

U.S. Department of Labor

Board of Contract Appeals
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September 29, 1999

Case Nos.: 1997-BCA-4, 1999-BCA-2

Appeal of

BRERO CONSTRUCTION, INC.

Contract No.: E-4098-3-00-82-20

BEFORE: MILLER, LEVIN, AND VITTONI
Miller, Member, Board of Contract Appeals

RULINGS ON CONTRACTING OFFICER'S FIRST AND SECOND
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This consolidated appeal pursuant to the Contract Disputes Act of 1978, as amended, by Brero Construction, Incorporated, is from the Contracting Officer's final decision issued on February 11, 1997, as amended June 22, 1999, related to revised claims submitted by the Appellant in December 1998, and certain claims previously addressed but not subject to a formal final written decision, and the Contracting Officer's final decision dated November 6, 1998, relating to a "pass through" claim filed on behalf of a subcontractor. The underlying fixed price contract with the U.S. Department of Labor, Employment and Training Administration, No. E-4098-3-00-82-20, dated January 15, 1993, provided for demolition, renovation, and construction of buildings at the Job Corps Center in San Jose, California. The project close out date as provided by amendment to the contract was November 4, 1994.

Contracting Officer's First Motion for Partial Summary Judgment

Brero Construction, Incorporated ("Appellant," "Brero, or "BCI") has claimed an amount of \$289,624.67 for "Contract Administration Costs" which has been denied by the Contracting Officer (sometimes referred to as CO or Respondent), who has entered a First Motion for Partial Summary Judgment to vindicate that denial. The slight discrepancy in the amount which the Contracting Officer has disputed, \$289,672.31, is not material to the merits of the motion. The essential thrust of the Contracting Officer's motion is that the costs in question were for professional and consulting services which are not allowable under FAR 31.205.33(b) because FAR 31.205-47(f) renders such costs unallowable if incurred in connection with the prosecution of claims or appeals against the

Federal Government.¹

The Contracting Officer contends that the consultants' work in issue occurred long after completion of the contract and was related to claims which had been denied by the Contracting Officer. Appellant contends that it notified the Contracting Officer of numerous construction related difficulties during the performance of the contract which resulted in large numbers of Clarification Requests and Change Order Proposals, some of which were incorporated in formal modifications to the contract and others of which were addressed in the Contracting Officer's Final Decision. Appellant contends that the professional and consultants' costs were incurred in order to facilitate the negotiation process dedicated to resolving these issues. Appellant contends that Modification 12 to the contract was actually issued during the performance of the disputed contract administration services, and related to changes incurred during the performance of the contract. Appellant also cites a discovered document entitled "Summary of Revised REA Claim and Status per Auditor" which purports to allow the costs in question while a "supposed audit" was being performed on behalf of the Contracting Officer. Appellant argues that the costs were not incurred in connection with prosecution of "claims" necessarily generated by "a written demand...seeking, as a matter of right, the payment of money in a sum certain," as defined in *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). Appellant also relies on a very broad definition of contract administration. That definition purportedly would encompass the claimed costs, because it would normally involve "the parties...working together" and that working together includes negotiating unresolved costs of work performed "of benefit to performance of the contract." See *Marine Hydraulics Intern, Inc.*, 94-3 BCA ¶27054.

Appellant concedes, however, that contract performance was complete when its consultants were engaged and the claimed costs were incurred. There is no material dispute of fact that the alleged contract administration services in question were performed after the date specified for performance of project closeout, November 4, 1994. However, Appellant does not concede that all issues regarding change order proposals and other performance issues arising during the period of contract performance had been resolved. Appellant asserts that whether the parties were engaging in contract administration at the time the consultant costs were incurred is a fact in dispute, because the parties were "working together," negotiating unresolved costs of work performed "of benefit to performance of the contract". Appellant also identifies as a fact in dispute whether the Contract

¹FAR 31.205-33(b) provides in relevant part:

Costs of professional and consultant services are allowable subject to this paragraph and paragraphs (c) through (f) of this subsection when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see 31.205-30 and 31.205-47).

FAR 31.205-47(f)(1) provides in relevant part:

Costs not covered elsewhere in this subsection are unallowable if incurred in connection with—(1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government (see 33.201).

Administration Costs were considered an allowable cost by the Respondent and its representatives during the audit performed by Respondent in January 1999. Finally, Appellant contends that the issuance of a modification by the Respondent during the performance of the alleged contract administration services validated the performance of the services for purposes of entitlement.

The Contracting Officer has asserted that the professional and consulting services that are the subject of Appellant's claim were performed after completion of the contract; do not meet any of the standards cited in the legal authorities cited; were factually and legally unallowable costs of prosecuting a claim against the Federal Government; and are not contract administration costs as alleged by Appellant. Appellant has made no showing that the facts are not as the CO alleges, that is, that the costs were incurred after completion of performance of the contract, not during its performance, and were associated with claims by the contractor against the government.

These issues characterized by Appellant as facts in dispute are actually issues of law. The fact that there might be ongoing disputes under the contract does not alter the completion or closeout dates, or the legal effect of those completion and closeout dates, upon the status of the claim, even though those dates might in theory be changed for technical purposes by subsequent dispute resolutions. The date of substantial completion of the contract was specified in the contract as modified to be September 29, 1994, and the period of performance for project closeout was extended to November 4, 1994. The fact that the parties might have been working together to resolve change order proposals related to work which had been, or was to have been, performed in the course of contract performance, does not cause the professional or consultant services engaged by Appellant to assist that process to be contract administration services under any legally established concept of that activity, if they occurred after substantial completion of the contract or after project closeout. Whether government personnel, other than the Contracting Officer acting in his official capacity, might have considered the disputed costs allowable at some time after the performance of the contract is neither material nor binding upon this Board. Likewise, the mere fact that a modification might have been negotiated and issued during the period when the disputed professional and consultant services were being performed, but after the project closeout date would not, without more, establish the services as contract administration services. The Board is aware of no legal authority which would require such a result.

Established law makes clear that "the plain meaning of FAR 31.205-47(f) brings within its scope consulting fees merely associated with or related to the submission of a CDA claim. Hence, even costs incurred prior to submission of a claim are unrecoverable under FAR 31.205-47(f) if they were associated with or related to the submission of that claim." *See Plano Builders Corp. v. United States*, 40 Fed. Cl. 635, 639 (1998). This tribunal finds the conclusion inescapable, based on the uncontroverted allegations of the Contracting Officer, and the response of the Appellant, which does not directly confront the issue, that the professional and consulting services involved were associated with or related to the prosecution of Appellant's claims against the Federal government under the Contract Disputes Act ("CDA"). Consequently, they are not allowable as a matter of law. Since Appellant has not shown that any material fact is in issue, and since the Contracting Officer has demonstrated by factual allegations and supporting legal authority that he is entitled to judgment as

a matter of law, the First Motion for Partial Summary Judgment is granted.

Contracting Officer's Motion To Dismiss and Second Motion for Partial Summary Judgment

The Contracting Officer has moved to dismiss Brero's claim related to COP #227, which is a claim for \$1,273.00 to change a door swing , or in the alternative to dismiss for failure to state a claim upon which relief can be granted, or for summary judgment. The Board considers the Contracting Officer's motion for summary judgment. In addition, the Contracting Officer has moved for partial summary judgment with respect to COP #238, which is a claim for \$50,437.00 in increased lumber costs incurred as the result of a lumber price increase during the bid period. The Contracting Officer has also moved for partial summary judgment with respect to COP #239, which is a claim for recovery of \$4,959 of charges for usage of electricity incurred during performance of the contract.

1. In addition to the existence of the contract and the contract performance period, the Contracting Officer asserts as an undisputed fact related to COP #227 that the COP relates to a change of the swing of a door outward instead of inward into an office. The amount of the original claim in issue, as submitted by Brero to The Steinberg Group, was \$1,273, based on subcontractor estimates, and included a notation that a time extension would be required. No time extension was awarded for any of the Final Resolution Items, including COP #227, listed in the modification. The Steinberg Group recommended denial because the enlarged design drawing, which was deemed to prevail over the "1/4 plan," indicated that the door was to swing into the corridor.

The Contracting Officer denied COP #227 on the ground that the enlarged design plan showed the door opening outward and that this plan would prevail over the smaller scale design plan. No contractual basis is cited for this assignment of priority. The CO asserts that after negotiation COP #227 was among various enumerated change order proposals which "were resolved" in Modification No 11. The applicable description was "Change Door Swing," and the "Final Negotiated Fee" was recorded as "\$0." The CO asserts that the Modification No. 11, which is included in the Appeal File submitted to the Board, included the usual provision that "[e]xecution of this contract [Modification No. 11] constitutes final and complete agreement for equitable adjustment for the change order proposals (Final Resolution Items) listed on Page 3 and 4 of this modification." This assertion of fact is not disputed. The items listed included COP #227 with a notation of "Final Negotiated Fee" in the amount of \$0, and a comment, "Final Resolution." Several other listed COP's also noted final negotiated fees of \$0.

The CO maintained that this was a denial in a letter to Brero on June 27, 1995, presumably in response to a query or challenge by Brero, but allowed submission of information or documentation within fifteen days. There is no evidence that any additional information or documentation was submitted by Appellant within the prescribed fifteen days. Subsequently, in the CO's Final Decision of February 11, 1997, relating to unresolved change order proposals, the CO noted that COP #227 had been previously denied, and that there was no new information which could change the CO's position. Nevertheless, on November 3, 1997, Brero submitted the same claim again as part of Appellant's Proposal to the Contracting Officer.

The CO's position is that the resolution of COP #227 for "\$0" in Modification No. 11 reflects an accord and satisfaction reflected in that contract modification which is indicative of intent and adequate consideration. Consequently, the CO contends that the claim should be dismissed, or the final resolution which is recorded in Modification No. 11 should be sustained as a matter of law. Appellant contends primarily, in effect, that the Modification No. 11 does not reflect an accord and satisfaction, and that the intent of the parties at the time of the execution of the Modification is a material fact in dispute. Appellant contends that the CO has erroneously assumed that the language of the relevant modifications represents an accord and satisfaction regarding any further claims in any way related to these modifications. Specifically, Brero does not accept the CO's position of allegedly not addressing the time impact as a result of the alleged additional work or "additional costs due to acceleration, stacking, loss of efficiency, etc."

Appellant relies on a recitation of extensive authorities defining the technical requirements of accord and satisfaction. The authorities cited, however, deal in essence with the scope of the various accords and satisfactions involved in the particular cases cited. It is the scope of the accord and satisfaction which is really in issue as a matter of law in this case. The gist of the Appellant's position seems to be that if a party has or states any mental reservation regarding a formal modification which has been executed with respect to a government contract, the contract is a nullity and not binding at least to the extent of any such reservation. This theory would suggest that the parties' execution of contract modifications related to contract performance is an exercise in futility, and the objective of finality is frustrated, because the purported resolution of disputed contract changes incorporated in an executed modification would be ineffectual and would be open to challenge by mere allegation of a party that the modification does not mean to that party what it purports to say, or that it does not reflect the intent of the challenging party. There is no allegation here of unilateral mistake caused by fraud, deception, or material misrepresentation that might support such a challenge. Nor is there any suggestion of clerical or ministerial error or material mistake.

Appellant contends, first, that it did not intend to concede the claim as listed, and, second, that there is no consideration for any accord and satisfaction regarding this claim related to COP #227, because no compensation was allowed for this particular COP. Appellant specifically relies on the argument that the modification "shows a failure to demonstrate consideration for COP 227 and creates a question whether the parties intended to resolve the issue or whether the Contracting Officer was unaware of the need for consideration in order to provide a valid accord and satisfaction." These contentions patently lack merit. There is sufficient consideration manifest in the terms of the Modification #11 as a whole. That modification purported to resolve some seventy-one COP's, each listed separately within it. The applicable dollar amounts allowed for the various listed items would, taken as a whole, support an accord and satisfaction with respect to the included item of the swinging door, as to which the modification specifies no compensation is allowed in the final resolution.

Because the final resolution of COP #227 was incorporated in Modification No. 11, the underlying facts which Appellant argues in its response either were, or should have been, before the Contracting Officer at the time of the final resolution. There is no evidence that they were not. Those facts are not appropriately reargued here after execution of the modification. If the

modification was not acceptable as drafted, Appellant could have refused to sign. Having signed, Appellant is bound by its terms, absent any express reservation of rights or exception in the document. None is disclosed. In contrast with COP #227, there are a number of disputed COP's included in Appellant's claims before the Board that were not included in the executed modifications, because they apparently were not negotiated to resolution.

Appellant's list of alleged facts in dispute, which relate to the validity of the CO's February 11, 1997, final decision, include whether the 1/4 plan or the enlarged plan should prevail; whether Modification 11 constitutes persuasive evidence of consideration; and whether there was an exchange of consideration regarding COP #227. These issues, as presented, are manifestly questions of law, not fact, and do not create any issue of material fact which would bar an award of partial summary judgment as to COP #227. The factual question of whether the prior change in the sink location resulted in the door swing conflict is immaterial after execution of the Modification No. 11, which listed and finally resolved any factual dispute underlying the claim for compensation for the change in the swing of the door. Partial summary judgment is granted to the Contracting Officer with respect to COP #227, which has been finally resolved in the context of Modification No. 11, which was formally executed by both parties.

2. In its response to the Contracting Officer's Motion To Dismiss and Second Motion for Partial Summary Judgment Appellant has asserted a variety of generalized claims regarding aspects of contract administration and the status of claims. These claims require only limited treatment in order to dispose of the motions in issue. The Contracting Officer asserts as an undisputed fact that Modification No. 8 dated June 5, 1994, extended the period of performance for project closeout to November 4, 1994. Modification No. 8 by its terms explicitly specifies a closeout date of November 4, 1994. Appellant's generalized claims seem to question the validity of this Modification No. 8 and Modification No. 11, because of mental and other reservations asserted by the Appellant. Modification No. 8, like Modification No. 11, bears the signature of Claudette Weber as President of the Appellant contractor, and includes a "Note: This price is accepted on a lump-sum basis and the Government does not accept or recognize by implication any other costs, including by [sic] not limited to 'impact costs' from Brero Construction, Inc. for this work," applicable to all of the listed changes. However, nothing asserted creates an issue of material fact regarding the effect of Modification No. 8 expressly extending the period of performance for project closeout to November 4, 1994, as asserted by the CO. Although the terms of this modification might be changed by subsequent negotiations and formal modification, the fact that Appellant has some reservation regarding the current status of this particular provision, or has some additional unresolved claims, after the Modification has been executed, does not necessarily put any material fact in issue. The mere recitation of unilateral precatory or self-serving reservations in a letter of transmittal accompanying an executed change order or modification does not, without more, effect any change in the terms of the change order or modification, legally or factually.

Appellant also questions the CO's reliance "upon a February 11, 1997, document ostensibly issued as a final decision by the Contracting Officer" because Appellant "disputes that the document exists as a valid final decision." Brero contends that the CO issued the decision without certain

information requested from Brero, and without “a written demand...seeking, as a matter of right, the payment of money in a sum certain” from Brero, citing *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1578 (Fed. Cir. 1995). Because Appellant misconstrues the holding and the thrust of *Reflectone*, and because the Contracting Officer’s final decision of February 11, 1997, purports to be, and manifestly is, a final written decision dealing with claims within the broad definition recognized in *Reflectone*, the Board rejects Appellant’s assertion that the CO’s final decision dated February 11, 1997, is ineffective or invalid. It is also immaterial as a matter of law or fact that Appellant did not demand a decision or payment of money in a sum certain, or that it was based on available information that did not include additional information which Appellant had not yet submitted.

The FAR 33.201 definition of “claim” explicitly includes, not only a demand for payment of money in a sum certain, as recited by Appellant, but, expressly, other contract relief as well. Under the holding in *Reflectone*, a claim need not even involve a preexisting dispute. An appellant contractor may not frustrate the process by its failure to provide information related to a claim identified by a contracting officer as needful of resolution or by denying that a claim exists because the contractor has not requested a final decision. The timeliness of claims is subject to resolution on an individual basis. Likewise, the two modifications in question being duly executed may be presumed to be binding in accordance with their terms unless modified, and the mere assertion by Appellant that the executed contractual document is not in accord with its intent at the time of signing is inherently specious and does not, without more, put the validity of the modification or its terms in issue. Each such modification is presumed to reflect an accord and satisfaction in accordance with its terms. There is no contention that there is any binding effect beyond such terms, and the Board does not understand Appellant or the CO to be contending that it has any such effect.

3. Brero claimed \$50,437 in additional costs in COP #238 as a result of changes in the lumber and plywood market after the project was bid. Appellant has not affirmatively challenged, and the Board finds that it is undisputed, that the bid date and time were established as 2:00 p.m., P.S.T., November 19, 1992; that the applicable Project Manual for Solicitation required that offers be available for Government acceptance for no less than sixty days after the date offers were due; that Brero submitted its offer effective November 19, 1992; that Brero agreed to extend the bid time by an extra thirty days; and that the Contracting Officer accepted Brero’s offer and executed the contract on January 15, 1993, within 60 days of the established bid date and time. Brero submitted COP #238 claiming \$50,437 additional costs attributable to the price increase on November 11, 1994. That claim was rejected by the Contracting Officer, first on June 27, 1995; subsequently in his February 11, 1997, Final Decision; and, again, in an amended Final Decision dated June 22, 1999. Although the Government had requested an extension of the bid holding period, which was granted by Brero, the contract was actually awarded during the original sixty day holding period specified in the applicable Project Manual for Solicitation.

Appellant contends only that “[w]hile price increases may be a risk the contractor normally assumes during a bid extension, the circumstances here fall far outside the risk of normal price increases during a short period of time.” Appellant lists as facts in dispute, whether the February 11, 1997, Final Decision was valid, whether there was a statute of limitations for submission of

COP's, and whether the contract came into existence upon the Contracting Officer's acceptance and execution on January 15, 1993. The first of these has been answered in the affirmative. The second is irrelevant, as no objection has been interposed to any COP as barred because of untimely submission. Since no contrary fact is advanced which would question the effective date of the contract as January 15, 1993, that is not a material fact in dispute. Brero has cited no authority that would establish entitlement to the relief requested because of exceptional circumstances. It is not disputed that the acceptance of the bid and execution of the contract was within the bid holding period. The applicable law is long settled that a firm fixed-price contract, such as the subject contract of this appeal, imposes the risk of material price increases on the contractor. *SAI Industries Corp.*, 98-1 BCA ¶29,662, ASBCA No. 49,149; *D.W. Clark, Inc.*, 94-3 BCA ¶27,132, ASBCA No. 45,562; *So Ros Shakij Ltd.*, 75-1 BCA ¶11,028, ASBCA No. 19,238. Therefore, the Appellant's response is rejected, and the Contracting Officer's motion for partial summary judgment with respect to COP #238 is granted.

4. Brero submitted COP #239 on November 18, 1994, in the amount of \$4,959.00 to cover the costs of electricity usage on the job-site. The request for a change order was denied by letter to Brero dated June 27, 1995. Although Appellant's argument is confusing, its gist is that the contract required the Government to pay for the usage of electricity at the project site, because an "exception [to the general rule] was created by the Contracting Officer's conduct at the Preconstruction Meeting." The disputed issue is one of contract interpretation, involving no disputed material fact that this Board can discern on the record before it. Appellant simply confuses the distinction under the Contract between the provision of electricity, which the Government must do, and the payment for the electricity provided and used, which the Contractor must do. No exception is affirmatively established. Since Appellant's interpretation of the contract requirement is clearly not supported by his argument or any factual showing, and is clearly erroneous, the Contracting Officer is entitled to partial summary judgment with respect to his denial of COP #239.

Appellant contends that the Government is liable for the electrical bills because "electrical utility usage was not specifically excluded in the solicitation documents or the contract. Therefore, BCI did not include these amounts in their bid." The significance of this averment is unclear. Brero also contends that copies of the electric bills, a copy of that contract specification Section 1500, and a copy of the DOL's Pre-Construction Text were included as support for COP#239 when that COP was submitted, and that The Steinberg Group took no exception to these costs in their transmittal letter to DOL. Appellant seems to argue that The Steinberg Group's inaction implicitly approved Appellant's submission and contention as to liability for electrical usage costs.

The Contracting Officer contends that the Government was required to provide electricity at the site. There is no dispute that sufficient electricity was provided at the site. The Contracting Officer relies in part upon a Board interpretation of an analogous clause in *Hull-Hazard, Inc.*, 90-3 BCA ¶23,173, ASBCA No. 34,645; *compare Engineering Technology Consultants, S.A.*, 93-1 BCA ¶25,556, ASBCA Nos. 44,912 and 44,913; *Marcus Thomas Co., Inc.*, 90-1 BCA ¶22,531, ASBCA No. 37,539 (where the FAR language was affirmatively modified by contract provisions to shift the obligation for payment). There is insufficient showing of conduct which might establish a contract

change. Appellant contends that FAR 52.236-14 requires that, “unless otherwise provided in the contract, the amount of each utility service consumed shall be charged to or paid for by the Contractor...”; that the language provides for exceptional circumstances when the contractor is not required to pay the costs of usage of electricity; and that there was such an exception which was created by the Contracting Officer’s conduct at the Preconstruction Meeting.² Appellant’s complaints of ambiguities created by the Contracting Officer’s argument in relation to the language of the Preconstruction Conference Text, and that the FAR 52.236.14 provision are essentially irrelevant.³ There is no dispute that the Preconstruction Conference Text was made available at a meeting which took place after bid opening. That Text, therefore, even if ambiguous, could not have been a factor relied on in Appellant’s bid preparation. It is also undisputed that the Text stated that it was “intended to be informative in nature only....” And there is no factual showing, other than citation to portions of the Text, which relates to the provision of or liability for electricity used at the site.

²FAR Clause 52.236-14, entitled “Availability and Use of Utility Services” and incorporated by reference in the contract provides in pertinent part:

(a) The Government shall make all reasonably required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract. Unless otherwise provided in the contract, the amount of each utility service consumed shall be charged to or paid for by the Contractor at prevailing rates charged to the Government or, where the utility is produced by the Government, at reasonable rates determined by the Contracting Officer. The Contractor shall carefully conserve any utilities furnished without charge.

(b) The Contractor, at its expense and in a workmanlike manner satisfactory to the Contracting officer, shall install and maintain all necessary temporary connections and distribution lines, and all meters required to measure the amount of each utility used for the purpose of determining charges. Before final acceptance of the work by the Government, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.

³The pertinent part of The Preconstruction Conference Text whose significance is in dispute provides:

A. SPECIAL SITE CONDITIONS RELATING TO JOB CORPS

The Construction Contract specifies several steps and general procedures that the Construction Contractor must take while working at a Job Corps Center.

1. Utilities

Reasonable amounts of water and electricity will be provided. Telephones are the Contractor’s site responsibility.

The Contracting Officer observes that the preconstruction meeting was held after bid opening and award, so that discussions at that meeting could not be used to change the terms of the contract. Appellant contends that the Contracting Officer's claim that the contract could not be changed, because that meeting took place after bid opening and award, is ridiculous, and would make a number of contract clauses irrelevant and meaningless. But this fact and legal conclusion are immaterial, because there is no evidence of what, if anything, was actually said at the Preconstruction Meeting, or who said it. There is no provision in the Preconstruction Conference Text which changed the Contract, any suggestion by Appellant to the contrary notwithstanding. The CO asserts that, because the Preconstruction Conference Text makes clear that it is intended for information only, the contract would be controlling in the event of any conflict. The Contracting Officer relies on Section 01500 of the specifications which requires Brero to provide various utility services at the site, including electrical service, in connection with the work under the contract. Section 01500, Part I, Section 1.04A requires the Contractor to "Provide power service required by construction operations for work of this Contract...."

Brero's interpretations of the contract and The Steinberg Group's inaction are legal arguments which do not put material facts in issue. Brero has not established any factual basis for an estoppel or other significant consequence which might be created by such an omission on the part of The Steinberg Group, since, absent affirmative proof to the contrary, there is no evidence that The Steinberg Group would have had final authority to resolve the issue in any event. Appellant contends with regard to this COP #239 that "[i]t is certainly customary for the owner to provide electricity to contractors during construction in both commercial and Federal contracts. The contract does not specifically preclude the contractor from requesting or recovering electrical utility costs from the DOL, and certainly does not establish that BCI would be responsible for these costs. The DOL repeatedly stated during its pre-construction meeting that electricity and water would be provided." That the applicable FAR clause and case law establish that there are circumstances when the contractor is not required to pay the cost of usage of electricity seems incontrovertible. That an exception to the normal requirement that the contractor pays the cost of usage of electricity "was created by the Contracting Officer's conduct at the Preconstruction Meeting" is not established as a material fact or as a material fact in dispute by the arguments of Appellant or by the record before the Board. The assertion of counsel that repeated statements were made during the preconstruction meeting that electricity and water would be provided is wholly unsupported by affidavits or otherwise, and therefore does not present a genuine issue for trial. *See* F.R.Civ. P. 56(e).

Thus, the issue presented to the Board is purely one of contract interpretation as to who was required to pay for the electricity used. To the extent that these disputed issues may have factual underpinnings, there are no supported allegations of fact whatever advanced by Appellant except by reference to selected portions of the Preconstruction Conference Text. Although Appellant refers to an alleged exception created by the Contracting Officer's conduct at the Preconstruction Meeting, there are no supporting factual allegations which support the allegation that "[t]he DOL repeatedly stated during its pre-construction meeting that electricity and water would be provided," or that such statements referred to liability for electrical bills.

The Board finds no basis for an exception to the Contract provisions that the Government will make available utilities, electricity and water, and that the contractor will pay for the usage of those utilities. Appellant has not identified any basis for an exception. The Preconstruction Conference Text is not shown to provide such an exception. There is no factual support whatever for counsel's allegation that there were repeated statements at the preconstruction conference that would in some manner have assigned liability for the cost of electricity to the Government. Therefore, the Contracting Officer's request for partial summary judgment with respect to his denial of COP #239 seeking \$4,959.00 to cover the costs of electricity usage on the job site is granted.

John M. Vittone, Chairman

Stuart A. Levin, Member

Edward Terhune Miller, Member