ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
MIG Corporation	)	ASBCA No. 54451
	)	
Under Contract No. DACW33-00-C-0012	)	

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

At issue is the government's motion for partial summary judgment in ASBCA No. 54451 regarding certain costs totaling $157,159.68 claimed by appellant MIG Corporation (MIG) in the termination for convenience settlement proposal it subsequently certified as a Contract Disputes Act claim. Appellant opposes the motion. We grant the government's motion in part and otherwise deny it.

FINDINGS OF FACT
FOR PURPOSES OF THE GOVERNMENT'S MOTION

On 4 February 2000, the government issued Solicitation No. DACW33-00-B-0007 for fixed-price sealed bids for deck repairs and paving to the Bourne and Sagamore Bridges in Bourne, MA (R4, vol. 1, solicitation). The 7 March 2000 bid opening date was postponed on 25 February, and on 8 March the bid opening was rescheduled for 20 March 2000 (R4, vol. 1, amend. nos. 1, 3).

The bridges cross the Cape Cod Canal, providing passage between Cape Cod, MA and the mainland (R4, vol. 2, tab 6 at 2). The contract specifications provided scheduling restrictions and phased work sequences. Among other things, the contractor was required to work a minimum of two shifts a day, seven days a week before Memorial Day

weekend and after Labor Day weekend. In June, July and August, the contractor was only permitted to work weeknights between 9:00 p.m. and 5:00 a.m. and was required to remove all traffic control devices during the day. (R4, vol. 1, amend. no. 3, § 01110 at 2, ¶ 1.5.1) Five work phases were specified, with work to begin on the Bourne Bridge on 18 April 2000, and be completed by 24 May 2001, after which work was to commence on the Sagamore Bridge on 17 September 2001, and be completed by 28 May 2002 (*id.* at 6-7, ¶ 1.5.2.6).

Contract Line Item No. (CLIN) 0001 included "TRAFFIC CONTROL, SINAGE [sic] AND EQUIPMENT." Appellant's lump-sum bid for CLIN 0001AA "BOURNE BRIDGE" was $335,000.00 and its lump-sum bid for CLIN 0001AB "SAGAMORE BRIDGE" was $185,000.00. (R4, vol. 3, tab A) Paragraph 1.6, "BIDDING SCHEDULE – PAYMENT ITEMS" of Section 01270, "MEASUREMENT AND PAYMENT," of the specifications provided as follows with respect to CLINs 0001, 0001AA and 0001AB:

> a. Payment will be made for costs associated with furnishing, installing, maintaining, and removing specified Contractor traffic control devices (jersey barriers, reflectorized drums w/lighting, and signs including the message boards), all in accordance with Section 01570 TRAFFIC REGULATION[.] The work includes all labor associated with the setting up and breaking down of traffic control, signage, and equipment for each construction phase of work . . . .

(R4, vol. 1, solicitation, § 01270, ¶ 1.6, and amend. no. 3, § 01270 at 2)

On 20 March 2000, appellant learned that it was the low bidder and was contacted by the government in anticipation of award (Voghel aff., ¶ 5, n.6, and ex. B). Contract No. DACW33-00-C-0012 in the amount of $3,427,459.00 was awarded to appellant on 31 March 2000 (R4, vol. 3, tab A). Notice to Proceed was issued on 10 April 2000, and acknowledged by appellant on 13 April 2000 (R4, vol. 3, tab B).

The contract contained the following relevant standard FAR clauses: 52.233-1, DISPUTES (DEC 1998); 52.236-13, ACCIDENT PREVENTION - ALTERNATE I (NOV 1991); and 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) - ALTERNATE I (SEP 1996). The Accident Prevention clause provides in relevant part:

> (a) The Contractor shall provide and maintain work environments and procedures which will (1) safeguard the

> public and Government personnel, property, materials, supplies, and equipment exposed to the Contractor operations and activities . . . .
>
> (b) For these purposes on contracts for construction or dismantling, demolition, or removal of improvements, the Contractor shall—
>
> (1) Provide appropriate safety barricades, signs and signal lights . . . .

(R4, vol. 1, solicitation at 27 of 33)

Appellant timely commenced work on the Bourne Bridge (R4, vol. 4; app. supp. R4, tab 66). By a letter dated 12 July 2001, the government provided appellant with a final punch list for the Bourne Bridge repairs, except for final electrical installation items (R4, vol. 3, tab M). Effective 10 September 2001, the government issued Modification No. P00006, terminating the contract in part for the convenience of the government under FAR 52.249-2. The termination applied to "all work associated with the Sagamore Bridge portion of [the] contract only." (R4, vol. 3, tab N)

On 5 December 2001, appellant submitted a "COMBINED TERMINATION SETTLEMENT/EQUITABLE ADJUSTMENT PROPOSAL" to the contracting officer (R4, vol. 2, tab 14). On 26 January 2002, the government requested that appellant separate the costs attributable to the equitable adjustment it claimed and those attributable to the termination for convenience (R4, vol. 2, tab 13). Appellant did so on 20 February 2002 (R4, vol. 2, tabs 6, 7).

Appellant's "AMENDED TERMINATION PROPOSAL" uses the inventory method under FAR 49.206-2(a). Its Standard Form (SF) 1435 seeks $2,216,998.03. (R4, vol. 2, tab 6) The proposal was converted into a termination for convenience claim and certified on 6 June 2003, and forwarded to the contracting officer on 10 June 2003 (R4, vol. 2, tab 3). The Defense Contract Audit Agency (DCAA) Audit Report No. 2161-2002V17100001 on the termination proposal is dated 23 July 2003 (R4, vol. 2, tab 5A). An appeal from a deemed denial of the termination claim was filed on 23 December 2003 and docketed as ASBCA No. 54451.

Some of the costs appellant seeks in its termination claim are the subject of the government's present motion for partial summary judgment. Specifically, the government challenges a total of $157,159.68, which is comprised of $125,714.64 in precontract costs and $31,445.04 in costs it asserts have already been reimbursed under the contract.

Precontract Costs

Appellant's termination claim states that "Get Ready Costs" are "costs incurred by MIG in preparing to do the work subject to this contract" and that, generally, appellant "assumed a thirty (30) day get ready period" in its termination claim (R4, vol. 2, tab 6 at 5).

Schedule B, Chart 1 of appellant's termination claim is entitled "Standby Equipment Calculation" (*id*. at 17). According to the claim, Schedule B, Chart 1 records "costs for standby of equipment during the get ready period . . . . This is the thirty day period for each discreet piece of equipment." (*Id.* at 7) Schedule B, Chart 1 includes standby equipment costs for 38 pieces of equipment for 23 working days between 1 March 2000 and 1 April 2000. The total amount sought, $75,504.49, is challenged by the government. (R4, vol. 2, tab 6 at 18-19) The standby equipment rates were determined using the Rental Rate Blue Book for Construction Equipment. The reasonableness and allocability of all of the equipment costs claimed were questioned by DCAA under FAR 31.201-3 and 31.201-4. (R4, vol. 2, tab 5A at 13-15)

Mr. Donald Voghel, MIG's Chief Executive Officer/Treasurer, was involved in, and in charge of, the compilation of appellant's bid (Voghel aff., ¶¶ 1, 3). He avers that, because of the short period between bid opening and the start of work, "MIG had to reserve, service and prepare its equipment for the job and get ready to perform the work even before MIG would know whether or not it would be the low bidder or would be awarded the contract." He further avers that he "made allowance for those preparations" and, in calculating MIG's bid, expected "to recover the cost for the idle time, including the period for servicing and preparing the equipment to start the work in 2000, from the revenues received for the entire project." (Voghel aff., ¶ 5, footnotes omitted)

Schedule B, Chart 3 of appellant's termination claim is entitled "Get Ready, Idle and Post Term Costs" (R4, vol. 2, tab 6 at 27). According to the claim, it records non-equipment costs for the get ready period (*id.* at 7). Three items listed as "Start Up" costs from Schedule B, Chart 3 are challenged by the government (*id*. at 28).

The first is $647.25 based upon an invoice dated 14 March 2000 from Tools Renewed Inc. (*id.*). DCAA questioned this cost because the invoice "did not reference the subject contract" and the tools were not delivered to the job site. DCAA incorrectly stated that the invoice was dated after the 30-day start-up period identified in the termination proposal, but correctly noted that it was paid 11 May 2001, well after this period. (R4, vol. 2, tab 5A at 32-33; vol. 3, tab E-5 at 6-7)

The second is $176.00 charged for labor, also on 14 March 2000 (R4, vol. 2, tab 6 at 28). DCAA questioned this cost, citing FAR 31.201-2(d), noting that it lacked documentation and was based upon the estimates of appellant's consultant. The report also commented that appellant did not explain the extent to which the costs were incurred under CLIN 0001AA. (R4, vol. 2, tab 5A at 33)

The last cost listed as a "Start Up" cost challenged by the government is $1,210.90 based upon an invoice dated 12 April 2000 from B&H Equipment Corporation (B&H) for CLIN 0001AA (R4, vol. 2, tab 6 at 28; vol. 3, tab E-5 at 8-9). The DCAA audit indicates that this invoice was for the purchase of various construction signs and questioned the cost because the same invoice was used to support costs of construction signs in Schedule B, Chart 2 entitled "Necessitated and Stranded Costs" (R4, vol. 2, tab 5A at 23, 34). This item is also challenged as a cost reimbursed under the contract.

Schedule C of the termination claim is entitled "Overhead from Audited Statements" (R4, vol. 2, tab 6 at 34). Schedule C includes precontract general and administrative (G&A) costs in the amount of $24,088 per month for February and March 2000, a total of $48,176.00 (*id.* at 35). These costs were questioned by DCAA on grounds they "reflect a period prior to the contract commencement and therefore do not represent costs caused by or incidental to the termination" (R4, vol. 2, tab 5A at 9).

Appellant did not come forward with explanatory evidence regarding the tools and labor charged on 14 March 2000, or the G&A claimed for February and March 2000. It also did not provide any explanation regarding either why the invoice for $1,210.90 from B&H dated 12 April 2000 was included as a start-up cost or whether it duplicates the cost claimed in Schedule B, Chart 2, which we find it does.

Costs Reimbursed Under The Contract

The government also challenged a number of post-contract costs claimed by appellant in Schedule B, Chart 2, "Necessitated and Stranded Costs," on grounds the costs have already been reimbursed. Appellant's termination claim defines "Stranded Equipment Costs" as the "cost of acquiring and outfitting equipment purchased specifically for this project and which is not presently commercially marketable. This cost is subject to credit for the residual liquidation value of the equipment." (R4, vol. 2, tab 6 at 5)

The first such costs challenged total $20,326.88 for two purchases of traffic drums from L&C Flashing Barricades, Inc. (L&C). The claim contains the notation "Spec not allowed in DOT work" for both items. The first set of drums cost $14,826.88. We have used $5,500.00 for the second set based upon the claim and the DCAA audit, although the record includes appellant's cancelled check in the amount of $5,255.00. (R4, vol. 2,

tab 5A at 20-21, tab 6 at 26; vol. 3, tab E-4 at 16-19) The second group of costs total $2,482.26 for "Special Purchase" traffic cones from B&H in the amount of $1,936.26 and L&C in the amount of $546.00 (R4, vol. 2, tab 5A at 22, tab 6 at 26). The final cost challenged is $1,210.90 for "Special Purchase" construction signs from B&H based upon a 12 April 2000 invoice (R4, vol. 2, tab 6 at 26). The total of all these costs is $24,020.04.

The DCAA audit questioned all of these requested amounts because the traffic drums, traffic cones and construction signs were used for contract work on the Bourne Bridge and it considered the costs to have been incurred within the scope of CLIN 0001AA. DCAA concluded that appellant had already been reimbursed for these costs under the Accident Prevention clause, FAR 52.236-13. (R4, vol. 2, tab 5A at 21-22) DCAA also questioned the $1,210.90 claimed for construction signs because, as we found, it duplicated the "Start Up" cost based upon the same invoice that was claimed in Schedule B, Chart 3 (R4, vol. 2, tab 5A at 23, 34).

When purchasing traffic control devices, Mr. Voghel expected to be able to retain the drums and cones after completing the contract work, and when compiling appellant's bid, he "expected to amortize all costs of traffic control, including the purchase of the drums and cones over both the Bourne and Sagamore Bridge projects from the revenues expected in bid items 0001AA (Bourne Bridge), and 0001AB (Sagamore Bridge)." He also considered other items such as "flashing lights, traffic barriers, variable message boards and arrowboards" to be included in CLINS 0001AA and 0001AB. (Voghel aff., ¶ 6) He avers that appellant never had the opportunity to amortize its drum and cone purchases over both projects because the Sagamore Bridge work was terminated (*id*., ¶ 7).

Additionally, his affidavit explains that the Massachusetts State Highway Department had changed its specifications for traffic drums when it obtained replacement work in 2002, rendering obsolete the traffic drums appellant had purchased for the Bourne and Sagamore Bridge projects (*id*.; app. answers to interrogs. 20, 22, and attach. A).

The last cost challenged is $7,425.00 for "Special Purchase" anti-glare barrier screening from Northeast Traffic Control Services, Inc. (R4, vol. 2, tab 6 at 26; vol. 3, tab E-4 at 27-28). DCAA determined that these costs had been paid to appellant under Modification No. A00001, dated 15 June 2000, and appellant acknowledges that this cost should be deleted from its termination claim (R4, vol. 2, tab 5A at 25; app. br. intro.).

CLIN 0001AA was increased to $345,936.92 by Modification Nos. A00001 and A00002 to the contract (R4, vol. 1). Appellant has been paid this entire amount (gov't mot. attach.).

DISCUSSION

In order to prevail upon its motion for partial summary judgment, the government must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law on the matters addressed. *Mingus Constructors, Inc. v. United Sates*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To survive the government's motion, appellant must come forward with specific facts showing that there is a genuine issue of material fact and what specific evidence could be offered at trial or show that the government is not entitled to judgment as a matter of law. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). The failure to set forth specific evidence by affidavit or otherwise may result in the grant of summary judgment. *See Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

Precontract Costs

The government asserts that the precontract costs claimed by appellant do not satisfy the definition contained in FAR 31.205-32, PRECONTRACT COSTS and, absent agreement, are not recoverable unless they meet the four-part test applied in *Radant Technologies, Inc.*, ASBCA No. 38324, 91-3 BCA ¶ 24,106. The government further asserts that the costs claimed are not reasonable as required by FAR 31.201-3.

Appellant responds that the precontract costs claimed are allowable under FAR 31.205-42(c)(2) and that, under *RHC Construction*, IBCA No. 2083, 88-3 BCA ¶ 20,991, the type of preparatory costs allowed due to a termination for convenience depends upon the character and circumstances of the contract as tempered by the fairness policy enunciated in FAR 49.201. It asserts that *Radant Technologies* is not applicable because it did not involve a termination for convenience and, therefore, did not implicate FAR 31.205-42. It further contends that reasonableness is a question of fact.

FAR Part 49 governs contract terminations. FAR 49.113, COST PRINCIPLES requires that, subject to general principles set forth in FAR 49.201, the cost principles and procedures contained in FAR Part 31 are to be used to determine costs relevant to

termination for convenience settlements. *See also* FAR 52.249-2(i). Under FAR 49.201(a), a contractor is to be compensated "fairly" for work done and preparations made for the terminated portions of the contract.

Precontract costs are defined in FAR 31.205-32 as 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."

FAR 31.205-42, TERMINATION COSTS states that contract terminations "generally give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated" and provides cost principles "peculiar" to terminations that are to be used "in conjunction with" the other FAR Subpart 31.2 cost principles. FAR 31.205-42(c) *Initial costs* explains that initial costs include preparatory costs. FAR 31.205-42(c)(2) provides that "preparatory costs incurred in preparing to perform the terminated contract" may include such costs as "initial plant rearrangement and alterations, management and personnel organization, and production planning."

We are persuaded that the government's motion for summary judgment has merit with respect to many of the claimed precontract costs it challenged. First, it is generally true that a contractor cannot recover a cost that is incurred before the award of a contract. *Aislamientos y Construcciones Apache S.A.*, ASBCA No. 45437, 97-1 BCA ¶ 28,632 at 142,960. FAR 31.205-42, upon which appellant relies, does not specifically address recovery of initial and preparatory costs incurred *before* contract award and does not change the general rule against recovery of such costs simply because a contract has been terminated for convenience. Moreover, the provisions of FAR 31.205-42 make clear that it is to be used "in conjunction with" the other FAR Subpart 31.2 cost principles. One of these cost principles is FAR 31.205-32, which we addressed in *Radant Technologies* and, consistent with the FAR 31.205-32 definition, concluded that absent an advance agreement, recovery of precontract 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. 91-3 BCA at 120,657. We find nothing inconsistent with the application of these requirements to precontract costs claimed in the context of a termination for convenience under FAR 31.204-42. *See Consolidated Defense Corporation,* ASBCA No. 52315, 03-1 BCA ¶ 32,112 at 158,778-79.

Next, the facts in this case are substantially different than those in *RHC* upon which appellant relies. Indeed, the facts in *RHC* were such that the outcome no doubt

would have been the same if *Radant Technologies* had been decided earlier and applied by the Interior Board of Contract Appeals (IBCA). The contractor in *RHC* was a one-man construction company that was notified by telephone on 27 November 1984 that it was the successful bidder on a construction contract, after which the owner immediately began working to obtain steel pipe that had to be fabricated in order to meet the contract's deadline. The contract was awarded on 21 December 1984, and terminated for convenience on 15 January 1985. The contracting officer disallowed expenses that were not incurred between the dates upon which the contractor received notice of the contract award (22 December 1984) and the termination date. The major single item in dispute was the owner's salary. On these facts, the IBCA analyzed FAR 31.205-32, 31.205-42(c), and 49.201 and concluded that the contractor was entitled to reimbursement of reasonable costs incurred for the owner's advance planning and preparations. Employing a jury verdict, the IBCA awarded the contractor most of the additional costs it claimed. *RHC, supra,* 88-3 BCA at 106,058-59, 106,061. We do not see anything in *RHC* that provides support for appellant with respect to the issues we decide *infra.*

In this case, appellant learned that it was the low bidder on 20 March 2000, and the contract was awarded on 31 March 2000. Unlike the facts in *RHC*, virtually all of the precontract costs appellant claims were incurred prior to 20 March 2000. Moreover, although appellant opposed the government's motion, it did not come forward with any additional factual evidence by affidavit or otherwise to explain why it was claiming $647.25 for tools and $176.00 for labor on 14 March 2000 as "Start Up" costs on Schedule B, Chart 3, and $48,176.00 for G&A for February and March 2000 on Schedule C. (We do not decide any issues relating to the possible recovery of G&A as a burden factor to recoverable costs.) Thus, there are no facts in the record from which we can even infer that these costs may be allocable to this contract, much less that they may have been incurred by appellant in anticipation of contract award and in order to comply with the proposed contract delivery schedule as required by FAR 31.205-32 and *Radant Technologies.*

Appellant also did not attempt to explain why the same cost claimed as a "Start Up" cost on Schedule B, Chart 3 based upon an invoice dated after contract award in the amount of $1,210.90 for construction signs from B&H is also claimed on Schedule B, Chart 2 as a "Necessitated and Stranded Cost."

We must conclude, therefore, that we have no rational basis upon which we can say that there are genuine issues of material fact in dispute as to the $647.25 claimed for tools and $176.00 claimed for labor on 14 March 2000, and the $1,210.90 claimed for construction signs as "Start Up" costs on Schedule B, Chart 3, and the $48,176.00 claimed for G&A for February and March 2000 on Schedule C. *See Pure Gold, supra.*

The remaining precontract cost claimed by appellant that is challenged by the government is $75,504.49 computed for 23 days of standby between 1 March 2000 and 1 April 2000 for 38 pieces of equipment. Mr. Voghel avers in his affidavit that appellant had to "reserve, service and prepare its equipment for the job and get ready to perform the work even before [it knew] whether or not it would be . . . awarded the contract" and that he made an allowance for those preparations when preparing appellant's bid and expected to recover the costs from revenue received for the entire project. According to appellant, whether these actions and expectations were reasonable under the circumstances and whether the costs claimed are reasonable and can be allocated to the terminated portion of the contract are factual questions that must be considered in arriving at a fair compensation.

We conclude that appellant has raised genuine issues of material fact regarding the standby equipment costs it claims. In addition to the factual questions identified by appellant, there are also factual questions relating to whether the costs were incurred directly in anticipation of contract award and in order to comply with the proposed contract delivery schedule. *Radant Technologies, supra. See North American Rockwell Corp.,* ASBCA No. 15863, 72-2 BCA ¶ 9490 (appellant must show its actions in incurring precontract costs were reasonably necessary and undertaken in good faith). Whether any recovery of standby equipment costs should be limited to the time period 20 through 31 March 2000 if we were to adopt the reasoning of *RHC* will also be an issue.

In summary, we grant the government's motion as to the 14 March 2000 labor and tool costs and the B&H construction sign costs claimed on Schedule B, Chart 3, and the February and March 2000 G&A claimed on Schedule C. We deny the motion as the standby equipment costs claimed for March 2000.

Costs Reimbursed Under The Contract

The government further asserts that the costs of traffic drums, traffic cones, construction signs, and barrier screening were included in CLINs 0001AA (Bourne Bridge) and 0001AB (Sagamore Bridge) and were not "stranded," but fully reimbursed because appellant was paid 100% of CLIN 0001AA. According to the government, appellant's claim for these items is a claim for additional profit, constituting a cost-plus-a-percentage-of-cost payment which, under *Urban Data Systems, Inc. v. United States*, 699 F.2d 1147 (Fed. Cir. 1983), is illegal under 10 U.S.C. § 2306(a). (Gov't mot. at 10)

As we understand it, appellant concedes the government's motion with respect to the $7,425.00 claimed for anti-glare barrier screening, but opposes the remainder of the government's motion regarding its allegation that these costs have already been

reimbursed (app. br. intro.). It also argues that the government's contention that payment of the costs claimed could violate 10 U.S.C. § 2306(a) is misguided.

Based upon Mr. Voghel's affidavit, appellant asserts that the cost of the traffic drums and traffic cones is allocable to both the Bourne and Sagamore Bridges and that it is entitled to amortize the cost of those devices over the Sagamore Bridge portion of the work because of the termination for convenience. It also points to FAR 31.205-42(a) which provides in relevant part:

> *(a) Common items*. The costs of items reasonably usable on the contractor's other work, shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss.

We conclude that appellant has raised a genuine issue of material fact regarding the costs claimed for traffic drums and cones. The record indicates that this equipment was purchased for this contract and Mr. Voghel's affidavit establishes that appellant expected to amortize the costs over both the Bourne and Sagamore Bridge projects. Thus, it appears that at least some portion of the cost of the traffic drums and cones may be considered in determining the post-award preparatory costs allocable to this contract under FAR 31.205-42(c)(2). *See Celesco Industries, Inc.*, ASBCA No. 22460, 84-2 BCA ¶ 17,295 at 86,160-62. Further evidence regarding the costs, accounting treatment and actual use of the drums and cones is necessary to determine the extent of the recovery to which appellant may be entitled.

Moreover, given Mr. Voghel's explanation that the drums could not be used for Massachusetts State Highway Department work, the cost of the drums may also be recoverable as common items under the exception in FAR 31.205-42(a) as appellant asserts. In making such a determination, we have previously applied the DCAA Audit Manual guidance which states that "[t]he test [of what is a common item] is whether the contractor can divert the item to other work without loss." *Symetrics Industries, Inc.*, ASBCA No. 48529, 96-2 BCA ¶ 28,285 at 141,217. A genuine issue of fact exists as to whether the drums satisfy this test.

Finally, we disagree with the government that either *Urban Data Systems* or 10 U.S.C. § 2306(a) is applicable here. In *Urban Data Systems*, the court considered whether there was a violation of 41 U.S.C. § 254(b), which prohibits the use of cost-plus-a-percentage-of-cost systems of contracting. At issue in that case was application of a price adjustment clause, not a termination for convenience, and whether the contractor had unduly increased costs, and thus, its profit. *Urban Data Systems, supra,* 699 F.2d at 1152.

In summary, we grant the government's motion as to the $7,425.00 claimed for anti-glare barrier screening and deny it as to the costs claimed for traffic drums and cones. Finally, having granted the motion as to the B&H construction signs claimed on Schedule B, Chart 3 as a precontract cost, we deny the motion as to the claim for these same costs on Schedule B, Chart 2 inasmuch as there is no longer any duplication.

CONCLUSION

Consistent with the foregoing, the government's motion for summary judgment is granted to the extent indicated, and otherwise denied.

Dated: 25 May 2005

CAROL N. PARK-CONROY
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. 54451, Appeal of MIG Corporation, rendered in conformance with the Board's Charter.

Dated:

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