

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
States Roofing Corporation) ASBCA No. 55504
)
Under Contract No. N62470-97-C-8319)

APPEARANCES FOR THE APPELLANT: Neil S. Lowenstein, Esq.
David W. Lannetti, Esq.
Vandeventer Black LLP
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
David L. Koman, Esq.
Senior Trial Attorney
Monique Myatt Galloway, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

This is the last of 11 appeals arising from Contract No. N62470-97-C-8319 awarded to appellant States Roofing Corporation (SRC) by the Navy for repairs and related work on the roof cells at Building W-143, Naval Operating Base (NOB), Norfolk, VA. At issue are SRC's proposal preparation costs. We sustain the appeal, in part.

FINDINGS OF FACT

SRC's Cost Proposals and Settlement Negotiations

Contract No. N62470-97-C-8319 was awarded to SRC on 7 August 2000. It included, among others, the following standard FAR clauses: 52.214-26, AUDIT AND RECORDS – SEALED BIDDING (OCT 1997); 52.233-1, DISPUTES (DEC 1998); and 52.243-4, CHANGES (AUG 1987) (R4, tab 1). There were many changes to the contract work during performance for which unilateral contract modifications had been issued and for which SRC had submitted cost proposals as requested. At the time of beneficial occupancy, 6 November 2001, none of these contract modifications had been definitized. (R4, tabs 2, 11)

By a letter dated 1 December 2001, the Navy advised SRC that it found no merit in SRC's 12 December 2000 Request for an Equitable Adjustment (REA) relating to installation of DynaClad parapet wall flashing. The letter specifically stated that it was not a contracting officer's final decision. (Supp. R4, tab 356)

On 12 December 2001, Mr. Hugh DeLauney, SRC's president, Mr. Neil S. Lowenstein, SRC's legal counsel, and Ms. Susan Moser, SRC's accountant, met with the Navy to discuss the issues relating to the unsettled contract changes (supp. R4, tab 521). On 21 December 2001, Mr. Jerry T. Haste, supervisor of general engineering for the Resident Officer in Charge of Construction (ROICC), sent an e-mail to Ms. Diane H. LeCroy, the contracting officer, Mr. Mark J. Airaghi, the ROICC supervisory engineer, and ENS Alex J. Palmer, the Assistant Resident Officer in Charge of Construction (AROICC), advising them that he had asked Mr. Lowenstein to contact SRC about responding to the concerns raised by the Navy at the 12 December 2001 meeting. His plan was to try to settle all outstanding issues with SRC, but if that was not possible to issue a unilateral definitization modification in early January 2002. (Supp. R4, tab 361; tr. 8/218-19, 6(2)/95-97)¹

By a letter to Ms. LeCroy dated 21 January 2002, Ms. Moser summarized the background and status of the primary issue discussed at the 12 December 2001 meeting, namely SRC's calculation of its indirect cost rates. She advised Ms. LeCroy that SRC was "committed to working with the Navy to resolve the outstanding issues with regard to unsettled change orders." (Supp. R4, tab 521)

Meanwhile, on 17 January 2002, and then again later on 7 February 2002, Mr. DeLauney and Mr. Aubrey L. Etheridge, Jr., SRC's Quality Control Manager, met with representatives of the ROICC office and negotiated a settlement of 24 of the pending changes. A list of the settled items was provided to ENS Palmer by Mr. Etheridge, with the notation that the settled items did not include delay, disruption or time extensions. (Supp. R4, tabs 367, 369) The settled items were subject to an audit by the Defense Contract Audit Agency (DCAA) of SRC's indirect cost rates (tr. 8/219-20).

Another meeting was held on 14 February 2002 to negotiate a settlement of all of SRC's outstanding cost proposals, including the REA for the DynaClad wall flashing and other constructive change proposals, and to reach agreement on the indirect rates (supp. R4, tab 368). Messrs. Lowenstein and DeLauney attended on behalf of SRC. During the meeting, "many new issues concerning the project" were raised by SRC. (R4, tab 125; tr. 6(2)/38-40, 95) The follow day, ENS Palmer faxed a letter to SRC asking for documentation for these new issues so that the ROICC office could review it before

¹ We continue designation of the transcripts from the third week of trial as volumes 6(2) through 10(2) to differentiate them from the transcripts from the second week of trial, both of which were numbered 6 through 10.

meeting again with SRC to attempt to reach agreement (R4, tab 125; tr. 8/221-22, 6(2)/97).

On 25 February 2002, Mr. DeLauney responded to ENS Palmer's 15 February 2002 letter, providing information relating to its cost proposals for the defective submittal register (a request for a 50-day time extension had previously been submitted on 6 October 2000), safety assurance, acceleration, delay (general conditions extension costs), disruption, and proposal preparation costs. It also included seven new cost proposals for additional miscellaneous items. (R4, tab 130; tr. 8/222-23, 6(2)/42, 97-98)

At a meeting on 26 March 2002, Mr. DeLauney promised the ROICC representatives SRC would provide further information to support what ENS Palmer characterized as SRC's 25 February 2002 REA. By a 6 June 2002 e-mail, ENS Palmer confirmed a telephone conversation he had initiated with SRC in which SRC agreed that it would provide this information by 14 June 2002. (Supp. R4, tab 371; tr. 8/225-27)

On 12 June 2002, SRC submitted a cost proposal signed by Mr. DeLauney in the revised amount of \$44,848 for its proposal preparation costs. Included were 600 hours of in-house SRC labor at an hourly rate of \$27.15, a total of \$16,290; \$2,280 for legal fees billed by Vandeventer Black LLP for the period 6 December 2001 through 30 April 2002; and \$5,455 for accounting fees billed by Cherry, Bekaert & Holland, L.L.P. (CB&H) for the period 1 June 2001 through 29 January 2002. Work that was not performed by Mr. Lowenstein was redacted from the Vandeventer Black legal bills, as was some of Mr. Lowenstein's time which we assume did not relate to Building W-143. There are a few entries that appear to include work in addition to that associated with Building W-143. The entry for 11 February 2002 states: "Travel and meet with Aubrey [Etheridge] to discuss W143 claim; discuss claim with Jerry Haste." A total of \$6,255 was billed; \$2,280 was claimed as part of SRC's proposal preparation costs. The CB&H accounting bills included work other than that related to Building W-143. A total of \$9,350 was billed; \$5,455 was included in the claim. (R4, tab 131; tr. 9(2)/39-41) SRC has not explained the basis for the prorated allocations of the legal and accounting fees.

On 14 June 2002, SRC re-submitted its pending cost proposals to ENS Palmer, noting that another cost proposal (# 117 – delay and disruption) would follow on 17 June 2002 (supp. R4, tab 373; tr. 8/227). On 26 June 2002, ENS Palmer advised SRC that he was still reviewing the REA re-submission and hoped to respond by 26 July 2002 (supp. R4, tab 528). In fact, ENS Palmer continued working on and preparing documentation to definitize the outstanding unilateral contract modifications and the REA items through 12 December 2002 (R4, tabs 387 through 392; tr. 8/228-36, 9/99).

SRC's Certified Claim

On 7 April 2003, the Navy sent Modification No. P00007 to SRC for signature. It was intended to definitize Modification Nos. P00001 through P00005 and provide payment to SRC for REA items for which entitlement had been found. (R4, tab 133; tr. 6(2)/136) SRC did not sign the modification (R4, tab 134). Instead, on 18 April 2003, SRC converted 67 of its 117 cost proposals into a certified Contract Disputes Act (CDA) claim, which was received by the contracting officer on 21 April 2003 (R4, tabs 133, 147). Included as Claim Item 66, Proposal Preparation, was the \$44,848 cost proposal SRC had submitted on 12 June 2002 (R4, tab 147 at II.66).

The contracting officer issued final decisions on SRC's CDA claim on 1 and 30 September 2004 (R4, tabs 143, 146). Claim Item 66 was among the claims she denied. This timely appeal followed and SRC's claim for proposal preparation costs was docketed as ASBCA No. 55504.

Ms. Moser was qualified as an expert in government cost accounting (tr. 8(2)/86-99). On 13 June 2006, she revised SRC's claim for proposal preparation costs to seek \$43,479, which she later reduced by \$1,717, to \$41,762 to reflect "settled amounts" on 26 June 2006 (ex. A-2, tab (V) at 6111).

Legal and Accounting Fees

SRC's claim was audited by Ms. Cecelia R. Ambrose, a DCAA auditor, who was stipulated to be an expert in the field of auditing government contractors (tr. 10(2)/43-45). Her final audit report is dated 21 June 2006 (Amended Response to Statement of Costs (ARSOC), tab 15). Ms. Ambrose questioned both the \$2,280 in legal fees and the \$5,455 in accounting fees claimed because she could not verify the prorated allocation amounts to the invoices and because the costs were included in SRC's General and Administrative (G&A) Pool (home office overhead) and would be recaptured through application of the home office overhead rate (ARSOC, tab 15 at 149; tr. 10(2)/129). Her audit report states that SRC was going to transfer these costs from G&A to the contract as direct costs, but notes that, as of 8 June 2006, the transfer had not been accomplished (ARSOC, tab 15 at 149). Ms. Ambrose did not take exception to the average 13.57% home office overhead rate computed by CB&H using fiscal years (FY) 2000 and 2001 (*id.* at 14-15).

Ms. Moser's revised written report, dated 27 June 2006, states her opinion that \$2,280 in legal fees and \$5,455 in accounting costs are direct costs to the Building W-143 contract. Her report further states that SRC was claiming only a prorated portion of the CB&H expenses and that general legal expenses were not being claimed and were properly included in G&A. (Ex. A-2, tab 1 at 39-40 of 47) She acknowledged that SRC normally includes legal and accounting fees as a G&A expense (tr. 8(2)/210-12,

10(2)/129). There is no evidence that the legal and accounting costs associated with Building W-143 have been removed from G&A.

Ms. Moser's spread sheets, however, reflect legal fees of \$5,455 for Vandeventer Black and \$2,280 for the accounting firm, CB&H, a total of \$7,735 (ex. A-2, tab 2(V) at 6111-6112). Based upon SRC's 12 June 2002 cost proposal and the attached invoices, and the DCAA audit, it is obvious that she inadvertently transposed the amounts for the legal and accounting fees (R4, tab 131; ARSOC, tab 15 at 149). During the hearing she was referred to a letter from SRC's counsel to the Navy's counsel that led her to further prorate the incorrect amount of the legal fees and to revise SRC's claim to reflect \$2,280 each for legal and accounting fees, a total of \$4,560 (exs. A-2, tab 2(V) and A-28; tr. 8(2)/182-83, 10(2)/205-06). SRC recognized these errors in its post-hearing brief and requests award of the full \$5,455 in accounting fees and \$2,280 in legal fees, the same as that requested in SRC's 12 June 2002 cost proposal (app. br. at 93).

In-House Labor

In a preliminary audit report dated 6 August 2004, Ms. Ambrose had questioned the entire amount of the claimed in-house labor for which she had been provided certified payrolls for Mr. Joseph Hernandez, SRC's project supervisor, for the period 2 July 2001 through 6 October 2001. Ms. Ambrose was of the view that, because the payrolls reflected his time at the project site, Mr. Hernandez could not have been incurring time associated with proposal preparation activities and that if the costs were allowed as "claim preparation costs" SRC would recover the costs twice; first as direct costs and again as reimbursement for "claim preparation costs." (Response to Statement of Costs (RSOC), tab 1 at 59-60; tr. 10(2)/129-30)

On 9 June 2006, SRC provided Ms. Ambrose with a summary schedule of time charges for Mr. Hernandez, for the period beginning 7 November 2001 and ending 4 May 2002, and also for Mr. Etheridge, beginning 7 November 2001 and ending 15 June 2002. This was a total of \$14,027 for 590 man hours, an average hourly rate of \$23.77. (ARSOC, tab 10, O-19-d(1) and tab 15 at 151; tr. 10(2)/131-32) Ms. Ambrose determined that SRC had simply moved the costs for the labor hours for Messrs. Hernandez and Etheridge to its proposal preparation claim after she had pointed out to SRC that the costs could not be in its general conditions claim after 6 November 2001, the beneficial occupancy date. There were no detailed records from which she could verify the work they actually performed on the days listed. She considered the schedule to be an estimate prepared long after contract completion and, therefore, questioned the entire amount claimed for in-house labor in her audit report dated 21 June 2006. (ARSOC, tab 15 at 151; tr. 10(2)/131-32)

When Ms. Moser revised SRC's claim for proposal preparation costs, she included what appears to be the same schedule of time charges for Messrs. Etheridge and

Hernandez that had been provided to Ms. Ambrose, but with the addition of time charges for Ms. Elizabeth Foushee on 16 and 23 February 2002. The in-house labor information was provided to her by SRC from the job cost records (tr. 8(2)/181-82). Ms. Moser's total is 604.5 labor hours at an average actual hourly rate, \$23.63, a total of \$14,285, plus mark-ups and profit. (Ex. A-2, tab 1 at 40 of 47 and tab 2(V))

Mr. DeLauney reviewed the schedule provided to Ms. Moser and testified that the three employees were gathering information and preparing folders for the various cost proposals (tr. 9(2)/42-45). Mr. Hernandez testified that he had assisted in the preparation of some of the proposals, but did not identify which ones or provide any time frame (tr. 5/118, 131). Messrs. Etheridge and Hernandez are direct labor charged employees and are not included in the indirect cost pool (ARSOC, tab 15 at 111-12; tr. 8(2)/213-17, 10(2)/122-28). It is not clear whether Ms. Foushee is also classified as direct labor. Our review of the record reflects that Mr. DeLauney signed all of the cost proposals and attended virtually all of the settlement negotiations. Although Mr. DeLauney spent many hours working on the cost proposals, his time was not included in the proposal preparation claim because he is carried in SRC's overhead (tr. 9(2)/40; app. br. at 92).

Mr. DeLauney intended to reduce the total number of SRC man hours claimed by five percent to reflect other work being performed, but this adjustment was not accounted for in Ms. Moser's revised claim (tr. 9(2)/42-45). Based upon Mr. DeLauney's testimony, Ms. Moser adjusted her revised claim during the hearing to reflect a five percent reduction in the SRC in-house labor hours, reducing the total to 574.3 hours at \$23.63, a total of \$13,571, plus mark-ups and profit (ex. A-2, tab 2(V); tr. 10(2)/206).

DISCUSSION

SRC seeks legal, accounting and in-house labor costs it alleges it incurred in the preparation of its cost proposals. It asserts that these are contract administration costs recoverable under *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds, Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (*en banc*).

According to the Navy, the costs at issue are not allowable contract administration costs under FAR 31.205-33, "Professional and consultant service costs," but rather are unallowable under FAR 31.205-47, "Costs related to legal and other proceedings," subparagraph (f) because they were incurred in connection with the preparation and prosecution of SRC's claim.

The Navy first addresses the ROICC's December 2001 letter regarding the parapet wall and the cost proposals SRC submitted on 25 February 2002 relating to the submittal register, safety assurance, acceleration, delay, disruption, proposal preparation and other miscellaneous items. It contends that these matters were not in furtherance of contract

administration because the parapet wall issue was already in dispute and the other cost proposals were not submitted until after contract performance. This is virtually the same argument raised by the government and rejected by the Board in *Advanced Engineering & Planning Corp.*, ASBCA Nos. 53366, 54044, 03-1 BCA ¶ 32,157 at 158,993-95, *aff'd*, *Johnson v. Advanced Engineering & Planning Corp.*, 292 F. Supp. 2d 846 (E.D. Va. 2003). We have no cause to revisit either the argument or our decision rejecting it.

The Navy next contends that the parties were already in a disputed claim status at least as early as December 2001 when SRC began using the services of Vandeventer Black for matters related to Building W-143 and definitely by 11 February 2002 when Mr. Lowenstein described his discussions with Messrs. Etheridge and Haste as relating to the “W143 claim.” Additionally, it asserts that the accounting fees are not recoverable because they were incurred in connection with the DCAA audit or to assist the contracting officer in understanding SRC’s overhead and are costs SRC should have anticipated under the audit clause, FAR 52.214-26.

In *Bill Strong, supra*, the court of appeals held that contract administration costs are “presumptively allowable if they are also reasonable and allocable.” 49 F.3d at 1549. In evaluating the costs claimed, we are to examine the objective reasons why SRC incurred the costs in order to determine whether they are contract administration costs or are incidental to the prosecution of a claim. The court further advised that the underlying policy benefits to the government of the negotiation process in resolving contractual issues by mutual agreement are such that costs incurred for the “genuine purpose of materially furthering the negotiation process” should normally be viewed as contract administration costs, even if the negotiation ultimately fails and a claim is filed. *Id.* at 1550. See *American Mechanical, Inc.*, ASBCA No. 52033, 03-1 BCA ¶ 32,134 at 158,894-95.

The evidence here established that, beginning in December 2001, and continuing through June 2002, SRC personnel, in particular Mr. DeLauney, its counsel and accountant, met numerous times with the Navy and provided requested information for the purpose of resolving the outstanding unilateral contract modifications and SRC’s REA cost proposals. The 14 February 2002 negotiation was intended to settle all of SRC’s outstanding cost proposals and when SRC raised new issues during the negotiation, ENS Palmer asked for supporting documentation. SRC provided this additional information on 25 February 2002 and agreed at another meeting on 26 March 2002 to further supplement it. When ENS Palmer inquired about the supplementation on 6 June 2002, SRC re-submitted its cost proposals on 14 June 2002. ENS Palmer continued working on both the outstanding modifications and SRC’s additional REA cost proposals through 12 December 2002.

These facts indicate that the claimed legal and accounting fees and in-house labor should be classified as contract administration costs. We conclude, however, that not all

the claimed costs are recoverable either because they are not reasonable and allocable or are not supported by the record. *Bill Strong*, 49 F.3d at 1549.

Legal and Accounting Fees

With respect to the claimed legal and accounting fees, we note that, contrary to the Navy's contentions, we do not infer from the use of the word "claim" by counsel to describe his discussions on 11 February 2002 that there was any impasse in the negotiations because there were significant further discussions and submissions of information. Nor do we consider FAR 52.214-26 to bar recovery of accounting fees inasmuch as that provision only relates to the contracting officer's right to examine and audit a contractor's records and has no application to the recovery of allowable contract administration costs under *Bill Strong*.

Rather, we deny the claimed fees for a number of other reasons. First, we have concerns about the support provided for the fees. See FAR 31.205-33(f). SRC did not explain the basis for its prorated allocations. Thus, while there was more detail relating to the legal fees, Ms. Ambrose could not verify the prorated amounts requested to the invoices. Moreover, there appear to be errors associated with the allocations.

Second, SRC's legal and accounting fees are normally included in its G&A expense and are recovered in its home office overhead rate. SRC's treatment of the claimed legal and accounting costs as direct costs, therefore, is not consistent with its established practice of treating these costs as indirect costs. See *Defense Supply Systems, Inc.*, ASBCA No. 54494, 05-2 BCA ¶ 33,031 at 163,707-08, *aff'd*, 188 Fed. Appx. 995 (Fed. Cir. 2006) ("[c]osts incurred for the same purpose in like circumstances cannot be classified as both direct and indirect"). See also FAR 31.201-1(a) (consistency required) and FAR 31.202(a) (direct costs not allocable to final cost objectives if other costs incurred for same purpose in like circumstances are included in any indirect cost pool allocated to that or any other final cost objective.).

Lastly, SRC acknowledged that the fees requested needed to be transferred from its G&A pool to the contract as direct costs, but did not do so. Thus, we agree with Ms. Ambrose that SRC is seeking a double recovery. See *E.L. Hamm & Assocs., Inc.*, ASBCA No. 51085 *et al.*, 03-2 BCA ¶ 32,259 at 159,574, *rev'd on other grounds*, 379 F.3d 1334 (Fed. Cir. 2004) (contract administration costs denied where contractor failed to show claimed direct costs were not included in its overhead rate).

In-House Labor

With respect to the claimed in-house labor, the Navy contends that SRC failed to prove that all of its claimed costs were attributable to the preparation of its proposals or that the five percent reduction was accurate and reasonable.

Here, the costs now claimed for Messrs. Hernandez and Etheridge were moved to SRC's proposal preparation claim after Ms. Ambrose advised SRC that the costs could not be included in its general conditions after beneficial occupancy, which occurred on 6 November 2001. Ms. Ambrose was of the view that the summary time schedule provided to her on 9 June 2006 was essentially an estimate because there were no detailed records from which she could determine the work Messrs. Hernandez and Etheridge were performing on the days listed. Two summary entries were subsequently added for Ms. Foushee.

The record reflects that some 117 cost proposals were submitted to the Navy and we infer from the evidence that Mr. DeLauney, for whom in-house labor costs are not sought, was involved in virtually every aspect of the proposal preparation process and the subsequent cost negotiations. There also was some evidence reflecting the participation of Messrs. Hernandez and Etheridge and Ms. Foushee in the preparation of SRC's cost proposals. Mr. DeLauney testified that they gathered background information and prepared the folders supporting the proposals. Mr. Hernandez confirmed that he had been engaged in this effort, although he did not provide specifics. Additionally, the record establishes that Mr. Etheridge participated in the negotiations that resulted in settlement of 24 pending change items in February 2002.

We are not satisfied, however, that this evidence is sufficient to find entitlement to all of the in-house labor costs claimed. Indeed, even Mr. DeLauney recognized that not all of the time listed on the summary time schedule for these employees was devoted to cost proposal activities. But, he reduced the claimed amount by only five percent, explaining broadly that the reduction was meant to reflect other, unidentified, work being performed during that time period.

While we agree with the Navy that SRC has not proved all of its in-house labor costs or that its five percent reduction is correct, and reasonable, we are nevertheless persuaded that the record contains sufficient evidence to award some of these costs to SRC under *Bill Strong*. See *Fru-Con Construction Corp.*, ASBCA Nos. 555197, 55248, 07-2 BCA ¶ 33,697 at 166,813-816. Thus, in the nature of a jury verdict, we conclude that SRC is entitled to recover the lump sum amount of \$5,000.00 as the reasonable and allowable costs of in-house labor for proposal preparation/contract administration.

CONCLUSION

The appeal is sustained, in part. We award SRC the lump sum amount of \$5,000.00, plus CDA interest running from 21 April 2003, until paid.

Dated: 19 January 2010

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

I concur

I concur

MARK N. STEMLER
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. 55504, Appeal of States Roofing Corporation, rendered in conformance with the Board's Charter.

Dated:

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