ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons Global Services, Inc.	)	ASBCA No. 56731
	)	
Under Contract No. W914NS-04-D-0006	)	

APPEARANCES FOR THE APPELLANT:

John H. Williamson, Esq.
McGuireWoods LLP
McLean, VA

James J. Gallagher, Esq.
Michael R. Rizzo, Esq.
McKenna Long & Aldridge LLP
Los Angeles, CA

APPEARANCES FOR THE GOVERNMENT:

E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Srikanti Dixit, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE PEACOCK ON
GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

The government has moved to dismiss the captioned appeal for lack of jurisdiction alleging that no valid claim under the Contracts Disputes Act (CDA) (41 U.S.C. § 601 *et seq.*) has been submitted to the contracting officer. We grant the motion.[1]

[1] The record includes: the Government's Motion to Dismiss for Lack of Juridiction (gov't motion), Appellant's Opposition to the Government's Motion to Dismiss for Lack of Jurisdiction (app. opp'n), Government's Reply to Appellant's Opposition to Government's Motion to Dismiss for Lack of Jurisdiction (gov't reply), Appellant's Sur-Reply to the Government's Motion to Dismiss for Lack of Jurisdiction (app. sur-reply); Government's Response to the Board's Request for Additional Briefing (gov't resp. to Bd. request); Appellant's Response to the Board's 17 February 2010 Request for Additional Briefing (app. resp. to Bd. request); Government's Reply to Appellant's Response to the Board's Requests (gov't reply to app. resp. to Bd. request); Appellant's Sur-Reply in Support of Appellant's Response to Board Request (app. sur-reply to Bd. request);

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The referenced indefinite delivery indefinite quantity contract (referenced hereinafter as the contract or prime contract) for design-build work in Iraq for "buildings, housing, and health projects," was awarded to Parsons Global Services, Inc. (Parsons) in March 2004 with funding provided by the Department of the Army. The contract included FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996); FAR 52.233-1, DISPUTES (JULY 2002); FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (OCT 2003); FAR 52.232-20, LIMITATION OF COST (APR 1984) and FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002). (R4, tab 1)

2. Parsons entered into a Basic Ordering Agreement (subcontract) with Odell International, LLC (Odell) in May 2004, with an effective date of 25 March 2004. The subcontract required Odell to construct healthcare facilities in Iraq and deliver medical equipment in support of the prime contract. Parsons awarded the subcontract to expedite contracting for supplies or services and issued task orders, as necessary, in accordance with the prime contract. Direct labor rates were specified for specific labor classifications, but initially no overhead (OH) rate was specified. (R4, tab 3)

3. Prime contract Delivery (or Task) Order 0004 (TO 4) was issued in May 2004 for the construction, restoration, rebuilding, and development of public projects in Iraq. Task Orders 0011 (TO 11) and 0012 (TO 12) were issued under the prime contract in October 2004. Both TO 11 and TO 12 required the construction of health care facilities in various part of Iraq. Parsons in turn awarded subcontract task orders to Odell to support the above prime contract task orders. (R4, tabs 4-6)

4. Amendment No. 2 to the subcontract, signed by Parsons and Odell on 27 October 2004 and effective as of 26 March 2004, was issued to reflect the parties' agreement that Odell was entitled to be compensated for its OH and general administrative (G&A) expenses in addition to its hourly labor rates and its 12% share of fees that Parsons received. Amendment No. 2 added ¶ 1.0 C to the subcontract, which states:

> a. A mark-up of 1.75% will be added to Subcontractor's direct labor rates to cover G&A, OH and other [in]direct costs but not Fee which will be compensated as stated in paragraph B – Award Fee, as corrected in Am. 1....

Government's Response to the Board's Second Request for Additional Briefing (gov't resp. to Bd. second request); and, Appellant's Response to the Board's 17 May 2010 Request for Additional Briefing (app. resp. to Bd. second request).

Under the heading "Remarks," Amendment No. 2 states:

> Above changes are made for compliance with the original teaming agreement entered into for the proposal to the government, and were inadvertently omitted.

(R4, tab 7)

5. Amendment No. 3 to the subcontract, signed by both parties on 19 January 2005 and effective 26 March 2004, revised ¶ 1.0 C as follows:

> Paragraph C is hereby corrected as follows:
> a. A mark-up of 1.75 (175%) will be added to [Odell's] direct labor rates to cover G&A, OH and some other [in]direct costs....[emphasis added]

(R4, tab 8)

6. On 28 February 2006, the Defense Contract Audit Agency (DCAA) determined that Odell's provisional indirect cost rate for calendar year 2005 was 187% (compl. at 5). We are unable to determine whether the indirect cost amounts included by DCAA in computing an indirect rate for 2005 were the same amounts intended to be included by the Odell and Parsons subcontract clause above.

7. The government terminated for convenience TOs 4, 11, and 12 under the prime contract on 3 March 2006 (R4, tabs 10-12).

8. On 7 March 2006, Odell notified Parsons of the DCAA audit results and claimed reimbursement for the difference between the mark-up Odell had billed to date and the provisional indirect rate approved in February 2006 by DCAA (compl. at 5). Odell submitted Invoice 2002, in March 2006, to Parsons seeking $2,113,864.99 for the difference between a 75% "mark-up" billed by Odell (and paid by Parsons on previous invoices) and the 187% rate determined by DCAA to be Odell's 2005 provisional indirect cost rate (compl. at 5).

9. Parsons did not pay Invoice 2002 noting that the 187% rate was a provisional indirect rate covering 2005 (compl. at 5).

10. Modification No. P00023 to the Prime Contract assigned termination contracting officer (TCO) authority to the Defense Contract Management Agency (DCMA) in December 2006 (R4, tab 9).

11. Parsons submitted three Termination Proposals for TOs 4, 11 and 12 in July 2007 (R4, tabs 10-12).

12. During performance, Odell billed Parsons and appellant paid Odell a "mark-up" at the rate of 75% of Odell's direct labor costs. Parsons in turn submitted invoices during the period 2004 to 2006 to the government that included costs for Odell's "mark-up" using the 75% rate (app. resp. to Bd. second request at 2; compl. ¶ 18).

13. In June 2008, DCAA issued audit reports for Odell's claimed costs associated with TOs 4, 11 and 12. The purpose of the audits was to determine whether the billed amounts were allowable, allocable, reasonable, and in accordance with the terms of the subcontract. DCAA examined Odell's claimed costs that were submitted via invoices to Parsons. DCAA noted in each of the audit reports that the subcontract provided for a "mark-up" to be added to direct labor costs of 175%. (R4, tabs 13-15)

14. Odell submitted Invoice 2045 Rev 1 for $2,444,975, dated 8 July 2008, to Parsons to recover the claimed difference between labor costs previously billed with a "mark-up" of 75% and labor billed at the revised "mark-up" of 175% (R4, tab 19 at G-646).

15. Odell also submitted the following invoices to Parsons to recover costs incurred as a result of the government's termination of the Task Orders: Invoice 2040 for $19,827.50, dated 23 June 2008; Invoice 2041 for $46,963, dated 23 June 2008; Invoice 2042 for $2,362.50, dated 25 June 2008; Invoice 2046 for $11,453.75, dated 8 July 2008; and Invoice 2047 for $68,332.54, dated 8 August 2008 (R4, tab 19 at G-647, -689, -667, -680, -731).

16. The contract incorporated FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002), which stated in pertinent part (R4, tab 1 at G-41):

> (a) *Invoicing*. (1) The Government will 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 Federal Acquisition Regulation (FAR) subpart 31.2 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 (b)(2) of the clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only–

(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) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made–

(1) In accordance with the terms and conditions of a subcontract or invoice; and

(2) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government....

17. FAR 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (OCT 2003) (Prompt Payment clause) was also included in the contract and stated in part as follows (R4, tab 1 at G-66, -71):

(h) Subcontractor payment entitlement. The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contractor Officer that the subcontractor is entitled to the payment of such amount.

> (i) Prime-subcontractor disputes. A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the Government is a party. The Government may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

18. FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996) states in pertinent part (R4, tab 1 at G-102):

> (c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:
>
> ....
>
> (5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract; approval or ratification will be final for purposes of this clause.

19. Parsons did not pay Odell the invoiced amounts nor did it submit invoices to the government for payment of incurred subcontract indirect costs in question (app. resp. to Bd. second request at 2). Instead, Parsons submitted three "Payment Approval Request[s]" to the TCO in August 2008 "[p]ursuant to Parsons' Termination for Convenience Settlement Proposals and Federal Acquisition Regulation 49.108-3."[2] All three payment approval requests included the following language: "Parsons submits this memorandum recommending that the United States Government (USG) approve of Parsons' payment" to Odell in various amounts. (R4, tabs 16-18)

[2] There appears to be some confusion as to whether the vast majority of the costs are allocable to the terminated task orders (*see* gov't reply to app. resp. to Bd. request at 8). In light of our denial of jurisdiction in our decision below, it is unnecessary to attempt to address or resolve this possible issue.

20. The FAR contains the following relevant provisions regarding post-termination requirements:

> **49.103 Methods of settlement.**
>
> Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the TCO, (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in Subpart (49.3), or (d) a combination of these methods....
>
> **49.104 Duties of prime contractor after receipt of notice of termination.**
>
> After receipt of the notice of termination, the contractor shall comply with the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause applicable to convenience terminations generally require that the contractor–
>
> ....
>
> (g) Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;
>
> (h) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules....
>
> **49.105 Duties of termination contracting officer after issuance of notice of termination.**
>
> (a) Consistent with the termination clause and the notice of termination, the TCO shall–
>
> (1) Direct the action required of the prime contractor;
>
> (2) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors....

49.108 Settlement of subcontract settlement proposals. (No Text)

49.108-1 Subcontractor's rights.

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the settlement proposals of their immediate subcontractors.

....

49.108-3 Settlement procedure.

(a) Contractors shall settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts in this subpart and Subparts 49.2 or 49.3. However, the basis and form of the subcontractor's settlement proposal must be acceptable to the prime contractor or the next higher tier subcontractor. Each settlement must be supported by accounting data and other information sufficient for adequate review by the Government....

(b) Except as provided in 49.108-4, the TCO shall require that–

....

(2) The prime contractor submit, for approval or ratification, all termination settlements with subcontractors.

(c) The TCO shall promptly examine each subcontract settlement received to determine that the subcontract termination was made necessary by the termination of the prime contract (or by issuance of a change order–see 49.002(b)). The TCO will also determine if the settlement was arrived at in good faith, is reasonable in amount, and is

allocable to the terminated portion of the contract.... After the examination, the TCO shall notify the contractor in writing of–

(1) Approval or ratification, or

(2) The reasons for disapproval....

....

49.108-8 Assignment of rights under subcontracts.

....

(b) The termination for convenience clauses (except the short-form clauses) also provide the Government the right, in its discretion, to settle and pay any settlement proposal arising out of the termination of subcontracts. This right does not obligate the Government to settle and pay settlement proposals of subcontractors. As a general rule, the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines that it is in the Government's interest, the TCO shall, after notifying the contractor, settle the subcontractor's proposal using the procedures for settlement of prime contracts.... Direct settlements with subcontractors are not encouraged.

21. FAR Subpart 49.3, "ADDITIONAL PRINCIPLES FOR COST-REIMBURSEMENT CONTRACTS TERMINATED FOR CONVENIENCE," contains the following pertinent provisions:

49.302 Discontinuance of vouchers.

(a) When the contract has been completely terminated, the contractor shall not use Standard Form 1034 (Public Voucher for Purchases and Services Other than Personal) after the last day of the sixth month following the month in which the termination is effective. The contractor may elect to stop using vouchers at any time during the 6-month period. When the contractor has vouchered out all costs within the 6-month period, a proposal for fee, if any, may be submitted on SF 1437 (see 49.602-1) or by letter appropriately certified.

> The contractor must submit a substantiated proposal for fee to the TCO within 1 year from the effective date of termination, unless the period is extended by the TCO. When the use of vouchers is discontinued, the contractor shall submit all unvouchered costs and the proposed fee, if any, as specified in 49.303.
>
> **49.303 Procedure after discontinuing vouchers. (No Text)**
>
> **49.303-1 Submission of settlement proposal.**
>
> The contractor shall submit a final settlement proposal covering unvouchered costs and any proposed fee to within 1 year from the effective date of termination, unless the period is extended by the TCO. The contractor shall use the form prescribed in 49.602-1, unless the TCO authorizes otherwise. The proposal shall not include costs that have been–
>
> (a) Finally disallowed by the contracting officer; or
>
> (b) Previously vouchered and formally questioned by the Government but not yet decided as to allowability.

22. The first of Parsons' August 2008 payment approval requests was for "Odell-Project Close-Out and DCAA Audit Support," under TO 4 and TO 11, included Odell Invoices 2040, 2041, 2042, and 2046 and requested approval to pay Odell a total of $80,606.75 (R4, tab 16). These amounts were allegedly incurred following completion of the subcontract and in connection with the close out of the prime contract TOs as a consequence of the termination (*id.*, R4, tabs 16, 19).

23. The second payment approval request concerned the "Odell – Multiplier Issue" (or indirect cost issue) under TO 4 and TO 11. The request included Odell Invoice 2045 Rev 1, and sought approval to pay Odell a total of $2,444,975.92. (R4, tab 17) The parties agree that the entire amount sought was for costs incurred prior to the termination for convenience of the prime contract TOs and prior to completion of Odell's subcontract (*id.*; R4, tab 19; *see also* SOF ¶¶ 24, 31 below).

24. The third payment approval request pertained to "Odell – Legal Expenses," under TOs 4 and 11, included Odell Invoice 2047, and requested approval to pay Odell a total of $162,494.01. Of that total, $94,161.47 pertained to Odell's alleged costs incurred as a result of the termination and the remainder ($68,332.54) related to legal costs of an Odell subcontractor. (R4, tab 18)

25. The TCO orally notified Parsons he did not intend to act upon the requests for approval determining pursuant to FAR 49.108-8[3] that it was not in the best interest of the government to settle the Odell subcontract claim separately from settlement of the prime contract (compl. ¶ 39; R4, tab 20).

26. Under cover letter dated 22 December 2008, Parsons attached a "Certified Claim for Payment" under the CDA, on behalf of Odell to the Procuring Contracting Officer (PCO). Odell's attached claim was accompanied by a CDA certification signed by its Managing Director and sought reimbursement for $2,585,642 for costs incurred under the subcontract in connection with TOs 4, 11 and 12 under the prime contract from the government. (R4, tab 19)

27. The amount of $2,585,642 represented the total amounts previously sought in the above-described six invoices, with the exception that the legal expenses claimed by Odell on behalf of its subcontractor in invoice 2047 were deleted and Odell's claimed legal expenses reduced to $60,060.04 (R4, tabs 18, 19). Thus, the total amount sought of $2,585,642 consists of the $2,444,976 indirect cost amount (invoice 2045 Rev 1) incurred prior to completion of the Odell subcontract work and the post-completion close-out costs sought in the complaint totaling $140,666 (invoices 2040, 2041, 2042, 2046, 2047) related to the termination for convenience of Parsons' captioned prime contract (R4, tabs 16, 17, 18, 19; compl. ¶¶ 38, 48-49). There is no indication in the payment requests submitted to the TCO (or in the record generally) that the amounts were the result of any agreed "settlement" with Odell. Nor do the payment requests indicate that they were intended to be an amendment of Parsons' previously submitted termination settlement proposals to update any "settlement" with Odell. We are unable to determine with certainty the amount of the Odell subcontract at the time of termination or all pertinent details concerning whether the costs are properly reimbursable under the pertinent regulations, contract and subcontract provisions.

28. Parsons' cover letter to which Odell's "Certified Claim" was attached also stated (R4, tab 19):

> Through this cover letter and my signature provided below, Parsons hereby sponsors Odell International's

[3] FAR 49.108-8 was cited in the PCO's final decision as the basis for the TCO's determination not to act on the "payment approval requests" (R4, tab 20). There is nothing in the record that indicates that the PCO misstated the basis for the TCO's determination. Nor has appellant contended at any time that the "payment approval requests" were in fact attempts to amend its termination settlement proposal following an actual settlement between Odell and Parsons.

> Certified Claim. Further, Parsons hereby certifies that, to the best of Parson's knowledge and belief, Odell International has presented good grounds to support the equitable adjustment it seeks, and that Odell International has furnished its Certified Claim in good faith. Further, Parsons certifies that the amount of Odell International's Certified Claim accurately reflects the contract adjustment requests presented in good faith by Odell International. We provide this certification and sponsor this claim on the basis of our review of the facts and arguments presented by Odell International over approximately the past six weeks.
>
> I certify that I am duly authorized by Parsons to sponsor Odell's claim and to provide these certifications and representations.

29. On 3 January 2009, the PCO denied the "claim" (R4, tab 20).

30. Parsons timely filed the instant appeal.

31. In its complaint, appellant acknowledged that "most of Odell's claims did not arise from the termination of the...[t]ask [o]rders" (compl. ¶¶ 38, 43). As we have indicated above, only $140,666 of the $2,585,642 claimed were termination-related expenses. Therefore, the parties have agreed that the PCO (or ACO) rather than the TCO had the requisite authority to issue a final decision regarding the vast majority of the costs ($2,444,975) (gov't reply to app. resp. to Bd. request at 8; app. sur-reply to Bd. request at 1-3, 6-7). There is no evidence that appellant paid Odell and/or included the remainder ($140,666) in an amendment of its termination settlement proposal submitted to the TCO.

31. Although Parsons maintains that its certification (finding 28) "substantially complied" with CDA certification requirements and was not defective "in any way," it submitted a revised certification using the precise language required by the CDA and implementing regulations in response to the Board's request. In a cover letter dated 14 June 2010 to which the certification was attached, Parsons stated in pertinent part (app. resp. to Bd. second request):

> We note that Odell has not granted us access to Odell's books and records. Parsons has not, therefore, reviewed Odell's books and records either prior to (or since) Parsons' submission of the Certified Claim on 22 December 2008. In other words, Parsons has not audited Odell's incurred costs to ascertain whether Odell's indirect cost allocation bases and

> indirect costs pools support the 175 percent mark-up that DCAA recommended should apply to Odell's direct labor rates. Although we have not had the opportunity to verify DCAA's findings with such an independent audit conducted by Parsons, we have no reason to believe that Odell's alleged claim calculations are incorrect.

32. In its second request for additional briefing, the Board asked, "Does appellant concede that it is liable to reimburse its subcontractor for all costs in question?" Parsons responded, "Parsons is liable to pay Odell for any amounts that Parsons receives from the Government for the sponsored claim...." (App. resp. to Bd. second request at 3)

DECISION

The government primarily contends that Parsons failed to comply with the captioned flexibly-priced contract's standard invoicing, termination and cost reimbursement provisions. As a consequence, the government argues that appellant failed to make "routine requests for payment" of the subcontract costs in question. The government maintains that it has not disputed, and in fact could not dispute, its liability for payment of the costs because of the absence of such a request. Therefore, the government alleges that no "claim" has been properly submitted to the contracting officer and appellant is not entitled to recover CDA interest for its circumvention of the contract's cost invoicing/vouchering and termination procedures.

Appellant must prove by a preponderance of evidence that the Board has jurisdiction under the CDA to entertain its appeal. *E.g., Reynolds v. Army and Air Force Exchange Service,* 846 F.2d 746, 748 (Fed. Cir. 1988); *Thai Hai,* ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,919-20, *aff'd on recon.*, 03-1 BCA ¶ 32,130, *aff'd,* 82 Fed. Appx. 226 (Fed. Cir. 2003). It has failed to sustain its burden of proof here. Accordingly, we lack jurisdiction to consider the appeal.

Under the CDA, the submission of a claim to the contracting officer and a final decision on (or the deemed denial of) the claim are prerequisites to jurisdiction over contractor claims. 41 U.S.C. §§ 605(a), (c)(5); *E.g., Reflectone, Inc. v. Dalton,* 60 F.3d 1572 (Fed. Cir. 1995). The CDA does not define "claim" but FAR 2.101 (previously codified at FAR 33.201) provides the following definition:

> Claim means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.... A voucher, invoice, or other

> routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

There is no dispute that subcontract indirect costs generally are reimbursed by the government following receipt of "routine requests for payment" from the contractor. The prime contractor simply submits an invoice (or voucher) to the government to receive reimbursement after paying the costs (or in appropriate cases incurring but not actually remitting payment to the subcontractor). There is also no dispute that such routine invoices, submitted as a matter of course during performance of cost reimbursement contacts, are not claims when submitted under the above FAR definition. An invoice may only become a claim if disputed or the government unreasonably delays payment of the invoice. *E.g.*, *Reflectone,* 60 F.3d at 1579-80; *Moshman Associates, Inc.*, ASBCA No. 52320, 00-1 BCA ¶ 30,906 at 152,488; *General Dynamics Corp. Electric Boat Division,* ASBCA No. 25919, 82-1 BCA ¶ 15,616 at 77,105 (because vouchers under cost reimbursement contracts qualify as routine requests for payment, CDA certification not required). The government is afforded a reasonable time to determine, *inter alia,* the reimbursability of invoiced costs and whether payment would violate any contractual provisions, including, for example, the Limitation of Cost clause. If the government fails to make timely payment, the contractor may be entitled to interest to the extent authorized by the Prompt Payment Act (PPA). Appellant did follow routine invoicing and payment procedures and obtained timely reimbursement from the government for payments to Odell for subcontract indirect costs at the erroneous 75% rate. In this appeal, appellant seeks reimbursement for the remainder of Odell's indirect costs (using the 175% rate) that were eventually invoiced to Parsons for payment. Parsons declined to pay these costs or enter into a "settlement" with Odell regarding them. Parsons recognizes an obligation to pay Odell only to the extent that the government first agrees to reimburse Parsons for the costs.

Although a termination for convenience normally is not a routine occurrence, similar routine procedures are prescribed for vouchering and paying costs, including subcontract "settlement" costs, and for submission of TSPs seeking reimbursement of such costs. The non-routine nature of a termination for convenience does not *ipso facto* convert the TSP into a "claim," absent an "impasse" with the government. Therefore, had the costs been invoiced by Parsons it would have been a routine request. Alternatively, had appellant "settled" with Odell and amended its TSP to recover the costs, the amended TSP generally would not have qualified as a claim pending an "impasse" in negotiating the termination settlement. *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-46 (Fed. Cir. 1996).

Appellant argues that its 22 December 2008 request to the PCO for payment of Odell's indirect costs (and some close-out costs associated with the termination) qualifies as a CDA "claim" despite its failure to submit an invoice to the government or to enter into a "settlement" with Odell and amend its TSP. Although it alleges that the costs here were not subject to "routine" invoicing or TSP procedures, it has failed to persuasively explain why the costs were not treated in accordance with the customary, standard procedures provided for in the contract.

We consider that routinely invoiced indirect subcontractor costs payable pursuant to prescribed contractual procedures may not be the subject of non-routine claims for payment under flexibly priced contracts solely as a consequence of subjective factors unique to the prime-subcontractor relationship. The government must be afforded the fair opportunity to timely pay or dispute liability as envisioned by contractual payment procedures, before becoming liable for interest under the PPA (if applicable) or the CDA. Requests relating to the payment of such costs are not recast as "non-routine" within the meaning and intent of FAR 2.101 solely as a result of prime-subcontractor disagreements regarding their reimbursability that preclude "settlement," or delays or mistakes in their invoicing by the subcontractor or payment by the prime. Parsons has failed to comply with the requisite, prescribed procedures to obtain reimbursement of the Odell subcontract costs in issue. It has neither paid Odell and invoiced the government nor entered into a "settlement" with Odell and amended its TSP to recover the amount of the "settlement." We emphasize that in this case, appellant cites no change, government fault, act or other common "claim" event that allegedly led to the incurrence of the increased indirect, "multiplier" costs claimed. There is no indication that Parsons seeks payment under any provision of the prime contract other than pursuant to standard cost reimbursement and termination clauses with which it has not complied. *Cf. E.R. Mitchell Constr. Co. v. Danzig*, 175 F.3d 1369, 1374 (Fed. Cir. 1999) (government delay resulted in increased subcontract overhead costs for which prime contractor and government were liable). The "claim" here simply involves unsettled subcontract costs that appear to have been erroneously computed by Odell and Parsons and are initially a matter for resolution by them.

In this regard, the "payment approval requests" do not qualify as "routine requests for payment." Nor did the TCO's "inaction" with respect to those "payment approval requests" evidence that the government "disputed" its potential liability to pay them. Of decisive importance is the fact that the costs that were the subject of the requests were not the result of a "settlement" between Odell and Parsons. Although denominated "payment approval requests" by appellant, the TCO and PCO interpreted them in substance and intent to be requests that the government directly settle with Odell given the absence of an underlying settlement agreement with the subcontractor. That interpretation has not been disputed by appellant. Direct settlements by the government with subcontractors are authorized by FAR 49.108 but, in fact, are discouraged by the provision. FAR 49.108-8

affords the TCO discretion to intervene but states the "general rule" that "the prime contractor is obligated to settle" with and pay the subcontractor. There is no evidence or argument that the TCO somehow abused his discretion in denying the requests or disputed the government's eventual liability to pay properly submitted subcontract "settlement" costs. To argue that the TCO's determination was the equivalent of a "dispute," would effectively deprive the TCO of his discretionary right and be contrary to the general intent of FAR 49.108-8 to use the direct settlement option sparingly. In essence, the TCO's direction required appellant to simply settle its subcontract claims in accordance with customary and standard termination procedures. No persuasive reason has been given for appellant not doing so. To the extent that the costs claimed are cognizable under the Termination clause, appellant should include them in an appropriate amendment to its termination settlement proposal.

It is also noteworthy that, in response to a request for further briefing by the Board, appellant maintains that the PCO (not the TCO) was the appropriate government official with authority to issue a final decision to whom a "claim" should have been addressed. Appellant does not contend that its August 2008 payment approval requests were implicitly an inartfully-worded attempt to amend its prior termination settlement proposals and were properly before, and should have been considered by, the TCO. Appellant concedes that it has not entered into a "settlement" with Odell regarding the costs now claimed.

Nor is there any other possible indication that the government "disputes" liability for reimbursement of the subcontract costs. To the contrary, the government's audit report concluded that the claimed indirect costs had been incurred by Odell and drew attention to the discrepancy between the prior Odell indirect costs billed and paid at the 75% rate and the revised subcontract rate of 175%. The results of the audit appear to have triggered the chain of events leading to the "claim" for the very costs verified by the audit. DCAA did not question the costs and there was no dispute between appellant and the government regarding them. The government simply asks that appellant unequivocally determine whether the costs are properly payable under the subcontract and follow customary procedures in seeking reimbursement. The government is not in a position to know and weigh all facts, circumstances and issues related to internal subcontract matters regarding the indirect cost issue or determine whether Parsons is liable to Odell for the costs. As late as the Board's second request for additional briefing, Parsons concedes only that it is liable to pay Odell to the extent that the government pays Parsons. Appellant's position puts the cart before the horse. It is for Parsons to first determine whether the indirect costs should be paid, not for the government to evaluate facts and potential defenses that are unique to the prime-subcontractor relationship. The only indication of a potential dispute involves solely Odell and Parsons and their subcontract. The government was not privy, *e.g.*, to the multiple revisions of the subcontract indirect cost provision, the timing of Odell's notices and request for

reimbursement to Parsons, and subcontract administration matters generally. As late as June 2010 when appellant provided a corrected CDA certification of the claim tracking the requisite CDA language, Parsons equivocally indicated that it had not conducted its own audit of the subcontract costs. It is particularly questionable for appellant to expect the government to make a determination as to the allowability and reimbursabilty of subcontract overhead costs under a cost reimbursement contract when appellant has failed to take a firm position on entitlement issues involving the subcontract. *Cf. W.G. Yates & Sons Constr. Co. v. Caldera*, 192 F.3d 987, 991 (Fed. Cir. 1999) (noting contractors have standing to sue "if the prime contractor is liable to the subcontractor for damages sustained by the subcontractor [as a result of government actions], that prime contractor can bring an action against the government for the subcontractor's damages").

Absent persuasive proof that the costs in issue were disputed, the contractor cannot circumvent customary invoicing, payment and termination procedures and submit a CDA "claim" for their payment. Accordingly, we lack jurisdiction to consider the appeal.

The government's motion is granted. The appeal is dismissed for lack of jurisdiction.

Dated: 3 December 2010

ROBERT T. PEACOCK
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

(Signatures continued)

I concur

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

ROLLIN A. VAN BROEKHOVEN
Administrative Judge
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. 56731, Appeal of Parsons Global Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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