ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Consolidated Defense Corporation	)	ASBCA No. 52315
	)	
Under Contract No. N00024-92-C-4188	)	

APPEARANCE FOR THE APPELLANT: Raymond M. Hassett, Esq.
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Hartford, CT

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
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OPINION BY ADMINISTRATIVE JUDGE REED
ON GOVERNMENT MOTION TO DISMISS IN PART

In this motion to dismiss in part, the Government asks that the Board dismiss Count Two of the revised amended complaint submitted by Consolidated Defense Corporation (appellant). The Government contends that Count Two seeks "pre-award costs" for which no claim has been submitted to the contracting officer (CO). Therefore, the Government contends that the Board presently lacks jurisdiction over any potential claim for pre-award costs. The motion was submitted in lieu of a Government answer to Count Two.

Appellant responds that the portion of its claim designated by "the term 'pre-award costs' is synonymous with 'pre-contract costs,' as allowed for by [FAR] 31.205-32" (appellant's response (app. resp.) at 1 n.1). Such costs, asserts appellant, are based on the same operative facts and are merely a larger dollar amount of the same types of costs as appellant's claim arising out of the termination for convenience settlement proposal (TFCSP) that was submitted to the termination CO (TCO) following the Government's TFC. The Government submitted a reply to appellant's response.

The Board previously issued decisions in response to a Government motion to dismiss and for summary judgment, *Consolidated Defense Corporation*, ASBCA Nos. 52315, 52719, 01-2 BCA ¶ 31,484, and a Government motion to dismiss in part and to

strike portions of appellant's revised amended complaint related to punitive damages and alleged bad faith breach of contract, *Consolidated Defense Corporation*, ASBCA No. 52315, 2002 ASBCA LEXIS 135, 2002 WL 31648256 (21 November 2002). For the reasons explained in the latter opinion, we view the Government's motion to dismiss Count Two as involving only ASBCA No. 52315, not the related and consolidated appeal, ASBCA No. 52719.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. Request for Proposal No. N00024-91-R-4159(Q) (the solicitation) is dated 12 March 1991. Appellant submitted an offer dated 4 July 1991, a best and final offer dated 12 August 1991 (BAFO), and a second BAFO dated 20 November 1991, extended by letter dated 14 January 1992. Appellant's offer was accepted by Naval Sea Systems Command, Department of the Navy (NAVSEA), and awarded as Contract No. N00024-92-C-4188 (the contract), a supply contract, on 17 March 1992. Neither party has identified any advance agreement between the parties by which pre-award or pre-contract costs are addressed, although the present record provides little information concerning pre-award negotiations. First article equipment, the initial deliverable under the contract, was due ten months after contract award. The contract includes by reference, among others, the following standard provisions:

a. FAR 52.233-1 DISPUTES (APR 1984); and

b. FAR 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984)

(R4/SR4, tabs 50, 53-54)

2. By contract Modification No. P00009, dated 16 March 1993, the Government terminated the contract in its entirety for the Government's convenience. Appellant's TFCSP dated 31 October 1993 and revised TFCSP dated 30 April 1994, totaling $2,102,819.75, were submitted on standard forms and claimed payment for cost items typical of a TFCSP (purchased parts, work-in-process, special tooling and test equipment, other property and equipment costs, general and administrative costs (G&A), amounting to $695,519.61, settlement expenses, subcontractor settlements, and a credit for disposal) plus profit on certain costs. No separate category of pre-award or pre-contract costs is explicitly included in the TFCSP because, appellant contends, "[t]he TCO refused to allow Appellant to submit pre-award costs in the TFCSP." However, Defense Contract Audit Agency (DCAA) auditors noted costs submitted within the TFCSP as a part of the asserted G&A expenses, in the amount of $30,852.64, that are characterized by DCAA as "precontract." The costs are questioned by DCAA as follows:

> These costs[s] were incurred and paid prior to contract award. Although FAR 31.205-32 allows cost[s] incurred prior

> to contract award if it could be determined that the cost[s] were incurred directly pursuant to the negotiation and in anticipation of the contract award, there is no supporting information to make this determination. Therefore, we will questioned [sic] these cost[s] as unallowable Organization costs (FAR 31.205-27).

In his unilateral determination (UD), contract Modification No. A00006 dated 12 May 1999, which allowed $725,366.06, the TCO noted and agreed with the DCAA's questioning of submitted G&A costs. The TCO disallowed, among other G&A costs, "organizational costs [and] incurred costs . . . prior to contract award." By appellant's undated letter, postmarked 6 August 1999, an appeal to the Board from the UD was taken. (R4, tabs 2, 6-7, 38, 47-48; Revised Amended Compl. and Answer to Revised Amended Compl., ¶¶ 2; Board correspondence file; app. resp. at 3, ¶ 7).

3. In the revised amended complaint, at Count One, ¶ 40.9., appellant averred recoverable G&A costs totaling $695,200.54. At Count Two, "Pre-Award Costs," appellant incorporates all of Count One, and asserts, in ¶¶ 45-46 that pre-award costs are sought pursuant to the contract and the TFC. At ¶ 47, appellant avers that on or about 12 March 1991, work was begun "in accordance with the [solicitation]" on the supplies to be provided under the envisioned contract. Paragraphs 48-50 and 58 state that such work, "entirely for the NAVSEA," continued throughout 1991 in order "to produce the lowest cost [product] for the government." Paragraph 51 describes the alleged pre-contract costs: (a) to study, evaluate, and reproduce solicitation documents and governing regulations; (b) to search for and evaluate prospective vendors; (c) to develop a manufacturing program and schedule; (d) to travel to prepare the offer, "to set up manufacturing," and "regarding the protest;" (e) to organize, obtain financing for, and incorporate appellant; (f) to recruit and hire employees; and (g) to respond to the Government's pre-award surveys. Appellant contends at ¶ 52 that the sole purpose of appellant's corporate existence was to perform the contract based on "an extremely aggressive manufacturing schedule that had to meet the fleet's existing shipyard retrofit schedules." Paragraphs 51d., 53-57, and 62 allege costs for (a) labor with profit added, (b) manufacturing equipment, and (c) reproduction of solicitation documents, all totaling $431,921. Paragraph 61 contends that "[t]he Government, in bad faith, has refused to permit [appellant], with limited exception, to submit costs incurred beyond the Settlement Proposal, including Pre-Award related costs, as allowed by the FARs."

DECISION

Pre-Contract Costs

Costs that may be recovered by a contractor on account of a TFC are determined under FAR Part 31, "Contract Cost Principles and Procedures," with due consideration for fairness in arriving at the compensation to be paid. Judgment, not merely a strict application of cost allowance rules, must be applied. *D.E.W., Inc. and D.E. Wurzbach (JV)*,

ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104 at 153,632, *recon. granted in part, denied in part*, 01-1 BCA ¶ 31,150.

Pertinent portions of FAR Part 49, "Termination of Contracts," provide as follows:

> 49.113 Cost principles
>
> The cost principles and procedures in the applicable subpart of Part 31 shall, subject to the general principles in 49.201, (a) be used in asserting . . . or determining costs relevant to termination settlements . . . .
>
> . . . .
>
> 49.201 General
>
> (a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.
>
> . . . .
>
> (c) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. . . .

The TFC provision of the contract, FAR 52.249-2(h), specifies that "The cost principles of [FAR] Part 31 . . . shall govern all costs claimed . . . or determined under this clause" (Statement of Facts 1b.).

FAR 31.205-32, "Precontract costs," provides as follows:

> Precontract costs are those incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (see 31.109.)

FAR 31.109 speaks to advance agreements related to the allowability of certain costs. There is no evidence in the record to date of any advance agreement between the parties regarding pre-contract costs (Statement of Facts 1).

Absent an advance agreement, recovery of pre-contract costs requires proof of four elements: (1) the costs were incurred prior to the effective date of the contract; (2) the costs were incurred directly pursuant to negotiation of the contract and in anticipation of award; (3) the costs were necessarily incurred in order to comply with the proposed contract delivery schedule; and (4) the costs would have been allowable if incurred after the date of the contract. *Radant Technologies, Inc.*, ASBCA No. 38324, 91-3 BCA ¶ 24,106 at 120,657; FAR 31.205-32.

New Claim

That pre-contract costs, to be allowable, require proof of the sub-elements described above, does not divorce those costs from an overall claim pursuant to the TFC provision of the contract. Pre-contract costs have been considered and in some instances have been allowed as part of a claim arising under the TFC provision. *Codex Corp. v. United States*, 226 Ct. Cl. 693, 697-99 (1981); *J.W. Cook & Sons, Inc.*, ASBCA No. 39691, 92-3 BCA ¶ 25,053 at 124,864-65; *Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 87-1 BCA ¶ 19,622 at 99,289-90 (allowed pre-award option to buy bus), 99,292-93 (denied pre-award marketing costs), *aff'd in part and modified in part in other respects*, 88-1 BCA ¶ 20,499; *American Electric, Inc.*, ASBCA No. 16635, 76-2 BCA ¶ 12,151 at 58,511-12 (allowed incorporation expenses and other pre-contract costs), *aff'd in part and modified in part in other respects*, 77-2 BCA ¶ 12,792; *see also* FAR 31.205-42(c) and 52.249-2(f)(2)(i) ("Initial" and "Preparatory" costs).

The scope of an appeal is circumscribed by the parameters of the claim, the responsive CO final decision (COFD), in this case the UD, and the appeal therefrom. Appellant's complaint cannot expand our jurisdiction. *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920. However, if Count Two of the Revised Amended Complaint merely adds additional pre-contract costs, all of which arise under the TFC claim which already included pre-award or pre-contract costs, then the Board could, absent other jurisdictional infirmities, resolve those cost categories within its authority over the TFC claim, the COFD, and the appeal. *Frontier Contracting Co.*, ASBCA No. 33658, 89-2 BCA ¶ 21,595 at 108,732-33; *E.C. Schleyer Pump Co.*, ASBCA No. 33900, 87-3 BCA ¶ 19,986 at 101,264; *Spradlin Corp.*, ASBCA No. 23974, 81-2 BCA ¶ 15,423 at 76,430-31.

In appellant's case, certain pre-contract costs were submitted as a part of the G&A line item under the TFC claim. The CO considered and decided whether to allow those costs in the UD. Thereafter, appellant noticed its appeal from the UD. (Statement of Facts 1a., 2)

We note the large dollar difference between the pre-contract costs addressed by DCAA, $30,852.64, and the amount averred in Count Two, $431,921 (Statement of Facts 2-3). The record does not yet flesh out all of the specific costs being claimed. To the extent that some portion of the costs demanded under Count Two might be based on other operative facts, then a new claim not under the Board's jurisdiction could exist. *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990); *Consolidated Construction, Inc.*, ASBCA No. 38283, 90-3 BCA ¶ 23,219 at 116,520. In that event, appellant would be obliged to submit the new claim to the CO.

Given the preliminary state of the record, we are not well and fully informed of all costs comprising the G&A portion of the TFC claim. For example, we do not know whether costs are duplicated in Count Two of the complaint and in other costs under the TFC claim, particularly the G&A portion. For its part, appellant incorporates all of Count One within Count Two. The Government has not specifically disputed that assertion except by the motion decided here. Therefore, we are not convinced that Count Two presents a new claim based on operative facts that differ from the claim already submitted. Accordingly, on the grounds that a new claim for pre-contract costs has been submitted, the Government's motion to dismiss in part is denied.

Certification

Related to whether a new claim was submitted, but separate, is whether the claim has been properly certified in accordance with the Contract Disputes Act, as amended (the CDA). *Placeway*, 920 F.2d at 907-08. The issue to be examined, to assure ourselves of proper subject matter jurisdiction, is whether the apparent increase in asserted pre-contract costs from $30,852.64 to $431,921 must be certified pursuant to the CDA, 41 U.S.C. § 605(c)(1) and the Disputes provision of the contract (Statement of Facts 1a., 2-3).

The general rule is "that a monetary claim *properly* considered by the [CO] . . . need not be certified or recertified if that very same claim (but in an increased amount reasonably based on further information) comes before a board of contract appeals . . . ." *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984) (italics in original).

Appellant admits that the increase is not based on "further information." Rather, appellant avers that the Government would not allow submission of pre-contract costs, "with limited exception" not defined by appellant. (Statement of Facts 2-3) Therefore, it is clear that, beyond the undefined limited exception, appellant has not previously submitted to the CO the full and certified amount of its alleged recoverable pre-contract costs.

We have previously held that in a "situation where the data supporting the [claim amount] augmentation is available at the time of the original claim submission, we cannot permit appellant to proceed without submitting the entire claim to the [CO] with proper certification." *E.C. Morris & Son, Inc.*, ASBCA No. 30385, 86-2 BCA ¶ 18,785 at 94,653. Under the admitted circumstances of this case, appellant has not met its burden "to establish

[that] the increased amount is based on further information not reasonably available when the original claim was filed." *Mediax Interactive Technologies, Inc.*, ASBCA Nos. 43961, 46408, 96-1 BCA ¶ 28,247 at 141,028, quoting *Jema Corp*., ASBCA No. 40985, 93-3 BCA ¶ 26,076 at 129,596.

Accordingly, the Government's motion to dismiss Count Two of the revised amended complaint must be granted.

SUMMARY

The Board has jurisdiction over appellant's TFC claim which includes some pre-contract costs. However, appellant's apparent large increase for other pre-contract costs, as set forth in Count Two of the revised amended complaint, has not been properly certified. The motion to dismiss Count Two of the revised amended complaint is granted without prejudice to the submission of a properly certified claim to the CO.

Dated: 6 December 2002

STEVEN L. REED
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

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. 52315, Appeal of Consolidated Defense Corporation, rendered in conformance with the Board's Charter.

Dated:

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