



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: November 8, 2016

CBCA 4985

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Kenneth B. Weckstein and Shlomo D. Katz of Brown Rudnick LLP, Washington, DC; and Stanley J. Bensussen, General Counsel of Mission Support Alliance, LLC, Richland, WA, counsel for Appellant.

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

Before Board Judges **SOMERS**, **WALTERS**, and **LESTER**.

SOMERS, Board Judge.

This matter comes before the Board on cross-motions for summary relief. The issue is whether certain costs are allowable under the terms of the contract. For the reasons explained below, we conclude that the costs are not allowable. Accordingly, we deny appellant's motion for summary relief, grant the Government's motion for summary relief, and deny the appeal.

Background

Beginning in 1940 with the Manhattan Project, Hanford, Washington (the Hanford Site) played a pivotal role in the nation's defense through the production of nuclear materials. With the signing of the Hanford Federal Facility Agreement and Consent Order, the Department of Energy (DOE) is engaged in the world's largest environmental cleanup project at the Hanford Site. In support of this project, in April 2009, DOE and Mission Support Alliance, LLC (MSA) entered into a performance-based cost-plus-award-fee contract, contract no. DE-AC06-09RL14728 (the Mission Support Contract, MSC, or contract), in the amount of \$3,059,369,580.¹

Under this contract, MSA provides mission support services, including furnishing personnel, equipment, material, supplies, and services. MSA does "all things necessary for, or incident to, providing its best efforts to manage, operate, and deliver mission support services." The statement of work provides that MSA will accomplish the following:

The Contractor shall directly provide time-phased ready-to-serve capability to all Hanford Site environmental cleanup missions, including protective forces, physical security systems, information security, personnel security, nuclear materials control and accountability (MC&A), cyber-security, program management, Hazardous Materials Management and Emergency Response (HAMMER) facility operations, site-specific safety training, fire and emergency response services, emergency operations, maintenance of a selected set of Hanford Site safety standards, radiological assistance program (RAP) operations, environmental regulatory management, and public safety and resource protection. These services are integral to the Hanford Site environmental cleanup mission.

The contract included various clauses from the Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR). The regulations relevant to this appeal are identified below.

¹ MSA is a joint venture of Lockheed Martin Integrated Technology, LLC; Jacobs Engineering Group Inc.; and Centerra Group, LLC (formerly Wackenhut Services, Inc.). DOE initially awarded the contract to MSA on September 3, 2008, following a competitive procurement under Federal Acquisition Regulation (FAR) part 15. Following resolution of a bid protest to the Government Accountability Office, on April 28, 2009, DOE awarded the contract to MSA.

Relevant Contract Clauses

FAR 52.216-7/DEAR 952.216-7, Allowable Cost and Payment (Dec 2002), Alternate I,² provided that “[t]he Government will make payments to the Contractor . . . in amounts determined to be allowable by the Contracting Officer in accordance with [FAR] subpart 31.2 in effect on the date of this contract and the terms of this contract.” Likewise, section H.24(j) of the contract required the contracting officer to “determine allowable costs in accordance with the [FAR] Subpart 31.2 and [DEAR] Part 931, *Contract Cost Principles and Procedures* in effect on the date of this Contract and other provisions of this Contract.”

In turn, FAR subpart 31.2 defined the allowability and allocability³ of costs incurred in cost reimbursement contracts. FAR 31.201-2 lists the factors to consider in determining allowability:

- (a) The factors to be considered in determining whether a cost is allowable include the following:
 - (1) Reasonableness.
 - (2) Allocability.
 - (3) Standards promulgated by the CAS [Cost Accounting Standards] Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.
 - (4) Terms of the contract.
 - (5) Any limitations set forth in this subpart.

With respect to reasonableness, the FAR provides, in part:

31.201-3 Determining reasonableness

- (a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. . . . No presumption of reasonableness shall be attached to the incurrence of costs by a contract. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer’s representative, the burden of proof shall be upon the contractor to establish that such a cost is reasonable.

² The contract refers to “Alternate II” of the clause. However, in April 2009, the year the parties entered into the contract, Alternate II of the clause did not exist.

³ Allocability of these costs is not at issue in this appeal.

(b) What is reasonable depends upon a variety of considerations and circumstances, including –

(1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or contract performance;

(2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;

(3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and

(4) Any significant deviations from the contractor's accepted practice.

Also included is DEAR 952.231-71 (48 CFR 952.231-71), Insurance – Litigation and Claims (Jul 2013), which states:

(a) The contractor must comply with 10 CFR part 719, contractor Legal Management Requirements, if applicable.

(b) (1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to worker's compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in the form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) The contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the

contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

- (d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed –

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms and approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or the limitation of funds clause of this contract.

- (e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds to meet deficiencies.

- (f) (1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but not be limited to litigation costs, counsel fees, judgment and settlements –

(I) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 970.31, as supplemented by 48 CFR part 931;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer;

....

- (h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

The contract included or incorporated by reference other standard FAR and DEAR clauses, including FAR 52.250-1, Indemnification Under Public Law 85-804 (APR 1984) Alternate I (APR 1984) (Deviation), and DEAR 952.250-70, Nuclear Hazards Indemnity Agreement (Jun 1996).

MSA Applies for Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) Designation

On August 5, 2009, subsequent to starting performance on the contract,⁴ MSA submitted its application to the Department of Homeland Security (DHS) for designation as a seller of a Qualified Anti-Terrorism Technology (QATT)⁵ pursuant to the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act), 6 U.S.C. §§ 441-444.⁶ Before submitting this application, MSA employees recognized in several internal e-mail

⁴ Actually, a year before it submitted its application in August 2009, and shortly before DOE's original award of the contract to MSA, MSA had submitted an application to DHS for SAFETY Act designation. MSA withdrew that application pending resolution of a bid protest.

⁵ FAR Subpart 50.2 implements the SAFETY Act liability protections "to promote development and use of anti-terrorism technologies." FAR 50.201 defines QATT as "any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology."

⁶ As noted in FAR 50.203, Congress enacted the SAFETY Act "to . . . provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain."

messages that the contract did not require MSA to have liability insurance, that the bid was “not conditioned on getting SAFETY Act designation,” and that the cost of the premium for such insurance was not likely to be an allowable cost under the contract. In fact, MSA did not discuss its plan to apply for SAFETY Act designation with the contracting officer either prior to bidding on the contract or after contract award.

In its DHS application, MSA, confirming that DOE had not approved reimbursement for SAFETY Act insurance, stated:

MSA intends to obtain insurance for the Technology that is in an amount, at a cost, and on terms and conditions that the DOE customer has approved under the Contract Also, the U.S. government is providing two forms of financial protection under the Contract to cover third-party losses resulting from both nuclear and non-nuclear related incidents. . . . The DOE-approved insurance coverage and government liability protection under the Contract taken together are comparable to – if not in excess of – insurance for the technology that would be available at a reasonable cost to satisfy compensable liability claims arising out of an act of terrorism in accordance with SAFETY Act requirements. . . . Further to the above, any such insurance would be duplicative of other risk management/financial protection already provided for by the U.S. government customer (DOE). **Moreover, under the terms of the Contract, the cost of any liability insurance additional to the DOE-approved covered . . . is not an allowable cost of performance or reimbursable to MSA.** Accordingly, even if it is available on the world market, MSA [sic] has concluded that the cost of additional liability insurance that is not reimbursable [sic] to MSA under the Contract is a cost that would unreasonably distort the sales (or Contract) price of the Technology.

. . . .

The only insurance that the DOE customer has approved under the Contract is the \$5 million retroactively-rated insurance policy . . . Under DEAR 952.231-71, the cost of such insurance – \$___ – and claims in excess of \$5 million are [sic] reimbursable [sic] to MSA. **Costs associated with any other insurance coverage is not reimbursable** [sic].

(Emphasis added.) Likewise, in a “talking paper” to the MSA board of directors on the SAFETY Act, employees indicated that if DHS requires MSA to have liability insurance, the cost of that insurance may not be allowable.

While MSA's application was pending, MSA continued to examine the allowability of the SAFETY Act liability insurance premiums. It asked a DOE subcontractor whether "DOE Sandia [had] determined insurance premium costs [to be] allowable." In response, a Sandia employee stated that "insurance premiums that are Sandia specific (workers compensation, auto, liability, bonds for self insured products, etc.) are paid by the Sandia corporation. All other coverage that is provided by Lockheed is not allowable. "

Advance Understanding on Costs Did Not Include SAFETY Act Insurance

Section H.14 of the contract required DOE and MSA to "reach advance understandings regarding certain costs" under the contract within sixty days of contract award. As stated in that section:

Such advance understandings enable both DOE and the Contractor to determine the allocability, allowability, and reasonableness of such costs prior to their incurrence, thereby avoiding subsequent disallowances and disputes, and facilitating prudent expenditure of public funds.

Notably, this section references DOE Acquisition Guide Chapter 70.28, which, in turn, identifies the insurance requirements specified in DOE Order 350.1 as the basis for identifying the insurance "required by the contract." DOE Order 350.1 requires contractors to have, in addition to an approved program for self-insurance, "cost-effective liability program . . . covering employer's liability, commercial general liability, business auto liability, aircraft public and passenger liability, and vessel liability." FAR 28.307-2. The contract requirements make no mention of terrorism liability insurance, SAFETY Act insurance, or insurance of any kind associated with the requirements of the SAFETY Act.

MSA submitted to DOE its proposed advance understanding on costs on July 23, 2009 (within one week of submitting its DHS application for QATT designation). In the section governing "insurance and indemnification," MSA proposed that "[i]nsurance required by the contract, law, and normal business requirements [be] allowable." Later, MSA amended its proposal related to the insurance and indemnification costs to indicate, in part, that "(i)nsurance required by the contract, law, and normal business requirements is allowable." At no point did MSA reference SAFETY Act insurance in its proposal.

DOE responded in January 2010, revising the section concerning insurance and indemnification to read that "insurance required by contract is allowable," and deleting the reference to "law and normal business requirements." In its comment, DOE states that "[w]e are not sure what normal business requirements would entail, but are concerned that would allow for more insurance than what is anticipated. Thus, we have struck this language. The

recommended language is also consistent with other PRC's [other contractors] AU [Advanced Understanding]."

On April 21, 2010, MSA resubmitted its Advance Understanding on Costs, stating "insurance required by the contract is allowable." This language remained the same throughout the later contract modifications.

MSA Receives SAFETY Act Designation

Meanwhile, by letter dated December 8, 2009, DHS issued a "Certificate of SAFETY Act Designation" which designated MSA's technology as "Qualified Anti-Terrorism Technology." This certification required MSA to obtain third-party liability coverage for acts of terrorism with a per-occurrence level of no less than \$100,000,000. On February 19, 2010 MSA appealed DHS's decision concerning the level of insurance required, stating:

As stated in the Application, the Contract provides for a 3-pronged approach to liability protection against losses that the contractor sustains in performance of the Contract – U.S. government indemnification of Price-Anderson claims; contractor's purchase of commercial liability insurance, and DOE reimbursement of non-Price-Anderson claims in excess of such insurance as an allowable cost under the Contract. If the insurance is in an amount, at a cost, and on terms and conditions approved by DOE, the premium is also an allowable Contract cost. This is the standard DOE approach to contract liability – including insurance – for agency services contracts involving nuclear/hazardous waste sites.

For the Hanford program – consistent with its past practice – the only insurance DOE would and did approve for MSA to purchase was insurance provided under a DOE Rating Plan (or a comparable retrospectively-rated policy). Accordingly, MSA obtained the maximum amount of approved insurance available on the market – \$5,000,000 – at an allowable cost of \$71,750. **The cost of any additional insurance is not reimbursable under the Contract.**

(Emphasis added.) MSA asked DHS to reduce the required amount of insurance coverage. In support of this request, MSA stated in its June 9, 2010, response:

In the interests of expeditiously closing out the Proposed Modification, and in light of the availability of the Homeland Protector coverage at a significantly lower premium rate, MSA would be prepared to incur the additional, non-

reimbursable cost of the Homeland Protector policy to assure terrorism liability protections afforded under the SAFETY Act.

Ultimately, on June 24, 2010, DHS issued an amended certificate of SAFETY Act designation, reducing the insurance requirement to \$30,000,000. MSA purchased a SAFETY Act insurance policy (SAFETY Act insurance) and paid for the initial premium with its own funds.

On July 25, 2011, an MSA employee identified as the “Director, MSA - Contracts” decided that the SAFETY Act insurance should be considered an allowable cost, noting:

The attached letter [from DHS] approves our application for Safety Act coverage. Within this document, there is a requirement to maintain insurance to certain levels as a pre-requisite for receiving the Safety Act coverage. I consider this letter to be authorization to maintain the insurance as a contract requirement. By this requirement it is an allowable charge and is specifically allocable to this contract.

When another MSA employee stated in an email message dated August 12, 2011, that “I understand that we have received approval from DOE to treat the SAFETY Act insurance costs as allowable,” the MSA director responded:

We do not have, nor do we need “approval” from DOE. The requirement from the government to purchase is clear. Its [sic] also clear that its [sic] allowable due to the government requirement. I want to make sure we characterize this correctly.

Thereafter, starting in September 2011, MSA charged the initial premium for the SAFETY Act insurance to the contract. MSA continued charging the annual premiums for FY 2011-FY 2014 to the contract, culminating in a total charge of \$1,364,806.72. Again, at no time did MSA seek approval from the contracting officer to treat the cost of SAFETY Act premiums as allowable.

In 2014, DOE first learned that the costs of the SAFETY Act insurance policy were being charged to the contract through an audit by a DOE contractor pension and benefits specialist.⁷ When asked about the move of the insurance policy premiums from unallowable

⁷ A declaration submitted by a DOE contracting officer reveals that the electronic invoices submitted by MSA simply show that in 2013, 2014, and 2015, MSA paid

to allowable costs. MSA's director of finance and accounting assumed that MSA had obtained approval from the DOE contracting officer. DOE asked MSA to justify these costs, including an explanation of which contract provisions required MSA to purchase SAFETY Act insurance and why the premiums should be reimbursed as allowable costs under the contract.

A flurry of correspondence between MSA and DOE ensued. In one email message dated November 17, 2014, the MSA director of contracts explained his rationale for deeming insurance premiums reimbursable as allowable costs:

The request of Safety Act Designation was based on the requirements set forth in the [statement of work] and the allowability for the cost is derived from the requirement set forth in that letter to maintain liability insurance (pg 2 of 4). The cost principal [sic] associated with the insurance allowability contained in FAR 31.205-19(e)(1) states costs of insurance required or approved pursuant to the contract are allowable. . . . I believe the requirement stems directly from the contract and not a stand-alone DOE letter and allowability is governed by the FAR reference."

The contracting officer did not agree with MSA's rationale, and, after more exchanges of correspondence, on April 22, 2015, DOE's contracting officer gave MSA notice of DOE's intent to disallow the costs of SAFETY Act insurance.

After receiving MSA's June 30, 2015, response to the April 22, 2015 notice, the contracting officer issued a detailed decision on August 24, 2015. The contracting officer explained that "DOE has several cost-plus award fee contracts with companies that utilize anti-terrorism technologies and provide security services to protect against threats related to the presence of nuclear materials and hazards similar to or greater than those at Hanford, including DOE's contract with Centerra at the Savannah River Site," and "[n]one of DOE's contractors – including Centerra – has ever charged the Government for insurance costs associated with QATT certification, except for MSA." Next, the contracting officer determined that MSA's purchase of SAFETY Act insurance does not comply with the terms of the subject contract, or does not meet the FAR definition of "reasonable." The contracting officer concluded that the costs were unallowable, and that MSA must reimburse the Government for the unallowable costs in the amount of \$1,364,806.72, plus applicable interest. The contracting officer provided MSA with its appeal rights should it disagree with

itself for costs associated with "insurance." The costs were not broken down, itemized, or described in any meaningful way for DOE to identify what they actually represented.

the decision.

MSA subsequently submitted its appeal to us.

Discussion

Standard of Review

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 relief. *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.” *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,344; *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 12-2 BCA ¶ 35,094, at 172,353 (citing *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398).

The parties’ motions require the Board to decide a contract interpretation issue. Contract interpretation “is a legal question that is often amenable to summary disposition.” *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)).

Parties’ Contentions

Appellant: MSA contends that the cost of premiums for SAFETY Act insurance is an allowable cost because its contract required it to maintain adequate insurance against liability on account of damage to persons or property. A terrorist attack at the Hanford Site, MSA argues, could result in MSA having liability for damage to persons or property, precisely the type of event the SAFETY Act insurance policy covers. MSA also claims that buying the insurance was reasonable, in that a terrorist attack is not far-fetched, a claim allegedly supported by DHS’s requirement that MSA obtain insurance that will cover up to \$30 million in damages from terrorist attacks.

Alternatively, MSA says, even if the contract did not require it to purchase such insurance, MSA is entitled to exercise its reasonable judgment to purchase such insurance and the costs of that insurance would be allowable under the contract. Because the Mission Support Contract is MSA’s only contract, such costs were allocable to the contract, and they

were reasonable in their nature and amount.

In response to DOE's claim that MSA failed to submit the SAFETY Act insurance policy allowability issue to the contracting officer for approval, MSA asserts that while it is true that MSA did not submit the policy for approval in fiscal year 2010, it was not true in fiscal years 2011 through 2014. This is so because, when MSA submitted the insurance policies to the contracting officer, "DOE never bothered to respond."

Respondent: DOE contends that nothing in the contract required MSA to obtain designation as a QATT. It purchased SAFETY Act insurance only because a different agency, DHS, required it for QATT designation. The cost of the premiums cannot be determined to be "reasonable" as required by FAR 31.201-3 because, DOE claims, SAFETY Act insurance is "uniformly recognized as unnecessary for the performance of any DOE contracts, and equally recognized as not ordinary for any DOE contract." Focusing upon MSA's application for QATT designation, DOE points out that MSA certified, under penalty of perjury, that the costs of SAFETY Act insurance were not allowable under the contract.

DOE states that, even if MSA's purchase of SAFETY Act insurance could be found to be "reasonable" or "required," the costs are nevertheless unallowable because MSA failed to comply with an express contractual requirement to obtain the contracting officer's approval of the policy. DOE highlights evidence in the record which suggests that MSA considered having a discussion about the insurance premiums with the contracting officer, but made a deliberate decision not to submit the policy to the contracting officer for approval.

Analysis

In this case, we find the material facts are uncontested. The dispositive issue is a legal one – whether the premiums that MSA paid for a SAFETY Act insurance policy are allowable costs under the terms of the contract. We conclude that the premiums are not, because (1) MSA failed to obtain contracting officer approval for its SAFETY Act insurance policy, in violation of contract terms; and (2) the costs are not reasonable pursuant to FAR 31.201-3(a) and (b), because MSA has not demonstrated that SAFETY Act insurance is generally recognized as ordinary and necessary for the contractor's business or the contract performance. We review the applicable FAR regulations for determining allowability before applying these regulatory mandates to the facts at hand.

a. Allowability of costs

As we noted above, various FAR and DEAR provisions incorporated in the contract require that a cost be allocable to the contract under which it is incurred and that the cost be

allowable. *URS Energy & Construction, Inc.*, 12-2 BCA at 172,353. Here, the issue is not whether these costs are “allocable” to this contract, but rather, whether the costs are “allowable”:

Allocability is an accounting concept involving the relationship between incurred costs and the activities or cost objectives (*e.g.*, contracts) to which those costs are charged. . . . The concept of cost allowability concerns whether a particular cost can be recovered from the government in whole or in part.

Boeing North American, Inc. v. Roche, 298 F.3d 1274, 1280 (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.” *URS Energy & Construction, Inc.*, 12-2 BCA at 172,353 (citing 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 31.2] and the treatment of similar or related selected items.” FAR 31.204(c). In addition, whether a cost is considered reasonable depends upon a variety of circumstances, including whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor’s business or the contract performance. *Id.* FAR 31.201-3 affords the contracting officer “considerable flexibility in assessing the reasonableness of costs.” *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013).

b. MSA failed to obtain the contracting officer’s approval of its SAFETY Act insurance

The contract expressly requires MSA to have “all bonds and insurance required by this clause be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.” DEAR 952.231-7(c)(b)(2). In addition, the “Insurance – Litigation and Claims” clause of the contract expressly provides that “[t]he contractor agrees to submit for the Contracting Officer’s approval . . . bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement.” DEAR 952.231-71(c).

The record indicates that MSA submitted the SAFETY Act insurance policy to DOE via email message on March 21, 2012, and through letters dated November 29, 2012, January 22, 2014, and October 30, 2014. MSA asserts that DOE “constructively ‘approved’” the

policy because DOE did not object to the charges for more than three years. Nonetheless, the contract expressly required MSA to submit the SAFETY Act insurance policy “for the contracting officer’s approval.” There is no evidence that MSA did so, nor has MSA pointed to any report to the contracting officer that identified the type of insurance, the cost of the premium, or any other details related to the SAFETY Act premiums submitted in conjunction with a request for approval. MSA did not identify the reimbursements for SAFETY Act premiums separately. The accounting codes and amounts reflected in the payment system did not correspond with MSA’s payments for SAFETY Act insurance. Further, any “approval” by the contracting officer of MSA’s treatment of SAFETY Act insurance premiums as allowable costs would have to be knowing and intentional. *Automotive Management Services*, ASBCA 58352, 14-1 BCA ¶ 35,646, at 174,549; *W.S. Jenks & Son*, GSBCA 10513, 92-1 BCA ¶ 24,502, at 122,282 (1991). He could not “constructively” approve it, as MSA argues, when he lacked the information that would have told him that MSA was including SAFETY Act insurance premiums in its allowable costs. After evaluating the terms of the contract and the record evidence, we find that MSA failed to submit the SAFETY Act insurance policy for approval, as required by the contract, and the contracting officer never approved the allowability of SAFETY Act insurance premiums.

c. The costs are not reasonable

Cost reasonableness “is a question of fact.” *Kellogg Brown & Root Services*, 728 F.3d at 1360 (citing *General Dynamics Corp.*, 410 F.2d 404, 409 (Ct. Cl. 1969)). The standard for assessing reasonableness is flexible. *Id.* (citing FAR § 31.201-3). A determination that costs are “reasonable” for allowability purposes is an overall conclusion based on consideration of all the factual circumstances relating to the incurrence of the costs in question, including the amount incurred. *Abt Associates, Inc.*, ASBCA 54871, 06-1 BCA ¶ 33,218, at 164,633.

The contracting officer’s determination that MSA’s purchase of SAFETY Act insurance does not meet the FAR definition of “reasonable” and, therefore, is not allowable, is well supported by the facts. The contracting officer properly noted that nothing in the contract required MSA to apply for or obtain a QATT designation from DHS, nor does the contract set forth any requirement for MSA to purchase SAFETY Act insurance. Rather, the contract required MSA to obtain the DOE contracting officer’s approval for its SAFETY Act insurance policy, because the contract required “all bonds and insurance required by this clause to be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.” Because MSA did not submit the insurance policy to the contracting officer before purchasing it, the contracting officer did not have the opportunity to review the nature of the costs and their relationship with the contract.

The contracting officer also found that the costs of the insurance are not ordinary among DOE contracts. Not only does the evidence in the record support the contracting officer's conclusion, it is consistent with FAR 31.201-3(a), which provides that a cost is not "reasonable" unless it is of the type "generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance." The record contains several examples of other contractors performing security services for DOE under similar cost-reimbursement contracts for the protection of nuclear facilities and assets from threats. Most did not elect to obtain QATT designations from DHS. Those that have such designations have not attempted to charge the costs of the SAFETY Act insurance to their DOE contracts.

In a circular argument, MSA contends that the requirement to purchase SAFETY Act insurance can be implied by the fact that DHS approved its QATT designation and, citing FAR 31.205-19(e)(1), asserts that if insurance is required pursuant to the contract or applicable law, the cost of the insurance is allowable. However, MSA fails to explain how the DHS designation makes the cost of the SAFETY Act insurance premiums reasonable for allowability purposes, particularly since the contract did not require MSA to obtain SAFETY Act certification. MSA's decision to seek QATT designation arose on its own accord.

Next, MSA points to contract clause 1.79, which requires MSA to maintain "adequate" insurance to cover liabilities on account of damage to persons or property. MSA argues that "adequate" insurance must include SAFETY Act insurance. MSA's argument ignores the contract modification incorporating the parties' advance understanding on costs which limits the types of insurance allowable under the contract to that "required by the contract." The contract does not require terrorism liability insurance, SAFETY Act insurance, or insurance of any kind associated with SAFETY Act requirements. It is not reasonable to infer that SAFETY Act insurance was "required by the Contract" when it was entirely absent from the advance understanding on costs.

MSA also argues that if MSA did not succeed in preventing, deterring, or mitigating a terrorist attack, injured third parties could be expected to sue MSA. The SAFETY Act would limit MSA's potential liability. MSA contends that DOE directly benefits from MSA's SAFETY Act designation because, under the SAFETY Act, only MSA could be sued for loss of property, personal injury, or death for performance or non-performance of the seller's QATT in relation to an act of terrorism, and that the buyer of QATT (meaning DOE) could not be found liable for such costs. Thus, MSA argues, its SAFETY Act designation insulates DOE from lawsuits it might otherwise face under the Federal Tort Claims Act or other potential grounds if MSA failed to deter a terrorist attack at Hanford and persons or property were injured as a result.

MSA's argument on this point ignores the fact that the contracting officer never had the chance to evaluate the SAFETY Act insurance policy or to make a decision as to whether the benefits of the policy would be a worthwhile investment for the Government. It is entirely possible that the contracting officer, given the chance, would have concluded that the SAFETY Act insurance policy provided no benefit to DOE, particularly since DOE is not listed as a beneficiary under the policy. Other DOE-approved insurance coverage and financial protections under the contract appear to duplicate the benefits provided by SAFETY Act insurance. As one predecessor board noted in evaluating DOE's indemnification policy for management and operating (M&O) contractors as to the allowability of certain costs:

For decades, the policy of DOE and its predecessor agencies has been to provide its M&O nuclear weapons contractors with virtually complete indemnification in the sense of reimbursing them for their expenses including losses, incurred in the performance of the contract work, that are necessary or incident thereto, with only narrow, defined exceptions.

. . . DOE viewed its reimbursement policy as an integral part of a rational, overall strategy to retain private industry to manage and operate the country's nuclear weapons production facilities at a reasonable price.

Rockwell International Corp., EBCA C-9509187, et al., 02-2 BCA ¶ 32,018, at 158,217, *aff'd* on other grounds *sub nom. Abraham v. Rockwell International Corp.*, 326 F.3d 1242 (Fed. Cir. 2003). In light of DOE's indemnification policy, the contracting officer could easily have found the SAFETY Act insurance unnecessary, had he been given the chance to evaluate the policy.

MSA's own actions reflected its belief that the SAFETY Act insurance premiums would not be allowable under the contract. For example, in its application for SAFETY Act designation, MSA stated that the only insurance that had been approved by DOE is "the \$5 million retroactively-rated insurance policy" and that "costs associated with any other insurance policy is not reimbursable [sic]." MSA failed to list terrorism liability insurance or SAFETY Act insurance when it identified insurance costs when it was negotiating with DOE on its advance understanding of costs, as required by the contract. After DHS approved MSA's SAFETY Act designation, in response to DHS's requirement that MSA purchase \$100 million in coverage, MSA sought a reduction, in part on the grounds that it "would be prepared to incur the additional, non-reimbursable cost of the [SAFETY Act] policy." Upon DHS approval of the application, MSA did not seek reimbursement for the initial premium at first. In fact, MSA did not seek approval from the contracting officer before charging this cost to the contract.

Decision

For these reasons, MSA's motion for summary relief is denied, DOE's motion for summary relief is granted, and the appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

RICHARD C. WALTERS
Board Judge

HAROLD D. LESTER, JR.
Board Judge