



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: June 29, 2012

CBCA 2260

URS ENERGY & CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Daniel R. Frost, Claire Y. Dossier, and Shawn Rodda of Snell & Wilmer L.L.P., Denver, CO, counsel for Appellant.

Brady L. Jones, III, Sky W. Smith, and Kaniah W. Konkoly-Thege, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

SOMERS, Board Judge.

URS Energy & Construction, Inc. (URS) has appealed a contracting officer's decision denying its claim for reimbursement of an indemnity obligation incurred pursuant to a supersedeas bond. Specifically, URS seeks payment of \$7,799,049.19, the amount paid by URS to the surety.

Pending before the Board are the parties' cross-motions for summary relief. Upon extensive review of the parties' papers, the relevant legal authorities, and the entire record

in this case, we grant appellant's motion for summary relief and deny the Government's cross-motion for summary relief. Appellant may recover its costs as claimed.

Background¹

Pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, Public Law 95-605, the Department of Energy (DOE or Government) is responsible for remediation at twenty-four inactive uranium mill tailings sites (mill sites) and properties near these sites that are contaminated with residual radioactive materials (mill tailings). In 1983, DOE entered into a cost reimbursement contract with Morrison-Knudsen Company, Inc. (Morrison-Knudsen), now known as URS Energy & Construction, Inc. or URS². The contract, issued through DOE's Uranium Mill Tailings Remedial Action (UMTRA) Project Office, called for appellant to perform engineering, design, construction, and inspection services necessary to accomplish remedial cleanup tasks at contaminated sites. The parties refer to the contract as the UMTRA contract.

In March 1995, URS awarded a subcontract to Ground Improvement Techniques, Inc. (GIT) to perform a task assignment under the UMTRA contract. DOE agreed to the subcontract award.

GIT's performance under the subcontract did not live up to URS's expectations. Consequently, in September 1995, URS terminated GIT for default. DOE knew about and agreed to the termination. URS filed suit against GIT, again with DOE's permission, and GIT countersued. In 1996, a jury ruled against URS and awarded GIT \$5,600,000.

While DOE and URS discussed whether to appeal the decision, the parties sought to stay enforcement of the judgment. As a condition of staying enforcement of the judgment

¹ On July 28, 2011, we denied the Government's motion to dismiss. *See URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 11-2 BCA ¶ 34,815. As in the previous decision, the facts here are taken from the parties' pleadings, declarations from various witnesses, declarations from counsel for DOE, the appeal file, the supplemental appeal files, and other exhibits submitted to support the cross-motions for summary relief.

² By virtue of an assignment and a series of name changes and mergers, URS Energy & Construction, Inc., is the entity now pursuing this litigation. To avoid confusion, we refer to appellant for the remainder of this opinion as either URS or appellant. However, the record (and, consequently, portions quoted from the record) refers to previous corporate entities, such as MK-Ferguson, Washington Group International, and/or Morrison-Knudsen.

pending appeal, the United States District Court in Colorado required URS to provide a surety bond (known as a supersedeas bond). The district court's order stated as follows:

Provided that plaintiff tenders the Clerk of the United States District Court for the District of Colorado a supersedeas bond for the benefit of GIT in the total amount of seven million dollars (\$7,000,000) on or before the close of business on December 30, 1996, then GIT is stayed from executing on its judgment in this matter, or taking any action or proceeding to enforce this judgment, during the pendency of any post trial-motions filed by any party in this matter under Fed. R. Civ. P. 50, 52(b), 59, or 60.

Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc., No. 95-2510, slip op. at 2 (D. Colo. Dec. 20, 1996) (order staying execution or other proceedings to enforce judgment during pendency of post-trial motions and appeal).

URS asked DOE for permission to acquire the bond, as noted in a letter from URS's project manager to the contracting officer:

As you were advised at our December 5, 1996 briefing, an adverse jury verdict was provided against MK-F [MK-Ferguson, the name of the contractor at the time] in the reference[d] no. 2 case. The judgement was filed last Friday, December 06, 1996. MK-F has ten (10) calendar days from that date to provide a supersedeas bond in the amount of \$6,600,000. That means MK-F must provide the bond by December 18, 1996. Morrison Knudsen Corporation can provide this bond through its broker, Terry Paine Company of Missoula, Montana in the required time. The cost is not expected to exceed \$33,000.

MK-F requests your approval to acquire said bond and incur the above expense.

Thereafter, URS posted the supersedeas bond for \$7,000,000 to be paid to GIT.³

As part of the acquisition of the bond, URS executed certain agreements of indemnity, pursuant to which URS agreed that, should the surety company incur liability on the bond, URS would reimburse the company. On that same day, the contracting officer directed URS to begin the appeals process. The contracting officer required "[URS] to provide a detailed

³ In 1999, the district court ordered that the amount of the supersedeas bond be increased by \$75,000.

plan to include milestones, estimated costs for activities associated with the appeal, and any other information that may be pertinent to this effort . . . not later than 30 days from the date of this letter.” Per instructions, URS appealed the 1996 judgment to the United States Court of Appeals for the Tenth Circuit.

In 1999, the United States Court of Appeals for the Tenth Circuit affirmed the district court’s judgment, but vacated the judgment’s damages award and remanded the case for a new trial limited to the issue of damages. *Morrison Knudsen Corp. v. Fireman’s Fund Insurance Co.*, 175 F.3d 1221, 1261 (10th Cir. 1999). The contracting officer agreed that URS should retain outside legal counsel for the new trial. While the parties awaited commencement of the new trial, the Government regularly reimbursed URS for the costs of renewing the supersedeas bond.

Meanwhile, in May 2001, URS filed for Chapter 11 bankruptcy in the United States Bankruptcy Court, Reno, Nevada. URS identified as a debt the judgment issued by the district court (still on appeal). On December 21, 2001, the bankruptcy court confirmed URS’s plan for reorganization. The bankruptcy court affirmed that the supersedeas bond was indeed among the indemnity agreements URS assumed as a result of that court’s July 10, 2001, order. As the bankruptcy judge explained:

Clearly the way I read this[,] that includes the supersedeas bonds for the action that was pending in Colorado That means that that bond has now been assumed.

On January 24, 2002, URS entered into an underwriting and continuing indemnity agreement with its surety, Federal Insurance Company (Federal). Paragraph 32 of the agreement provided, in pertinent part, as follows:

Reaffirmation of Indemnity Agreements: Indemnity: Waiver of Claims. [URS] by the execution of this Agreement reaffirm[s] all of [its] obligations to [Federal] under the Indemnity Agreements and confirm[s] and acknowledge[s] that the Indemnity Agreements remain in full force and effect as originally written.

The agreement defined the term “Indemnity Agreements” to include, *inter alia*, “the General Agreement of Indemnity dated October 23, 2000, executed by [URS] in favor of [Federal].”

The second trial began on May 8, 2006. This time, the jury awarded GIT approximately \$15,600,000 – nearly \$10,000,000 more than the 1996 judgment. At the conclusion of the second trial, GIT sought entry of judgment based on that verdict against

both URS and the surety. The district court determined that the bond remained valid and entered judgment against URS and the surety.

URS and the surety appealed portions of the district court's judgment, including the portion relating to the determination that the bond remained valid. URS advised DOE of its intent to appeal. This time, however, DOE did not consent to the appeal. After August 31, 2006, DOE paid no further premiums on the bond.

The Tenth Circuit ruled that the bond remained valid, but reduced the 2006 judgment by several million dollars. *See Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1085 (10th Cir. 2008). In January 2009, on remand, the district court issued a judgment against URS and the surety, awarding all costs to GIT. The judgment expressly stated that the costs awarded to GIT were "all found reasonable, allowable, and allocable pursuant to the Federal Acquisition Regulation[] (FAR)." The surety paid a portion of the judgment as required by the terms of the supersedeas bond, and URS compensated the surety for the payments.

Soon after the Tenth Circuit's decision in *Morrison Knudsen*, but before the district court entered final judgment, the parties reached an agreement "that Federal's portion of the August 2006 Judgment, plus post-judgment interest, may immediately be paid into the Registry of the Court." Accordingly, the district court ordered, as follows:

Federal is DIRECTED, on or before August 1, 2008, to deposit \$7,075,000, plus post-judgment interest at the rate of 5.09% through the date of deposit Interest as of August 1, 2008 shall have accrued in the sum of \$724,049.19, and will thereafter accrue at \$1,036.84 per day.

Federal, as URS's surety, paid \$7,799,049.19 into the registry of the court on August 1, 2008. In order to satisfy its obligations under the indemnity agreements with Federal, URS reimbursed Federal for these payments. On November 6, 2008, URS submitted an invoice for \$7,799.049.19 to Carin P. Boyd, the contracting officer responsible for the contract at the time.

The contracting officer denied URS's request for reimbursement in a letter dated January 11, 2010. The contracting officer determined that no specific clause in the contract authorized reimbursement of the indemnity obligation, and she rejected URS's contention that the general cost reimbursement provisions of the contract apply.

On January 22, 2010, URS submitted a certified claim seeking, among other things, "the amount URS has paid as a result of delays and damages caused by DOE on the Slick

Rock Project and . . . amounts incurred to procure the Bond and then indemnify URS's surety." By letter dated March 22, 2010, the contracting officer rejected the claim on two grounds. First, the contracting officer found that URS did not "identify" its claim of delay and damages that DOE allegedly caused it during the Slick Rock project. Second, she determined that URS had never presented delay or damages claims to the contracting officer prior to submitting the certified claim.

URS wrote to the contracting officer and explained that the mention of "damages and delays" in the certified claim referred to the appellate decision, the underlying judgment awarding GIT damages, and the cost incurred by URS that was ultimately used to partially satisfy the judgment. URS confirmed that the certified claim had not changed and sought payment of the amount originally billed through the November 6, 2008, invoice. URS requested that the contracting officer issue a final decision on the certified claim. The certified claim sought only the amount paid in order to satisfy the indemnity obligation, which did not encompass the entire judgment awarded against URS.

On October 18, 2010, the contracting officer issued a final decision denying the claim. She determined that the indemnity obligation could not be considered a contract cost, stating:

Prior to executing the January 24, 2002 indemnity agreement, [URS] was released from liability for the GIT judgment relating to the termination for default lawsuit against GIT during its bankruptcy. It was therefore no longer liable for any contract costs (including termination for convenience costs) associated with the GIT Subcontract. This also cuts off any potential DOE reimbursement for contract costs associated with that contract. [URS]'s decision to reaffirm the FIC [Federal Insurance Company] debt for its own bonding purposes was a decision it made to stay in business, not a cost incurred or related to the GIT Subcontract or the 1983 [Morrison-Knudsen] contract. All such potential costs were terminated by the bankruptcy proceedings. Reimbursement of [the contractor's] indemnity obligation to FIC for [URS] is therefore not allowable as a reimbursable cost under the 1983 [Morrison-Knudsen] contract and FAR Subpart 31.201-2.

URS timely filed its notice of appeal on January 10, 2011. We denied the Government's motion to dismiss on July 28, 2011. *See URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 11-2 BCA ¶ 34,815. The parties subsequently filed cross-motions for summary relief.

The contract includes many standard FAR clauses. Of relevance are the following: 32.201-1, Composition of Total Cost; 32.201-2, Determining Allowability;

31.201-3, Determining Reasonableness; 31.201-4, Determining Allocability; 31.204, Application of Principles and Procedures; 31.205-33, Professional and Consultant Service Costs; 31.205-47, Costs Related to Legal and Other Proceedings; and 52.244-2, Subcontracts Under Cost-Reimbursement and Letter Contracts.

Discussion

Summary relief is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment. *Id.* at 248. “When, as here, both parties have moved for summary relief, each party’s motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration.” *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398 (citations omitted).

In this case, we find that the material facts are uncontested. The dispositive issue here is a legal one – whether the cost of reimbursing URS for the amount paid pursuant to its indemnity obligation is a cost allowable under the terms of the DOE-URS contract. We conclude that it is.

FAR provisions incorporated in the contract set forth two primary requirements that must be satisfied before the Government may pay a contractor’s claimed cost. First, the cost must be allocable to the contract under which it is incurred. Second, the cost must be allowable. A cost is *allocable* to a given contract if there is a logical connection between the incurrence of the cost and the performance of the contract. *Boeing North American Inc. v. Roche*, 298 F.3d 1274, 1281 (Fed. Cir. 2002). Contractor costs are generally *allowable* upon consideration of five factors: reasonableness, allocability, cost accounting standards (CAS) accounting principles, the terms of the contract, and limitations included within FAR 31.2 (listing factors for determining allowability) -- in particular FAR 31.205, which governs specific categories of costs. *See* FAR 31.201-2; *see generally* FAR 31.205. Where neither the contract nor the FAR dictates the treatment of specific costs, the FAR provides that “[t]he determination of allowability shall be based on the principles and standards of [FAR 31.21] and the treatment of similar or related selected items.” FAR 31.204(c).

The Government contends, without clear explanation, that the costs incurred are not allocable to the contract at issue. However, the FAR states plainly that a cost is allocable to a contract if, among other things, it “[b]enefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received.” FAR 31.201-4(b). This means that a contractor must “show a nexus between the contractor’s cost and the

contractor's government work in order to allocate the cost to a government contract." *Boeing*, 298 F.3d at 1284. Here, the nexus between the cost for which URS seeks reimbursement and our contract is clear: the MK-GIT litigation and its associated costs arose directly from the MK-DOE contract. Accordingly, we conclude that the cost is allocable.

Next, we turn to the issue of whether the costs incurred are allowable. On this point, FAR 31.205-33 provides that most legal costs associated with defending a third-party lawsuit are allowable.⁴ As the Armed Services Board of Contract Appeals has explained:

[A]n ordinarily prudent person in the conduct of competitive business is often obliged to defend lawsuits brought by third-parties, some of which are frivolous and others of which have merit. In either event, the restraints or requirements imposed by generally-accepted sound business practices dictate that, except under the most extraordinary circumstances, a prudent businessman would incur legal expenses to defend a litigation and that such expenses are often the type generally recognized as ordinary and necessary for the conduct of a competitive business. Accordingly, legal expenses incurred in defending a civil litigation brought by a third-party, regardless of the outcome thereof, are *prima facie* reasonable and are allowable, unless shown to have been incurred unreasonably or reimbursement is expressly prohibited by an exclusionary cost principle.

Hirsch Tyler Co., ASBCA 20962, 76-2 BCA ¶ 12,075, at 57,985-86. Thus, legal defense and settlement costs are unallowable only when the FAR expressly disallows such costs, or if the costs were "similar or related" to unallowable costs, *i.e.*, when the costs resulted from

⁴ See also FAR 31.205-47, Costs related to legal and other proceedings:

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees) . . . are unallowable if the result is--

- (1) In a criminal proceeding, a conviction;
- (2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct.

litigation involving fraud or similar misconduct commenced by a government entity. Such is not the case here.

Rather, URS seeks to recover costs resulting from the lawsuit against GIT. The cost of defending against GIT's counterclaim for breach of contract, and appealing the adverse jury verdict, especially upon the direction of the Government, is allowable.

Next, we consider whether URS's claimed cost is reasonable under FAR 31.201-3. The record indicates that a predecessor of URS terminated GIT's subcontract for default after consulting with DOE and with DOE's approval. In addition, DOE approved the lawsuit against GIT and instructed URS to appeal the adverse judgment. Although a jury later determined that the decision to terminate GIT's subcontract breached the subcontract, there is nothing in the record, and the Government has not offered any evidence on this point, that the contractor acted unreasonably in deciding to terminate the subcontract or paid an excessive amount to pursue the case (including the acquisition of the bond). Therefore, URS's claim for reimbursement of the costs incurred in connection with the decision to appeal is reasonable. *See, e.g., Nolan Brothers, Inc. v. United States*, 437 F.2d 1371 (Ct. Cl. 1971).

The Government's other arguments as to why URS's claim must be denied can be summarized as follows: (1) DOE need not reimburse URS for the costs of the bond because the bankruptcy extinguished URS's personal liability to GIT; (2) URS's indemnity obligations are not contract costs of the DOE-MK contract because the indemnity obligations "were not entered into pursuant to the DOE-MK [] contract;" and (3) the *Severin* doctrine bars the appeal. We address each of the Government's arguments in turn.

(1) The Government argues that the bankruptcy discharged URS from personal liability to GIT for the amount of the judgment. This, the Government believes, ends URS's appeal. Because "the bankruptcy extinguished MK Ferguson's liability to GIT," the amount that URS paid Federal for the cost of the supersedeas bond "does not represent 'termination for convenience' costs under the MK-GIT subcontract and therefore is not an allowable cost under the DOE-MK UMTRA Contract."

This argument misses the point. In this appeal, URS seeks reimbursement only for the amount it was obligated to pay Federal, as surety, as part of its indemnity obligation. Because URS's indemnification obligation was not discharged during the bankruptcy, the bankruptcy does not, in any way, affect the outcome of the case.

The Government concedes that "[h]ad MK-Ferguson paid the judgment in accordance with the [first] district court decision, it could have sought reimbursement from DOE for the

judgement under the Subcontract termination for convenience clause under the UMTRA contract.” Rather than accepting the first judgment, and reimbursing URS, DOE instructed URS to appeal the judgment. As noted previously, DOE paid URS for the costs incurred throughout the appeal process, as well as those related to the second trial. For reasons unknown but not relevant to our decision, the Government decided to stop paying costs incurred related to the second appeal.

The evidence shows that the bankruptcy proceedings did not release URS’s indemnity obligations to Federal. Therefore, the Government’s argument on this point is rejected.

(2) On the issue of the indemnity agreements, the Government asserts that the cost of the supersedeas bond is not allowable under the contract. The Government claims that (a) URS’s failure to inform DOE that it had agreed to indemnify Federal for the costs of the supersedeas bond renders those costs unallowable under FAR 52.244-2(h), and (b) the Federal-URS indemnity agreements did not include the supersedeas bond at issue in this appeal, and thus, URS cannot claim the costs of the bond as allowable contractual costs. These arguments, however, are unsupported under the law.

“Generally, ‘[a] surety bond creates a three-party relationship, in which the surety becomes liable for the principal’s debt or duty to the third party obligee’” *National American Insurance Co. v. United States*, 498 F.3d 1301, 1304 (Fed. Cir. 2007) (quoting *Insurance Co. of the West v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001)). As the Supreme Court has explained, “[T]raditionally sureties compelled to pay debts for their principal have been deemed entitled to reimbursement even without a contractual promise.” *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 136-37 (1962); *see also id.* at 137 (“[T]here are few doctrines better established than that a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed.”).

In this case, the Government directed URS to appeal the adverse jury verdict; and, as explained above, the posting of a supersedeas bond was a prerequisite to the issuance of a stay of the judgment pending appeal.⁵ The Government’s contention that it was unaware that URS would be obligated to indemnify Federal, as surety, is implausible.

(3) The *Severin* doctrine arises from a United States Court of Claims case, *Severin v. United States*, 99 Ct. Cl. 435 (1943), which concerns the issue of whether a prime

⁵ Indeed, Federal Rule of Civil Procedure 62(d) requires appellants to secure a supersedeas bond in order to secure a stay of judgment pending appeal. *See* Fed. R. Civ. P. 62(d).

contractor could pursue a claim against the Government on behalf of a subcontractor. In *Severin*, the court held that the prime contractor could not pursue a subcontractor's claim against the Government when the prime contractor and the subcontractor had agreed to hold each other harmless for any damages caused by the Government. In order to pursue a subcontractor claim against the Government, the *Severin* court found that the contractor had to prove either that (a) it suffered actual damages from the Government's alleged breach, or (b) "that liability, though not yet satisfied by payment, might well constitute actual damages to [the contractor], and sustain [its] suit." 99 Ct. Cl. at 443. As this Board has explained, the *Severin* doctrine "relieves the Government from responsibility for a subcontractor's claim unless the prime contractor is also responsible to pay the subcontractor." *Hedlund Construction, Inc. v. Department of Agriculture*, CBCA 105, 08-1 BCA ¶33,798, at 167,317; see also *James Reeves Contractor, Inc. v. United States*, 31 Fed. Cl. 712, 714 (1994) ("The prime contractor's suit is thus based on its liability to the sub for the government's breach.").

The Government argues that, in reality, URS is attempting to bring a claim against the Government on behalf of GIT. Because, it asserts, URS has been released from liability to GIT through the bankruptcy proceedings, under *Severin*, URS cannot bring a claim against the Government on behalf of GIT. As noted previously, however, URS seeks reimbursement for its indemnity obligation. This claim is not a subcontractor claim. Because URS does not raise a subcontractor claim, the *Severin* doctrine is inapplicable.

Decision

For the foregoing reasons, appellant's motion for summary relief is granted and respondent's motion for summary relief is denied. The appeal is **GRANTED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge