Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: November 18, 2005

GSBCA 16233

AMEC CONSTRUCTION MANAGEMENT, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Barbara G. Werther, Patrick G. McGaughan, and Ronan J. McHugh of Thelen Reid & Priest LLP, Washington, DC, counsel for Appellant.

Dalton F. Phillips, Catherine C. Crow, Torrie N. Harris, and Richard Hughes, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **NEILL**, and **PARKER**.

DANIELS, Board Judge.

AMEC Construction Management, Inc. (AMEC) claims that it is entitled to $1,582,769 in general conditions costs it incurred in supporting tenant fit-out work on a major construction project from March 2 to July 20, 2001. The project was undertaken pursuant to a contract with the General Services Administration (GSA).

GSA, the respondent in this case, and AMEC, the appellant, have filed cross-motions for summary relief. The theories behind these motions, and the uncontested facts on which the parties believe a ruling may be made, have been difficult to discern. GSA's motion was

predicated in part on declarations which contained after-the-fact analyses by individuals who did not appear on the job until after the occurrence of the events they described. The defects in AMEC's filing were more egregious: the contractor failed to submit a Statement of Genuine Issues as to GSA's proposed facts or a Statement of Uncontested Facts as to its own motion, both of which are required by Board Rule 108(g) (48 CFR 6101.8(g) (2004)). The theories on which both motions were predicated were diffuse.

Faced with this difficult record, the Board asked the parties to file jointly a statement of uncontested facts and permitted them to file supplemental argument on the motions. Board's Memorandum of Conference (Sept. 23, 2005) at 3. The parties more or less complied with this request. Although the joint statement of uncontested facts is replete with disagreements and argument, it contains sufficient agreement that we can recite some relevant uncontested facts, which we do below. Our citations to "Uncontested Facts" are to this document, which was filed on October 13, 2005. The joint statement also contains a section entitled "Statement of Genuine Issues," to which we refer in this opinion as "Genuine Issues."

In the Introduction to the Statement of Uncontested Facts and Genuine Issues, at 2, GSA makes clear its position, which was inchoate earlier, that "the correct issue is whether AMEC is entitled to general conditions in addition to the 10 percent commission GSA paid on CE [construction estimate request for proposal] 435, the TFO [tenant fit-out] change order." *See also* Respondent's Rebuttal [to] Appellant's Opposition to Motion for Summary Relief (June 1, 2005) (Respondent's Rebuttal) at 4. In the same place in the same filing, AMEC says that "[t]he issue is whether AMEC is entitled to be compensated for its general conditions costs for the period March 2, 2001 to July 20, 2001." *See also* AMEC's Opposition to GSA's Motion for Summary Relief and Cross-Motion for Summary Relief (May 2, 2005) (Appellant's Motion) at 2.

We deny both motions. GSA's position is wrong as a matter of law. We cannot grant AMEC's motion for two reasons. First, the motion does not even begin to address the appropriateness of the amount of the claim, and without considering the amount, we cannot grant the appeal. Second, with regard to the contractor's entitlement to any recovery – a subject that the motion does address – the entire matter is so confusing that we cannot reach a conclusion without the benefit of testimony which explains it more fully.

Background

On November 8, 1996, GSA and AMEC entered into a contract for the renovation of the Interstate Commerce Commission (ICC), United States Customs Service (USCS), and Connecting Wing (CW) Buildings in Washington, D.C. Uncontested Facts ¶ 1.

The contract contained General Services Administration Acquisition Regulation (GSAR) clause 552.243-71, 48 CFR 552.243-71 (1996), "Equitable Adjustments (Apr 1984)." This clause contains the following material:

> (a) The provisions of the "Changes" clause prescribed by FAR [Federal Acquisition Regulation] 52.243-4 are supplemented as follows:
>
> . . . .
>
> (2) The allowable overhead shall be determined in accordance with the contract cost principles and procedures in Part 31 of the Federal Acquisition Regulation (48 CFR Part 31) in effect on the date of this contract. The percentages for profit and commission shall be negotiated and may vary according to the nature, extent and complexity of the work involved, but in no case shall exceed the following unless the contractor demonstrates entitlement to a higher percentage:
>
> | | Overhead | Profit | Commission |
> |---|---|---|---|
> | To Contractor on work performed by other than his own forces ---------- | – | – | 10% |

Appeal File (GSBCA 16151),[1] Exhibit 1 at 57 of Construction Contract Clauses.

The contract consisted of three "Construction Contracts" (CC). CC 1 involved the central utility plant for all three buildings, CC 2 involved the ICC Building, and CC 3 involved the USCS and CW Buildings. CC 3 was an option exercisable at the discretion of GSA at any time between January and May of 1998. Uncontested Facts ¶ 2.

The contract drawings issued by GSA stated that the contract documents did not include any TFO information for CC 3. The drawings said that AMEC was to provide a proposal for this TFO work when the TFO design documents were completed. Uncontested Facts ¶ 3.

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[1] AMEC has filed many appeals of contracting officer decisions issued under this contract. GSBCA 16151 was the first of these appeals to be filed, and the appeal file for that case contains many documents which are relevant to other appeals.

GSA did not receive the funding necessary to exercise its option for CC 3 within the contract's time frame of January to May of 1998. GSA removed some work from CC 3 and incorporated it into CC 2 due to the funding difficulties. In September 1997, in CE 66, GSA asked AMEC to submit a proposal for CC 3 by re-pricing some of the original unit prices and pricing some new line items, on the assumption that GSA would exercise its option for CC 3 at some time between December 31, 1998, and December 31, 1999. Uncontested Facts ¶ 6.

In March 1998, GSA asked that the pricing assume a start date of January 1, 1999. AMEC pointed out that CE 66 did not address issues such as a completion date which were necessary to pricing. Uncontested Facts ¶ 8. GSA responded on March 18 that AMEC should assume that the start date would be January 4, 1999, with the CC 3 TFO to begin on April 7, 1999. The agency said that it would issue CC 3 TFO drawings as a CE on February 7, 1999, for the basement through seventh floor of the USCS Building. GSA also told AMEC it would have to –

> Complete by October 20, 2000 CC#3 all vertically communicating mechanical, electrical, telecommunications facilities, fire and life safety systems, and attic level for CC#3 base building. All work associated with this item must be completed prior to government acceptance of substantial completion for areas G-L. Final completion of CC#3 will be phased with tenant fit out areas as stated below [showing dates from October 20, 2000 (for Area G) to March 23, 2001 (for Area L)].

Id. ¶ 9; Affidavit of Mark S. McGaughan (Apr. 29, 2005) (attachment to Appellant's Motion), Exhibit 22. As AMEC points out, the period from January 4, 1999, to October 20, 2000, is nearly twenty-two months.

GSA also explained, in its March 18, 1998, communication:

> [Y]our tenant fit out cost cannot be estimated at this time due to the fact the drawings will not be issued until February 2, 1999. Therefore, you are to use the following allowances in your CE#66 cost proposal for USCS Floors Basement through seven tenant fit out for the following trades: [Note: These allowances do not include individual subcontractor mark ups or commission(s).][2]

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[2] The brackets are in the original.

Electrical = To be determined by the GSA
Mechanical = To be determined by the GSA
Drywall = To be determined by the GSA
[AMEC[3]] = To be determined by the GSA

Uncontested Facts ¶ 9; McGaughan Affidavit, Exhibit 22.

On April 24, 1998, GSA set the amount of the allowances at $5,900,000, as follows:

Electrical = $2,200,000
Mechanical = $900,000
Drywall/Acoustical = $1,000,000
[AMEC] for the remaining trades = $1,800,000

Uncontested Facts ¶ 10. GSA expressly stated, "[T]hese allowances do not include the general contractor's mark up for commission." *Id.* Proposals AMEC submitted two months later for CE 66 specifically stated that AMEC understood that the allowance of $1,800,000 was for AMEC's own costs. *Id.* ¶ 12.

On May 4, 1998, AMEC priced CE 66 based on a duration of January 4, 1999, to October 22, 2000 – a period which the parties call twenty-two months. The proposal, which totaled $61,922,815, included $3,653,006 in general contractor direct administrative costs – $3,193,494 in general conditions costs plus markups of 3.99% for overhead and 10% for profit. Uncontested Facts ¶ 13; McGaughan Affidavit, Exhibit 24.

After AMEC submitted this proposal, GSA asked that the proposal be amended to include a price for the difference between the original bid for CC 3 and the new price, rather than the total price for CC 3. Uncontested Facts ¶ 14. AMEC complied with this request, submitting on June 22, 1998, a revised proposal in the amount of $9,900,000. This revised proposal included $1,109,853 in general contractor direct administrative costs – $998,973

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[3] The document contains the words "Morse Diesel" here. The contract was awarded by GSA to Morse Diesel International, Inc. Appeal File (GSBCA 16151), Exhibit 5 at 1. The appellant is AMEC, however, and the parties consistently refer to that firm as the contractor. The parties have not explained the relationship between Morse Diesel and AMEC. We note that according to an AMEC p.l.c. media release dated May 14, 2000, Morse Diesel, which was formerly the United States construction business of that firm, adopted the AMEC identity at the end of 2000. See <http:\\www.amec.com/news/mediareleasedetails .asp?Pageid=876&MediaID=154> (last visited Nov. 18, 2005).

in general conditions costs plus markups – over a period of twenty-two months. *Id.* ¶ 16; McGaughan Affidavit, Exhibit 25. AMEC resubmitted the proposal to GSA on July 28, in the same cost amounts and for the same twenty-two month period. Uncontested Facts ¶ 17.

At no point during discussions of the original or revised CE 66 proposals did GSA ever question AMEC's having priced a twenty-two month period for its general conditions costs, which on the basis of GSA's projected start date for CC 3 (January 4, 1999) would have been through March 2, 2001. GSA was aware that the pricing period was twenty-two months, not twenty-seven months. Uncontested Facts ¶ 14.

On August 18, 1998, GSA's project manager, Eric Albrecht, prepared "Findings of Fact for Contract Modification" relating to CE 66. His findings of fact are based on a twenty-two-month duration, from January 2, 1999, to October 20, 2000. Uncontested Facts ¶ 18.

On August 31, 1998, AMEC and GSA bilaterally executed contract modification PS 39. This document stated, "The purpose of this contract modification is [to] provide the general contractor with an equitable adjustment for extension and acceleration of Construction Contract #3." It added $9,900,000 to the contract price and delayed the beginning of CC 3 to a date of GSA's choosing between January 4, 1999, and May 30, 1999. The price increase included the CE 66 allowances. PS 39 also stated, "The project schedule, as shown in this modification, includes all work required by the conversion of these allowances to the actual work" and "Cost over and above these allowances will entitle the contractor to time adjustment, if necessary." Finally, the contract modification stated, "Settlement of this change includes all cost, direct, indirect, impact and delay, associated with this change order." Uncontested Facts ¶ 19; McGaughan Affidavit, Exhibit 13.

PS 39 includes a "Construction Schedule Summary." McGaughan Affidavit, Exhibit 13 at 4-6. AMEC interprets this summary to require that all base contract work be completed by March 2, 2001. GSA disagrees with this interpretation. Uncontested Facts ¶ 20. According to the agency, PS 39 included all work through July 20, 2001. Genuine Issues ¶ 1. We note that the construction schedule summary shows that GSA might issue a notice to proceed at any time between January 4, 1999, and May 31, 1999, with completion dates for various areas to be dependent on the date of the notice to proceed. For example, if the notice were to be issued on January 4, 1999, the completion dates would be October 20, 2000, for CC 3 vertically communicating work and Area G, through March 15, 2001, for Area L; and if the notice were to be issued on May 31, 1999, the completion dates for those areas would be March 16, 2001, through August 3, 2001. Whenever the notice to proceed would be issued, the TFO documents would be provided to AMEC by April 7, 1999. The summary shows that if the notice to proceed were to be issued on May 17, 1999, as it was, the

completion date for CC 3 vertically communicating work and Area G would be March 2, 2001, and the completion date for Area L would be July 20, 2001. McGaughan Affidavit, Exhibit 13 at 4-6; Uncontested Facts ¶ 24. AMEC derives the March 2, 2001, base contract work completion date from its original CC 3 schedule. GSA says that this schedule was rejected for several reasons – among them a failure to comply with various completion dates. Uncontested Facts ¶ 20. According to GSA, AMEC's approved baseline schedule shows that AMEC planned to complete the base work for Areas G through L of CC 3 together with the TFO work for each of those areas, and AMEC performed the work as planned. Respondent's Motion for Summary Relief (Mar. 18, 2005) at 12.

On March 9, 1999, GSA sent AMEC CE 435, asking that the contractor "[p]rovide a cost proposal for the USCS/CW Tenant Fit Out drawings and Narrative dated February 22, 1999." The agency told AMEC to "[i]nclude all direct, indirect, and impact costs or benefits associated with this change." GSA issued the TFO drawings and narrative as a complete, stand alone design package that was in addition to the base work for the two buildings. Uncontested Facts ¶ 21.

On March 15, 1999, GSA instructed AMEC to remove all of the $5,900,000 TFO allowances that AMEC had included in its schedule of values after executing PS 39. This amount, GSA said, "will be negotiated under CE 435." What remained was $4,000,000 – an amount which included, in addition to subcontractor costs and general contractor commission on them, the $1,109,853 that AMEC had proposed as general contractor direct administrative costs (general conditions costs plus markups). Uncontested Facts ¶ 23.

Due to design conflicts within the CE 435 documents, AMEC sought, and was granted by GSA, additional time during which the parties could resolve and fix the scope of the request. On August 12, 1999, AMEC submitted its proposal for TFO work in the amount of $7,038,504. This figure included $1,058,524 in general contractor direct administrative costs (general conditions costs plus markups). AMEC's proposal contained a worksheet that specifically indicated that these costs were for what the parties call the five-month period from March 2, 2001, to July 20, 2001, and a schedule showing that the TFO work would be performed during this period. Uncontested Facts ¶ 25.

Between August 20, 1999, and November 18, 1999, GSA and AMEC exchanged communications concerning AMEC's CE 435 proposal. During this period, GSA never questioned AMEC's inclusion of general conditions costs in its proposal. Uncontested Facts ¶ 26.

On November 18, 1999, AMEC's project coordinator, Mark McGaughan, and assistant project manager, Benjamin Davis, met with representatives of GSA (Leonard

Weiser and James Hopkins) and GSA's construction manager, Sverdrup/Turner (Jamie Camp and Carmen Casile), to negotiate the general conditions portion of AMEC's CE 435 proposal. According to AMEC, supported by Mr. Davis's contemporaneous notes of the meeting, GSA's Mr. Weiser acknowledged that AMEC general conditions costs for the CC 3 TFO work were not included in CE 66. GSA disputes this assertion, but says that for the purposes of the motions, it assumes that Mr. Weiser did admit that AMEC's proposal for CE 435 did not include general conditions. Uncontested Facts ¶ 28. As AMEC notes, GSA's statement is odd because the agency has agreed in Uncontested Facts ¶ 25, cited above, that the contractor's CE 435 proposal did include general conditions costs for the five-month period from March 2, 2001, to July 20, 2001. AMEC's Response (Oct. 21, 2005) at 4.

At the November 18 meeting, GSA asserted that AMEC had overstaffed the project and should be paid only part of the general conditions costs set forth in AMEC's CE 435 proposal. Uncontested Facts ¶ 29. GSA offered to pay about $50,000 in general conditions costs, and AMEC rejected this offer as insufficient. *Id.* ¶ 31. GSA then asserted that the intent of CE 66 and PS 39 was to include general conditions costs through the end of the project, including TFO work during the period from March 2 to July 20, 2001. *Id.* ¶ 32.

Whether the parties ever modified the contract to include any of the items included in AMEC's CE 435 proposal is not addressed by the parties in their joint statement of uncontested facts. The parties do agree, however, that AMEC was entitled to a ten percent commission on its subcontractors' work under CE 435 and that GSA paid it this amount. Appellant's Motion at 43; Respondent's Rebuttal at 7 n.1.

By letter dated October 24, 2002, AMEC submitted to the contracting officer a claim for "its actual extended general conditions costs for supporting the added tenant work for the period from March 2, 2001 through July 20, 2001." The claim was in the amount of $1,689,220. Appeal File (GSBCA 16233), Exhibit 40. On July 22, 2003, AMEC appealed the contracting officer's deemed denial of the claim.[4] In its complaint, AMEC decreased the amount of the claim to $1,582,769. Complaint ¶ 1.

Discussion

Both parties have moved for summary relief. We consider the motions separately, recognizing that we are under no compulsion to grant one of them simply because cross-

[4] The contracting officer issued a decision dated July 23, 2003, denying the claim. Appeal File, Exhibit 41.

motions have been filed. *2160 Partners v. General Services Administration*, GSBCA 15973, 03-2 BCA ¶ 32,269, at 159,639; *Clark College District 14 Foundation v. General Services Administration*, GSBCA 15603, 02-2 BCA ¶ 32,005, at 158,136-37. Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The dispute in this case involves what AMEC calls "general conditions costs." This term generally is used to refer to "field" or "job site" overhead costs of a construction project. These are expenses for project managers, supervisors, and clerical assistants; temporary offices and utilities and supplies for those offices; and other miscellaneous expenses necessary for on-site management. *Baldi Bros. Constructors v. United States*, 50 Fed. Cl. 74, 81 n.20 (2001); *Clark Concrete Contractors, Inc. v. General Services Administration*, GSBCA 14340, 99-1 BCA ¶ 30,280, at 149,755-56.

GSA's motion focuses on one clause of the contract between the parties, GSAR 552.243-71. That clause provides that when pricing equitable adjustments to the contract price, to reflect changes in the work performed under the contract, the contractor is entitled to a single markup for work performed by other than his own forces. That single markup is a commission which shall be no more than ten percent "unless the contractor demonstrates entitlement to a higher percentage." Although the parties do not include this fact in their joint statement of uncontested facts, they seem to agree that all of the tenant fit-out work completed under this contract was performed by subcontractors – persons other than AMEC's own forces. AMEC has already been paid a ten percent commission on this subcontractor work. Therefore, says GSA, the contractor is entitled to no more money for any activity associated with the work – including general conditions costs.

GSA supports its position with citations to *Jack Picoult*, GSBCA 3516, 72-2 BCA ¶ 9621, *aff'd on reconsideration*, 73-1 BCA ¶ 9971, *dismissed*, 529 F.2d 532 (Ct. Cl. 1975) (table), and *Samuel S. Barnett Co.*, GSBCA 4855, 80-1 BCA ¶ 14,355. In both of these cases, the costs of field office supervisors and assistants were held to be appropriately paid only through markups for overhead, profit, and commission. Evidently, the agency believes that because these costs were paid only through markups in *Picoult* and *Barnett*, they may be paid only through markups here. This conclusion is not correct. As pointed out by another board of contract appeals, the decisions in *Picoult* and similar cases "turn on express language of the respective contracts. . . . The very fact that, in those contracts, it was thought necessary to specify that [certain] costs . . . would be treated as indirect costs, suggests that there is not a generally accepted practice to that effect." *Peter Kiewit Sons' Co.*, ENGBCA

4742, 85-1 BCA ¶ 17,911, at 89,707. GSA has not shown that the contract between AMEC and GSA contains a clause like the one on which the decisions in *Picoult* and *Barnett* turned, so those decisions are not controlling here.

In all instances relevant to this case, the parties appear to have treated general conditions costs as direct costs of the contract. AMEC's CE 66 proposal included the firm's own general conditions costs as direct costs, which were marked up for overhead and profit. Those costs, with their markups, were included in PS 39, a contract modification to which GSA assented. They remained agreed upon when GSA issued CE 435, removing tenant fit-out allowances from PS 39 for the purpose of negotiating a price for the fit-out work. Even as late as November 18, 1999, when the parties met to discuss CE 435, GSA representatives considered general conditions costs to be direct costs, subject to negotiation, rather than indirect costs, subject to payment through markups alone. We find no reason, given the practice of the parties under this contract and the absence of a contract clause directing a contrary conclusion, to find that AMEC's general conditions costs are indirect costs subject to recovery only through a ten percent commission markup on subcontractors' costs.

As stated earlier, AMEC's motion cannot possibly be granted because summary relief would entail awarding the contractor all $1,582,769 it claims, but AMEC has not presented any facts on the basis of which an award of this amount could be made. The motion addresses only AMEC's entitlement to general conditions costs for the period of time from March 2 to July 20, 2001. As to that matter, the record at this point in the proceeding is insufficient for us to reach a conclusion.

On AMEC's side of the issue, it is clear that GSA told the contractor to price its CE 66 proposal on the assumption that the work covered by the proposal – including AMEC's own general conditions work – would last for twenty-two months. It is also clear that AMEC's CE 66 proposal was priced on this basis. GSA never questioned AMEC's having priced on this basis – indeed, preparatory to execution of contract modification PS 39, which addressed CE 66 costs, the agency's project manager made an analysis which assumed such a basis.

When the parties entered into PS 39, however, they agreed to a schedule which included a variable completion date for work covered by the modification. The completion date could have been as early as March 15, 2001, or as late as August 3, 2001, depending on when GSA issued a notice to proceed. Only the March date would have resulted in a twenty-two month schedule; later dates would have required a lengthier time period. Yet the parties agreed to a fixed price for the work and specifically stated, "Settlement of this change includes all cost, direct, indirect, impact and delay, associated with this change order." This would seem to indicate an agreement that as long as the notice to proceed was issued early

enough that the completion date was no later than August 3, 2001, the amount to be paid AMEC would be the $9,900,000 stated in the modification.

On the other hand, PS 39 also said, "Cost over and above these [tenant fit-out] allowances will entitle the contractor to time adjustment, if necessary." When GSA later sent AMEC CE 435, with the intent of replacing the allowances with specific, negotiated cost figures, it told the contractor to "[i]nclude all direct, indirect, and impact costs or benefits associated with this change." This later direction, coupled with the quoted sentence from PS 39, may demonstrate an intent on the part of GSA to pay whatever additional costs (which might have included general conditions costs) resulted from the specifically described TFO work. AMEC responded to CE 435 with prices which were in excess of the allowances. We do not know whether GSA eventually accepted these higher prices, but if it did, even on the terms of PS 39 alone, this could have triggered a time adjustment and thereby necessitated additional general conditions costs.

At November 18, 1999, negotiations regarding CE 435, GSA questioned the amount of AMEC's general conditions costs, but not the contractor's entitlement to some such costs. The agency offered to reimburse AMEC for general conditions costs which were additional to the amount provided in PS 39. Was this a concession that AMEC was entitled to more general conditions costs? Or because, after AMEC rejected the offer, GSA asserted that PS 39 precluded paying additional general conditions costs, should the offer be viewed as a momentary misunderstanding of the contract modification?

We are not sure, based on the limited record of uncontested facts presented by the parties, precisely what AMEC and GSA intended with regard to general conditions costs when they agreed to PS 39. Did the parties mean to limit recovery of these costs, no matter how long the project lasted? Or did they mean to allow for reimbursement of additional costs if appropriate? The contract modification can be read both ways – and so can GSA's actions subsequent to the execution of it. Drawing all justifiable inferences in favor of GSA, the nonmovant, we cannot accede to AMEC's motion for summary relief.

Decision

The cross-motions for summary relief are both **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

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ROBERT W. PARKER
Board Judge