ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Environmental Safety Consultants, Inc.	)	ASBCA No. 53485
	)	
Under Contract No. N62472-90-C-5164	)	

APPEARANCE FOR THE APPELLANT: Mr. Peter C. Nwogu
President

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Headquarters
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE TODD
ON APPELLANT'S MOTION FOR RECONSIDERATION AND
THE GOVERNMENT'S MOTION TO DISMISS AND
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Appellant Environmental Safety Consultants, Inc. (ESCI) filed a timely motion for reconsideration of the Board's decision on its motion for summary judgment, dated 1 July 2003, on the grounds that the government had not produced evidence to dispute the facts in its supporting evidentiary documents and it was entitled to recovery of its reasonable job costs as a matter of law. *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 03-2 BCA ¶ 32,298. This docketed quantum appeal follows the Board's decision on entitlement in *Environmental Safety Consultants, Inc.*, ASBCA No. 47498, 00-1 BCA ¶ 30,826. Familiarity with the Board's prior decisions is presumed. Appellant filed additional support for its motion on 18 July and 29 July 2003. The government opposed appellant's motion on the grounds that, with some exceptions, appellant's costs were never incurred or are otherwise unsupported.

The government filed a motion to dismiss the portion of appellant's statement of costs relating to invoices from Central New York Industrial Services, Inc. (CNYIS) alleging that they were not part of appellant's certified claim. In the alternative, the government moved for summary judgment that appellant was not entitled to recover CNYIS costs since they were not incurred. The government also requested summary judgment that costs that appellant has not paid, involving other subcontractors and its president's salary, were not incurred. The government submits that all the claimed costs, with certain exceptions for

which it admits entitlement, are not recoverable because of a lack of supporting evidence and asserts that it is, therefore, entitled to summary judgment as a matter of law.

Appellant filed its opposition to the government's motions with a supporting declaration of appellant's president and additional documents. The Board has held a hearing on the merits of the appeal. This decision is issued in the interests of clarifying the issues presented for the parties' post-hearing briefing.

STATEMENT OF FACTS

Appellant's claim, dated 28 June 1992, was certified by appellant's president, Mr. Peter C. Nwogu, in the amount of $150,587.95. The claim included costs for extra time spent by Mr. Nwogu and subcontractors Godwin Pumps; S. Wagner, Inc.; and Industrial Weighing Systems with respect to lagoon # 1. (47498, ex. A-78, tab 20) The claim also included lagoon # 1 costs invoiced by Chemical Waste Management (CWM) (*id.*, tab 22) and Analytical Services, Inc. (*id*., tab 23). With respect to lagoon # 2, the claim included costs for subcontractors Enpro; Continental; ECP, Inc.; CBS Environmental; Law & Company; Envirite; CWM; and Horwich Trucking (*id.*, tab 45).

Appellant's claim did not include CNYIS costs, but stated that CNYIS "mobilized a filter press to lagoon 2 . . . [but] the Navy would not allow ESCI to begin any on-site operations, or liquid sludge removal, on Lagoon 2 work" (*id.* at 19, 26-28, tab 45). Appellant's claim did not include costs for Waste Conversion, Inc. (WCI), but stated that the government directed it to replace this subcontractor for lagoon # 1 work with another subcontractor (*id*. at 7). Appellant included in its claim a letter from WCI to the government that stated that it held the contractor responsible for all charges prior to its withdrawal as a subcontractor on the project (*id.*, tab 7).

As of 23 April 1992, CNYIS had sued ESCI for nonpayment of its invoices in Georgia state court. ESCI disputed liability. ESCI argued that there was no contract between ESCI and CNYIS because the government failed to approve CNYIS without insurance certification and satisfactory equipment (gov't motion, ex. T). ESCI did not make payment to CNYIS. In June 1993, the lawsuit was voluntarily dismissed (gov't motion, ex. U).

On 2 February 1994, the contracting officer issued the final decision denying appellant's claim. *ESCI*, 00-1 BCA at 152,142. Appellant filed a timely appeal.

In our decision on entitlement, we found CNYIS had an unpaid claim against appellant in the amount of $32,595 for mobilization, equipment, personnel, equipment standby, and demobilization. We concluded that the government generally acted improperly in rejecting appellant's proposals for subcontractors to perform work requiring government approval. The stated reason for not approving CNYIS as appellant's subcontractor was a

lack of evidence of current insurance. *ESCI,* 00-1 BCA at 152,135. After the government terminated ESCI's contract, it awarded a completion contract for removal of the Lagoon # 2 sludge to CNYIS. *Id.* at 152,141.

In 1999 and 2000, appellant filed for relief in Bankruptcy Court in Georgia, and listed its creditors holding unsecured claims, but did not list any vendors identified in its claim to the contracting officer. Appellant is not before the Bankruptcy Court because its cases were dismissed for failure to file monthly operating schedules and pay required fees. (Gov't motion, exs. J, K, L, M)

On 14 August 2001, the Board directed the parties to comply with its Order on Proof of Costs. Appellant filed a complaint for quantum determination of its entitlement that included a statement of costs schedule detailing the amount sought on appeal. Appellant did not certify this filing as a claim. ESCI included the amount of $32,595 billed by CNYIS among the subcontractor charges resulting from the government's improper interference with appellant's performance (compl. ¶ 22, exs. A, H).

In pre-hearing discussions with the Board, the government raised issues of appellant's liability to third party subcontractors and vendors. ESCI attempted to discuss the subject third party costs with CYNIS but was unsuccessful in contacting CNYIS by telephone. ESCI sent a letter to CNYIS stating the government's position with respect to the amount owed and ESCI's intention to pay CNYIS in accordance with the Board's decision on quantum. (Gov't motion, ex. Q at 6)

DECISION

Government Motion to Dismiss

The government argues that the inclusion of CNYIS costs in appellant's statement of costs amounts to the assertion of a new claim that was not submitted to the contracting officer for decision and is thus beyond the jurisdiction of the Board. The government maintains that CNYIS did not perform work for ESCI and did not submit invoices for the changed or differing site conditions of the sludge which were "primarily" the issues presented in appellant's claim (gov't motion at 8). Appellant submits that its agreement with CNYIS was that it would pay CNYIS for use of its mobile filter equipment to dewater lagoon # 2 when the government paid appellant. CNYIS invoiced ESCI costs it incurred because of the equipment standby. Appellant alleges that the CNYIS costs resulted from the government's hindering of appellant's performance.

To determine whether a separate new claim has been presented, we assess whether or not the claims are based on a common or related set of operative facts. *Placeway Construction Corp. v. United States,* 920 F.2d 903, 907 (1990); *Adkins Construction, Inc.,* ASBCA No. 46081 *et al.,* 94-1 BCA ¶ 26,575 at 132,231. New elements of damages have

been held not to constitute additional claims or revised new claims. *Transco Contracting Company,* ASBCA No. 28620, 85-2 BCA ¶ 17,977 at 90,171. Here appellant's claim was for extra costs resulting, *inter alia,* from the government's delays and disruptions when it was trying to begin Lagoon # 2 work (47498, ex. A-78 at 25). Among the proposed subcontractors, CNYIS was one that had equipment at lagoon # 2, but was not permitted to start work, removed its equipment, and submitted invoices for its costs to appellant. *ESCI,* 00-1 BCA at 152,135. The operative facts underlying this claim involved the government's failure to cooperate in granting appellant access to the lagoons and approval for subcontractor work. These facts were common for all the subcontractors and involved an identical defense presented by the government. We have concluded that appellant's claim with respect to the CNYIS invoices was not a separate new claim, and we have jurisdiction to decide the amount of appellant's recovery for CNYIS costs, if any.

Government Motion for Partial Summary Judgment

Summary judgment is properly granted when 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); *Information Sys. and Networks Corp.,* ASBCA No. 46119, 96-1 BCA ¶ 28,059, *aff'd on reconsid.,* 96-1 BCA ¶ 28,094. A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). In deciding a motion for summary judgment, we are not to resolve factual disputes, but ascertain whether material disputes of fact are present. *DynCorp,* ASBCA No. 49714, 97-2 BCA 29,233. If the record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial, and the motion must be granted. *Matsushita Electr. Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). If there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems, Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988); *McKnight Constr. Co.,* ASBCA No. 47937, 97-2 BCA ¶ 29,102.

The government maintains that it is entitled to judgment as a matter of law on the grounds that appellant's costs claimed were not incurred or are otherwise unsupported. The government excepts the amount of $31,082.72,[*] which it has admitted appellant is entitled to recover. The government argues first that appellant has not incurred the costs charged by its subcontractors because it has not paid them. Second, the government suggests that CNYIS "no longer exist[s]" based on a government employee's sworn statement of information received from the New York Corporation Division that CNYIS was dissolved and listed in inactive status. Appellant has disputed the government's evidence that it cannot

[*] This amount includes $20,213.72 for surcharges due to additional solids content and contaminants in lagoon # 1 and $10,869 for remission of liquidated damages.

locate appellant's subcontractors (app. reply at 8). Third, the government maintains that an unidentified statute of limitations bars suit by CNYIS against appellant, and therefore, the costs were not incurred and cannot be recovered.

Costs may not be charged against the government unless actually incurred. *LA Limited, LA Hizmet Isletmeleri,* ASBCA No. 53447, 04-1 BCA ¶ 32,478 at 160,635, and cases cited therein. An incurred cost is defined as "an amount paid out in the past or an obligation to be paid out in the future." *Riverside Research Institute,* ASBCA No. 28132, 87-2 BCA ¶ 19,693 at 99,718, *reversed on other grounds,* 860 F.2d 420, 422 (Fed. Cir. 1988) (defining cost as the amount a contractor forgoes or gives up, *i.e.*, its sacrifice to obtain goods or services). *See also Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1370 (Fed Cir. 2003) (definitions of cost include an item of outlay incurred in the operation of a business enterprise); *Norman M. Giller & Associates v. United States,* 535 F.2d 37, 41 (Ct. Cl. 1976) (by contract the government agreed to reimburse indirect contract expenses as to which the contractor "incurred a cost and paid or incurred an obligation to pay"); *Ocean Technology, Inc.,* ASBCA No. 30021, 85-2 BCA ¶ 17,983 at 90,211 (cost incurred represents an amount paid out in the past or to be paid in the future). We have held that a contractor may not recover for costs allegedly incurred by a subcontractor if there is no legal obligation to pay that subcontractor. *H.E. Johnson Co., Inc.,* ASBCA No. 50861, 98-2 BCA ¶ 29,868 (no recovery of a subcontractor's equipment costs where there was no agreement or billing to the contractor for costs attributable to the Government-caused shutdown); *McRae Industries, Inc.,* ASBCA No. 48125, 96-2 BCA ¶ 28,492 (no recovery where the contractor had no legal obligation in its agreement with a supplier of leased equipment to pay a technical data fee).

In this instance we have found signed acceptance by ESCI of the CNYIS proposal to perform the sludge removal work. *ESCI,* 00-1 BCA at 152,135. The underlying facts of this agreement with CNYIS are sufficient to raise a genuine issue of material fact as to whether appellant is under an obligation to make payment to CNYIS.

The government submits that the CNYIS costs are unsupported. Witness testimony at the entitlement hearing and the invoices submitted by CNYIS to ESCI are sufficient to raise genuine issues of material fact as to the amount appellant may be entitled to recover on behalf of this subcontractor. *Id.*

The government's argument that appellant's CNYIS costs are not recoverable as a matter of law because CNYIS no longer has a cause of action against ESCI to recover the costs is without merit. The government states that suit would be barred in Georgia, appellant's corporate address, or in New York, the corporate address of CNYIS, based on law digest excerpts from MARTINDALE-HUBBELL LAW DIGEST (gov't mot. at 14, ex. V). Appellant argues that any statute of limitations has been tolled by the pending litigation. Assuming *arguendo* the applicability of some statute of limitations, it would not extinguish ESCI's obligation to pay. The running of a statute of limitations provides a defense, but does

not extinguish the claim, which may be revived with the defendant's consent. *Crown Coat Front Co., Inc. v. United States*, 275 F. Supp. 10 (S.D.N.Y.1967), *aff'd*, 395 F.2d 160 (2d Cir. 1968), *cert. denied*, 393 U.S. 853 (1968). The government has failed to establish that a governing statute bars appellant's obligation to pay CNYIS as a matter of law.

The government also names Waste Conversion, Inc. (WCI) as one of appellant's subcontractors that allegedly cannot recover costs in litigation against ECSI (gov't mot. at 14). There is no dispute that WCI incurred costs pursuant to an agreement with ESCI. The government points to Mr. Nwogu's deposition testimony that appellant paid $5,000 to WCI in settlement of a larger unidentified amount claimed by WCI. The government argues that "the statute of limitations has run as to any cause of action which might be available to any of the vendors involved who are still in existence" (gov't mot. at 15). The statute of limitations is not a bar to recovery, as discussed above. The assertions that ESCI vendors no longer exist are made without information as to the effect, if a company were out of business, that that fact would have on appellant's claims. *See Murdock Machine & Engineering Company of Utah*, ASBCA No. 42891, 93-1 BCA ¶ 25,329 at 126,194, *reconsid. denied*, 93-2 BCA ¶ 25,887, *aff'd in part and reversed in part on other grounds*, 19 F.3d 41 (Fed. Cir. 1994) (table). The government provides no authority for an assumption that there can be no compensation to a contractor for costs incurred by its subcontractor or its mark-ups if the subcontractor no longer exists. Appellant disputes whether subcontractor costs were incurred in stating that agreements with subcontractors were provided to the government and the approximate amount unpaid to subcontractors is in appellant's financial records (Nwogu decl., filed 8 Oct. 2003, at 7).

The government's argument concerning ESCI's alleged failure to list third party claims under this contract in its petitions for bankruptcy is vague, and we find it insufficient to bar recovery of ESCI subcontractor costs. The government states that "it is unclear what role, if any, appellant's attempts to file for bankruptcy have had, or should have, on proceedings before the Board, including this appeal" (gov't mot. at 20). The government states the alleged exclusion of the third parties from bankruptcy schedules and for whom costs are claimed here is "problematic" (gov't mot. at 21). Disputed facts related to appellant's obligations to pay its subcontractors must be resolved after receipt of post-hearing briefs and review of the complete record.

The government alleges that with the exception of certain costs, partial summary judgment is appropriate because there is "a complete lack of evidence to establish that claimed costs were incurred" (gov't mot. at 17). Appellant has disputed the government's facts stating that its financial records in 1991 were provided to the government for audit and records on file at the Board do not support the government's theories (Nwogu decl. at 7). The complete record needs to be reviewed before the issues presented by appellant's claim for recovery can be resolved as a matter of law.

Appellant's Motion for Reconsideration of the Board's Decision
Denying Its Motion for Summary Judgment

Appellant filed a motion for reconsideration of the Board's decision denying its motion for summary judgment claiming that identified documents supported its quantum recovery and the government failed to dispute the evidence or show that the records were unreliable or falsified (app. mot. at 1, tab A-1 at 1). The government saw nothing in appellant's motion that required a response (gov't letter, dated 12 August 2003, to the Board). The government's position is that except for the amount it admits, appellant's costs claimed were never incurred or are otherwise unsupported (gov't mot. at 22).

Appellant has referenced aspects of the record to support its costs claimed, but the government conducted discovery and presented issues of disputed facts that cannot be resolved as a matter of law. We do not find any compelling reason to disturb our original decision. Our determination of whether appellant has met its burden of proof for recovery of the quantum claimed will depend upon complete review of the evidentiary record as developed at the hearing.

CONCLUSION

The government's motion to dismiss is denied. The government's motion for partial summary judgment is denied. Appellant's motion for reconsideration is denied, and the Board's decision denying appellant's motion for summary judgment is affirmed.

Dated: 7 May 2004

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

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. 53485, Appeal of Environmental Safety Consultants, Inc., rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals