UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY RELIEF DENIED: November 28, 2007

CBCA 19, 864

ANGEL MENENDEZ ENVIRONMENTAL SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Laurence Schor and Dennis C. Ehlers of McManus, Schor, Asmar & Darden, LLP, Washington, DC, counsel for Appellant.

Stacey North-Willis, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **SHERIDAN**, and **WALTERS**.

WALTERS, Board Judge.

On August 21, 2007, appellant, Angel Menendez Environmental Services, Inc. (AMES), filed a motion for partial summary relief (Motion) together with a statement of undisputed facts (Appellant's Statement), seeking partial summary relief in the amount of $353,965.38 for work AMES allegedly performed for or under the subject contract prior to the contract's termination for default. Respondent, the Department of Veterans Affairs (VA), on September 21, 2007, filed an opposition to the motion (Opposition) together with a statement of genuine issues (Respondent's Statement), and, on October 12, 2007, appellant

filed a reply to the Opposition (Reply). Thereafter, the Board requested the submission of supplemental briefs on the recoverability of the cost elements being claimed. Appellant filed its supplemental brief (Supplemental Brief) on October 29, 2007, and respondent, in turn, filed its reply to the supplemental brief (Supplemental Reply) on November 13, 2007. The motion has been rendered moot as to one claimed cost item, by reason of the parties' settlement of the claim for that item. For the reasons set forth below, as to the balance of appellant's claimed cost items, the motion is denied.

Background

AMES and VA were parties to contract V101DC0211 (contract) for the design and construction of the New Mental Health Outpatient Facility Building at the VA Medical Center, Tucson, Arizona (a so-called "design-build" contract). VA awarded this contract to AMES on September 29, 2005, in the amount of $11,200,000. The contract required that AMES provide performance and payment bonds, and AMES submitted such bonds to the VA on or about November 15, 2005. The bonds were issued by Edmund C. Scarborough, an individual surety.

VA took several months to review and consider the bonds and ultimately issued a cure notice to AMES by letter dated March 24, 2006, contending that Scarborough's bonds did not meet the requirements of the Federal Acquisition Regulation (FAR) and threatening to terminate the contract for default unless replacement bonds were furnished. AMES submitted a response to the cure notice, by letter dated March 27, 2006, in which AMES asserted the validity and adequacy of the bonds. Notwithstanding AMES' response, VA terminated the contract for default based on alleged bond deficiency, by letter dated April 7, 2006, received by AMES on or about April 11, 2006. Thereafter, AMES filed an appeal of the default termination to one of this Board's predecessors, the Department of Veterans Affairs Board of Contract Appeals (VABCA), and the VABCA docketed that appeal as VABCA 7592. Subsequent to January 6, 2007, when the VABCA along with other federal civilian agency boards of contract appeals was consolidated into this Board, the matter was docketed as CBCA 19.

On August 18, 2006, AMES also submitted to the VA contracting officer a certified claim under the contract's Termination for the Convenience of the Government clause, in the total amount of $747,278.54. Motion, Exhibit 7. That claim included the $392,000 in premiums allegedly paid by AMES to Mr. Scarborough for the bonds, travel costs of $1313.16 allegedly incurred by AMES to attend a meeting with VA regarding the bonds, plus a total of $353,965.38 in costs purportedly expended by AMES for or under the contract up until the time of its termination. On July 31, 2007, appellant submitted an appeal to this Board by reason of the contracting officer's failure to issue a decision on the convenience

termination claim. The second appeal was docketed as CBCA 864 and was consolidated by the Board with CBCA 19 for purposes of litigation and adjudication.

Neither the propriety of the default termination nor the claimed bond premiums of $392,000 are addressed by the instant motion. Also excluded from the costs sought under the motion are the aforesaid $1313.16 in travel costs associated with a meeting with VA about the bonds. The $353,965.38 being sought by AMES in the current motion, i.e., the remainder of the costs under the convenience termination claim, encompasses the following elements: (1) AMES' travel costs for attending the pre-bid meeting in Tucson, Arizona ($1107.69); (2) AMES' travel costs relating to its travel to Tucson for "Project negotiations" with VA ($1331.67); (3) costs associated with ordering plans and specifications from VA ($4807.50); (4) costs associated with travel to Tucson for a meeting with appellant's subcontractors and the costs of finalizing subcontracts with Qualified Mechanical and Castro Electric ($2179.07); (5) costs associated with the conduct of mandatory post-award partnering and pre-construction meetings, including AMES' own travel costs as well as the costs it incurred for securing hotel space and a professional facilitator ($11,704.22); (6) costs of a specified Occupational Safety and Health Administration (OSHA) course taken by appellant's Mr. Jack Beckman ($375); (7) salary and expenses paid to Mr. Beckman after contract award ($13,877.60); (8) costs associated with geotechnical work at the site (additional test borings) ($2900); (9) costs incurred by AMES' subcontractor (Castro) and architect (Heery International), including costs related to design and value engineering ($65,972.98); (10) costs paid to a critical path method (CPM) consultant, GWC & Associates ($1500); (11) estimated costs for claims and legal consultants and experts ($100,000); and (12) allocated overhead at 13.40% ($80,275.23) and profit at 10% ($67,934.41). Motion, Exhibit 7.

As to AMES' claim for performing additional test borings at the jobsite, VA, by letter dated December 16, 2005, had formally authorized AMES to perform that boring work, and the parties agreed to a price of $2900 for this additional work. *See* Motion, Exhibit 3, Exhibit 7 at 4, Exhibit 8; Respondent's Statement, ¶ 2. VA is not disputing either entitlement or the amount being claimed for this item. Also, VA does not contest AMES' entitlement to *a portion of* the amounts it may have expended in connection with the post-award partnering and pre-construction meetings. However, VA does not admit liability for any specific cost elements or amounts.

From transcript excerpts of the deposition of the VA contracting officer offered by appellant with its August 21, 2007, motion, it appears that the contracting officer has acknowledged that she was aware AMES was performing *some* contract work, even though she had not issued to the contractor a notice to proceed (other than for the additional test boring work). In addition, the contracting officer, during her deposition, agreed that AMES

may be entitled to recover for its reasonable costs and that she had been expecting a claim for such costs, albeit not in the amount that AMES ultimately submitted:

> Q. So it was something they're entitled to payment for?
>
> **A. Yes, if we let it -- since we let it go on.**
>
> Q. And you agree that you let it go on.
>
> **A. Yes.**
>
> Q. If you knew that they were performing work and you thought it was at their own risk, did it ever occur to you that you needed to let them know this?
>
> **A. No. I never put them on notice.**
>
> Q. Did it occur to you that you needed to let them know it was at their own risk?
>
> **A. Yes.**
>
> Q. And why do you let them know?
>
> **A. Because if you don't let them know it would be what is considered a constructive acceptance.**
>
> Q. Did you constructively accept?
>
> **A. In the manner that it was treated, yes.**
>
> . . . .
>
> Q. Now, do you feel that the work they did, that they're entitled to payment for that?
>
> **A. Yes.**
>
> Q. So you were not surprised when you got their claim?

A. I was surprised at the amount.

Q. But not the fact of the claim?

A. Right.

Q. Do you believe they should get paid for that work?

A. They should be paid for whatever they're entitled to.

Motion, Exhibit 2 (Deposition of Contracting Officer, Maria Pizarro (April 10, 2007)) at 251, 280.

Although VA advises that, subsequent to the instant termination, it awarded a reprocurement contract to complete the project, it has yet to assess excess reprocurement costs against AMES. The reprocurement contract, according to VA, is scheduled to be completed by April 27, 2008. Supplemental Reply at 13; *id.*, Exhibit 2 (Declaration of Acting Senior Contracting Officer, Chris Kyrgos (November 13, 2007)), ¶ 3.

Discussion

Concerning motions for summary relief, we held recently:

> Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the nonmovant after a hearing. *Fred M. Lyda v. General Services Administration*, CBCA 493 (July 17, 2007); *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284.

George P. Gobble v. General Services Administration, CBCA 528, 07-2 BCA ¶ 33,675, at 166,734.

Here, the parties are in complete agreement as to appellant's performance of additional test borings and as to the amount due. In its supplemental reply, VA states, unequivocally:

> Respondent has already agreed to pay the $2900 sought by Appellant for this item. The contracting officer clearly authorized this work and Appellant is entitled to be compensated for it.

Supplemental Reply at 11. Accordingly, in view of the parties' settlement as to both entitlement and quantum, appellant's motion has been mooted for this one cost item.
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Also, there is no dispute that appellant arranged for and attended mandatory post-award preconstruction and partnering meetings with VA contracting officials on two consecutive days in December 2005. *See* Response, Exhibit 6, ¶ 3. As noted above, with regard to the meetings, AMES is seeking a total of $11,704.22, to cover its own travel costs as well as the costs it incurred for securing hotel space and the provision of a professional facilitator. *See* Motion, Exhibit 7 at 3, ¶ 5. As also stated above, VA takes no issue with AMES' entitlement to *a portion of* the claimed costs. Nevertheless, VA does not concede liability for either the specific cost elements or the amounts being sought, and it argues that, based on the language of the contract, AMES' entitlement would be only to one-half of whatever costs the parties may eventually agree upon:

> Appellant seeks approximately $11,000 for costs associated with the Partnering Meetings. Since the Contracting Officer required Appellant's attendance at these meetings, Respondent agrees that Appellant is due some compensation for this category of costs. Contract Section 00101 at paragraph 8(c) provides that **"[a]ny cost associated with effectuating this partnership will be agreed to by both parties and will be shared equally with no change in contract price."** Respondent submits that Appellant is entitled to be compensated for one-half of the costs that are agreed to by the parties for the Partnering sessions.

Supplemental Reply at 10 (emphasis added). In contrast with AMES' claim for test boring work, the parties have presented no evidence that they have discussed, let alone agreed upon, any of the costs associated with the December 2005 pre-construction and partnering meetings. Furthermore, the Board cannot say, based on the contract language, that AMES would be entitled, as a matter of law, to recovery for all claimed elements of its meeting

related costs. Indeed, the contract language in question is ambiguous, i.e., it would allow for more than one reasonable interpretation. More specifically, since both parties would have expended travel costs to bring their representatives to the meetings, the intent of the contract language in question may well have been for each party to bear its own travel costs and only to share equally the costs that pertained to all attendees, e.g., the hotel conference room rental, the fees and expenses of bringing in a facilitator, expenses for copying of materials, etc. Alternatively, the language could be interpreted to mean that all costs incurred by both parties, to the extent reasonable, should be added together and then shared equally. In any event, there are genuine issues of material fact regarding the categories and amounts of meeting-related costs that the Board will have to address through a hearing and that it cannot resolve by way of summary relief.

As to the remainder of the costs sought in conjunction with appellant's motion, appellant's claims to those costs are disputed by VA based, in most instances, on arguments that the work preceded a government notice to proceed and that the work was accomplished purportedly without VA awareness. Appellant, arguing that the requirement of a notice to proceed had been effectively waived, relies heavily on the above-quoted deposition testimony of the contracting officer to the effect that VA knew the contractor was performing "work" and permitted such "work" to "go on" without putting AMES on notice that it was performing at its own risk. *See* Appellant's Statement, ¶ 24; Motion, Exhibit 2 at 251. On this basis, the contracting officer, during her deposition, opined that VA had constructively accepted such work. Motion, Exhibit 2 at 251. The contracting officer further testified that she had expected a claim from AMES for such work, albeit not in as large an amount as was ultimately presented. *Id.* at 280.

The contracting officer's deposition testimony did not clearly identify which of the claimed items of work she had in mind when she spoke of her awareness of "work" being performed by AMES. VA, as part of its opposition to the motion, perhaps in an attempt to clarify that testimony, submitted an affidavit of the contracting officer containing the following statements:

> 5. Aside from the bore testing, I did not know that AMES thought it was performing contract work for which it intended to be paid separately. I was not aware of any design work being completed by AMES or its subcontractors, nor should any design work have been done prior to the issuance of the notice to proceed. Furthermore, at the Partnering Meeting, representatives of AMES indicated that no design work could begin until the additional bore testing was completed.

> 6. I told AMES at the Pre-Con[struction] Meeting that the notice to proceed would not be issued until my review of the performance and payment bonds was complete.

Opposition, Exhibit 6. Even with this affidavit, the record still is insufficiently clear as to (1) what specific items of claimed work the contracting officer considers to be the "design work" she had no knowledge of as it allegedly was being performed; or (2) whether there were other items of claimed work she considers "non-design" work that she was actually aware of as it was being performed by AMES, and for which she would allow compensation. Accordingly, the Board cannot conclude that there is an absence of genuine issues of material fact regarding government awareness and AMES' authority to perform the claimed items of work.

Moreover, as the Board had indicated to the parties when it requested supplemental briefing, even if the Board were to accept that AMES had accomplished all the work with full authority, there still remains the question of whether particular costs are legally recoverable under a contract that has been terminated for default. Unlike the situation presented by a convenience termination, where a contractor may be entitled to recover for all reasonable, allowable, and allocable costs expended in performance, plus a reasonable profit thereon, when a contract has been properly terminated for default, a contractor's recovery is limited to those costs that are associated with "work in place" that the Government has available to it for use in completing a terminated project. Further, where there has been a default termination, a contractor's recovery for "work in place" may be offset by any excess reprocurement costs that the Government may incur. In this regard, another of our predecessor boards, the General Services Administration Board of Contract Appeals (GSBCA), had the following to say:

> [W]here a construction contract is terminated for default the contractor is entitled to payment for the value of the work in place at the time of termination. However, if the amount remaining of the contract price is insufficient to cover the respondent's cost of completing the contract, the payment due the contractor is reduced by the excess amount. *J.G. Enterprises, Inc.*, ASBCA No. 27150, 83-2 BCA ¶ 16,808, at 83,543.

Sunsav, Inc., GSBCA 7523-COM, *et al.*, 86-3 BCA ¶ 19,290, at 97,548. Here, because appellant's motion does not address the issue of the propriety of the default termination or call for the Board to make a summary finding that would convert that termination to one for the Government's convenience, we must analyze each of the elements of claimed cost in the

context of a default termination and in terms of whether the cost element would qualify as "work in place."

AMES' travel costs for attending the pre-bid meeting in Tucson, Arizona ($1107.69)

AMES has failed to explain how these pre-bid travel costs can qualify as "work in place" that could benefit the Government in completing the terminated contract, and the Board can see no legal basis for allowing their recovery in connection with a contract that has been terminated for default. Even if these costs were being considered as part of a settlement of a convenience termination, bid and proposal related costs such as these would not be recoverable. *Barsh Company,* PSBCA 4481, 00-2 BCA ¶ 30,917; *Orbas & Associates,* ASBCA 50467, 97-2 BCA ¶ 29,107.

AMES' travel costs relating to its travel to Tucson for "project negotiations" with VA ($1331.67)

Again, as bid and proposal related costs, there would be no legal basis for allowing their recovery, especially in connection with a contract terminated for default. The costs cannot qualify as "work in place."

Costs associated with ordering plans and specifications from VA; pre-award estimating costs ($4807.50)

Although AMES might be able to recover the costs of ordering plans and specifications ($175) as "work in place," were it to show that it turned over its copies of the plans and specifications to VA for use by the reprocurement contractor, no such evidence has been advanced here. The costs it allegedly incurred in advance of the contract award, for its Mr. Jack Beckman to do "estimating" ($4632.50) (Motion, Exhibit 7 at 2), purportedly for purposes of preparing AMES' project bid, would clearly be non-recoverable, either as "work in place" or otherwise, as previously explained. *Barsh*; *Orbas*; *see also George E. Jensen Contracting, Inc.*, GSBCA 3260, 71-1 BCA ¶ 8850.

Costs associated with travel to Tucson for a meeting with appellant's subcontractors and the costs of finalizing subcontracts with Qualified Mechanical and Castro Electric ($2179.07)

These travel costs were incurred by AMES primarily in November 2005 (*see* Motion, Exhibit 7 at 2), i.e., subsequent to contract award, and might be recoverable as part of a

termination for convenience settlement, since they were incurred in furtherance of AMES' performance of the contract prior to termination. Nevertheless, in conjunction with the instant motion, the claim must be addressed as being under a contract that has been terminated for default -- one where construction had not commenced and where it is presently unclear as to whether post-award design work by either AMES or the subcontractors in question yielded deliverables that benefited VA in terms of its reprocurement (*see* discussion of subcontractor related costs below). Under these circumstances, AMES has not as yet established such costs as "work in place" for purposes of this motion.

Costs associated with the conduct of mandatory post-award partnering and pre-construction meetings, including AMES' own travel costs as well as the costs it incurred for securing hotel space and a professional facilitator ($11,704.22)

Aside from there being outstanding issues of material fact yet to resolve relating to the meeting costs, and although VA has conceded AMES' entitlement to recover at least a portion of those costs, the claimed costs would not benefit completion of the reprocurement contract and would not qualify as "work in place." Thus, their recovery would only be available in the event the default termination were eventually overturned and converted to one for the Government's convenience.

Costs of a specified OSHA course taken by appellant's Mr. Jack Beckman ($375)

VA has questioned whether Mr. Beckman actually attended the course (*see* Supplemental Reply at 10), thus indicating a dispute as to a material fact pertaining to this claim element. In addition, the Board cannot see how Mr. Beckman's course attendance could possibly qualify as "work in place" or serve to benefit completion of the reprocurement contract. Accordingly, relief for this item would not be available unless the default termination is overturned.

Salary and expenses paid to Mr. Beckman after contract award ($13,877.60)

These costs may well be recoverable, in whole or in part, as part of a convenience termination settlement. However, in terms of establishing these costs as "work in place," AMES has not provided any detail on what Mr. Beckman was doing after contract award that would have benefited completion of the reprocurement contract.

Further, in terms of the post-award salary and expenses claimed for Mr. Beckman, as VA correctly observes, AMES has not explained why some of the costs being claimed were incurred as late as November 2006, months after AMES' contract had been terminated.

There clearly are issues of material fact that require further development. In short, then, for purposes of the instant motion, summary relief cannot be granted for this cost element.

Costs associated with geotechnical work at the site (additional test borings) ($2900)

The parties achieved a complete settlement for this one item, thus mooting it for purposes of the motion.

Costs incurred by AMES' subcontractor (Castro) and architect (Heery International), including costs related to design and value engineering ($65,972.98)

AMES indicates that the original amount sought for this cost element ($65,972.98) is to be increased by $36,612 for costs allegedly expended for another subcontractor, Qualified Mechanical. *See* Supplemental Brief, Exhibit 9. Also, AMES states that it expects the submission of an amended invoice from its architect, Heery International. Supplemental Brief at 16. That amended invoice has yet to be submitted.

AMES has furnished, as exhibits to its supplemental brief, modified computer-aided design (CAD) drawings and other documents relating to "value engineering" proposals on which AMES' subcontractors allegedly worked, which purportedly were ultimately used by the Government to develop specifications and requirements for the reprocurement contract. VA does not contest the authenticity of those exhibits or the fact that they were used in conjunction with the reprocurement. Still, neither the convenience termination claim, nor the motion or subsequent briefs from appellant, distinguish adequately design work done prior to contract award from design work that post-dated contract award or identify the hours and dollars associated with each.

For example, at page 5 of its supplemental brief, AMES states: "Attached as Exhibits 1 to 6 are various files of documents including CAD drawings produced by AMES's subcontractors **between award of the Contract and the end of January 2006** . . . ." Supplemental Brief at 5 (emphasis added). On page 15 of that same brief, AMES states:

> With respect to the value engineering design, AMES submitted value engineering proposals generated by its mechanical and electrical subcontractors. Heery [AMES' architectural subcontractor] reviewed the VE [value engineering] proposals from a design standpoint. The VA accepted AMES's VE proposals and incorporated them into Amendment No. 003 (Exhibit 8), pp. 6-7, items 6, 7, 8 and 11a. Gil Bakshi [AMES' vice president] testified that VA took AMES' VE work and incorporated it into its new design for the Project. AMES has provided certain of the drawings for the reprocurement contract and compared them against the VA's original drawings to

> demonstrate how AMES's VE proposals were incorporated into the project. *See* Exhibits 1-6 hereto.

Id. at 15. This statement would seem to indicate that the VE proposals and related drawings were prepared **prior to the date of contract award** (September 29, 2005) and were adopted and incorporated by VA into its request for proposals by amendment no. 003, dated September 16, 2005. *See id.*, Exhibit 8.

Putting aside the issue raised by VA regarding whether AMES had submitted proposals that adhered to the contract's requirements for value engineering proposals (*see* Supplemental Reply at 2 (quoting from contract Specification Section 01001, Paragraph 1.48 VALUE ENGINEERING (FAR 52.248-3) (FEB 2000))), to the extent the proposals in question were generated and submitted by AMES in conjunction with the pre-award contract negotiation process, the costs involved would not be recoverable under the contract as pre-contract costs. Under the FAR, pre-contract costs are recoverable only if: (1) they were incurred "directly pursuant to the negotiation" and in anticipation of contract award; (2) their incurrence was necessary to comply with the proposed contract delivery schedule; and (3) they would have been allowable if incurred after the date of contract. 48 CFR 31.205-32 (2004) (FAR 31.205-32); *AT&T Technologies, Inc.*, DOT BCA 2007, 89-3 BCA ¶ 22,104, at 111,151.

Here, it appears that the proposals were needed in order to reduce the project's cost so as to fit within VA's budget; that is, they were needed not "in anticipation of contract award," but rather so as to secure an award. *See* Motion at 4; Appellant's Statement ¶ 7. There is no evidence that AMES and VA ever discussed the cost of developing the "VE proposals" as part of the contract negotiation or "directly pursuant to the negotiation." In this latter regard, AMES has not demonstrated that VA was "unambiguously . . . informed of the extent and costs of the proposed work" before AMES proceeded with it. *See Integrated Logistics Support Systems International, Inc. v. United States*, 47 Fed. Cl. 248, 256 (2000). Also, there is no indication that the pre-contract work was necessary in order for AMES to meet a specified completion date. Therefore, any pre-contract costs incurred to prepare the "VE proposals" would not be compensable under the contract, as part of a convenience termination settlement, or otherwise. Again, because there remains substantial uncertainty as to the extent and amount of such costs that post-dated the contract award and that relate to design deliverables that were incorporated as part of the reprocurement contract specifications and drawings, the Board cannot conclude that there are no genuine issues of material fact to be tried as to this claim element.

AMES also raises, as an alternative theory of recovery for such design and "VE proposal" costs, the possibility of quasi-contractual relief, either *quantum meruit* or *quantum valebant*, arguing that VA "cannot simply walk away where it has taken a role in the ordering of the services and where it has retained the benefit [i.e., by reason of the product being incorporated into the requirements for the reprocurement contract]." Appellant's Supplemental Brief at 16-17 (citing *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118, 07-1 BCA ¶ 33,556). Such recovery would have to arise from an implied-in-fact contract, since this Board would not have jurisdiction under the Contract Disputes Act over an implied-at-law contract. *See Means Co.,* AGBCA 95-182-1, 95-2 BCA ¶ 27,837; *see also Garrett v. United States,* 78 Fed. Cl. 668 (2007). VA argues that such a theory must fail because "the existence of an express contract precludes the existence of an implied contract dealing with the same subject." Reply to Appellant's Supplemental Brief at 14 (quoting from *Optimal Data Corp.,* NASA BCA 381-2, 85-1 BCA ¶ 17,760 (1984)). In terms of any pre-award design work AMES may have done at the behest of VA, to modify or reduce the scope of the original design so as to allow for the project to be awarded within VA's budget, the Board does not find such work to be have been part of the subject matter of the parties' express contract here. Theoretically, VA could have entered into a separate contract (express or implied) with AMES or another contractor to perform such design modification or reduction work. Nevertheless, as was observed by one of our predecessor boards, the Department of Housing and Urban Development Board of Contract Appeals (HUD BCA), in order to establish the existence of an implied-in-fact contract with the Government, a contractor must first clear a number of significant hurdles:

> It is well established the "[t]he general requirements for a binding contract with the United States are identical for both express and implied contracts." *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). Proof of the existence of an implied-in-fact contract requires showing the following: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government's representative to bind the government." *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1265 (Fed. Cir. 2005).

Guilltone Properties, Inc., HUD BCA 02-C-103-C4, 06-1 BCA ¶ 33,249, at 164,785. Thus, AMES bears a heavy burden of proof, if it wishes to establish the existence of a separate implied-in-fact contract that would allow for recovery of its pre-award design work. AMES has not met this burden in connection with its current motion for partial summary relief, which, as noted previously, requires that the Board draw all reasonable inferences in favor of the nonmovant. *George P. Gobble*, 07-2 BCA at 166,734.

Costs paid to a critical path method (CPM) consultant, GWC & Associates ($1500)

AMES does not provide detail on any post-award work performed by its CPM consultant, other than to state that the consultant was in attendance at the December 2005 partnering and pre-construction meetings. Supplemental Brief at 14. Because AMES has not cited to any work product created by the CPM consultant that was of benefit to VA or that was used by VA in connection with the reprocurement contract, this cost element cannot be said to qualify as compensable "work in place" that is deserving of summary relief.

Estimated costs for claims and legal consultants and experts ($100,000)

As with the CPM consultant costs, the estimated costs AMES seeks for its claims and legal consultants cannot be considered as relating to "work in place" compensable in the context of a default termination. Of course, should the termination be converted to one for the Government's convenience, reasonable costs of attorneys or other professionals in assembling and presenting a convenience termination proposal are allowable costs. FAR 31.205-42(g)(1)(i)(A).

Allocated overhead at 13.40% ($80,275.23) and profit at 10% ($67,934.41)

The amounts due AMES for allocated overhead and profit would, of course, depend on the base costs it can establish are due, either for "work in place," should the termination for default be upheld, or for a convenience termination, should it be overturned. VA points to a provision of VA Acquisition Regulation (VAAR) incorporated into the instant contract (CHANGES -- SUPPLEMENT (VAAR 852.236-88)) that limits markup percentages to be applied for work undertaken under either the standard Changes clause (FAR 52.243-4) or the Differing Site Conditions clause (FAR 52.236-2), and argues that the provision should apply in this case. *See Allen Ballew General Contractors, Inc.*, VABCA 6987, *et al.*, 07-1 BCA ¶ 33,465, at 165,896 (2006). Notably, VAAR part 849, Termination of Contracts, does not include such a markup limitation provision for termination settlements.

Finally, as to the issue of any offset for excess reprocurement costs, because the reprocurement contract is not scheduled to be completed until April 27, 2008, VA has not yet determined whether any excess reprocurement costs will be incurred. Supplemental Reply at 13; *id.*, Exhibit 2, ¶ 3. The parties are at odds as to whether VA has the right ultimately to assess any such excess costs. Compare Supplemental Reply at 13 with Supplemental Brief at 8. Because the matter is not before the Board at present, the Board declines to comment on whether excess reprocurement costs may be assessed. Moreover, should appellant prevail in its appeal of the default termination, the matter of excess reprocurement costs would be obviated.

Decision

Other than for its claim of $2900 for additional test borings, which has been rendered moot by reason of the parties' settlement, appellant's motion for partial summary relief is **DENIED**.

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RICHARD C. WALTERS
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
PATRICIA J. SHERIDAN
Board Judge