ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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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: Susan Raps, 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 CROSS-MOTIONS FOR RECONSIDERATION

Appellant Environmental Safety Consultants, Inc. (ESCI) filed a timely motion for reconsideration of the Board's decision on quantum on the grounds that it was prevented by the government from articulating the basis for all the cost items in its claim of $210,492 and there is evidence to substantiate specific costs that were found without support (mot., dtd. 21 March 2005, and undated mot., rec'd 15 April 2005, submitted with supporting documents). We held appellant entitled to an equitable adjustment of $103,399, plus interest, and denied recovery of the balance of appellant's claim primarily for lack of proof of amount. *Environmental Safety Consultants, Inc. (ESCI II),* ASBCA No. 53485, 05-1 BCA ¶ 32,903. The government responded with a request to strike the entirety of appellant's submissions as an offer of post-trial testimony (resp., dtd. 20 May 2005).

The government filed its timely motion for reconsideration on the grounds that the Board made factual and legal errors with respect to supporting evidence, the standard of proof for quantum, the total cost analysis of lagoon # 2 additional costs, and incurred subcontractor costs. The government also argues that the Board erred in its conclusion in its decision on entitlement that there was a changed condition in lagoon # 1. (Mot., dtd. 8 April 2005) Appellant has opposed the government's motion as being without merit and not supported by the facts (resp., dtd. 5 May 2003 at 3). Appellant also replied to the government's response to its motion for reconsideration (reply, dtd. 15 June 2005). The

government moved to strike the entirety of appellant's reply as additional, unsworn testimony offered after trial and asked the Board to take judicial notice of a state court order involving ESCI in an unrelated matter (reply, dtd. 7 July 2005). Familiarity with the Board's prior decisions on entitlement[1] and quantum is presumed.

We assess a motion for reconsideration against the standard of whether the motion is based upon any newly discovered evidence that was not reasonably available to the moving party at the hearing, errors in our fact findings, or legal theories which the Board failed to consider in formulating its original decision. *Management Resource Associates, Inc.,* ASBCA Nos. 49457, 50866, 04-1 BCA ¶ 32,491 at 160,723; *ITT Avionics Div.,* ASBCA No. 50403 *et al.*, 03-2 BCA ¶ 32,378 at 160,214. The Board will not generally revisit an issue once decided during the course of litigation. *See Black River Limited Partnership,* ASBCA No. 51754, 02-1 BCA ¶ 31,839. A second chance to the losing party to prove its case by evidence which it could have produced at the first submission is not to be granted lightly and good cause must be shown before the losing party is given "a second bite of the apple." *Freeman General, Inc.,* ASBCA No. 34611, 89-3 BCA ¶ 22,096, citing *Madison Park Clothes, Inc.,* ASBCA No. 4234, 61-1 BCA ¶ 3054 at 15,809. A party is not free to withhold evidence at a Board hearing and then to introduce it on reconsideration. *See Charles R. Shepherd, Inc.,* ASBCA No. 13412, 70-2 BCA ¶ 8531 at 39,663. The parties' motions and supporting submissions do not present newly discovered evidence or arguments that were not previously considered by the Board. We have reviewed all the lengthy submissions and the record only to determine if errors were made in the amount of recovery to which appellant was held entitled. We discuss some aspects of the decision to verify our conclusions and to provide the parties further understanding of the Board's findings of fact and conclusions of law.

Appellant argues that there is evidence in support of all direct labor costs claimed for Mr. Nwogu and appellant's employees; time that the backhoe was used for the additional lagoon # 1 work; time that the portable scales were rented but idle; increased CWM transportation costs; travel expenses in connection with lagoon # 2; and lagoon # 2 testing performed by Envirite.[2] Appellant submits that all its costs were substantiated because estimates in its claim are reasonable and are supported by the events and

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[1] *Environmental Safety Consultants, Inc. (ESCI I),* ASBCA No. 47498, 00-1 BCA ¶ 30,826.

[2] Appellant argues entitlement to recovery of other amounts without citation to its claim. These include $684 for turf and liner damage and an unstated amount for time Mr. Les Hill spent as a certified public accountant (CPA) for appellant. The record only shows the amount of $800 in a cost proposal for Mr. Hill's presence at the meeting on 29 August 1971, which we found was voluntary and not the result of an alleged government requirement to use a CPA to prepare the claim. (*ESCI I,* 00-1 at 152,148, n.11; 47498, ex. A-78, tab 23)

circumstances of performance of the contract which the government has not disputed with testimony of witnesses who were present for the events (app. resp., dtd. 5 May 2005 at 6). We stated in our decision that appellant has the burden to prove "the *amount* of loss with sufficient certainty. . . " *ESCI II,* 05-1 BCA at 163,019 (emphasis added). Contrary to appellant's assertion, it was not necessary for Mr. Haynes, the government's certified cost engineer, who was qualified to testify as an expert witness, to testify to his written estimates and be subjected to cross-examination for the Board to rely on aspects of the government's Response to the Statement of Costs that he prepared (app. resp., dtd. 5 May 2005 at 4). There was no reason for the government to dispute events underlying the performance of the contract which were the subject of the Board's findings in its decision on entitlement.

Our decision denied some of appellant's claims because appellant had not cited evidence to support the claims, and we were not, after a complete review of the record, aware of supporting evidence. Appellant has presented spreadsheets of hours and days allegedly worked on dates that correspond to manifests, invoices, or activities to show that all the direct labor hours recorded for lagoons #1 and # 2, as well as Mr. Nwogu's travel costs, were for additional, changed work (app. mot., rec'd 15 April 2005 at 11, tabs 1, 2; app. reply, tab 6 at 21). As stated in Board Rule 13(b), "except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing . . . ." A request to reopen the record, if that is what appellant seeks, is granted only in exceptionally rare and unusual circumstances where a party has demonstrated compelling reasons for reopening the record. *Dae Lim Industries Co.,* ASBCA No. 28416, 87-3 BCA ¶ 20,110 at 101,833; *Northeast Air Group, Inc.,* ASBCA No. 46350, 95-2 BCA ¶ 27,916 at 139,308. Appellant's purported justification for seeking reconsideration – that the government interfered with its proof of claims – is without merit. Appellant had ample time to present evidence for the record. The government's request to strike, insofar as it concerns evidentiary cost data, is granted.

Appellant, in responding to the government's motion for reconsideration, submitted further argument in support of its motion by way of clarification to address what it considered were government misrepresentations as to the events of contract performance. In this submission appellant argues that the Board was in error with respect to the basis of appellant's bid, the increased costs claimed for lagoon # 1 subcontractor surcharges due to contaminants, the restriction on CNYIS work, and the lack of supporting evidence for specific costs (app. resp., tab 6). By letter dated 6 May 2005, appellant submitted a page to substitute in its response to correct an incorrect tab reference on page 3. The Board accepts the correction, but hereby strikes as an offer of post-trial evidence the enclosed two spreadsheets entitled "Environmental Safety Consultants, Inc. Statement of Costs" which itemize quantum claim items and Board findings. The Board also strikes the documents enclosed with appellant's reply, dated 15 June 2005, that were not part of the record as of the close of the quantum hearing.

The government's requests to strike all of appellant's submissions for reconsideration are otherwise denied.

Appellant's motion reargues support for certain claims to remedy its failure of proof. We do not allow a party to supply on reconsideration evidentiary citations, even to evidence in the record, that should have been included in the original post-hearing briefs. *See VIZ Mfg. Co.,* ASBCA No. 17787, 79-1 BCA ¶ 13,682 at 67,109, where the Board stated:

> To allow appellant now to rebrief these claims would render our briefing instructions pointless and would be an imposition on the Government and the Board, wasteful of our resources, and contrary to the fundamental principle that all adjudication must come to an end at some reasonable time. Moreover, it could encourage other claimants to dump into the record documents en masse and exhaustive testimony covering the entire course of contract performance, and then to do a less than comprehensive briefing job, hoping that Board would make out their cases for them, and reserving a "second bite at the apple" on reconsideration.

We are not persuaded that our evaluation of, or failure to consider the evidence resulted in specific findings of fact or conclusions of law that were wrong. We have considered the omission from appellant's recovery of $26,390 for subcontractor surcharges due to contaminants as a possible error. Appellant argues that CWM surcharges for transportation to a RCRA-permitted facility were compensable.[3] Appellant continues to assert that its bid to dispose of lagoon # 1 sludge was based on POTW disposal and not Envirite TSD disposal, *i.e.* its alternative one and the figures shown on page one of its bid estimate sheets (app. resp., tab 6 at 8-11). Appellant thus argues that all the WCI (TSD) and CWM (its POTW and RCRA) costs incurred due to contaminants were increased costs that it did not plan to incur in bidding.[4] We found, however, that appellant's bid was based on disposal in a TSD and surcharges for disposal in a TSD rather than a

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[3] On reconsideration appellant first addresses only the amount of $9,306, later corrected to $7,755, of increased transportation costs as incorrectly evaluated as TSD costs we found that appellant considered in bidding when in fact they were increased RCRA costs. (*ESCI II,* finding 9, n.4, 05-1 BCA at 163,023; ex. A-15, tab C; 47498, 00-1 BCA ¶ 30,826 at 152,136; 47498, ex. A-78, tab 12.)

[4] Appellant relies on our conclusion on entitlement and asserts that our finding (*ESCI I,* 00-1 BCA at 152,144) was revised in the quantum decision because of "intimidation" of the Board by the government (app. reply at 6). Our decisions in this appeal have not been coerced by the government.

POTW were not increases in appellant's anticipated cost of disposing of lagoon # 1 sludge. Our findings concerning the basis of appellant's bid are supported by the evidence, including appellant's deposition testimony in evidence at the entitlement hearing (tr. 3/132; 47498, ex. A-5 at 5; 47498, ex. G-19 at 47-50, 63, 65). Appellant has not presented evidence of the cost of TSD disposal, and we have been without basis here to find an amount of increased costs that may have been attributable to the contaminants in lagoon # 1 sludge due to applicable RCRA requirements. Similarly, on other claims, we could not accept appellant's estimates as the fair and reasonable number of hours spent or amount of direct costs where determination of the amount would have been no more than mere speculation.[5]

The government argues in its motion for reconsideration that the Board made factual and legal errors in deciding the appeal. As a matter of law, the government argues that the Board applied an improper standard of proof in relying on appellant's Statement of Costs and finding specific costs verified by the government's Response to the Statement of Costs; that the use of a total cost analysis for recovery of lagoon # 2 increased costs was improper because appellant failed to prove that it was impossible or highly impracticable to determine the losses with a reasonable degree of accuracy, that its bid was realistic, that its actual costs were reasonable, and that it was not responsible for the added expenses; that unpaid costs are not incurred costs; that costs not booked in a contractor's accounting records are not incurred costs; that the omission of subcontractor obligations in appellant's bankruptcy schedules is an admission that the costs were not incurred; that there is concern about a windfall to appellant; that due to the running of the statute of limitations subcontractor costs are not incurred costs for which appellant is legally obligated to make payment; and that certain entitlement determinations were made in error.

We find that the government has offered no new argument that it could not reasonably have offered to the Board prior to its decision. Its arguments with respect to the standard of proof and appellant's incurred costs attributable to subcontractors have been fully answered in prior decisions. We have reviewed the government's alleged errors in the Board's findings only to determine whether the government has pointed to any facts in the record that show error.

The government argues that the Board erred in awarding costs for appellant's rental of equipment from Godwin pumps to the extent that certain invoices were missing

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[5] In response to appellant's argument, we note that although the government accepted statements of appellant's estimates in negotiation of Modification No. P00001, the Board has no corresponding obligation to accept appellant's estimates in litigation (resp. at 5).

from the record and appellant's planned use of pumping equipment was underestimated. The government submits that the amount of $6,083 is represented by "missing invoices" that were only listed in appellant's claim (gov't mot. at 3, n. 8; 47498, ex. A-78, tab 20). Although appellant may have failed to produce certain invoices received from Godwin, there was no basis to presume that they did not exist or if produced they would not support appellant's position in the litigation. Godwin listed the same invoice numbers and amounts in a letter, dated 7 October 1991, to appellant to verify its records for purposes of an audit (ex. A-59, tab 22 at 2). We found this evidence substantiated the amounts claimed. The amount charged C.O.D. for the initial equipment for the base contract work was $2,386 per week (47498, ex. A-21). We did not take into account the time that appellant planned to dispose of the lagoon # 1 sludge which can be estimated as longer than one week. Appellant performed the planned base contract work for only three days (*ESCI I,* 00-1 BCA at 152,133). We use the amount for lagoon # 1 "[p]umping" estimated as $4,500 in appellant's bid sheets to correct this error (ex. A-5 at 1). On this basis we recalculate appellant's increased costs for equipment rental from Godwin.[6] The amount of $15,227 in finding 17 and related text is corrected to read $13,113.

The government objected to appellant's use of a total cost method for proving its increased costs involving the lagoon # 2 sludge, but did not support its position as it now attempts to do on reconsideration. *ESCI II,* 05-1 BCA at 163,015-17. With respect to the Board's finding that appellant's bid was realistic, the government's references to the bid estimate sheets and Mr. Nwogu's testimony at the hearing do not contradict our finding (gov't mot. at 13-14). Prior to contract award the government found appellant's cost estimate realistic after comparing it to a lagoon # 1 disposal cost of $82 per cubic yard and a lagoon # 2 disposal cost of $146 per cubic yard (47498, ex. A-16). We found appellant's bid price of $165 per cubic yard for disposal of 525 cubic yards of lagoon # 2 sludge realistic. We compared it to the substantiated costs appellant incurred for disposal of 237 cubic yards of the changed sludge to determine appellant's recovery of $30,572 for increased lagoon # 2 subcontractor costs.[7]

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[6] We subtract the C.O.D. unclaimed costs incurred for base contract work from appellant's planned costs to find the amount to deduct from the amount previously found as additional costs incurred for Godwin equipment ($4,500 - 2,386 = $2,114. $15,227 – 2,114 = $13,113.) *ESCI II,* 05-1 BCA at 163,011.

[7] On the basis of substantiated incurred costs and adding overhead and profit, we found appellant reasonably incurred costs of at least $294 per cubic yard, or $69,677 from which we deducted the amount of $39,105 that appellant was paid to find additional costs of $30,572. (*ESCI II,* finding 32, 05-1 BCA at 163,014). The government noted the resulting error in our conclusion where we again added overhead and profit to the amount found and labeled it as additional costs rather than direct costs plus overhead and profit (gov't mot. at 1-2).

The government objected to the Board's use of the bid price instead of the bid estimate sheets in its total cost analysis of the lagoon #2 increased costs. First, the government considers the Board's finding that Mr. Haynes' calculations of appellant's planned costs were based on a 1991 cash flow projection which was not appellant's bid erroneous. Mr. Haynes summarized his calculations in a bid analysis sheet attached to the government's Response to the Statement of Costs, which the government maintains was based on analysis of appellant's bid estimate sheets. The government states that the Board failed to understand appellant's planned costs that Mr. Haynes analyzed. Government counsel required an expert cost analyst to understand appellant's bid, but declined to offer Mr. Haynes' testimony for the Board's benefit and appellant's cross-examination at the hearing. As a result we were reluctant to, and did not, rely on Mr. Haynes' work product in this instance. Second, the government objected to the Board's calculations. We find appellant's planned costs for disposal and transportation of lagoon # 2 sludge for contract line item 0001AB shown in appellant's bid sheets were $69,870, or $133 per cubic yard, to which appellant added 15 percent in contingency fees (47498, ex. A-5). Alternatively, appellant's bid price of $165 per cubic yard, which has been found realistic, less amounts for overhead and profit, provides a fair and reasonable amount of $143 per cubic yard that appellant would have incurred in the absence of changed conditions.[8] The government has proposed a revised total cost calculation to arrive at a more appropriate and more equitable result (gov't mot. at 20-21). We have accordingly reevaluated this portion of the claim to use reasonable costs deemed to have been planned, rather than the bid price for a comparison with actual costs. We correct the amount of additional lagoon # 2 subcontractor costs in finding 32 and related text to $26,543.[9] The recalculations correct the mistake the government noted of adding overhead and profit twice for this part of the claim.

[8] We apply an overhead rate of five percent, which was agreed for the subcontractor costs which were most of the costs of lagoon # 2 performance, and a profit rate of ten percent. *ESCI II,* 05-1 BCA at 163,022. The amount of direct costs attributable to a bid price of $165 per cubic yard is $143.

[9] Lagoon # 2 costs for contract line item 0001AB, disposal of 525 cubic yards, before the changed conditions should reasonably have been anticipated as $75,075 ($143 x 525). ESCI disposed of 237 cubic yards of the 525 cubic yards specified in the one contract line item. The actual disposal represents approximately 45 percent of the specified quantity (237/525 = 45%). The substantiated incurred costs were $60,327. Forty-five percent of $75,075 is $33,784. This amount reflects costs to compare with the amount of costs found to have been incurred. The amount of the increased direct costs is $26,543 ($60,327 – 33,784 = $26,543).

Our opinion of 8 March 2005 is amended as follows. In the first paragraph of the Conclusion, for lagoon # 1 ESCI costs replace "$25,023" with "$22,919," for lagoon # 2 subcontractor costs replace "$30,572" with "$26,543," for the total of ESCI increased costs replace "$27,583" with "$25,469," and for the total of subcontractor increased costs replace "$52,973" with "$48,944." The calculations in the Conclusion are amended to read as follows:

Added ESCI Costs		$25,469		
Overhead @ 3 %		764		
	Subtotal	26,233		
Profit @ 10 %		262		
	Subtotal		26,495	
Added subcontractor costs		48,944		
Overhead @ 5 %		2,447		
	Subtotal	51,391		
Profit @ 10 %		5,139		
	Subtotal		56,530	
Liquidated damages			10,964	
	Total			$93,989

In the second paragraph of the Conclusion, for the equitable adjustment, replace "$103,399" with "$93,989."

We have considered the parties' other arguments in their motions for reconsideration, but do not believe it necessary to discuss them. Having reviewed the record and our findings and decision in light of the parties' motions, we have found that our earlier decision contained errors. Our decision is modified to the extent indicated above to provide that appellant is entitled to a total equitable adjustment of $93,989, plus interest. The cross-motions for reconsideration are otherwise denied, and our decision is otherwise affirmed.

Dated: 15 September 2005

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Vice 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:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals