ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of -- | ) | |
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| Thomas Associates, Inc. | ) | ASBCA No. 57795 |
| | ) | |
| Under Contract Nos. N61331-01-D-0001 | ) | |
| N61331-04-D-0007 | ) | |
| N00178-04-D-4142 | ) | |

APPEARANCE FOR THE APPELLANT: Mr. Michael L. Fretwell
Vice President, Finance & Administration

APPEARANCE FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
DCMA Chief Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE JAMES

This dispute arises from the appeal by Thomas Associates, Inc. (TAI) from the final decision of the Defense Contract Management Agency (DCMA) administrative contracting officer (ACO) who determined that five indirect cost items submitted for TAI's fiscal year 2004 under the three captioned contracts were expressly unallowable and demanded payment of $17,318 in penalties and interest pursuant to FAR 42.709-1(a)(1). The Board has jurisdiction of this appeal under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. § 7105(e)(1)(A). The appeal was submitted on the record pursuant to Board Rule 11. The record consists of the government's Rule 4 file, tabs 1-16, its supplemental Rule 4 documents, tabs 17-22, and the parties' initial and reply briefs. We decide entitlement only.

FINDINGS OF FACT

1. TAI is a small business concern wholly owned by Ms. Alexis F. Thomas, its president (R4, tab 11 at 383,[1] tab 17 at 402, tab 22 at 614).

2. The Naval Surface Warfare Center (NSWC), Panama City, Florida, awarded to TAI indefinite quantity type Contract No. N61331-01-D-0001 (contract 1) on 3 November 2000 and Contract No. N61331-04-D-0007 (contract 7) on 29 January 2004 (R4, tab 1 at 1, tab 5 at 46). Contracts 1 and 7 are Small Business Administration section 8(a) direct awards, pursuant to their DFARS 252.219-7009 clause, and provide for

[1] All Rule 4 file page citations are to Bates numbers, unless otherwise indicated.

issuance of delivery orders (DO) on a cost plus fixed-fee (CPFF) basis and for DCMA administration (R4, tab 1 at 1-2, 13-15, tab 5 at 48, 61-63).

3. NSWC Dahlgren, Virginia, awarded to TAI indefinite quantity type Contract No. N00178-04-D-4142 (contract 4142), effective 5 April 2004, providing for issuance of DOs on CPFF and firm fixed-price bases and for DCMA administration (R4, tab 7 at 230, 272).

4. Contract 1 incorporated the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000), FAR 52.242-3, PENALTIES FOR UNALLOWABLE COSTS (OCT 1995) and FAR 52.242-4, CERTIFICATION OF FINAL INDIRECT COSTS (JAN 1997) clauses (R4, tab 1 at 16-17). Contracts 7 and 4142 each incorporated the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002); FAR 52.242-3, PENALTIES FOR UNALLOWABLE COSTS (MAY 2001) (sic; though effective 11 May 2001, that clause was dated "MAR 2001"); and FAR 52.242-4, CERTIFICATION OF FINAL INDIRECT COSTS (JAN 1997) clauses (R4, tab 5 at 59-60, tab 7 at 269-70). The FAR 52.216-7, ALLOWABLE COST AND PAYMENT clause of March 2000 and December 2002, ¶ (a), required the government to pay costs the CO determined to be allowable in accordance with FAR Subpart 31.2 in effect on the date of the contract.

5. On 30 June 2005 TAI submitted to the Defense Contract Audit Agency (DCAA) the "Certificate of Final Indirect Costs" for its fiscal year ending 31 December 2004 pursuant to FAR 52.242-4 stating: "This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR or its supplements" (R4, tab 10 at 319-20, 327).

6. TAI's job cost accounting system in 2004 included two intermediate indirect cost pools, "Fringe" costs and "Facilities" costs, whose costs were allocated to two indirect cost pools, "Overhead" and "G&A" (R4, tab 11 at 373, 376).

7. The Defense Procurement Improvement Act of 1985, Pub. L. No. 99-145, § 901 *et seq.*, codified as amended at 10 U.S.C. § 2324, prescribes, *inter alia*, a penalty assessed by the contracting officer (CO) in the amount of the disallowed cost plus interest on any amount paid, when a contractor submits "expressly unallowable" costs in a proposal for settlement of indirect costs, and waiver by the CO of such penalty under three specified circumstances. 10 U.S.C. § 2324(b)(1), (c); FAR 42.709-1(a)(1), FAR 42.709-5. DCAA calls the foregoing penalty a "Level One" penalty (R4, tab 11 at 375-76, 378).

8. DCAA began its audit of TAI's 2004 costs not later than 22 November 2006 (R4, tab 21 at 454). DCAA Report No. 6701-2004M10100008, of 13 June 2007, questioned $33,890 in expressly unallowable overhead costs and $4,498 in expressly unallowable G&A costs (excluding a $20,823 "GSA Service Charge") incurred in 2004

(a) under TAI's intermediate *fringe* pool for costs of a hunting club membership, a jazz ensemble, and flowers and (b) under TAI's intermediate *facilities* pool for the part of the corporate office building rent in excess of normal ownership costs, and for the costs of a Christmas party/business meeting. From the ratios of government CPFF contracts to government fixed-price contracts and commercial work, DCAA calculated the government's participation percentages of 33.81% of overhead and of 36.41% of G&A, and determined level one penalties of $11,458 ($33,890 x .3381) for overhead and $1,638 ($4,498 x .3641) for G&A, totaling $13,096. (R4, tab 11 at 371, 373-78)

9. The record contains the following additional facts with respect to the costs DCAA questioned.

(a) Pintail Point Club. TAI included $9,908 in its 2004 overhead and G&A costs for a Pintail Point corporate deluxe membership, which included sporting clay instruction, shooting, tournaments, a full-day fishing trip, a night at "Manor House Bed & Breakfast," a one-time use of a banquet room and five rounds of golf (R4, tab 20 at 447-48, 450, tab 21 at 560). DCAA questioned these costs citing FAR 31.205-14 (R4, tab 11 at 373, 377). TAI averred that these costs were allowable as a wellness/fitness center to improve employee morale, fitness and teamwork under FAR 31.205-13 (R4, tab 21 at 485, 489).

(b) Unified Jazz Ensemble. TAI included $1,500 for the "Unified Jazz Ensemble" in December 2004, which amount was among the $11,547.71 employee morale costs which DCAA questioned, citing FAR 31.205-13 and 31.205-14 (R4, tab 11 at 373, 377, tab 19 at 444, tab 21 at 546, 560).

(c) Flowers. DCAA questioned two flower purchases TAI made on 26 June 2004, totaling $138.58, among the $11,547.71 fringe benefits questioned, citing FAR 31.205-13 and FAR 31.205-14; TAI asserts that the flower costs are employee morale costs provided at significant events (R4, tab 11 at 373, 377, tab 19 at 444, tab 21 at 546, 560).

(d) Office Rent. TAI's president, Alexis F. Thomas, as tenant, leased warehouse and office premises at 1007 and 1009 Butterworth Court, Stevensville, Maryland, for $4,811.25 per month for the period 1 August 2001 through 31 July 2007 from landlord "Dutcher Enterprises" and owned by John Dutcher (R4, tab 17 at 409-12). Effective 1 July 2004 that lease was amended to replace references to "Dutcher Enterprises" and "John Dutcher" with "Alexis F. Thomas" (R4, tab 17 at 413). From January to November 2004 TAI made eleven payments of $4,811.25, five to Dutcher Enterprises and six to Alexis Thomas (R4, tab 17 at 404). TAI admitted that Ms. Thomas owned TAI's leased office building in her personal capacity in FY 2004 (R4, tab 22 at 614). To support the rent paid for the 1009 Butterworth Court office, TAI provided DCAA rental information on comparable properties in Stevensville and Chester, Maryland, ranging from $10.96 to $16.00 per square foot, compared to what Mr. Fretwell stated was $10.37 per square foot for

1009 Butterworth ($4,811.25 x 12 ÷ 5,568 sq. ft.) (R4, tab 22 at 620, 626-35). On the premise that allowable rental costs should not exceed the normal ownership costs of property taxes, insurance, maintenance and cost of money (R4, tab 21 at 471), DCAA requested, and TAI provided, further documentation (R4, tab 21 at 467-72, 487). TAI's 2004 costs of depreciation, maintenance, build out (conversion of warehouse to office space) and condo fee were $36,709. Rent paid for 2004 was $52,924 for 11 months, leaving a $16,215 difference ($52,924 – 36,709), which DCAA questioned as unallowable pursuant to FAR 31.205-36(b)(3), rental costs under common control or a related party transaction (R4, tab 11 at 374, 377, tab 21 at 564).

(e) Christmas Party. TAI paid $9,848.48 to the Chesapeake Bay Beach Club (CBBC) for the "Thomas Associates Christmas Party" held on 10-12 December 2004 for about 38 employees and 43 guests. CBBC services included liquor and wine, hors d'oeuvres, meal entrees and dessert. TAI also paid $700 to Prince Limousine to carry passengers to the party. TAI scheduled 26 hours of activities over these three days, of which the corporate business meeting took at most two hours. (R4, tab 11 at 380, tab 19 at 437-40, 443, tab 21 at 493). DCAA questioned $10,548 ($9,848 + $700) as unallowable under FAR 31.205-14, Entertainment costs (R4, tab 11 at 374). On 20 April 2007 Mr. Fretwell stated that the Christmas party was the only event when all TAI employees gather to recognize the outstanding performance of fellow employees and to present the "Employee of the Year" award, so the party costs should be allowable under FAR 31.205-13, employee morale. (R4, tab 21 at 485)

10. DCMA ACO David Mason's 11 January 2010 letter asked TAI whether it agreed or disagreed with the $13,096 level one penalty for expressly unallowable costs in 2004 calculated by DCAA (finding 8), which was exclusive of interest (R4, tab 12).

11. TAI's 29 April 2010 letter to the DCMA ACO requested a "waiver of the proposed penalty based on financial hardship" to wit, losses of $829,000 in 2009 and $217,000 as of 31 March 2010, and an ASBCA "complaint" seeking relief from a $72,000 penalty on its 2005 cost audit.[2] TAI stated: "[T]he questioned costs in our 2004 audit had not been identified in prior audits. This was a learning experience for us. We have subsequently revised our policies and procedures to preclude these types of costs from being included in our incurred cost submissions." (R4, tab 14)

12. TAI admitted during discovery that it had "revised our policies and procedures to preclude certain types of unallowable costs identified in the FY 2004 DCAA audit after the costs had already been included in our [30 June 2005] FY 2004 incurred cost

[2] *See Thomas Associates, Inc.*, ASBCA No. 57126, 11-1 BCA ¶ 34,764, *modified on recon.*, 11-2 BCA ¶ 34,858 (*Thomas I*).

proposal" (R4, tab 22 at 613, ¶ 6) (emphasis in original). The "certain" types of costs were "related part[y] rent" and GSA "Industrial Funding Fee" (for which DCAA proposed no penalty) (*id.* at 616, ¶ 7, at 636-42).

13. DCMA ACO Erin Felent's 29 June 2011 decision did not challenge the reasonableness or allocability of TAI's 2004 questioned costs. She determined that $38,388 in fringe and facilities pool costs and respondent's shares of $11,458 overhead and $1,638 G&A costs (see finding 8) were expressly unallowable, demanded payment of $13,096 in level one penalties and $4,222 in interest thereon, totaling $17,318, denied TAI's request for waiver of such penalties as insufficient to meet any of the FAR 42.709-5 waiver criteria, and notified TAI of its appeal rights. (R4, tab 15 at 395-98)

14. On 22 September 2011 TAI timely appealed the ACO's 29 June 2011 decision to the Board, which was docketed as ASBCA No. 57795 (R4, tab 16).

15. The FAR Part 31 cost principles relevant to the disputed costs and in effect on the dates of contracts 1, 7 and 4142 (respectively 3 November 2000, 29 January 2004 and 8 April 2004) (findings 2-3), provided in pertinent part:

> **31.205-13 Employee morale, health, welfare, food service, and dormitory costs and credits.**
>
> (a) Aggregate costs incurred on activities designed to improve working conditions, employer-employee relations, employee morale, and employee performance (less income generated by these activities) are allowable, except as limited by paragraphs (b), (c), and (d) of this subsection. Some examples of allowable activities are house publications, health clinics, welfare/fitness centers, employee counseling services, and food and dormitory services, which include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations, or similar types of services for the contractor's employees at or near the contractor's facilities.[3]
>
> (b) Costs of gifts are unallowable. (Gifts do not include awards for performance made pursuant to 31.205-6(f)

[3] FAR 31.205-13(a), modified by FAC 2001-16, effective 31 October 2003, and applicable to contracts 7 and 4142, was substantively the same as set forth above, except the "examples of allowable activities" were in numbered subparagraphs.

or awards made in recognition of employee achievements pursuant to an established contractor plan or policy.)

(c) Costs of recreation are unallowable, except for costs of employees' participation in company sponsored sports teams or employee organizations designed to improve company loyalty, team work, or physical fitness.

....

**31.205-14 Entertainment costs.**

Costs of amusement, diversions, social activities, and any directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are unallowable. Costs made specifically unallowable under this cost principle are not allowable under any other cost principle. Costs of membership in social, dining, or country clubs or other organizations having the same purposes are also unallowable, regardless of whether the cost is reported as taxable income to the employees.

....

**31.205-36 Rental costs.**

(a) This subsection is applicable to the cost of renting or leasing real or personal property acquired under "operating leases" as defined in Statement of Financial Accounting Standards No. 13 (FAS-13), Accounting for Leases....

(b) The following costs are allowable:

(1) Rental costs under operating leases, to the extent that the rates are reasonable at the time of the lease decision, after consideration of—

(i) Rental costs of comparable property, if any;

(ii) Market conditions in the area;

(iii) The type, life expectancy, conditions, and value of the property leased;

(iv) Alternatives available; and

(v) Other provisions of the agreement.

....

(3) Charges in the nature of rent for property between any divisions, subsidiaries, or organizations under common control, to the extent that they do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, facilities capital cost of money, and maintenance (excluding interest or other unallowable costs pursuant to Part 31), provided that no part of such costs shall duplicate any other allowed cost....

....

**31.205-51 Costs of alcoholic beverages.**

Costs of alcoholic beverages are unallowable.

16. From 3 November 2000 through 8 April 2004 FAR 42.709-5 provided:

**42.709-5 Waiver of the penalty.**

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is $10,000 or less (*i.e.*, if the amount of expressly or previously determined unallowable costs which would

be allocated to the contracts specified in 42.709(b) is $10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (*e.g.*, the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and—

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; *i.e.*, their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

## DECISION

This appeal presents two issues: (1) Was each of the five cost items described in findings 8-9 "expressly unallowable"? (2) Was respondent required to waive level one penalties for any of the foregoing expressly unallowable cost items?

I.

FAR 31.001 defines an "Expressly unallowable cost" as a "particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable." The reasonableness and allocability of TAI's disputed costs are not in issue (finding 13). Thus, respondent has the burden to prove that each disputed cost is unallowable under a statute, regulation or contract provision. *See Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563 at 166,252. We decide the five disputed, indirect cost items in turn.

Pintail Point Club. TAI argues that the Pintail Point Club "is not a social or dining club" and its 2004 costs were for "wellness/fitness center" activities designed to improve

its employee morale and performance, allowable under FAR 31.205-13(a) (app. br. at 4). Respondent contends that the Pintail Point Club is not a fitness center contemplated by FAR 31.205-13(a), but is a hunting, fishing and sport shooting club, with a dining room and bed and breakfast accommodations available to the five TAI employees who had Pintail Point Club memberships in 2004. Thus, TAI's membership cost was expressly unallowable as recreation per FAR 31.205-13(c), or as social, dining or country club entertainment per FAR 31.205-14. (Gov't br. at 20)

Pintail Point Club made available to five TAI employees the amenities of sporting clay instruction, shooting, tournaments, a full-day fishing trip, a night at "Manor House Bed & Breakfast," a one-time use of a banquet room and five rounds of golf (finding 9(a)). These Pintail Point Club amenities sufficiently correspond to those provided by "country clubs," and bear no resemblance to a wellness/fitness center. We hold that respondent has sustained its burden of proof that TAI's $9,908 corporate membership cost is expressly unallowable pursuant to FAR 31.205-14.

Unified Jazz Ensemble. TAI argues that the U.S. Naval Academy's "Unified Jazz Ensemble" demonstrated support for the Navy, TAI's "most significant customer" in 2004, linked its employees with the customers they supported daily, and "result[ed] in increased employee performance and morale" during "an official corporate event" (app. br. at 5), its December 2004 Christmas party (finding 9(b)). Respondent argues that jazz ensemble music "is clearly an unallowable entertainment cost under FAR 31.205-14" (gov't br. at 20). We hold that respondent sustained its burden of proof that TAI's $1,500 United Jazz Ensemble costs were expressly unallowable pursuant to FAR 31.205-14.

Flowers. TAI argues that its "de minimis gestures" to provide "flowers at times of significant events in employees' lives," e.g., "birth of baby, hospitalization, death in family...serve to improve working conditions, employer-employee relations, employee morale and increase employee performance, and thus are allowable per FAR 31.205-13" (app. br. at 5). Respondent argues that "flower costs...are unallowable as gifts under FAR 31.205-13(b).... A cost-free gesture of this sort to its employees...is nothing more than a gift and is therefore expressly unallowable" (gov't br. at 21). We hold that respondent sustained its burden of proof that the flowers cost was expressly unallowable.

Office Rent. TAI argues that its $4,811.25 monthly rent, at $10.37 per square foot, was comparable to property rentals in the same locale of $13 to $16 per square foot and justified including its rentals in its 2004 indirect cost submission. TAI acknowledges that when DCAA audited its 2004 costs TAI was not aware of the requirement to limit allowable rental payments, but it now has "a full understanding of the FAR as it pertains to related party rental transactions" and has "taken proper steps to adjust our incurred cost submission for FY 2006." (App. br. at 5) Respondent argues that a "penalty related to

the rental of [TAI's] corporate office from a related party" in 2005 was properly assessed in *Thomas I*, 11-1 BCA ¶ 34,764 at 171,099 (gov't br. at 17).

Alexis F. Thomas wholly owned TAI in 2004 (finding 1). Pursuant to the FAR 31.205-36(b)(3) criteria, the six rental payments TAI made to Ms. Thomas in 2004 were between entities "under common control." TAI made the other five rental payments in 2004 to "Dutcher Enterprises," owned by John Dutcher. (Finding 9(d)) Family relationships are sufficient to establish common control. *See Manlabs, Inc.*, ASBCA No. 12389, 69-1 BCA ¶ 7480 at 34,704-05 (husband and wife were owners of appellant and the leased property, and later conveyed their lease to the husband's sister as trustee for the husband and wife; appellant was bound by the common control principle in ASPR 15-205.45(b), the predecessor of FAR 31.205-36(b)). Alexis F. Thomas, "aka Alexis Thomas Dutcher," shows that Ms. Thomas and Mr. Dutcher are related parties. *See Thomas I*, 11-1 BCA ¶ 34,764 at 171,095, finding 1. Furthermore, TAI admitted that in FY 2004 Ms. Thomas owned TAI's leased office building in her personal capacity (finding 9(d)).

FAR 31.205-36(b)(3) allows rental charges for property between organizations under common control "to the extent that they do not exceed the normal costs of ownership" (finding 15). We conclude that charges exceeding normal ownership costs are expressly "unallowable." Respondent sustained its burden of proof that the $16,215 difference between the rentals TAI paid in 2004 and normal ownership costs of depreciation, taxes, insurance, facilities capital cost of money and maintenance, was an expressly unallowable cost.

Christmas Party. TAI argues that its "annual awards banquet and employee recognition event" was the only event when all TAI employees gather to recognize the outstanding performance of fellow employees and to receive briefings on corporate performance and stability. This "meeting" was a team building event serving to improve employee morale, cooperation and productivity and thus should be considered allowable under FAR 31.205-13. (App. br. at 4) Respondent argues that, considering the substantial costs of food, beverages and entertainment, and the express unallowability of alcohol under FAR 31.205-51, TAI's Christmas party costs were for "amusement, diversions, social activities," were expressly unallowable under FAR 31.205-14 and cannot be allowable under any other cost principle. Respondent adds that the Board held that meal costs for TAI's 2005 Christmas party/business meeting were expressly unallowable and for which a penalty was required. *Thomas I*, 11-2 BCA ¶ 34,858 at 171,477-78.

Of the 26 hours of TAI's Christmas party activities, the corporate meeting took at most two hours (finding 9(e)). Company business clearly was incidental to the primary social purpose of the Christmas party. The majority of attendees were guests, not TAI

employees (finding 9(e)), emphasizing its social aspect. *See Lulejian and Associates, Inc.*, ASBCA No. 20094, 76-1 BCA ¶ 11,880 at 56,949 (lunches and dinners with business associates were unallowable entertainment costs; the wife of the vice president emphasized its social aspect). We hold that respondent sustained its burden of proof that the Christmas party costs were expressly unallowable entertainment costs under FAR 31.205-14. *See Thomas I*, 11-2 BCA ¶ 34,858 at 171,477-78.

II.

The FAR 42.709-5 criteria for waiver of expressly unallowable costs included in a contractor's indirect cost proposal are set forth in finding 16. TAI does not contend that it withdrew its 30 June 2005 final indirect cost proposal for 2004 and submitted another proposal before 22 November 2006 when DCAA initiated its audit of TAI's 2004 costs (findings 5, 8). Thus, FAR 42.709-5(a) is inapplicable.

TAI's 31 October 2011 complaint alleged that FAR 42.709-5(b) "is applicable" because each penalized cost element "is less than $10,000" (compl. at 3). TAI apparently ignored our ruling on reconsideration in *Thomas I*, 11-2 BCA ¶ 34,858, whose slip opinion TAI received on 24 October 2011. TAI's 2004 total expressly unallowable costs are $13,096 (findings 10, 13), which exceeds the $10,000 FAR 42.709-5(b) waiver threshold. *See Thomas I*, 11-2 BCA ¶ 34,858 at 171,477 (the FAR 42.709-5(b) $10,000 waiver criterion refers to the portion of the total penalizable costs allocable to covered contracts). Therefore, FAR 42.709-5(b) is inapplicable.

TAI seeks waiver of the penalties based on "financial hardship" – $1,046,000 cash losses in 2009-2010 and a year 2005 penalty of $72,000. There is no known regulatory or decisional authority for considering "financial hardship" as a basis to waive penalties.

TAI also asserts: "[T]he questioned costs in our 2004 audit had not been identified in prior audits. This was a learning experience for us. We have subsequently revised our policies and procedures to preclude these types of costs from being included in our incurred cost submissions." (Finding 11) TAI bases its waiver request on FAR 42.709-5(c)(1) (app. br. at 6). TAI ignores the FAR 42.709-5(c)(2) requirements and its basis is unpersuasive. TAI's policy and procedures revision addressed only the expressly unallowable, penalized cost of "related part[y] rent" (finding 12). There is no evidence that TAI submitted the five expressly unallowable costs in 2004 "inadvertently" or due to "unintentional error, notwithstanding the exercise of due care," as prescribed by FAR 42.709-5(c)(2). Thus, the ACO properly denied TAI's 29 April 2010 waiver request. *See Inframat Corp.*, ASBCA No. 57741, 2012 ASBCA LEXIS 77, 3 August 2012, slip op. at 8 (FAR 42.709-5(c) waiver unavailable when contractor failed to show that it exercised due care in preparing its 2004 proposal thereby including expressly unallowable costs, notwithstanding its subsequent establishment of proper policies and procedures to assure exclusion of such costs).

## CONCLUSION

The appeal is denied.

Dated: 4 October 2012

DAVID W. JAMES, JR.
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. 57795, Appeal of Thomas Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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