DEPARTMENT OF ENERGY
BOARD OF CONTRACT APPEALS

PAL CONSULTANTS, INC.) **EBCA No. C-9812283**

Representing Appellant:

Nick Pal, Ph.D., P.E.
Pal Consultants, Inc.
14380 Story Road
San Jose, CA 95127-3818

Representing Respondent:

Debra S. Engel, Esq.
U.S. Nuclear Regulatory Commission
Mail Stop OWFN 15-B-18
Washington, DC 20555-0001

DECISION

April 21, 2000

Pal Consultants, Inc. ("Pal") claims recovery for costs it allegedly incurred under a cost-type contract. The Nuclear Regulatory Commission ("NRC") disallowed these costs because they did not meet the allowability standards of the Federal Acquisition Regulations ("FAR").

Facts

On July 19, 1991, Pal entered into contract no. NRC-04-91-073 with the Small Business Administration and the NRC. This contract was for Human Factors research in support of the regulatory function of the NRC. The contract's duration was approximately 5 months and consisted of four tasks. The NRC retained the option to extend the contract for about 7 months to accomplish nine additional tasks. The total estimated cost for the basic contract was $124,465. If the option to perform tasks five through thirteen were exercised, the total estimated cost of the contract would be $163,332.

Pal performed the first four tasks under the contract. After reviewing Pal's performance, the NRC elected not to exercise the option to extend the contract to cover the additional nine tasks.

By DCAA audit report dated September 24, 1997, Pal's Final Indirect Cost Rates for Fiscal Years 1989 through 1992 were determined. Accordingly, on April 30, 1998, the Contracting Officer issued a letter to Pal stating that there had been an overpayment in the amount of $10,412.39, and demanding payment. Pal disagreed with this finding, and on July 6, 1998, submitted certified claims totaling $104,450. The Contracting

Officer denied Pal's claims, and Pal appealed. In its complaint, Pal reduced its claims to $73,302, the amount Pal alleges it incurred in excess of what it has been paid under the contract. Pal alleges two claims for relief: one for $28,964 and one for $42,641 (28,964 + 42,641 = 71,605).[1] The $28,964 represents the difference between the $37,150 in other direct costs allowed in the initial audit, and the $8,216 in other direct costs allowed in the audit correction. Rule 4, 32, p6.[2] The $42,641 represents the reduction in G&A expenses from the amount ($50,160) calculated using the original audit rate of 56.5%, minus the amount ($7,519) calculated using the corrected audit rate of 8.47%.

At the hearing Pal withdrew its claim for $28,964 in other direct costs. Accordingly, that claim is dismissed with prejudice.

We now address Pal's remaining claim for $42,641 for the difference in G&A rates applied. When the auditor conducted his initial audit he applied a version of FAR 31.205-18 that was current at the time. This version was more liberal with respect to bid and proposal ("B&P") costs than preceding versions. This led to a G&A rate computation for Pal of 56.5% for fiscal year 1992. This version of FAR 31.205-18 came into existence well after the completion of the contract. When this oversight was brought to the auditor's attention, he corrected his audit by applying the version of the clause that was in effect at the time of execution and performance of Pal's contract. This led to a reduction of the G&A rate from 56.5% to 8.47%, and a reduction in allowable G&A expenses from $50,160 to $7,519.

There is no dispute between the parties that if the costs were, in fact, bid and proposal costs, and if the version of FAR 31.208-18 in effect at the time of contract execution were applied, the correct G&A rate would be 8.47%. Oddly, in his final decision, the Contracting Officer indicated that Pal had agreed that the correct G&A rate was 8.47%. Nevertheless, in its complaint Pal disputes the correctness of this 8.47% rate.

It is Pal's position, as stated at the hearing, that it is entitled to the G&A rate of 56.5% used in the initial audit, before the audit was corrected. Pal sets forth two arguments. It alleges that the costs in issue were not B&P costs, but were, instead, business development costs. Thus, Pal alleges that the formula contained in FAR 31.205-18 that limits the amount of B&P costs that can be used to calculate the G&A rate should not be applied. The NRC does not dispute that if the costs were business development costs, the formula would not apply, and the correct G&A rate would be 56.5%. Pal also alleges that even if the costs were B&P costs, it would not be fair to apply the version of FAR 31.205-18 in effect at the time. Pal alleges that the FAR was changed for the very reason that it led to inequitable results.

---

[1] Pal does not explain the discrepancy in amounts between $71,605 and $73,302.

[2] References to Rule 4, No. __, are to the Rule 4 documents contained in the record. Res. Ex. __, refers to Respondent's Exhibits.

With regard to Pal's first argument, the records submitted by Pal are clear. They describe the costs in issue as B&P costs. See Pal's letter of July 7, 1993, Res. Ex.11. Furthermore, when asked about the significant increase in 1992 B&P costs during the audit, Dr. Pal indicated that Pal worked on four proposals in 1992. Res. Ex 8. At the hearing, however, Dr. Pal indicated that these costs were not primarily B&P costs, but were primarily business development costs. This was the first time that this position had been asserted by Pal. Dr. Pal testified that Pal only worked on one proposal during the relevant time period. Dr. Pal attempted to substantiate his position by reference to timecards. The timecards, however, do not describe the kind of work that was being performed at the time.

In light of the documentary evidence contained in the record, this Board cannot accept, at this late date, Dr. Pal's bald assertions that the costs in issue are primarily business development costs. Pal had been characterizing these very costs as B&P costs for a number of years. The Board has been shown no documents that support Pal's new position. On the contrary, all of the relevant documents support the position that the costs in issue were B&P costs. Even the timecards that Dr. Pal relies upon do not support his change in position. The evidence is insufficient to find that the hours in question are not B&P hours, but are, instead, business development hours.

The sole remaining issue then is whether the version of the clause in effect at the time should be used to calculate the G&A rate, or should the later, more inclusive, version of the clause be applied. Pal argues that applying the clause in effect at the time would be unfair. Pal, however, does not explain its position. It simply argues unfairness. Presumably, Pal feels that it is unfair because, by applying the regulation in effect at the time of award, more of Pal's B&P costs were disallowed.

Plainly the clause in effect at the time must apply. At the time of contract execution, if Pal had wanted to check on just how B&P costs and G&A rates would be handled, it could have gone to FAR 31.205-18 and read it. The agreement between the parties on this point then would have been clear. "The FAR is the primary regulation for use by all Federal Executive Agencies in the acquisition of supplies and services with appropriated funds." FAR Chapter 1, Forward (1997). Actually, there is no dispute between the parties that the FAR applies. The only dispute here is which version applies. The general rule is that the regulation that is in effect at the time of the execution of the contract applies to that contract. *Appeal of Havelock Progress Publishing Co., Inc.*, ASBCA No. 33,975, 87-3 BCA ¶20,124. In *Havelock* the ASBCA stated:

> Likewise, for regulations, the normal rule is that new regulations are to be applied prospectively to events and agreements which occur later, unless there is a clear mandate that the change should be retroactive. *Lockheed Aircraft Corp v. United States,* 426 F.2d 322, 327-28 (Ct. Cl. 1970). Furthermore, the burden of proving a retroactive application is on the party that seeks such an application. *Taliaferro v. Stafseth*, 455 F.2d 207, 209 (6th Cir. 1972).

87-3 BCA at 101,894.

In this instance, Pal has not shown that there is a clear mandate that the change should be retroactive. It has not sustained its burden of proving retroactive application. In fact, Pal has provided the Board with no good reason upon which to base a change to this principle.[3] The Board finds that the version of FAR 31.205-18 that was in effect at the time of contract execution is the version to be applied. Pal's claim for an additional $42,641 in G&A expenses is denied.

Decision

Pal's claim for G&A expenses is denied.

R. Anthony McCann
Administrative Judge

I concur:

E. Barclay Van Doren
Chief Administrative Judge

I concur:

Beryl S. Gilmore
Administrative Judge

[3] Although unclear, Pal may be alleging that the later version of the regulation should be applied because of alleged unfairness in the procurement process. Pal may be claiming that the later version of the regulation should apply because Pal was lead to believe that the contract would last about 13 months and cover all 13 items in the contract, instead of lasting about 5 months and covering just four items. At the hearing Pal alleged that, based on NRC representations, it did all of its pricing based on performing the entire contract (all thirteen items) and not just the first four. Pal alleges that, at the last moment, the NRC changed the solicitation to cover only four items, with the NRC retaining the option for the last nine. At that point Pal alleges that it was too late to change its proposal. Pal alleges that it was the failure to exercise the option that put Pal into the situation where it had to go out and drum up business and submit bids during a period where Pal thought it would be fully occupied performing this contract. It is these B&P costs that are being disallowed by the application of the regulation in effect at the time.

After being in litigation for over a year, a contractor cannot make this kind of undocumented allegation for the first time at the hearing and expect to receive relief. The Board has no idea whether there was anything defective about the procurement process. This claim was never brought to the Contracting Officer, nor was it stated in the complaint. Certainly, any documented proof of a defect in the procurement process is missing. Also, the NRC has not been provided an opportunity to investigate this allegation, let alone defend against it. Pal's bald allegation of procurement unfairness, made for the first time at the hearing, cannot be relied upon by this Board as a basis for granting relief. Furthermore, the application of a regulation that was not in existence at the time the contract was executed would not be an appropriate remedy, even if the alleged procurement defect were properly alleged and proven.