ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Caddell Construction Company, Inc.	)	ASBCA No. 53144
	)	
Under Contract No. DACA41-92-C-0016	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON THE GOVERNMENT' S MOTION TO DISMISS
AND FOR SUMMARY JUDGMENT

This appeal arises from a contracting officer's decision denying appellant's claim for additional field office (job site) overhead. The Government moves to dismiss on grounds that the issues in this appeal were fully litigated in a previous dispute between these same parties, *Caddell Construction Co., Inc.*, ASBCA No. 49333, 00-1 BCA ¶ 30,702 (*Caddell I*), *aff'd on recons.*, 00-1 BCA ¶ 30,859 (*Caddell II*). Alternatively, the Government requests summary judgment, contending that the appeal must be denied in accordance with our decision in *M. A. Mortenson Co.*, ASBCA Nos. 40750 *et al*., 98-1 BCA ¶ 29,658 (Senior Deciding Group). Appellant opposes both motions. For the reasons discussed *infra*, we deny the motion to dismiss, and grant the alternative motion for summary judgment in part.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTIONS

1. On 30 December 1991 the U.S. Army Corps of Engineers (Corps or Government) awarded Contract No. DACA41-92-C-0016 (contract) to Caddell Construction Company, Inc. (Caddell or appellant). The contract was a fixed-price agreement for the construction of a waste water treatment facility at Sunflower Army Ammunition Plant in DeSoto, Kansas. The contract incorporated, *inter alia*, standard Federal Acquisition Regulation (FAR) clause 52.243-4 CHANGES (AUG 1987) and

Department of Defense FAR Supplement (DFARS) clause 252.243-7001 PRICING OF ADJUSTMENTS (APR 1984). The latter clause specified that the cost principles of FAR Part 31 and DFARS Part 231 were applicable to the pricing of equitable adjustments under the contract. Caddell completed work on the project in July 1994. (R4, tab 2; compl., answer, ¶¶ 1, 4)

2. Caddell does not dispute that it bid the contract intending to treat overhead charges consistent with its past practice (app. resp. at 2). That practice involved two separate approaches for calculating field office overhead on contract modifications: for modifications that extended the length of contract performance, Caddell computed field office overhead on a daily cost of operation (per diem) basis; for modifications that did not extend the contract's duration, Caddell assessed field office overhead as a percentage of direct cost (Gov' t mot. at 1-2).[1] Whether the Corps accepted this practice over the course of several years and routinely permitted the company to recover field office overhead as part of the equitable adjustment on every change, regardless of whether the duration of the project was extended by the modification, is in dispute (compl., answer, ¶¶ 7-9; R4, tab 15).

3. The Defense Contract Audit Agency recommended that the Corps permit recovery of field office overhead only on a per diem basis (R4, tab 8). The Corps thereafter announced a new policy for the reimbursement of field office overhead. Specifically, the Corps permitted Caddell to recover job site overhead on a per diem basis for changes that extended the duration of the contract, but refused to allow a percentage markup for job site overhead on changes that did not extend performance (*Caddell I*, finding 6). Caddell strongly disagreed with the Corps' approach and reserved the right to pursue a formal claim for additional field office overhead on a percentage basis for modifications that did not result in a time extension (R4, tab 10). Caddell accepted reimbursement of job site overhead on per diem basis for at least some modifications, such as Modifications P00003, P00008, and A00055 (R4, tab 3). In January 1995, appellant submitted to the Corps a certified claim seeking recovery of field office overhead using a percentage markup for open modifications that did not extend performance, while leaving intact its recovery based on a per diem rate for changes that did extend the duration of the contract (R4, tab 10). The Corps denied the claim in its entirety. Upon appeal, we docketed the dispute as ASBCA No. 49333. We denied the appeal (*Caddell I, Caddell II*).

4. In *Caddell II* we held that no claim based on overhead calculated exclusively on application of a percentage markup had been presented to a contracting officer. Thus, we concluded that, if appellant's arguments included such an issue, we did not have jurisdiction. *Id.* at 152,336-37. Following our decisions in *Caddell I* and *II,* appellant submitted to the contracting officer a claim seeking recovery of field office overhead computed on a percentage basis for all contract modifications, including modifications previously settled on a per diem basis (R4, tab 3). Recognizing that it already had been partially reimbursed for field office overhead on a per diem basis for various modifications, Caddell deducted $122,561.00 from the amount being sought to reflect these prior

payments and avoid a double-recovery (R4, tab 3 at 4). Caddell also deducted several additional modifications from its overhead cost pool to arrive at what it considered to be a reasonable percentage markup. The Corps denied the claim in its entirety (R4, tab 1). This appeal timely ensued.

DECISION

The Government moves to dismiss on the ground that the issues to be resolved here were already litigated and decided in *Caddell I* and *II.* Alternatively, the Government requests summary judgment, contending that appellant cannot prevail in light of the *Mortenson* decision. We address the motions *seriatim.*

Motion to Dismiss

The Government first contends that this appeal is barred under principle of *res judicata*. Under *res judicata*, or "claim preclusion,"[2] a final decision on the merits bars relitigation of the same claim by the same parties or their privies. The elements of proof of *res judicata* are:

> (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first.

Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1362 (Fed. Cir. 2000).

In this case, there is no dispute that the parties here are identical to those in the earlier *Caddell I* and *II* proceedings (finding 3). Further, in *Caddell II*, appellant raised the same question involved in this appeal (*i.e.*, whether appellant could recover field office overhead through exclusive use of a percentage rate), and the Board briefly addressed that contention in its decision (finding 4). Nevertheless, no decision "on the merits" of that portion of appellant's allegations was issued. Instead, the matter was dismissed for lack of jurisdiction pending submission of a proper claim to the contracting officer. (*Id.*) A dismissal for lack of jurisdiction is not a decision "on the merits" for purposes of *res judicata*. *E.g., Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640 (Fed. Cir. 1989). Thus, *res judicata* does not bar the instant appeal because element (2) of the test has not been established.

The Corps reminds us that *res judicata* applies not only to points that actually were raised in previous litigation, but also to matters that could and should have been raised in the prior proceedings. *E.g., Case, Inc. v. United States*, 88 F.3d 1004, 1011 (Fed. Cir. 1996); *Epic Metals Corp. v. H.H. Robertson Co.*, 870 F.2d 1574, 1576 (Fed. Cir. 1989), *cert. denied*, 493 U.S. 855 (1989). In this way, *res judicata* prevents a party from pursuing

repetitious lawsuits by simply repackaging the same cause of action under nominally "different" legal theories. *E.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (*res judicata* "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever"). Although the Government correctly recites the law, it is inapplicable because we expressly declined to consider the issues in question here on jurisdictional grounds.

Accordingly, the Government's motion to dismiss is denied. Caddell's appeal is not barred by *res judicata*.

Motion for Summary Judgment

The Government alternatively seeks summary judgment on ground that appellant's claim is precluded by our decision in *M. A. Mortenson Co.*, ASBCA Nos. 40750 *et al.*, 98-1 BCA ¶ 29,658 (Senior Deciding Group). According to the Corps, appellant incorrectly seeks to utilize "whatever [field office overhead] allocation method produces the greatest recovery," whereas the Board made clear in *Mortenson* that the FAR restricts contractors to one, and only one, allocation base for field office overhead costs (Gov't mot. at 5). In response, Caddell directs our attention to FAR 31.201-2(c), which provides that:

> When contractor accounting practices are inconsistent with this Subpart 31.2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from using practices consistent with this subpart.

Relying on this provision, appellant argues that use of inconsistent methods for computing field office overhead is not necessarily impermissible, provided that the contractor does not recover more than it would have obtained through use of a consistent methodology. Appellant further insists that the cost principles and case law do not contemplate a complete "forfeiture" of job site overhead, which, in appellant's view, is the result ultimately sought by the Corps.

We evaluate a motion for summary judgment under the established standard that:

> Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. . . . The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); FED. R. CIV. P. 56. In deciding a motion for summary judgment, our task is not to resolve factual questions, but rather to ascertain whether genuine disputes of material fact are present. *E.g., Stewart & Stevenson Services, Inc.*, ASBCA No. 52140, 00-2 BCA ¶ 31,041 at 153,288. Although the burden is on the movant to establish that it is entitled to summary judgment, the moving party may prevail on its motion, if the non-moving party bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support one or more crucial aspects of the non-movant's case. *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Summary judgment is appropriate in that situation, even though some factual issues may remain unresolved, because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*, 477 U.S. at 323.

In this case, we agree with the Corps that application of a percentage base to some modifications and a per diem base to others would violate our Senior Deciding Group's interpretation of FAR 31.203(b) in *Mortenson*, not to mention our decisions in *Caddell I* and *II*. To the extent appellant seeks to do so here, its claim must fail. Appellant's efforts to evade our previous decisions by reference to FAR 31.201-2(c) are unpersuasive. That regulation does not authorize use of more than one allocation base in a situation like that presented here. Indeed, read in context with FAR 31.203(b), FAR 31.201-2(c) echoes FAR's disapproval of inconsistent accounting practices of any kind, and places an upward limit on recovery where such practices are found. Thus, FAR 31.201-2(c) is not inconsistent with our interpretation of FAR 31.203(b), and the Board will not construe regulations to be in conflict unless the provisions are hopelessly irreconcilable and no other reasonable interpretation is possible. *E.g., Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1568 (Fed. Cir. 1993). Further, although we did not reference FAR 31.201-2(c) in *Mortenson*, the same provision was in effect at the time of that decision and had no bearing on our analysis. Thus, there is no reason to revisit *Mortenson* based on FAR 31.201-2(c).

Appellant argues further that the job site overhead expenses here are not indirect costs at all but rather should be treated as direct costs under the contract (app. reply at 2, 5-6). Appellant thereby reasons that *Mortenson* is not controlling and that Caddell "has not violated FAR 31.203(c) because it is not distributing indirect costs in two different manners" (app. reply at 6). Appellant is correct that the applicable cost principle permits recovery of job site overhead as either a direct or indirect cost. FAR 31.105(d)(3). Nevertheless, as the Board observed in *Mortenson*, treatment as a direct cost would require the contractor to substantiate its job site overhead expenses "change-by-change." *Mortenson*, 98-1 BCA at 146,945. Thus, use of a percentage markup, as appellant seeks to do here, would not be permissible if field office overhead were classified as a direct cost. Moreover, if field office overhead were treated as direct costs, a contractor often could not expect any significant recovery for change orders that did not extend contract performance because field office overhead expenses, as described in FAR 31.105(d)(3), tend to be fixed costs which do not increase in the absence of a time extension. Thus, appellant's view that

job site overhead should be treated as direct costs is inconsistent with the premise of its claim and lacks the factual support to survive the Corps' motion. *Celotex, supra*. Accordingly, we grant the Government's motion in part.

On the other hand, unlike appellant's previous claim, which was the subject of our decisions in *Caddell I* and *II*, we do not read appellant's present claim as seeking to apply a percentage allocation base to some modifications and per diem base to others. Rather, appellant now seeks to apply the same percentage markup to *all* modifications. (Finding 4) Because Caddell seeks to employ a consistent percentage rate for all modifications, instead of a mix of percentage and per diem, its approach is not necessarily contrary to *Mortenson*. It is true that, prior to the Senior Deciding Group's decision in *Mortenson*, a majority of a Board panel had concluded that contractors may not recover job site overhead as a percentage of cost for change orders that do not extend contract performance, and that recovery of field office overhead would be permitted only on per diem basis for modifications that resulted in a contract extension. *M. A. Mortenson Co.*, ASBCA Nos. 40750 *et al*., 97-1 BCA ¶ 28,623. Nevertheless, the Senior Deciding Group, in *dictum*, rejected that view in its decision, noting that a plurality of the participating judges disagreed with the reasoning of the earlier opinion and stating that a "contractor may choose any acceptable distribution base for allocating its job site overhead pool to particular cost objectives, but not more than one." *Mortenson*, 98-1 BCA at 146,946. Appellant's argument would have us authorize a retroactive change in its accounting practices, because appellant's claim backs out amounts recovered using a per diem method to recover field office overhead during performance, while seeking to go back and recover its field office overhead costs based exclusively on a percentage rate. This Board has made it clear that we will approve retroactive accounting changes only in rare circumstances because of the "commercial havoc" that would ensue if such changes were more regularly permitted. *E.g., Blue Cross and Blue Shield Ass'n.*, ASBCA No. 26529, 86-2 BCA ¶ 18,751 at 94,427, *aff'd*, 13 Cl. Ct. 710 (1987), *aff'd*, 852 F.2d 1294 (Fed. Cir. 1988) (table), *cert. denied*, 488 U.S. 993 (1988). Neither party has adequately addressed this, and other, issues. Indeed, as is too frequently the case, we are confronted here with an issue of considerable import in a motion with a sparse record. Neither side has so much as filed affidavits. Moreover, neither side has comprehensively laid out the accounting issues.

If we were to follow the *dictum* in *Mortenson*, and we think it would be imprudent to attempt to finally resolve that issue on this motion with its meager record, appellant could recover for field overhead where there was no delay if it were able to establish entitlement to a retroactive accounting change because of special circumstances. *Blue Cross, supra*. It is conceivable that such circumstances exist in appellant's allegation that its dual treatment of field overhead was accepted for years, and that the use of only the per diem method was forced upon it by the Corps. The record contains sufficient evidence to support a finding that this is, at least, a genuine issue (findings 2, 3).[3] Accordingly, the Corps' motion is denied with respect to its contention that Caddell should be precluded from using any but a time based distribution base for recovery of field overhead.

SUMMARY

Because the Board did not previously evaluate the merits of the instant claim, the Government's motion to dismiss is denied. We grant the Government's alternative motion for summary judgment with respect to recovery of field office overhead as a direct cost or by use of more than one distribution base. The motion is otherwise denied.

Dated: 1 May 2002

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signature continued)

I concur

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

I concur

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

NOTES

[1] Where appellant has not excepted to or identified evidence rebutting the Government's factual assertions, we find the facts to be undisputed.

[2] We do not understand the Government to have raised the companion principle of issue preclusion, or collateral estoppel, and thus do not address it.

[3] Recovery may also be contingent on, *inter alia,* proof there was no double recovery, no accounting inconsistency not yet apparent on this limited record, and that the

retroactive accounting change was not merely an artifice concocted for the modifications in the claim, to be promptly abandoned for other purposes. These are matters either not raised or for which sufficient evidence has been presented to create a genuine issue (*e.g*., finding 4).

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. 53144, Appeal of Caddell Construction Company, Inc. rendered in conformance with the Board's Charter.

Dated:

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