ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Swanson Group, Inc.	)	ASBCA No. 52109
	)	
Under Contract No. N68711-91-C-9509	)	

APPEARANCE FOR THE APPELLANT: Mr. Johnny Swanson, III
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Engineering Field Activity West
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal involves the termination for convenience settlement that arose from the Government's improper default termination of a contract for guard services. The Government terminated the contract in whole for failure to comply with the terms of the contract and meet the conditions identified in a cure notice. On appeal, we concluded that the Government failed to follow proper procedures, and we converted the default termination into a termination for the convenience of the Government. *The Swanson Group, Inc.*, ASBCA No. 44664, 98-2 BCA ¶ 29,896.

Appellant submitted a timely written request for an extension of time to submit its termination settlement proposal. We held that FAR 52.249-2(i) does not operate to deny appellant its right of appeal. *The Swanson Group, Inc.*, ASBCA No. 52109, 01-1 BCA ¶ 31,164. Appellant claims entitlement to relief in the amount of $2,359,608.78.

FINDINGS OF FACT

1. On 20 December 1991, the Government awarded Contract No. N68711-91-C-9509[1] to appellant The Swanson Group, Inc. as a combination firm fixed price lump sum/indefinite quantity contract for the provision of guard services at the Long Beach Naval Shipyard at the Naval Station in Long Beach, California. The contract included a phase-in period, a base period that could not go beyond 30 September 1992, and four one-year options. The firm fixed price was $2,441,492.70 for a basic one-year term. Appellant's unit price for all work other than indefinite quantity work was $203,457.73 per month. The estimated amount of the contract award for the initial term was $1,444,388.05.

The funds allotted to the contract were $721,725. The schedule of indefinite quantity work included a line item for special events and Item 0001C for Phase in Cost in the amount of $12,000. (R4, tab 2 at 9, B-1, B-2, F-1)

2. The contract's firm fixed price was supported by a Schedule of Deductions, which was to be used as the basis for deductions upon the contractor's failure to provide required services (*id*. at E-7). Modification No. P00002, dated 16 April 1992, incorporated the approved Schedule of Deductions which contained unit prices for services to be provided at listed guard posts (*id*. at 2).

3. The contract specified that the contractor would meet with the contracting officer and other designated representatives in a pre-performance conference to develop mutual understandings for scheduling the work (*id*. at F-1).

4. The contract provided for a "phase-in" period beginning 60 days prior to the contract start date during which appellant was to plan and procure material and personnel for contract performance (*id*. at F-1, H-13).

5. The contract specified that the Government would provide uniforms, accessories, office equipment, including a copying machine, and furniture as listed in attachments to the contract (*id*. at J-C3, J-C4). The contractor was required to install commercial telephone service (*id*. at C-12). The contract required that contract employees take and pass a physical examination by a medical doctor certified by the Government. The contractor was required to submit written certification from the examining physician to the Government that the employee met the physical qualifications stated in the contract. (*Id*. at C-14) Each guard was required to have a permit and also a firearm permit (*id*. at C-17).

6. The contract required the contractor to maintain various types of insurance in specified amounts, including comprehensive general liability, automobile liability, worker's compensation, employer's liability coverage, and other insurance required by state law (*id*. at H-8).

7. The contract incorporated the standard provision FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)(APR 1984) (*id*. at I-18).

8. The Government initially denied payment of appellant's invoices for the phase-in work and performance of services. The invoices were returned "not accepted" with letters of explanation. (Ex. A-31 at 2, 10, 16) As of 26 March 1992, appellant had not submitted proper workmen's compensation insurance that was accepted by the contracting officer. On 7 May 1992, the Government withheld payments at the request of the Department of Labor (DOL) pending completion of a DOL investigation of wage violations. The Government required appellant to resubmit an invoice for payments due in excess of the amount withheld. On 15 May 1992, the Government rejected an invoice for stating the dates of

performance incorrectly. (Ex. A-31; tr. 61-66, 208) Appellant's performance was made more costly and difficult without receipt of Government funds for payment of expenses for travel, lodging, and meals during the phase-in portion of the contract and the costs of training, wages, and equipment that were reasonable and necessary for contract performance (tr. 121).

9. Appellant began providing guard services on 5 March 1992 (R4, tab 1).

10. On 7 March 1992, appellant submitted Invoice TSG 92005 for its phase-in services in the amount of $12,000. The Government deducted 10 percent of the amount invoiced because the phase-in did not proceed smoothly and an acceptable phase-in plan was not received. (R4, tab 3) On 28 July 1992, the Government paid this invoice in the amount of $10,800. (R4, tab 16)

11. On 25 March 1992, the State of California ordered appellant to stop work due to insurance violations. Appellant cured the violations on 14 April 1992, and resumed performance. Appellant's guard services were performed for a total of 34 days. (R4, tab 13; ex. A-40 at 7-8; tr. 253)

12. On 1 April 1992, appellant submitted invoice TSG 92009 for services provided during the period 5 March through 25 March 1992, calculated as 20 days of service in the amount of $131,263. The Government found that appellant had underbilled by $6,951.29, because of billing for 20 days rather than 21 days, and that the amount of $2,380.09 should be deducted for failure to provide satisfactory services at certain guard posts. (R4, tab 4) The invoice was paid in the full amount of $131,263 (R4, tab 13).

13. On 27 April 1992, the Government terminated the contract for default (R4, tab 1; tr. 222).

14. On 1 May 1992, appellant submitted invoice TSG 92017 for services provided during the period 14 April through 27 April 1992, calculated as 14 days of service in the amount of $94,946.88. The Government erroneously calculated the period of services and deducted an amount for unsatisfactory services and untimely submission of the work schedule. (R4, tabs 5, 13) On 20 July 1992, DOL requested that $80,000 be withheld from the contract (R4, tab 6). On 28 July 1992, the invoice was paid in the amount of $1,222.92 (R4, tab 13). Appellant has acknowledged receipt of payments on its invoices, subject to adjustment for the deductions (tr. 221).

15. On 17 September 1992, DOL notified the Government that it had concluded its investigation of wage violations by appellant. All but $300 in back wages had been paid to appellant's workers. DOL requested release of all but $300 of the withheld funds to appellant. (R4, tab 7)

16. On 26 September 1992, appellant invoiced the funds that had been withheld in the amount of $79,700. The Government assessed a deduction of $12,559.45 for uniforms that were not returned by appellant. (R4, tab 8) The invoice was paid in the amount of $67,140.55 (R4, tab 16).

17. By letter dated 10 March 1993, DOL notified the Government that all monetary violations had been satisfied by appellant. DOL requested that all monies being withheld on the contract be released. (R4, tab 10)

18. After appellant's timely request for an extension of time to submit its termination settlement proposal, Mr. Swanson, appellant's president and legal representative, sent "Tab A," which was a handwritten estimated proposal to his attorney with a request, dated 18 January 1999, to type it and forward it to Mr. McMunn, Government counsel. Appellant did not submit a termination settlement proposal to the contracting officer. Mr. Swanson proceeded in accordance with the instructions in Mr. McMunn's letter, dated 9 December 1998, to forward information for consideration to him. Mr. McMunn did not receive appellant's proposal until after the appeal was filed. (Exs. A-46, G-3; tr. 209, 223-25)

19. On 2 March 1999, Ms. Melody K. Petersen, the terminating contracting officer (TCO), had not received a settlement proposal from appellant, but made a settlement determination in accordance with FAR 49.109-7. Ms. Lisa Young, a contract specialist, prepared the determination under her supervision. Ms. Young requested and obtained contract documentation from the field office serving Long Beach. She did not have any cost information from appellant or think she had any way to contact Mr. Swanson for further information. The Government had appellant's official address in Springfield, Virginia, the last known address of Mr. Swanson, and the address of appellant's counsel, but no contact was made. An attempt to contact appellant may have been made, but Ms. Petersen could not verify what was done to obtain cost information from appellant. (R4, tab 13; tr. 238-40, 266)

20. Ms. Young based the determination on review of the invoices and the validity of the deductions that had been taken, which were primarily for guards not being present at a specified post at a given time. She found underbilling, that some deductions were not substantiated, and that $300 was due because of the DOL release of withholding. (R4, tab 13; tr. 238-40, 244-46) Another deduction of ten percent of the invoice amount was taken against appellant's phase-in cost for "unsatisfactory" performance and "unacceptable submittals" (R4, tabs 1, 13 at 8). We find that of the total amount of $238,209.88 invoiced, the Government took deductions of $16,340.05 and also withheld funds at the request of DOL. The determination stated that $210,426.47 had been paid and a net amount of $12,294.21 was due[2] (R4, tab 13; tr. 221, 239-40, 246, 255-56, 261-62).

21. The TCO's determination stated that there was no profit consideration applicable to the settlement (R4, tab 13 at 9). After the fact, Ms. Petersen thought the contractor would have been in a loss position at contract completion based on appellant's claimed incurred costs of approximately $600,000, which reflected spending at a rate of 160 percent of a contract price of approximately $720,000 for nine months that she selected (tr. 263).

22. On 4 March 1999, the TCO made the settlement by determination for a net amount of $12,294.21 in a contracting officer's final decision sent to appellant (R4, tab 16; tr. 248).

23. On 22 March 1999, appellant filed a timely appeal of the contracting officer's final decision.

24. On 20 April 1999, appellant filed its handwritten complaint in the appeal with a typed schedule of termination settlement costs entitled Tab A attached. Appellant stated that the costs were estimated. The settlement proposal was as follows:

1. Contract startup costs	$110,000
Hotel and lodging costs	
Airline flight costs	
Training classes costs	
2. Unpaid fixed price charges	410,000
3. Interest	291,200
4. IRS penalty and interest	600,000
5. Legal expenses	92,000

The total estimate of this proposal was $1,503,200. (Ex. A-45; tr. 229-32) Appellant estimated that additional interest beyond the amount shown in the schedule would total $500,000 (compl., ¶ 29). Appellant also alleged a claim for damages for the intentional infliction of loss in an amount not to exceed $300,000 (compl., ¶ 30). The total amount of appellant's alleged estimate for losses, interest, and damages in paragraph 31 of the text of its complaint was $1,920,000 (compl., ¶ 31; tr. 232).

25. Appellant filed a motion to stay the proceedings because Mr. Swanson was incarcerated, and the files concerning the matter were not available for appellant to present proof of termination settlement costs other than the estimates in appellant's complaint. Mr. Swanson stated that the amounts in the complaint warranted revision to actual figures and requested a hearing. The Government filed a motion to dismiss on the grounds that appellant failed to file a termination for convenience settlement proposal within one year of the Board's conversion of the termination for default to a termination for convenience. The Board suspended the proceedings for approximately six months and deferred decision on the Government's motion to dismiss the appeal.

26. On 27 July 2000, appellant supplemented the Rule 4 file. Appellant included Exhibit A-17, dated 24 July 2000, which itemized appellant's proposal in the amount of $975,562.76 (excluding bank interest) (R4, tab 17), and supporting documentation. The Board treated the Government's motion to dismiss as one for summary judgment and concluded that appellant's request for an extension of time within which to submit a termination settlement was timely. The Board denied the Government's motion. *The Swanson Group, Inc., supra,* 01-1 BCA ¶ 31,164.

27. The Government did not audit appellant's termination settlement proposal or attempt to verify the costs claimed to have been incurred in performance of the contract work (tr. 249).

28. At the hearing appellant introduced Exhibit A-17, amended on 22 March 2001, entitled, "THIS EXHIBIT REFLECTS THE FORMULA TO BE USED TO CALCULATE THE TOTAL OF THIS CLAIM AND REFLECTS NO MISSING AMOUNTS" (ex. A-17). The total amount of relief requested was $2,376,256.67. In its post-hearing brief appellant revised the amount requested to $2,359,608.78 (app. br. at 22).

Appellant's revised proposal is as follows:

1	Payroll Wages		$ 210,085.06[3]
2	Reproduction Cost		3,244.99
3	Medical Exams		4,620.00
4	Insurance (Workers Compensation and General Liability)		108,785.64
5	Training Cadre Pay and Taxes		82,656.09
6	Guard Licenses		5,912.12
7	Training Cadre Health and Welfare Benefits		6,918.72
8	Lodging and Meal Expenses		91,032.36
9	Bank Interest		13,488.20
10	Various Expenses		80,416.97
	Total		$ 607,160.15
11	IRS Penalty and Interest		973,140.72
12	Overhead and G & A Expenses		37,428.49
	Total		$ 1,617,729.46
Credits to the Government:			
	Payment of Invoices Received	$222,720.68	
	American Express	10,400.00	(233,120.68)
13	Damages		975,000.00
	Total Relief Requested		$ 2,359,608.78

(App. br at 21-22)

29. Appellant claims $210,085.06 for payroll wages. The breakdown of this amount includes labor costs prior to termination based on the net pay of $168,876.38 and FICA (for OASDI and Medicare) of $16,975.22 shown on five of its bi-monthly payroll registers covering the period 16 February through 11 April 1992 (ex. A-8 at 7, 14, 25, 31, ex. A-9 at 10, ex. A-17; tr. 87-92, 253). Appellant claims labor costs for training pay for the second pay period in February 1992 in the amount of $4,788.08 and an additional FICA amount of $433.12 on this pay. Appellant has not presented any rate for claiming FICA or other payroll taxes or fringe benefits as part of these claims for FICA. (Ex. A-8 at 8, ex. A-17; tr. 95). Appellant claims $19,012.26 for health and welfare benefits shown in its computerized transaction posting record summary, dated 5 August 1992, that was forwarded to the DOL (ex. A-10 at 5-7, ex. A-17; tr. 47-49, 96-97). Applying the FICA rate of 7.65 percent to wages paid, we find payroll costs incurred in the total amount of $187,888.64. Appellant has invoiced and been paid for services performed during this period billed on a fixed price basis. The amounts claimed are not duplicative of the amounts paid. Appellant's claim gives credit for all payments made by the Government to date.

30. Appellant claims $3,244.99 for reproduction costs of documents for submission to the Government, costs to prepare copies of a policy manual and a quality control manual, costs of fingerprint cards, and training materials. Appellant did not receive the copying machine that the contract specified was Government-furnished office equipment (tr. 71-72). Appellant included in this computation of expenses for reproduction its shipping expenses between its corporate office in Annandale, Virginia and Long Beach, California. Appellant's receipts for reproduction of documents and shipping business papers and files evidence costs incurred in the amount of $1,981.16. (Exs. A-12, -17; tr. 56-59, 67-71, 189, 191)

31. Appellant claims $4,620 paid for medical examinations of employees that were conducted by Dr. Assibi Z. Abudu in February and March 1992 (exs. A-13, -17; tr. 72-75, 252).

32. Appellant claims $108,785.64 for insurance costs (exs. A-15, -17; tr. 76-86). Appellant has not presented the cost of the liability insurance policy that expired 25 April 1992 to prove liability insurance costs prior to the date of the termination. The proposals to continue the coverage after the termination do not evidence costs that appellant incurred. Appellant presented the cost of workmen's compensation insurance from more than one insurance agency. Appellant had "problems" with Roberts and Lloyd insurance coverage and cannot reasonably claim that coverage was obtained for the contract by payments made to that agency in February 1992 (ex. A-15 at 1-2, ex. A-40 at 7-8; tr. 82). Appellant obtained workmen's compensation insurance from Raintree Insurance Agency after work was shut down by the State of California on 25 March 1992. The deposit premium paid for

workmen's compensation insurance is shown in a check, dated 27 March 1991 [sic], to Raintree Insurance Agency in the amount of $28,183 and receipt, dated 27 March 1992 (ex. A-15 at 4, 15; tr. 79). Appellant made a second payment in the amount of $5,900.50 by check, dated 14 April 1992, to Raintree Insurance Agency (ex. A-15 at 3). Appellant used an insurance agent, United Services of Arizona, but did not provide evidence of payment made for these insurance services during the term of the contract. Appellant's receipt and canceled checks evidence costs incurred for insurance in the amount of $34,083.50.

33. Appellant claims $82,656.09 for training cadre pay and taxes (ex. A-17; tr. 98-101). Appellant brought employees in to Long Beach on a temporary basis for the start up of the contract to interview applicants, perform the training, and do administrative work and gave them the title, "training cadre" (tr. 210). Mr. Swanson and his sister, Ms. Essie Swanson, who was employed by appellant as vice president, secretary, and contract manager, relocated to Long Beach and worked full eight-hour days directly on the contract. Appellant includes one-third of their salaries in this item of costs. (Tr. 38, 212-14) The time of other employees is all their time while working in Long Beach since it was all spent on the contract work (tr. 213). Appellant has payroll registers which show these employees working on the contract beginning in the second pay period of December 1991, when the contract was awarded. Mr. Swanson extracted information from the official payroll records of the corporation and certified on 20 March 2001 that he had prepared the summaries showing payments to individuals assigned to contract work. Mr. Swanson made the underlying records available for inspection at the hearing (tr. 98). The pay periods covered the period ending at the end of April 1992. They also included two pay periods in May 1992, after the termination, when administrative personnel were required to organize records, terminate security clearances, move offices, and perform other post-contract tasks. The total amount of payroll expenses of corporate officers and employees shown in these extracts is $76,688.47. Appellant added FICA to this payroll at the rate of 7.762 percent. Applying the rate of 7.65 percent to wages paid, we find payroll costs incurred for the training cadre in the total amount of $82,555.14. Appellant has invoiced and been paid for phase-in services billed on a fixed price basis. The amounts claimed are not duplicative of the amount paid. Appellant's claim gives credit for all payments made by the Government to date.

34. Appellant claims $5,912.12 for guard licenses, which includes both permits and licenses (exs. A-17, -20; tr. 101-08). On 16 January 1992, appellant received a business license from the City of Long Beach for a fee of $1,380.12 plus a $32 fingerprint charge (ex. A-20 at 4-5). Appellant made payments to the State of California Bureau of Consumer Affairs for the fees charged by the California Bureau of Security and Investigative Services for guard registration, fingerprint processing, firearm permits, and baton permits. On 25 February 1992, appellant paid the amount of $2,880 to the State of California, which was acknowledged as received for 100 baton permits and 44 firearm requalifications. Mr. Swanson used this payment to estimate that the cost of a license for a guard was $60. (Ex. A-20 at 3, 7) Appellant claimed the amount of $1,440 on the basis of an estimated fee of

$60 for 24 guard licenses. Appellant has failed to furnish other cost records of the fees paid. The estimate is not explained with documentary support for the number of guards that required qualification, the number of guards hired, whether the employer or employee was responsible for the payment of fees, or actual per permit cost, and we find it speculative. It is also not credible in view of Mr. Swanson's prior estimate that the estimated fee for guard licenses was $45 (R4, tab 20). On 5 March 1992, appellant paid the amount of $180 to the State of California, without identification of the reason for the payment. We cannot find this expense was related to the contract without more supporting evidence (ex. A-20 at 2; tr. 102). We find supporting data for a total cost of permits and licenses of $4,292.12.

35. Appellant claims $6,918.72 for training cadre health and welfare benefits (ex. A-17; R4, tabs 17, 21; tr. 107). Mr. Swanson based this calculation on a rate of $1.52 for hours worked by corporate officials and employees brought in for the phase-in of the contract (R4, tab 21). This is a lower rate than the $1.84 rate required and paid to contract employees (ex. A-7 at 4, ex. A-10 at 5). Appellant paid health and welfare benefits to its employees to satisfy the DOL investigation of wage violations, but we find no corroboration that health and welfare benefits were paid according to hours worked by the training cadre. We question the payment and amount of health and welfare benefits for the training cadre without additional evidence of the costs.

36. Appellant claims $91,032.36 for "[h]otel [e]xpenses/rations" during the period December 1991 until the date of the termination (app. br. at 22). We classify these costs as travel costs. They are supported by American Express company credit card statements from which Mr. Swanson has deducted items not chargeable to the contract (exs. A-17, -22 through -24; tr. 119). We find supporting data that the following costs for air fare, rental cars, hotel accommodations, meals, office supplies, and classified advertising were incurred, were related to the contract, and were reasonable:

	Total Charge	Claim	Supported
January 1992 2/5/92 Stmt	$10,366.11	$10,366.11	0[4]
February 1992 2/5/92 Stmt	19,384.44	16,034.58	15,765.97
March 1992 3/6/92 Stmt	21,507.35	19,010.14	17,588.28[5]
April 1992 4/5/92 Stmt	38,084.89	35,330.53	34,540.33[6]
May 1992 5/5/92 Stmt[7]	10,449.43	10,291.00	10,236.00

(R4, tabs 22 through 25; ex. A-17; tr. 107-19) The total incurred costs for transportation, lodging, meals and incidental expenses supported by appellant's books and records were $78,130.58. American Express credited appellant because of an error in its billings, which

is undocumented. Appellant has determined that a credit of $10,400 should be extended to the Government. (Tr. 130)

37. Appellant claims $13,488.20 for bank interest incurred prior to 15 June 1992. During the contract period ending 27 April 1992, appellant incurred interest charges in the total amount of $8,366.91. Appellant drew on a $700,000 line of credit from the First Interstate Bank of Arizona, N.A. to operate the contract. The bank charged interest to appellant's checking account when funds were used. Appellant needed to draw on its line of credit due to nonpayment of invoices by the Government. (Exs. A-17, -30; tr. 121-23)

38. Appellant claims a total of $80,416.97 for various expenses that we find included consultant fees; shipping and telephone charges; bank interest; training costs; Mr. Swanson's expenses; hotel expenses; employee pay, travel and moving expenses; forms; and state unemployment taxes (ex. A-17). More specifically, the charges were:

(a) $2,095.55 to Semler and Pritzker by check, dated 18 June 1992, for legal assistance in preparing a Strike Contingency Plan for submittal in the phase-in period of the contract (ex. 32 at 6; tr. 124-25)

(b) $673.25 to Federal Express by check, dated 3 July 1992 (ex. A-32 at 7; tr. 126)

(c) $222.16 to two telephone companies by checks, dated 18 June 1992, for contractually required service (ex. A-32 at 8-9; tr. 127)

(d) $11,733.59 for bank interest accruing after termination of the contract (ex. A-32 at 10 through 15; tr. 127)

(e) $7,059.44 for costs of security training involving classroom training, weapons training, and physical training for the guards during the phase-in portion of the contract and use of services of Impact Security Training Center and the Long Beach Pistol Range, which we find substantiated by supporting data in the total amount of $2,810.99 (ex. A-33 at 1-2, 5-9, 12; tr. 134-35, 185-87, 211, 216-19)

(f) $15,000 on 16 April 1992, for expenditures by Mr. Swanson evidenced by a bank statement and debit showing a transfer of funds to Citibank that represented payment of charges incurred against a credit card, but did not show any itemization of charges (ex. A-34 at 1-2; tr. 131)

(g) $15,150.29 to Feith & Zell, P.C. by check, dated 28 April 1992, for legal services regarding start-up of the contract (ex. A-34 at 3, ex. A-42; tr. 132)

(h) $5,093.44 to the Long Beach Hilton Hotel by check, dated 10 April 1992, paid when appellant had reached its credit limit on its American Express card (ex. A-34 at 6; tr. 132-33)

(i) $2,100 to Steven King for wages by two checks, stamped 4 March and 13 April 1992 (ex. A-34 at 8-9)

(j) $5,597.03 to Robert L. Lewis for travel and moving expenses, by two checks, dated 6 March and 17 March 1992, in the total amount of $3,475.93, and a third check for pay and moving expenses back to New Jersey which we find was issued after the contract termination (ex. A-34 at 10-11, 19)

(k) $770 to Lawrence Wilson for reimbursement of training expenses by check, dated 25 March 1992 (ex. A-34 at 12)

(l) $2,325.01 to Rapid Forms for blank forms needed for the contract work by check, stamped 20 March 1992 (ex. A-34 at 13; tr. 133)

(m) $418.68 for "close-out pay" shown in a check, dated 8 June 1992, made payable to Jackie Dixson (ex. A-17 at 2, ex. A-34 at 14)

(n) $11,368.53 to the State of California Employment Development Department by check, dated 19 April 1993, with a statement showing payment was for:

3rd Quarter	$1,999.46
2nd Quarter	8,880.30
1st Quarter	1,488.77

for state unemployment taxes from which the amount payable for the third quarter is deducted for a balance paid for state unemployment taxes prior to the termination of $10,369.07 (exs. A-17, -34 at 18; tr. 133).

39. Appellant claims $973,140.72 for interest and penalties payable to the Internal Revenue Service with supporting documentation showing how the calculation was made. At the time of the hearing, appellant had a debt of approximately $4,000,000 to the IRS for unpaid employment taxes. (Exs. A-17, -41; tr. 130-31, 214-15, 219-20)

40. Appellant claims overhead and G&A expenses in the amount of $37,428.49. Appellant's calculation is based on use of a 6 percent rate for overhead, G & A, and profit which Mr. Swanson considered a reasonable rate. Appellant applied the rate to the total amount claimed after deduction of credits. (Ex. A-17; tr. 25-26, 130)

41. Appellant acknowledges a credit to the Government that decreases the amount of its termination settlement claim for the Government's payment of invoices and the amount of the TCO's settlement determination in the amount of $222,720.68. The Government does not dispute this amount. (Ex. A-17; tr. 129-30; Gov't br. at 6)

42. Appellant claims $975,000 in damages "due to losses, bad Faith acts [sic], debarment, etc." (app. br. at 22). Civil service and Navy personnel in Long Beach were opposed to the contracting out of guard services which resulted in a loss of Federal jobs (ex. A-40 at 18; tr. 197). Appellant has alleged that they engaged in a deliberate conspiracy of improper and illegal activities to prevent appellant from successfully performing the contract work. We previously found that a pre-performance meeting was held during the phase-in and do not credit Mr. Swanson's testimony that the Government without justification refused to hold this meeting (R4, tab 1 at 5; tr. 197). Appellant maintains that the Government failed to cooperate in identifying the guard posts, supplying uniforms, furnishing adequate vehicles for patrol activities, and further that the Government rejected every submittal appellant made (tr. 29-32). Appellant further alleged that Navy personnel were responsible for instigating DOL investigations of wage violations and debarment after the termination. The Navy delayed payment of invoices and allegedly reported improper conduct of appellant to the IRS. (Tr. 27, 32-33) Absent corroboration of Mr. Swanson's brief description of Government acts and omissions during appellant's contract performance, we cannot find that the Government acted with hostility and malice in administering this contract. Appellant suffered losses of other Government contracts and had uniforms, computers, copy machines, and communication equipment that were unusable after the termination of the contract and claims that its losses were caused by the alleged bad faith conduct of the Government (tr. 27).

DECISION

Appellant alleges entitlement to costs in addition to the contracting officer's unilateral determination of $12,294.21 based on its consolidated statement of costs in Exhibit A-17, supporting backup documentation, and testimony at the hearing. Appellant argues for a fair and reasonable settlement considering that the Government was allegedly engaged in illegal acts taken in bad faith to thwart appellant's performance and cause a termination of the contract. The Government maintains that the vast majority of appellant's settlement claim is not allowable under the FAR. The Government also objects to the fact that appellant made no adjustment in its costs claimed to reflect actual days on which contract services were satisfactorily performed.

Appellant bears the burden to prove by a preponderance of the evidence that it is entitled to a greater termination settlement amount than that determined by the TCO. A termination for convenience settlement should compensate the contractor fairly for the work done. It normally includes a reasonable allowance for profit, subject to any loss adjustment. In essence, a convenience termination converts a fixed price contract into

a cost-reimbursement contract, entitling the contractor to recover its allowable costs in accordance with the standards of reasonableness, allocability, and regulatory cost principles, as applicable, plus profit. *General Dynamics Land Systems, Inc.*, ASBCA No. 52283, 02-1 BCA ¶ 31,659 and cases cited therein; FAR 49.201(a); FAR 52.249-2(f)(2)(iii).

Subparagraph (h) of the Termination for Convenience clause in the contract requires that all costs under this clause be determined in accordance with FAR Part 31. *D.E.W., Inc. & D. E. Wurzbach, A Joint Venture,* ASBCA No. 50796, 98-1 BCA ¶ 29,385. FAR 31.205-6 provides for allowability of compensation for personal services that includes salaries, wages, employee insurance, fringe benefits, contributions to retirement benefits, and location allowances. The Government has argued that these costs are unacceptable termination costs because they are "neither reasonable nor substantiated by reliable accounting data or other competent evidence" (Gov't br. at 13). The facts in the cases cited by the Government distinguish them from this appeal. In *Tagarelli Brothers Construction Co., Inc.,* ASBCA No. 34793, 88-1 BCA ¶ 20,363 at 102,990, a claim was held unsubstantiated and unreasonable where the record was inadequate to find that a contractor's estimates had a reasonable basis in fact. There was no showing that accounting records were unavailable. Testimony at the hearing amounted to allegations that were not supported by competent evidence, but refuted by competent evidence presented by the Government. In *Stanley Aviation, Inc.,* ASBCA No. 49932, 97-1 BCA ¶ 28,764 at 143,543, personnel and G&A costs that had not been incurred specifically as a result of the contract work and were unsubstantiated in the record represented unabsorbed indirect or overhead costs not properly allocable directly to a contract termination. In *Cape Tool & Die, Inc.*, ASBCA No. 46433, 95-1 BCA ¶ 27,465, the contractor failed to meet its burden of proof to the extent there were no invoices or contemporaneous records to support costs claimed only in an affidavit and letters to counsel without additional corroboration. The contractor offered no persuasive explanation for the lack of records.

In this appeal appellant has substantiated its termination claim with contemporaneous accounting and payroll records. The costs were directly incurred in performance of the contract. The Government has made no effort to refute appellant's records with its own competent evidence, and we accept appellant's accounting data as valid and reliable. We do not agree that the Government was deprived, as it has asserted, of an opportunity to review appellant's supporting data by not having appellant's termination settlement proposal on the appropriate FAR forms (Gov't br. at 14). We have found appellant's direct labor settlement expense for wages was $168,876.38 (finding 29). We take judicial notice of the FICA and Medicare percentage of 7.65. We have calculated the amount of payroll taxes by applying this rate to the wages paid to conclude that appellant is entitled to recovery of an additional $12,919.04 for payroll taxes. Appellant has failed to prove other state payroll taxes or benefits that would account for the additional amounts it included in its claim for FICA. The costs of $19,012.26 for health and welfare benefits are allowable. These costs are supported by appellant's contemporaneous accounting and personnel records and evidence

of the work that was performed. We conclude that they are reasonable. The total amount of this settlement expense that appellant can recover is $187,888.64.

We do not accept the Government's argument that appellant should take into account the nonperformance of services in its termination settlement costs. Appellant invoiced for the days of its performance of services and was paid on that basis less deductions for services not performed (posts that were not manned for some shifts) or other deficiencies and for the Government's objections to appellant's submittals and phase-in performance. We have found that appellant paid its employees on an hourly basis on days that contract performance was shut down by the State of California. As a general rule, the Government is not entitled to reduce the contractor's termination settlement by the costs of defective or non-compliant work. For the Government to obtain a credit due to deficiencies in a contractor's work, the Government has the burden of proving that the work was defective resulting from the contractor's "gross disregard" of its contractual obligations, and the reduction in contract price that is due. *Lisbon Contractors, Inc. v. United States,* 828 F.2d 759 (Fed. Cir. 1987); *D.E.W., Inc. and D. E. Wurzbach, A Joint Venture,* ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104 at 153,634, *modified on reconsid.,* 01-1 BCA ¶ 31,150; *Goetz Demolition Co.,* ASBCA No. 39129, 90-3 BCA ¶ 23,241, *motion for reconsid. denied,* 91-1 BCA ¶ 23,397. The Government has presented no evidence in support of the deductions made by the TCO in her unilateral determination. The costs of wages and fringe benefits that were incurred are recoverable in a termination settlement to the extent they have not been previously paid. Similarly, appellant's costs incurred during the phase-in period of the contract, recoverable to the extent they have not been paid, are not subject to deduction.

The compensation paid to appellant's employees during the phase-in period of the contract is also allowable under FAR 31.205-6. These costs are substantiated by appellant's contemporaneous records and are reasonable. The direct labor expense that we have found is $76,688.47. We have increased it by application of the FICA and Medicare rate of 7.65 percent to a total settlement expense of $82,555.14 (finding 33). The costs are recoverable to the extent they have not been previously paid.

Appellant incurred direct costs for reproduction, medical examinations, and insurance that were required by the contract and constitute reasonable and allowable expenses in a settlement determination (findings 30, 31, 32). The expenses of permits and licenses are also reasonable and allowable (finding 34). The total amount of these costs that we have found substantiated by appellant's evidence and not challenged by the Government is $44,976.78.

Under the FAR costs for transportation, lodging, meals and incidental expenses are allowable. FAR 31.205-46. We are satisfied that travel and lodging practices were generally reasonable under the circumstances and conclude that appellant is entitled to the

amount of these costs and its other miscellaneous direct costs supported by its credit card statements, which we have found is $78,130.58 (finding 36).

FAR 31.205-20 prohibits payment of interest on borrowing, however represented. *Servidone Construction Corp. v. United States*, 19 Cl. Ct. 346 (1990), *aff'd*, 931 F.2d 860, 863 (1991); *D.E.W., Inc. & D. E. Wurzbach, A Joint Venture, supra*, 98-1 BCA at 146,055. Accordingly, appellant is not entitled to recover the interest it has claimed was paid on its line of credit from the bank either during performance of the contract or after the termination or interest that has been due and payable to the IRS (findings 37, 38 (d)).

FAR 31.205-15 provides that costs of fines and penalties resulting from the failure of the contractor to comply with Federal or State law are unallowable. The penalties appellant has owed to IRS are not recoverable (finding 39).

Appellant submitted various expenses that include direct costs that are reasonable and allowable, including consultant fees (finding 38 (a), (g)), employee costs (finding 38 (i), (j), (m)), reproduction and shipping expenses (finding 38 (b), (l)), travel costs (finding 38 (h)), utilities (finding 38 (c)), and state unemployment tax (finding 38 (n)). These expenses total $41,923.38. Under FAR 31.205-44(b) training costs of providing on the job and classroom instruction are allowable. We have found the costs incurred that are claimed for security training supported by contemporaneous documentation in the amount of $2,810 (finding 38 (e), (k)). Where there was insufficient supporting data to find that the expenses were related to the contract and reasonable, they are not allowable (finding 38 (f)).

Appellant has claimed overhead, G&A, and profit as a single item without evidence of the amount or nature of the costs incurred or any source documentation (finding 40). We question these costs and conclude that appellant is not entitled to recovery of G&A and overhead in its termination settlement. *Voices R Us, Inc.*, ASBCA Nos. 51565, 52307, 01-1 BCA ¶ 31,328; *Mediax Interactive Technologies, Inc.*, ASBCA No. 43961 *et al.*, 99-1 BCA ¶ 30,318, *aff'd on reconsid.*, 99-2 BCA ¶ 30,453. Paragraph (f)(2)(iii) of the Termination for Convenience clause requires fair and reasonable profit unless it appears that the contractor would have sustained a loss on the entire contract had it been completed. The TCO did not include profit in the unilateral settlement determination, but stated only that it was not "applicable" (finding 21). The Government's view is that that appellant was in a loss position (*id.*). FAR 49.203 provides the specific loss adjustment formula which is required to be applied. *Boeing Defense & Space Group*, ASBCA No. 50048, 98-2 BCA ¶ 29,779, *motion for reconsid. denied*, 98-2 BCA ¶ 29,927. The TCO did not apply this formula properly, but looked to the appropriated amount of approximately $720,000 instead of the estimated price for the initial contract term of approximately $1,443,000 to consider that appellant would have incurred a loss had the contract been completed. To the contrary, it is apparent based on its monthly billing rate compared to the costs it has

claimed were incurred that appellant would have earned a profit if the contract had been completed. Furthermore, the requirement to disallow profit in case of a loss is not applicable to situations in which the Government substantially contributed to the increased costs and it is not possible to separate that portion of the loss from possible losses caused by the contractor. *See D.E.W., Inc. & D.E. Wurzbach, A Joint Venture, supra,* 98-1 BCA at 146,059. Absent evidence of appellant's bid profit rate or its historic profit rate on similar work, we conclude that appellant is entitled to a reasonable profit on the incurred costs in the circumstances here of ten percent. *Defense Systems Corporation,* ASBCA No. 44131R *et al.,* 00-1 BCA ¶ 30,851 at 152,281; *D.E.W., Inc. and D. E. Wurzbach, A Joint Venture, supra,* 00-2 BCA at 153,633.

Appellant's claim for damages is based on its allegations that the Navy engaged in a deliberate conspiracy to prevent appellant from performing the contract work because of its opposition to the contracting out of guard services that had resulted in loss of federal jobs. Appellant argues that there are similarities in these circumstances with the facts in *Apex International Management Services, Inc., by Trustee in Bankruptcy,* ASBCA No. 38087 *et al.*, 94-2 BCA ¶ 26,842, *aff'd on reconsid.*, 94-2 BCA ¶ 26,852, an appeal in which the Board held a contractor entitled to damages for breach of contract when the Government had acted in bad faith (app. br. at 6). Appellant has recited in its brief numerous Government actions taken at the beginning of contract performance in denying meetings with appellant's representatives, intentionally rejecting submittals, refusing to show appellant the location of guard posts, providing an inadequate supply of uniforms, weapons, holsters for weapons, and vehicles; declining to furnish office space, copying machines, and training space; requiring security clearances with longer processing time; sending mail to appellant's corporate offices in Virginia while knowing that appellant's management personnel were located in Long Beach; and hiring former civil service employees as quality control evaluators who mentally harassed appellant's employees (app. br. at 6-8, 19-20). Appellant presented these matters in its appeal of the default termination and has requested that the Board take judicial notice of the hearing transcript in that appeal (app. br. at 19). Appellant also presented brief testimony in this appeal in support of its allegations (finding 42). We have not found corroboration in contemporaneous documents or the testimony of other witnesses for appellant's version of contract performance. For the most part, this testimony consisted only of allegations of Mr. Swanson. Mere allegations without substantiated explanatory facts that support the statements are not sufficient to carry the necessary burden of proof. *See C Construction Co., Inc.,* ASBCA No. 47928, 96-2 BCA ¶ 28,499. Furthermore, appellant's assertions of Government interference and failure to cooperate were litigated fully in the prior proceeding and not proved. *The Swanson Group, Inc., supra,* 98-2 BCA at 147,993. We have found that the Government did not pay appellant's invoices, but returned them not accepted with the result that appellant used its own financial resources to fund contract performance (finding 8). This failure was not in bad faith, however, and did not constitute a material breach of contract. Appellant is not entitled to damages for bad faith.

Accordingly, we find appellant entitled to a net termination settlement of $249,840.38, in addition to the TCO's unilateral determination of $12,294.21, as follows:

a. Total Incurred Cost (Findings 29 through 34, 36, 38 (a) through (c), (e), (g) through (n))	$439,055.51
b. Profit at 10% (Finding 40)	43,905.55
c. Credit (Finding 36)	(10,400.00)
d. Payments to Date (Finding 41)	(222,720.68)

The appeal is sustained.

Dated: 28 March 2002

LISA ANDERSON TODD
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

RONALD JAY LIPMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] This contract number was changed from N62474-91-C-9509 by Modification No. P00001, dated 10 January 1992 (*id*. at 6).

[2] Appellant's errors in invoicing account for the discrepancies in these figures.

[3] Appellant identified a ten cent error on Exhibit A-17, which also appears in its post hearing brief, at the hearing (tr. 97).

[4] There are no charges itemized for the amount paid for the previous month.

[5] We find charges for electronic accessories and sporting equipment not allowable and have made additional deductions accordingly (R4, tab 23).

[6] We find appellant improperly charged a United Airlines credit (R4, tab 24).

[7] The date on the statement is a closing date. Appellant's charges were not made after the date of the termination.

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. 52109, Appeal of The Swanson Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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