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RAYTHEON STX CORPORATION, Appellant, v. DEPARTMENT OF COMMERCE, Respondent

GSBCA No. 14296-COM

General Services Administration Board of Contract Appeals

1999 GSBCA LEXIS 252

October 28, 1999

COUNSEL:
Daniel R. Allemeier of Raytheon STX Corporation, Malibu, CA, counsel for Appellant.

Jerry A. Walz, Fred Kopatich, and Edward Weber, Office of General Counsel, Department of Commerce, Washington, DC, counsel for Respondent.

JUDGES: [*1] MARY ELLEN COSTER WILLIAMS, Board Judge. ANTHONY S. BORWICK, Board Judge, ALLAN H. GOODMAN, Board Judge, concur.

OPINION BY: WILLIAMS

OPINION:

Before Board Judges **BORWICK**, **WILLIAMS**, and **GOODMAN**.

MARY ELLEN COSTER WILLIAMS, Board Judge.

Appellant, Raytheon STX Corporation (Raytheon), seeks $ 196,994, representing its costs arising from the partial shutdown of Government operations due to the expiration of Fiscal Year 1996 funds in December 1995. Specifically, appellant seeks reimbursement for layoff pay of its employees and its subcontractors' salary costs paid or potentially owed to employees for the period of the shutdown when they were unable to work. Appellant invokes the Stop Work, Administrative Leave, and Changes clauses of the cost-reimbursement contracts at issue, as well as the doctrine of equitable estoppel. Respondent alleges that reimbursement is not warranted because the shutdown was a "sovereign act" which would relieve the Government of any liability [*2] under particular contracts, and alternatively contends that appellant has not demonstrated entitlement because the employees performed no work during the shutdown.

Although the shutdown was a sovereign act, we grant the appeal in part, finding that the sovereign acts doctrine does not bar recovery since the cost-reimbursement contracts obligate the Government to bear the increased costs attributable to the shutdown which are allocable to the contracts. Specifically, because the Government closed the sites of performance and stopped work for an uncertain time frame but expected appellant to maintain its work force and

resume work immediately after the shutdown, appellant is entitled to recover its employee and subcontractor salary costs actually paid during the shutdown. We grant appellant's claim in part in the amount of $ 166,944. We deny that portion of the claim representing the salary that one subcontractor potentially owes but has not paid to its employees. We dismiss appellant's claim for delay damages in the amount of $ 3084.24 because that claim was never presented to a contracting officer.

Findings of Fact

The Contracts and Subcontracts

The National Oceanic and [*3] Atmospheric Administration (NOAA) operates and maintains Geo Stationary Operational Environmental Satellites (GOES), which provide continuous coverage of cloud conditions over the Western Hemisphere. Appeal File, Exhibit 1 at C-2. Hughes STX Corporation (HSTX), the predecessor to the appellant, Raytheon, entered into four contracts with NOAA:

. Contract No. 50-DDNE-0-00045 (Contract No. 45), dated September 27, 1990 (executed by ST Systems Corporation, which was later part of HSTX), for the development of products obtained from GOES-I/M series satellites.

. Contract No. 50-DDNE-2-00029 (Contract No. 29), dated September 30, 1991 (executed by ST Systems Corporation), for software maintenance and development for support of environmental satellite data processing.

. Contract No. 50-DGNW-2-00054 (Contract No. 54), dated May 13, 1992, for Systems Engineering and Technical Support Services (SETSS) for the National Weather Service and NOAA's Systems Program Office.

. Contract No. 50-DDNE-4-00155 (Contract No. 155), dated September 30, 1994 (executed by HSTX), for services in support of the Tiros-N Operational Vertical Sounder (TOVS) and revised TOVS (RTOVS).

First [*4] Set of Stipulated Facts (July 15, 1998) (Stipulations) PP 1-4; Appeal File, Exhibits 1-4. Contract Nos. 45, 29, and 155 were cost-plus-fixed-fee type contracts. Contract No. 54 was a cost-plus-award-fee type contract, which had no base fee. Id. Because all actions relevant to this case occurred when HSTX held the contracts, we refer to the appellant by that name in this opinion.

Contract No. 45

Under Contract No. 45, appellant was required to develop and implement a data processing capability for the generation and distribution of atmospheric sounding products from radiance data obtained from the GOES-I/M series satellites, and provide technical reports to NOAA's National Environmental Satellite, Data and Information Service (NESDIS). Appeal File, Exhibit 1 at C-2 to C-3. The Statement of Work (SOW) of Contract No. 45 detailed the complex software as well as the science required for contract performance, including atmospheric physics, mathematics, statistics, meteorology, and radiative transfer theory. The SOW continued: "The science aspects require expert support involving state-of-the-art technology." Id. at C-3.

Paragraph 6.0 of Contract No. 45 required the contractor [*5] to furnish full-time personnel with education in computer science or physics, mathematics, meteorology, or astronomy to work on-site at Federal Office Building (FOB) No. 4 in Suitland, Maryland. Appeal File, Exhibit 1 at C-11. The Work Site and Hours clause further provided: "The contractor shall schedule planned vacations so that no more than twenty to twenty-five percent of the contractor force is

absent at any time. Office space, telephones, office furniture, and computer resources . . . will be provided by the Government." Id. Paragraph F.4 expressly required all services furnished under Contract No. 45 to be performed at FOB No. 4 in Suitland. Id. at F-2.

Contract No. 29

Contract No. 29 required appellant to maintain and develop software supporting operational environmental satellite data processing within NESDIS. Appeal File, Exhibit 2 at C-1. Contract No. 29 was also to be performed at FOB No. 4 in Suitland, Maryland. Id. at F-1. Under clause G.7 in Contract No. 29, HSTX was "authorized to use on a no-charge, noninterference basis . . . Government owned facilities in Building 4 at Suitland." Id. at G-6. n1

n1 Although paragraph H.14 of Contract No. 29 authorized the Government to direct personnel to perform software development services offsite, there is no indication in the record that the Government exercised this option. Appeal File, Exhibit 2 at H-7 to H-8.

[*6]

The Statement of Work for Contract No. 29 provided, "In addition to the complex software, the work involves . . . mathematics, statistics, meteorology, oceanography, physics, atmospheric physics, data communications, and computer science." Appeal File, Exhibit 2 at C-3. The Statement of Work further required the contractor to provide approximately thirty-five "full time scientists and programmers each having an educational background in computer science, atmospheric physics, meteorology, physics, oceanography, mathematics, statistics, other related physical sciences, or data communications." Id. The contractor was also required to obtain appropriate security clearances for its personnel. Id. at C-4.

Contract No. 54

Under Contract No. 54, HSTX was to support the National Weather Service's programs on automated weather observation systems, forecast information systems, communications, and meteorological and hydrological data from satellite radar. Appeal File, Exhibit 3, Attachment 1 at 1.

The personnel required for this contract included systems engineers, software and communications engineers, meteorologists, physical scientists, computer scientists, and technicians. [*7] Appeal File, Exhibit 3, Attachment 2. This contract was also to be performed on-site at NOAA facilities. Id., Attachment 1 at 5; see also id. at H-2.

Contract No. l55

Under Contract No. 155, HSTX was required to provide software support for operational science troubleshooting, interactive graphics display and quality control, and science improvements to the TOVS/RTOVS sounding operation. Appeal File, Exhibit 4 at C-5. The contract was also to be performed on-site at FOB No. 4. Id. at C-19; see id. at C-20.

The four contracts at issue include the following clause:

STOP-WORK ORDER (AUG 1989), ALTERNATE (APR 1984)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable [*8] to the work covered by the order during the period of work stoppage.

> Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either--
>
> (1) Cancel the stop-work order; or
>
> (2) Terminate the work covered by the order as provided in the Termination clause of this contract.
>
> (b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected, and the contract shall be modified, in writing, accordingly, if--
>
> (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
>
> (2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts [*9] justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.

Appeal File, Exhibits 1 at F-1; 2 at F-1; 3 at F-1; 4 at F-1.

The Holidays and Administrative Leave clause in Contract Nos. 45, 54, and 155 provides, in pertinent part:

> When NOAA grants administrative leave to its Government employees, onsite contractor personnel shall also be dismissed. . . . In each instance when administrative leave is granted to Contractor personnel as a result of inclement weather, potentially hazardous conditions, explosions, or other special circumstances, it will be without loss to the Contractor. The cost of salaries and wages to the Contractor for the period of any such excused absence as a reimbursable item of direct cost under the contract for employees whose regular time is normally a direct charge and a reimbursable item of indirect cost in accordance with the Contractor's established accounting policy.

Appeal File, Exhibits 1 at H-4; 3 at H-9; 4 at H-4 to H-5.

The Holidays and Administrative Leave clause in Contract No. 29 provides, in pertinent part:

> When NOAA grants administrative leave [*10] to its Government employees, on-site Contractor personnel shall also be dismissed. . . . In each instance when administrative leave is granted to the Contractor personnel as a result of inclement weather, potentially hazardous conditions, explosions, or other special circumstances, it will be without loss to the Contractor. The contract shall permit incurred costs of salaries and wages to the Contractor for the period of any such excused absence as a reimbursable item of direct cost under the contract for employees whose regular time is normally directly charged. The amount of any incurred indirect costs shall be reimbursed for such excused absences, if in accordance with the Contractor's established accounting policy.

Appeal File, Exhibit 2 at H-5 to H-9.

The contracts also included Federal Acquisition Regulation (FAR) 52.243-2, "Changes -- Cost Reimbursement

(AUG 1987), Alternate I (APR 1984)," which provides:

> (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
>
> (1) Description of services to be performed.
>
> (2) Time of performance [*11] (i.e., hours of the day, days of the week, etc.).
>
> (3) Place of performance of the services.
>
> (b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.

Exhibits 1 at I-10; 2 at I-3; 3 at I-3; 4 at I-3.

The Subcontracts

HSTX entered into subcontracts under Contract No. 54 with Systems Engineering & Security, Inc. (SES) and EG&G Washington Analytical Services Center, Inc. (EG&G). Appeal File, Exhibit 17 n2 at 28 and Exhibit 1; Id., Exhibit 19 n3 at 14-15 and Exhibit 1.

n2 Exhibit 17 contains the deposition of Mahesh C. Mittal (July 2, 1998).

n3 Exhibit 19 contains the deposition of Dennis Hunt (July 28, 1998).

[*12]

HSTX entered into a subcontract under Contract No. 29 with SM Systems and Research Corporation (SMSRC). Appeal File, Exhibit 18 n4 at 23 and Exhibit 5.

n4 Exhibit 18 contains the deposition of Sarma Modali (July 28, 1998).

The Partial Government Shutdown

Appropriations bills were not enacted by October 1, 1995, to fund the activities of the Federal Government for Fiscal Year 1996. On September 30, 1995, a Continuing Resolution was passed by the Congress and signed by the President which provided funding for the Federal Government until November 14. Pub. L. No. 104-31, 109 Stat. 278 (1995). On November 20, 1995, Congress passed, and the President signed, a Continuing Resolution which provided funding for federal agencies, including the Department of Commerce, until December 15. Pub. L. No. 104-56, 109 Stat. 548 (1995). Subsequently, Congress passed H.R. 2076, which would have extended Fiscal Year 1996 appropriations to the Department of Commerce past December 15, 1995. Stipulations P 6. However, on December 19, [*13] 1995, the President vetoed H.R. 2076. Id. As a result, no Fiscal Year 1996 funds were available to pay salaries of NOAA employees after December 15, 1995. Id. P 7. NOAA employees continued to be paid until December 21 with funds which had been previously appropriated. Id.

Upon the exhaustion of this funding, no Fiscal Year 1996 funds were available to pay the salaries of NOAA employees, and most NOAA operations ceased. n5 Stipulations P 7; Appeal File, Exhibit 21 n6 at 24. The four contracts had previously-appropriated funds available for performance of task order work at the time of the shutdown. Respondent's Record Submission at 5. Under all four contracts, appellant's employees had to have access to Government facilities in order to perform contract work. Appeal File, Exhibit 16 n7 at 35.

n5 Some NOAA employees continued to work as "excepted" employees, as defined in 31 U.S.C. § 1342 -- employees from whom the Federal Government can accept voluntary services for emergencies involving the safety of human life or the protection of property. Appeal File, Exhibits 20 at 19; 23; 33. (Exhibit 20 contains the deposition of Aileen Redding (Aug. 31, 1998). Excepted employees can only be paid upon a special action of Congress. Id., Exhibit 23. Non-excepted NOAA employees were furloughed. Declaration of Contracting Officer Aileen Redding (Sept. 30, 1998) P 10; Appeal File, Exhibits 20 at 34-36; 12; 23. NOAA employees' approved and requested leave was canceled when the furloughs began since furlough is by definition a non-pay/non-duty status. Memorandum from Deputy Under Secretary of Commerce to All NOAA Employees (Dec. 20, 1995); (Appeal File, Exhibit 30 at 45).

[*14]

n6 Exhibit 21 contains the deposition of William Voitk (Aug. 31, 1998).

n7 Exhibit 16 contains the deposition of David Sherry (July 29, 1998).

On December 21, when NOAA had exhausted its available funds and sent home non-excepted workers, stop-work notices were issued to HSTX on Contract Nos. 45 and 155, ordering all work to be stopped on the two contracts as of December 22. Appeal File, Exhibit 5. These notices provided:

> Effective close of business of the date of this notice, NOAA has shut down except for essential operations. Until a Continuing Resolution is passed by Congress and approved by the President, you are hereby notified that you are to Stop Work for all but those positions/tasks, etc. set forth below:
>
> NONE
>
> In the event the Continuing Resolution authorizing operation of this Agency is passed and signed by the President, this notice is rescinded or canceled.

Id. That same day, partial stop-work notices were issued to HSTX on Contract Nos. 29 and 54, ordering work to be stopped on the contracts and containing the same provisions quoted above except for the excluded [*15] tasks and employees specified in those orders. Id., Exhibit 16 at 16-19. n8 HSTX issued stop-work notices to its subcontractors on December 22, 1995. Id., Exhibit 11, Appendix H. The notices stated that the stop-work order would "extend for the same time period as the furlough for non-essential government personnel." Id.

n8 Subsequently, a notice was sent to HSTX ordering all work to be resumed on Contract No. 45, effective January 3, 1996. Appeal File, Exhibit 6. That notice provided:

> Due to the extended nature of the shutdown and the changes to the National Weather Service requirements for spacecraft support, it is necessary to reactivate the personnel previously furloughed from the subject contract.

Id.

Appellant's Response to the Shutdown

Upon receipt of the Government's stop-work order, appellant first attempted to locate alternative assignments for its employees. Appeal File, Exhibit 16 at 51. Appellant diverted some of its employees who would have been affected by the layoff to other [*16] work, i.e., a bid and proposal effort. Appeal File, Exhibit 26, Audit at 7. Appellant also permitted some employees to take vacation days. Id. Absent either of these circumstances, HSTX issued layoff notices. Id., Exhibit 16 at 53, 83. Appellant's vice president explained:

> In order to minimize the exposure to the Government, we determined that using accrued vacation or taking leave without pay would only extend or increase our . . . potential cost obligation, and those were not viable options. So as a last resort, we did temporary layoffs.

Id. at 53.

HSTX did not issue layoff notices to its employees under the four contracts until stop-work notices were issued by NOAA because the company's policy is to avoid issuing layoff notices until absolutely necessary, and it had no previous indication from the Government that work would stop on a specific date. Appeal File, Exhibit 16 at 58-59. HSTX's vice president explained: "We had nothing concrete to indicate that the work would be stopping, and we did not issue layoff notices in anticipation of what might happen in order to avoid employee morale problems, turnover and performance problems under contracts." Id. [*17] at 59. In appellant's vice president's view, granting leave without pay would not have mitigated the cost because it would have extended the employment relationship and its associated fringe benefits, management, severance, and other costs. Id. at 53-54.

Appellant's Layoff Notices

Appellant issued layoff memoranda dated December 21, 1995, to its employees who were affected by the Government shutdown, stating, in pertinent part:

> As a result of the government shutdown and a suspension of work under your project, you are hereby notified that effective December 22, 1995, you are being placed on temporary lay-off status. In accordance with Company policy, you are entitled to up to 2 weeks severance pay, in lieu of advanced notice, depending upon the length of the Government shutdown. This severance will be paid out on the normal pay cycle. During this two week severance period, as a special exception to company policy, your benefits will remain intact (i.e. health, 401k, life insurance, etc.).
>
> Please note that during this severance period, it is your responsibility to stay abreast of changes in the Government status, as it is anticipated that your employment will be [*18] immediately reinstated upon reopening of the Government facilities. The Company will make every reasonable attempt to contact you at your home to advise you of reinstatement. If we are unable to contact you and you do not report to work concurrent with the Government reopening, you will be required to use vacation or Leave Without Pay (LWOP).

Appeal File, Exhibit 11, Appendix B.

HSTX employees under the NOAA contracts who were not given alternate work assignments were paid their full salaries and benefits by HSTX for the period that the stop-work notices were in effect, although they did not perform

services under the contracts. Appeal File, Exhibit 16 at 70-75, 80, 84-85, Exhibits 5-11. HSTX established special "furlough" accounts to accumulate the costs associated with the stop-work orders. Id. at 78; Appeal File, Exhibit 26, Audit at 3.

Holidays during the furlough were charged to HSTX's holiday indirect expense account, and snow days immediately after the furlough were charged to other accounts. Appeal File, Exhibit 26, Audit at 7. All employees were subject to HSTX's layoff policy. HSTX employees who actually reported for work during the furlough and worked on other projects [*19] properly charged their time to such other projects. Id. No amounts for other work performed during the furlough were included in HSTX's claim. Id. HSTX employees who worked during the furlough on other projects charged a total of 487 hours for a cost of $ 10,605 to those other accounts. HSTX employees whose salaries were charged full time to furlough accounts remained at home during the furlough period. Id.

HSTX's Layoff Policy

According to its Layoff and Recall Policy, HSTX was required to provide either two weeks' written notice of a layoff to an employee or two weeks' pay in lieu of notice. HSTX's Layoff and Recall Policy provides:

> **Policy**
>
> It is the policy of the Company to stabilize employment so that employees may be provided with regular and continuous work. Although every effort is made to avoid layoffs, changing business and economic conditions may occasionally necessitate them. In the event that a reduction in the workforce becomes necessary, employees will be selected for layoff in the following manner.
>
> **Definitions**
>
> **Layoff**--Personnel action resulting in the release of an employee because of a lack of work or elimination [*20] of a position.
>
> **Discussion**
>
> Layoffs will be made:
>
> . On the basis of work availability; employees for whom no work is available may be laid off first.
>
> . . . .
>
> **Procedure**
>
> . An employee who is being laid off will be notified in writing by the Human Resources Manager at least 2 weeks in advance of the layoff. Two weeks' pay may be provided in lieu of notice. Only the Human Resources Manager has the authority to make this notification. The reason for the layoff, as well as the employee's chances for recall, will be given.

Appeal File, Exhibit 11, Appendix G.

On December 21 and 22, 1995, appellant notified its subcontractors, SMSRC, EG&G, and SES, of the stop-work order from NOAA and directed that each of the subcontractors stop work for all non-essential employees. Appeal File, Exhibit 11, Appendix H.

The Subcontractors' Actions in Response to the Shutdown

SES

Appellant's subcontractors SES and EG&G continued to pay full salaries and benefits to their employees during the shutdown period. Appeal File, Exhibit 17 at 11-13, Exhibits 6-9; Appeal File, Exhibit 19 at 18, 25-26. These employees could not work during the shutdown because their [*21] place of work was inaccessible. Id, Exhibit 17. at 12.

SES sent a temporary layoff notice to each of its three affected employees stating, in pertinent part:

> In response to the Government shutdown, we have received official notice through NOAA contracts that selected tasks may continue uninterrupted, and that others must be cancelled as of 22 December 1995. Your task is among those which are to be cancelled. You are hereby notified that you will be placed in a temporary lay-off status effective today, 22 December 1995.
>
> I am concerned with the impact of this shutdown on you and the other members of our project team, especially during this holiday season. But to a great extent, most of this is beyond our control and is based on specific direction from our customer. Since you are in a temporary lay-off status, you become eligible for severance benefits in accordance with company policy. Our lay-off policy provides for one (or two) weeks basic salary as a severance benefit, and I hope this severance pay will ensure continuity of income for you throughout this difficult period. We believe this shutdown will be of short duration, and the Government has indicated their intention [*22] to renew your task at the conclusion of the furlough period. We anticipate recalling everyone back to work within a few days and hope this severance benefit will ensure your availability to return to work when recalled.

Appeal File, Exhibit 17, Exhibits 3-5. SES segregated the salaries it paid to its employees during the shutdown into a separate account designated NWS-F. Id. at 33. Pay for holidays and vacations was not included in SES' claim. Id. at 40-41, 43.

SES paid its employees during the shutdown pursuant to its severance policy, which provides:

> Severance Pay
>
> All full time staff are eligible for severance pay upon involuntary termination of employment based on length of service with the company.

- No Severance Pay During First 3 Months.

> - 1 week of basic salary for less than 1 year (but more than 3 months with the company).
>
> - 2 weeks basic salary for more than 1 year with the company.

Appeal File, Exhibit 17 at 25-26, Exhibit 15, SES Policies and Procedures (November 1993) at 3.

SES used this section of the employment policy to provide its employees with a severance benefit, as it was the only policy that could have been applied. Appeal [*23] File, Exhibit 17 at 71. SES did not terminate its employees

because "if we had terminated them and the furlough ended twenty-four hours or forty-eight hours later, we would be in noncompliance with the contract because these people would have left, and they would not be available to work." Id. SES' president and CEO believed that his company was obligated to pay its employees under company policies during the Government shutdown as the place of work was inaccessible to them, and absent such payment the employees might not have chosen to remain employed at SES. Id. at 85-86.

SES' claimed costs totaled $ 4078, representing direct labor costs of three employees for 184 hours plus overhead and general and administrative expenses (G&A) during the shutdown. Appeal File, Exhibit 26, Audit Report, Attachment 2 at 2-4. No fee was claimed. Id. at 2.

EG&G

Thirteen of EG&G's fifteen employees assigned to its contract with HSTX were affected by the furlough. Appeal File, Exhibit 19 at 16. Upon receipt of the stop-work order, EG&G continued to pay full salary to its affected employees, and set up a special stop-work order account to capture its personnel costs. Id. at 23-26. [*24] EG&G did not exercise either its severance or layoff policy during the Government shutdown. Id. at 16-17. EG&G's decision not to exercise its severance or layoff policy was based on its efforts to mitigate costs to the Government. Id. at 17, 41-43. EG&G assigned some employees who were affected by the shutdown work to other projects during that period. Id. at 44-46.

Some EG&G employees charged their time to vacation and holiday accounts and not the stop-work account. Appeal File, Exhibit 19 at 18, 44-45. EG&G's mitigation efforts reduced costs that would otherwise have been charged to the stop-work account by approximately $ 17,000. Id. at 44, 46. EG&G's claimed costs in this appeal total $ 26,782, representing the dollars affected employees would have charged to the contract during the shutdown. Id. at 18.

SMSRC

SMSRC orally notified its affected employees of the stop-work order and told them to stay at home until they were called back. Appeal File, Exhibit 18 at 27. n9 SMSRC's affected employees were kept on the payroll and received their benefits but no salary during the shutdown; they were not laid off. Id. at 39. SMSRC's president had an understanding [*25] with the employees that if SMSRC were paid by NOAA for their salaries during the shutdown, SMSRC would be obliged to pay the employees. Id. at 17. SMSRC advised its employees that "they [would] not receive the salary [for the shutdown period] unless the government pays for those hours." Id. at 27; see also, id. at 46.

n9 The SMSRC layoff policy provided: "In most layoffs, SMSRC will give the employee two weeks notice of the action. However, in some cases, two weeks pay may be given in lieu of the notice." Appeal File, Exhibit 26, Audit, Attachment 2 at 13.

SMSRC sent an invoice for estimated salary payments for the period to appellant, which was passed on to NOAA. Appeal File, Exhibit 18 at 14-17; id., Exhibit 11, Appendix L. SMSRC's invoice was for "total estimated cost plus fee" for "time lost due to Government shutdown" for 464 hours plus 5.5% fee totaling $ 14,792.17. Id. SMSRC's time sheets for the shutdown period show only forty-eight hours for one employee charged to the furlough or Stop-Work [*26] Order account, but that was a mistake because SMSRC advised its employees not to make any entries on their time sheets for the furlough. Id., Exhibit 18 at 32-33. Other than the erroneous time sheet, there are no SMSRC time sheets in the record which evidence hours actually charged to the furlough. There is no persuasive evidence that SMSRC made any effort to mitigate salary costs it now claims.

The End of the Shutdown

Fiscal Year 1996 funding again became available to the Department of Commerce on January 6, 1996, when

Congress passed, and the President signed, a Continuing Resolution, temporarily funding the Department of Commerce and other agencies until January 26, 1996. Pub. L. No. 104-92, 110 Stat. 16 (1996). By their terms, the stop-work notices which had been sent by NOAA to its contractors were rescinded as of that date. Appeal File, Exhibit 11, Appendix A.

Payment of Federal Employees

Payment for NOAA employees for the shutdown period was provided by Congress in Pub. L. 104-92. Section 301 of that Act provided authority for agencies to use appropriated funds to pay the salaries of excepted employees for the shutdown period. Section 310, in turn, designated [*27] all federal employees as excepted employees, thus allowing payment of salary for any federal employee impacted by a shutdown of agency operations. Appeal File, Exhibit 20 at 35-36. n10 In effecting payment of federal employees for the shutdown period, Congress did not designate their employment status as "administrative leave." Id. at 35.

n10 This legislation did not include an authorization for the expenditure of funds to pay contractor employees who did not work during the period of the partial shutdown of NOAA operations.

The Claims

On June 13, 1996, HSTX submitted a Request for Equitable Adjustment (REA) to the contracting officer. Appeal File, Exhibit 11. The REA cited two bases for entitlement: (1) NOAA employees had been placed on administrative leave during the shutdown and HSTX should be reimbursed under the "Holidays and Administrative Leave" clause of the contracts, and (2) HSTX had issued "severance pay" to its employees, and this cost should be reimbursed under the contracts.

Under the REA, [*28] HSTX sought reimbursement for (1) 4497 hours of direct labor for its employees who did not work during the partial shutdown of NOAA operations, (2) an overhead rate of 35.5% applied to the hourly direct rate, (3) subcontractor claims submitted by SES, SMSRC, and EG&G for the salaries of their employees who had not worked during the shutdown, (4) G&A of 12.27% applied to the combined figures for (1)-(3) above, and (5) a fee of 7% applied to the entire claim. Appeal File, Exhibit 11, unpaginated Worksheet following page 12. HSTX has not paid any of its three subcontractors for any part of their claims. Id., Exhibit 16 at 103.

On October 1, 1996, the contracting officer denied the REA. Appeal File, Exhibit 12. On February 21, 1997, HSTX submitted its certified claim for $ 196,994 for the costs it had sought in the REA. Id., Exhibit 13. On June 9, 1997, the contracting officer issued her final decision denying the claim. Id., Exhibit 15.

The Audit

On December 24, 1997, NOAA requested the Defense Contract Audit Agency (DCAA) to audit the instant claim. Appeal File, Exhibit 19 at 14, 26. DCAA reviewed the claimed costs under the FAR and the Cost Accounting Standards (CAS). [*29] Id. at 2. The auditors concluded that HSTX and SES n11 had adequate accounting and timekeeping systems, verified the claimed costs against the contractors' and subcontractors' books, sampled time sheets, compared time charged prior to and after the furlough, and interviewed a sample of employees to determine if the time charged was consistent with their activities during the furlough. Id., Exhibit 26 at 3. DCAA issued its original audit report on February 9, 1998, and a supplemental audit report on August 27, 1998, which added findings on subcontractor SES, which had not been received in time to be included in the original report. Id.

n11 SES acquired the assets of SMSRC subsequent to the submission of the claim. Appeal File, Exhibit 26,

Attachment 2 at 2. The auditors considered SMSRC's claim as part of SES' claim.

The audit further concluded that the claimed labor costs for HSTX, SES, and EG&G were based on costs charged to specific subaccounts for the furlough and that labor charges were input from employee [*30] time sheets. Appeal File, Exhibit 26; Affidavit of Daniel Allemeier (Second Allemeier Affidavit) (Sept. 29, 1998), Attachment. n12 The results of the audit were as follows:

Elements of Proposal	Contractor's Proposal	Questioned Cost	Differences
Direct Labor	$ 86,432	$ 603	$ 85,829
Overhead	30,554	213	30,341
Subcontract Costs	46,999	14,471	32,528
Subtotal	$ 163,985	$ 15,287	$ 148,698
G & A 20,122	1,876	18,246	
Total Cost	$ 184,107	$ 17,163	$166,944
Fee	12,887	12,887	
Total Cost Plus Fee	$ 196,994	$ 30,050	$166,944

Appeal File, Exhibit 26 at 3.

n12 The DCAA's verification of EG&G's labor costs dated March 12, 1998, was not included in the audit report in Appeal File, Exhibit 26, but was submitted as an attachment to the Second Allemeier Affidavit.

The questioned $ 603 in HSTX's direct labor costs represented $ 506 in furlough salary for a part-time employee and $ 97 in furlough salary for an employee who resigned. Appeal File, Exhibit 26 at 3. The $ 97 represented [*31] eight hours charged by an employee for December 22, the first day of the furlough, which was also this employee's last day of work. Id. The $ 213 in questioned overhead represented the overhead attributable to this questioned direct labor at the proposed/audit-determined rate of 35.35%. Id. at 4.

The questioned subcontractor costs in the amount of $ 14,471 were calculated as follows: $ 2118 was an error in HSTX's claim overstating SES' claim; $ 12,045 was questioned because these costs have not been paid by SMSRC; and $ 308 in EG&G costs under Contract No. 29 were questioned because that amount could not be verified by the auditors. Appeal File, Exhibit 26 at 5; Id., Attachment 2 at 3. The hours supporting the claim of $ 12,045 were not recorded on the SMSRC employees' time sheets. Id., Attachment 2 at 4. Appellant has not offered any factual rebuttal to the audit report except for the declaration of EG&G's Contract Manager and Operations Manager, Silver Spring, Maryland (Contract Manager). Appellant's Record Submission at 50-55; Affidavit of Dennis Hunt (Sept. 25, 1998) P 7. EG&G's Contract Manager testified in his affidavit:

> I have reviewed the Defense Contract [*32] Audit Agency (DCAA) verification of EG&G's labor costs, which was provided to NOAA via a March 12, 1998 memorandum, and do not concur with their findings. The DCAA audit claims that for the period covered by Invoice Number 43, Exhibit Hunt 5, that only 406.26 hours and $ 13,071 should have been allocated to the shutdown charge numbers. Exhibit pages 90 through 92, 94, and 105 through 108, which reflect the time sheets for the period, substantiate

> our claim that 414.25 hours and $ 13,789.44 should be allocated to the contract. Also the DCAA audit claims for the period covered by Invoice Number 44, Exhibit Hunt 6, that $ 13,404 should have been allocated to the shutdown charge numbers. Exhibit pages 173 through 175, 182, 191, and 192 and Attachment 2 (pages of Invoice Number 44 not included in my copy of the deposition) substantiate our claim of [sic] that only $ 12,993.53 should be allocated to the contract.

Id. Appellant did not submit the EG&G employee time sheets referenced in the declaration into the record in this case, or offer any additional substantiation of its position.

Discussion

Appellant's Motion to Strike is Denied

By agreement of the parties, this case [*33] was submitted on the record with no evidentiary hearing. Appellant moved to strike section IIB of respondent's reply brief which contains respondent's objections to several exhibits offered by appellant. For the reasons stated below, the motion is denied.

Respondent objects to Exhibits 68, 75, and 78 through 80 on the grounds of relevance. Respondent also objects to Appellant's Supplemental Appeal File, Exhibits 44 through 47, 70 (portions), 73, 74, and 77 on the grounds that these documents were not produced in discovery and are irrelevant. Respondent's Reply at 9-11. Appellant contends that, with the possible exception of Exhibit 77, the documents were produced in discovery and respondent's objections, raised for the first time in the reply brief, are too late and have been waived. Affidavit of Daniel R. Allemeier (Nov. 6, 1998) PP 3, 5; Appellant's Motion to Strike.

As reflected in the Board's conference memorandum, the parties agreed among themselves that respondent would supplement the Appeal File by September 18 and appellant would do so by September 25. Further, "the parties agreed that any deposition transcripts or documents exchanged in discovery [could] be filed as exhibits, [*34] but reserved the right to argue their relevance and raise other objections to these exhibits in their record submissions." Conference Memorandum (Aug. 27, 1998). Appellant's proposed exhibits, filed on September 25, contained hundreds of pages of documents. Under the parties' agreement, approved by the Board, initial record submissions were due on September 30 and replies on October 30. Neither party sought an enlargement of time within which to raise objections to exhibits. Counsel for respondent did not understand that by agreeing to this schedule (which gave appellant an additional week within which to object to respondent's exhibits), respondent would have to file its objections simultaneously with its initial record submission -- only three working days later -- or have waived all objections. Declaration of Fred Kopatich (Nov. 20, 1998) P 5.

Several factors cause us to conclude that respondent did not waive its objections: (1) the lack of clarity in the parties' agreement as to whether objections had to be filed with initial or reply submissions, (2) the voluminous exhibits filed by appellant just days before initial record submissions were due, (3) the short time frame for respondent's [*35] objection if required in the initial record submission, and (4) respondent's counsel's understanding of the parties' agreement.

The record contains squarely conflicting testimony regarding whether the disputed documents were produced during discovery. As such, the party with the burden of proof, respondent, has failed to demonstrate that any exhibits must be excluded on this ground. We conclude that the documents at Exhibits 70, 73, and 74 are relevant and respondent's objections to these three exhibits are overruled.

Documents 44 through 47 relate to another agency, not a party to this dispute, and how that agency dealt with the shutdown. Exhibit 68 relates to a suspension of work on another contract due to a bid protest. Exhibit 75 relates to a different contract with a different contractor. Exhibit 77, according to appellant, "merely establishes that there were no unusual reductions in payments for the November 1995 through January 1996 time frames on one of appellant's

[National Aeronautics and Space Administration] contracts." Exhibits 78 through 80 deal with contracts between NOAA and third-party contractors, and appellant has not addressed respondent's objections to these exhibits. [*36]

In this appeal, the Board must determine whether appellant may be reimbursed for costs incurred due to the shutdown under appellant's contracts with NOAA or whether the sovereign acts doctrine bars recovery. We need not look to nonparties' contracts or conduct in resolving the instant dispute. The Board concludes that Exhibits 44 through 47, 68, 75, and 77 through 80 lack probative value and are irrelevant.

The Subcontractor Portion of the Claim is not Summarily Denied

Respondent argues that the entire subcontractor portion of the claim should be summarily denied because no basis for subcontractor entitlement was ever presented to the contracting officer and HSTX merely passed along subcontractor invoices which did not include any contractual or legal basis for the costs sought. Respondent's Reply at 27-28. Respondent cites Contract Cleaning Maintenance, Inc. v. United States, 811 F.2d 586, 592 (Fed. Cir. 1987), for the proposition that the minimum requirements for submission for a valid certified claim include "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." Respondent's [*37] Reply at 27-28. Applying this standard, we conclude that the claim sought employee salary or layoff costs incurred during the shutdown period and set forth a sum certain, giving the contracting officer adequate notice of the basis and amount of the claim.

The Sovereign Acts Doctrine Does Not Bar Government Liability

Respondent contends that the Government shutdown constituted a sovereign act for which no recovery is permitted. Respondent's Posthearing Brief at 22-24. Under the sovereign acts doctrine, the United States Government, when sued as a contractor, cannot be held liable for an obstruction to the performance of a particular contract resulting from the Government's public and general acts as a sovereign. Horowitz v. United States, 267 U.S. 458, 461 (1925); Yankee Atomic Electric Co. v. United States, 112 F.3d 1569, 1574 (Fed. Cir. 1997). cert. denied, 118 S. Ct. 2365 (1998). The Supreme Court in Horowitz, adopting the earlier reasoning of the Court of Claims in Jones v. United States, 1 Ct. Cl. 383, 384 (1865), explained:

> The two characters [*38] which the Government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.

267 U.S. at 461.

As the Supreme Court more recently recognized, the sovereign acts doctrine attempts to "balance [the] Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." United States v. Winstar Corp., 518 U.S. 839 (1996). n13 This balancing, according to the United States Court of Appeals for the Federal Circuit, "is not a hard and fast rule, but rather a case specific inquiry that focuses on the scope of the [Governmental act] in an effort to determine whether on balance that [act] was designed to target prior governmental contracts." Yankee Atomic Electric, 112 F.3d at 1575. [*39] Thus, we begin by examining the scope of the governmental act in question.

> n13 In Winstar the Court analyzed the sovereign acts doctrine in four separate opinions, with none of these analyses carrying a majority. However, as the United States Court of Appeals for the Federal Circuit recognized, the concurring and dissenting Justices agreed with this general statement of the doctrine. Yankee Atomic Electric, 112 F.3d at 1585 n.5.

The shutdown resulted from the failure of the Congress and the President to enact appropriations legislation and was not specifically targeted to any Government contracts. Rather, the shutdown was of general applicability, broadly impacting governmental functions and services. See generally Appeal File, Exhibit 24. Here, as in Horowitz, the governmental action's impact upon specific public contracts is merely incidental to the accomplishment of a broader governmental objective. n14 As such, the shutdown was a public and general act. E.g., Granite Construction Co., IBCA 947-1-72, 72-2 BCA P 9762 [*40] (an act of the President in withholding funds as part of an overall plan to halt national inflation was a public and general act in the exercise of sovereign power for which the Government was not liable).

> n14 The questionable benefit of a public act does not alter the applicability of the sovereign acts doctrine. As Justice Souter, writing for the plurality in Winstar, observed, "an intent to benefit the public can no more serve as a criterion of a 'public and general' sovereign act than its regulatory character can." 518 U.S. at 903.

This does not, however, end our inquiry. As our appellate authority has recognized, the Government can enter into an express or implied agreement to pay a contractor the amount by which its costs are increased by a sovereign act. The court has explained:

> It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that it [*41] if does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act, and that this agreement can be implied as well as expressed. Amino Bros. v. United States, 372 F.2d 485, 178 Ct. Cl. 515, cert denied, 389 U.S. 846 . . . (1967); Ottinger v. United States, 88 F. Supp. 881, 116 Ct. Cl. 282 (1950).

D&L Construction Co. & Associates v. United States, 402 F.2d 990, 999 (Ct. Cl. 1968); See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953, 959 (Fed. Cir. 1993) ("Contracts routinely contain provisions shifting financial responsibility to the Government for events which might occur in the future. That some of these events may be triggered by sovereign Government action does not render the relevant contractual provisions any less binding than those that contemplate third party acts, inclement weather, and other force majeure."); Hills Materials Co. v. Rice, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992) [*42] ("The sovereign acts doctrine certainly does not prevent the government as contractor from affirmatively assuming responsibility for specified sovereign acts."); Rockwell International Corp., EBCA C-9509187, et al., 99-1 BCA P 30,345, at 150,061-2 (agency not barred from agreeing to reimburse contractor for costs incurred due to sovereign acts in the absence of specific statutory or regulatory limitations).

In D&L Construction Co., 402 F.2d at 999, the Government closed the access roads to a construction site due to a strike, and the court held that, to the extent this blockade of the access roads resulted in additional costs, the sovereign acts doctrine would not bar recovery because full access had been warranted in the contract. The court relied on Gerhardt F. Meyne Co. v. United States, 76 F. Supp. 811 (Ct. Cl. 1948). There, the specifications had provided that the truck entrance to a site would be a road which was later closed by military authorities, forcing the contractor to construct a temporary road. The Court of Claims held that the Government's representation that certain roads [*43] would be available carried with it the implied promise "that if they were not, defendant would stand the increased cost." 76 F. Supp. at 815.

Analyzing the instant contracts under these principles, we conclude that the Government's representation that Government facilities would be accessible to the contractor for performance "carried with it the implied promise that if they were not, [the Government] would stand the resulting cost." Gerhardt Meyne, 76 F. Supp. at 815. The contracts

expressly provided that appellant's personnel would perform their work at Government facilities which were closed by the Government through no fault of appellant.

Our resolution of this case does not rest solely on the Government's obligation to provide site access. n15 Rather, the fact that the contracts at issue were cost-reimbursement type contracts, which contained Stop-Work Order clauses providing for payment of increased allocable costs incurred while such orders were in effect, further supports a conclusion that the Government should bear the increased costs of performance attributable to the shutdown. n16 As Professors Cibinic and Nash have [*44] recognized:

> The most significant feature of the cost-type contract is that the contractor assumes no risk for nonperformance. In 20 Comp.Gen. 632, 635 (B-15593) (1941) the Comptroller General observed that this type of contract "contemplates the actual costs of the work and the risks thereof are to be assumed by the Government; that is, that the contractor is to come out whole, regardless of contingencies, in performing the work in accordance with the contract."

John Cibinic, Jr. & Ralph C. Nash, Jr., Cost-Reimbursement Contracting, at 17 (2nd ed. 1993); see generally United States Steel Corp. v. United States, 367 F.2d 399, 408 (Ct. Cl. 1966) ("Generally [cost-plus-fixed-fee] agreements are designed to give businessmen the expenses of operating that portion of their enterprise dedicated during the contract period to Government work together with a reasonable profit. . . . Key drawbacks from the Government's standpoint are that the 'risk' of variations in allowable costs is borne entirely by it . . . .").

n15 In its reply brief, respondent contends that the Board should only consider the bases for entitlement presented to the contracting officer in appellant's certified claim. This is erroneous. It is well established that the Board reviews contracting officer decisions under the de novo standard. Wilner v. United States, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (en banc).

[*45]

n16 Appellant contends that it was required to pay employees for one day, December 22, under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq. on the ground that salaried personnel who are exempt from the overtime provisions of the FLSA are entitled to a full week's pay for any part of a week's work. Appellant's Record Submission at 31-32. It appears that this is an alternative argument since salaries (or layoff pay) for December 22 are included in appellant's overall claim. We need not reach this basis of recovery since we grant entitlement under the Stop-Work Order clause. Nonetheless, we note that appellant has not stated the amount it would be due under the FLSA and failed to marshal any factual support for this argument.

The contracts' Stop-Work Order clauses provided that the contracting officer would make an equitable adjustment if a stop-work order resulted in an increase in the "contractor's cost properly allocable to the performance of any part of the contract(s)." n17 Here, there is no question that the Government issued stop-work [*46] orders on all four contracts covering the period of NOAA's shutdown. An issue is whether appellant incurred increased costs "allocable to" the performance of the contracts as a direct result of the shutdown.

n17 We do not rely upon the Holidays and Administrative Leave clauses or the Changes clause, given that we view this as a classic stop-work order case.

FAR 31.201-4, Allocability of Costs, provides:

> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it--
>
> (a) Is incurred specifically for the contract;
>
> (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
>
> (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

As the Armed Services Board of Contract [*47] Appeals has recognized, the provisions of this regulation are stated in the disjunctive, and thus the cost need meet only one of the three criteria in order to be allocable. Northrop Worldwide Aircraft Services, Inc., ASBCA 45877, et al., 95-1 BCA P 27,503, at 113,504 (quoting Hayes International Corp., ASBCA 18447, 75-1 BCA P 11,076).

HSTX, SES, and EG&G paid affected employees during the shutdown to retain them and maintain the necessary capability to perform the contracts immediately after the shutdown ended. The costs incurred are the direct salaries of the employees who could not work due to the shutdown, and who were assigned full-time to the contracts at issue at the time of the shutdown. Under the circumstances, the costs of salaries or layoff pay, however characterized, can be viewed as being "incurred specifically for the contracts." As such, HSTX's, SES', and EG&G's costs are allocable to the contracts at issue.

SMSRC, however, never incurred the costs it is claiming since it has not paid its employees for the shutdown period. Nor has appellant proven that SMSRC assumed a bona fide liability, debt, or legal obligation [*48] for the salary costs. Rather, SMSRC's president has candidly and consistently stated that SMSRC would not pay its employees unless HSTX were to prevail in this appeal and NOAA were to pay the amount claimed. In analogous circumstances, tribunals have denied reimbursement for an unincurred cost. E.g., Universal American Enterprises, Inc., ASBCA 22562, 81-1 BCA P 14,942, at 43,285 ("Appellant has expressed an intent to pay additional salaries depending on the outcome of this appeal, in effect, the occurrence of a contingency, but the ASPR (DAR) cost principles incorporated into the contract do not permit reimbursement for an unincurred cost. See Norman M. Giller & Associates v. United States, 210 Ct. Cl. 80, 535 F.2d 37 (1976); affirming . . . ASBCA No. 14696, 73-1 BCA P 10,016. Compare Seven Sciences Industries, ASBCA 23337, 80-2 BCA P 14,518."). n18 See also, Worsham Construction Co., Inc., ASBCA 25907, 85-2 BCA P 18,016, at 90,376 ("Amount claimed is no more than a contingent cost to the extent of any recovery [*49] permitted by the Board and is therefore unallowable under DAR 15-205.7.") (citation omitted).

> n18 The board relied on Defense Acquisition Regulation (DAR) 15.205.7(c), which provided that costs to be incurred on the basis of contingencies, including the results of pending litigation, are not generally allowable since such costs have not been incurred. FAR 31.205-7 contains a similar provision.

Nor has appellant demonstrated that SMSRC is entitled to recover its unpaid potential salary costs under the other two subsections of FAR 31.201-4. There is no indication that such salaries would be proportionally distributed between this contract and other work or that the potential payments would benefit the contracts at issue or were necessary to the overall operation of the business. The United States Court of Appeals for the Federal Circuit recently recognized in Caldera v. Northrop Worldwide Aircraft Services, Inc., No. 98-1500 (Fed. Cir. Sept. 10, 1999), "in order to demonstrate

that a cost is allocable, the contractor [*50] must show a benefit to the Government work from an expenditure of a cost that it claims is necessary to the overall operation of its business." (citations omitted). In the instant case, appellant has not attempted to show that its potential expenditure of these salaries is necessary for the operation of its business. In fact, given that appellant has not paid these costs to date and will not pay these costs absent reimbursement from NOAA, it is apparent that reimbursement is not "necessary" for the overall operation of its business, which continued after the shutdown. We conclude that appellant has not demonstrated that SMSRC's unpaid salary costs are allocable under the FAR cost principles.

The Stop-Work Order clause also requires that "the contractor take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage." Appeal File, Exhibits 1-4 at F-1. Appellant, EG&G, and SES minimized the costs allocable to the stop-work order in two respects. They used some affected employees to perform work charged to other cost accounts and allowed employees to take vacations during this period without charging those costs [*51] to the contract. However, the record contains no evidence that SMSRC attempted to minimize the incurrence of costs allocable to the work covered by the suspension order. Unlike the other contractors, SMSRC simply told its workers to stay home and did not attempt to charge their work to other accounts.

Appellant must also demonstrate that the claimed costs were "allowable" within the meaning of the cost principles in FAR 31.201-2, which adds the requirement that a cost be reasonable and reiterates the requirement of allocability. n19

n19 FAR 31.201-2, Allowability of Costs, provides, in pertinent part:

(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 Board, if applicable; otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

[*52]

FAR 31.201-3, Reasonableness of Costs, provides:

(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. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. 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 cost is reasonable.
>
> (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 the 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, [*53] the owners of the business, employees, and the public at large; and
>
> (4) Any significant deviations from the contractor's established practices.

In the instant case, the salary costs paid by HSTX, SES, and EG&G during the shutdown are reasonable in that they are the actual salary rates normally paid to these employees performing these contracts. E.g., TRC Mariah Associates, Inc., ASBCA 51811, 99-1 BCA P 30,386, at 150,187 ("Under ordinary circumstances an employee's salary would form the basis for the rate at which a prudent employer would incur costs for that employee's services.").

Respondent contends that these employee salary costs do not meet the test of reasonableness or allocability because these costs provided no benefit to the Government during the shutdown, since the employees performed no work on the contracts. Respondent's Reply at 14-18. We disagree for two reasons. First, maintaining skilled scientists and computer technicians capable of performing these contracts did benefit the Government by ensuring that these individuals remained available under the contracts after the shutdown was over. Second, labor costs for an idled [*54] workforce during a Government-caused suspension or delay have been recoverable in similar circumstances. For example, in Stroh Corp. v. General Services Administration, GSBCA 11029, 96-1 BCA P 28,265, at 116,019, the Board recognized:

> [another allowable cost is the cost of labor and equipment that has remained idle or is underutilized, subject to reasonable efforts to mitigate the expense. Laburnum Construction Co., 325 F.2d 451 (Ct. Cl. 1963); Hardeman-Monier-Hutcherson (JV), ASBCA 11785, 67-1 BCA P 6210, at 28,748-49.

Similarly, in Tayag Brothers Enterprises, Inc., ASBCA 42097, 94-3 BCA P 26,962, aff'd. on reconsideration, 95-1 BCA P 27,599, the board awarded wage costs for electricians and an air conditioning technician who were on standby due to Government-caused delays. In AST Anlagen-Und Sanierungstechnik GmbH, ASBCA 42118, 92-2 BCA P 24,961, at 19,135, the board held that salaries of idled workers during a suspension due to a bid protest were recoverable under the Protest After Award [*55] clause. The board stated: ". . . the proven actual costs for the idled employees' wages and overhead during the stop work period are recoverable." See generally Stanwick Corp., ASBCA 18083, 76-2 BCA P 12,114, at 51,637 (decision to retain or release employees above productive need must be that of a prudent businessman and must consider the needs of his customers including the Government).

Respondent also contends that the layoff pay paid to appellant's employees during the shutdown was discretionary and not required by HSTX's policy, and thus not reasonable or allocable to the contracts. This issue of whether "layoff pay" was required or not under appellant's employment policy is something of a red herring in that appellant has

demonstrated that the amounts it, SES, and EG&G paid to workers on these contracts during the shutdown were required in order to maintain a capability to perform, regardless of internal contractor policies and whether those amounts are characterized as salary costs, layoff pay, or idle time costs.

Nonetheless, even applying HSTX's Employment Policy, we would conclude that the layoff payments here were required. HSTX's Employment [*56] Policy provides that an employee who is being laid off will be given two weeks' advance notice or may be provided two weeks' pay in lieu of notice. We read this policy as requiring that HSTX give its employees either notice of the layoff, or the pay, if notice could not be given. Respondent claims that notice could have been given two weeks before the then-existing Continuing Resolution was to expire on December 15, 1996, because appellant was fully aware of NOAA's funding situation and should have anticipated that NOAA's funding would end. The evidence of record, however, shows that the political circumstances preceding the shutdown were volatile and uncertain, and that neither appellant nor the media knew or could have reasonably anticipated whether there would be a NOAA shutdown or what the dates of any shutdown would be. Appeal File, Exhibits 16 at 65-67; 24. As such, notice of potential layoff was not feasible, and once the layoff was instituted without the requisite notice, pay was required.

Quantum

In this appeal, HSTX seeks $ 196,994. The Board has reviewed the audit reports prepared by DCAA and notes that neither party has effectively challenged the factual [*57] conclusions in the audit reports, even though EG&G's contract manager "does not concur" in the audit's findings with respect to EG&G. Hunt Affidavit P 7. The audit reports reflect a review of HSTX's and the subcontractors' accounting systems, books, and records and of the claimed costs for verification and the consistency of the charges. Based upon the audit, the Board agrees that $ 30,050, which includes SMSRC's claim of $ 12,045, may not be paid.

Specifically, as the auditors correctly noted, HSTX's part-time employee and terminated employee salary costs are not properly included as furlough costs. Further, the terminated employee was not retained in order to perform the instant contracts and was dismissed for reasons unrelated to the furlough. The overhead and G&A associated with those costs were also properly denied.

Appellant has provided no factual evidence to counter DCAA's finding that SES' claim was overstated by $ 2118. Appellant's Record Submission at 51-54. Nor has appellant demonstrated that EG&G is entitled to additional compensation disallowed by the auditors. Appellant has the burden of proof, and the conclusory statements in the affidavit of EG&G's Contract Manager [*58] submitted after his deposition and without adequate supporting documentation, such as the underlying time sheets, does not constitute sufficient proof that the hours are properly allocable to the furlough account. See Hunt Affidavit P 7 and Attachments; Appeal File, Exhibit 19 and Exhibits; Appellant's Record Submission at 51-54; Appellant's Reply at 22 As such, these costs are disallowed.

Although we have denied the portion of the claim attributable to SMSRC's unpaid salary costs as to entitlement, we note that SMSRC's quantum claim also fails for lack of proof. Appellant admittedly submits this portion of the claim as an "estimate," because SMSRC did not pay the salaries, and adequate documentation was not submitted to support these costs.

The auditors questioned the entire fee claimed in the amount of $ 12,887 because allowing this fee would result in increasing the fee negotiated for these contracts. We agree with the auditors. In these cost-plus-fixed-fee contracts, the parties negotiated an estimated cost of performance and pre-established a fee to be paid to the contractor for performing the work. Appeal File, Exhibits 1-3. This fee is a fixed amount of dollars which "will [*59] vary only if the contractor is required to perform work not included in the original contract." Cibinic and Nash, Cost-Reimbursement Contracting, supra, at 75; see generally FAR 16.306(a). Here, there admittedly is no additional or changed work, but rather the absence of work for which appellant is nonetheless being paid. As such, it is clear that no additional fee is payable. Similarly, Contract No. 54, the cost-plus-award-fee contract, does not permit awarding a fee for layoff pay during the shutdown period. Rather, the contract provides that appellant's fee will be determined by a subjective evaluation by the

Government based upon the quality of performance. Appeal File, Exhibit 3 at B-6; see generally FAR 16.405-2(a); Cibinic & Nash, Cost-Reimbursement Contracting, supra, at 102-05. Further, because we grant this claim under the Stop-Work Order clause, a fee is not recoverable. Cf. Stroh Corp. v. General Services Administration, GSBCA 11029, 96-1 BCA P 28,265, at 116,022 ("Under the Suspension of Work Clause, profit is not allowable.").

Appellant's Claim for Delay Damages is Dismissed

For the first time in its record [*60] submission, appellant raised a claim for what it termed "delay damage" in the amount of $ 3084.24. Appeal File, Exhibit 16 at 97; Appellant's Response to Interrogatory No. 23; Appellant's Record Submission at 54-55. This claim includes "direct costs diverted from these contracts to other work," and overhead and G&A shifted from the instant contract to appellant's bid and proposal effort, when it reassigned employees to mitigate salary costs. Id. However, this claim is wholly separate from appellant's certified claim of $ 196,994 at issue, was never presented to a contracting officer, and was not audited. Appeal File, Exhibit 16 at 97-99. Presentation of a claim to a contracting officer is a jurisdictional prerequisite to proceeding at the Board. 41 U.S.C. § 605 (1994). Because HSTX failed to present its delay damages claim to a contracting officer for final decision, we lack jurisdiction to consider this claim. E.g., Buckner & Moore, Inc. v. General Services Administration, GSBCA 13403, 96-1 BCA P 28,021.

Decision

Appellant's motion to strike section IIB of respondent's reply brief is **DENIED**. Respondent's [*61] objections to Exhibits 44 through 47, 68, 75, and 77 through 80 are **SUSTAINED**. These documents are not part of the record in this appeal.

Appellant's claim for $ 3084.24 for delay damage is **DISMISSED FOR LACK OF JURISDICTION**.

Appellant's claim for $ 12,045 representing salary costs which SMSRC has not paid its employees is **DENIED**.

Appellant's claim for salary or layoff costs paid to its employees and those of EG&G and SES during the shutdown period is **GRANTED IN PART**, in the amount of $ 166,944.

MARY ELLEN COSTER WILLIAMS
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawCollective Bargaining & Labor RelationsStrikes & Work StoppagesLabor & Employment LawEmployment RelationshipsEmployment at WillEmployeesPublic Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral Overview