASBCA No. 50188, 97-2 BCA ¶ 29,081, *aff'd on reconsid.,* 98-1 BCA ¶ 29,362. In *Potomac Marine & Aviation, Inc.,* ASBCA No. 42417, 93-2 BCA ¶ 25,865 at 128,689, we

denied recovery where the contractor failed to prove either actual ownership costs or an agreement by the contracting agency to use predetermined ownership rates.

It is generally improper to grant a motion to dismiss for failure to state a cause of action in a timely filed quantum appeal after the Board has held a contractor entitled to an equitable adjustment. *Robert D. Carpenter,* ASBCA Nos. 25742, 25743, 81-2 BCA ¶ 15,263 at 75,581. Where there is a controversy as to the adequacy of the evidence submitted to the contracting officer on the question of quantum, the resolution of the question will be addressed by the Board in proceedings on the merits. *Raby Hillside Drilling, Inc.*, ASBCA Nos. 20178, 22192, 77-2 BCA ¶ 12,819 at 62,394. The Board held appellant entitled to recovery on its claim, and appellant may present whatever quantum evidence and arguments it believes appropriate. *Robert D. Carpenter, supra,* at 75,850. Appellant's statement of costs is sufficient to proceed with the appeal. Accordingly, the Government's motion to dismiss is denied.

The Government also filed a motion to strike portions of appellant's complaint that referred to letters from the contracting officer that were allegedly offers to compromise. The Government based its motion on Rule 408 of the Federal Rules of Evidence which states as follows:

> Rule 408. COMPROMISE AND OFFERS TO COMPROMISE
>
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Appellant defends against the motion to strike on the basis that its allegations concern the parties' agreed-upon basis for settlement negotiations, on which it relied in repricing its standby equipment costs. Appellant argues that to strike its allegations would seriously prejudice its position.

Review of appellant's complaint indicates that the Government-cited paragraphs 5, 6, 8, 10, 12, and 13 refer to documents exchanged in the course of settlement negotiations. *See Charles G. Williams Construction, Inc.*, ASBCA No. 39493, 90-1 BCA ¶ 22,592; *Dynalec Corporation*, ASBCA No. 40860, 91-1 BCA ¶ 23,553. Where both parties recognize that their negotiations are in the nature of settlement discussions and the statements made would not be considered admissions of fact or responsibility, statements offered to prove liability are held inadmissible under Rule 408. *Ateron Corporation*, ASBCA Nos. 46352, 46867, 94-3 BCA ¶ 27,229; *Scott Aviation*, ASBCA No. 40776, 91-3 BCA ¶ 24,123. In this case, appellant's reason for use of the contracting officer's letters is to present matters relevant to the existence of an agreement with the contracting officer to use predetermined equipment use rates in pricing its claim. They have not been presented for the purpose of establishing the validity of the claim, which was decided in the entitlement phase of the appeal, or its amount.

We conclude that Rule 408 does not apply to exclude evidence of conduct or statements made in the discussions of appellant's quantum claim that will be considered in deciding the issue of whether the parties reached an agreement or the Government is otherwise estopped from denying that it is appropriate for predetermined rates to be used to calculate appellant's subcontractor's idle construction equipment costs. Accordingly, the Board denies the Government's motion to strike.

Dated: 20 December 2001

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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

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. 53452, Appeal of U.A. Anderson Construction Company, rendered in conformance with the Board's Charter.

Dated:

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