ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
ATK Launch Systems, Inc.	)	ASBCA Nos. 55395, 55418, 55812
	)	
Under Contract Nos. NAS8-38100 *et al.*	)	

APPEARANCE FOR THE APPELLANT: Steven M. Masiello, Esq.
McKenna Long & Aldridge LLP
Denver, CO

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Chief Trial Attorney
Gregory T. Allen, Esq.
Trial Attorney
Defense Contract Management Agency
Manassas, VA

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

ATK Launch Systems, Inc. (ATK or appellant) has filed a motion for partial summary judgment, contending that the government's failure to fully pay executive compensation costs under contracts[1] entered into prior to November 1997 was a breach of contract. The government has filed a cross-motion for partial summary judgment, contending that all such costs incurred after 1 January 1998 in excess of a "cap" of these costs, defined by law, were unallowable. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. There are a number of prime contracts and subcontracts relevant to appellant's claim. For purposes of its motion, appellant relies upon two prime contracts with NASA,

[1] The government has moved to dismiss the portion of the appeal involving subcontracts. By Order dated 17 February 2009, the Board ruled, *inter alia*, that the government's motion sought to reduce appellant's claim and thus related only to quantum, and deferred ruling on the motion pending resolution of entitlement issues.

Contract No. NAS8-38100 and Contract No. NAS8-39749, that were awarded to appellant prior to November, 1997. These contracts were cost-reimbursable type contracts in excess of $500,000. Each contract contained the provision at FAR 52.216-7, ALLOWABLE COST AND PAYMENT.[2] The allowability and payment of cost under each contract was subject to FAR Subpart 31.2, which was incorporated under (a) of the ALLOWABLE COST AND PAYMENT clause. It is undisputed and we find that as of the date of the award of these contracts, the existent FAR Subpart 31.2 did not limit or cap the executive compensation costs subject to this dispute.

2. On 18 November 1997, the National Defense Authorization Act for Fiscal Year 1998 (NDAA or Act), Pub. L. No. 105-85, 111 Stat. 1629 (1997), was enacted. Section 808 of the Act, 111 Stat. at 1836, effective 90 days after the date of enactment, imposed a fixed cap on allowable executive compensation costs, making unallowable all such costs that exceeded a benchmark compensation amount to be determined annually by the Administrator for Federal Procurement Policy. It is undisputed and we find that the Section 808 cap covered cost reimbursable or fixed-price incentive contracts in excess of $500,000, and applied to all executive compensation costs incurred after 1 January 1998, whether the contracts were awarded on, before or after the date of enactment of the Act. *See* 10 U.S.C. § 2324(e)(1)(P); 41 U.S.C. § 256(e)(1)(P); 41 U.S.C. § 435.

3. On 15 September 2000, the Court of Federal Claims ruled that the government's failure to fully allow and pay executive compensation costs incurred after 1 January 1998 under a 1996 contract based upon the application of the Section 808 cap was a breach of contract. *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514 (2000). The government appealed this decision to the Federal Circuit but later withdrew the appeal.

4. Based upon *General Dynamics*, ATK sought payment from the government for executive compensation costs not included in its billing rates and final incurred cost submissions. On or about 18 November 2003, ATK submitted a letter to the Division Administrative Contracting Officer ("DACO") stating in pertinent part as follows:

> ATK Thiokol Propulsion hereby submits a claim to adjust its original submissions for all years wherein overhead rates have not been negotiated (Promontory location prior to FY02)

[2] Appellant asserts and the government does not dispute that Contract No. NAS8-38100 contains the April 1984 version of the ALLOWABLE COST AND PAYMENT clause, and Contract No. NAS8-39749 contains the July 1991 version of the clause. Insofar as pertinent to these appeals, these clauses appear to be identical in all material respects and the parties do not argue otherwise. For convenience, we shall cite to the July 1991 version of the clause (SOF ¶ 11).

by removing claims for unallowable excess compensation from the following types of contracts:

1. Cost reimbursement or fixed-price incentive contracts
2. Contracts in excess of $500,000
3. Contracts entered into prior to January 1, 1998

(App. supp. R4, tab 19). Appellant attached to this letter a summary of the estimated amounts of excess compensation to be adjusted for each year. On 23 August 2004, ATK wrote to the DACO requesting a response to the 18 November letter and requesting payment of compensation costs totaling $1,630,150.11 (*id*., tab 20). By letter to the DACO dated 29 July 2005, ATK reiterated its demand and filed a claim certification, executed by Mr. David Peet, Vice President of Finance (*id*., tab 23).

5. By letter to appellant dated 23 September 2005, the DACO advised that he expected to render a final decision on or before 23 November 2005 (app. supp. R4, tab 21). By letter to appellant dated 18 November 2005, the DACO advised that he expected to render a final decision on or before 28 February 2006 (*id*., tab 22). Having failed to receive a decision by 23 March 2006, ATK submitted a notice of appeal to the Board based upon the deemed denial of its asserted claim. The Board docketed the appeal as ASBCA No. 55395.

6. On 27 March 2006, the DACO issued a final decision denying appellant's claim (app. supp. R4, tab 25). ATK appealed this decision to the Board, and the appeal was docketed as ASBCA No. 55418. The appeals were consolidated.

7. On 9 November 2006, ATK submitted to the DACO amended portions of its incurred cost submissions for Thiokol Propulsion's Fiscal Years 1998, 1999, and 2000, and Cordant Technologies, Inc.'s Fiscal Years 1998, 1998T, and 1999.[3] These amended incurred cost submissions sought to recover executive compensation costs that had been previously categorized as unallowable excess compensation costs in accordance with the NDAA and the revised FAR cost regulations that implemented it. Appellant also submitted invoices to the DACO for the relevant covered contracts, requesting "billing rates which represent current approved billing rates modified only for the increase in allowable executive compensation as described above." (App. supp. R4, tab 31)

[3] Absent any evidence or indication otherwise, we find that appellant was the successor in interest to "Thiokol Propulsion." It appears that during the relevant fiscal years, Cordant Technologies, Inc. was appellant's "parent" corporation that allocated or flowed down certain executive compensation costs to Thiokol Propulsion.

8. By letter to appellant dated 17 November 2006, the DACO stated he did not agree with the billing rates as modified by ATK that were used to prepare the above invoices (R4, ASBCA No. 55812, tab 11).

9. On 29 November 2006, ATK submitted to the DACO a "Certified Claim for Payment of Executive Compensation Costs Invoices Submitted November 9, 2006 under Contract Nos. NAS8-38100, *et al*." Appellant sought $1,757,658.63 and requested a CO's final decision. (R4, ASBCA No. 55812, tab 12)

10. On 26 January 2007, the DACO issued a final decision denying ATK's claim (R4, ASBCA No. 55812, tab 15). ATK filed a notice of appeal with this Board. The Board docketed this appeal as ASBCA No. 55812 and consolidated it with ASBCA Nos. 55395 and 55418. The parties filed amended pleadings. These motions followed.[4]

11. Insofar as pertinent, FAR 52.216-7, ALLOWABLE COST AND PAYMENT (JUL 1991) states as follows:

> (a) *Invoicing*. The Government shall make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, *in amounts determined to be allowable by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract*. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.
>
> (b) *Reimbursing costs*. (1) *For the purpose of reimbursing allowable costs* (except as provided in subparagraph (2) below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), *the term "costs" includes only—*

[4] On 7 August 2008, the Board directed the parties to brief whether appellant's certified claim dated 29 July 2005 was timely filed within six years of claim accrual, 41 U.S.C. § 605(a). The parties responded and agreed that appellant's claims were timely filed under the CDA. The two representative contracts were awarded prior to the effective date of the six-year provision (1 October 1995). We conclude that we have jurisdiction for purposes of the cross-motions.

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;
(B) Direct labor;
(C) Direct travel;
(D) Other direct in-house costs; and
(E) *Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts*; ….

….

(d) *Final indirect cost rates*. (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2) The Contractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by the Contracting Officer, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by agency procedures, to the cognizant audit activity proposed final indirect cost rates for that period and supporting cost data specifying the contract and/or subcontract to which the rates apply. The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and Contractor shall establish the final direct cost rates as promptly as practical after receipt of the Contractor's proposal.

(3) The Contractor and the appropriate Government representative shall execute a written understanding setting

forth the final indirect cost rates. The understanding shall specify (i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(e) *Billing rates*. Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. *These billing rates—*

(1) *Shall be the anticipated final rates*; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Quick-closeout procedures*. When the Contractor and Contracting Officer agree, the quick-closeout procedures of Subpart 42.7 of the FAR may be used.

(g) *Audit*. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

(h) *Final payment*. (1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than one year (or

> longer, as the Contracting Officer may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(Emphasis added)

CONTENTIONS OF THE PARTIES

Both parties seek partial summary judgment with respect to their respective interpretations of the ALLOWABLE COST AND PAYMENT clause regarding the allowability of executive compensation costs in excess of the cap prescribed by the NDAA and its implementing cost regulations.

Appellant contends that pursuant to paragraph (a) of the ALLOWABLE COST AND PAYMENT clause the allowability of executive compensation costs must be determined by the incorporated FAR cost principles, FAR Subpart 31.2, "in effect on the date of this contract," *i.e.*, the date of award of the contracts. According to appellant, since there was no cap or limitation of the subject costs contained in the FAR 31.2 cost regulations or otherwise as of the award dates, these costs are fully allowable. The government contends that the allowability of the costs that were incurred after 1 January 1998 must be determined by the FAR cost regulations in effect during the period the costs were incurred, by which time the FAR cost regulations implementing the NDAA provided for a cap of these costs, FAR 31.205-6(p), and hence the costs in excess of the cap were unallowable. Further, the government argues that even if the disputed costs are allowable, the government's failure to pay them was not a breach since billing rates are set by the CO on an interim basis and may only be changed with the CO's consent pending resolution of final indirect rates.

The government's motion does not address whether the "sovereign act" doctrine applies to this case, nor does the government invoke the "sovereign act defense" in its amended pleadings. Accordingly, we proceed to address the disputed issues as framed by the parties.

DECISION

As framed by the parties, the key issue is one of contract interpretation, *i.e.*, whether the government's actions breached the ALLOWABLE COST AND PAYMENT clause. The parties agree that the material facts are undisputed and that summary judgment on the interpretation issue is appropriate, and we agree.

For purposes of contract interpretation, our first task is to examine the plain text of the relevant contract language. *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203 (Fed. Cir. 2004); *Gould, Inc. v. United States*, 935 F.2d 1271 (Fed. Cir. 1991). Under (a) of the ALLOWABLE COST AND PAYMENT clause, *Invoicing*, the government is obligated to pay the contractor in amounts determined to be "allowable" by the CO in accordance with FAR 31.2 "in effect on the date of this contract." Paragraph (a) talks to a contractor's "claimed allowable cost" and makes no distinction between whether the costs claimed are direct or indirect costs. Under (b) of the ALLOWABLE COST AND PAYMENT clause, *Reimbursing costs*, the reimbursement of allowable costs is also defined to include direct and indirect costs, *i.e.*, recorded paid cost of items or services purchased directly for the contract, (b)(1)(i), and costs incurred but not necessarily paid for including "properly allocable and allowable indirect costs," (b)(1)(ii)(E). (SOF ¶ 11)

From these provisions it is clear that the "allowability" determinations made by the government for reimbursement purposes must include a determination of the allowability of a contractor's direct and indirect costs. Under (a), allowability is determined by the FAR 31.2 cost principles "in effect on the date of this contract" without distinguishing between direct and indirect cost. It follows that the allowability amount for both direct and indirect costs must be determined by the FAR 31.2 cost principles in effect on the date of the contract. Executive compensation is such an indirect cost. As of the "date" of the subject contracts, *i.e.*, the date of award of these contracts, there was no cap or limit to these executive compensation costs under FAR Subpart 31.2, and hence no cap should be applied to limit these costs.

The government relies upon (d)(1) of the ALLOWABLE COST AND PAYMENT clause that requires the establishment of final annual indirect cost rates in accordance with FAR 42.7 "in effect for the period covered by the indirect cost rate proposal." But we see nothing in the plain language of (d) of the clause – or in the FAR Subpart 42.7 referred to therein – that provides for a determination of cost allowability in a manner other than through the FAR 31.2 cost principles in effect on the date of the contract as provided in (a) of the clause.

The government also alleges matters of practicality and/or policy that argue for a contract interpretation that makes the allowability of indirect costs dependent upon the cost principles in effect in the period when the costs were "incurred" rather than when the contract was "awarded" (mot. at 9-10; reply at 2-3). However, such arguments are irrelevant insofar as the government's contract interpretation is not supported by a plain reading of the text of the ALLOWABLE COST AND PAYMENT clause. We have duly considered all of the government's arguments, but they are not persuasive.

Having found that the disputed executive compensation costs are not subject to cap or limitation, we address the nature of the relief to be granted to appellant.[5] We understand appellant to claim that the CO's failure to modify the subject billing rates to allow for these costs as requested by appellant, and the government's resultant failure to pay appellant based upon the revised billing rates was a breach of the ALLOWABLE COST AND PAYMENT clause for which appellant is entitled to damages. We understand the government to argue that even if the disputed costs are allowable, the government's failure to pay them was not a breach, since billing rates under the ALLOWABLE COST AND PAYMENT clause are set by the CO on an interim basis, and may only be changed with the CO's consent pending resolution of final indirect rates.

The government fails to cite to any case law to support its position. On the other hand, in *ATK Thiokol, Inc. v. United States*, 76 Fed. Cl. 654 (2007) (*ATK III*)[6] the court held that the government was liable for breach of contract damages for its wrongful disallowance from appellant's indirect cost pools and billing rates of certain independent, research and development (IR&D) and production equipment costs. In *ATK III*, the government also contended that the ALLOWABLE COST AND PAYMENT clause prohibited the court from finding breach and awarding damages, *ATK III*, 76 Fed. Cl. at 664-67. The court rejected these arguments. Based upon *ATK III*, appellant asserts that the government is barred from relitigating such arguments here on the grounds of *res judicata*.

Res judicata or claim preclusion applies when the following factors are met:

> (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based upon the same set of transactional facts as the first (citation omitted).

Phillips/May Corp. v. United States, 524 F.3d 1264, 1268 (Fed. Cir. 2008). We do not believe appellant has shown that prong (3) has been met here. Appellant's claim in *ATK III* was based upon the allocability of certain IR&D and production equipment costs under CAS as incorporated into the contract, while appellant's claim here is based upon the allowability of executive compensation costs under the FAR cost principles incorporated into the contract. The transactional facts between the two cases are materially different. Appellant has not persuaded us that *res judicata* bars the government's legal position here.

---

[5] We limit our discussion to the nature of the relief and not to the amount of relief since only entitlement issues are before us in the parties' motions.

[6] The court issued two earlier decisions in this matter, *ATK Thiokol, Inc. v. United States*, 68 Fed. Cl. 612 (2005)(*ATK I*), and *ATK Thiokol, Inc. v. United States*, 72 Fed. Cl. 306 (2005)(*ATK II*).

We next address whether the related doctrine of *collateral estoppel* applies. The doctrine of *collateral estoppel* or issue preclusion generally bars a party from raising issues that have already been litigated in a prior proceeding and applies when the causes of action in the two proceedings are different. The moving party must establish the following:

> (1) identity of the issues in a prior proceeding;
> (2) the issues were actually litigated;
> (3) the determination of the issues was necessary to the resulting judgment; and,
> (4) the party defending against preclusion had a full and fair opportunity to litigate the issues (citations omitted).

Jet, Inc. v. Sewage Aeration Systems, 223 F.3d 1360, 1366 (Fed. Cir. 2000).
The government contends it should not be barred from asserting its legal position here because, among other things, the legal issue it now raises, *i.e.*, "that a contractor is only entitled to receive interim payments of indirect costs at the billing rates set by the cognizant contracting officer" (reply at 18) was not actually raised, litigated and determined in *ATK III*. We agree. The *ATK III* opinion does not clearly indicate that this specific legal argument was raised by the government and addressed and decided by the court. Appellant has not shown that *collateral estoppel* bars the government's legal position here. Accordingly, we consider all of the government's legal arguments in its motion papers, but those not raised are deemed waived.

While we agree with the government that under the ALLOWABLE COST AND PAYMENT clause the CO or authorized representative is responsible to set interim billing rates, there is nothing in the clause -- or anywhere in the contract, regulations or case law for that matter -- that would forbid a contractor from filing a claim under the CDA challenging this CO determination. The parties often use billing rates for years until final rates are agreed upon, or litigated and determined by a court or board. An erroneously low billing rate may cause loss to a contractor throughout this period. Subsection (e) of the ALLOWABLE COST AND PAYMENT clause provides that the billing rates "shall be the anticipated final rates." This means that they must include all properly allowable and allocable costs, and failing mutual agreement a contractor may claim under the CDA that the CO did not include such costs and hence violated this contract provision and the ALLOWABLE COST AND PAYMENT clause. We conclude that the "anticipated" rates to be used to set the billing rates here must reflect the otherwise allowable, uncapped executive compensation costs as part of appellant's indirect costs, and that the government's failure to modify the billing rates to reflect these otherwise allowable costs and to pay them as requested by appellant was a breach of contract.

We also disagree with the government that the ALLOWABLE COST AND PAYMENT clause precludes the Board from awarding "damages" for breach. We find no such limitation in the clause. In this respect, we subscribe to the approach taken by the court in *ATK III*, 76 Fed. Cl. at 668:

> *The consequence of an award of monetary damages in this case is only that the award will be included in the G&A pool applicable to the affected contracts.* The court is not making, and does not need to make, any additional determinations about what other costs appropriately may or may not be included in the G&A pool or what final payments are due, if any. *To the extent that the court's award implicates cost ceilings, incentive provisions or other clauses of particular contracts, the DACO, not the court, will make any necessary interim adjustments.* … Ultimately, a final indirect cost rate and the final amount due under each contract will be established by the DACO, reconciling any payments that have been paid out on an interim basis, including any damages awarded by the court…. (Emphasis added)

CONCLUSION

For reasons stated, appellant's motion for partial summary judgment is granted. The government's cross motion for partial summary judgment is denied. The parties shall report to the Board on their progress towards settling quantum and any other remaining issues within 90 days of receipt of this opinion.

Dated: 9 April 2009

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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 Nos. 55395, 55418, 55812, Appeals of ATK Launch Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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

_____
Front Office

ARMED SERVICES BOARD OF CONTRACT APPEALS
Skyline Six - Seventh Floor
5109 Leesburg Pike
Falls Church, Virginia 22041

CONCURRENCES IN DRAFT DECISION

_____ _____ _____ _____
LST spellcheck Date Author/Judge reviewed Date

_____ _____
LST citechecked Date

Draft prepared by Staff Attorney _____

Appeals of --	)	
	)	
ATK Launch Systems, Inc.	)	ASBCA Nos. 55395, 55418, 55812
	)	
Under Contract No. NAS8-38100 *et al*	)	

The first undersigned member hereby tenders the attached draft decision in the above-referenced appeal for action by the other members of this division, a Vice Chairman and the Chairman.

_____ _____
Member Date

I _____ _____ _____
Member Date

I _____ _____ _____
Member Date

I _____ _____ _____
Vice Chairman Date

I _____ _____ _____
Acting Chairman Date