Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

RECONSIDERATION DENIED: January 24, 2006

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.

The General Services Administration (GSA), respondent, moves for reconsideration of the portion of the Board's November 18, 2005, decision which denied GSA's motion for summary relief in this case.

The case involves a claim by AMEC Construction Management, Inc. (AMEC) for general conditions costs it incurred in supporting tenant fit-out work on a major construction

project from March 2 to July 20, 2001. GSA's motion for summary relief asked the Board to limit AMEC's recovery of costs in accordance with the agency's view of a clause in the contract under which this claim was brought, General Services Administration Acquisition Regulation (GSAR) 552.243-71. This clause provided that for supplemental work performed by other than the contractor's own forces, the contractor was entitled to a markup of no more than ten percent for commission (unless the contractor demonstrated entitlement to a higher percentage) and was not entitled to a markup for overhead or profit. GSA maintains that because the tenant fit-out work in question was performed by other than AMEC's own forces and GSA has already paid AMEC a markup of ten percent on this work, the clause precludes recovery of any more money for any activity associated with the work – including general conditions costs.

The Board explained that "general conditions costs" "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" of a construction project. *AMEC Construction Management, Inc. v. General Services Administration*, GSBCA 16233, slip op. at 9 (Nov. 18, 2005). We noted that while general conditions costs are often referred to as "'field' or 'job site' overhead" costs, they are sometimes treated by contractors as direct costs. *Id.* In the contract at issue here, both parties treated AMEC's general conditions costs as direct costs. *Id.* at 10. We therefore concluded that there was "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." *Id.*

In asking us to reconsider our decision, GSA contends that the Board erred in making a distinction between direct costs, which could be reimbursed if proved, and indirect costs, which could be recovered through a markup. The agency urges that "the issue is whether AMEC's general conditions cost[s] are overhead, not whether they are direct or indirect costs." Motion for Reconsideration at 3. GSA suggests that the decisions in three cases – *North American Construction Corp. v. United States*, 56 Fed. Cl. 73 (2003); *Eurostyle Inc. v. General Services Administration*, GSBCA 12084, 94-2 BCA ¶ 26,891; and *P. J. Dick Inc. v. General Services Administration*, GSBCA 11772, et al., 94-3 BCA ¶ 27,266 – support its position.

Although it is true that general conditions costs are sometimes called job site or field overhead, overhead is actually an expense "that cannot be allocated to a particular product or service." *Black's Law Dictionary* 1129 (7th ed. 1999). It is therefore by definition an indirect cost. *See Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1363 (Fed. Cir.), *cert. denied*, 540 U.S. 1012 (2003) (overhead pool consists of aggregated indirect costs).

The percentage limitations in the contract clause in question relate to markups for indirect costs (and profit). But as we noted in our previous decision, the general conditions costs which AMEC seeks to recover are direct costs – "costs that are directly attributable to the performance of a specific contract and can be traced specifically to that contract." *See Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003). The Federal Acquisition Regulation permits "[c]osts incurred at the job site incident to performing the work" to be treated as direct costs, "provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work." 48 CFR 31.105(d)(3) (1996)[1]; *see also Caddell Construction Co.*, ASBCA 53144, 02-1 BCA ¶ 31,850, at 157,399. If they are so treated, as AMEC says it treated them, the costs are not truly overhead and thus are not subject to a percentage limitation for markups. "General conditions costs" turns out to be a far more accurate label for these costs than "job site" or "field" "overhead" would be.

The cases cited by GSA are not to the contrary. In *North American Construction Corp.*, "the crux of the parties' dispute," according to the court, was "whether the contractor's commission, undisputably a negotiable item, may be upwardly adjusted based upon the factors [the contractor] has presented." 56 Fed. Cl. at 79. The court held, consistent with earlier GSBCA decisions, that the contract clause with which we are concerned precluded the contractor from receiving any markup on its direct costs to cover overhead or profit. *Id.* at 81-82. The court did not consider, however, because the matter was not presented, what direct costs might be recoverable. In *Eurostyle*, the Board denied the contractor's request for recovery of "extended job site overhead" through the *Eichleay* formula because use of the formula was inappropriate and the contractor failed to demonstrate that its extended job site overhead had not already been reimbursed. 94-2 BCA at 133,857. The claims had not been presented to the contracting officer as direct costs, so we did not consider them as such. *Id.* In *P. J. Dick*, we simply noted that pursuant to the contract clause at issue in this case, the contractor could receive a markup for commission, but not profit, on work performed by other than its own forces. 94-3 BCA at 135,857 n.9.

Furthermore, if AMEC's theory of the case is correct, the contractor's practice of accounting for its general conditions costs as direct costs makes good sense in the context of the case. AMEC believes that actions by GSA required AMEC to provide supervision (general conditions) on the project for a longer period of time than the period for which the parties had provided in contract modifications, though the actual tenant fit-out work was no more expensive than contemplated. If the contractor can persuade us that this is what

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[1] We cite to the version of the regulation which was in effect when the contract was awarded.

actually occurred, reimbursement of general conditions costs incurred during the prolonged period would be equitable. Under GSA's theory, however, such reimbursement would be impossible because recovery would be limited to a percentage of the costs of the fit-out work and that percentage amount could not be increased no matter how long supervision of that work was required.

Decision

GSA's motion for reconsideration of the Board's denial of its motion for summary relief is **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