UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION DENIED: October 20, 2022

CBCA 6477-R

MISSION SUPPORT ALLIANCE, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

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

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

Before Board Judges **GOODMAN**, **DRUMMOND**, and **CHADWICK**.

CHADWICK, Board Judge.

Mission Support Alliance, LLC (MSA) timely sought reconsideration under Board Rule 26 (48 CFR 6101.26 (2021)) of our August 2022 decision denying MSA's appeal of a government claim under a cost-type contract. We found that MSA did not meet its burden to prove the reasonableness of $333,895 it paid to three subcontractors. MSA argues that, in fact, it "presented hard evidence via exhibits, testimony and briefing that the costs were allowable and reasonable." We deny reconsideration but clarify our decision in part.

Grounds to reconsider a Board decision may include, among other things, "clear error," which is what we understand MSA to assert here. *See, e.g.*, *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907-R, 19-1 BCA ¶ 37,465,

at 182,010. MSA argues that we overlooked record evidence that "the disputed costs are reasonable because [MSA followed] its Purchasing System procedures . . . , which had been reviewed and approved by DOE [the respondent, Department of Energy,] and its auditor . . . , for reviewing and approving subcontractor work and costs."

We disagree that we improperly neglected to address such evidence. As we wrote, "We know of no authority . . . suggesting that evidence of mere 'review' and 'approval' by contractor personnel suffices to show that subcontractor charges are reasonable." *Mission Support Alliance, LLC v. Department of Energy*, CBCA 6477, slip op. at 6 (Aug. 17, 2022) (citing 48 CFR 31.201-3(a) (2018) ("No presumption of reasonableness shall be attached to the incurrence of costs.")). We did not consider MSA's arguments that it followed its own procedures to be material. Rather, "[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." 48 CFR 31.201-3(a) (emphasis added). Proof of reasonableness should entail some "independent evidence of the reasonableness" of the dollars spent—not merely evidence of the contractor's own behavior. *See Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1363 (Fed. Cir. 2013); *see also Kellogg, Brown & Root Services, Inc. v. Secretary of the Army*, 973 F.3d 1366, 1373 (Fed. Cir. 2020) (noting, inter alia, that a sophisticated defense contractor "only offered conclusory testimony, unsupported by any data or evidence in the record, that [a] daily rate of $300 was . . . reasonable").

We find, therefore, that by reemphasizing the evidence relating to its internal purchasing procedures, MSA raises only "[a]rguments and evidence previously presented" and addressed, which "are not grounds for reconsideration." Rule 26(a). We also conclude, however, that some language in our decision warrants amplification. We repeatedly stated that MSA cited "no" evidence of cost reasonableness. *Mission Support Alliance*, slip op. at 5–7. The context of those statements was that MSA denied bearing any burden of proof. *See id*. at 4 n.4. MSA argued at pages 41–42 of its post-hearing brief, "To MSA's knowledge, DOE is not challenging the reasonableness or allocability of the costs. . . . [I]t is *up to the government* to show that costs incurred by a contractor are unallowable . . . . *The Government bears the burden of proof* when the government is not disputing the reasonableness or allocability of costs incurred under a particular contract." (Emphasis added.) We explained that MSA was mistaken and that it needed to prove reasonableness to defeat DOE's claim. *Id.* ("It is true that an unreasonable cost is also unallowable . . . , but this case is at bottom about reasonableness, and MSA bears the burden of proof per 48 CFR 31.201-3(a).").

In this context, we understood MSA to be arguing only that DOE failed to satisfy a burden of proof that, we held, DOE did not actually bear. MSA repeatedly argued at pages 75–92 of its post-hearing brief that its costs were "supported and allowable" because they were internally "reviewed and approved" and that DOE could not prove otherwise. We saw,

and still see, no citation of evidence sufficient to demonstrate that the costs that MSA paid the three subcontractors were reasonable, but it is possible our language went too far. We now see, in considering MSA's motion, that evidence of a contractor's documented, audited procurement practices could, at least arguably, be seen as "circumstantial" evidence probative of cost reasonableness. *See, e.g.*, *Kellogg Brown & Root*, 728 F.3d at 1363 ("Having chosen to proceed by what the Court of Federal Claims characterized as 'circumstantial' evidence (e.g., . . . negotiations, . . . [a] Settlement, and . . . audits), . . . [the contractor] has not now shown the Court of Federal Claims's weighing of the evidence or calculation of price was clearly erroneous."); *Art Metal–U.S.A., Inc*., GSBCA 5898(5245)–REIN, 83-2 BCA ¶ 16,881, at 83,986–87 (analyzing the support for the costs of a change of a fixed-price contract). It is at least a colorable argument (although not one that MSA ever made in this form) that a contractor that uses a Government-reviewed purchasing system is marginally more likely, other things being equal, to have spent money reasonably than is a contractor without such a system. *See, e.g.*, Fed. R. Evid. 401(a) (defining relevant evidence as "having any tendency to make a fact more or less probable"). Rather than "no" evidence of cost reasonableness, it could be more accurate to say that MSA cited weak or unpersuasive evidence. Accordingly, we clarify that our decision is the same even if we assume that MSA cited "circumstantial" evidence that it acted reasonably.

MSA does not meet its burden of proof under the latter assumption. We take up the payments to each subcontractor in turn. With regard to the $169,405 that MSA paid to Federal Engineers & Constructors, Inc. (FE&C) under a labor-hour subcontract, but for which MSA lacks time cards or other direct evidence that FE&C properly billed the hours, *see Mission Support Alliance*, slip op. at 5–6, MSA restates its contentions (supported mainly by the summary *opinion* testimony of its expert witness) that MSA's procurement employees "reviewed, scrutinized, and approved costs incurred by FE&C, including the labor rates and hours billed under the subcontract, in accordance with the requisite Purchasing System, and the [DOE contract]. At no point has *DOE introduced evidence or testimony to contradict* MSA['s] evidence reflecting the *approval* of its subcontractor incurred costs." (Emphasis added.) As discussed, DOE need not introduce evidence on this issue, and the Board must decide cost reasonableness for itself. Evidence that MSA employees took the steps necessary to "approve" certain labor-hour payments without, apparently, saving good records of reasonableness does not convince us that the costs were reasonable to incur.

Similarly, regarding the $61,160 that MSA paid to EnergX, LLC for training courses, *see Mission Support Alliance*, slip op. at 6, MSA reemphasizes that its employees would have confirmed that "all necessary paperwork was in place . . . contemporaneous[ly] with invoice review. At no point has DOE introduced evidence to contradict testimony or record evidence provided by MSA." Again, with no opportunity to review supporting paperwork, such as course records, for ourselves, we cannot determine that these costs were reasonable in type or amount merely because MSA's employees agreed to pay them.

MSA makes essentially the same arguments in urging us to reconsider our decision regarding the $103,330 it paid to DRG Grant Construction, Inc. under fixed-price construction subcontracts. *See Mission Support Alliance*, slip op. at 6–7. Here, the lack of evidence was, and remains, particularly glaring. MSA has cited no basis, either in its post-hearing brief or in the current motion, upon which the Board could conclude independently that the subcontractor was entitled to the subcontract modifications at issue or to pass through the disputed charges by lower-tier subcontractors. We still do not know, in fact, exactly what this construction work entailed.

Decision

MSA's motion for reconsideration is **DENIED**.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge