ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Analysas Corporation	)	ASBCA No. 54183
	)	
Under Contract No. DAAA15-93-D-0010	)	

APPEARANCES FOR THE APPELLANT: Andrew Mohr, Esq.
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Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
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Agency, Manassas

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
RESPONDENT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Analysas Corporation (appellant) has claimed amounts unpaid under the captioned Army contract for technical, environmental services, and has moved for summary judgment on the first count of its complaint. Respondent opposes that motion and has cross-moved for partial summary judgment thereon. The second count of the complaint is not in issue in these motions.

STATEMENT OF FACTS (SOF)
FOR PURPOSES OF THE MOTIONS

1. On 3 September 1993, Contract No. DAAA15-93-D-0010 was awarded to the Small Business Administration (SBA) to provide services and support on environmental programs at military installations or sites formerly owned by the government. SBA subcontracted the contract to appellant under SBA's 8(a) program. (R4, tab 1)

2. Schedule § B.1 of the contract was an Army clause "52.0000-4122 INDEFINITE QUANTITY TASK ORDER CONTRACT (OCT 88)," which provided in pertinent part:

> a. This is an Indefinite Quantity/Indefinite Delivery contract as defined at FAR 16.504.
>
> . . . .

> c. The contract minimum and maximum (see Section I, clause entitled "Indefinite Quantity" (FAR 52.216-22)) shall be as follows:
>
> (1) The minimum quantity shall be $299,051.00.
>
> (2) The maximum quantity shall be 48,725 direct labor hours[.]
>
> d. The contractor shall receive a fixed fee as negotiated for each task order/delivery order. In no event shall such fixed fee exceed 10% of the *estimated cost* . . . for the task order/delivery order [DO]. . . . [Emphasis added]
>
> . . . .
>
> f. Individual delivery order [sic] issued under the basic contract will use the pricing arrangement indicated below:
>
> Cost-Plus-Fixed-Fee Completion Form (FAR 16.306(d)(1))

(R4, tab 1 at 2, B-1).[1]

3. The contract included the FAR 52.216-22 INDEFINITE QUANTITY (APR 1984) clause, which stated in pertinent part:

> (a) This is an indefinite-quantity contract for the supplies or services specified . . . in the *Schedule*. The quantities of supplies and services specified in the *Schedule* are estimates only and are not purchased by this contract.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the *Schedule* up to and including the quantity designated in the *Schedule* as the "maximum." The Government shall order at least the quantity of supplies or services designated in the *Schedule* as the "minimum." [Emphasis added]

[1] The contract used "task order" and "delivery order" interchangeably.

> (c) Except for any limitations on quantities in the Delivery-Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. . . .

Though required by FAR 16.505(b) for indefinite quantity contracts, Analysas' contract did not include a clause substantially the same as the FAR 52.216-19 DELIVERY-ORDER LIMITATIONS (APR 1984) clause that set minimum and maximum dollars or quantities for a DO. (R4, tab 1, ¶ I-96)

4. The contract included the FAR 52.216-18 ORDERING (APR 1984) clause, which provided in ¶ (a): "Any supplies and services to be furnished under this contract shall be ordered by issuance of [DOs]" and in ¶ (b): "All [DOs] are subject to the terms and conditions of this contract. In the event of conflict between a [DO] and this contract, the contract shall control" (R4, tab 1 at I.95).

5. The contract incorporated by reference the FAR 52.232-20 LIMITATION OF COST (APR 1984) clause (LOC clause), which provided in pertinent part:

> (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the schedule . . . .
>
> (b) The Contractor shall notify the contracting officer [CO] in writing whenever it has reason to believe that—
>
> (1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; . . . .
>
> . . . .
>
> (d) Except as required by other provisions of this contract . . .
>
> (1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule . . . .

(R4, tab 1, ¶ I.73) The FAR instructions for the LOC clause stated that the government could substitute "Task Order" or other appropriate designation for "Schedule." In the instant contract, respondent did not make such substitution (R4, tab 1).

6. The contract incorporated by reference the FAR 52.215-33 ORDER OF PRECEDENCE (JAN 1986) clause, which provided that any inconsistencies in the solicitation or contract were to be resolved by giving precedence in the following order: (a) the Schedule (excluding specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications (R4, tab 1, ¶ I.29).

7. The contract's Standard Form 26 AWARD/CONTRACT sheet, Block 15G, set forth: "TOTAL AMOUNT OF CONTRACT ? $ -0-" and Block 16, Part I, included §§ A through H in the "Schedule" (R4, tab 1 at 1). Contract §§ A through H stated no dollar amount of "estimated cost" for the contract (R4, tab 1 at 1 to H-8).

8. Task orders were to be assigned by the CO and sent to the contractor for evaluation. Within 10 days, the contractor was to submit, *inter alia*, the estimated cost for the task order. The CO was to negotiate with the contractor as necessary, and to authorize the contractor to proceed with the task by written DO. (R4, tab 1, ¶ C.4)

9. Respondent issued DOs on DD Form 1155, Order for Supplies or Services. Block 16 thereon stated: "This [DO] is issued . . . in accordance with and subject to terms and conditions of above numbered contract" which number was set forth in Block 1. Block 19 thereon was entitled Schedule of Supplies/Service. The six DOs respondent issued under the contract between September 1993 and August 1995, set forth the following estimated cost or total estimated cost in Block 19:

DO No. 1	"total estimated cost of	$ 76,398"
DO No. 2	"total estimated cost of	$192,783"
DO No. 3	"total estimated cost of	$192,024"
DO No. 4	"total estimated cost of	$388,418"
DO No. 5	"Estimated Cost	$ 31,666.95"
DO No. 6	"Estimated Cost	$101,000"

(R4, tabs 3, 6, 8, 10-12). The foregoing amounts for DOs 1, 2 and 3 were subsequently amended.

10. According to a February 1999 government audit report, appellant submitted invoices for the following costs plus fee for the six delivery orders:

DO No. 1	--	$ 96,845
DO No. 2	--	$377,480
DO No. 3	--	$320,776
DO No. 4	--	$463,218
DO No. 5	--	$ 36,934
DO No. 6	--	$146,931
[Total		$1,442,183]

(R4, tab 45 at 2). Each of those amounts invoiced exceeded the total estimated costs, as last amended, for each of the six DOs.

11. Respondent states that it has paid appellant the following amounts:

DO No. 1 --	$ 95,302
DO No. 2 --	$319,155
DO No. 3 --	$273,290
DO No. 4 --	$388,418
DO No. 5 --	$ 33,732
DO No. 6 --	$109,080
[Total	$1,218,977]

Respondent limited payments to the total estimated costs specified in each DO, as amended, because appellant did not notify the CO that the costs it expected to incur for each DO would exceed 75% of the estimated cost in each DO. (R4, tab 63 at 4-5)

12. Appellant's 28 October 2002 certified claim sought the differences between the amounts claimed in its invoices and the amounts respondent paid, which it calculated as follows:

DO No. 1 --	$ 1,542.80
DO No. 2 --	$ 58,324.28
DO No. 3 --	$ 47,485.42
DO No. 4 --	$ 74,810.26
DO No. 5 --	$ 3,202.06
DO No. 6 --	$ 37,851.03
Total	$223,215.85[2]

(R4, tab 57 at 5)

13. The CO denied appellant's claim (R4, tab 63). Appellant filed a timely appeal with the Board. In the first cause of action in its complaint, appellant alleged that the LOC clause applies to the contract as a whole, not to the individual DOs, and hence the labor hours it incurred under each DO, and under the six DOs collectively, did not trigger the LOC (compl., ¶¶ 33-37). In its second cause of action, appellant alleged that the indirect cost overruns it incurred were not foreseeable (compl., ¶ 38-39).

14. Appellant billed for a total of 12,488 direct labor hours under the contract (R4, tab 93).

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[2] Appellant's certified claim exceeds by $9.85 the $223,206 difference between the amounts invoiced and paid (SOF ¶¶ 10-11), an unexplained discrepancy.

15. Attached to respondent's reply brief on the summary judgment motions was a declaration from CO William Hofmann. Appellant moved to strike the declaration and all quotes from, and references to, the declaration. Appellant also seeks its "costs and fees incurred by this motion." The government opposes appellant's motion to strike.

DECISION

I.

Respondent's attempted use of the Hofmann declaration conflicts with its position that the summary judgment motions raise no genuine issues of material fact, and its inclusion in the last brief on the motions potentially prevents appellant from responding to it. As the Board analyzes the facts and law, it is not necessary to resort to the Hofmann declaration to decide the cross-motions for summary judgment. Accordingly, we will not consider the Hofmann declaration or the arguments based upon it. *See Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164-65 (10th Cir. 1998), *cert. denied*, 525 U.S. 1054 (1998) (when new material is presented in a reply brief, a court may permit a surreply or refrain from relying on the new material); *Globe Construction Company*, ASBCA No. 21365, 78-2 BCA ¶ 13,486, *aff'd on other grounds*, 230 Ct. Cl. 957 (1982) (Board disregarded new material in a reply brief that was irrelevant to the appeal issues).

The Board does not have jurisdiction to award costs and attorney fees on interlocutory motions, such as appellant's motion to strike. Recovery of such costs and fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, is premature before the merits of the appeal are decided. *See Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,954; *Dalton Construction Co.*, ASBCA Nos. 30833 *et al.*, 86-1 BCA ¶ 18,604 at 93,390. We deny appellant's request for the costs and fees incurred in presenting the motion to strike without prejudice to any subsequent EAJA application.

II.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); *U.S. Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001). The parties agree that there are no disputed issues of material fact in the SOF herein. The disputed legal issue, whether the LOC clause applied only to the contract as a whole or to each task order or DO individually, is a matter of contract interpretation that is appropriate for decision by summary judgment. *See TRW, Inc.*, ASBCA No. 51172, 02-2 BCA ¶ 31,919 at 157,720.

Appellant argues that the LOC clause required it to notify the CO when it would exceed 75 percent of the estimated cost of the contract, not of each task order or DO individually, and it never exceeded 75 percent of the maximum direct labor hours (or costs) specified in the contract. Respondent argues that appellant was required to notify the CO whenever it had reason to believe that it expected to incur costs in the next 60

days that, when added to prior costs, would exceed 75 percent of the estimated cost of a task order; since appellant did not do so, respondent had no obligation to pay appellant any amount (exclusive of fee) exceeding the estimated cost specified in the Schedule of each task order.

The contract before us is an indefinite-delivery, indefinite-quantity (ID/IQ) type contract under which services were to be ordered by DOs (SOF, ¶¶ 2-4). The contract included, or incorporated by reference, the FAR 52.215-33 ORDER OF PRECEDENCE, 52.216-22 INDEFINITE QUANTITY, and 52.232-20 LIMITATION OF COST clauses, each of which referred to the "Schedule" (SOF, ¶¶ 3, 5, 6). The contract's Standard Form 26, AWARD/CONTRACT, Block 16, included §§ A through H in the "Schedule," and its Block 15G set forth "$ -0-" for the "TOTAL AMOUNT OF CONTRACT" (SOF, ¶ 7). To notify the CO whenever appellant had reason to believe that it expected to incur costs in the next 60 days that would exceed 75 percent of the $0 total amount of the contract was impossible and meaningless.

The Schedule § B.1.c phrase "maximum quantity shall be 48,725 direct labor hours" (SOF, ¶ 2) did not specify any "estimated cost" for the contract, but only the maximum amount of services respondent had the right to order. Schedule §§ A through H stated no dollar amount of "estimated cost" for the contract (SOF, ¶ 7). Schedule § B.1.d provided for a fixed fee "for each task order/delivery order" that was limited to "10% of the *estimated cost* . . . for the task order/delivery order" (emphasis added) (SOF, ¶ 2). Section B.1.d connected the phrase "estimated cost" with each DO. In each DO, DD Form 1155, Block 19, was a Schedule of Supplies/Service that specified the estimated cost or total estimated cost for each DO (SOF, ¶ 9). The contract's FAR 52.216-18 ORDERING clause (SOF, ¶ 4) and each DO document stated that the terms of the contract applied to the DO. Those terms included the LOC clause. Therefore, the contract required Analysas to notify the CO whenever it expected to expend more than 75 percent of the estimated cost "specified in the Schedule" of a DO. We agree with respondent's interpretation of the phrase "specified in the Schedule" in the LOC clause, which gives effect to the relevant provisions of the contract, and leaves none inoperative or meaningless. *See Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1057 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 814 (1983).

Lockheed Electronics Co., Inc., ASBCA No. 17566, 73-1 BCA ¶ 9871 at 46,164-66, on which appellant relies, held that, since the contract Schedule unambiguously stated that the "total estimated cost for this Lot [1] shall be $168,000.00" (which was amended to $407,261), the estimated cost figure for "Lot 1" in the "basic 'Job Order' contract" was controlling, not the estimated cost figure in each of the 96 individual job orders issued under Lot 1. In the instant appeal, the contract Schedule lacked the critical provision in *Lockheed*; it set forth no dollar figure for the estimated cost or total estimated cost of all DOs to be issued thereunder.

Appellant argues that respondent could have provided that the LOC clause referred to the estimated costs in each DO by substituting the phrase "DO" or "task

order" for the word "Schedule" in the LOC clause. Although the instructions for the LOC clause allowed respondent to substitute DO or "task order" for "Schedule" in the clause, it was not required to do so, and its failure to do so does not cause a conflict or ambiguity in the contract terms. We have considered appellant's other arguments and find them to be without merit.

CONCLUSION

Appellant's motion for summary judgment on its first cause of action is denied. Respondent's cross-motion for partial summary judgment on appellant's first cause of action is granted.

Dated: 12 May 2004

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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. 54183, Appeal of Analysas Corporation, rendered in conformance with the Board's Charter.

Dated:

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