

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
AM General LLC) ASBCA No. 53610
)
Under Contract Nos. DAAE07-89-C-0998)
DAAE07-95-C-R021)
DAAE07-96-D-X001)

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OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR RECONSIDERATION

AM General LLC (AM General) moves for reconsideration of our decision in *AM General LLC*, ASBCA Nos. 53610, 54741, 06-1 BCA ¶ 33,190.¹ In that decision, we denied AM General's motion for summary judgment on the bases that it was exempt from Cost Accounting Standard (CAS) coverage, and other defenses. We granted the government's cross-motion for summary judgment holding that AM General's single indirect cost pool for accumulating and allocating manufacturing overhead to its military HMMWVs and the commercial HUMMERS is not homogeneous and in violation of CAS 418. In moving for reconsideration, AM General stated that it "does not seek reconsideration of that portion of the Board's decision denying AM General's Motion for Summary Judgment" (mot. at 1 n.1). We will therefore focus here exclusively on that portion of our decision granting the government's cross-motion for summary judgment.

On 16 May 2006, the Board received from the National Defense Industrial Association (NDIA) a motion for leave to file a brief as *amicus curiae*. NDIA introduced itself as "a non-partisan, non-profit, educational association and America's leading defense industry association promoting national security." NDIA tells us that it files the brief because "it does have serious concerns about the Board's analytical approach, which is not consistent with the meaning of Cost Accounting Standard 418 or with an equitable and practical allocation of overhead expenses." (*Amicus* br. at 1-2)

The government objects to NDIA's filing "principally because NDIA, as contrasted to its corporate members . . . is not and will not be a party involved in similar issues in the future" (gov't reply to *amicus* br. at 2). The granting or denial of an application to intervene as an *amicus curiae* lies wholly within the discretion of the trial court and is not reviewable on appeal. *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953); *Ginsburg v. Black*, 192 F.2d 823 (7th Cir. 1951), *cert. denied*, 343 U.S. 934 (1952), *rehearing denied*, 343 U.S. 958 (1952). In exercising our discretion, we believe

¹ ASBCA No. 54741 involved AM General's offset claim based on an incremental overhead rate (122.4%) the parties negotiated to compensate AM General for increased direct and material costs to perform changed work for the vehicles ordered under the three High Mobility Multipurpose Wheeled Vehicles (HMMWV) contracts (*see* Administrative Contracting Officer's (ACO) 30 August 2004 decision). As indicated in our decision, we did not decide ASBCA No. 54741 because the issue involved in the offset claim appeared to be separate and distinct from the CAS 418 noncompliance issue, and because both parties did not fully develop the underlying basis of the offset claim in their motion papers. *See* 06-1 BCA at 164,516.

it is appropriate in this case to permit NDIA to file its brief as *amicus curiae* because this appeal “raises important and difficult questions,” and the general and public interest is best served by a “full and complete presentation” on the question raised. *The Boeing Co.*, ASBCA No. 28342, 85-3 BCA ¶ 18,435, *aff’d*, 802 F.2d 1390 (Fed. Cir. 1986).

Background

Since the early 1990’s, AM General had manufactured the military HMMWVs as well as the civilian HUMMERs. Both the HMMWVs and the HUMMERs were manufactured in AM General’s Mishawaka plant. While the HMMWVs were assembled and finished entirely in the Mishawaka plant, those vehicles that would ultimately become commercial HUMMERs were finished in the Armour building which was a part of AM General’s production line at the Mishawaka plant.

Prior to 1 September 1995, AM General had allocated manufacturing overhead using a direct labor base. Effective 1 September 1995, AM General began to accumulate all manufacturing overhead costs, including fixed and variable expenses for both the commercial and military vehicles, into a single manufacturing overhead pool, and allocate the manufacturing overhead to the number of vehicles manufactured without distinguishing between military HMMWVs on the one hand and commercial HUMMERs on the other.

In August 2001, the ACO by final decision determined that AM General’s post-1 September 1995 allocation of indirect manufacturing overhead costs accumulated in a single pool to the vehicles produced was in violation of CAS 418. AM General timely appealed the ACO’s decision. In its cross-motion for summary judgment, the government argued that “[t]he single manufacturing overhead pool results in commercial only costs being allocated to the HMMWVs,” and for that reason the pool is “not homogeneous in accordance with the provisions of 9904.418-50(b), and separate pools must be established in accordance with 9904.418-40(b).” (Motion Papers No. 2² at 50)

In opposing the government’s cross-motion for summary judgment, AM General argued that its units-of-production base was authorized by CAS 418-50(d)(2)(iii) (48 C.F.R. § 9904.418-50(d)(2)(iii)), and that whether its manufacturing overhead pool was homogeneous was “a function of the causal or beneficial relationship to the cost objectives,” and was therefore “fact-driven.” AM General argued that, in any event, the

² As explained in 06-1 BCA at 164,517, we used Motion Papers Nos. 1 to 4 as a shorthand reference to the motion, opposition, cross-motion, and replies the parties filed between October 2004 and April 2005.

government had agreed to a “special allocation” pursuant to 48 C.F.R. § 9904.418-50(f). (Motion Papers No. 3 at 25-26)

In our decision, we observed that the government took no exception to the units-of-production base, and that there was no evidence that the parties had entered into a special allocation agreement. 06-1 BCA at 164,546-48. With respect to the homogeneity of AM General’s overhead pool, our decision concluded:

In this case, it is undisputed that AM General’s indirect manufacturing overhead cost pool included the indirect costs from the Armour building. It is also undisputed that the military HMMWV derived no benefit from the costs incurred in the Armour building because none of the military HMMWVs were manufactured in that building. Consequently, we agree with the government that the indirect manufacturing overhead cost pool was not homogeneous because the costs included therein did not have the same or bear a similar beneficial or causal relationship to all activities whose costs were included in the cost pool.

Because AM General’s single manufacturing overhead pool included indirect costs from both the Mishawaka plant activities (both HMMWVs and HUMMERS) and the Armour building activities (HUMMERS only), and because the Mishawaka plant activities did not have the same or similar beneficial or causal relationship to the cost objective (vehicles) as the Armour building activities, we hold AM General’s single manufacturing overhead pool was not homogeneous in accordance with the requirements of 48 C.F.R. § 9904.418-40(b).

Id. at 164,547.

DECISION

In moving for reconsideration, AM General has raised numerous issues that it did not raise before. The government did what it could to address these issues within the confines of the existing record. We have considered the parties’ exhaustive arguments on these issues. In the end, however, whether the single indirect cost pool into which AM General accumulated its manufacturing overhead is or is not homogeneous must depend on considering simultaneously three crucial factors in cost allocation: the cost objective,

the cost pool, and the allocation base. *LANE K. ANDERSON, ACCOUNTING FOR GOVERNMENT CONTRACTS, COST ACCOUNTING STANDARDS*, § 27.08[2] (Darrell J. Oyer ed. 2006).

CAS 418 measures homogeneity in one of two ways:

(b) *Homogeneous indirect cost pools.*

(1) An indirect cost pool is homogeneous if each significant activity whose costs are included therein has the same or a similar beneficial or causal relationship to cost objectives as the other activities whose costs are included in the cost pool. It is also homogeneous if the allocation of the costs of the activities included in the cost pool result in an allocation to cost objectives which is not materially different from the allocation that would result if the costs of the activities were allocated separately.

(2) An indirect cost pool is not homogeneous if the costs of all significant activities in the cost pool do not have the same or a similar beneficial or causal relationship to cost objectives and, if the costs were allocated separately, the resulting allocation would be materially different. The determination of materiality shall be made using the criteria provided in 9903.305.

48 C.F.R. § 9904.418-50(b)(1), (2).

While the record is clear that AM General's post-September 1995 accounting uses the total number of vehicles (HMMWVs and HUMMERS) as the allocation base, neither party has provided the Board much help with respect to what "activities" are in the cost pool; when an activity becomes a "significant" activity; and what are the "costs of all significant activities in the cost pool." There is a total lack of explanation with respect to how "the same or a similar beneficial or causal relationship" between "the costs of all significant activities in the cost pool" and the cost objectives – vehicles – is established.

In this regard, AM General points out, as an example, that the fringe benefits for two direct labor employees, one who works in the Mishawaka plant and one in the Armour building, are both included in the manufacturing overhead pool. AM General argues that the fringe benefits for these two direct labor employees have the same or similar "beneficial or causal relationship to cost objectives," and therefore should be considered homogeneous for purpose of CAS 418. Conspicuously, the government did not respond to this proposition – which goes to the heart of determining whether an

indirect cost pool is homogeneous – in opposing AM General’s motion for reconsideration.

Moreover, in its cross-motion for summary judgment, the government did not address the issue of materiality – a crucial test for determining homogeneity – and AM General did not raise materiality as an issue in opposing the government’s motion. When AM General’s new counsel moved for reconsideration, the question of “whether the allocation results would be materially different if the costs were separately allocated” – the second prong of the two-prong test for homogeneity – surfaced as a major issue (mot. at 10-11). Although the government attempts to address each criteria set out in 48 C.F.R. § 9903.305 it deems appropriate, its effort has been handicapped by what is not in the record.

After studying all of the briefs the parties submitted in connection with the reconsideration motion, it has now become clear that the facts the parties provided initially in support of and in opposition to the government’s cross-motion for summary judgment fall short of what we believe is necessary to establish whether AM General’s post-September 1995 manufacturing overhead pool is not homogeneous and in violation of CAS 418.

For the foregoing reasons, we hereby vacate that portion of our 2 February 2006 decision granting summary judgment in favor of the government on the basis that AM General’s manufacturing overhead pool is not homogeneous and in violation of CAS 418.

Dated: 23 February 2007

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

(Signatures continued)
I concur

I concur

MARK N. STEMLER

EUNICE W. THOMAS

Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 53610, Appeal of AM General LLC, rendered in conformance with the Board's Charter.

Dated:

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