ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Fluor Corporation	)	ASBCA No. 57852
	)	
Under Contract No. W52P1J-07-D-0008	)	

APPEARANCES FOR THE APPELLANT: Karen L. Manos, Esq.
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DCMA Chief Trial Attorney
Robert L. Duecaster, Esq.
Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION TO DISMISS

Fluor Corporation (Fluor) appeals a contracting officer's final decision asserting a government claim for the increased costs paid by the government over seven years on Fluor's billings for its work on government contracts. The government alleges that the increased costs in the billings were caused by Fluor's cost accounting practices that were not compliant with the Cost Accounting Standards (CAS) specified by statute, regulation and contract provisions.[1] Fluor denies any CAS non-compliance, but as a preliminary matter it asserts that the government claim is barred entirely by the six-year statute of limitations in the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 7103(a)(4)(A). Since the CDA statute of limitations is jurisdictional, Fluor asserts this defense as a motion to dismiss. *See McDonnell Douglas Services, Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 at 169,529. We grant the motion in part.

[1] The captioned contract is representative of the contracts affected by the alleged non-compliance.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. At all times relevant herein, Fluor has been in the business of engineering, construction, maintenance, and procurement operations around the world. Its business is predominantly commercial but, it also includes government contracts subject to CAS. (Tr. 1/9) The CAS provisions at issue in the alleged non-compliance are CAS 403-40(a)(1) and CAS 403-40(b)(4). CAS 403-40(a)(1) states in pertinent part: "Home office expenses...shall be allocated directly to segments to the maximum extent practical." CAS 403-40(b)(4) states in pertinent part: "Central payments or accruals which are made by a home office...which cannot be identified specifically with individual segments shall be allocated to the benefitted segments using an allocation base representative of the factors on which the total payment is based." 48 C.F.R. § 9904.403-40 (1 Oct. 2003).

2. At all relevant times herein, Fluor's corporate office cost accounting system included a Burden & Benefits (B&B) indirect cost pool consisting of payroll taxes, health insurance, life insurance, and other employee benefits that were paid by the corporate office (tr. 1/16). At all times relevant herein, the allocation base for the corporate office B&B pool was described in Fluor's Cost Accounting Standards Board (CASB) Disclosure Statements as "total office and field assigned salaried staff base compensation working time labor associated with Fluor domestic segments" (app. supp. R4, tab 1 at 46, tab 12 at 46).

3. Fluor's Salary Administration Policy effective 15 January 2001, defined "Base Compensation" as "A[n] employee's base salary plus salary adjustments, professional engineer incentive, project assignment allowances, foreign service incentives and foreign hardship allowances, shift differential, variable compensation, and TOWP (Time Off With Pay)." The Policy defined "Base Salary" as "A[n] employee's current salary excluding overtime and any temporary salary adjustments or other incentives." (Whitaker-ex. 19 at 5)

4. In August 2004, the Defense Contract Audit Agency (DCAA) audited the reasonableness of Fluor's premium pay ("uplifts") for employees based in Iraq. The cash uplifts were percentage add-ons to the employee's base salary. The largest uplifts were Hazard Pay (25%), Supplemental Hazard Pay (25%), and Foreign Assignment Pay (10%). In a message dated 20 August 2004, DCAA presented its "preliminary" conclusion to Fluor that, among other things, the total of the Fluor cash uplifts was substantially above "market" and unreasonable. (Whitaker-ex. 7)

5. On or about 16 February 2005, DCAA audited Fluor's corporate office B&B rate for reasonableness in connection with a forward pricing proposal. The auditor examined the relationship between the B&B pool costs and the allocation base costs and concluded that: "In our opinion, the compensation labor dollar base is an equitable base

for the proposed National B&B pool costs as required by FAR 31.203 and CAS 418." (Thi Le-ex. 23 at 3) On 25 February 2005, pursuant to a request by DCAA, Fluor provided to DCAA the Fluor Salary Administration Policy document which defined "Base Compensation" and "Base Salary" (Whitaker-ex. 18 at 1, ex. 19 at 1, 5).

6. On or about 9 June 2005, DCAA began a CAS 403 compliance audit of Fluor's corporate office expenses allocated to its business segments (Thi Le-ex. 28 at 1). The auditor made a detailed examination of the costs in the B&B cost pool for compliance with CAS 403-40(a)(1) and the costs in the allocation base for compliance with CAS 403-40(b)(4). The auditor found a CAS 403-40(b)(4) non-compliance in the B&B allocation base as to some of the pool costs, but it was not the non-compliance at issue in this appeal. The assigned auditor's work was completed on 27 September 2005. (Thi Le-exs. 29, 31; tr. 2/23-32, 40-44) Subsequently, the assigned auditor's finding of a CAS 403-40(b)(4) non-compliance was overruled by DCAA management (tr. 2/45-53). The audit report issued on 30 December 2005 concluded that: "Fluor complied, in all material respects, with the requirements of Cost Accounting Standard 403–Allocation of Home Office Expenses to Segments during the period of January 1, 2004 through September 15, 2005" (ex. A-11 at 2).

7. On the basis of an alleged "discovery" in June 2006 that the Fluor corporate office B&B pool labor cost allocation base included the premium pay "uplifts " that had been disclosed to the government on 25 February 2005 (*see* SOF ¶ 5), the DCAA on 21 September 2007 issued an audit report stating that Fluor's corporate office B&B rate was non-compliant with CAS 403-40(b)(4) and recommended that Fluor establish a separate B&B pool and allocation base for the government international contracts (R4, tab 2 at 2-3).

8. On 2 November 2010, the government administrative contracting officer (ACO) issued a final determination that Fluor was noncompliant with CAS 403-40(a)(1) and CAS 403-40(b)(4). The stated basis for the determination was that:

> Fluor's Benefit and Burden rate does not allocate to benefitting segments using an allocation base representative of the factors on which the total payment is based. Fluor's B&B pool is comprised of central payments or accruals, including such costs as group insurance, pension accruals, and payroll taxes. Fluor's B&B allocation base, per Fluor's FY2004 Disclosure Statement, is "total office and field assigned salaried staff base compensation working time labor associated with Fluor domestic segments." This failure to allocate such expenses to segments is noncompliant with CAS 403-40(a)(1). The base used for allocating B&B costs is not representative of the pool cost because Fluor includes

> overtime and hazardous/hardship incentive pay in the base. Pension accruals, group insurance premiums, etc. do not increase because of overtime or hazardous/hardship incentive pay, yet a larger amount of B&B costs was allocated to segments and cost objectives with substantial overtime or hazardous/hardship incentive pay. Therefore, the B&B allocation base was not representative of the factors on which total B&B pool payments were based and is noncompliant with CAS 403-40(b)(4).

(App. supp. R4, tab 21 at 2)

9. The ACO's determination letter requested Fluor to submit within 60 days a proposal for amending its cost accounting practices to correct the CAS non-compliant practices and a general dollar magnitude (GDM) proposal for the cost impact of those practices on its government contracts. Fluor did not comply with this request and on 17 November 2011, the ACO issued a final decision under the CDA, 41 U.S.C. §§ 7101-7109, asserting a claim in the total amount of $63,361,631 for the increased cost of Fluor's alleged CAS non-compliant billings on government contracts during the fiscal years 2004 through 2010. (R4, tab 9 at 3-5) This appeal followed.

DECISION

The CDA statute of limitations at 41 U.S.C § 7103(a)(4) states that a claim relating to a contract "shall be submitted within 6 years after the accrual of the claim." FAR 33.201 defines "accrual of a claim" in pertinent part as: "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known."

Fluor contends that the government's entire 17 November 2011 CDA claim accrued on 1 January 2004, the date set forth in the final decision as the start date of CAS non-compliance, and was untimely because on 1 January 2004 the alleged CAS non-compliance, cost accounting practices at issue were Fluor's established practices which the government knew or should have known at that time (app. br. at 50, 60; R4, tab 9 at 3). We disagree. Assuming *arguendo* that the government knew or should have known on 1 January 2004 of Fluor's CAS non-compliant cost accounting practices, the government did not and could not know at that time, much less submit a CDA claim for, the increased cost of those practices to the government work over the next seven years until that work was performed, billed and paid. *See Raytheon Company*, ASBCA Nos. 57576, 57679, 13 BCA ¶ 35,209 at 172,752.

The government's 17 November 2011 claim was a continuing claim inherently susceptible to being broken down into a series of independent distinct events each having its own associated damages–namely, each payment by the government to Fluor for a CAS non-compliant billing on a government contract. The billings and payments in Fluor's case are similar to the contingent option years in *DynCorp International LLC,* ASBCA No. 56078, 09-2 BCA ¶ 34,290, and the contingent delivery orders in *Gray Personnel, Inc.,* ASBCA No. 54652, 06-2 BCA ¶ 33,378 at 165,477 in both of which cases we held that the statute of limitations runs on each distinct liability-creating event having its own associated damages. *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990) and *Ariadne Financial Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998) are inapposite. The statutory survivor's benefit claimed in *Hart* was due and payable in monthly installments one day after the serviceman's death. No billing was required to establish the liability and amount due for each monthly payment. The repudiation in the fourth year of a promise to permit use of an asset for a term of 25 years in *Ariadne* was a one-time event with damages extending out for many years, but no other event was necessary to fix the liability.

The government contends that its 17 November 2011 claim was timely as to the entire amount claimed because it did not know and had no reason to know, that Fluor's billings were not compliant with CAS until July-August 2006 (gov't br. at 12). We disagree. The government knew in August 2004 that Fluor was paying substantial amounts of hourly premium pay (uplifts) to its employees stationed in Iraq (SOF ¶ 4). The government knew or should have known no later than 25 February 2005 that "Base Compensation" in the B&B allocation base included "foreign service incentives and foreign hardship allowances" in addition to base salary (SOF ¶¶ 3, 5). From on or about 1 June to 27 September 2005, the government audited Fluor's corporate office B&B indirect cost rate specifically for compliance with CAS 403. The auditor identified a CAS 403-40(b)(4) non-compliance in the B&B allocation base. The auditor could have identified during that audit any other CAS 403-40 non-compliances in the B&B pool and allocation base that were the subject of the 17 November 2011 claim.

For the reasons stated above, we find that the government's 17 November 2011 CDA claim was a continuing claim in which each payment by the government of the increased cost in an alleged CAS non-compliant billing for government work was an independent and distinct event having its own associated damages. We further find that the 17 November 2011 claim as to all such payments made on or before 27 September 2005, the date the CAS 403 compliance audit was completed, accrued on that date, and all such payments made after 27 September 2005 accrued on the date they were paid.

Accordingly, the motion to dismiss is granted as to the claimed amounts accruing before 17 November 2005 (i.e., 6 years before the 17 November 2011 CDA claim was asserted), and denied as to the claimed amounts accruing on or after that date.

Dated: 5 December 2013

MONROE E. FREEMAN, 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

RICHARD SHACKLEFORD
Administrative Judge
Acting 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. 57852, Appeal of Fluor Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals