



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: November 6, 2013

CBCA 2235

RUSSELL SAND & GRAVEL COMPANY, INC.,

Appellant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

Mickey Beisman of Law Offices of Mickey Beisman, Albuquerque, NM, counsel for Appellant.

Steven M. Fitten and Eric C. Meza, Office of the Legal Advisor, United States Section, International Boundary and Water Commission, El Paso, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **DRUMMOND**.

DANIELS, Board Judge.

The International Boundary and Water Commission (IBWC) terminated for the convenience of the Government a delivery order it had issued to Russell Sand & Gravel Company, Inc. (RS&G) under a contract for the supply and delivery of embankment material. RS&G then submitted a claim to the IBWC for termination settlement costs. The agency's contracting officer denied the claim, and RS&G appealed her decision to the Board.

We conclude that the contracting officer had no valid basis for denying the claim, but that RS&G has overstated the amount it is due. The appeal is granted in part.

Findings of Fact

The IBWC determined that it needed to reconstruct levees in the Mesilla Valley area of Doña Ana County, New Mexico, along the Rio Grande River, to provide flood protection. In May 2008, the agency sought price quotations for various materials to be used in this work – embankment material, flex base, coarse aggregate, concrete sand, and miscellaneous embankment. RS&G was the low bidder for embankment material.

The contracting officer for this procurement, Patricia S. Singer, made inquiries of RS&G concerning its responsibility for performing the work. The company informed her, “We are capable of supplying this project using our own resources.” Ms. Singer determined that the company was responsible: “Russell Sand & Gravel Co. Inc. [has] adequate financial resources to perform the contract [and] the necessary production, technical equipment and facilities, or the ability to obtain them, to perform the required services.” Although the agency suggests that RS&G’s statement was not accurate and misled Ms. Singer into an incorrect determination, we find that the opposite is true. As explained at hearing by Russell Casados, RS&G’s president:

We had some heavy equipment, trucks. We had a pit that was leased from the New Mexico State Land Office that contained the material and the borrow pit that met the specifications of the embankment material. We had a finance company in place so that we were able to purchase equipment whenever necessary. We had accounts with different rental companies so we had the availability of being able to lease whatever equipment or rent whatever equipment we might need for the project.

On June 25, 2008, the parties entered into a contract for supply and delivery of the embankment material. The contract provided that the IBWC would purchase material delivered by RS&G at the price of \$7.49 per ton. If the number of tons estimated in the solicitation (2,705,755) had been purchased, the contract would have been worth \$20,266,104.95.

The contract stated, “THIS IS A FIRM FIXED PRICE REQUIREMENTS CONTRACT” and included Federal Acquisition Regulation (FAR) clause 52.216-21, “Requirements (Oct 1995).” The instrument provided more specifically:

Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from CONTRACT AWARD through EIGHTEEN (18) MONTH [sic] OF CONTRACT AWARD

DATE. . . Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order . . . provided, that the Contractor shall not be required to make any deliveries under this contract after AFTER [sic] 24 HOURS FOLLOWING THE EXPIRATION OF THE CONTRACT PERIOD OF EIGHTEEN (18) MONTHS FROM CONTRACT AWARD DATE.

The contract contained some language about minimums and maximums. In FAR clause 52.216-19, “Order Limitations (Oct 1995),” it said, under the heading “Minimum order,” that whenever the Government required less than eighteen tons of embankment material, “the Government is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies . . . under the contract.” The clause also said that if the Government ordered more than the estimated amount of 2,705,755 tons, the contractor would not be obligated to honor the order, as long as the contractor returned the order within seven calendar days after it was issued. The contract provided as well that the “contractor shall guarantee that a maximum daily delivery rate of 18 tons of requested materials can be met.”¹

The contract incorporated by reference FAR clause 52.212-4, “Contract Terms and Conditions – Commercial Items (Feb 2007).” This clause includes the following Termination clause:

Termination for the Government’s convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the contractor’s records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

¹ The parties seem to agree that the contract’s reference to a “maximum daily delivery rate of 18 tons” was in error and should have read, “1800 tons,” but the contract was never modified to make this change.

48 CFR 52.212-4(l) (2007).

The IBWC issued two delivery orders under this contract. On June 30, 2008, it issued an order for 213,351 tons of embankment material, at a price of \$1,597,998.99. On July 25, 2008, the agency issued an order for 600,000 tons, at a price of \$4,494,000. Throughout contract performance, the parties did not distinguish between the delivery orders; the two were treated as, in effect, a single order for 813,351 tons of material.

The IBWC established the rate at which the material was delivered to the job site, for placement by agency personnel. Although the rate varied over time, Robert Ramzy, the agency's onsite supervisor for the levee project, testified that 1800 tons per day "was pretty much our norm." Mr. Ramzy said that the material RS&G delivered met all specifications and that no issues were ever raised about its quality.

By mid-2009, RS&G was concerned that because the agency had set production rates so low, delivery of all 813,351 tons ordered could not be completed by the date eighteen months after contract award (December 25, 2009). A meeting was arranged in the office of Congressman Harry Teague of New Mexico to discuss the situation. According to RS&G President Casados, the IBWC assured him at this August meeting that the orders could be completed as much as a year after the scheduled contract closing date. We accept this testimony, which was unchallenged at hearing. The IBWC included on its witness list the agency's representative at the meeting, acquisition chief Hugo White, but chose not to present him as a witness.²

On September 25, 2009, however, Contracting Officer Singer sent an e-mail message to RS&G stating, "[D]elivery of material reference subject contract is temporarily suspended until further notice." Three days later, Acquisition Chief White told the contractor:

S&B Infrastructure, LTD is designing various reaches along the Upper Rio Grande on behalf of the USIBWC [United States Section, International Boundary and Water Commission]. These reaches will be designed and

² Mr. White did send Mr. Casados a letter allegedly summarizing their understanding. The letter makes no sense, however. It says that "Delivery Orders issued to-date are expected to be fulfilled within twelve (12) months of issuance . . . and will remain open until fulfilled within the twelve (12) month period." By the time of the meeting, more than twelve months had passed since each of the delivery orders had been issued, so if the sentence in the letter were to be honored, RS&G would have been precluded from making any additional deliveries.

packaged for national competition among interested sources. The USIBWC in-house operation which required your material was negatively impacting the A/E's [architect/engineer's] ability to proceed with the design, therefore a temporary suspension was put in effect on those contracts providing embankment material along affected reaches. The length of this suspension depends on the A/E's ability to expeditiously complete various analyses.

The following month, on October 23, Ms. Singer told Mr. Casados that "modification to terminate for convenience for [sic] subject DO [delivery order] will be forthcoming by early next week." On October 27, she sent RS&G a contract modification terminating the second delivery order for the convenience of the Government. (By this time, the first delivery order had been completed.)

Mr. Casados then laid off the majority of the company's workers on the project, returned equipment he had rented for the job, and began to pursue other work for the company's own equipment which had been devoted to the contract. During the following year, RS&G bid on forty-five to fifty projects and tried to get work as a subcontractor or materials supplier on other projects for which the equipment could be used. The company was unsuccessful in these efforts. It was the low bidder for two contracts, but one of the jobs was put out for re-bid and the other was awarded to another firm after a bid protest. Due to a downturn in the economy, Mr. Casados testified, little work was available and his competitors were bidding so aggressively that he was unable to find other work for the equipment. With few exceptions, the vehicles the company had used on the IBWC project remained idle.

On September 16, 2010, Mary Casados – Mr. Casados' wife, as well as the secretary/treasurer and co-owner of RS&G – sent the following e-mail message to Ms. Singer and Mr. White:

While preparing to submit our settlement proposal for the subject Termination of contract IBM08D0005[,] Russell Sand & Gravel has determined that under our accounting system, unit costs for work in process and finished products cannot readily be established prior to completion of all the work initially ordered Therefore, as required under [FAR] section 49.206-2, bases for settlement proposals of the FAR, we request your approval to submit our proposal under the total cost basis.

Ms. Singer responded on September 23:

This is your written notification of the Contracting Officer's decision on your request to submit your termination settlement proposal as a 'total cost basis' in accordance with Federal Acquisition Regulation (FAR) part 49.206-2. Your request for a settlement is denied based upon the terms of the contract as stated herein.

....

This is a 'requirements' type contract, reference contract FAR clause 52.216-21. The quantities specified in the schedule of the contract are estimates only and are not purchased by the contract. If the Government's requirements do not result in ordering the quantities described in the schedule as estimated or maximum, that fact shall not constitute the basis for an equitable price adjustment. Further, the minimum order quantities specified in accordance with the 'Order Limitation' FAR clause 52.216-19 of the contract was [sic] satisfied.

... This is the final decision of the Contracting Officer. You may appeal this decision to the Civilian Board of Contract Appeals.

Undaunted, RS&G submitted a termination settlement proposal to Ms. Singer on September 28. The proposal was prepared by Mr. Casados in conjunction with Gene Beisman, a highly experienced construction engineer who had a long history of costing projects and had been involved in roughly a dozen convenience terminations. The two men took all of their figures from RS&G's cost records. The proposal was submitted on a government Standard Form 1435, "Settlement Proposal – Inventory Basis," and included a certification which was pre-printed on the form and signed by Mr. Casados. The proposal requested payment of \$945,644.31, which was the difference between the asserted costs incurred on the project and the payments RS&G had received from the IBWC. The asserted costs included those for equipment between the date of termination of the delivery order and October 2010, which is when the company calculated it would have completed its material deliveries had the production rate been the 1800 tons per day which had predominated during the life of the orders. RS&G included with its proposal a cover letter which stated, "In an undated letter recently, you denied this proposal without ever having seen it. Therefore, [RS&G] asks that you review its enclosed Convenience Termination Settlement Proposal and issue a decision based on your review."

Ms. Singer wrote a "determination and findings" on October 1, concluding that "the claim . . . is *not valid* and shall *not be* paid." She explained, "Russell has not demonstrated to the satisfaction of the government using standard record keeping system, resulting from

the T4C [termination for convenience].” She then sent RS&G a letter dated October 14, stating, “This . . . is to advise you that the Contracting Officer stands by its [sic] decision delivered to you via certified mail on September 28, 2010. Your request for a settlement is denied.”

RS&G appealed from both of Contracting Officer Singer’s decisions on December 9, 2010.

After the appeal was filed, the IBWC finally began to consider RS&G’s termination settlement proposal critically. On January 11, 2011, Mr. White, who was by then the contracting officer for this contract, prepared what he called “Contracting Officer Statement of Facts and Analysis of Termination Proposal.” In this document, he concluded that the contractor was entitled to \$226,518. Mr. White also prepared questions about the proposal and its supporting documentation, and he sent those questions to RS&G on February 7.

RS&G responded to the questions and submitted an amended settlement proposal on March 3, 2011. This proposal was submitted on a government Standard Form 1436, “Settlement Proposal (Total Cost Basis).” Like the September 28, 2010, proposal, this one included a certification which was pre-printed on the form and signed by Mr. Casados. The certification on this Standard Form 1436 is identical to the certification on the Standard Form 1435, which had been submitted earlier. The amended proposal sought payment of \$758,039. It differed from the original proposal only in that it eliminated two items – depreciation for vehicles more than five years old and an inadvertent double-counting of some equipment ownership costs – and added one item, facilities capital cost of money (FCCM).

Because this proposal forms the basis of RS&G’s claim as presented at hearing and in the briefs, we set it forth here in detail:

Labor		\$ 928,711.88
Equipment		1,761,817.06
Ownership costs		\$ 939,207.82 ³
Registration and insurance	\$ 317,187.65	
FCCM	85,351.96	
Depreciation	536,668.22	
Rent		52,285.43
Major repairs		310,316.30

³ We note this total is one cent less than the sum of its three components.

Maintenance and fuel	460,007.51
Material	124,339.11
Project overhead	<u>129,510.56</u>
Total project direct costs	\$2,944,378.61
Project general & administrative expenses	<u>109,074.82</u>
Subtotal	\$3,053,453.42
Profit (12%)	366,414.41
Settlement expenses	<u>35,000.00</u>
Total project value	\$3,454,867.83
Less: payments received	(2,696,829.47)
Total claimed	\$ 758,038.36

After receiving this proposal, on March 10, 2011, Mr. White wrote a second “Contracting Officer Statement of Facts and Analysis of Termination Proposal.” In this document, he concluded that RS&G was entitled to \$297,747.25. Mr. Casados rejected this offer as insufficient reimbursement for the costs RS&G had incurred, and the parties proceeded to litigate the case.

At some point during 2011, IBWC counsel asked the agency’s internal audit program manager, Christopher Parker, to review the proposal. On January 5, 2012, Mr. Parker produced a position paper on the matter. He concluded, after taking what he called an “enterprise level approach,” “It is my opinion that none of the settlement proposal should be allowed – primarily because RS&G already made a profit in 2008 and 2009.” Under Mr. Parker’s approach, the “contract termination expenses are to be portrayed as a representative and proportional estimate of the entity’s operations for 2008 and 2009.” At hearing, Mr. Parker explained, “This is a simple matter of allocating expenses. The RS&G settlement proposal over-allocates expenses to the IBWC.” Mr. Parker believed that RS&G “underbid this contract by 36 percent. . . . So it was evident to me that perhaps they underbid too low on this contract, and yet the figures showed they still made money.” The IBWC characterizes Mr. Parker as an expert, but it did not attempt to qualify him as an expert at hearing. Mr. Parker acknowledged that he has no experience whatsoever with bidding construction jobs or analyzing convenience termination settlements. We find that whatever expertise he may have is not applicable to analyzing RS&G’s settlement proposal/claim. Nevertheless, we discuss his analysis below because the IBWC relies heavily upon it.

After Mr. Parker's paper was issued, on February 23, 2012, Mr. White penned his third analysis of the proposal. This time, he concluded, "The net result of the Government review and analysis reflects Russell did not have any excess total project costs (utilizing the Cost Method approach) and therefore the Government is not obligated to pay any amount to [RS&G]." On April 24, 2012, Mr. White wrote a fourth analysis of the proposal. His conclusion this time was identical to the one he reached in the third analysis.

Discussion

The IBWC terminated for the convenience of the Government a delivery order it had issued to RS&G under a contract for the supply and delivery of embankment material.⁴ Under the terms of the contract, when the contract (or in this case, a delivery order) is terminated for the convenience of the Government, the agency is required to make two varieties of payment to the contractor. The first is "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination." There is no doubt that the agency paid this amount. The second is "reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination." (These charges do not include, the contract says, "costs incurred which reasonably could have been avoided.") Because the parties have not been able to agree on the reasonable charges that resulted from the termination, we must determine that amount here.

We must keep in mind a couple of basic principles when making the determination. First, as enunciated in the FAR, "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract,

⁴ The parties have devoted excessive attention to whether the contract is a requirements contract (RS&G's position) or an indefinite delivery/indefinite quantity contract (the IBWC's). The contract plainly states that it is a requirements contract, and agency counsel is incorrect in asserting that the agency ordered a contractually-required minimum amount of embankment material. (The only minimum in the contract is an amount of material less than which the agency need not order from the contractor and which, if ordered, the contractor may refuse to supply.) The nature of the contract is unimportant to the resolution of this case, however. The agency issued two delivery orders under the contract, and each of those delivery orders, standing alone, constituted a fixed-price contract. The contractor has never contended that the agency improperly diverted to other vendors orders which should have been given to it under the contract, and it has not sought any costs which resulted from anything other than the delivery orders.

including a reasonable allowance for profit.” 48 CFR 49.201(a). Thus, as the Court of Appeals for the Federal Circuit has said –

A contractor is not supposed to suffer as the result of a termination for convenience of the Government, nor to underwrite the Government’s decision to terminate. If he has actually incurred costs . . . , it is proper that he be reimbursed those costs when the Government terminates for convenience and thereby [cuts] off his ability to amortize those costs completely.

Jacobs Engineering Group, Inc. v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (quoting *Kasler Electric Co.*, DOT CAB 1425, 84-2 BCA ¶ 17,374, at 86,566-67).

Second, to effectuate this purpose, the Government’s decision to terminate a contract for convenience essentially acts to convert a fixed-price contract into a cost reimbursement contract. *Divecon Services, LP v. Department of Commerce*, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, at 161,636; *Airo Services, Inc. v. General Services Administration*, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071; *Richerson Construction, Inc. v. General Services Administration*, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,704 (1992); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 12 (2007), *aff’d*, 296 F. App’x 929 (Fed. Cir. 2008) (citing *White Buffalo Construction, Inc. v. United States*, 52 Fed. Cl. 1, 4 (2002), and *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 638 (1997)). The Government’s Standard Forms 1435 and 1436 for convenience termination settlement proposals recognize this principle by directing a contractor to make its proposal on a total cost basis, showing its costs and profit, plus settlement expenses, less payments received, to arrive at an amount requested. The IBWC’s reliance on *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991), and *Trafalgar House Construction, Inc. v. United States*, 73 Fed. Cl. 675 (2006), for the proposition that the total cost method of calculating claims is disfavored is misplaced. The courts in those cases were addressing claims for equitable adjustments under fixed-price contracts, not claims for termination costs under what have essentially been converted into cost reimbursement contracts.

To determine the proper amount of recovery, we review each of the elements of RS&G’s claim, using the headings established by the contractor. We use precise numbers, as the contractor did in its proposal. We hasten to add, however, that this should not have been necessary. As the FAR explains –

Fair compensation is a matter of judgment and cannot be measured exactly. . . . The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

....

Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

48 CFR 49.201(a), (c). Because the parties resist settlement so strenuously, however, we believe that we must proceed as we do.

Labor. The contractor's records include a lengthy and detailed document showing "IBWC Payroll by Week" for the duration of its work under the delivery orders issued by the agency. The document shows wages for each of the contractor's employees on a weekly basis. The total payroll, less payments to Mr. and Mrs. Casados, is \$920,564.73. RS&G acknowledges that \$29,964.07 of the total payroll was for labor involved in other projects, so only \$890,600.66 was for labor under the delivery orders issued by the IBWC. To this amount, the contractor adds \$38,111.22 in costs for worker's compensation insurance and drug testing of its truck drivers. The total noted for labor is \$928,711.88.

The IBWC challenges this figure on three grounds. First, the actual payroll devoted to the IBWC work must have been less than alleged because it constitutes 74.69% of the company's wage costs for 2008 and 2009, but the IBWC work constituted only 28.15% of the company's sales in 2008 and 37.93% of its sales in 2009. Second, the records include wages for employees who are not listed on a foreman's notes for particular days. Third, the records include wages for some employees who have addresses in Los Ojos, New Mexico, which is four hundred miles north of the job site, and therefore could not have been working on this project.

None of these assertions is a valid reason for questioning RS&G's labor costs. As to the first, as pointed out by the company's accountant, Dean Willingham, the wage payments and sales receipts are not directly comparable because the records of the former are on a cash basis and the reports for the latter were prepared on an accrual basis. We do not know whether the numbers cited by the agency are correct because the record contains no foundation for them, other than bald statements in Mr. Parker's report. Even if the wages and sales could be compared, we have no idea of the extent to which any of RS&G's projects involved labor costs or capital costs, or the profit margins of any of the projects. The IBWC did not bother to engage in discovery about these matters, and it did not present any evidence

about them. Further, if the agency is correct in its surmise that only 62 to 72% of the wages (and other costs claimed) were actually spent for work under the contract, the company's profit on the job would have been enormous. We will discuss this further below, under the heading "Profit." For the moment, it is sufficient to say that the wages claimed are proportionate to a reasonable profit on the job, and this factor helps to persuade us that those wages are reasonably stated.

As to the agency's second assertion, the IBWC did not bother to call the foreman as a witness to ask about the discrepancies. RS&G says, plausibly, that the foreman's notes list people at the site where he was working (the IBWC levees), but other employees were working at another site (the pit from which the embankment material was taken). The contractor's rejoinder to the third assertion is simple and makes sense: some employees lived permanently in Los Ojos, where the company is headquartered, but while they were working on the project, they were lodged temporarily near the job site.

We do make two minor modifications to RS&G's charges for labor. (1) Mr. Beisman, the very knowledgeable individual who assisted in preparation of the settlement proposal/claim, noted in his expert report that after further review of the company's records, he determined that \$8358.63 in labor costs included in the claim should actually have been charged to other customers' orders. We accept this amendment, decreasing the payroll amount devoted to the IBWC work to \$882,242.03. (2) With this change, the percentage of labor costs listed in the payroll records, but associated with other jobs, becomes 4.163%. The parties agree that charges incurred for many items, listed below, should be reduced by the proportion attributable to other jobs. RS&G has used, as a proxy for that proportion, the percentage of labor costs which were attributable to other jobs. (The contractor miscalculated that percentage as 3.259%, using an incorrect number for the wages paid to Mr. and Mrs. Casados; the percentage should have been 3.255%.) Having no other guide rationally suggested, we use the one suggested, modified to include the number we find appropriate. In our judgment, the practice of allocating 4.163% of costs claimed to other jobs should be applied to charges for worker's compensation insurance and drug testing of drivers as well. We reduce those charges by that percentage. The charges therefore become \$36,524.65. The total labor charge for the IBWC delivery orders was \$882,242.03 (wages) plus \$36,524.65 (insurance and drug testing), or \$918,766.68.

Equipment – ownership. Under this heading, RS&G lists three subcategories, registration and insurance, facilities capital cost of money (FCCM), and depreciation. For each of these categories, the contractor shows its costs for the period of time from July 2008, when it began work under the IBWC's delivery orders, until October 2010, when it would have completed work if the second delivery order had not been terminated for convenience and the production rate had remained the predominant 1800 tons per day during the period

after termination. As to FCCM and depreciation, RS&G includes analyses, prepared by Mr. Beisman, on a vehicle-by-vehicle basis. The FCCM figures are, for each vehicle, for the period from the time the vehicle was brought to the job until October 2010 or the earlier date on which the vehicle was taken off the job and used for other purposes. The depreciation figures are shown in similar fashion; they are also divided between the time when the job was ongoing and the time after termination occurred. The charges claimed and documented are \$317,187.65 for registration and insurance, \$85,351.96 for FCCM, and \$536,668.22 for depreciation of vehicles.

The IBWC's objection to including these costs in the claim is diffuse. The agency does not complain about any of Mr. Beisman's calculations. In its posthearing brief, however, the agency maintains that depreciation is claimed for some vehicles which had been fully depreciated before contract performance began, and that FCCM should not be allowed because the contractor did not allocate those costs among different projects. Earlier, in Mr. White's analyses, none of the costs were allowed for the period after termination occurred. Mr. White also testified at deposition that ownership costs should not be allowed because the contractor's vehicles were being used on other projects. When he was asked, however, if there was "documentary . . . evidence that they were used on other projects than the IBWC project?", he responded, "I did not see any documentation." Instead, he said, he relied solely on the word of Mr. Parker and agency counsel. Neither Mr. Parker nor counsel directed us to such evidence, and there is none in the record.

Again, the agency's concerns are misplaced. RS&G has explicitly removed from its claim all depreciation for vehicles which were fully depreciated before contract performance began. Allocating FCCM among different projects is inappropriate because, with a small exception noted below, every vehicle for which those costs are noted was devoted solely to this project during the relevant time period.

The FAR contains a specific cost principle for costs continuing after termination:

Despite all reasonable efforts by the contractor, costs which cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs continuing after the effective date of the termination due to the negligent or willful failure of the contractor to discontinue the costs shall be unallowable.

48 CFR 31.205-42(b). We find that RS&G's thesis that but for the termination, work would have continued for another year is valid. Mr. Casados testified convincingly that RS&G tried hard but failed, during this year after termination, to get work for which the vehicles could be used. The costs associated with the vehicles could not be discontinued during the

time when contract performance would have continued, but for the termination. These costs are consequently allowable.

We do make some modifications to the claimed amounts. First, because the vehicles were used for other small projects as well as IBWC work, we deduct the proportion of the work on those other projects, 4.163%, from the amount in each of the three categories. Second, to assist in the determination of an appropriate profit on this contract, we divide the costs between those incurred during contract performance and those incurred during the following year, when performance would have continued but for the termination. For registration and insurance, and FCCM, the division is proportionate; for depreciation, it is as per Mr. Beisman's calculations. With these two changes, we find that the costs were as follows:

	<u>July 2008 to October 2009</u>	<u>October 2009 to October 2010</u>
Registration and insurance	\$173,704.64	\$130,278.48
FCCM	46,742.15	35,056.61
Depreciation	293,916.96	220,409.77

We note that these three categories and project general and administrative expenses (discussed below) are the only ones for which RS&G seeks reimbursement for post-termination costs.

Our third modification involves FCCM. FCCM "is an imputed cost designed to compensate a contractor for the opportunity and inflationary costs of holding fixed assets used to perform a contract." *AT&T v. General Services Administration*, GSBCA 11730, 95-2 BCA ¶27,869, at 138,969. This cost is generally applicable to cost-reimbursement contracts, where it must be identified in the proposal in order to be claimed. 48 CFR 31-205.10(b)(3). When a fixed-price contract is terminated for the convenience of the Government, it essentially becomes a cost-reimbursement contract, so FCCM may be claimed there even though it was not identified in the proposal. *AT&T*, 95-2 BCA at 138,970; *Fiesta Leasing & Sales, Inc.*, ASBCA 29311, 87-1 BCA ¶ 19,622, at 99,287-88, 292; (decision holding that commercial vehicles – buses, in that case – are eligible for application of FCCM). Because FCCM is an accounting concept which is an offset against profit, however, *see* Office of Federal Procurement Policy Policy Letter 80-7, 45 Fed. Reg. 82,594 (Dec. 15, 1980), we remove it from the costs on the basis of which profit may be calculated. This is the practice followed by Mr. Beisman, as well, in the expert report he submitted, correcting what he properly perceived as an error in the development of the settlement proposal/claim.

Equipment – rent. RS&G spent \$52,285.43 to rent equipment which it used in performance of the IBWC delivery orders. Allocating 4.163% of this amount to the other small jobs the contractor took on with this equipment, we determine that \$50,108.79 should be charged to the project in question.

Equipment – major repairs. RS&G spent \$320,770.20 to repair equipment used on the project. (Only \$310,316.30 is claimed, since the contractor deducted 3.259% for non-IBWC work done using the equipment.) All the repairs took place during contract performance. The agency, following Mr. Parker’s lead, is concerned that this amount is more than the company’s financial statements show it spent for repairs in 2008 and 2009. This concern is allayed by Mr. Willingham’s testimony that many of the repair costs are included on the statements among “equipment expenses.” Those expenses are considerably greater than the amounts claimed for repairs of equipment used on the IBWC project. We allocate 4.163% of the repair costs to other projects, leaving \$307,416.54 attributable to the work for the IBWC.

Equipment – maintenance and fuel. RS&G spent \$475,504.19 for maintenance and fuel for vehicles used on the project. (Only \$460,007.51 is claimed, since the contractor deducted 3.259% for non-IBWC work.) We allocate 4.163% of these costs to other jobs, leaving \$455,708.95 attributable to the IBWC work.

Material. RS&G spent \$124,339.11 for material used on the project – primarily royalties to the New Mexico Land Office, from whose pit the company secured embankment material, and also lesser costs for material testing. We allocate 4.163% of these costs to other jobs, leaving \$119,162.87 attributable to the IBWC work.

In the agency’s posthearing brief, under the heading “Direct Material,” the IBWC discusses royalty payments made by the company to Mr. and Mrs. Casados. These payments have nothing whatsoever to do with the IBWC contract or this case. Mr. and Mrs. Casados own a gravel pit in Los Ojos, in northern New Mexico, and when RS&G extracts material from that pit, it pays royalties to Mr. and Mrs. Casados. The company did not extract any material from the Los Ojos pit for this project.

Project overhead. RS&G spent \$133,873.50 on direct project overhead, including items such as rent for office space and living quarters for employees, fencing, and utilities, during contract performance. (Only \$129,510.56 is claimed, since the contractor deducted 3.259% for non-IBWC work.) We allocate 4.163% of these costs to other jobs, leaving \$128,300.35 attributable to IBWC work.

Total project direct costs. The sum of the above figures (excluding FCCM) is \$2,797,774.03: \$2,447,085.78 during contract performance and \$350,688.25 in continuing costs which could not be discontinued (despite the contractor's best efforts) after termination.

Project general and administrative expenses. RS&G attributes to this category \$60,597.12 in pay and vehicle expenses for Mr. and Mrs. Casados in working on the IBWC delivery orders during contract performance, and \$4039.81 per month (or \$48,477.70 for twelve months⁵) as continuing costs for the following year. As the contractor explains, these were costs charged directly to the project. Following our practice as to other items, we attribute 4.163% of these costs to other work, allocating \$104,534.03 to IBWC work: \$58,074.46 during contract performance and \$46,459.57 in continuing costs which could not be discontinued after termination.

Subtotal. The total of project direct costs (excluding FCCM) and project general and administrative expenses is \$2,902,308.06: \$2,505,160.24 during performance and \$397,147.82 in continuing costs.

Payments received. RS&G says that it received \$2,696,829.47 in payments from the IBWC on the delivery orders. Mr. Parker's analysis states that the contractor received only \$2,651,279. We have examined the records presented by the two parties as to this matter and reach the following conclusions: With a very few small exceptions, the records show identical amounts paid at virtually identical times. Two of the three instances of difference may well be attributable to the IBWC's mischaracterizing, as payments for embankment material, reimbursements for gross receipts tax to be paid by the contractor to the State of New Mexico. Even with regard to the information in the agency's records, Mr. Parker's statement is incorrect; he included tax reimbursements among the payments for material, and the contractor's claim excludes all such reimbursements. The principal difference between the contractor's total payments number and the agency's is that the agency's records are incomplete; they do not include the final payment to the contractor, which was in the amount of \$198,031.93. It is inconceivable that RS&G would not have billed after September 11, 2009, for material it had delivered as late as September 25. The contractor's number for total payments received is correct.

Profit. RS&G's termination settlement proposal/claim includes a 12% profit on costs incurred. The contractor explains that it generally makes a profit of between 10 and 15% on jobs like this one, and to be conservative, it picked 12% as a reasonable profit.

⁵ The total is two cents shy of twelve times the monthly figure.

The IBWC notes, with regard to profit, Mr. Parker's conclusion that the contractor "underbid this project by 36%." By this statement, Mr. Parker evidently meant that RS&G's bid was 36% lower than the next lowest bid for the job. (His math is wrong: RS&G's bid of \$7.49 per ton is actually 38.85% lower than the next lowest bid of \$10.40 per ton.) We do not understand how the relationship between the two bids has anything to do with costs incurred or a reasonable profit. We do not understand, as well, Mr. Parker's testimony that "to evaluate their profit on the IBWC contract, I would have to use something like the Eichleay formula that takes a pro rata share and allocates it to just the IBWC." "The Eichleay formula is used to 'equitably determine allocation of unabsorbed overhead to allow fair compensation of a contractor for government delay.'" *Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003) (quoting *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1578 (Fed. Cir. 1994)). The claim we analyze here does not involve unabsorbed overhead or government delay. The formula has nothing to do with the situation here.

We do believe, however, that 12% is not an appropriate figure for profit in this situation. Under our analysis, RS&G incurred costs of \$2,505,160.24 in performing under the IBWC contract, and it received \$2,696,829.47 in payments for the material it delivered. The difference between these two figures, \$191,669.23, represents a profit of 7.65% on its costs. Applying a 7.65% profit to the continuing costs which could not be discontinued after termination (\$397,147.82, excluding FCCM), we find that an additional \$30,381.81 in profit is appropriate. The total amount for profit on this job is \$222,051.04.

Suppose we had allocated only 67% of each of RS&G's expenses to the IBWC project, as suggested by the agency. (Sixty-seven percent is the mid-point of the range urged by the agency, 62 to 72%.) If we had done so, using the methodology above, we would have concluded that the total costs incurred during contract performance were only \$1,725,690.19. The contractor's profit would have been \$971,139.21, or 56.28% of its costs. This unlikely scenario serves only to reinforce our belief that the costs claimed are reasonable.

Settlement expenses. RS&G contends that it incurred \$35,000 in expenses to prepare its settlement proposal. The IBWC says that these expenses are unallowable because "RS&G never earnestly participated in negotiations. They did not seek to arbitrate or mediate." This statement is not true; the contractor did respond to the agency's requests for information, and it did modify its proposal upon further review. Even if the statement were true, however, it would not be cause for denying reimbursement for preparation of the proposal. Whether a contractor accepts an agency offer in response to a proposal does not affect the validity of a contention that the contractor spent money to prepare the proposal. We allow the \$35,000 claimed for settlement expenses.

Total project value. This entry consists of the sum of total project direct costs (\$2,797,774.03), project general and administrative expenses (\$104,534.04), profit (\$222,051.04), settlement expenses (\$35,000), and FCCM (\$81,798.76). That sum is \$3,241,157.87.

Total claimed. This is the difference between the total project value (\$3,241,157.87) and the payments received for delivery of embankment material (\$2,696,829.47). This amount, which we consider an equitable termination settlement award, is \$544,328.40.

Before closing, we mention two other subjects. The first is interest. Under the Contract Disputes Act, “[i]nterest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor’s claim . . . until the date of payment of the claim.” 41 U.S.C. § 7109(a)(1) (Supp. IV 2011). A contractor claim of more than \$100,000 may be considered by a contracting officer, however, only if it is accompanied by a certification as to specified matters. *Id.* § 7103(b).

RS&G’s president signed a certification on a Standard Form 1435 when he submitted the company’s initial termination settlement proposal. By asking for a contracting officer’s decision, he also effectively designated the proposal a claim. This was reasonable, since the contracting officer had already made clear (by denying the claim before it was made) that the parties were at an impasse regarding the proposal. The president also signed a certification on a Standard Form 1436 when he submitted the company’s revised proposal/claim. In *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1545 (Fed. Cir. 1996), the Court of Appeals for the Federal Circuit noted that the Government had accepted a certification on a Standard Form 1436 as containing language similar to the certification language of the Contract Disputes Act. Since then, courts and boards of contract appeals have held that such a certification is not deficient for Contract Disputes Act purposes. *E.g.*, *Scan-Tech Security, L.P. v. United States*, 46 Fed. Cl. 326, 336 (2000); *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 547-48 (1999); *Walashek Industrial & Marine, Inc.*, ASBCA 52166, 00-1 BCA ¶ 30,728, at 151,791; *Metric Constructors, Inc.*, ASBCA 50843, 98-2 BCA ¶ 30,088, at 148,940. We follow this practice by holding that RS&G’s claim was properly certified at the outset. Interest shall run from the date the contracting officer received the claim (no later than October 1, 2010, since on that date she wrote an analysis of it) until the date of payment.⁶

⁶ Had we not agreed with the other courts and boards that the Standard Form 1435/1436 certification meets Contract Disputes Act standards, the result would be the same. (continued...)

The final subject on which we comment is something that has consumed a great deal of the IBWC's attention: the New Mexico gross receipts tax (GRT). The contract incorporated by reference FAR clause 52.212-4. Paragraph (k) of that clause, entitled "Taxes," states, "The contract price includes all applicable Federal, State, and local taxes and duties." Notwithstanding this provision, from the very beginning of the contract, RS&G billed, and the IBWC paid, the New Mexico GRT on invoices for delivery of embankment material. In April 2009, the contracting officer told the contractor that she had "made a determination to allow payment of taxes not initially included in your price," but that under pressure from her finance office, she would have to modify the contract to continue the practice. On May 13, 2009, the parties agreed to a modification which states that it is "to provide provision for taxes are applicable against this contract due to the location of the merchant's business is in a state that does not afford the federal government a tax-exempt status under its state and local laws."

This modification was in keeping with the general practice, as explained by RS&G President Casados, that "in New Mexico, you don't include GRT with your unit bid prices. It's almost impossible to figure out what the rate's going to be because the rate changes every six months." Mr. Casados testified that RS&G did not include GRT in its unit pricing for the contract, and the contractor presented evidence of bids from other companies on IBWC solicitations for levee-building materials which do not include New Mexico GRT in unit pricing.

The contractor's termination settlement proposal/claim makes no mention of GRT as a cost or receipt, which is appropriate since the company in effect did nothing more than collect from the agency and pass through to the State all charges for GRT. Nevertheless, the IBWC thinks that RS&G engaged in some sort of shenanigans with regard to this tax. Mr. Parker thinks that the company sometimes delayed, after receiving money from the agency to pay GRT, in making payments to the State. Ultimately, however, he testified that the company has paid to the State all GRT that it owed on the project.

⁶ (...continued)

Under the Act, a defective certification may be corrected at any time before a board of contract appeals enters its judgment on the claim. 41 U.S.C. § 7103(b)(3). If the certification is corrected, any interest found due runs from the date on which the contracting officer received the claim. *Id.* § 7109(a)(2). To be safe, RS&G submitted a certification signed by its president, with the precise language specified in the Act, in September 2012.

If RS&G made late payments to the State of New Mexico – and Mrs. Casados, the company secretary/treasurer who made the payments, strenuously denies that it did – that is a matter for the State to raise with the company. It has nothing to do with this case.

Decision

The appeal is **GRANTED IN PART**. The International Boundary and Water Commission shall pay to Russell Sand & Gravel Company, Inc., as a consequence of the agency's termination for convenience of a delivery order it issued under a contract with the company, the sum of \$544,328.40. The agency shall also pay to the contractor interest on this amount, at the rates prescribed under the Contract Disputes Act, 41 U.S.C. § 7109(b), from the date on which the contracting officer received the company's September 28, 2010, claim until the date of payment.

STEPHEN M. DANIELS
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge