

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: February 15, 2005

GSBCA 16374-TD

BENMOL CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Terrence M. O'Connor, Alexandria, VA, counsel for Appellant.

Marvin Kent Gibbs, Office of Chief Counsel, Bureau of Engraving and Printing,
Department of the Treasury, Washington, DC, counsel for Respondent.

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

DANIELS, Board Judge.

BENMOL Corporation (BENMOL) operated and maintained the Bureau of Engraving and Printing's (BEP's) wastewater pre-treatment facility in Fort Worth, Texas, under two successive contracts. Each of the contracts, at any particular point in time, contained both a firm, fixed-price line item and time-and-materials line items. These contracts ran from July 7, 1997, through June 30, 2003. BEP is an entity within the Department of the Treasury.

Each of the contracts' firm, fixed-price line items, "Operate Wastewater Pretreatment Plant," "include[d] all charges not listed elsewhere that are necessary for the safe, clean, and successful operation" of the plant. Sub-line items of one of the successive time-and-materials line items were labeled "Materials."

In resolving cross-motions for summary relief, we considered the application to the Materials sub-line items of a Federal Acquisition Regulation (FAR) clause which was incorporated by reference in the contracts. The clause, FAR 52.232-7, "Payments Under Time-and-Materials and Labor-Hour Contracts," includes this statement:

Reasonable and allocable material handling costs may be included in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with subpart 31.2 of the FAR.¹

Reading this clause together with the rest of each of the contracts, we concluded that the contractor is entitled to recover material handling costs under the time-and-material sub-line items for materials, not – as BEP contended – under the firm, fixed-price line items. BENMOL Corp. v. Department of the Treasury, GSBCA 16374-TD, 04-2 BCA ¶ 32,669.

In this opinion, we consider whether BENMOL has proved that it incurred any material handling costs which are reimbursable under the sub-line items for materials, and if it has, the extent of those costs. We evaluate the contractor's proof in light of guidance we provided in our earlier decision:

Finding for BENMOL as to the meaning of the contracts is not sufficient for us to conclude that the contractor is entitled to recover any material handling costs, however. FAR 52.232-7(b) allows these costs to be included in the charge for material only if they meet various tests. The costs must be "[r]easonable and allocable." General and administrative expense may be allocated to materials only if doing so is "in accordance with the Contractor's usual accounting practices consistent with subpart 31.2 of the FAR." The preferred way of demonstrating proper allocation is to establish and implement a separate cost pool for material handling costs. General Engineering & Machine Works v. O'Keefe, 991 F.2d 775 (Fed. Cir. 1993); E-Systems, Inc., ASBCA 18877, 76-1 BCA ¶ 11,797. In addition, the contractor must show that the material handling costs are "clearly excluded from the hourly rate." The purpose of this requirement is to ensure that the Government does not make duplicate payments for the same costs. Id.; see also Lee Associates, Inc., NASA BCA 1268-21, 69-2 BCA ¶ 7864. Given that the contracts with which we are concerned include fixed-price as well as labor-hour line items, the purpose can be effected here only by a showing that the material handling costs are excluded from the hourly rates used to calculate costs for the fixed-price line items, as well as from the hourly rates used to calculate costs for the labor-hour line items.

BENMOL, 04-2 BCA at 161,699.

I.

¹The original contract incorporated by reference the February 1997 version of the clause, which is set out here. The second contract incorporated the February 2002 version. The latter version is structured differently, but is substantively the same. Compare 48 CFR 52.232-7(b) (2002) with id. (1997).

When a party seeks recovery of costs incurred, it has "the burden of proving the amount . . . with sufficient certainty so that the determination of the amount . . . will be more than mere speculation." Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting Willems Industries, Inc. v. United States, 295 F.2d 822, 831 (Ct. Cl. 1961), cert. denied, 370 U.S. 903 (1962)); see also Advanced Materials, Inc. v. United States, 54 Fed. Cl. 207, 209 (2002); Twigg Corp. v. General Services Administration, GSBCA 14386, et al., 00-1 BCA ¶ 30,772, at 151,975. "It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough – but some convincing basis must be advanced." Twigg Corp., 00-1 BCA at 151,976 (citing Wunderlich Contracting Co. v. United States, 351 F.2d 956, 968 (Ct. Cl. 1965); Bruce Construction Corp. v. United States, 324 F.2d 516, 518-19 (Ct. Cl. 1963)). "Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted non-opinion testimony. Such testimony . . . carries its own death wound." Sternberger v. United States, 401 F.2d 1012, 1016 (Ct. Cl. 1968) (quotation and citations omitted).

As we said in our earlier opinion in this case, the preferred way of demonstrating proper allocation of material handling costs is to establish and implement a separate pool for these costs. Had BENMOL done this, we strongly suspect that the parties could have settled the case and not required our analysis. But the contractor did not establish or implement a separate pool for material handling costs. Transcript at 84, 88-89. Nor did it have an established overhead rate for such costs. Id. at 42. And of course the contracts did not specify a markup on material costs to account for material handling. Id. at 40-42; e.g., Appeal File, Exhibit 12 at 3-4. We must therefore scrutinize the record laid before us to see whether it justifies an award.

II.

A. BENMOL says that its claim involves three elements: reimbursement for the cost of the labor of its supervisor of accounting, Dora Wu; reimbursement for the cost of the labor of home office employees other than Ms. Wu; and other direct home office costs associated with material handling. Appellant's Posthearing Brief at 9. The dollars associated with each of these elements are \$552,704.09 for Ms. Wu's time, burdened with overhead; \$170,254.36 for the other employees' time, also burdened with overhead; and \$39,050 for other direct home office costs. From the total of \$762,008.45, BENMOL subtracts \$2958.52, which it says is the amount it has received for material handling costs associated with sub-line items for facility improvements. Id. at 23, 25. The total amount of the claim is therefore \$759,049.93.

The materials whose cost was to be reimbursed under the Materials sub-line items were five specified chemicals – calcium chloride, sulfuric acid, sulfonated castor oil, caustic soda, and pellet salt. BENMOL, 04-2 BCA at 161,696. The labor involved in the handling of these materials, for which BENMOL seeks reimbursement, was described by Ms. Wu in testimony before the Board. The BENMOL office in Fort Worth (the location of the wastewater pre-treatment facility) would send a requisition to the company's home office in Alexandria, Virginia. An individual in the home office would get quotations from suppliers, ensure that the quotations were for the appropriate chemicals, determine which supplier offered the best price, get approval from BENMOL president Benjamin Molayem to buy the

materials from that firm, type a purchase order, and contact the supplier by telephone and facsimile to inform it of the order. If the order was not filled promptly, the individual would determine why and take necessary action to have it filled. Later, after personnel in Fort Worth had received the chemicals and sent packing slips to Alexandria, the individual in the home office would review documentation to make sure the shipment and its price were as agreed with the supplier, get approval from Mr. Molayem to pay for the materials, and write a check to the supplier. Transcript at 15-19.

During the six-year duration of the contracts, BENMOL issued about five hundred purchase orders for the chemicals in question. Transcript at 17.

B. Ms. Wu was the principal BENMOL employee involved in ordering and paying for materials. Transcript at 17. These activities were by no means her only duties, however. She had "a wide variety of responsibilities in addition to . . . material handling." Id. at 26. As the company's supervisor of accounting, she reviewed time sheets for all its employees (about twenty), made payroll entries into a computer system, wrote checks to pay suppliers of goods and services other than the chemicals in question, prepared monthly invoices to BEP for payment for work under the contracts, was involved in the preparation of quarterly tax reports, and answered correspondence. Id. at 13, 20, 23-25.

Ms. Wu and Mr. Molayem both testified that while the contracts were in effect, about eighty percent of her time was devoted to material handling. Transcript at 27-28, 44. BENMOL's claim reflects this estimate. See Appeal File, Exhibits 50, 50A. For the following reasons, we find that the estimate lacks credibility.

First, the estimate does not square with any rational analysis of the allocation of Ms. Wu's time among her many responsibilities. Ms. Wu testified that prior to the award of the first contract, she had been working three days per week, and that her workload was increased to four days per week because of the need to purchase materials in addition to performing her other duties. Transcript at 27-28. If, while the contracts were in effect, eighty percent of her time was devoted to material handling, even with an increase in time from three to four days per week, she would have had less than one day per week in which to perform other duties which had previously consumed three days. It is unreasonable to believe that Ms. Wu could have more than tripled her efficiency on her other tasks as soon as the first contract was awarded.

Second, the estimate does not comport with any rational consideration of the amount of time required to perform the material ordering and paying activities themselves. Ms. Wu worked a total of 9230.5 hours (not including vacation time) while the contracts were in effect. Appeal File, Exhibit 49. Eighty percent of this figure is 7384.4 hours. As noted above, approximately five hundred orders for the specified chemicals were placed under the contracts. On average, therefore, Ms. Wu is alleged to have devoted 14.8 hours to an order. In light of the simple, routine, repetitive nature of the tasks involved in ordering and paying for the materials, we cannot believe that anywhere near 14.8 hours – nearly two full business days – might have been involved in dealing with an average order. This conclusion is especially compelling because Ms. Wu was no mere secretary, but rather, a supervisor of accounting who was paid between \$22 and \$33 per hour during the life of the contracts. See Transcript at 12, 39; see also Appeal File, Exhibits 49, 50, 50A (from which pay rates have

been calculated). She should have been able to perform the material ordering and paying activities with reasonable efficiency.

The picture that emerges from BENMOL's presentation is of a Ms. Wu with two diametrically opposed approaches to work – a woman capable of performing most of her duties with lightening speed, but functioning at a glacial pace when ordering and paying for five specified chemicals. This image is not believable. Although we have no doubt that Ms. Wu actually spent some time on what BENMOL calls "material handling," the evidence is insufficient even to make the "fair and reasonable approximation of the damages" necessary to permit a jury verdict in favor of the contractor as to the cost of this time. See Raytheon Co. v. White, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (citing WRB Corp. v. United States, 183 Ct. Cl. 409, 425 (1968)).

C. Mr. Molayem testified that in addition to Ms. Wu, other BENMOL home office employees also spent time "helping out" with the purchasing of materials. He said that he told those employees that in order to track material handling costs, they should indicate on their time sheets "BEP" when working on material handling. Transcript at 42-43, 61, 104. BENMOL claims that 2654 hours were devoted by its employees to this function. Appeal File, Exhibits 50, 50A.

As with the time claimed for Ms. Wu, this figure is highly dubious.

First, we note that 2654 divided by five hundred purchase orders yields 5.3 as the average number of hours devoted to a purchase order by these employees. This time is in addition to the 14.8 hours Ms. Wu is said to have devoted to a purchase order, on average. Having determined that Ms. Wu's claimed time alone is incredibly high for the tasks involved, we could hardly find that adding a third again as much time for other employees – making the average time for all employees 20.1 hours per order – bears any semblance of rationality.

Second, the figure advanced for the other employees' time is exceedingly suspect in light of the employees' time sheets themselves. See Appeal File, Exhibit 49. (a) Contrary to Mr. Molayem's testimony, it is not true that any notation of "BEP" on the time sheets indicates that an employee was working on material handling. Three employees stated on the time sheets, next to the notation "BEP," that they spent 240 hours on "ultrasonic tests," twenty-two hours on "respirator program," and sixteen hours on "acid test" involving the Fort Worth BEP contract. Thus, 278 hours are specifically noted as not having involved material handling. (b) Four hundred forty-three hours – between twenty-one and 110 in each calendar year during which either or both of the contracts were in effect – were noted as "BEP" by Rebecca Yule. Ms. Yule is a secretary. Transcript at 155. BENMOL's proposal includes, under each of the firm, fixed-price line items, four hundred hours per year for a secretary. The secretary is to be "responsible for the contract activities including materials, supplies, and equipment requisitioning/purchasing." Appeal File, Exhibit 1 at 6, 8. No evidence has been presented to show that the claimed 443 hours of Ms. Yule's time were not actually devoted to activities that should have been allocated to the firm, fixed-price line items. (c) During ten semimonthly pay periods while the contracts were in effect, either of home office employees Baerwald or Rogali marked his time sheet as including at least forty hours for the BEP project. The total number of hours involved in these pay periods is 591. We have no

evidence as to what these employees did during this time. It is not credible, however, that employees would have to spend such concentrated time on material handling while merely "helping out" on this task. This is so particularly because, during each of these pay periods, Ms. Wu – the person who supposedly needed help – worked approximately her full schedule.

We are consequently highly skeptical that 1312 – nearly half – of the 2654 hours claimed for other employees are properly attributable to material handling. This determination gives us no confidence that any particular number of hours claimed were actually devoted to this activity. For the same reason that we did not make a jury verdict award regarding the costs of Ms. Wu's material handling time, we cannot make such an award regarding the costs of other employees' material handling time, either.

D. BENMOL has gone through a long series of accounting gymnastics in an effort to demonstrate that re-allocating claimed costs to material handling would not result in recovery of amounts which have already been paid under the contracts' firm, fixed-price line items. These efforts have only served to convince us that even if we could estimate with any confidence how much time BENMOL's employees devoted to material handling, internal inconsistencies within the company's accounting system would preclude an award. The company has not met the Federal Acquisition Regulation's requirement that it "account[] for costs appropriately and . . . maintain[] records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart [31.2]." 48 CFR 31.201-2(d) (1997, 2002). In particular, the company has not shown that its "method of allocating indirect costs [is] in accordance with generally accepted accounting principles which are consistently applied." Id. 31.203(d).

"In the course of performance of any contract, a contractor incurs both direct and indirect costs. Direct costs are those costs that are directly attributable to the performance of a specific contract and can be traced specifically to that contract. Indirect costs include such things as home office overhead, defined as costs that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract." Nicon, Inc. v. United States, 331 F.3d 878, 882 (Fed. Cir. 2003) (citations and quotations omitted); see also 48 CFR 31.202, .203. BENMOL's explanation makes a hash of the distinction between these kinds of costs.

The contractor has told us that two categories of employees – Ms. Wu and others – spent time on material handling activities. It had these two groups record their time differently, however. Ms. Wu recorded all of her time as overhead, an indirect cost. Transcript at 61; Appeal File, Exhibit 49. The contractor's brief says, "Because purchasing is an indirect-type/overhead function, it would not be proper to account for her time as a direct charge." Appellant's Posthearing Brief at 9; see also Transcript at 60 (Mr. Molayem's testimony that because purchasing is an indirect cost, taking Ms. Wu's time out of overhead "would be messing everything up"). Notwithstanding this statement, the other employees who allegedly spent time on purchasing materials recorded this time as a direct charge to the BEP contracts. Transcript at 60-61; Appellant's Reply Brief at 6, 9-10. Further confusing the distinction between direct and indirect costs, when BENMOL reallocates eighty percent of Ms. Wu's pay to material handling, it says that those costs should "Be Added to Dir[ect] Labor." Appeal File, Exhibit 48. Material handling costs, it will be remembered, are defined

by the contract clause we are concerned with implementing to be indirect costs. 48 CFR 52.232-7(b).

Also inconsistent is BENMOL's way of marking up alleged costs so as to burden them with overhead. BENMOL does not apply a single overhead rate to all costs. Instead, it allocates "Costs to Field and Non-Field centers . . . based mostly on the practical use of the service by each cost center in relation to [the] total." Appeal File, Exhibit 44. Although all the employees who are said to have worked on material handling were located in the home office, BENMOL has usually called their duties a field activity. Transcript at 61, 63; Appellant's Reply Brief at 6, 7; but see Appellant's Reply Brief at 7 ("Ms. Wu's material handling work is a Non-field activity."). When it marks up the costs of the employee's salaries, however, BENMOL uses the non-field overhead rate. Appeal File, Exhibits 50, 50A. This technique increases the amount of the claim, for the non-field overhead rate is higher than the field overhead rate in every contract year – and much higher in some years. Id., Exhibits 45, 46, 48 (e.g., 1999: non-field, 297.95%; field, 87.25%). We do not understand why, however, if the material handling work is truly a field activity, a markup appropriate for non-field activities should be applied to it.

The treatment of Ms. Wu's time is perplexing in another way as well. The contractor's reply brief, at 4-8, provides the following explanation: The costs of Ms. Wu's time are captured in BENMOL's accounting system as being divided between field and non-field overhead. Like other overhead salaries, they are divided proportionately to the distribution of non-salary overhead costs. When eighty percent of the costs of Ms. Wu's time is removed from overhead and reallocated to material handling, that component is removed from the field portion of the overhead only, leaving the non-field portion unaffected. For example, for 2002, the contractor's statement of indirect expenses shows 88.93% of overhead (including Ms. Wu's salary) as allocated to field and 11.07% as allocated to non-field; removing eighty percent of her salary from field leaves 8.93% of it as a field overhead cost and 11.07% of it as a non-field overhead cost.

A fundamental problem of this accounting technique is that by removing some of Ms. Wu's salary from field overhead, but leaving non-field overhead unaffected, the proportion of field to non-field overhead decreases, and as a result, the two overhead rates need to be adjusted. BENMOL has not made such an adjustment. Additionally, even if the technique makes sense for any particular year – and we are not convinced that it does – how it makes sense for years in which less than eighty percent of overhead was allocated to field activities is truly baffling. There were two such contract years. In 1998, only 76.5% was allocated to field activities, and in 2000, only 75.33% was. Appeal File, Exhibit 44. If the technique were implemented for these years, reallocating eighty percent of Ms. Wu's salary from field overhead to material handling costs would leave a negative amount in field overhead. How this could be accomplished has not been explained.

We note additionally that the overhead rate which is used for the last contract year appears exorbitant. The non-field overhead rates used for 1997 through 2000, which were audited by the Defense Contract Audit Agency, average 158.09%; excluding the very high 297.95% for 1999, they would average 111.47%. Appeal File, Exhibits 45, 46, 50, 50A. The non-field overhead rate used for 2003, which has not been audited, is 746.3%. Id., Exhibits 50, 50A. BENMOL has provided no explanation for the disparity.

E. The third and final element of BENMOL's claim is other direct home office costs. Mr. Molayem testified that these are costs "that are really difficult to give backups for," including the use of a copying machine for purchase orders or invoices, long-distance telephone charges for calls to suppliers, the use of a postage meter for sending copies of purchase orders or checks, and office supplies such as file folders. Transcript at 74-75. He said, "I put in \$550 a month, which is an estimate I used based on the size of the job," for these expenses. Id. at 75.

We find no support in the record for the idea that these expenses should be reimbursed as material handling costs. BENMOL's bid preparation sheet shows that the company expected to recover, under the firm, fixed-price line items, \$27,706 in other direct costs for the first contract year and that amount plus two percent escalation for each additional year. Appeal File, Exhibit 35 at 9. This amount – more than \$2300 per month – is much more than enough to encompass the \$550 per month estimate. BENMOL has not explained persuasively how we could find that the claim for other direct costs allegedly attributable to material handling does not duplicate the amounts included in the anticipated costs to be recovered under the firm, fixed-price line items. Further, BENMOL's annual statements of indirect expenses show that the company included in its overhead pool "printing, supplies, & post[age]" and "telephone." Reclassifying these expenses from overhead to direct costs would be inconsistent with BENMOL's established accounting system.

III.

In maintaining that recovery of claimed material handling costs would not duplicate payments already received under the firm, fixed-price line items of the contracts, BENMOL places great importance on testimony by Mr. Molayem as to his thinking in formulating the company's offer which led to the first of the contracts in question. According to the contractor's president, BENMOL's overhead rate in previous years had been "running in the 70s," and the firm had just lost a major contract, which meant that the overhead rate would increase. BENMOL had never separately accounted for material handling costs, having considered them to be some of the company's many overhead costs. He expected to be paid separately for material handling costs under this contract, however, so he "intentionally reduced the overhead [rate] below what [he] thought it's going to end up to leave room for . . . material handling costs," consequently using an overhead rate of only sixty-eight percent in crafting the offer. Transcript at 33-36. Mr. Molayem buttressed his testimony by pointing to notes on his bid preparation sheet: "Note: Add MHC [material handling costs] either as % or wait til later/end and base it on actual cost – Nothing is added in the based fixed monthly price or elsewhere" and "0' G&A or fee on Reimbursibles [sic] (Add MHC directly to purchases)." Appeal File, Exhibit 35 at 9.

It seems odd that a company president who considered material handling costs an important factor in pricing an offer would not also direct that his firm's accounting system be redesigned to capture those costs in an organized fashion. It seems especially odd in light of his acknowledgment, on cross-examination, that "to recover material handling costs, you have to keep records and be able to substantiate your records." Transcript at 79. And why the contractor would plan to "wait til [end] and base it on actual cost," yet submit a claim which is based primarily on an estimate (as to Ms. Wu's time) is also unexplained. But whether Mr. Molayem's testimony and alleged bid preparation sheet are accurate or not is

immaterial to our conclusion. The estimates and accounting techniques on which BENMOL relies are insufficient to prove any amount of recovery. The "[e]xaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors" in BENMOL's evidence and explanations have "[bred] disbelief and therefore the disregard of even uncontradicted non-opinion testimony." They have "carrie[d] [their] own death wound." See Sternberger, 401 F.2d at 1016.

Decision

The appeal is **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

EDWIN B. NEILL
Board Judge