



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON
DECEMBER 17, 2020**

GRANTED: December 8, 2020

CBCA 6476, 6811

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Marisa M. Bavand and Allison L. Murphy of Groff Murphy PLLC, Seattle, WA, counsel for Appellant.

Paul R. Davis and Andrew J. Unsicker, Office of Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **LESTER**, and **CHADWICK**.

SOMERS, Board Judge.

Pending before us is a motion for summary judgment by Mission Support Alliance, LLC (MSA). MSA seeks a ruling as a matter of law that the Department of Energy (DOE) is not entitled to disallow \$11,424,602 in Parent Office Support Plan (POSP) costs reimbursed by DOE during fiscal years (FYs) 2009–2012 and \$5,247,135 during FYs 2013–2018. DOE opposes the motion, contending genuine issues of material fact preclude summary judgment. We agree with MSA and grant the motion and the appeal.

Background

In April 2009, DOE and MSA entered into a performance-based cost-plus-award-fee contract with a value of \$3,059,369,580. Under the contract, MSA provided infrastructural support to the Hanford Site, a decommissioned nuclear production complex located adjacent to the Columbia River in Washington State. The scope of work required MSA to provide, among other things, laboratory services, security services, transportation infrastructure, utilities, telecommunications and IT support, and various business administrative services. MSA subcontracted a portion of the work.

As a cost-reimbursement contract awarded under Federal Acquisition Regulation (FAR) part 15 (48 CFR pt. 15 (2008)), the contract included various clauses from the FAR and Department of Energy Acquisition Regulation (DEAR) requiring MSA to document and support its costs. For example, FAR 31.201-2(d) required MSA to “account for costs and maintain records, including supporting documentation, adequate to demonstrate that the costs claimed have been incurred, are allocable to the Contract, and comply with the applicable cost principles.” 48 CFR 31.201-2(d).

In addition, the contract provided a mechanism whereby MSA, a joint venture, could receive technical support from its parent organizations¹:

H.39 Parent Organization Support²

(a) For on-site work, U.S. Department of Energy (DOE) fee generally provides adequate compensation for parent organization expenses incurred in the general management of this Contract. The general construct of this Contract results in minimal parent organization investment (in terms of its own resources, such as labor, material, overhead, etc.) in the Contract work. The

¹ Originally, the parent organizations were Lockheed Martin Integrated Technology (LLC) (Lockheed Martin); Jacobs Engineering Group, Inc. (Jacobs); and Wackenhut Services, Inc. (Wackenhut). During FYs 2013–2018, the parent organizations’ corporate identities changed. Lockheed Martin became known as Leidos. Wackenhut became G4S and then Centerra. As a result, over FYs 2013–2018, Jacobs, Wackenhut, Centerra/G4S, Lockheed Martin, and Leidos all billed MSA pursuant to the POSPs.

² DOE summarizes section H.39 as follows: “[The clause] allows MSA to utilize services from its Parent Organizations to perform Contract work under certain limited circumstances, and expressly provides that Parent Organization allocation costs are unallowable.”

Contract is largely financed by DOE advance payments, and DOE provides government-owned facilities, property, and other needed resources. Accordingly, allocations of parent organization expenses are unallowable for the prime contractor, major subcontractors, and/or teaming partners, unless authorized by the Contracting Officer in accordance with this Clause.

(b) The Contractor may propose, or DOE may require, parent organization support to:

- (1) Monitor safety and performance in the execution of Contract requirements;
- (2) Ensure achievement of Contract environmental clean-up and closure commitments;
- (3) Sustain excellence of Contract Key Personnel;
- (4) Ensure effective internal processes and controls for disciplined Contract execution;
- (5) Assess Contract performance and apply parent organization problem-solving resources on problem areas; and
- (6) Provide other parent organization capabilities to facilitate Contract performance.

© The Contracting Officer may, at its unilateral discretion, authorize parent organization support, and the corresponding indirect or direct costs, if a direct-benefiting relationship to DOE is demonstrated. All parent organizational support shall be authorized in advance by the Contracting Officer.

(d) If parent organization support is proposed by the Contractor or required by DOE, the Contractor shall submit for DOE review and approval, an annual Parent Organization Support Plan (POSP). The Contractor shall submit its initial POSP 60 days prior to: (1) the end of the Contract Transition Period; or (2) the commencement date of parent organization support proposed by the Contractor or required by the Government. Any subsequent POSP shall be submitted 90 days prior to the start of each year of Contract performance.

In June 2012, MSA submitted a POSP to DOE (the “2013 POSP”). The 2013 POSP identified MSA’s parent organizations and enumerated the ways in which the parent organizations would support MSA’s mission. The 2013 POSP included two forms of parent organization involvement. One included a “members committee,” comprised of executive level leaders from the parent organizations, which would provide advice and oversight of MSA’s activities. The second also contemplated the use of “direct support” from the parent

organization, which would enable MSA to gain expert assistance from the parent organizations on an as-needed basis.

In August 2012, DOE approved the 2013 POSP, authorizing the use of the members committee and direct support totaling \$5,732,298. A similar process happened in FYs 2014–2018. Once DOE authorized the POSPs, MSA billed against the total authorized POSP costs, allocating the cost of parent organization support, as billed to MSA by the parents, to the contract. DOE approved POSPs for all years relevant to this dispute.

DOE required MSA to maintain records, with supporting documentation, adequate to demonstrate that any costs claimed were incurred, were allocable to the contract, and complied with the applicable cost principles. MSA implemented a cost-review system of the invoices from the POSPs. At various times during performance, MSA asked the parent organizations to confirm that no unallowable costs were being billed or had been billed in the past. External audits conducted by KPMG led MSA to respond by identifying what corrective action would be applied to any items requiring corrective action. MSA alleges that it interpreted the results of the audits to indicate that MSA's use of the POSPs met contract requirements. MSA notes in a brief that "none of the audits suggested either that MSA's use of the POSP was problematic or that visibility into the parent organizations' rate buildup was a necessary precondition to avoid 100% disallowance of costs."

In August 2018, MSA provided DOE with an internal audit of the POSP for fiscal year 2017. A DOE employee asked the MSA director of internal audit whether MSA had obtained payroll cost information for each person in the POSP and what audit steps MSA had taken to ensure that the costs billed by the parent organizations were defensible. Discussions between DOE and MSA commenced. DOE exchanged internal emails concerning the POSP costs. DOE received email inquiries from the parent organizations regarding the data sought. Ultimately, while discussions continued, DOE issued a contracting officer's decision on February 19, 2019, withholding \$1,046,467 in parent organization support costs for FY 2010, \$5,346,183 in parent organization support costs for FY 2011, \$4,354,859 in parent organization support costs for FY 2012, and estimated general and administrative costs of \$677,093.

MSA appealed this decision in May 2019 (CBCA 6476). In March 2020, DOE issued a subsequent final decision, disallowing \$5,247,136 in POSP costs reimbursed by DOE during FYs 2013–2018. MSA appealed that decision as well (CBCA 6811), and we granted a joint motion to consolidate the appeals. MSA filed the instant motion in March 2020.

Discussion

Summary judgment is appropriate when “there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law.” *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). We must view all inferences in a light most favorable to the non-movant. See *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 19-1 BCA ¶ 37,376 (citing *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 599 (1986)). Here, although the parties disagree sharply about a variety of facts, we agree with MSA’s legal argument, and it follows from our legal conclusion that any facts in dispute are immaterial.

MSA contends that the “various rules and contract provisions” on which DOE relies “contain[] no requirement that MSA provide” the parent-entity cost information that DOE has demanded. MSA states that because the parent organizations are distinct from MSA, “any audits would need to be performed by a cognizant auditing agency and would need to come from an audit request from DOE, not MSA, with the findings of the audit delivered to DOE, not MSA.” In response, DOE contends that the record “is replete with conflicting evidence about whether MSA’s performance conformed with contract requirements, and conflicting evidence about what MSA reasonably knew, didn’t know, or could have known about the costs being charged by its parent organizations.”

DOE cites five regulatory provisions and two contract sections in its brief to support its position that “MSA must verify that the costs charged by its Parent Organizations are at cost only and do not include either expressly unallowable profit/fee or expressly unallowable Parent Organization allocations.” We see no such requirement set forth in the language cited by DOE.

Four of the cited regulations—three FAR provisions, 48 CFR 31.201-2(d), 52.215-2, and 52.216-7 (2012); and one DEAR clause, *id.* 970.5232-3—require MSA to maintain cost records to support its invoices and to make those records available to the agency on request. Such record keeping rules do not, in and of themselves, make any incurred costs either allowable or unallowable as a matter of law. Moreover, MSA undisputedly has the records of *its own costs*. DOE argues that allowability further depends on records of costs that *other* companies incurred when selling services to MSA. The DEAR cost regulation does obligate MSA in many instances to “either conduct an audit of [a] subcontractor’s costs or arrange for such an audit to be performed by the cognizant government audit agency through the Contracting Officer.” *Id.* 970.5232-3(c). We are not certain that an approved POSP creates a “subcontractor” relationship within the scope of this regulation—indeed, in a supplemental brief, DOE expressly denies that MSA’s parents are its “subcontractors.” We need not

decide that point, however, since even if the DEAR applies here, the fact remains that MSA has elected the second option under the regulation by encouraging the agency to conduct its own audits.³

The fifth regulatory provision cited by DOE is the cost principle of FAR 31.205-26(e), requiring that “[a]llowance for” sales or transfers “between any divisions, subdivisions, subsidiaries, or affiliates of the contractor under a common control shall be on the basis of cost incurred,” with specified exceptions. 48 CFR 31.205-26(e). This rule is generally understood as “limit[ing] profits on sales between ‘divisions, subdivisions or affiliates’ under the *common control of a contractor*.” *United States ex rel. Kholi v. General Atomics*, 2003 WL 21536816, at *2 n.3 (S.D. Cal. 2003) (emphasis added). The “contractor” in this case is MSA. 41 U.S.C. § 7101(7) (2018). This case does not involve an entity under MSA’s “control.” The term in the cost principle that describes the relationship between MSA and its parents is “affiliate[s].” See *Securus Technologies Inc. v. Global Tel*Link Corp.*, 676 F. App’x 996, 999 (Fed. Cir. 2017) (defining the term “affiliate” as including parent corporations); *Materials Science Corp.*, ASBCA 47067, 96-2 BCA ¶ 28,329 (“[The principle] applies to sales or transfers of a service from an affiliate under common control.”), *modified in non-relevant part on reconsideration*, 96-2 BCA ¶ 28,532. We agree with MSA that this cost principle would need to be phrased differently to reflect an intent to require a joint venture to audit prices that it pays (as *its* incurred costs) to affiliates that control the contractor but that the contractor does not control.

³ DOE’s argument that MSA failed in its obligation under the DEAR clause to “arrange for . . . the cognizant government audit agency” to audit its parents’ costs fails. Because MSA has no power itself to order an audit from a government audit agency, the DEAR clause recognizes that the contractor must “arrange for” any audit “through the Contracting Officer.” 48 CFR 970.5232-3(c). FAR 42.102 provides the contracting officer with the authority to “request audit services directly from the responsible audit agency cited in the Directory of Federal Contract Audit Offices.” *Id.* 42.102(a). Under the language in the DEAR clause and in light of the contracting officer’s exclusive authority to request a government audit, it appears that a contractor has done all that it can do to “arrange for” a government audit of its subcontractor once it asks the contracting officer to set up that audit; at the very least, DOE has not identified any other actions that the contractor would need or be able to take. In making the request, the contractor effectively shifts responsibility for arranging the audit to the contracting officer. The contracting officer’s election in this case not to make that request does not mean that MSA is required to find a different way to access and audit its parent companies’ cost records—parent companies that are separate legal entities from MSA and that MSA does not control—outside the context of a government audit. The contracting officer’s election means only that DOE cannot rely on the absence of an audit to challenge MSA’s parent company costs under the DEAR clause.

We turn then to the contract, which “we must interpret . . . as it is written, not as one party wishes in retrospect that it should have been written.” *Sigal Construction Corp. v. General Services Administration*, CBCA 508, 10-1 BCA ¶ 34,442; *see also Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 17-1 BCA ¶ 36,739 (“Smithsonian cannot reap the benefits of a bargain it wishes it had struck.”). From its arguments, it seems that DOE would have us discern, by piecing together separate provisions of the contract, an overarching policy requiring MSA to produce the cost information that DOE says it needs. The difficulty for DOE is that none of the contract language quite says what DOE wishes it said.

DOE first notes that section B.11 “expressly disallows separate additional fee for individual team members or affiliates of team members.” This is true, but since MSA does not seek a “fee” for its parents, section B.11 is irrelevant.

The heart of DOE’s argument relies on contract section H.39. This section permits DOE, “at its unilateral *discretion*, [to] authorize parent organization support, *and the corresponding indirect or direct costs*, if a direct-benefiting relationship to DOE is demonstrated.” (Emphasis added.) In short, section H.39 provides the mechanism for DOE to approve or disapprove parent office support. This section would have been the obvious location in the contract to say so *expressly*, had DOE intended to place on the joint-venture contractor the unusual burden to audit and document the “indirect or direct costs” behind the parent entities’ authorized support prices. Under this section, DOE probably could have chosen in its discretion to *condition* approval of parent office support on MSA’s performing audits of its parents’ costs. But that is not what DOE did. Instead, DOE affirmatively approved each of MSA’s POSPs from 2013 through 2018. Having granted the approvals as it did, DOE cannot now retroactively impose the condition it wishes existed.

If DOE wanted to impose a requirement to produce a non-contractor’s cost information, it needed to say so expressly, as such a requirement will not be implied or inferred. *See generally Kellogg, Brown & Root Services, Inc. v. Secretary of the Army*, 973 F.3d 1366, 1371 (Fed. Cir. 2020) (“As the government conceded at oral argument, the amounts paid . . . were ‘costs’ under the prime contract, and there is no provision in the prime contract that required [the contractor] to submit the actual costs incurred by its subcontractor. . . . While the failure to collect and submit [subcontractor] costs bears on the reasonableness of the payments, submission of the subcontractor’s costs is not a separate requirement.”). DOE has approved the POSP costs as reasonable. Because DOE’s allowability argument rests solely on legal authorities we find do not support it, we grant MSA’s motion and appeal.

Decision

The Board **GRANTS** MSA's motion for summary judgment.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge