

U.S. Department of Labor

Board of Contract Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



Appeal of:

Home Builders Institute,
Appellant,

v.

Case No.: 89-BCA-2

Department of Labor,
Appellee.

For the Appellant: Michael R. Lemov, Alexander MacNabb, and Gregory Bishop of Washington, D.C. For the government: Frank P. Buckley, U.S. Department of Labor.

Opinion by Administrative Judge Glenn Lawrence with Chief Administrative Judge Nahum Litt concurring.

DECISION AND ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

On February 27, 1989, Home Builders Institute (hereinafter "Home Builders") appealed a decision by the contracting officer, dated January 11, 1989, disallowing \$678,553.00 in costs under the above contract. AF. at 5-6. On October 20, 1989, Home Builders filed a Motion for Summary Judgment with this office stating that it had complied fully with the provisions of the contract and was entitled to full reimbursement of costs by the Department of Labor (hereinafter "Government") or, in the alternative, that principles of equity, estoppel, reliance, and prior dealings mandate the allowance of the \$678,553.00 in disputed costs.

On January 10, 1990, the Government filed a Motion for Summary Judgment contending that Home Builders failed to comply with the provisions of its contract concerning the budget for fringe benefits, subcontracting procedures, and charging of indirect costs to the contract. The Government further alleged that Home Builders failed to adequately document its expenses under the contract and improperly allocated costs to the contract. However, the Government did approve \$126,785.00 in previously disallowed administrative and supervisory fees upon submission of documentation by Home Builders. The Government further acknowledged the "double-counting" of \$15,986.54 in disallowed costs and concluded that it sought debt collection of that amount only once. Miscalculation of these alleged excess costs by the Government does not discharge the Contractor's obligation for the \$15,986.54 amount. Ronald L. Collier, (ASBCA) 89-1 B.C.A. 21,328 (1988). Therefore, an amount of \$535,781.00 remains in dispute under the contract. A Reply Memorandum in Support of Appellant's Motion for Summary Judgment

and in Opposition to Appellee's Motion for Summary Judgment was filed with this office by Home Builders on January 19, 1990.

THE FRINGE BENEFITS BUDGET

Findings of Fact

1. The contracting officer disallowed \$282,856.00 in fringe benefit costs under Finding No. IV of his final decision. AF. at 15. The approved budget for fringe benefits from April 1, 1984 through June 30, 1986 was \$1,672,912.00. The actual costs incurred for fringe benefits during the contract period were \$1,955,768.00 or a total of \$282,856.00 in excess of the budget for fringe benefits. The excess amount constituted a 16.9% increase in the budget line item for fringe benefits. AF. at 15.

2. Clause 56 of the contract, entitled "Availability of Funds," states that "Clause 4 of the General Provisions entitled 'Limitation of Funds, is applicable to the funds currently available and cited.'"¹ AF. at 162.

3. The "Limitation of Funds" clause at 3.b(a) of the General Provisions states that "[i]t is estimated that the cost to the Government for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost." AF. at 169.

4. Clause 3.b(d) of the "Limitation of Funds" provisions states that "[e]xcept as required by other provisions of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost in the Schedule . . ." AF. at 169.

5. Clause 5 of the contract, entitled "Budget Line Item Flexibility", states that "[f]lexibility of Direct Costs will be allowed within the Prime Contract Budget . . . provided no single line item of cost shall be increased or decreased in excess of 20% and provided further that no increase shall be made in any of the wages, salaries or fringe benefits or that the total estimated cost of the contract is not exceeded." AF. at 119.

¹ Clause 3.b of the General Provisions is entitled "Limitation of Funds" and complements clause 56 of the contract.

6. The total estimated cost of the contract from April 1, 1984 through June 30, 1986 was \$15,144,400.00 and the actual cost of the contract during that time period totalled \$15,121,093.00. AF. at 66.

7. Clause 6 of the contract, entitled "Fringe Benefits," states the following:

Social Security, Workmen's Compensation, Unemployment Compensation and any other fringe benefits required by law and paid by the employer are allowable costs under this contract.

Additional fringe benefits may be negotiated under this contract provided such fringe benefits are a normal practice of the Contractor at the time of final negotiations for this contract and are available to all employees. Fringe benefits from an immediate previous employer which may be continued while employed under this contract are an allowable costs (sic). In no event will duplicate fringe benefits be allowable to an individual under this contract.

AF. at 119.

8. The first written request for modification to the contract was submitted by Philip Polivchak, representative of Home Builders, to the contracting officer, Edward A. Tomchick on May 30, 1986, one month prior to the close of the contract period on June 30, 1986. The request proposed readjustment of "certain" budget line items to accommodate the "indirect cost rate for general and administrative expenses." No request for adjustment of the line item for fringe benefits was made. Appellant's Appendix (Ax.) at 23.

9. On October 17, 1986 a second request for modification was submitted to the contracting officer by Home Builders through its representative, Eric V. Bellamy. Again, Home Builders sought only a readjustment of "certain line items to accommodate the indirect cost rate for general and administrative expenses approved in April of 1986." Ax. at 23. No adjustments to the fringe benefits line item was requested.

10. On February 23, 1988, Eric V. Bellamy, a representative of Home Builders, submitted a request for modification to the contracting officer designed to incorporate the indirect cost rate into the contract. The February 1988 request also sought to increase the line item for fringe benefits by \$283,000.00 for a total line item budget of \$1,955,912.00. The request also

provided for a downward adjustment of \$283,000 in the line item for salaries and wages for a total line item budget of \$8,438,622.00. Ax. at 23.

Discussion

Summary judgment is appropriate where there is no genuine issue of a material fact. Aerospatiale Helicopter Corp., (DOT BCA) 89-2 B.C.A. 21,706 (1989). The disallowance of fringe benefit costs pursuant to clause 5 of the contract in this case involves a question of contract interpretation and is, therefore, ripe for summary decision. Crawford Technical Services, Inc., (ASBCA) 89-2 B.C.A. 21,783 (1989).

Clause 5 of the contract concerns adjustment of line item costs and directs the following:

Flexibility in Direct Costs will be allowed within the Prime Contract Budget . . . provided no single line item of cost shall be increased or decreased in excess of 20% and provided further that no increase shall be made in any of the wages, salaries or fringe benefits or that the total estimated cost of the contract is not exceeded.

AF. at 119. Under the facts of the present case, the actual cost of the contract fell below its estimated cost by \$23,307.00. The fringe benefits line item budget showed an increase of 16.9% or a total of \$282,856.00.

Home Builders contends that clause 5 allows flexibility within the contract so long as no budget line item is increased or decreased by more than twenty percent. Moreover, Home Builders argues that an increase in fringe benefits is permitted under clause 5 if the estimated cost of the contract is not exceeded. Home Builders concludes that it complied with these provisions because the estimated cost of its contract was not exceeded and thus it was permitted under clause 5 to increase its fringe benefits within the 20% limitation.

The Government agrees that clause 5 permits flexibility of line item costs under the contract within the 20% limitation. However, the Government interprets the second prong of clause 5 to prohibit such flexibility in the line item for fringe benefits while, at the same time, requiring that the total cost of the contract not be exceeded.

The Board finds the Contractor's interpretation of the Clause 5, allowing it to increase the line item for fringe benefits while remaining within the total contract budget, to be incorrect. Set Corporation, DOL Case No. 84-BCA-15 (March 25, 1985) (unpub.). The language of the second

prong of clause 5 states that flexibility of line item costs of up to 20% is allowed within the contract budget "provided further that no increase shall be made in any of the . . . fringe benefits or that the total estimated cost of the contract is not exceeded." The Contractor's interpretation of the second prong of clause 5 allows it to increase its budget for fringe benefits while staying within the estimated cost of the contract. Conversely, this interpretation would authorize the Contractor to exceed the estimated cost of the total contract budget so long as the line item for fringe benefits was not increased.

Such a reading plainly contradicts clause 3.b of the General Provisions to the contract as well as the preface of clause 5. Clause 5 states that "[f]lexibility of Direct Costs will be allowed within the Prime Budget Contract. . . ." The concluding proviso of the clause, which directs "that the total estimated cost of the contract (not be] exceeded," merely reinforces and complements its preface. Finally, clause 3.b(a) of the General Provisions, specifically incorporated into the contract through clause 56, directs that "the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost in the Schedule. . . ."

Clause 5 does not stand alone and its interpretation must be harmonious and consistent with other provisions of the contract. Hesco Roofing, Inc., (ASBCA) 89-1 21,204 (1988). The Contractor's interpretation of clause 5 is inherently contradictory to its preface and stands in contradiction to clause 3.b of the General Provisions to the contract. Clause 5 cannot be interpreted as a blanket authorization for the Contractor to exceed the estimated cost of its contract. Such an interpretation is, therefore, unreasonable and the contracting officer properly disallowed fringe benefit costs totalling \$282,856-00.

Home Builders argues that it is unreasonable to interpret clause 5 so as to place an inflexible cap on wages, salaries, and fringe benefits during the contract period. However, the Board's interpretation does not impose such a rigid ceiling on these cost items. According to the Board's interpretation, Clause 5 allows for up to a 20% adjustment of budget line items by the Contractor, except for line items concerning wages, salaries, and fringe benefits, without seeking prior approval from the Government. Clause 5 does not prevent submission of a contract modification form to the contracting officer requesting negotiation of any increased fringe benefit costs.

Indeed, Home Builders submitted such a request on February 20, 1988 to increase the line item for fringe benefits by \$283,000.00. The request was made more than one and a half years after the contract period ended and, thus, cannot be the basis for allowance of these costs. Southwest Marine of San Francisco, Inc., (ASBCA) 89-1 B.C.A. 21,425 (1988). Positive Futures, Inc., DOL Case No. 82-BCA-7 (April 27, 1983) (unpub.). Requests for modification were also made on June 30, 1986, before the close of the

contract period, and on October 17, 1986. However, these requests did not seek an increase in the line item for fringe benefits. Under these circumstances, Home Builders is not entitled to an allowance in fringe benefit costs based upon its untimely modification request.

Finally, the Contractor suggests that the excess fringe benefit costs are allowable under clause 6 of the contract which reads as follows:

Social Security, Workmen's Compensation, Unemployment Compensation and any other fringe benefits required by law and paid by the employer are allowable costs under this contract.

Additional fringe benefits may be negotiated under this contract provided such fringe benefits are a normal practice of the Contractor at the time of final negotiations for this contract and are available to all employees. Fringe benefits from an immediate previous employer which may be continued while employed under this contract are an allowable costs (sic). In no event will duplicate fringe benefits be allowable to an individual under this contract.

First, the Contractor argues that the first paragraph of clause 6 makes all social security, workmen's, compensation, and unemployment compensation payments allowable under the contract because they are required by law. Secondly, Home Builders contends that clause 6 provides that the fringe benefits be allowed under this contract because they were continued "from an immediate previous employer." The Board disagrees.

The first paragraph of clause 6 makes it clear that the Contractor is responsible for making all legally required social security and compensation payments. The clause puts the Contractor on notice that these payments are required and allowable under the contract such that the Contractor should have budgeted a sufficient amount to cover these costs. The Contractor charges that, through mistake of the parties, workers, compensation payments unexpectedly exceeded the budgeted amount and no allowance was made in the contract to cover unanticipated unemployment compensation costs.

The fact that the Contractor's payment of fringe benefits exceeded its line item budget partially due to unanticipated workers, compensation and unemployment compensation costs does not give rise to allowance of these costs merely because they were required by law. In Drake University, DOL Case No. 83-BCA-1 (February 23, 1984) (unpub.), the Board held that a contractor is presumed to have negotiated its contract with the Government

fully cognizant of the prevailing laws which affected it. Although that case involved a fixed-price contract, the principle is the same for the fixed-fee, cost reimbursable contract in the present case. SER-Jobs for Progress, Inc., (LBCA) 83-2 B.C.A. 16,779 (1983). Thus, the Contractor was expected to budget a sufficient amount to cover these expenses.

In order to be reimbursed for otherwise allocable and allowable costs under a cost-reimbursement contract, the contractor must not let its costs exceed the total estimated cost of the contract and must also keep within the line items of its budget subject to the narrow degree of flexibility afforded by the contract. See SER-Jobs for Progress, Inc., 83-2 B.C.A. at 16,779. The provisions of clause 6 of the contract regarding statutorily required compensation payments do not authorize the Contractor to exceed the line item budget for fringe benefits. However, the Contractor could have filed a timely request for modification to the contract in order to bring its expenditures in line with its budgetary obligations. It failed to do so and, thus, cannot now seek reimbursement of these over-expenditures.

Finally, Home Builders is not entitled to recover the excess amount of fringe benefit costs on the basis that it was merely continuing the benefits "from an immediate previous employer." Home Builders states that, through "its predecessor and parent corporation, the National Association of Home Builders," it had a contractual relationship with the Government "covering 12 prior contracts, over a period of twenty-two years." Further, the Contractor urges that clause 6 authorizes it to continue payment of the fringe benefits from the "immediate previous employer", the National Association of Home Builders.

The Government, on the other hand, argues that the sentence must not be read out of context of the rest of the clause nor the rest of the contract. Rather, the Government asserts that the sentence in clause 6 allowing "[f]ringe benefits from an immediate previous employer . . . (to) be continued while employed under this contract" applies when the Contractor hires an individual during the period of performance of this contract.

The Board finds the Contractor's interpretation of clause 6 regarding benefits paid by an "immediate previous employer" to be incorrect. The contract in dispute was negotiated by Home Builders and the Government. It is unreasonable to interpret Clause 6 to allow an override of all negotiations concerning fringe benefits between the two parties and to find that the contract incorporates by reference the fringe benefits included in contracts between the Government and National Association of Home Owners. Under the circumstances of this case, the Board is bound by the four corners of the contract in dispute and cannot reasonably turn to the benefits negotiated under prior contracts with either this Contractor or between other parties. Laborer's International Union of North America, DOL Case No. 83-BCA-11 (September 17, 1984) (unpub.); Raytheon Service Co., (ASBCA) 70-2 B.C.A. 8,390 (1971); Hasco Electric Corp., (GSBCA) 89-2 B.C.A. 21,878 (1989). The funding problems which arise under this contract must be

judged independently. Mark Battle Associates, Inc., (LBCA) 84-3 B.C.A. 17,539 (1984); North American Rockwell Corp., (ASBCA) 72-1 B.C.A. 9,207 (1972).

IT IS THEREFORE ORDERED that the Government's motion for summary judgment regarding fringe benefits is granted. The contracting officer properly disallowed \$282,856.00 in costs for fringe benefits under this contract.

The remaining cross-motions for summary judgment are denied because material facts remain in dispute. With respect to the disallowed costs totalling \$126,785.00 under Finding No. II of the contracting officer's final determination, the Government alleges that insufficient documentation has been submitted by the Contractor to establish the reasonableness of its indirect cost rate during the first year of the contract period. Although the Contractor submitted documentation showing that it had charged approximately 70% of its overhead expenses to this contract and that this contract comprised approximately 70% of its total programs, it remains in dispute whether the budget of this contract affords a fair indication of its proportionate use of overhead services and supplies. No evidence has been offered on this point.

The \$42,753.00 in disallowed costs for consulting services under Finding No. VI likewise presents genuine issues of material facts. First, it is unclear whether ACS-Compuline Systems Incorporated was the sole vendor for the IBM System 38 in the Washington metropolitan area during the contract period. Second, there is a factual dispute as to what documents are included in Contract Modification No. 4. The Government states that it is comprised of only three pages including the revised budget. Home Builders, on the other hand, asserts that the modification includes a fourth page which references M.B. Hariton and Company as an accounting consultant. Ax. at 15. Finally, it is unclear whether the contracting officer had knowledge of the retention of the consulting firms by Home Builders during the contract period, notwithstanding his failure to give written approval.

With respect to the contracting officer's disallowance of \$22,800.00 in year end bonuses under Finding No. VII of his final determination, a genuine issue of material fact exists as to the basis for awarding the bonuses to the employees. There is evidence on the record that bonuses were in fact paid to Home Builders, employees in December of 1984 and 1985. In addition, there is a memorandum dated January 26, 1984 from Philip Polivchak, President of Home Builders, to his employees announcing that bonuses would be paid in accordance with the level of performance and length of service of the employees. The record indicates that this is a "long-standing" policy. No other evidence, however, has been offered on this point. Moreover, no documentation has been submitted which shows that these criteria were followed. Consequently, the Board is unable to determine from the record that the bonuses reflected years of service and

performance.

Finally, with respect to the \$284.00 disallowed as misallocated costs under Finding No. IX of the final determination and the \$1,170.00 disallowed in rental costs under Finding No. V, documentation submitted by the Contractor affords the Board an insufficient basis upon which to determine their allowability under the contract.

IT IS THEREFORE ORDERED that the cross motions for summary judgment concerning Finding Nos. II, V, VII VII, and IX of the contracting officer's final decision are denied.*

Glenn Robert Lawrence
Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

I concur:

Nahum Litt
Chief Administrative Law Judge
Member, U.S. Department of Labor
Board of Contract Appeals

March 22, 1990

* Edward Terhune Miller, Chairman of the Board of Contract Appeals, was unable to partake in this decision as he was out of town on official business. Pursuant to subsection 29-60.101(b) of title 41 of the Code of Federal Regulations, "[t]he decision of a majority of the (three member) panel constitutes the decision of the Board."