ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DynCorp	)	ASBCA No. 49714
	)	
Under Contract No. DAKF04-91-C-0072	)	

APPEARANCES FOR THE APPELLANT: Richard O. Duvall, Esq.
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APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ Sandra J. Fortson, JA
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OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying appellant's claim for attorneys' fees and other related costs. The principal issue is the applicability of the Major Fraud Act of 1988 and related regulations. The underlying contract is for various services at Fort Irwin, California. Entitlement only is before the Board for decision. We sustain the appeal.

FINDINGS OF FACT

1. Contract DAKF04-91-C-0072, for various base support services at Fort Irwin, was awarded to appellant, DynCorp, on 25 September 1991. The contract was a cost-plus-award-fee contract for a base period and four option years. All four options were exercised. The amount of the contract at award was $195,003,822. The contract contained the clause at FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991), under which the allowability of costs is to be determined pursuant to Subpart 31.2 of the FAR and the terms of the contract. The contract incorporated by reference the clause at FAR 52.233-1 DISPUTES (APR 1984). (R4, tab 1; tr. 1/172)

2. Commencing in 1992 the Army Criminal Investigation Division (CID) began investigating allegations[1] of criminal activity related to contract performance and involving DynCorp and its employees. Investigated were, *inter alia*, allegations of fraud involving vehicle maintenance (ex. A-1), fraudulent use of Government gasoline credit cards (Joint Rule 4 file (JR4), tab 5), and recording of false data by a DynCorp employee, Larry Marcum (JR4, tab 4). Investigative responsibility was turned over to the cognizant Assistant United States Attorney (AUSA) and the Federal Bureau of Investigation (FBI) (tr. 3/27).

3. During the period relevant to this appeal, pursuant to 8 Del. Code § 145(a), (c), Delaware corporations were required to pay legal costs incurred by employees in the successful defense "on the merits or otherwise" of an investigation brought about "by reason of the fact that he is or was a[n] . . . employee . . . of the corporation[.]" *Id.* at (a). Similarly, DynCorp's bylaws required DynCorp to pay its employees' legal costs if the costs are reasonably incurred when an employee is threatened with suit or prosecution by reason of employment where the employee had no reasonable cause to believe that the challenged conduct was unlawful (exs. A-6, -14).

4. Cheralyn Cameron, an attorney with DynCorp met the CID agent in charge of investigating the early allegations. The CID agent opposed allowing DynCorp corporate counsel to advise the employees. (Tr. 1/207, 2/167) Thereafter, outside counsel was employed to represent the corporation and employees who were under investigation (tr. 1/209-10). Several law firms were employed in this fashion (tr. 1/210, 221). DynCorp has a corporate policy on retaining outside counsel (ex. A-7). The policy was followed in dealings with outside counsel in matters relevant to this appeal. (Tr. 1/222-30, 235-36) We find that at least some of the costs were allowable under the contract if not barred by the Major Fraud Act and related regulations.

5. The AUSA declined prosecution as a result of the investigations except in the case of Mr. Marcum, who entered into a plea agreement on 17 March 1994 under which he pled guilty to unauthorized access to a Government computer in violation of 18 U.S.C. § 1030(a)(3) (R4, tabs 9, 11). No civil or criminal lawsuits were filed against DynCorp as a result of investigating the various allegations (tr. 2/24-25).

6. Appellant submitted a certified claim in the amount of $755,929.05 by letter of 23 January 1996, seeking reimbursement for "legal costs incurred in connection with this investigation" (R4, tab 31). The legal costs incurred in connection with representation of Mr. Marcum were not submitted (tr. 1/184-85). The claim was denied in a contracting officer's decision dated 29 March 1996 (R4, tab 36). An appeal was filed on 2 April 1996 (R4, tab 37).

RELEVANT STATUTES AND REGULATIONS

Prior to enactment of the Major Fraud Act of 1988, 10 U.S.C. § 2324(e)(1) disallowed, in relevant part, the following contract costs:

> (C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing a false certification).
>
> . . . .
>
> (N) Except as provided in paragraph (2), costs incurred in connection with any civil, criminal, or administrative action brought by the United States that results in a determination that a contractor has violated or failed to comply with any Federal law or regulation if the action results in any one of the following:
> (i) In the case of a criminal action, a conviction (including a conviction pursuant to a plea of nolo contendere).

Pub. L. No. 99-145, § 911, 99 Stat. 682-83 (1985); Pub. L. No. 100-456, § 832, 102 Stat. 2023 (1988).

10 U.S.C. § 2324 was amended by the Major Fraud Act of 1988, Pub. L. No. 100-700, which imposes penalties for fraud in the procurement process. The penalties include fines and imprisonment. 18 U.S.C. § 1031. While not amending 10 U.S.C. § 2324 (e)(1)(C), the Major Fraud Act amended 10 U.S.C. § 2324 (e)(1)(N) and other sections of 10 U.S.C. § 2324 to read as follows, in pertinent part:

> (b) AMENDMENTS TO TITLE 10. - Section 2324 of title 10, United States Code, is amended -
> (1) in subsection (e) -
> (A) by striking out subparagraph (N) and inserting in lieu thereof the following:
> "(N) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).";
> (B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2); and (2) by striking out subsection (k) and inserting in lieu thereof the following:

"(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

"(2) A disposition referred to in paragraph (1)(B) is any of the following:

"(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

"(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

"(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

"(D) A final decision by the Department of Defense -

(i) to debar or suspend the contractor;

(ii) to rescind or void the contract; or

(iii) to terminate the contract for default; by reason of the violation or failure referred to in paragraph (1).

"(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

. . . .

"(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

"(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) [the FAR].

"(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

"(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

"(l)(1) In this section, the term 'covered contract' means a contract for an amount more than $100,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

"(2) In subsection (k):

"(A) The term 'proceeding' includes an investigation.

"(B) The term 'costs', with respect to a proceeding -

"(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding and

"(ii) includes -

"(I) administrative and clerical expenses;

"(II) the cost of legal services, including legal service performed by an employee of the contractor;

"(III) The cost of the services of accountants and consultants retained by the contractor; and

"(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers and employees to such proceeding.

"(C) The term "penalty" does not include restitution, reimbursement or compensatory damages."

. . . .

(d) REGULATIONS.-The regulations necessary for the implementation of . . . section 2324(k)(5) of title 10, United States Code (as added by subsections (a) and (b))-

(1) shall be prescribed not later than 120 days after the date of the enactment of this Act; and

(2) shall apply to contracts entered into more than 30 days after the date on which such regulations are issued.

The FAR provision implementing 10 U.S.C. § 2324, FAR 31.205-47 "COSTS RELATED TO LEGAL AND OTHER PROCEEDINGS," inserted the parenthetical phrase "(including its agents or employees)" in delineating when costs are unallowable. The relevant portions of FAR 31.205-47 in effect on the date of award of the contract are set out below:

31.205-47 Costs related to legal and other proceedings.

(a) Definitions.

. . . .

"Proceeding," includes an investigation.

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees) are unallowable if the result is -

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct.

(3) A final decision by an appropriate official of an executive agency to:

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract, or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation;

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in subparagraphs (b)(1) through (3) of this subsection (but see paragraphs (c) and (d) of this subsection);

. . . . .

DECISION

DynCorp argues, *inter alia*, that the Major Fraud Act and the amendments to 10 U.S.C. § 2324 enacted therein do not bar recovery of the legal costs claimed unless it was convicted or otherwise punished thereunder. Respondent argues that, because of an employee conviction, all costs are barred by the FAR.

THE AMENDMENTS TO 10 U.S.C. § 2324

Prior to enactment of the Major Fraud Act, 10 U.S.C. § 2324(e)(1)(C) and (N), *supra*, explicitly required a conviction, nolo contendere plea, finding of liability, or

determination of violation of a Federal law or regulation of a contractor (hereinafter "contractor wrongdoing") before proceeding costs were unallowable. The requirement in subparagraph (e)(1)(C) for contractor wrongdoing in the case of civil or criminal fraud proceedings brought by the United States did not change with passage of the Major Fraud Act. However, that Act amended subparagraph (N) to tie allowability of proceeding costs to a new subsection (k). With regard to criminal proceedings, paragraph (k)(1) and subparagraph (k)(2)(A) are not explicit regarding whether contractor wrongdoing is necessary for costs to be unallowable, or whether conviction of an employee will also bar recovery of proceeding costs. Accordingly, we look to the whole statute for guidance in determining whether an employee conviction is a basis for denying costs related to a proceeding involving a contractor which has not been determined to have engaged in "contractor wrongdoing." *Sterling Federal Systems, Inc. v. Goldin*, 16 F.3d 1177, 1185 (Fed. Cir. 1994).

The Marcum conviction is under 18 U.S.C. § 1030, *Fraud and related activity in connection with computers*. The version of 10 U.S.C. § 2324 that resulted from enactment of the Major Fraud Act, by maintaining subparagraph (e)(1)(C), explicitly required contractor wrongdoing in the case of fraud "or similar proceeding" when brought by the United States. The Marcum conviction is covered by subparagraph (e)(1)(C), and under that provision the costs are not unallowable because a contractor plea or conviction is explicitly required to preclude allowability. Paragraph (k)(1) and subparagraph (k)(2)(A) are silent on the point of contractor wrongdoing vice an employee conviction, although they also explicitly involve fraud and are applicable to the Marcum conviction. In respondent's view, the lack of explicitness in the subsection (k) provisions permits promulgation of a regulation which disallows proceeding costs where there is an employee plea or conviction. To interpret the relevant portions of subsection (k) as requiring a different result than subparagraph (e)(1)(C), one must rely on the silence of those portions of subsection (k) to treat an employee conviction as a further basis for cost disallowance. "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946). An interpretation that reads out the explicit provision in subparagraph (e)(1)(C) which requires contractor wrongdoing because the new paragraph (k)(1) and subparagraph (k)(2)(A) are silent on this point would be "treacherous" indeed. Since all the cited provisions deal with the same subject - the allowability of proceeding costs incurred as a result of criminal proceedings - and one provision is clear on the point in question while the others are silent, we conclude that a reading of all provisions together supports appellant's argument that Mr. Marcum's conviction does not bar recovery of the otherwise allowable proceeding costs at issue.

Moreover, subparagraph (k)(5)(C) sets out as a basis for disallowance of otherwise allowable costs those situations arising from criminal, civil, or administrative proceedings involving "the same *contractor* misconduct alleged as the basis of another criminal, civil

or administrative proceeding . . . [if] the costs of such other proceeding are not allowable under paragraph (1)" (emphasis added). Thus, in a reference to paragraph (k)(1), under which respondent would have us disallow costs because of an employee conviction, subparagraph (k)(5)(C) sets out contractor misconduct as the criterion for not allowing recovery of proceeding costs. This further supports DynCorp's position.

Although respondent argues that FAR 31.205-47 bars recovery of legal costs incurred in connection with investigations where an employee or agent of the corporation is convicted, a regulation must maintain consistency with the statute it implements. Where it does not, it is entitled to no deference:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law - for no such power can be delegated by Congress - but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936).

Accordingly, assuming *arguendo* that FAR 31.205-47(b) is intended to bar recovery of proceeding costs of a corporation in the event of only an employee conviction, we hold that it is inconsistent with the statute it implements. As such, insofar as it would constitute a bar to recovery of proceeding costs based on an employee conviction, the insertion of the parenthetical phrase "(including its agents or employees)" in FAR 31.205-47(b) is "out of harmony with the statute, [and] is a mere nullity." *Manhattan General Equipment Co., supra.* We further conclude that, based on our interpretation of the statute, appellant is not prevented from recovering proceeding costs otherwise allowable under the FAR because of the Marcum conviction.

THE LEGISLATIVE HISTORY AND THE *CHEVRON* OPINION

While neither party has raised the applicability of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), we have considered that opinion in reaching our decision. In *Chevron*, the Supreme Court reversed an appellate court ruling because it had "adopt[ed] a static judicial definition of the term stationary source when it had decided that Congress itself had not commanded that definition." *Id.* at 842. Citing *United States v. Shimer*, 367 U.S. 374 (1961), the Court reasoned that where the reconciliation of conflicting policies is committed to an agency by a statute, the agency's regulation implementing the statute should not be disturbed unless it appears from the

statute or its legislative history that the agency's interpretation is not one that Congress would have countenanced.

We have analyzed the Major Fraud Act's amendments to 10 U.S.C. § 2324 above, and we find no indication that Congress entrusted the accommodation of conflicting policies on the issue before us to the agencies through the FAR. The Congressional intent, in our view, is that Congress meant to restrict allowability in paragraph (k)(1) and subparagraph (k)(2)(A) only where a contractor was convicted, pled nolo contendere, or found liable. Our analysis of the legislative history supports this view.

The legislative history of the Major Fraud Act expressly states that it was not the intent of the Congress to depart from traditional lines in finding a corporation liable for the acts of its employees in criminal prosecutions:

> The committee did not attempt to modify or establish new principles regarding respondeat superior and other forms of vicarious liability in criminal prosecutions. Leading cases on this subject include, for example, *United States v. Beusch*, 596 F.2d 871 (9th Cir. 1979); and *United States v. Hilton Hotels Corp*., 467 F.2d 1000, 1004-1007 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1978). In order for the corporation to be liable for a crime involving a mental element, it is necessary to prove that the agent acted within the scope of his or her actual or apparent authority and with the intent to benefit the corporation.

S. REP. NO. 100-503 at 14 (1988), *reprinted in* U.S.C.C.A.N. 5969, 5977.

The Senate Report leads us to conclude that the Congress intended to treat a corporation and its employees as separate entities. In interpreting the Major Fraud Act, it has been held that a corporation and its employees may be separately prosecuted and convicted for offenses arising from the same criminal scheme perpetrated under a Government contract. *United States v. Sain*, 141 F.3d 463 (3d. Cir.), *cert. denied*, 525 U.S. 908 (1998) (corporation convicted of fraud and its president, who was the sole stockholder, convicted of aiding and abetting fraud). Clearly, the Major Fraud Act did not intend for corporations to be *ipso facto* criminally responsible for the wrongdoing of employees. Indeed, appellant was not fined for Mr. Marcum's infraction under 18 U.S.C. § 1030(a)(3).

However, the Senate Report is not as helpful with the section of the Major Fraud Act that amends 10 U.S.C. § 2324. We turn to other areas of the legislative history for guidance. As noted above, 10 U.S.C. § 2324(e)(1)(C) disallows costs incurred in defense

of civil or criminal fraud proceedings only if the contractor was convicted or pled *nolo contendere*. It was a matter of concern to the Congress that no limitation was imposed on recovery in other circumstances, and in deliberations on the Major Fraud Act Congress considered "treat[ing] the proceeding costs, including legal expenses, of contractors in the same manner as . . . other private parties involved in litigation with the federal government." S. REP., *supra* at 5, 5972. To this end, the bill included Section 3, added by Senator Grassley, which would have prevented recovery in the case of a violation by the contractor which led to an information or grand jury indictment without a conviction, and the costs of legal services were generally to be limited to those specified by the Equal Access to Justice Act. *Id.*; 134 Cong. Rec. S16697 (daily ed. Oct. 18, 1988). However, a subsequent amendment was sponsored by Senator Grassley, which ultimately became 10 U.S.C. § 2324(k).[2] Senator Grassley referred to the amendment at one point as "the 80 percent solution" in an obvious reference to the limitation on recovery of proceeding costs. *Id.* at S16704. He described the amendment as follows:

> In summary, the amendment provides that legal proceeding costs are unallowable in any criminal, civil or administrative proceeding brought by the Federal or State Government that results in a conviction, civil liability, the imposition of a fine or other money penalty, a suspension or debarment, or other similar result evidencing a violation or failure to comply on the part of the *contractor*. [Emphasis supplied.]

Id. at S16703.

While conceding that 10 U.S.C. § 2324(k)(2)(A) does not expressly state that the contractor must be convicted for the costs to be unallowable, appellant asserts, relying heavily on Senator Grassley's statement, that the legislative history supports its interpretation. Respondent relies heavily on FAR 31.205-47(b), but if we conclude that 10 U.S.C. § 2324 intended to bar costs only where the contractor was punished, there are no conflicting policies to be accommodated as was the case in *Chevron* and the regulation cannot "trump" the statute. *Manhattan General Equipment Co., supra.* Respondent also argues that courts have held contractors liable for the acts of employees when the employees were acting for the corporation and within the scope of their employment. Respondent's argument is correct as far as it goes. However, the corporate contractor here was, in fact, not held liable for the acts of its employees. Indeed, no actions, civil or criminal, were brought against appellant (finding 5).

We find appellant's argument persuasive. In addition to the statement of Senator Grassley cited by appellant, other statements by the amendment's sponsors support appellant's contention. The amendment removed an earlier provision that would have

barred costs where there was an indictment. Senator Grassley, in commenting on this, referred to compromise language in the bill which would make all proceeding costs unallowable when there was a "disposition favorable to the Government in a parallel, subsequent or other, criminal, civil or administrative proceeding involving the same *contractor* conduct[.][3]" 134 CONG. REC. S16703 (daily ed. Oct. 18, 1988). Similarly, Senator Bingaman, a co-sponsor, stated that the amendment would render costs unallowable in the case of a criminal conviction "when a proceeding is brought against a *contractor* for violating a Federal or State law or regulation . . ." *Id.* at S16704.

In reviewing the legislative history of a statute, it is appropriate to look to the interpretation of the legislation articulated by a bill's sponsors or manager. Such comments are entitled to considerable weight. *See, e.g., North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982) (sponsor's remarks called "an authoritative guide" to a statute's construction and are to be accorded substantial weight); *T.V.A. v. Hill*, 437 U.S. 153, 183-84 (1978) (Court relies on statements by the floor manager reported in the Congressional Record). The statements by the sponsors of the amendment that added a new section (k) to 10 U.S.C. § 2324 establish that a conviction of the contractor, and not its employees, was necessary to bar otherwise allowable legal expenses. Those statements are entitled to substantial weight, as 10 U.S.C. § 2324(k)(2)(A) neither expressly declares that conviction of a contractor's employee is sufficient to bar proceeding costs nor expressly declares that only a contractor's conviction will make the costs unallowable.

Respondent cites *Beech Gap, Inc.*, ENG BCA Nos. 5585, 5600, 95-2 BCA ¶ 27,879, in support of its arguments that Mr. Marcum's acts are imputed to appellant, with the result that appellant's legal costs are unallowable. In *Beech Gap* the Government terminated the contract for default because the contractor's project manager pled guilty to scheming to defraud the Government by presenting a fraudulent progress payment claim. The reason for the default was the attribution of the project manager's guilt to the contractor. The Government also denied affirmative claims by the contractor. The contractor appealed. Thereafter, its quality control manager also pled guilty to fraud. However, the company principals were exonerated and there is no indication that the corporation, although indicted, was convicted. The Board dismissed the appeal involving the affirmative claims, finding it had no jurisdiction over claims tainted by wrongdoing and fraud. It upheld the termination, holding that the fraud committed was sufficient to warrant the default termination.

We do not find *Beech Gap* analogous to the appeal before us. The instant appeal involves the application of statutory and regulatory provisions on the allowability of costs and, unlike *Beech Gap*, the contract at issue was not terminated. Further, respondent has not challenged our jurisdiction. Cases relied on in *Beech Gap* which arguably affect

board jurisdiction because a contract was *void ab initio* involved facts influencing contract formation. *See United States v. Mississippi Valley Generating Co.,* 364 U.S. 520 (1961); *Godley v. United States*, 5 F.3d 1473 (Fed. Cir. 1993); *J.E.T.S., Inc. v. United States*, 838 F.2d 1196 (Fed. Cir. 1988), *cert. denied,* 486 U.S. 1057 (1988). The offense here - unauthorized use of a computer - did not involve contract formation, nor did it, as in *Beech Gap*, involve a false claim. Finally, and of greatest significance, in the case at bar the will of the Congress is determinative of whether the claim at issue should be denied because of the taint of employee wrongdoing and fraud. Unlike *Beech Gap*, the interpretation of a specific statutory provision is the linchpin to the disposition of this appeal. We conclude that the provision in question does not render those costs unallowable.

ALLOWABILITY OF THE COSTS

This appeal is before us on entitlement only. We have found that appellant incurred costs as a result of the investigation (finding 4). FAR Part 31.2 governs allowability in this cost-plus-award-fee contract (finding 1). We hold that the costs claimed are not disallowed by either the Major Fraud Act or FAR 31.205-47. Pursuant to FAR 31.201-2 costs must be reasonable and allocable. These issues are to be determined on quantum.

The appeal is sustained. The matter is returned to the parties for negotiation of quantum in accordance with this opinion.

Dated: 21 June 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] The parties have raised the issue of whether there was more than one investigation conducted. As our resolution of the appeal does not require us to decide that issue, nothing in this decision should be construed as supporting either party's position as to whether there was more than one investigation.

[2] The Major Fraud Act of 1988 was passed with the original section 3, an obvious conflict with the amendment which added section k to 10 U.S.C. § 2324. Pub. L. No. 100-700. Section 3 was repealed in 1989. Pub. L. No. 101-123

[3] Compare this statement to 10 U.S.C. §2324(k)(5)(C) which uses the phrase "the same contractor *misconduct*," which is discussed *supra*.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49714, Appeal of DynCorp, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals