

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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CACI International, Inc.) ASBCA No. 57559
)
Under Contract No. N00140-05-C-0016)

APPEARANCE FOR THE APPELLANT: J. William Koegel, Jr., Esq.
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APPEARANCES FOR THE GOVERNMENT: E. Michael Chiapas, Esq.
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Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE TING
ON THE GOVERNMENT'S MOTION TO DISMISS

The Corporate Administrative Contracting Officer (CACO) for CACI International, Inc. (CACI) made a final determination that CACI was noncompliant with Cost Accounting Standard (CAS) 403. In accordance with Federal Acquisition Regulation (FAR) 52.230-6, he directed CACI to correct the noncompliance, to submit a proposed change to its accounting practices, to report if existing contracts are affected by the noncompliance, and to submit a general dollar magnitude (GDM) proposal calculating the impact of the alleged noncompliant practice. After CACI submitted a cost impact analysis showing no adverse impact to government contracts, the government moved by letter dated 3 January 2012 to dismiss the appeal without prejudice as there was no longer any dispute for the Board to decide. CACI opposes the motion, contending that there is a "live dispute" on the CACO's finding of noncompliance.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

CACI is a holding company with two main branches: CACI, Inc., a Delaware corporation, and CACI, NV, a Netherlands corporation (R4, tab 6 at 7). CACI Premier Technology Group (CACI PTG) is a segment of CACI (R4, tab 8 at 1).

CACI has contracts that are subject to the CAS.¹ Its CAS-covered contracts contained FAR 52.230-2, COST ACCOUNTING STANDARDS (APR 1998) or its predecessor. This clause provides in part that “[i]f the parties fail to agree whether the Contractor or a subcontractor has complied with an applicable CAS in 48 CFR, Part 9904 or a CAS rule or regulation in 48 CFR, Part 9903 and as to any cost adjustment demanded by the United States, such failure to agree will constitute a dispute under the Contract Disputes Act (41 U.S.C. 601).”² (Compl. ¶ 2)

CAS 403 prescribes criteria for allocation of the expenses of a home office to the segments based on the beneficial or causal relationship between such expenses and the receiving segments. With certain exceptions, CAS 403-40(c)(1) requires residual expenses to be allocated to all segments under a home office by means of a base representative of the total activity of such segments. 48 C.F.R. § 9904.403.

In 2000, CACI PTG was awarded Blanket Purchase Agreement (BPA) No. NBCHA-01-0005 (BPA 0005) and ten other task orders under GSA Information Technology Schedule Contract No. GS-34F-587211. Pursuant to the task orders issued under the BPA, CACI PTG provided interrogation services to the United States military at Abu Ghraib prison and other locations in Iraq. (R4, tab 8 at 1)

In 2004, allegations of mistreatment of prisoners by CACI PTG employees at Abu Ghraib and other locations in Iraq surfaced. In the same year, prisoners and family members filed class action suits against CACI PTG and CACI alleging that CACI interrogators tortured or otherwise mistreated prisoners at Abu Ghraib in the course of fulfilling BPA 0005 task orders. Also in 2004, Congress, the General Accountability Office (GAO), the United States military and the Department of the Interior began investigations into the alleged mistreatment and improper contracting procedures that led to award of the interrogation contracts under an information technology BPA. In 2005, CACI PTG and CACI sued a radio talk show host and a radio station for defamation. (R4, tab 8 at 1-2) CACI incurred legal expenses on behalf of CACI PTG as a result of these lawsuits and investigations. CACI allocated these legal expenses to its home office residual pool which then was allocated by means of a three-factor formula to all CACI segments. (R4, tab 8 at 2)

On 16 March 2009, the Defense Contract Audit Agency (DCAA) issued Audit Report No. 6161-2008K19200602 (R4, tab 6). The DCAA audit found that CACI’s FY 2006 incurred cost submission “incorrectly claimed \$4.09 million of legal costs related to lawsuits resulting from the performance of Iraq contracts as CACI Home

¹ The parties agreed to use N00140-05-C-0016 as a representative contract affected by the dispute addressed in this appeal (*see* gov’t counsel’s 23 March 2011 letter).

² 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).

Office residual costs when they should have been treated as CACI Premier Technology costs.” The report opined this was CAS 403 noncompliant. (*Id.* at 1) According to DCAA, the legal costs “related to work performed under a single contracting effort and under a single segment,” and “[n]o causal or beneficial relationship exists between other segments that did not perform on this contract and the legal defense costs in question” (*id.* at 3). DCAA concluded that “the legal costs should not be allocated through the CACI home office which ultimately increases costs on all contracts,” and pursuant to CAS 403-40(a)(1), “these costs should be allocated in the most direct method available to the contract and/or business unit that performed work on the contract” (*id.* at 3). The DCAA report recommended that “the costs be booked to the contractor’s Segment 65 G&A pool rather than home office residual expense as claimed in the incurred cost submission” (*id.* at 4).

CACI’s 18 May 2009 response to the audit argued that “[t]he scope of the investigations and the allegations in the civil suits do not concern solely performance of the contract; rather they also address the overall operations of CACI and its contracting practices” (R4, tab 7 at 5). CACI maintained that “the claimed legal costs were incurred to defend the reputation of the company as a whole, and were necessary to ensure CACI’s business continuity and success across all business segments and contracts in support of critical national security missions.” It argued that it “properly treated these legal costs as home office expenses allocable to all its business segments in accordance with its disclosure statements and CAS 403.” (*Id.* at 1)

After this initial exchange, CACO R. Bryan Whitfield (CACO Whitfield) rendered his final determination in a letter dated 14 December 2010. He determined that CACI was “non-compliant with CAS 403 from July 1, 2004, through the present because it allocated certain legal costs to its home office residual expense pool rather than allocating those costs to its CACI Premier Technology Group (CACI PTG) segment in accordance with CAS 403.” (R4, tab 8 at 1) According to the CACO, the legal fees claimed were “directly identifiable with the specific activities of CACI PTG” which was “required to respond to a variety of federal government and news media inquires” (*id.* at 3). The CACO contended that even though CACI incurred the legal costs, the costs were incurred to defend CACI PTG employees under a CACI PTG contract. To be compliant with CAS 403, he determined the costs must be directly allocated to CACI PTG. According to the CACO, “no causal-beneficial relationship exist[ed] between these legal defense costs and other CACI segments,” but a causal-beneficial relationship existed between the legal costs and CACI PTG (*id.* at 5). Noting “[n]o determination of allowability has been made at this time,” and citing FAR 52.230-6 as authority, the CACO’s final determination required CACI “within 60 days from the date of this letter” to:

- a. Correct the noncompliance and submit your proposed change to your cost accounting practices to the undersigned with a copy to DCAA;
- b. Notify me as to whether existing contracts are affected by the noncompliance; and
- c. Submit a general dollar magnitude (GDM) proposal calculating the impact of the noncompliant practice with a copy to DCAA.

(R4, tab 8 at 5-6) CACI appealed the final determination by notice dated 9 March 2011 (R4, tab 9). The Board docketed the appeal as ASBCA No. 57559 (R4, tab 10).

By letter dated 10 June 2011, the Board ordered CACI to show cause why its appeal should not be dismissed under Rule 31 for failure to file its complaint. CACI's 27 June 2011 reply explained that counsel did not receive the Board's initial order directing it to file a complaint or explain the reason for delay. It explained further that pursuant to an agreement with the CACO it submitted a cost impact analysis that "demonstrated that a reallocation of Iraq legal costs to CACI's PTG segment – per the terms of the December 14, 2010 final determination – could not result in any cost recovery to the United States." The reply said it believed its cost impact analysis might well "moot this appeal." (*Id.* ¶ 4) The response also mentioned that the CACO had asked it to prepare a second cost impact analysis treating the questioned costs as direct costs of a specific CACI PTG contract, and as a result of that request, the final determination "may not, in fact, be a final determination" (*id.* ¶ 5).

CACI's 18 July 2011 complaint alleges that the CACO's final determination erroneously finds: (a) CACI's Iraq legal expenses were not necessary to and did not benefit the entire CACI business enterprise; (b) there was CAS 403 noncompliance regarding CACI's allocation of its Iraq legal expenses; and (c) there was CAS noncompliance beginning in 2004. As relief, CACA seeks:

- (a) A determination that there was no CAS 403 noncompliance;
- (b) A determination that the Government is estopped or otherwise precluded from asserting CAS 403 noncompliance with respect to CACI's allocation of its Iraq legal expenses for any period, including but not limited to noncompliance for 2004-2011.

(Compl. at 7)

Following the submission of pleadings and the Rule 4 documents, the Board's 18 August 2011 letter asked the parties how they wished to proceed. On 12 December 2011, the Board asked the parties whether it should dismiss the appeal without prejudice pursuant to Rule 30. The government's 13 December 2011 reply advised that it "has no objection to dismissal of this appeal without prejudice" since CACI had provided the cost impact analysis, and "there is no dispute or controversy for the Board to decide."

CACI's 22 December 2011 letter to the Board advised that it understood that DCMA had asked DCAA to audit the cost impact analysis it submitted, and that while no money was owed "*at this time*," the government had reserved its right to change its position based on the result of the audit. CACI moved to suspend proceeding until 30 days after receipt of DCAA's audit, contending that dismissal of the appeal would be inappropriate "as long as DCMA reserves the right to assert that CACI owes money pursuant to the Final Determination," and where "DCMA has not withdrawn its directive for CACI to submit a change to its cost practices to the CACO."

The government's 3 January 2012 opposition requested that the Board dismiss the appeal. It argued that "there is no longer any dispute for the Board to decide" inasmuch as CACI "has complied with the ACO's directive...to analyze the cost impact of the alleged Cost Accounting Standard violation." As for CACI's contention that DCMA reserved the right to claim money owed, the government said "[n]o money was ever at stake in this appeal," and "[t]he only dispute was CACI's initial refusal to submit a cost impact analysis of an alleged CAS violation" and this dispute "dissipated when CACI submitted the analysis." As for CACI's contention that the CACO had not withdrawn its directive "for CACI to submit a change to its cost practices," the government asserted that "[t]he cost practices...concern specific, finite costs incurred in the past by CACI. The costs are not ongoing. Consequently, there is no dispute regarding a continuing CAS violation in this appeal. There is no change to its cost accounting practices for CACI to submit or implement." As for waiting for the audit result, the government argued that if the audit asserts that CACI is indebted to the government, and if the CACO agrees with the DCAA, the CACO "would be required to issue a Contracting Officer's Final Decision...to collect that debt." The government argued if that occurs, the appeal now before the Board "would still be moot."

CACI's 24 January 2012 response continued to urge that the appeal should remain pending until DCAA issues its report, that disposition of the appeal should reflect no change in accounting practices needs to be implemented, and that dismissal of the appeal while reserving the right to reassert CAS 403 noncompliance in any future proceedings would be inappropriate.

CACI's 16 March 2012 letter advised the Board that based on information it obtained "just days ago," "it appears that the Corporate Administrative Contracting Officer is still conducting fact finding regarding whether DCMA should require CACI to correct the noncompliance for Iraq legal costs by reallocating those expenses to its PTG

segment *without having the Government suffer the negative impact produced by the cost impact analysis*" (emphasis in original). CACI contended that "[t]his potential action is...completely inconsistent with DCMA's prior representation...that '[t]here is no change to its cost accounting practices for CACI to submit or implement.'" CACI maintained that "there remains a live dispute with respect to the final determination's finding of CAS 403 noncompliance," and argued that "unless DCMA withdraws the final determination's finding of CAS 403 noncompliance and associated directive to correct that noncompliance, CACI must have the ability to proceed with its challenge to the final determination's finding that CACI's handling of Iraq legal costs was not in compliance with CAS 403."

To resolve the parties' disagreement on whether the appeal should be dismissed without prejudice, the Board's 23 March 2012 letter directed CACO Whitfield to answer the following questions through DCMA counsel:

1. Does the government still maintain CACI is in non-compliance with CAS 403 and must comply with ¶ a [of CACO's 14 December 2010 final determination] in proposing a change to its current accounting practices to correct the alleged non-compliance with CAS 403?
2. DCAA's 16 March 2009 audit report on CACI's FY 06 incurred cost submission noted CACI estimated costs to be incurred in FYs 2007 and 2008 at \$3.4 million (R4, tab 6 at 4). Counsel's 3 January 2010 letter represented that "[t]he cost practices referred to concern specific, finite costs incurred in the past by CACI. The costs are not ongoing. Consequently, there is no dispute regarding a continuing CAS violation in this appeal. There is no change to its cost accounting practices for CACI to submit or implement." If there is no change to CACI's cost accounting practices required, explain why CACO Whitfield has not withdrawn ¶¶ a and b of his 14 December 2010 final determination direction.

DCMA counsel's letter of 28 March 2012 responded as follows:

1. The Government still maintains that CACI is non-compliant with CAS 403 and must correct the noncompliance by submitting a compliant revision to its Disclosure Statement.

2. The Administrative Contracting Officer has been informed by Appellant's resident auditor that CACI may still be incurring costs of the type that were the subject of the ACO's Final Determination.... Consequently, withdrawal of Mr. Whitfield's final determination letter would not be appropriate at this time.

CACI's 30 March 2012 letter stated that this response "confirms that there remains a live dispute with respect to the Final Determination's finding of CAS 403 non-compliance."

DECISION

The CACO's final determination in this case found CACI's accounting practices noncompliant with CAS 403, and directed CACI to correct the noncompliance, to submit its proposed change to its cost accounting practices, to report if any existing contracts are affected by the noncompliance, and to submit a GDM proposal calculating the impact of the alleged noncompliance. CACI provided a cost impact analysis as directed. Based on the government's finding that CACI's noncompliance had no immediate cost impact, the government wants us to dismiss the appeal without prejudice. The government contends that if and when a need for a cost adjustment materializes in the future, the CACO will have to issue an appealable contracting officer's final decision at that time.

The procedures for administering CAS are set out in FAR Part 30 in extensive detail. At the time the CACO made his final determination of noncompliance with CAS 403 in December 2010, the applicable FAR regulation on "Processing noncompliance" required him to notify the contractor in writing of the determination of noncompliance and the basis of the determination. FAR 30.605(b)(3)(iii). If the CFAO³ makes a determination of noncompliance, he is required by FAR 30.605(b)(4) to follow certain procedures set out in FAR 30.605(c) through (h), as appropriate, unless he also determines the cost impact is immaterial. The criteria and procedure for determining materiality are set out in FAR 30.602. When the CFAO determines the cost impact is immaterial, he is required to (1) make no contract adjustments and conclude the cost impact process; (2) document the rationale for the determination; and (3) in the case of noncompliance issues, inform the contractor that (i) the noncompliance should be corrected; and (ii) if the noncompliance is not corrected the government reserves the right to make appropriate contract adjustments should the cost impact become material in the future. FAR 30.602(c)(1)-(3).

³ As defined in FAR 30.001, "Cognizant Federal agency official" or "CFAO" means "the contracting officer assigned by the cognizant Federal agency to administer the CAS." Although designated as the CACO, the record in this appeal indicates that CACO Whitfield is the DCMA CO assigned to administer CACI's CAS-covered contracts.

Implicit in these CAS noncompliance regulations is the concept that an immaterial cost impact determination does not resolve the underlying CAS noncompliance determination. In other words, should the cost impact become material in the future, that underlying determination of CAS noncompliance remains viable as support for a government claim for cost adjustment. Because changing a company's accounting practices require careful consideration and has long term implications, the Cost Accounting Standards clause at FAR 52.230-2(b) in CAS-covered contracts explicitly recognizes that failure to agree on "whether the Contractor or a subcontractor has complied with an applicable CAS...or a CAS rule or regulation" is a dispute justiciable under the Contract Disputes Act (CDA). 41 U.S.C. §§ 7101-7109.

Ample authorities support CACI's position that this appeal should not be dismissed. As early as the late 1970's, we held that we have jurisdiction to decide whether a contractor has violated CAS even though the government has not made a determination of the cost impact of the alleged violations or demanded any cost adjustments. *AiResearch Manufacturing Co.*, ASBCA No. 20998, 76-2 BCA ¶ 12,150 at 58,447 (holding the possibility that the cost impact of the alleged noncompliances may never be determined does not deny the Board jurisdiction over whether contractor has complied with CAS), *aff'd on recon.*, 77-1 BCA ¶ 12,546. Moreover, we have held that a final determination – as opposed to a final decision – that a contractor was in noncompliance with CAS was a government claim under the CDA. *Brunswick Corp.*, ASBCA No. 26691, 83-2 BCA ¶ 16,794. Similarly, we have held that an ACO's final determination of CAS noncompliance, not purporting to be a contracting officer's decision, is appealable despite the absence of a determination of monetary impact. *Systron Donner, Inertial Division*, ASBCA No. 31148, 87-3 BCA ¶ 20,066.

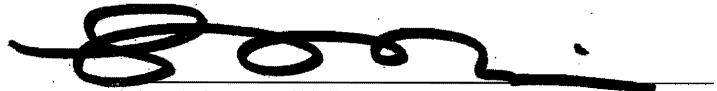
Summarizing the Board's decisions up to that point, we said in 1994 that even absent "(1) a cost impact statement and a Government assertion of monetary impact; (2) an attempt to recoup funds paid; and (3) a statement that the determination is a final decision, accompanied by the typical notice of appeal rights," we have jurisdiction of a contractor's appeal of a determination of CAS noncompliance. *Litton Systems, Inc., Guidance and Control System Division*, ASBCA No. 37131, 94-2 BCA ¶ 26,731 at 133,015; *accord, Newport News Shipbuilding and Dry Dock Co. v. United States*, 44 Fed. Cl. 613 (1999) (holding absent an ACO final decision and assessment of costs for past CAS noncompliance, the ACO's determination of CAS noncompliance constituted the government's claim on which the contractor had the right to seek declaratory relief in court).

The government has acknowledged that it "still maintains that CACI is non-compliant with CAS 403 and must correct the noncompliance by submitting a compliant revision to its Disclosure Statement." It has confirmed that withdrawing CACO's Whitfield's direction for CACI to correct its noncompliance is not appropriate "at this time." Under the circumstances, we agree with CACI there is a "live dispute" between the parties ripe for resolution.

CONCLUSION

Because there is an appealable and justiciable issue on whether CACI's accounting practice in allocating its Iraq legal costs to its home office residual pool is in compliance with CAS 403, the government motion to dismiss the appeal without prejudice is denied.

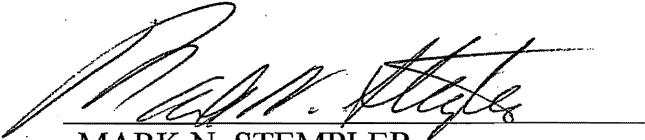
Dated: 25 April 2012



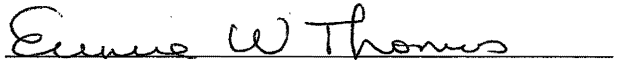
PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals



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. 57559, Appeal of CACI International, Inc., rendered in conformance with the Board's Charter.

Dated:

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