ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
SRI International	)	ASBCA No. 56353
	)	
Under Contract No. HR0011-06-C-0023	)	

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The parties' earlier dispute centered on whether the Letter of Credit (LOC) costs or bank fees SRI International (SRI) paid to Wells Fargo Bank, N.A. (Wells Fargo) in fiscal years (FY) 2005 and 2006 were allowable. The LOC costs were paid to have the bank guarantee SRI's short-term ability to pay off the full amount of its long-term bond debt incurred to finance its expansion project. On 18 February 2011, we issued our decision concluding that the claimed costs were allowable under FAR 31.205-27(a)(3) and FAR 31.201-2. Our decision went on to say: "Accordingly, this appeal is sustained in the amount of $609,621 with interest pursuant to 41 U.S.C. § 611 running from the putative receipt date of 21 September 2007."[1] *SRI International*, ASBCA No. 56353, 11-1 BCA ¶ 34,694 at 170,868.

SRI had claimed the LOC costs as a part of its G&A costs (R4, tab 8 at 7, 10). For purposes of its appeal, SRI had selected a sample contract with the Defense Advanced

[1] The Contract Disputes Act (CDA), originally codified at 41 U.S.C. §§ 601-613, was recodified at 41 U.S.C. §§ 7101-7109. Pub. L. No. 111-350, Subtitle III, 124 Stat. 3677, 3816-3826 (2011). The CDA interest provision, originally at 41 U.S.C. § 611, now appears at 41 U.S.C. § 7109. The minor wording changes have no substantive effect.

Research Project Agency.[2] Thus, not all of the details of the affected contracts are before the Board. Of the $609,621 claimed, $338,133 was for the LOC costs SRI incurred in FY 05 and $271,488 was for the LOC costs incurred in FY 06.

On 4 April 2011, we received a timely motion for reconsideration (mot.) from the government.[3] The motion does not challenge the Board's underlying entitlement holding that the LOC costs were allowable. Instead, the government wants us to clarify the portion of the decision that could be interpreted as making a lump sum monetary award plus interest.

For purposes of the government's motion, we summarize the salient provisions of the Federal Acquisition Regulation (FAR) 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002) clause, and FAR 42.705 which lie at the heart of the government's motion. The Allowable Cost and Payment clause requires final annual indirect cost rates to be established in accordance with FAR 42.7 in effect for the period covered by the indirect cost rate proposal. FAR 52.216-7(d). FAR 52.216-7(e) provides that "[u]ntil final annual indirect cost rates are established for any period," the government is required to reimburse the contractor at "billing rates established by the Contracting Officer...subject to adjustment when the final rates are established." FAR 52.216-7(d) sets out the procedures for establishing "*Final indirect cost rates*." The contractor is required to submit an adequate final indirect cost rates proposal with adequate supporting data. FAR 52.216-7(d)(2)(i). The appropriate government representative and the contractor are to establish the final indirect cost rates promptly. FAR 52.216-7(d)(2)(ii). They are then required to execute a written understanding setting forth the final indirect cost rates. Upon execution, this understanding is incorporated into the affected contract(s) and/or subcontract(s), although the understanding will not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in the contract. FAR 52.216-7(d)(3). The contractor is then required to submit a completion invoice or voucher to reflect the settled amounts and rates within 120 days after settlement of the final indirect cost rates for all years of a physically complete contract. FAR 52.216-7(d)(5). Upon approval of a completion invoice or voucher submitted by the contractor, and upon its compliance with all contract terms, the government is required to promptly pay any balance of allowable costs and fee not previously paid. FAR 52.216-7(h).

On 10 May 2010, after the hearing on this appeal had taken place and while the decision on the appeal was pending, ACO Craig M. Studley (ACO Studley) entered into a final overhead rate agreement with SRI for FY 05. According to ACO Studley, SRI's FY 05 final indirect cost rates were "determined in accordance with the procedure"

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[2] *See SRI International*, 11-1 BCA ¶ 34,694 at 170,858, finding 2.

[3] The record shows the government received the Board's decision on 2 March 2011. The envelope sending the motion for reconsideration was postmarked 1 April 2011.

prescribed in FAR 42.705 and FAR 52.216-7 "with due consideration given to the costs in dispute." (Mot., ex. G-1, Studley decl. ¶ 4).

The parties' 10 May 2010 final overhead rate agreement for FY 05 included the following paragraphs:

> 4. It is further agreed the following Reservation of Rights clause is applicable to this agreement.
>
> **Reservation of Rights**. The parties acknowledge that the Administrative Contracting Officer has determined the Contractor to be noncompliant with Federal Acquisition Regulation (FAR) 31.205-20 with respect to their inclusion of bank charges from Wells Fargo Bank of $365,900 in its final indirect rate submission for FY2005: costs directly associated with financing and refinancing capital. The charges were for maintaining a letter of credit for Contractor's outstanding Variable Rate Demand Revenue Bonds (Series 2003A and 2003B) issued in behalf of the Contractor by the California Infrastructure and Development Bank. The parties are in dispute concerning this alleged noncompliance and a decision is pending from the Armed Services Board of Contract Appeals (ASBCA Case No. 56353). The parties agree that the overhead rates established by this Agreement include disputed costs. In order to expedite the settlement of these rates and factors, these costs have been provisionally allowed. If ASBCA concurs with the Contracting Officer's Final Decision (COFD) finding the costs unallowable, the Contractor agrees to make separate payment to the Government of the amount of G&A expenses overpaid by the Government, plus interest, under the contracts subject to this Agreement by reason of the cited noncompliance. If the contractor prevails in the aforementioned ASBCA case, it is agreed no adjustments to the rates established by the Final Overhead Agreement for SRI International's FY 2005 shall be made.

(Mot., ex. G-1)

With respect to the FY 05 LOC costs, ACO Studley's 28 March 2011 declaration tells us "Base[d] upon this bilateral agreed to rate agreement, SRI has so far submitted approximately 65% of its completion invoices and vouchers in accordance with FAR 52.216-7(d)(5). As such, SRI has already been paid for a significant portion of the

disputed FY2005 Letter of Credit bank charges from Wells Fargo Bank through the agreed to FY 2005 indirect cost rates." (Mot., ex. G-1, Studley decl. ¶ 4)

With respect to SRI's FY 06 indirect cost rates, ACO Studley's declaration tells us:

> 5. SRI submitted their final (revised) indirect cost rate proposal for FY 2006 on July 19, 2007. DCAA performed an audit of the revised proposal and issued a report (4281-2006N10110001R) dated January 25, 2008. Because the Letter of Credit costs in dispute are applicable to FY 2006 as well as FY 2005, final rate negotiations were not entered into, and therefore the final indirect rates have not been settled for FY2006. As a result of the Board's decision in this case, the disputed FY 2006 Letter of Credit bank charges from Wells Fargo Bank will now be included in SRI's G&A cost pool allowing the parties to establish an agreed-to final indirect cost rate for FY 2006. In accordance with FAR 52.216-7, SRI will then submit its completion invoices and vouchers using the agreed to final cost rate and be paid the appropriate amount on its affected contracts.

(Mot., ex. G-1, Studley decl. ¶ 5)

CONTENTIONS OF THE PARTIES

Moving for reconsideration, the government asks us to clarify this statement in our decision: "Accordingly, this appeal is sustained in the amount of $609,621 with interest pursuant to 41 U.S.C. § 611 running from the putative receipt date of 21 September 2007" (mot. at 2). The government says this statement could be interpreted as awarding SRI "a lump sum payment in the amount of $609,621 with interest from September 21, 2007" as opposed to allowing SRI to "recover the LOC costs as part of the final overhead rate settlement process in accordance with the contract clauses of the affected contracts and the prescribed FAR provisions" (*id.*). The government reminds us that SRI selected only a sample contract for litigation (*id.* at 3), and SRI's recovery of the allowable indirect LOC costs "must be allocated to the affected contracts and the affected contract may have an applicable monetary ceiling or contract obligation that would impact the actual dollar amount of the allowable indirect LOC costs that may be recovered under a particular affected contract" (*id.* at 6). The government says that the Board should follow in this regard the reasoning in *ATK Launch Systems, Inc.*, ASBCA No. 55395 *et al.*, 09-1 BCA ¶ 34,118 (*id.* at 9).

The government contends that under the Allowable Cost and Payment clause, its obligation to make final payment for the indirect costs does not arise until SRI submits its completion invoices and vouchers and SRI has complied with all terms of the affected contract. The government says the exact amount SRI will recover under all the affected contracts may not necessarily be $609,621 and our decision awarding interest from 21 September 2007 on $609,621 "will result in SRI recovering more money than it is entitled to recover under the affected contracts." (Mot. at 7-8) The government asks us to remand the case to the parties to determine what additional amount SRI is due in accordance with the applicable contract clauses of the affected contracts (mot. at 10).

Opposing the government's motion, SRI maintains that "with one minor clarification, the Board's holding is correct as stated and should not be revised" (opp'n at 1). In view of the 10 May 2010 overhead rate agreement for FY 05, SRI says "there is no need for a lump sum payment of $338,133 of the $609,621 amount sustained by the Board" (*id.*). SRI contends, however, that it is entitled to "a lump sum payment of the FY 2006 LOC costs of $271,488, and to CDA interest on the full $609,621 sustained by the Board from 21 September 2007 until payment is made" (*id.*). SRI contends that the government "misconstrues" the Board's decision in *ATK Launch Systems,* and the Court of Federal Claims' decision in *ATK Thiokol, Inc. v. United States*, 76 Fed. Cl. 654 (2007) (*ATK III*), cited in *ATK Launch Systems*. Both decisions, SRI argues, rejected the government's argument that "the contractor must recover the disputed indirect costs through the final indirect cost rate process rather than through an award of monetary damages" (opp'n at 3).

As for CDA interest, SRI says it is mandated by statute, 41 U.S.C. § 7109(a)(1), and because SRI submitted a CDA claim for $609,621, and the Board sustained the appeal in that amount, it is entitled to "CDA interest on the full $609,621 sustained by the Board from 21 September 2007 until payment is made" (opp'n at 6).

DECISION

Payment of the Allowable LOC Costs

Even though the parties are well aware that the disputed LOC costs are indirect (G&A) costs, the government is correct that our holding – "Accordingly, this appeal is sustained in the amount of $609,621 with interest pursuant to 41 U.S.C. § 611 running from the putative receipt date of 21 September 2007" – could be misinterpreted to mean that we have made a lump sum award with interest. To be clear, what our decision holds is that the LOC costs SRI incurred in FYs 05 and 06 are allowable indirect costs, and SRI is therefore entitled to include the LOC costs in its indirect G&A cost pool for those years. This, however, is not the end of the process. As envisioned in the Allowable Cost and Payment clause and FAR 42.705-1, the allowable LOC costs for FYs 05 and 06 still have to be allocated to the affected contracts and be scrutinized against the terms of those

contracts before the actual amount of the allowable LOC costs under each affected contract may be determined. Thus, the final indirect cost rate establishment process must run its course.

ATK III and *ATK Launch Systems* stand for the proposition that the Allowable Cost and Payment clause does not preclude the Court and the Board from awarding monetary damages for breach of contract. Neither case made an actual monetary award. Both cases assigned to the DACO the task of making any necessary interim adjustments for billing purposes and ultimately establishing a final indirect cost rate and the final amount due under each contract. In *ATK Launch Systems*, we "subscribe[d] to the approach taken by the court in *ATK III*" quoting this passage from that decision at 09-1 BCA ¶ 34,188 at 168,707:

> *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 in original]

While the appeal was pending, the parties, following the final indirect cost rate establishment process prescribed in the Allowable Cost and Payment clause and FAR 42.705, with "due consideration given to the costs in dispute" reached agreement on the final overhead rates for FY 05. Based on the terms of that agreement, SRI tells us "there is no need for a lump sum payment of $338,133 of the $609,621 amount sustained by the Board" (opp'n at 1). There is, therefore, no remaining issue with respect to the payment of FY 05 LOC costs.

For FY 06, SRI's final (revised) indirect cost rate proposal was submitted in July 2007, and the Defense Contract Audit Agency (DCAA) issued its report on the proposal in January 2008. As far as we know, the parties have not begun the process of establishing the final indirect cost rates. SRI contends that "there is no need to follow that [final indirect cost rate] process for the LOC costs because the Board has already determined them to be allowable" (opp'n at 5). SRI says the allowable LOC costs for FY 06 should be removed from the FY 06 final indirect rate proposal and paid to SRI in a

lump sum, and the parties can take this interim payment into account in establishing the final indirect cost rates for FY 06 (*id.*).

In *ATK III,* one of the parties' disputes centered on whether award of money damages was prohibited by the Allowable Cost and Payment clause, FAR 52.216-7. The government argued award of money damages would necessarily determine final indirect cost rates and final payment amounts under all of the affected contracts in that case. 76 Fed. Cl. at 667. The Court ruled that the consequences of awarding monetary damages were that the damages would be included in the G&A pool applicable to the affected contracts and "[u]ltimately 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." 76 Fed. Cl. at 668.

Here, SRI's 18 September 2007 claim said that "[w]e have selected a 'test' contract for the purpose of this claim. However, the claimed costs were included in our final indirect cost rate proposals for fiscal years 2005 and 2006 and affect all of our contracts and subcontracts to which the indirect costs were allocated." (R4, tab 23) If that was the case, all the ACO needed to do was to establish a final indirect cost rate and final amount due under each affected contract, reconciling any payments that had been paid out on an interim basis. That is precisely what ACO Studley said he would do for the FY 06 LOC costs ($271,488) as a result of our decision ("As a result of the Board's decision in this case, the disputed FY 2006 Letter of Credit bank charges from Wells Fargo Bank will now be included in SRI's G&A cost pool allowing the parties to establish an agreed-to final indirect cost rate for FY 2006." (Mot., ex. G-1, Studley decl. ¶ 5).

Payment of CDA Interest

The government contends that "[u]ntil such time as SRI submits its completion invoices and vouchers for FY 2005 and FY 2006, the Government's contractual obligation to make final payments for the allowable indirect costs does not arise." To award CDA interest from the date the ACO received SRI's claim, the government argues, would result in SRI "recovering more money than it is entitled to recover under the affected contracts." (Mot. at 8)

As re-codified in 2011, Section 7109 of the CDA states: "Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim, pursuant to section 7103(a) of this title, until the date of payment of the claim." The interest provision of the CDA has been interpreted to set "a single, red-letter date for interest on all amounts found due by a court without regard to when the contractor incurred the costs." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 862 (Fed. Cir. 1991); *Caldera v. J.S.*

Alberici Constr. Co., 153 F.3d 1381, 1383 (Fed. Cir. 1998) (upholding Engineers Board's interpretation of 41 U.S.C. § 611 starting "interest accrual on costs when a contracting officer receives a claim, not when a contractor incurs costs"); *Raytheon Co. v. White*, 305 F.3d 1354, 1365 (Fed. Cir. 2002) ("interest may not be denied merely because costs later found due had not been incurred at the time the claim was filed").

The government's argument, if accepted, would mean that the CDA interest on the amount found due would not start on the date the CO received SRI's claim but start on some future date if and when the government failed to follow the final indirect cost rate establishment and payment process prescribed by the Allowable Cost and Payment clause. We reject the government's argument because it is contrary to the well-established case law on CDA interest.

In the context of this appeal, the amount found due is the total amount of LOC costs allocated to all of the affected contracts for FYs 05 and 06 and paid pursuant to FAR 52.216-7(h) as a consequence of our decision. That amount may or may not be $609,621. We picked 21 September 2007 as the date CDA interest began to run because SRI's certified claim for the LOC costs was submitted by letter dated 18 September 2007[4] and the ACO should have received it on 21 September 2007.[5]

For FY 05, we are told that as a result of the parties' 10 May 2010 final overhead agreement, SRI has already been paid a significant portion of the disputed FY 05 LOC charges from Wells Fargo through the agreed upon FY 05 final indirect cost rates, and SRI had submitted approximately 65% of the completion invoices and vouchers at the time the government filed its motion. For FY 06, there is no indication that the final indirect cost rate establishment process has begun or that any of the allowable FY 06 LOC costs have been allocated to the affected contracts and paid. For purposes of computing interest, the parties are in the best position to know when the amount found due under each affected contract is paid.

Accordingly, we remand the appeal to the ACO to determine the ultimate amount of FYs 05 and 06 LOC costs due as a consequence of our 18 February 2011 decision. The CDA interest on the FYs 05 and 06 LOC costs due SRI will be computed from 21 September 2007 and run until paid under each affected contract pursuant to 41 U.S.C. § 7109.

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[4] *See SRI International*, 11-1 BCA ¶ 34,694 at 170,864, finding 45.

[5] The record before us does not show the ACO's actual receipt date of SRI's certified claim.

CONCLUSION

For the foregoing reasons, we modify the last sentence of our 18 February 2011 decision to state: Accordingly, this appeal is sustained. Interest pursuant to 41 U.S.C. § 7109 is to run from 21 September 2007.

The government's motion for reconsideration is granted to the extent indicated above and is in all other respects denied.

Dated: 5 October 2011

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
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. 56353, Appeal of SRI International, rendered in conformance with the Board's Charter.

Dated:

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