UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON AUGUST 23, 2022

DENIED: August 17, 2022

CBCA 6477

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 **GOODMAN**, **DRUMMOND**, and **CHADWICK**.

CHADWICK, Board Judge.

This appeal involves the final 2.2% of what was once a larger cost-reimbursement dispute. The appellant, Mission Support Alliance, LLC (MSA), challenges disallowances by the respondent, Department of Energy (DOE), of a total of $333,895 paid by MSA to subcontractors in connection with MSA's work at the Hanford (Nuclear) Site near Hanford, Washington. We reject MSA's argument that the claim is partially barred by the statute of limitations, and we deny the appeal, thereby sustaining DOE's claim for $333,895.

Background

The Board previously addressed this appeal in *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 22-1 BCA ¶ 38,033 (2021), and *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, 20-1 BCA ¶ 37,657. We repeat facts from earlier decisions to the extent necessary to explain the current decision.

MSA provided various services to DOE at the Hanford Site under a cost-type contract from 2009 to 2020. Costs of work performed by three subcontractors are at issue.

(1) Federal Engineers & Constructors, Inc. (FE&C) provided on-site technical and administrative support to MSA under a labor-hour subcontract. DOE contends that FE&C invoices paid by MSA totaling $169,405 lack adequate supporting documentation.

(2) EnergX, LLC (EnergX)[1] taught training courses for MSA under a subcontract with fixed unit prices. DOE contends that a total of $61,160 invoiced by EnergX and paid by MSA lacks adequate documentation.

(3) DGR Grant Construction, Inc. (DGR Grant) provided miscellaneous construction services under fixed-price subcontracts. DOE challenges a total of $103,330 paid to DGR Grant as not justified under the terms of the subcontracts or as passed through by lower-tier subcontractors without proper documentation.

We discuss the record support for the respective costs as pertinent below.

MSA incurred the disputed costs in fiscal years 2009 through 2011. MSA's own internal audit division (or a subcontracted accounting firm) performed the relevant audits of costs paid to FE&C, EnergX, and DGR Grant starting in approximately 2017,[2] and MSA presented the audit findings to DOE in December 2018. On February 19, 2019, "a DOE contracting officer issued a decision asserting a claim against MSA" based on recent audit results for "$15,419,830 in allegedly 'unallowable subcontract costs,'" including costs charged by other subcontractors. *See Mission Support Alliance*, 22-1 BCA at 184,710. MSA appealed to the Board in May 2019. Over time, the parties reduced the amount in dispute

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[1] Some documents in the appeal file suggest that this subcontractor was named "Energx," as DOE sometimes calls it.

[2] We previously described the 2016 change in law that led to MSA's taking over the audit function from the Defense Contract Audit Agency. *See Mission Support Alliance*, 20-1 BCA at 182,834.

from $15.4 million to $333,895. We deem the remainder of the claim withdrawn. Only a claim for the latter amount remains before us to be resolved.

The parties submitted the case for decision in mid-2022. MSA presented evidence at a one-day hearing in May 2022. DOE made a hybrid election under Board Rule 18(b) (48 CFR 6101.18(b) (2021)) and submitted its case on the record under Rule 19 but appeared at the hearing to cross-examine witnesses. The case is fully briefed.

Discussion

Statute of Limitations

MSA argues that DOE did not assert the claim regarding the payments to FE&C or EnergX, and regarding three of the DGR Grant invoices, within the six years allowed by 41 U.S.C. § 7103(a)(4)(A) (2018). As the party asserting the time bar as an affirmative defense, MSA must show that DOE "knew or should have know[n] of its overpayment claim[s]" more than six years before the claim date, February 19, 2019. *See United Liquid Gas Co. v. General Services Administration*, CBCA 5846, 18-1 BCA ¶ 37,172, at 180,941 (discussing, inter alia, *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016)); *see also DRS Global Enterprise Solutions, Inc*., ASBCA 61368, 18-1 BCA ¶ 37,131, at 180,697 (noting that the asserting party must show that the other party possessed the "key facts, even if it failed to connect them" (distinguishing *Raytheon Missile Systems*, ASBCA 58011, 13 BCA ¶ 35,241)).

We agree with DOE that grounds for the disallowances were not "reasonably knowable" until MSA provided DOE the results of its subcontract cost audits shortly before DOE asserted the claim. MSA complains about the belated timing of the audits and points out that DOE saw cost submissions as early as 2011 showing that MSA had made payments to the three subcontractors of the general types now at issue. MSA argues that its "yearly [cost] submissions included sufficient information to notify DOE of a potential claim." MSA fails to show, however, that DOE could have known, or would have had reason to doubt, whether the payments to subcontractors were reasonably *supported*—the gravamen of the claim—before MSA disclosed the audit findings in 2018. *Cf. Kellogg Brown & Root Services, Inc*., ASBCA 58518, et al., 16-1 BCA ¶ 36,408, at 177,529 (finding the "record . . . inadequate to sustain a finding that . . . the government knew or should have known of the contractor's allocation practices for the subject contracts" six years before asserting the claim); *DRS Global Solutions*, 18-1 BCA at 180,697 ("[I]f the records disappeared over" time, "how could the government have known about the lack of substantiation [earlier?]"). DOE timely asserted the claim alleging inadequate cost support.

Costs Paid to FE&C

The ultimate issue regarding the costs in dispute is whether the record demonstrates the costs were reasonable, which is "a question of fact based on applicable legal principles." *Kellogg, Brown & Root Services, Inc. v. Secretary of the Army*, 973 F.3d 1366, 1370 (Fed. Cir. 2020) (citing *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1360 (Fed. Cir. 2013)). We are not limited to considering the audit findings on which DOE based its 2019 claim. A contractor may bolster its case at the Board with "evidence to show that it acted reasonably" in incurring costs, even if such evidence is adduced only in or for the litigation. *See Fluor Intercontinental, Inc*., ASBCA 62550, 22-1 BCA ¶ 38,105, at 185,101; *cf. Kellogg, Brown & Root*, 973 F.3d at 1374 ("Despite having ample opportunity to do so, [the contractor] supplied no meaningful evidence to the Board showing the reasonableness of its costs."). MSA must persuade us that the disputed costs did "not exceed th[ose] which would be incurred by a prudent person in the conduct of competitive business." 48 CFR 31.201-3(a).[3] In each instance, the factual *basis* of DOE's challenge is the alleged lack of documentation. *See Kellogg, Brown & Root*, 973 F.3d at 1371 (noting that "failure to collect and submit [supporting records] bears on the reasonableness of the payments").[4]

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[3] In a decision involving allegedly unsupported costs, another board placed the burden on the Government to show that the "costs [we]re unallowable." *Doubleshot, Inc*., ASBCA 61691, slip op. at 5 (July 19, 2022) (citing *Luna Innovations, Inc*., ASBCA 60086, 18-1 BCA ¶ 36,919 at 179,869). We respectfully disagree. The claim in *Luna Innovations* (cited in *Doubleshot*) was that the contractor charged "expressly unallowable costs," a legal issue. 18-1 BCA at 179,869. By contrast, asking whether costs are adequately supported is to ask whether such costs are "reasonable and therefore allowable," which is a fact that the contractor has the "burden to prove." *Kellogg, Brown & Root*, 728 F.3d at 1363.

[4] The parties debate at length what DOE's claim really alleges and how the Board should approach it. MSA's costs must be reasonable, allocable to the contract, and otherwise allowable. *See* 48 CFR 31.204(a); *Airo Services, Inc. v. General Services Administration*, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071–72. DOE does not challenge the allocation of costs or their allowability under law. DOE emphasizes cost reasonableness but mistakenly calls this an "issue of law." DOE seems to suggest that if facts such as the absence of supporting records are undisputed, the inquiry reduces to a legal one; nonetheless, reasonableness is inherently factual. *E.g.*, *Kellogg, Brown & Root*, 973 F.3d at 1371–74. MSA, for its part, claims "DOE is not challenging . . . reasonableness or allocability"—yet MSA presented an accountant witness to opine that "MSA's position that all its costs are supported is reasonable." Whether MSA's costs are supported is relevant, but the merits question is whether MSA reasonably incurred the costs. It is true that an unreasonable cost is *also* unallowable, *see* 48 CFR 31.201-2(a)(1), but this case is at bottom about reasonableness, and MSA bears the burden of proof per 48 CFR 31.201-3(a).

The challenged $169,405 incurred by MSA under its labor-hour subcontract with FE&C reflects payments for which MSA does not possess supporting time cards. MSA writes that "FE&C refused to comply with [MSA's] request" for time cards in 2019 "because the audit did not [begin] until October 18, 2017, which FE&C said was outside of the required record retention window imposed by" acquisition regulations. MSA agrees with FE&C that the subcontractor was "under no obligation" to cooperate and argues that "MSA should not be penalized for DOE's failure to coordinate timely audits."[5]

The Board is not interested, of course, in "penalizing" MSA for anything. We do, however, need to decide whether the record shows that MSA reasonably paid FE&C for the labor hours at issue. MSA devotes few words to that specific question. Citing one page of the hearing transcript, MSA asserts that "there is no doubt or question as to whether or not FE&C performed the work for which it invoiced." At the cited page, counsel for MSA asked a former MSA employee, "Was there any concern by MSA that th[e] work that was billed by FE&C was in fact not performed?" The witness answered, "No, there was no concern with work performance, getting our deliverable submittals [from] FE&C." This testimony is not about particular labor hours or rates and, at face value, addresses MSA's own "concern[s]" rather than whether FE&C actually billed MSA correctly for its time.

The Board, unlike DOE, would not necessarily insist on time cards to support the reasonableness of the challenged costs, and we understand why records might be unavailable—but we would need *something* to satisfy MSA's burden of proof. *See* 48 CFR 31.201-3(a). To hold otherwise would be to say that the effective statute of limitations for DOE's claim could be no longer than the required retention period for the time cards, a proposition for which we know of no authority.[6] We see no alternative evidence of the reasonableness of these costs cited in the 102 pages of post-hearing briefing filed by MSA. MSA cites the testimony of an expert witness to the effect that "MSA satisfied all contract terms and conditions when supporting its costs." Opinion testimony of this kind, however, does not constitute "evidence or facts." *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,949. "We will not search [the record] for better evidence" than MSA itself cites. *Id*. at 184,940; *see also Coffey Construction Co.*,

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[5] At MSA's request, the Board issued a subpoena to FE&C in 2021 for records including time cards. The parties do not discuss FE&C's response, if any.

[6] MSA does not raise equitable defenses such as laches or estoppel. *Cf. JANA, Inc. v. United States*, 936 F.2d 1265, 1269–70 (Fed. Cir. 1991) (rejecting laches and estoppel arguments); *Transworld Systems Inc. v. Department of Education*, CBCA 6049, 22-1 BCA ¶ 37,994, at 184,513–14 (2020); *Lockheed Martin Aeronautics Co.*, ASBCA 62209, 2021 WL 2912095 (June 22, 2021) ("The government's argument that laches remains a viable affirmative defense is unpersuasive[.]").

VABCA 3432R, et al., 1993 WL 218210 (June 16, 1993) (noting that the predecessor board was "not disposed to . . . do counsel's work for them"). We deny MSA relief and sustain the government claim as to the costs paid to FE&C.

Costs Paid to EnergX

MSA paid $61,160 to EnergX on five invoices that DOE writes "have nothing more" in the record "to support [them] . . . than a screenshot showing that an MSA [technical representative] . . . approved those invoices. . . . There are no training records or any other documentation . . . that line[s] up with the invoices." MSA argues primarily that the payments are reimbursable specifically because the costs "were reviewed and approved" within MSA. We know of no authority, and MSA cites none, suggesting that evidence of mere "review" and "approval" by contractor personnel suffices to show that subcontractor charges are reasonable. *See* 48 CFR 31.201-3(a) ("No presumption of reasonableness shall be attached to the incurrence of costs."). MSA does not, in any event, cite evidence concerning anyone in particular who monitored the EnergX subcontract or who approved these invoices. *Cf. BearingPoint, Inc*., ASBCA 55354, et al., 09-2 BCA ¶ 34,289, at 169,394 (crediting testimony of "three [contractor] [eye]witnesses" concerning cost allocability).

MSA further relies on the opinion testimony of its accounting expert and on a demonstrative exhibit prepared by the expert in 2022, which are "of no probative value in establishing the underlying facts" affecting reasonableness and are "not helpful" to us in resolving that factual issue. *See Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., 16-1 BCA ¶ 36,509, at 177,883 n.15; *see also* Rule 23(b) (post-hearing briefs "shall cite record *evidence* for factual statements" (emphasis added)). As MSA cites no documentation or other evidence that MSA reasonably paid the $61,160 at issue to EnergX, we deny the appeal and sustain the DOE claim as to that amount.

Costs Paid to DGR Grant

The dispute about the $103,330 paid to DGR Grant for construction services involves eight modifications of fixed-price subcontracts as well as miscellaneous other prices and markups that DOE alleges lack support in the record. MSA's arguments consist entirely of detailed recitations of the historical facts that MSA's technical representatives, auditors, management, and expert witness at the hearing "reviewed the costs" in dispute and, according to MSA, "successfully corroborated" them, finding them "allocable, allowable, and accurate." MSA asserts that DOE does not offer "a meaningful rebuke of the findings asserted" by MSA's expert witness. MSA neglects to cite hard, record evidence on the basis of which the Board could determine the reasonableness of the charges for ourselves. *See* Rule 23(b). As discussed above, we decline to search for exhibits or testimony that a

party does not bring to our attention in a brief. Accordingly, we deny the appeal and sustain DOE's claim as to the payments to DGR Grant.

Decision

We **DENY** the appeal insofar as MSA challenges DOE's claim for $333,895 and **DENY AS MOOT** the appeal as to the withdrawn remainder of the original DOE claim.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge