

BOBBY L. BURNS,)	AGBCA No. 94-170-1
D/B/A BURCO SYSTEMS DEVELOPMENT,)	
)	
Appellant)	
)	
Representing the Appellant:)	
)	
Bobby L. Burns, <u>pro se</u>)	
President)	
BURCO Systems Development)	
P.O. Box 425)	
Hurst, Texas 76065)	
)	
Representing the Government:)	
)	
David M. Stauss)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
101 South Main Street, Suite 351)	
Temple, Texas 76501-7686)	

DECISION OF THE BOARD OF CONTRACT APPEALS

September 26, 1995

OPINION BY ADMINISTRATIVE JUDGE SEAN DOHERTY

This appeal is from a Soil Conservation Service (SCS)¹ Contracting Officer's (CO's) decision dated April 4, 1994. The decision denied Appellant's claim for \$18,832.79 plus interest under SCS Contract No. 53-7482-8-61 awarded through the Small Business Administration (SBA) to Appellant September 30, 1988. The contract was a cost-plus fixed fee contract for Automatic Data Processing Services (ADP). The claim is that the Government did not properly distribute the owner's compensation between direct and indirect costs and that correct distribution would entitle Appellant to an additional overhead payment. The claim included \$3,000 in claim preparation costs.

Appellant asserts the president's salary was \$60,000; the Government that it was \$27,889. Appellant asserts salary allocation should be based on a ratio of 379 hours, attributed to the contract, to 2,080

¹ Through reorganization of the U.S. Department of Agriculture in 1994, the SCS is now the Natural Resources Conservation Service. The record in this case was complete prior to the reorganization and, therefore, the term SCS is used herein.

potential hours per year. The Government asserts direct costs should be based on the 379 hours at \$30 per hour. The parties stipulated to the entitlement under each of the possible computations based on their separate theories and that Appellant would be entitled to interest on any amount recovered. Appellant's theory applied to \$60,000 would result in an agreed payment of \$15,832.79; applied to \$27,889 would result in payment of \$4,599.91. The Government's theory applied to \$60,000 would result in an agreed payment of \$14,324.93; applied to \$27,889 payment has been made and no additional payment or interest is owed.²

The issue of the overhead rate to be applied to this contract was previously before this Board. Bobby L. Burns, D/B/A Burco Systems Development, AGBCA No. 91-228-1, 93-1 BCA ¶ 25,346. In that case we dismissed that portion of the appeal relating to Appellant's president's 1990 salary as it had not been appealed, presented as a claim to or finally decided by the CO. Appellant thereafter submitted the issue as a claim to the CO. This appeal is from the decision on that claim.

The prior decision details the contractual relation of the parties. Familiarity with that decision is presumed. Relevant findings from the prior decision are incorporated in this decision by reference as (Finding of Fact (FF)__: 91-228-1).

In the prior Board decision, specific findings were made pertaining to the president's compensation. Those findings are consistent with the numbers used by the parties in their agreement as to the measure of damages except that no finding references Appellant's assertion of a \$60,000 salary. Review of the entire record supports the earlier findings.

The Board has jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 601-613. The parties waived the right to a hearing and elected to have a decision issued on the written record. The record consists of the Appeal File (AF) compiled previously in appeal AGBCA No. 91-228-1, 93-1 BCA ¶ 25,346, as supplemented by the parties.

FINDINGS OF FACT

1. SCS Contract No. 53-7482-8-61 was awarded through the Small Business Administration (SBA contract No. 6-88-1-1028) to Burco Systems Development, Bobby L. Burns, Owner (FF 1: 91-128-1).
2. The work was computer programming at Government facilities with Government employee analysts. The contract work was accepted October 31, 1990. (FF 2: 91-128-1.)

² The parties entered into agreed stipulations dated October 31, 1994, reducing matters in dispute to (1) the amount of the president's 1990 salary to be allowed and (2) the method of allocating that salary to determine the overhead rate to apply to the contract. The stipulations included agreement to the amount owed under each theory.

3. In 1990 Bobby Burns received compensation of \$27,889 as president of the company. He worked 379 hours of direct work on the contract out of a standard work year of 2,080 hours. The record does not show a regular pattern of payment or an accrual of an obligation to Mr. Burns, but does include irregular loan and cash transactions between the company and Mr. Burns. (FF 14, 20-23: 91-128-1.)³

4. The record includes a copy of minutes of a special meeting of the directors of Burco Systems Development, Inc. dated March 3, 1990 for the sole purpose of establishing the salary of the president. The salary was set at \$60,000 to be paid at \$5,000 per month. The resolution further stated "The president is authorized to use his discretion in determining whether the salary, if paid, will be detrimental to the corporation and shall defer a portion thereof." (Supplemental (Supp.) AF 1-3.)

5. Appellant's response to an order on accounting data by the Board allocated \$27,889 in salary of the president between direct and indirect costs as \$14,223.39 direct and \$13,665.61 indirect (FF 23: 91-128-1).

6. A March 1990 audit of Appellant indicated Appellant had proposed in a contract with another federal agency that the owner would function as a project manager at a rate of \$30 per hour (FF 19: 91-128-1). The Government allocated direct costs based on multiplication of the agreed 379 hours times \$30 (\$11,370) and subtracting the result from \$27,889 (\$16,519) to arrive at the indirect cost. (FF 21: 91-128-1.)

DISCUSSION

The parties pose two questions for the Board. First, was the president's salary the \$60,000 referred to in minutes of a special meeting of the company directors (FF 4) or the \$27,889 paid (FF 3) and second, what of that salary should be allocated between direct and indirect costs (see footnote 1 above).

The action of the board of directors stands out as an anomaly in the record. Payments to Mr. Burns were irregular loan and cash transactions (FF 3). No credible evidence was offered to support payment or reserve beyond the amount the parties agreed was paid. In the main the manner of payment suggests a distribution of profits or fee. Such distribution would not ordinarily be considered salary for allocation purposes and would suggest Appellant has been overpaid. Donald R. Stewart & Associates, AGBCA Nos. 84-226-1, 84-227-1, 84-228-1, 84-239-1, 84-240-1, 94-241-1, 85-168-1, 89-122-1, 89-123-1, 89-124-1, 89-225-1, 92-1 BCA ¶ 24,705; 3M Contractors, AGBCA

³ We note that Appellant, in various letters and pleadings in the record, has suggested a number of varied assertions as to the amount and allocation of salary in the contested year and the previous year and, in the main, figures have been offered with- out supporting documentation.

No. 87-402-1, 91-2 BCA ¶ 23,672; H&H Reforestation, AGBCA No. 86-305-1, 87-3 BCA ¶ 20,154; Saylor Construction & Maintenance, AGBCA No. 84-342-1, 85-3 BCA ¶ 18,331; H&H Reforestation, AGBCA No. 84-311-3, 85-3 BCA ¶ 18,255.

Here the Government has stipulated \$27,889 was paid and that 379 of 2,080 hours were direct contract work. The Government proposes allocation on such facts and has not asserted the distributions to be profit or fee payment. See Wolverine Aerial Spraying, Inc., AGBCA No. 87-326-1, 88-1 BCA ¶ 20,373. See also Federal Acquisition Regulation (FAR) 48 CFR § 31.205-6, regarding compensation for personal services. Therefore, we find the amount of salary to be \$27,889.

Turning then to the allocation of the salary, we find no support for Appellant's allocation. It is not in keeping with any consistent practice shown by the contractor. See Gladwynne Construction Co., Inc., ASBCA No. 47076, 95-1 BCA ¶ 27,297; L&H Construction Co. Inc., ASBCA No. 23620, 81-1 BCA ¶ 14,823. It also is inconsistent with Appellant's response to the Board (FF 5). In this Board's initial decision we stated the well-established principle that mere allegations without more do not meet an appellant's initial burden of proof. Because of the jurisdictional issue addressed in that case, Appellant has essentially had a "second bite at the apple." Despite that, the supplemental record offered did not correct the deficiencies of the original record. It can only be concluded that was because there was no evidence to support the claim for an additional payment. Appellant's allocation fails because of a lack of proof.

DECISION

Appellant's claim for additional payment is denied.

SEAN DOHERTY
Administrative Judge

Concurring:

EDWARD HOURY
Administrative Judge

MARILYNN M. EATON
Administrative Judge

Issued at Washington, D.C.
September 26, 1995