



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DENIED;
APPELLANT'S MOTION FOR SUMMARY JUDGMENT GRANTED IN PART:
August 29, 2019

CBCA 6029, 6030

SOTERA DEFENSE SOLUTIONS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Nathanael D. Hartland and Katherine B. Burrows of Nelson Mullins Riley & Scarborough LLP, Baltimore, MD, counsel for Appellant.

Antonio Robinson, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **SULLIVAN**, and **RUSSELL**.

SULLIVAN, Board Judge.

Sotera Defense Solutions, Inc. (Sotera) appealed the deemed denial of its claims for wages paid to employees in compliance with the Service Contract Act (SCA), 41 U.S.C. §§ 6701–6707 (2012), on three task orders issued by the Food Service Inspection Service (FSIS), Department of Agriculture (USDA), under an indefinite delivery/indefinite quantity (ID/IQ) contract that was issued by the National Institutes of Health (NIH). The parties filed

cross-motions for summary judgment, seeking a determination of liability for these costs. Because the contract under which these task orders were issued assigned the responsibility for identifying labor categories subject to the SCA to the USDA contracting officer, USDA owes Sotera these costs. We deny USDA's motion and grant Sotera's motion in part. We leave a decision as to how much USDA owes Sotera until after the parties have further developed the record.

Statement of Facts

I. Relevant Terms of NIH ID/IQ Contract

In 2012, NIH awarded Sotera an ID/IQ contract for the provision of information technology (IT) services. Complaint ¶ 13; Answer ¶ 13.¹ The contract, awarded pursuant to 40 U.S.C. § 11302(e) (2012) (section 5112(e) of the Clinger-Cohen Act), was a Government-wide acquisition contract (GWAC) against which "any duly warranted federal government contracting officer" could place task orders. Exhibit 2 at 5.²

Prior to award of the contract, the NIH contracting officer prepared a "determination of service contract act (SCA) exemption," indicating that the contract positions were bona fide executive, administrative, or professional positions and that all labor categories on the contract met the criteria for the exemption. Exhibit 1. The contract stated that the positions on the contract were exempt from the SCA but advised that an ordering contracting officer would have to determine whether the SCA applied to any positions requested on a task order:

G.7.4 Service Contract Act

The preponderance of the GWAC's labor categories are considered bona fide executive, administrative, professional labor and are generally exempt from the Service Contract Act (SCA). To the extent that any labor is subject to the SCA and is within scope of a Task Order and the GWAC, the [ordering contracting officer] must identify such work under a separate CLIN [contract line item] on the task order and apply wages as required under FAR [Federal Acquisition Regulation] 22.10 [48 CFR 22.10 (2012)], Service Contract Act Wage Determinations.

¹ The Board relies upon the parties' agreement in the pleadings because the copy of the NIH contract included in the appeal file is neither signed nor dated. Exhibit 2 at 1.

² All exhibits referenced in this decision are found in the appeal file.

Exhibit 2 at 21. The contract neither contained nor incorporated by reference the standard SCA clauses, FAR 52.222-41, Service Contract Labor Standards, or 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards—Price Adjustment (Multiple Year and Option Contracts). Exhibit 2.

II. Task Order Contracts Awarded by USDA

A. First Task Order

The USDA issued three task orders against the NIH GWAC to Sotera that are at issue in this appeal. With these task orders, USDA sought IT operations and maintenance (O&M) support for twenty-four offices of the FSIS, located throughout the United States. Exhibit 3 at 11, 36-37; Exhibit 4 at C-1, F-2 to F-3. The first task order was issued in June 2016, and it neither included nor incorporated by reference clauses regarding the SCA. Exhibit 4.

In January 2017, the USDA contracting officer received a notice from the Wage and Hour Division of the Department of Labor (DOL), advising that the task order contracts included positions covered by the SCA. Exhibit 5. Pursuant to 29 CFR 4.5(c), DOL directed the USDA contracting officer to amend the task order contracts to include FAR 52.222-41 and the applicable wage determinations. *Id.*

Following this direction, in February 2017, the contracting officer issued modification 6 to the initial task order to “retroactively insert back to the original date of the award on [June 9, 2016,]” clauses FAR 52.222-41 and 52.222-43. Exhibit 6 at 1. As authority for the modification, the contracting officer cited the direction from DOL and FAR 22.1015. *Id.* at 1-2. The contracting officer also attached wage determinations for sixteen localities throughout the United States. *Id.* at 2.

On March 10, 2017, DOL notified both Sotera and the USDA contracting officer that it was conducting an investigation of Sotera for possible violations of the SCA. Exhibits 8, 9. It further directed the USDA contracting officer to withhold \$701,590.94, from funds due to Sotera on the task order, pursuant to 29 CFR 5.5(a)(2). Exhibit 8. On June 22, 2017, DOL notified USDA that DOL had determined that \$557,652.87, in back wages was due to Sotera employees, and that \$143,938.07 of the original amount DOL ordered withheld could be released to Sotera. Exhibit 10.³ On September 14, 2017, DOL

³ DOL also determined that Sotera owed its employees \$10,143.35 in overtime wages, for a total of \$567,796.22. Exhibit 17.

advised USDA that Sotera had made restitution of all the back wages it owed to its employees so USDA could release the remaining \$567,796.22 to Sotera. Exhibit 16.

B. Second and Third Task Orders

While DOL was investigating the first task order, in March 2017, the USDA contracting officer notified Sotera that it had been selected for award of the second task order. Exhibit 21. The solicitation for this task order, issued in 2015, did not contain any of the SCA clauses.⁴ Exhibit 20. Following notification, Sotera asked whether the task order had any applicable wage determinations, and the contracting officer provided the “updated SCA/AWDs [area wage determinations] for each appropriate service location.” Exhibit 21 at 4, 6 (e-mail exchange on March 24 and 27, 2017, without attached wage determinations). Sotera also requested that FAR 52.222-43 be included in the new task order, *id.* at 4, to which the contracting officer responded that it had been included. *Id.* at 3. The task order executed by Sotera on March 28, 2017, included both FAR 52.222-41 and 52.222-43.⁵ Exhibit 7 at I-9–I-17.

In the email exchange prior to the execution of the second task order, Sotera repeatedly noted an agreement that any adjustment to the wage rates resulting from the application of the SCA would be handled through a future contract modification. For example, on March 27, 2017, Sotera’s representative noted that the base contract wage rates “will need to be updated to make them current, but per our discussion the adjustment will be handled in a modification after award.” Exhibit 7 at 4. On March 28, 2017, Sotera’s representative summarized a phone call with the contracting officer regarding the issue:

Thank you for your return call concerning the SCA/AWD. I conveyed to my colleagues your feedback that if DOL determines in the future that there are other proposed labor categories, besides the general clerk under CLIN 4, that is [sic] subject to a wage determination then you will modify the task order at that time accordingly. With your explanation, Sotera does not have further questions concerning the SCA/AWD at this time.

⁴ Sotera protested the award on this solicitation, and the agency took corrective action, apparently delaying the award of the task order by two years. Exhibit 18 at 6.

⁵ The second task order stated that the USDA contracting officer was “authorized to take actions on behalf of the Government to amend, modify or deviate from the contract terms, conditions, requirements, specifications, details and/or delivery schedules; . . . and issue final decisions regarding contract questions or matters under dispute.” Exhibit 7 at G-1.

Id. at 1. The contracting officer, in a return email, provided the wage determination for the General Clerk II position and did not dispute the substance of Sotera's recitation. *Id.*

According to the parties, the contracting officer determined that Sotera had to pay SCA wages for the General Clerk II position on the second task order based upon a review of Sotera's proposed labor categories and the DOL website. The agency explains that, "[s]ince there was no clear ability to crosswalk the labor categories of the work proposed [by Sotera] with the DOL descriptions, the work was viewed as non-covered work except for the General Clerk II position." Respondent's Supplemental Brief at 4. By letter dated April 27, 2017, Sotera provided to the contracting officer "updated price files related to the impact from the inclusion of the Department of Labor Wage Determination (DOL-WD)." Exhibit 23.

By email sent on June 23, 2017, the contracting officer forwarded a new task order to replace the task order executed on March 28, 2017. The replacement task order was necessary because the March task order did not include the correct number of Sotera's contract with NIH. The contracting officer also noted that the new task order included "updated pricing" provided by Sotera in April 2017 for the General Clerk II position. That same afternoon, the USDA contracting officer forwarded to Sotera sixteen wage determinations "for the various locations the services of the O&M task order will be performed." Exhibits 12, 13.

In response to this new task order, a Sotera representative requested that USDA incorporate the following language in the new task order: "An equitable adjustment will be made to this contract to account for the Contractor's increased costs resulting from the application of the SCA/AWD in the labor categories being added under this modification." Exhibit 14 at 3. In response, on July 5, 2017, the contracting officer stated, "At this point, I am not comfortable committing the Government to an equitable adjustment that I do not have the details on. We can address the situation of an equitable adjustment if/once DOL makes a determination on this award." *Id.* at 2.

Sotera responded on July 6, 2017, noting that new labor categories covered by the SCA had been added:

As you are aware[,] the Department of Labor, Wage and Hour Division (DOL) has recently determined FSIS O&M to be SCA/AWD. At the time this original task order was established in late March 2017, the DOL had not issued a decision resulting in your assessment that only the General Clerk - Level II would be SCA/AWD covered. Since that time, in addition to the General

Clerk Level II, the Help Desk Specialist, Hardware Installation Technician - Level I, and Administrative Assistant[] are also SCA/AWD covered.

In light of these additional SCA/AWD covered labor categories, there is a cost impact to the program [] which is not covered in the Firm Fixed Price. Accordingly, Sotera will need to submit a revised price proposal to include these new costs in accordance with FAR 52.222-43.

Exhibit 14 at 1–2. In response on July 7, 2017, the contracting officer stated,

At this time, I have not received any official documentation of a determination from DOL regarding [the first task order].

Until I receive a final determination from DOL, I cannot commit to language in the contract binding the government to an equitable adjustment. When an official determination is disbursed by DOL, at that time we can determine the appropriate remedies if they are necessary.

Id. at 1. Sotera executed the third task order on July 19, 2017. Exhibit 15.

The parties dispute when DOL concluded its investigation. USDA asserts that it did not know that DOL had completed its investigation until Sotera submitted its claims in December 2017. Respondent’s Supplemental Brief at 4–5. However, the same DOL determinations were included in the request for equitable adjustment (REA) that Sotera submitted in June 2017. Exhibit 17. The DOL determinations were issued after the award of the second task order, but before the award of the third.

III. Claims to the USDA Contracting Officer

In June and November 2017, Sotera submitted REAs seeking costs incurred as the result of the inclusion of the SCA provisions in the task orders. When the contracting officer did not respond, Sotera submitted certified claims to the USDA contracting officer.

In the claim on the initial task order, submitted on December 7, 2017, Sotera sought \$720,451.19 for the increased wage costs for itself and a subcontractor following the incorporation of modification six plus the costs of complying with the SCA provisions. As support for its claimed costs, Sotera provided the DOL determinations of the backpay and overtime costs it owed its employees for the period June 10, 2016–March 31, 2017, in the amounts of \$557,652.87 and \$10,143.35, respectively, for a total of \$567,796.22. Exhibit 17. This determination covers the entire period of performance for the first task order.

Respondent's Statement of Uncontested Facts ¶ 13. As support for its subcontractor costs, Sotera provided a single-page invoice for the amounts paid six employees. Exhibit 34. The invoice states that the "adjusted total wages paid per employee when added to their previous wages is not in compliance with the Service Contract Act and Wage Determination for Anne Arundel, MD." Based upon this statement, it is not clear from the invoice whether the increased costs are \$30,688.49 (column labeled "H&W adjustment") or \$132,915.47 (column labeled "total adjustment").

In the claim submitted on December 8, 2017, Sotera sought \$3,337,101.50, for the increased costs of performance in the base period and each of the option years as a result of the application of the SCA requirements. In support, Sotera provided a DOL determination of wages owed its employees for the period April 1, 2017–June 24, 2017, in the amount of \$169,284.56. Exhibit 18 (Exhibit 5 to Sotera's REA).⁶ Sotera also provided a set of spreadsheets that purport to show how the requested equitable adjustment was calculated. *Id.* (Exhibit 6 to Sotera's REA).

In both claims, Sotera also sought its costs of preparing the underlying requests for equitable adjustment in an amount totaling \$26,241. As support, Sotera provided a declaration of its executive vice president and general counsel explaining that Sotera incurred the costs to obtain legal advice "relating to compliance with the SCA and preparation of two requests for equitable adjustment." Sotera also provided a list by date of the attorney's invoices that total the amount sought, but not the invoices themselves. Exhibit 33.

Discussion

I. Statutory and Regulatory Requirements to Implement SCA

The requirements of the SCA apply to any contract executed by the Federal Government for an amount exceeding \$2500 that "has as its principal purpose the furnishing of services in the United States through the use of service employees." 41 U.S.C. § 6702(a) (2012). A service employee is an individual who performs on a Federal Government contract that furnishes services, but does not include "an individual employed in a bona fide executive, administrative, or professional capacity," as those terms are defined in 29 CFR part 541. 41 U.S.C. § 6701(3). The SCA requires that any contract to which it applies must include a provision that specifies the minimum wage and fringe benefits to be paid "to each

⁶ There is an unexplained discrepancy between the total on the DOL determination (\$169,284.56) and the amount claimed by Sotera for this period (\$170,119.63). Compare Exhibit 18 at 8 and Exhibit 5.

class of service employee engaged in the performance of the contract.” *Id.* § 6703(1), (2). A contractor found to be in violation of contract provisions required by the act is liable for any compensation due the employee. *Id.* § 6705(a).

Pursuant to regulation, a contracting officer is required to insert the SCA clauses, FAR 52.222-41 and FAR 52.222-43, into contracts subject to the SCA. FAR 22.1006. The contracting officer is also responsible for obtaining applicable wage determinations. FAR 22.1007. When a contracting officer is aware that the contract includes “classes of service employees not included in the wage determination, the contracting officer shall require the contractor to classify the unlisted classes so as to provide a reasonable relationship” between the unlisted classes and those in the wage determination. FAR 22.1019(a). The contractor’s classification shall be submitted to DOL for review and approval. *Id.* FAR 52.222-43 provides that the agency will increase (or decrease) the contract price to pay the contractor for any increased wages resulting from a new wage determination applicable to the contract. If a contracting officer has questions concerning the applicability of the SCA, the contracting officer is required to obtain the advice of the agency’s labor advisor, and unresolved questions shall be submitted to the Wage and Hour Division, DOL. FAR 22.1003-7.

If DOL determines that the contracting officer erred in the analysis of whether the SCA applied to a contract, DOL may notify the contracting officer to remedy the mistake through modification of the solicitation or contract:

If the Department of Labor discovers and determines, whether before or after a contract award, that a contracting officer made an erroneous determination that the Service Contract Labor Standards statute did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract, the contracting officer, within 30 days of notification by the Department of Labor, shall include in the contract the clause at 52-222-41 and any applicable wage determinations

FAR 22.1015. In the event the contracting officer receives this direction, regulation further directs the contracting officer to “equitably adjust the contract price to reflect any changed cost of performance resulting from incorporating a wage determination or revision.” *Id.*

Once the agency has determined that the SCA applies, the contractor is responsible for identifying labor categories that are covered by the SCA and matching those categories to the applicable wage determination. FAR 52.222-41 puts the contractor on notice that the requirements of the SCA apply to the contract and employees must be paid not less than the monetary wages specified in wage determinations issued by DOL. FAR 52.222-41(b), (c)(1). The clause further provides that, if wage determinations are attached, the contractor is

obligated to match positions in the solicitation to those in the wage determination. FAR 52.222-41(c)(2). The contract often reiterates that it is the contractor's responsibility to undertake those efforts. *See, e.g., Collins International Service Co. v. United States*, 744 F.2d 812, 815 (Fed. Cir. 1984); *Northern NEF, Inc.*, ASBCA 44996, 94-3 BCA ¶ 27,094, at 135,004.

II. Requirements of the Contract

The contract at issue in this appeal imposes greater obligations on the Government than required by the SCA FAR clauses. Not only did it require the contracting officer to determine whether the SCA applied, the contract also required that the ordering contracting officer identify “under a separate CLIN on the task order and apply wages as required under FAR 22.10, Service Contract Act Wage Determinations,” “any labor [that] is subject to the SCA and is within scope of a Task Order.” The contract, by its terms, put the responsibility on the contracting officer to identify the labor categories subject to the SCA.

On the first task order, the contracting officer cited FAR 22.1015 as one of the bases for the modification to incorporate the SCA clauses. The contracting officer followed the requirements of this clause and modified the contract at DOL's direction. However, the contracting officer has not provided an equitable adjustment for the cost of this modification. If USDA had properly evaluated whether the SCA applied to the task order prior to award, it would have identified the labor categories and the applicable wage determinations and Sotera would have incorporated those wage rates into its offer or faced liability for its failure to do so. USDA is responsible for Sotera's inability to do so prior to contract award.

For the second and third task orders, the analysis is slightly different. It is not clear that DOL formally investigated these task orders, although DOL did make a determination of wages owed by Sotera for the period April 1–June 24, 2019. The contracting officer also included the clauses and wage determinations in the task orders prior to execution. Pursuant to FAR 52.222-41, Sotera would be responsible for determining which of its proposed positions matched the wage determinations attached to the contract. *See Spotless Janitorial Services, Inc. v. General Services Administration*, GSBCA 14651, 99-1 BCA ¶ 30,311, at 149,881.

In this case, the contract assigned responsibility to the contracting officer to identify SCA-covered positions. To the extent that this provision conflicted with the requirements of FAR 52.222-41, the more specific requirements of the contract control. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979-81 (Ct. Cl. 1965). We find nothing in the FAR that would preclude an agency from voluntarily assuming these responsibilities through contract. The contracting officer understood this responsibility and identified the

General Clerk II position as SCA-covered prior to the award of the second task order. Moreover, the contracting officer knew as early as January 2017 that DOL was concerned enough with the SCA compliance on the contract to direct the withholding of contract funds. Further, when Sotera asked about other possible positions, the contracting officer did not tell Sotera that it should undertake the effort to conform any SCA-covered positions to the wage determinations. Instead, the contracting officer indicated that he would wait until the DOL investigation of the first task order was complete, which was at least after the parties executed the second task order. USDA posits that the investigation concluded after award of the third task order.

USDA asserts that “it was not the sole responsibility of the ordering activity to determine whether the SCA would apply.” Respondent’s Brief at 10. As explained, this assertion is contradicted by the terms of the contract itself, which specifically assigned the ordering contracting officer this responsibility. Moreover, despite FAR 22.1006, which directs the insertion of SCA clauses for service contracts, the ordering activity still must determine that the SCA applies because service employees, as that term is defined in statute and regulation, will be performing work on the contract. NIH determined that there were no service employees on the base contract, but directed each ordering contracting officer to make that determination for its own agency prior to the award of a task order. The SCA clause cannot just be read into the contract under the *Christian* doctrine, as USDA advocates. Respondent’s Brief at 10. “The Christian doctrine is available only when relevant statutory or regulatory provisions are required to be included in an agency’s contracts.” *IBI Security Service, Inc. v. United States*, 19 Cl. Ct. 106, 109 (1989) (citations omitted). Because the SCA requires a determination that it applies to a contract and, on this contract, to which labor categories, the *Christian* doctrine does not assist USDA.

USDA’s reliance upon *Kleenco, Inc.*, ASBCA 44348, 93-2 BCA ¶ 25,619 (1992), and *Miller’s Moving Co.*, ASBCA 43114, 92-1 BCA ¶ 24,707, is misplaced. In both of those cases, the contracting officer apparently determined that the SCA applied and, regardless of a contractor’s actual notice of a wage determination, the contractor was responsible for complying with the SCA and paying the amounts in the applicable wage determination. *Kleenco*, 93-2 BCA at 127,523; *Miller’s Moving*, 92-1 BCA at 123,326. Here, the issue is that there was no wage determination or invocation of the SCA when the first task order was issued. For the second and third task orders, this contract put the burden on the contracting officer to determine which positions were required to be paid SCA wages.

The decision in *Sterling Services, Inc.*, ASBCA 40475, 91-2 BCA ¶ 23,714, is similarly inopposite. In that case, the contract stated that it was subject to the requirements of the SCA and the applicable wage determination was attached to the solicitation. The dispute arose because one of the positions to be provided under the contract did not match

up with the wage determination. But the contract assigned the responsibility for correctly classifying labor positions to the contractor and the costs resulting from the failure to undertake that effort remained with the contractor. *Id.* at 118,699. If the NIH contract had been silent as to the contracting officer's responsibility to determine other possible SCA positions, the reasoning in *Sterling* would be applicable. But it is not silent, and what it says controls the outcome of this matter.

Finally, USDA argues that, because “[b]oth the government and Sotera should have been on notice that the SCA applied to these contracts,” Sotera is not entitled to an equitable adjustment. Respondent's Brief at 11. We do not find to be dispositive the fact that Sotera was on notice following DOL's investigation that there were three other SCA positions. Under the structure of the contract, the contracting officer had to identify those additional labor categories on separate line items in the task order. The contracting officer declined to do so prior to the conclusion of the DOL investigation and chose, instead, to proceed with the execution of the replacement task order. Having failed to undertake the effort, USDA now owes the costs.

III. Further Proceedings are Necessary to Determine Amounts Owed to Sotera

A. First Task Order

In addition to seeking a ruling on liability, Sotera also moves for summary judgment on quantum. On the first task order, the contracting officer cited FAR 22.1015 as one of the bases for the modification to incorporate the SCA clauses. Sotera seeks an equitable adjustment for the cost of this modification, as permitted by FAR 22.1015.

USDA asserts that it is not liable for these costs because DOL did not require that the SCA be applied retroactively. Respondent's Brief at 12. USDA misapprehends DOL's direction. DOL directed USDA to modify the contract to add the provisions and told the contracting officer that it had found Sotera liable for back pay to its employees. If the application of the SCA provisions was not retroactive, Sotera would not have been liable for back pay. Moreover, the contracting officer acknowledged that the modification of the task order was retroactive to the beginning of performance.

DOL determined that Sotera owed its employees \$567,796.22 for the back pay and overtime for the performance period of the first task order. These determinations are sufficient evidence of quantum. Sotera also seeks the SCA-increased costs for its subcontractor, but has not provided sufficient support for these costs. The invoice amount matches the amount sought by Sotera, but the wording on the invoice suggests that the costs incurred may be different from the amount sought by Sotera. Given this confusion, we will

leave for further proceedings the determination of the amount owed to Sotera for its subcontractor costs on the first task order.

Sotera questions the need for further proceedings, given that USDA had not challenged the amounts that it seeks while the REAs and claims were before the contracting officer, nor after the appeals were filed at the Board. Appellant's Supplemental Brief at 13. Regardless of the challenges that the Board may permit USDA to present, Sotera bears the burden to prove the amounts it seeks. *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991). On appeal, the Board decides matters, including quantum, de novo without deference to the contracting officer's findings in response to a claim. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994). Sotera has to prove its quantum to the Board, rather than rely upon what it views as an implied concession by USDA. On the current record, the Board cannot determine quantum based upon the evidence before use. Accordingly, we deny Sotera's motion on quantum.

B. Second and Replacement Task Order

Sotera has also provided a DOL determination for the period April 1–June 24, 2019, but has not explained how this determination was issued or how it captures amounts that Sotera is owed for the second or third task orders. Sotera may also receive the costs of any increases attributable to the application of a revised wage determination, pursuant to FAR 52.222-43. However, Sotera has not explained what amounts, if any, are attributable to such increases.

Because we find USDA liable for the wage costs on all three task orders by operation of the contractual terms, we do not reach USDA's motion for summary judgment on Sotera's alternative argument of detrimental reliance.⁷

C. REA Preparation Costs

Sotera also seeks REA preparation costs. Sotera may recover legal fees that it incurred in connection with negotiations relating to additional compensation that it claimed as a result of the belated imposition of the SCA requirements on its task orders. *Bill Strong*

⁷ It appears that Sotera asserted this alternative theory only on the second and third task orders. The facts underlying that claim appear in the claim submitted to the contracting officer on December 8, 2017, for costs on the second and third task orders, but not in the claim submitted on December, 7, 2017, for costs on the first task order. *Compare Exhibits 17 and 18.*

Enterprises, Inc. v. Shannon, 49 F.3d 1541, 1550 (Fed. Cir. 1995), *overruled in part on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 & n.10 (Fed. Cir. 1995) (en banc). However, these costs must be incurred in pursuit of negotiations, not the prosecution of a claim against the Government, *Bill Strong*, 49 F.3d at 1550, or in other matters of contract administration. *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, *et al.*, 17-1 BCA ¶ 36,870, at 179,710. Sotera bears the burden to prove that these costs are recoverable. *Id.*, at 179,711.

We cannot find that Sotera is entitled to its REA preparation costs as a matter of law or on the record as it currently stands. The declaration that Sotera submitted describes the costs it seeks as both costs of preparing the REA and providing advice on SCA compliance. Advice regarding SCA compliance could be a general contract administration matter and the fees incurred for that advice are not recoverable. Moreover, while the dates of most of the invoices pre-date the submission of the claims, Sotera has not submitted the invoices themselves for review to establish that these costs were incurred solely for the pursuit of these negotiations. We will conduct further proceedings to determine whether and in what amount Sotera may recover its REA preparation costs.

Decision

Sotera's motion is **GRANTED IN PART** and USDA's motion is **DENIED**. The Board will issue a separate order for further proceedings.

Marian E. Sullivan

MARIAN E. SULLIVAN
Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge