ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
TRW Inc.	)	ASBCA No. 51003
	)	
Under Contract No. F04701-86-C-0022	)	

APPEARANCES FOR THE APPELLANT:
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OPINION BY ADMINISTRATIVE JUDGE HARTY
ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The subject contract between TRW Inc. (TRW) and the Air Force was partially terminated for the convenience of the Government. This appeal arises from the contracting officer's unilateral determination of a termination settlement amount. Two issues are involved in the appeal: first, the value of hardware and services delivered to TRW by a subcontractor, McDonnell Douglas Corporation, as of the partial termination for convenience; and second, the percentage of profit that the Air Force is entitled to claim in calculating the profit credit due for the subcontracted work. Only entitlement is before us. The parties have characterized the second issue as a quantum issue.

The Air Force has moved for summary judgment on the first issue. It argues that under Federal Acquisition Regulation (FAR) 49.202(a), no profit can be awarded for material or services "which, as of the effective date of the termination, have not been delivered by the subcontractor." It claims that under its interpretation of the subcontract the value of the deliveries at time of termination was $23,497,324 and on that basis the

termination contracting officer (TCO) determined the Government was entitled to a profit credit of $14,242,250 from TRW on the subcontract work.

TRW has filed a cross-motion for summary judgment on the first issue on the ground that the TCO and TRW had mutually agreed after negotiations that the profit credit due the Government would be $3.25 million, but that a Termination Settlement Review Board (TSRB) unreasonably refused to endorse the agreement. It asserts that, in any event, and apart from the applicability of FAR 49.202(a), under a correct interpretation of the subcontract the delivered value was at least $92 million, which would fully support a $3.25 million credit. TRW also argues that the Air Force erroneously failed to determine the delivered value of certain data items on the ground that they were not separately priced.

Because the material facts are not in dispute and we conclude the Air Force is entitled to judgment as a matter of law on the contract interpretation question presented, we grant its motion, and deny TRW's motion, with one exception. In the context of a termination settlement, TRW is entitled to profit on data items that were delivered but not separately priced, if a reasonable value can be placed on the items.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Contract

The Air Force and TRW entered into Contract No. F04701-86-C-0022, effective 30 July 1987. TRW was required to fabricate Defense Support Program Spacecraft 0018 - 0022 (DSP satellites) for a total price of $743,476,924.14. (R4, tab 2a) The portions of the prime contract relevant to this appeal were on a fixed-price-incentive-fee basis (complaint and answer, ¶ 8).

The contract incorporated by reference the following relevant Federal Acquisition Regulation (FAR) clauses: 52.233-1 DISPUTES (APR 1984) ALTERNATE 1 (APR 1984) and 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (APR 1984) (R4, tab 2a at 104-104a).

The TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) clause provided, in pertinent part:

> (e) . . . [T]he Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit. . . . Paragraph (f) below shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(f) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (e) above:

(1) The contract price for completed supplies or services accepted by the Government . . .

(2) The total of-

(i) The costs incurred in the performance of the work terminated . . .

. . . .

(iii) A sum, as profit on subdivision (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; . . .

The Subcontract

On or about 6 August 1987, TRW and McDonnell Douglas Corporation, McDonnell Douglas Electronic Systems Co. (MDC, MDESC, MDA, or subcontractor) entered into Subcontract No. D62103GP6S for the Defense Support Program Laser Crosslink Subsystem (LCS). The subcontract was effective 1 October 1986. (R4, tabs 2e, 2f) The LCS was to be imbedded in the DSP satellites and was intended to provide laser communications between satellites (R4, tab 1 at 1). TRW was identified as "the Buyer" and MDC was identified as "the Seller," "the Contractor," or "the Subcontractor." The subcontract was composed of two segments: Segment I consisted of LCS Nos. 1-4; and Segment II consisted of LCS Nos. 5-8. (R4, tab 2e at 200002-200003) Only Segment II is at issue in this appeal. The portions of the subcontract relevant to this appeal were on a firm-fixed-price basis (R4, tab 2e at 200016). The subcontract was signed by TRW's vice president and general manager for the Space & Technology Group, Military Space Systems Division. MDC's signature block is blurred, but the signature appears to be that of MDC's director of contracts. (R4, tab 2e at 200046)

Key Subcontract Provisions

ARTICLE I was entitled SCOPE OF WORK. Paragraph A of ARTICLE I provided:

> The Seller, as an independent contractor and not as an agent of the Buyer, shall, in conformance with the Terms and Conditions more particularly set forth herein, provide the necessary personnel, material and facilities and do all things necessary and/or incidental to the furnishing and delivery to the Buyer of the supplies and services set forth herein, all in accordance with the below listed specifications and other requirements applicable thereto and referenced therein:
>
> Statement of Work for Production of Laser Crosslink Defense Support Program, 35.86.511-300 dated 11 November 1986.

(R4, tab 2e at 200008)

Paragraph B of ARTICLE I provided: "The supplies and services to be furnished shall be:"

Item No.	Description	Billing Price
01	GFY 1987 Economic Order Quantity: The Seller shall furnish all necessary supplies and services required to identify, plan, purchase and control procurement of long-lead materials and subassemblies and perform fabrication and assembly at the subsystem level to realize Economic Order Quantity (EOQ) benefits necessary to support production of Laser Crosslink Subsystem (LCS) No. 5-8 and Laser Crosslink Subsystem Test Sets (LCSTS) No. 4, 5 and 6 in accordance with the Statement of Work identified in Article I except for tasks in paragraphs 3.3 and 3.4.	$27,704,228
02	GFY 1988 Economic Order Quantity: The Seller shall furnish all necessary supplies and services required to identify, plan, purchase and control procurement of long-lead materials and subassemblies and perform fabrication and assembly at the subsystem level to realize Economic Order Quantity (EOQ) benefits necessary to support production of Laser Crosslink Subsystems (LCS) No. 5-8 and Laser Crosslink Subsystem Test Sets (LCSTS) No. 4 and 5 in accordance with the Statement of Work identified in Article I except for tasks in paragraphs 3.3 and 3.4.	$52,936,259
03	GFY 1989 Economic Order Quantity: The Seller shall furnish	$13,533,759

	all necessary supplies and services required to identify, plan, purchase and control procurement of long-lead materials and subassemblies and perform fabrication and assembly at the subsystem level to realize Economic Order Quantity benefits [n]ecessary to support production of Laser Crosslink Subsystems (LCS) No. 7 and 8.	
04	Laser Crosslink Subsystem (LCS) 5 and 6 and Laser Crosslink Subsystem Test Sets 4 and 5: The Seller shall furnish all necessary supplies and services required for the fabrication, assembly, integration, test and performance verification of Seller produced equipment in accordance with the Statement of Work identified in Article I except for tasks in paragraphs 3.3 and 3.4.	$40,637,547
05	GFY 1990 Economic Order Quantity: The Seller shall furnish all necessary supplies and services required to identify, plan, purchase and control procurement of long-lead materials and subassemblies and perform fabrication and assembly at the subsystem level to realize Economic Order Quantity (EOQ) benefits necessary to support production of Laser Crosslink Subsystems (LCS) No. 8.	$ 5,650,372
06	Laser Crosslink Subsystem (LCS) 7: The Seller shall furnish all necessary supplies and services required for the fabrication, assembly, integration, test and performance verification of Seller produced equipment in accordance with the Statement of Work identified in Article I except for tasks in paragraphs 3.3 and 3.4.	$10,416,336
07	Laser Crosslink Subsystem (LCS) 8: The Seller shall furnish all necessary supplies and services required for the fabrication, assembly, integration[,] test and performance verification of Seller produced equipment in accordance with the Statement of Work identified in Article I except for tasks in paragraphs 3.3 and 3.4.	$ 4,870,982
	. . . .	
12	Firm Fixed Price Hardware Modification:	
12A	Test Set Modification ECP's TS2-001 thru -004 in Support of Engineering LCSTS. (Fully Funded)	$ 19,000

12B	Test Set Modification for IRIG "B" Synchronization Effort. (Fully Funded)	$	27,313
12C	Laser Radiator Panel Heater Harness Extension (Fully Funded)	$	20,828
12D	Protective Connector Covers per ECP LCS-002 (Fully Funded)	$	12,500
12E	Leading Edge Trigger Modification per ECP TS2-009 (Fully Funded)	$	7,257
12F	TOMI #2 Drive Capability per ECP TM2-001 (Fully Funded)	$	3,040
12G	SITS Interface Drawer Modification per ECP TS2-011		TBD
13	Kodak Storage & Protection of Critical STE (SOW Para. 3.3.9) (Fully Funded)	$	76,393
	. . . .		
14B	DSP-LCS Spare Laser Shipping Container (SOW Para. 3.2.24.2) (Fully Funded)	$	255,010
	. . . .		

The total billing price for these items is $156,170,824, which equals the grand total of the progress payment liquidation schedule at Exhibit B, which is discussed *infra*. (R4, tab 2e at 200008-200016) The Statement of Work paragraphs 3.3 and 3.4 referenced in some of the above items described tasks related to "Integration of LCSTS #4 and LCS #4 through #8" and "Special Studies and Analysis" which are not at issue in this appeal (R4, tab 2f at 200207-200213).

ARTICLE II - PERFORMANCE AND DELIVERY SCHEDULE provided, in pertinent part:

> The supplies and services required to be delivered to the Buyer shall be delivered in accordance with the delivery schedule set forth in the Statement of Work incorporated herein by reference in Article I above. . . .
>
> . . . .

> Applicable only to SOW Attachment II Items 1a and 7a: Each of LCS Test Set No. 4 (Item 1a) and LCS Test Set No. 6 (Item 7a), shall be delivered in place by MDESC, for use by MDESC as Buyer-owned property in the performance of the Subcontract effort. . . .

(R4, tab 2e at 200031)

ARTICLE VIII - PACKAGING AND DELIVERY provided, in pertinent part:

> Shipment of all deliverable items shall be F.O.B. Buyer's facility, freight prepaid by the Seller. . . .

The clause included two shipping addresses for TRW in Redondo Beach, California, one for hardware items and one for non-hardware items. (R4, tab 2e at 200032)

ARTICLE IX - REPORTS provided: "The Seller shall furnish Reports, data and other Documentation as set forth in the Statement of Work incorporated herein by reference in Article I" (R4, tab 2e at 200033).

The Statement of Work (SOW), entitled STATEMENT OF WORK FOR FOLLOW-ON PRODUCTION OF LASER CROSSLINK DEFENSE SUPPORT PROGRAM, referenced in Articles I, II, and X, provided, in pertinent part:

> 1.1 PURPOSE
>
> This Statement of Work (SOW) defines the tasks required for the follow-on production phase of the Laser Crosslink Subsystem (LCS).
>
> 1.2 SCOPE OF WORK
>
> The Subcontractor shall provide necessary management, labor, facilities and materials (except as specified herein to be furnished by either the U.S. Government or Buyer) and do all things necessary or incidental in the performance of the effort required by this Statement of Work to provide the equipment and services specified in Attachment II and the documentation specified in Attachment III herein.
>
> . . . .

1.4 DELIVERY SCHEDULE

Delivery of the required items shall be in accordance with Attachment II herein. Delivery of documentation shall be in accordance with Attachment III herein.

1.5 LASER CROSSLINK TERMS

1.5.1 Configured End Items (CEI)

Configured end items are the items to be delivered in accordance with Attachment II.

1.5.2 Configured Items (CI)

The following items are defined as configured items:

1) Power Regulator Assembly
2) Imaging Optics Assembly/Gimballed Telescope Assembly
3) Laser Assembly
4) Wide Field Detector
5) Narrow Field Detector
6) Acquisition and Tracking Electronics
7) Communication Electronics
8) LCS Structural Assembly

. . . .

3. TASKS

3.1 PROJECT MANAGEMENT, ADMINISTRATION AND CONTROL

[This section of the SOW detailed the tasks required of the subcontractor for the management, administration, and control of the program. It required the subcontractor to do things such as: conduct monthly project manager's reviews, prepare and submit monthly program schedules, prepare and submit Performance Measurement Status Reports and Contract Funds Status Reports, conduct Contractual Status

Reviews and Technical Status Reviews, and several other specified tasks.]

3.2 MATERIAL PROCUREMENT, MANUFACTURING, ASSEMBLY AND TESTING

[This section of the SOW required the subcontractor to perform such tasks as: procure materials required to fabricate, assemble, and test the deliverable items; conduct inspections on all CIs; maintain a configuration management program; submit monthly failure summary reports; conduct a test program in accordance with the requirements of the Buyer approved specifications, test plans, procedures, and applicable documents; conduct acceptance testing for all CIs and prepare a report for each test; perform all LCS integration tasks; conduct LCS CEI performance verification and acceptance testing and prepare a report for each acceptance test; update specified manuals; and several other specified tasks.]

4.0 DELIVERABLE ITEMS

4.1 END ITEMS

Delivery of the required end items shall be in accordance with Attachment II of this Statement of Work.

4.1.1 Ship in Place Deliverable Items

All ship in place deliverable items are referenced with Attachment II of this SOW and are deliverable to MDESC as Buyer-owned property in “AS IS” condition.

4.2 SPARES

Delivery of required spares shall be in accordance with Attachment II of this Statement of Work.

4.3 DELIVERABLE DOCUMENTATION

The Subcontractor shall prepare and deliver documentation in the quantities and to the delivery schedules specified in Attachment III, the Subcontractor Data Requirements List (SDRL).

. . . .

5.0 PREPARATION FOR DELIVERY

The subcontractor shall be responsible for the preservation, packaging and packing of all items to be delivered under terms of this contract.

(R4, tab 2f at 200166, 200173-215)

The SOW's ATTACHMENT II, DELIVERY SCHEDULE provided, in pertinent part:

ATTACHMENT II
DELIVERY SCHEDULE

(See Article II of Schedule-Performance and Delivery Schedule)

I. Deliverable Hardware

Item	Description	Quantity	Not Later Than
1a.	LCS Test Set (LCSTS) No. 4, 77GO00004-1001	1	01 Dec 1990
1b.	(Reserved)		
1c.	Telescope Optical Measurement Instrument (TOMI), 77GO34004-1001	1	01 May 1990
2a.	LCS No. 5, C 321209-1	1	25 Apr 1993
2b.	(Reserved)		
2c.	Protective Cover Set, 77GO00005-1001, -1003	1	Same as 2a
2d.	(Reserved)		
3a.	LCS No. 6, C 321209-1	1	31 Dec 1993
3b.	(Reserved)		
3c.	Protective Cover Set, 77GO00005-1001, -1003	1	Same as 3a
3d.	(Reserved)		
4a.	LCS No. 7, C 321209-1	1	27 Jun 1994
4b.	Protective Cover Set, 77GO00005-1001, -1003	1	Same as 4a
5a.	LCS No. 8, C 321209-1	1	01 Nov 1994
5b.	Protective Cover Set, 77GO00005-1001, -1003	1	Same as 5a
6a.	LCS Test Set (LCSTS) No. 5, 77GO00001-1001 (SIP)	1	01 Feb 1994
7a.	LCS Test Set (LCSTS) No. 6, 77GO00004-1001 (SIP)	1	05 Dec 1990
7b.	(Reserved)		
8a.	LCSTS Validation Unit/Shipping Container No. 1	1	01 Jul 1988
9a.	LCSTS Validation Unit/Shipping Container No. 2	1	01 Oct 1988
10a.	LCSTS Validation Unit/Shipping Container No. 3	1	03 Jan 1989
11a.	Laser Modulator Heater Power Unit (IMHPU) No. 9	1	01 Jun 1990

11b.	Laser Modulator Heater Power Unit (IMHPU) No. 10	1	01 Jun 1990
12.	Portable Modulator Heater Power Unit (PMHPU) No. 3	1	01 Mar 1990
13.	Cable Set D	1	01 Dec 1989
13a.	77G041211-1009 Cable (of Cable Set D) (SIP)	2	06 Oct 1989
14.	Amplitude Jitter Tester	2	28 Feb 1992
15.	Held Sum Selector	3	30 Mar 1992
16.	LMHSE Cable Set B	1	01 Mar 1992
17.	PMHPU A/B Select Unit #2 (77G041212-1001)	1	15 Jan 1992
18.	Spare Laser Shipping Container (P/N 77SK1229)	1	28 May 1993

II.	Formal Reviews		
1.	Contractual Status Review	Monthly/ Bi-Monthly	
2.	Technical Status Review	Every Six Weeks	
3.	LCS Physical Configuration Audit	As Required	At delivery of first hardware

. . .

(R4, tab 2f at 200227-200228)

ATTACHMENT III, Subcontract Data Requirements List (SDRL), listed the data required to be delivered under the subcontract, along with quantities and due dates. The SDRL listed sixty-five items and included, for example, schedules, status reviews, status reports, meeting agendas, photographs, failure reports, failure analysis and corrective actions, test reports, and manuals. Each SDRL item referenced the SOW paragraph that required that task. (R4, tab 2f at 200229-200233)

Other Relevant Subcontract Provisions

ARTICLE IV - CONSIDERATION AND PAYMENT provided, in pertinent part:

> A. The Buyer shall, subject to any Limitation of Buyer's Obligation or withholding provisions contained herein, pay the Seller in accordance with the Clause entitled "Payments" of the General Provisions hereof, as complete consideration for the satisfactory performance of all requirements of this Subcontract, including delivery of all reports and data required hereunder, the prices specified in Article I hereof.
>
> B. Progress Payments to the Seller will be made for items 01 through 07, and 12-14 in accordance with the Clause entitled "Progress Payments" (Apr 1984) (Dev), FAR 52.232-

16. The Seller's request for Progress Payments shall be on Standard Form 1443 completed in accordance with the instructions on the reverse side thereof and submitted to the invoicing address specified herein.

C. Progress Payments will be liquidated using the liquidation schedule in Exhibit B.

(R4, tab 2e at 200031-200032)

The PAYMENTS clause, referenced in ARTICLE IV, provided:

> Seller shall be paid, upon submission of proper invoices or vouchers, the prices stipulated herein for work delivered or rendered and accepted, less deductions if any, as herein provided. In computing discount time, such time shall commence upon Buyer's receipt of invoice or receipt of acceptable items delivered, whichever is later. Unless otherwise specified, payment will be made upon acceptance of any portion of the work delivered or rendered for which a price is separately stated in this Subcontract.

(R4, tab 2e at 200124)

The progress payment liquidation schedule referenced in ARTICLE IV provided:

EXHIBIT B
LCS NO. 5-8 AND LCS TEST SETS NO. 4 & 5
LIQUIDATION SCHEDULE FOR
BILLING PURPOSES ONLY
22 JANUARY 1987

The Seller may submit an invoice for whichever sub-elements are complete irrespective of the period. Any sub-element not completed at the end of a period may be invoiced for as part of a subsequent invoice after the sub-element is completed.

Invoicing hereunder shall not duplicate any amounts invoiced under such Article I.

The rest of Exhibit B was divided into six-month periods, beginning with January 1988 and ending with December 1992, and a one-year period beginning January 1993 and

ending December 1993. Each time period identified a number of what were termed "sub-elements" along with the corresponding value of each sub-element. For example, under time period I (January-June 1988), the first sub-element listed was "a. LCS #5 - Motorola complete PRA Printed Wiring Board" which had a corresponding value of $2,043,000. The second sub-element was "b. LCS #5 - MDAC-STL receive Avalanche Photo Diodes from RCA" with a value of $422,000, and the third sub-element was "c. LCS #5 - MDEC deliver (8) LCS #5 TMBS units to Eastman Kodak" with a value of $544,000.

Exhibit B listed 91 sub-elements. Four of the sub-elements specifically called for delivery of the LCSs to TRW. For example, the sub-element for delivery of LCS #5 provided: "LCS #5 - Deliver LCS #5 to TRW" and had a value of $7,779,224.00. The value assigned to delivery of LCS #6 to TRW was $7,791,724.00, for LCS #7 was $7,873,000.00, and for LCS #8 was $7,873,000.00. In addition to the four sub-elements calling for delivery of the LCSs to TRW, two of the remaining sub-elements also specified delivery to TRW. One was for a cable set and the other was for a test set. The grand total listed on Exhibit B for all of the sub-elements was $156,170,824.00. This was the total billing price for the items for which the ARTICLE IV - CONSIDERATION AND PAYMENT clause stated that MDC would be paid progress payments. (R4, tab 2e at 200089-200095)

According to TRW's project manager for the subcontract, Mr. Robert Stephen McNamara, who was involved in the negotiation of the subcontract, TRW and MDC used the progress payment liquidation schedule at Exhibit B to prove the completion and delivery of required tasks and services. In his declaration, Mr. McNamara stated, in pertinent part:

> 4.) In negotiating the [subcontract], it was essential to TRW that we and MDA agree upon a process whereby TRW would pay MDA only for those tasks and services encompassed by the CLINs set forth in the Schedule that were completed and delivered pursuant to the Subcontract. To this end, TRW and MDA agreed to use the completion of specific hardware items (both high level items and lower level components) as proof of the completion and delivery of the tasks and services performed in order to produce a particular hardware item.
>
> 5.) A schedule of the hardware items that the parties used to prove the completion and delivery of required tasks and services was incorporated into the [subcontract as Exhibit B]. . . . This schedule was intended to provide objectively verifiable milestones against which both parties would be able to measure the completion and delivery of the various tasks and services required under the Subcontract. In addition, this

> schedule also served as a means of determining the value of the tasks and services that MDA completed and delivered to TRW.

(McNamara declaration at ¶¶ 4, 5)

Mr. Louis Pape, TRW's LCS resident engineer at the time of this subcontract, has stated, in pertinent part:

> 3. . . . In my capacity as the LCS Resident Engineer for TRW, I became familiar with the CLINs of the LCS Subcontract and with the relationship between these CLINs and the various milestones referenced in Exhibit B to the LCS Subcontract. The CLINs set forth a general description of the combination of supplies, services and data that McDonnell Douglas was to deliver to TRW under the LCS Subcontract. Exhibit B broke down those general descriptions contained in the CLINs into segregable elements – fabricated subassemblies; subassemblies assembled into Configured Items ("CIs") that were acceptance tested; CIs integrated into Configured End Items – and attempted to establish a reasonable, mutually agreeable estimate of the value of the services necessary successfully to "complete," "deliver," or "receive" the tasks and services called for in the CLINs.

(Pape declaration at ¶ 3)

According to TRW's hardware acquisition manager, Mr. John R. Base, who was responsible for the administration of the subcontract, Exhibit B "set forth the values, mutually agreed upon by TRW and McDonnell Douglas, of the services to be delivered pursuant to the CLINs of the Subcontract" (Base declaration at ¶ 12b).

Mr. Michael G. Kibel, TRW's contracts manager, has stated that Exhibit B "set forth the values, mutually agreed upon by TRW and McDonnell Douglas, of the services to be delivered pursuant to the CLINs of the Subcontract in order to satisfactorily achieve certain predetermined milestones" (Kibel declaration at ¶ 23(d)(ii)).

Mr. William Deckelman, MDC's deputy program manager and then program manager for the subcontract, has stated, in pertinent part:

> 3. The LCS Subcontract called for the delivery to TRW by McDonnell Douglas of a combination of supplies and services. Article I of the LCS Subcontract, entitled

"Scope of Work," stated in this regard, in Paragraph A, that McDonnell Douglas would "do all things necessary and/or incidental to the furnishing and delivery to the Buyer of the supplies and services set forth herein."

4. The delivery of services was also specified in Article II ("Performance and Delivery Schedule"), as follows: "The supplies and services required to be delivered to the Buyer shall be delivered in accordance with the delivery schedule set forth in the Statement of Work incorporated herein by reference in Article I above."

5. The general nature of the services to be delivered by McDonnell Douglas was described in the Schedule "Item Nos." as including "all necessary supplies and services required to identify, plan, purchase and control procurement of long-lead materials and subassemblies and perform fabrication and assembly at the subsystem level to realize Economic Order Quantity (EOQ) benefits necessary to support production" of the Laser Crosslink Subsystems and Laser Crosslink Subsystem Test Sets that were to be delivered as hardware items under the LCS Subcontract.

6. The specific nature of the services that McDonnell Douglas was required to deliver under the LCS Subcontract are found throughout the Statement of Work ("SOW") to that Subcontract. . . .

7. In sum, the LCS Subcontract called for a wide variety of services, all of which were essential to the successful attainment of the objectives of the Subcontract. Simply stated, the LCS Subcontract required McDonnell Douglas to do everything necessary for the successful program – engineering and analysis, proof of designs, parts acquisition, test and analysis, cost/schedule/control, planning, internal management, external interfaces with TRW, fabrication, assembly, configuration management, and the like. These services were important elements of McDonnell Douglas' delivery obligations under the LCS Subcontract.

8. My conclusions in this regard were, and are, reinforced by the payment provisions of the LCS Subcontract. The LCS Subcontract used milestone payments, as set forth in

> Exhibit B to the Subcontract. The effect of Exhibit B was (a) to tie payments to McDonnell Douglas to the successful achievement of key stages in the performance of the Subcontract, and (b) to ensure that such achievements could be objectively assessed by an identifiable and determinable event, such as completion, delivery or receipt of items. Many of the items that triggered milestone payments were the critical CIs for which the acceptance testing specified in Section 3.2.8.1 of the SOW was a necessary precondition of a successful milestone. In effect, the successful achievement of the milestone provided an objective way of determining that the services necessary to "complete" or "deliver" an item, such as a CI, had been successfully delivered by McDonnell Douglas. I would note in this regard that these milestones were not pro forma events; each milestone was reviewed in depth by representatives of both McDonnell Douglas [and] TRW to test and validate the claim that the services underlying the milestone had, in fact, been successful.

(Deckelman declaration at ¶¶ 3-8)

Ms. Dorian E. Goetsch, MDC's senior contracts administrator for the DSP-LCS Program at the time, has stated, in pertinent part:

> 4. . . . The purpose of Exhibit B was to list the events for which MDAC could submit invoices (Milestone Billings) for liquidation of progress payments. Exhibit B basically has two columns of information. The first column is divided into particular time periods, e.g., "PERIOD JANUARY-JUNE 1988", "PERIOD JULY-DECEMBER 1988", etc. The events to be completed within that time period are listed under each time period. The second column lists an estimated value for each event. Essentially, once an event was completed, MDAC could liquidate progress payments by invoicing TRW at 20% of the corresponding value listed in the second column.

(Goetsch declaration at ¶ 4)

ATTACHMENT NO. 1, SPECIAL CLAUSES FOR SUBCONTRACT D62103GP6S included a clause, entitled FAR 52.232-16 PROGRESS PAYMENTS (APR 1984) (DEVIATION), which provided, in pertinent part:

Progress payments shall be made to the Contractor when requested as work progresses, but not more frequently [than] monthly in amounts approved by the Contracting Officer, under the following conditions:

(a) Computation of amounts

(1) Unless the Contractor requests a smaller amount, each progress payment shall be computed as (i) 80% of the Contractor's cumulative total costs under this contract, . . . plus (ii) progress payments to subcontractors . . . all less the sum of all previous progress payments made by the Government under this contract. . . .

. . . .

(b) Liquidation. Except as provided in the Termination for Convenience of the Government clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 80% of the amount invoiced, whichever is less. The Contractor shall repay to the Government any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. . . .

. . .

(d) Title.

(1) Title to the property described in this paragraph (d) shall vest in the Government. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.

(2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices.

> (i) Parts, materials, inventories, and work in process;
>
> (ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this contract;
>
> . . . .
>
> (iv) Drawings and technical data, to the extent that the Contractor or subcontractors are required to deliver them to the Government by other clauses of this contract.
>
> . . . .
>
> (6) When the [C]ontractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the proceeds thereof) not-
>
> (i) Delivered to, and accepted by, the Government under this contract; or
>
> (ii) Incorporated in supplies delivered to, and accepted by, the Government under this contract and to which title is vested in the Government under this clause.
>
> (e) Risk of loss. Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent that the Government expressly assumes the risk. The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.

(R4, tab 2e at 200073-200077) The Government says that the usual convention in applying the Progress Payments clause to a subcontract is to read "the Government" to mean the Buyer and "the Contractor" to mean the Seller (Gov't resp. to app. reply to Gov't mot. at 28-29). TRW has not indicated otherwise, and we conclude that this understanding is the only way to give reasonable effect to the provision.

The GENERAL PROVISIONS OF PURCHASE FIXED PRICE section included a clause, entitled GOVERNING LAW, which provided that the subcontract would be governed by and construed according to California law, with the exception of the Government contract clauses which would be construed and interpreted according to the federal law of Government contracts (R4, tab 2e at 200122).

The Termination and Settlement Negotiations

By letter dated 18 November 1993, the Government partially terminated the prime contract for the convenience of the Government. All work associated with the LCSs being manufactured by MDC under Segment II (LCS Nos. 5-8) of the subcontract was terminated. (R4, tabs 1, 2b)

On the date of the termination of the contract, all or some of the components of LCS Nos. 5, 6, 7, and 8 were located at MDC's facility in St. Louis, MO (R4, tab 21 at 11-14). In its Request for Admissions (First Set), the Government asked TRW to admit that, as of the date of termination, MDC, not TRW bore the risk of loss for the LCS components and that, if a fire or other catastrophe had destroyed or damaged the items, MDC, not TRW, would have been financially responsible for any damage to the components. TRW responded that the Government's requests were "[a]dmitted on the basis of the subcontract agreement concerning the assignment of risk of loss for items delivered in place." (R4, tab 21 at 4-6) Mr. Kibel, TRW's contracts manager, has stated that MDC retained risk of loss for "hardware items delivered in place at [MDC]," although he maintained that this was only because MDC "had a disapproved property system" and, as a result "retained risk of loss for all items physically housed at its plant, irrespective of who had title to the items" (Kibel declaration at ¶ 27(e)).

By letter dated 31 March 1994, the termination contracting officer (TCO), Mr. Thomas J. Misany, a contracting officer at the Space and Missiles Systems Center (SMC) at Los Angeles Air Force Base, authorized TRW to ship all LCS hardware to Phillips Laboratory at Kirtland AFB, NM (R4, tab 3b).

In the summer of 1994, the TCO requested the director of contracting for SMC to appoint a TSRB "in accordance with FAR 49.111, Air Force FAR Supplement 5349.111, and Air Force Material Command FAR Supplement 5349.111."[1] The director of contracting subsequently appointed a TSRB. (Misany declaration at 2)

By letter dated 2 November 1994, TRW submitted a termination settlement proposal for the terminated contract (R4, tab 3c). By letter dated 28 July 1995, TRW submitted an updated termination settlement proposal (R4, tab 3d).

In August 1995, the Government and TRW began negotiating the settlement agreement for the contract (Misany declaration at 3; Kibel declaration at ¶ 11). According to Mr. Kibel, TRW's contracts manager and the head of its contracts office, TRW and the TCO reached a termination settlement on 7 September 1995 which resulted in a $3.25 million credit to the Government. Mr. Kibel has stated that "based upon clear statements made to me by the TCO over the course of the negotiations, I believe[d] that this settlement was within both (i) the TCO's settlement guidelines and (ii) his final settlement authority." Mr. Kibel has further stated, "On 8 September 1995, I sent SMC our acceptance of their last offer on the Block 18 LCS termination negotiation." The fax cover sheet of the 8 September 1995 "acceptance" to which Mr. Kibel referred was signed by Mr. Kibel and stated, ". . . [A]ttached is our tentative acceptance of your last offer predicated on the conditions stated in page 2 attached." Page 2 provided, in pertinent part:

> This offer is conditioned on 1) obtaining a total settlement with respect to all Block 18 LCS issues; and 2) no Government reservation of rights or savings clause relating to any LCS issue being incorporated into the contract; provided, however, that the Government may reserve its rights with respect to final property disposition to be accomplished at contract completion.

(Kibel declaration at ¶¶ 13, 17, 19, attach. 6)

The TCO, Mr. Misany, acknowledges that a "tentative agreement" was reached in September 1995. According to Mr. Misany, as part of the agreement, he agreed to propose to the TSRB that TRW "be paid profit for the MDC subcontract items based upon the percentage of completion, rather than whether they had been delivered." (Misany declaration at 3) Mr. Misany has stated, "Both TRW and I knew that the TSRB had to review and approve any amount I proposed to them." Mr. Misany has also noted that the TSRB had to review and approve three earlier settlements to which TRW was a party. (Misany supplemental declaration at 2)

By memorandum dated 30 August 1995, addressed to SMC/PKC, the SMC Contracting Directorate, Mr. Misany requested that the TSRB, which was appointed in 1994, "be convened to review the subject settlement agreement, between [the Government and TRW]." There is some evidence that the date on the memorandum is erroneous and that the memorandum was written in September 1995. In the memorandum, Mr. Misany stated that "TSRB review and approval is requested prior to TCO signature since this settlement meets the review threshold of AFMC FAR Sup 5349.111-90(d)." Mr. Misany noted that he had reviewed the settlement package and considered it to be fair and reasonable. (Misany deposition at 60, attach. 5)

On 12 January 1996, the TSRB convened to review the proposed settlement agreement. Mr. Misany presented his price negotiation memoranda and the TRW proposal to the TSRB. According to Mr. Misany, "the TSRB began to review FAR 49.202(a) and noted that no profit could be paid for subcontractor material undelivered to the prime as of the date of the termination." (Misany declaration at 3)

In a memorandum for the file, dated 18 January 1996, the TCO stated, in pertinent part:

> The TCO has authority to pay a fair and reasonable profit on the TRW portion of the LCS Settlement because:
>
> . . . .
>
> 2. FAR 49.201 states that the primary objective should be to negotiate a settlement by agreement. (This has been achieved by SMC, TRW and MDA).
>
> 3. Subparagraph e. of the Termination for Convenience clause (FAR 52.249-2) in the contract explicitly states "Paragraph (f) Shall Not limit, restrict, or effect the amount that may be agreed upon to be paid under this paragraph." Since FAR 49.202 restrictions are referred to and covered in paragraph (f), said paragraph (f) is controlling and does not limit the TCO's authority to pay a fair and reasonable profit for effort performed from 1986 through 1993.
>
> . . . .
>
> 5. FAR 49.201 also states that fair compensation is a matter of judgment and cannot be measured exactly, and that business judgment, as distinguished from strict accounting principles, is the heart of the settlement. This has been accomplished because the settlement that SMC has reached with TRW has been mutually agreed to under paragraph (e) of the T for C clause in the contract.

(Misany deposition, attach. 27)

By letter dated 26 February 1996, the TCO informed TRW that the TSRB was in the process of evaluating the proposed termination settlement and had "requested additional data and information before deciding on whether the settlements are fair, reasonable, and in compliance with the FAR." Among other things, the TCO asked TRW

to provide the legal and factual basis for entitlement to profit on the MDC subcontract in light of FAR 49.202(a) and to explain why FAR 49.202(b) was not applied to the prime contract settlement. (R4, tab 3h) TRW responded by letter dated 12 March 1996 (R4, tab 3i).

Mr. Kibel, TRW's contracts manager, has stated, in pertinent part:

> 20. . . . I learned that the Air Force Termination Settlement Review Board ("TSRB") constituted relative to this termination had refused to ratify the profit calculation agreed to by TRW and the TCO. Specifically, the TSRB (i) refused to recognize more than $23 million of profit bearing subcontract costs and (ii) erroneously believed the proper profit credit rate on subcontractor effort to be 12%.
>
> 21. Upon learning of the TSRB's settlement position, TRW attempted once again to work with the Air Force to correct various TSRB misperceptions. TRW again prepared and forwarded many detailed letters, and provided additional data (and data analysis), to the TSRB. In addition, TRW met with the individual members of the TSRB on several occasions (and with the TSRB as a whole on one occasion). TRW even agreed to reopen negotiations, notwithstanding our strong belief that the settlement negotiated with the TCO in September 1995 was fair and reasonable and consistent with the FAR.

(Kibel declaration at ¶¶ 20, 21)

By letter dated 12 June 1996, the TCO informed TRW that the TSRB, among other things, requested "signed DD250s or formal acceptance documentation from TRW which demonstrate[ed] that delivery of subcontract items to TRW was accomplished" (R4, tab 3j).

TRW responded by letter dated 5 August 1996 which stated, in pertinent part:

> 3. TRW's formal acceptance documentation is TRW's authorization for payment of the items listed in Attachment 1, which contains the payment authorizations and a listing of the hardware and services delivered by MDA prior to the issuance of the termination for convenience. . . .

(R4, tab 3l)

Attachment 1 to TRW's 5 August 1996 letter was entitled MDA DELIVERED LCS HARDWARE AND SERVICES. The first page of attachment 1 contained the following five columns: "MDA Subcontract CLIN," "Description," "Price," "MDA Hardware and Services Delivered," and "Value of MDA Hardware and Services Delivered." In total, TRW stated that its subcontractor had delivered $92,198,291 of hardware and services "[p]lus value of delivered CDRLs, meetings, technical services, etc. related to the balance of hardware." For each CLIN listed, TRW provided the CLIN price and also indicated the value of the hardware and services allegedly provided under that CLIN by the subcontractor. For example, for CLIN 01, priced at $27,704,228, TRW indicated that MDA had delivered $27,614,885 of hardware and services. For CLIN 02, priced at $52,936,259, TRW indicated that MDA had delivered $29,614,885 of hardware and services. (R4, tab 3q)

On the second and third pages of attachment 1, TRW broke down the subcontractor delivered hardware and services totals for each CLIN into individual tasks. For example, the $27,614,885 total that TRW listed for CLIN 01 was divided into twenty-six separate items. The first item listed was "LCS6-MOTOROLA COMPLETION OF POWER REGULATOR ASSEMBLY (PRA) PRINTED WIRE BOARDS" and, like the other items listed, was followed by columns with the following headings: "MILESTONE," "MILESTONE VALUE," "DATE DELIVERED," "ACCEPTANCE DOCUMENTATION," and "REFERENCE MDA INVOICE." For this first item, TRW indicated that the item corresponded to milestone 1.a., had a milestone value of $2,043,000, was delivered on 14 July 1988, and that the acceptance documentation could be found at Tab A. The milestones referred to in these pages correspond to the sub-elements listed in the progress payment liquidation schedule in the subcontract's Exhibit B. The acceptance documentation for the first item at Tab A, like the acceptance documentation for the other items, was an invoice submitted by the subcontractor to TRW indicating that the item had been completed. Each invoice listed items that had been completed, their prices, and a subtotal price. Then, 80% of the subtotal price was subtracted from the subtotal price, with a notation that this was for "Less Prog Pay Liq @80%," resulting in an amount due to MDC of 20% of the subtotal price. (R4, tab 3q)

In its response to the Government's Request for Admissions (First Set), TRW admitted that the dates provided under the DATE DELIVERED column of these pages do not represent dates on which the items were physically delivered to TRW at Redondo Beach, CA "because the items were delivered in place" (R4, tab 21 at 7).

TRW's project manager for the subcontract, Mr. McNamara, has stated, in pertinent part:

> 9. TRW established a process for verification of work performed by MDA as a necessary step before payment of

> invoices for the related milestones could occur. This process required MDA personnel to provide a written statement testifying that the milestone had been accomplished, whether it was for a subassembly, a component, a Configured Item or a Configured End Item. TRW's Resident Engineer and/or Resident Quality Assurance Inspector were required to confirm milestone accomplishment by either signature, e-mail or telephone conference. Upon receipt of this verification, MDA could be paid for those tasks and services encompassed by the milestone, for which the invoice had been submitted.

(McNamara declaration at ¶ 9)

TRW's hardware acquisition manager, Mr. Base, has stated, in pertinent part:

> i) The services encompassed by Exhibit B were not considered delivered until (i) McDonnell Douglas (through certain responsible individuals) stated in writing that they had been performed and (ii) TRW independently verified that those services had been performed.

(Base declaration at ¶ 12b)

Mr. Pape, TRW's LCS resident engineer at the time of this contract, has stated, in pertinent part:

> 4. Both TRW and McDonnell Douglas regarded the successful achievement of a milestone, as set forth in Exhibit B, as a delivery of the services referenced in the CLINs. In fact, McDonnell Douglas personnel often referred to the milestones as "deliveries" when presenting the paperwork relative thereto to me for my review, evaluation and approval.
>
> 5. The process pursuant to which McDonnell Douglas presented and secured approval of its milestone deliveries was a rigorous one. Detailed evaluations of the work were performed to determine whether the services that underlay a milestone had been successfully performed, a process that routinely involved the preparation and review of voluminous acceptance test packages for any CIs included within a milestone. These acceptance test packages, which were deliverable data items under the LCS Subcontract, were

regarded by both parties as key objective indicators of successful delivery of the services required by the milestone.

6. The approval and acceptance of the contractually required acceptance test packages for CIs was a watershed event under the LCS Subcontract. Once a CI was accepted as flight hardware, McDonnell Douglas lost virtually all discretion with respect to the item. From that point forward, the CIs could be used only in pre-approved work flow sequences for further integration into a CEI. McDonnell Douglas could not, from that point forward, without TRW's approval, make any other use of the CI, modify it or its associated data, or even troubleshoot the CI. Control of the item was, for all but the pre-approved work flows, by TRW.

(Pape declaration at ¶¶ 4-6)

Ms. Goetsch, MDC's senior contracts administrator, has stated, in pertinent part:

5. During the performance of the Subcontract, [the progress payment liquidation schedule at] Exhibit B was used, like it said, for billing purposes only. By "billing purposes only", I mean that Exhibit B was used solely to determine when MDAC could invoice for liquidating progress payments. Just because an event had been completed did not necessarily mean that the goods and/or services related to that task had, in fact, been delivered to TRW.

6. MDAC invoiced TRW for the Milestone Billings using documents such as the [invoice plus attachments at R4, tab 3q at Atch 1 at Tab E]. The format agreed to by MDAC and TRW for submitting these Milestone Billings was to submit by contractual letter (1) a company shipper (MAC Form 1150) summarizing the milestone(s) completed and the associated value, (2) the detail milestone sheet and (3) the invoice itself. TRW would verify that each milestone was completed prior to payment of the invoice. . . . None of the above mentioned documents reflects the physical delivery and/or transfer of title/ownership of any deliverable from MDAC to TRW.

7. The deliverable items required under the subcontract are documented in Attachment II and III to the

> Subcontract Statement of Work. Attachment II (Delivery Schedule) provides for the hardware deliverables and formal services . . . . Attachment III shows the subcontractor data requirements . . . . Each document provides for an item number and description in the first two columns. The "Not Later Than" and "Frequency" columns from the appropriate attachment states [sic] the dates by which each deliverable was to be delivered to TRW. These deliverables were to be delivered in accordance with the delivery terms in Article II, III, IV and VIII . . . . In addition, all hardware deliveries required Government Source Inspection along with TRW inspection. The Milestone Billings did not provide for this contractual requirement and therefore could not be used as a vehicle to "deliver" any deliverable item to TRW.

(Goetsch declaration at ¶¶ 5-7)

On 29 August 1996, the TSRB and the TCO met with representatives of TRW. According to the TCO, it was his understanding that the TSRB "believed the TRW documentation established that TRW paid MDC for milestone billings and that there was no doubt that the material in question had not been delivered to TRW or SMC prior to the termination." (Misany declaration at 4) The TCO has further stated:

> After the 29 August 1996 meeting I met with Cal Larson, who was a member of the TSRB. . . . Cal and I reviewed, in detail, the TRW/MDC subcontract and the material provided by TRW. Cal was able to establish, to my complete satisfaction, that no delivery of LCS Nos. 5, 6, 7, and 8, as required by the TRW/MDC subcontract had occurred. We also established that most of the material had not been delivered to TRW as of the date of the termination.
>
> Basically, Cal and I compared Attachment II (Delivery Schedule) of the subcontract Statement of Work . . . to the documents provided by TRW that listed the materials that had allegedly been delivered . . . . First, it was apparent that the great majority of the items TRW claimed were delivered in its July and August 1996 documents were not listed on Attachment II as deliverables. I found, from my review, the first 11 items listed on the 2 August 1996 document were Attachment II deliverables. Then, I took TRW's word that these 11 items had been delivered to it prior to 18 November 1993 . . . . Cal and I also noted that paragraph 1.5.1 of the

SOW stated that Configuration End Items were the "items to be delivered in accordance with Attachment II." No other items were described in the SOW as deliverables.

Mr. Larson and I also examined the subcontract CLINs and clauses for references to delivery and deliverables . . . . The CLINs were silent, but did require the LCSs to be built as per the SOW. The Articles of the subcontract, were also relevant. Article II required delivery of supplies and services to TRW to be in accordance with the delivery schedule set forth in the SOW [Attachment II]. Article II also states that delivery in place only applied to Items 1a and 7a of Attachment II (both were test sets MDC needed to build and test the LCSs). Next, we found that Article III required final acceptance of specific deliverables described in Attachment II to occur at TRW/Redondo Beach. (None of the material listed in Article III had ever left St. Louis.) We also noted that Article VIII specifically stated that delivery of all deliverables "shall be F.O.B. Buyer's facility, freight prepaid by the Seller." Then, Article VIII specified that hardware items were to be shipped to TRW/Redondo Beach.

I also realized that TRW was trying to use MDC's milestone billings to establish delivery. That is wrong. Payment for milestones under Exhibit B, the Subcontract Liquidation Schedule, was for billing purposes only. As per Exhibit B, *delivery by MDC to TRW* was only rarely a condition of payment to MDC for the approximately six (6) of the 90 events on the liquidation schedule (the exception being the four LSCs [sic] themselves and a few other minor items). Instead, completion of the various milestones was almost uniformly the condition of payment rather than delivery.

From all the foregoing, I realized that the TSRB was correct and that MDC had not delivered all the materials TRW claimed it had. . . .

Before discussing this matter with Mr. Larson, I had disagreed with the TSRB. I believed, incorrectly, that the Air Force could pay profit to TRW based upon the percentage of completion. I did not realize that FAR 49.202(a) specifically forbade that exact kind of profit determination, unless the subcontractor had delivered the material to the prime. In

> retrospect, I should have read this more carefully. Moreover, I should have recognized the policy reason behind this requirement was designed to prevent contractors from gaining a profit on material for which they bore no risk. . . .

(Misany declaration at 4-6)

The Termination Contracting Officer's Final Decision

By letter dated 11 December 1996, the TCO informed TRW that an impasse had been reached in the termination settlement negotiations and stated that he intended to unilaterally determine the settlement amount due TRW pursuant to FAR 49.109-7, after considering any additional information that TRW wished to submit (R4, tab 3m). By letter dated 16 June 1997, the TCO issued a final decision. He noted that "FAR 49.202(a) prohibits the payment of profit on materials or supplies not delivered by a subcontractor as of the effective date of the termination, regardless of completion." He concluded that, "[c]ontrary to TRW's assertion that the value of subcontract deliveries equals to approximately $92,189,291, only 11 items on [the subcontract's] Delivery Schedule with a value of $23,497,324, have been delivered. At most, TRW is only entitled to profit on these delivered items." He further determined that the Government was due a profit credit of $14,242,250, using a 10.5% profit rate, for the MDA effort as an appropriate settlement of the termination, instead of the $3.25 million credit he had tentatively agreed to before seeking TSRB approval. In reaching his decision, he did not specifically value services. Moreover, he did not give TRW profit on data packages because data was not separately priced in the subcontract. (R4, tab 1; Misany deposition at 92, 133)

DISCUSSION

A motion for summary judgment is properly granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The party seeking summary judgment has the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing the motion. When, as here, both parties have moved for summary judgment, we must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is being considered. *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). In this context, however, each party is deemed to represent that all relevant facts are before the Board and that a trial is unnecessary. *See Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982). With these principles in mind, we turn to an evaluation of the parties' motions.

The Applicability of FAR 49.202(a)

The Government argues that FAR 49.202(a) prohibits the payment of profit on items that have not been delivered by a subcontractor to the contractor by the termination of the contract. FAR 49.202, Profit, provides, in pertinent part:

> (a) The TCO shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. . . . Profit shall not be allowed the contractor for material and services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The TCO may use any reasonable method to arrive at a fair profit.

The Government has offered an analysis of the regulatory history of FAR 49.202(a) to support its position that the provision means what it plainly says: "Profit shall not be allowed the contractor for material and services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion."[2]

TRW does not take exception to what we see as a clear regulatory direction, although it does take exception to what it considers the Government's "extraordinarily narrow" interpretation of the phrase, "material [and] services . . . delivered by a subcontractor" (app. opp. to Gov't mot. at 4, n. 2). Instead, TRW argues that while FAR 49.202(a) does impose some limits on profit payable for subcontractor work, it is inapplicable to this appeal because TRW and the Government, represented by the TCO, agreed to a termination settlement pursuant to paragraph (e) of the Termination for Convenience clause, FAR 52.249-2.

Paragraph (e) of the contract's Termination for Convenience clause states that the contractor and contracting officer may agree upon the whole or any part of the amount to be paid because of the termination, that the amount may include a reasonable allowance for profit on work done, and that paragraph (f) of the clause shall not limit, restrict, or affect the agreed upon amount. Paragraph (f) of the clause states that if the contractor and contracting officer fail to agree on the whole amount to be paid because of the termination, then the contracting officer shall pay, *inter alia*, a sum as profit on the costs incurred in the performance of the work terminated determined by the contracting officer, under FAR 49.202, to be fair and reasonable. TRW's argument is that, in the context of the termination clause, FAR 49.202 applies only to unilateral determinations under paragraph (f), but the provision has no application to mutual agreements under paragraph (e) because paragraph (f) "shall not limit, restrict, or affect" the agreed upon amount. Counsel cites *Worsham Constr. Co.*, ASBCA No. 25907, 85-2 BCA ¶ 18,016 at 90,367-68, in support of its position.

The Termination for Convenience (TFC) clause considered in *Worsham* contained a provision comparable to paragraph (e), as well as a provision that, among other things, spelled out specific profit limitations in the event an agreement was not reached. The appellant argued that the contractor and contracting officer had agreed to a ten percent profit rate under the comparable provision and it was improper to resort to the specific profit limitation provision. We agreed, observing that "[t]he proscriptions on profit recovery in . . . the TFC clause only apply to the extent agreement has not been reached pursuant to . . . [paragraph e]." *Id.* at 90,368.

As *Worsham* indicates, TRW's argument concerning the effect of paragraph (e) of the Termination for Convenience clause depends first on the existence of a binding termination settlement agreement. TRW has the burden of showing that the official with whom the agreement was made had the authority to bind the Government. *See S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 4 (Fed. Cir. 1985). We note that FAR 49.109-1 provides that "[w]hen a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on Standard Form 30 . . . ." Of course, the initial understanding reached by Mr. Kibel and Mr. Misany did not proceed to the stage of a settlement agreement on a Standard Form 30. The absence of a formal settlement agreement suggests the absence of a binding agreement. Compare *Mil-Spec Contractors, Inc. v. United States*, 835 F.2d 865, 868 (Fed. Cir. 1987) (where a regulation requires that a contract modification be written, an oral modification that has not been reduced to writing is ineffective) with *Texas Instruments Inc. v. United States*, 922 F.2d 810, 814 (Fed. Cir. 1990) (absence of an SF-30 does not exclude the possibility that a final binding agreement was reached). In any event, counsel for TRW has not pressed – correctly, in our view – the issue of whether there was a binding settlement agreement at the TCO level in September 1995. Counsel also has not contested the internal Air Force regulations spelling out the approval process. The argument has focused on the TSRB and its alleged improper refusal to "ratify" the agreement.

Mr. Kibel has declared his "belief" that the initial agreement was within the TCO's settlement guidelines and final settlement authority. There is no question that the TCO agreed to pay profit for the MDC subcontract items based upon the percentage of completion during the September 1995 negotiations and he initially supported this position to the TSRB. The problem is that the TCO, as his uncontested declaration makes clear, later changed his mind. His agreement was subject to review and approval. The TCO maintains, in this regard, that TRW knew that the TSRB had to review and approve the settlement and that TRW had experienced the review and approval process in three previous settlements. TRW has not contested the TCO's claim or put in issue the internal Air Force regulations governing the approval process. Moreover, Mr. Kibel acknowledges the role of the TSRB in the settlement process and its "refus[al] to ratify the profit calculation agreed to by TRW and the TCO." Underscoring for us the tentative

character of the September agreement, Mr. Kibel has also acknowledged that "TRW even agreed to reopen negotiations, notwithstanding our strong belief that the settlement negotiated with the TCO in September 1995 was fair and reasonable and consistent with the FAR."

Under the circumstances, we must conclude that there was no binding agreement. In the absence of a binding agreement, the contracting officer was free to change his mind after considering the TSRB's advice. Moreover, in fulfilling its review and approval responsibilities, it makes sense for the TSRB to insist that the TCO consider FAR 49.202(a) with respect to deliveries of subcontractor items.

The Determination of What was Delivered to TRW by MDC

TRW argues that, in any event, MDC delivered materials, data, and services valued at more than $92 million by the date of termination. As we have already noted, FAR 49.202 says that profit shall not be allowed a prime contractor for materials and services that have not been delivered by the subcontractor as of the effective date of the termination, regardless of the percentage of completion. FAR 49.202 does imply, as does the regulatory history, a distinction between "completion" and "delivery," with the latter being something more. However, "delivery" is not defined and neither party has suggested a particular definition to us. The regulatory history that has been brought to our attention is also silent on this point. Nevertheless, the basic idea of "delivery" is the transfer of possession or control, either actual or constructive, of the subject matter from one party to the other.[3]

The question here is what was delivered by MDC to TRW as of the partial termination of the contract. The answer depends on the interpretation of the subcontract between MDC and TRW. We begin with the language of the subcontract itself and apply the familiar principles of contract interpretation:

> It is basic that an interpretation which gives a reasonable meaning to all parts of a contract will be preferred to one which leaves a portion of it meaningless. Moreover, no provision should be construed as being in conflict with another unless no other reasonable interpretation is possible.

GTE Government Systems Corp., ASBCA No. 44080, 96-2 BCA ¶ 28,342 at 141,546, *aff'd on reconsid*., 96-2 BCA ¶ 28,535, citing *Fortec Constructors v. United States*, 760 F.2d 1288 (Fed. Cir 1985) and *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965).

In determining the subcontract's delivery terms, we first examine the subcontract itself. The terms, "deliver" and "delivery," are used throughout the subcontract and the parties, both experienced Government contractors, made specific provisions for a delivery schedule. The subcontract's PERFORMANCE AND DELIVERY SCHEDULE at ARTICLE II stated, "The supplies and services required to be delivered to the Buyer shall be delivered in accordance with the delivery schedule set forth in the Statement of Work. . . ." The PACKAGING AND DELIVERY clause at ARTICLE VIII provided that shipment of all deliverable items was to be F.O.B. Buyer's facility which, in this case, was in Redondo Beach, CA.[4] The SOW's SCOPE OF WORK indicated that MDC was to "provide necessary management, labor, facilities and materials . . . and do all things necessary or incidental in the performance of the effort required by this Statement of Work to provide the equipment and services specified in Attachment II and the documentation specified in Attachment III herein." The DELIVERY SCHEDULE at paragraph 1.4 of the SOW stated, "Delivery of the required items shall be in accordance with Attachment II herein. Delivery of documentation shall be in accordance with Attachment III herein." ATTACHMENT II of the SOW listed the hardware and services to be delivered, along with their delivery due dates, and ATTACHMENT III listed the data required to be delivered. Paragraph 4 of the SOW, entitled DELIVERABLE ITEMS, stated that the deliverable items were the required end items and spares which were to be delivered in accordance with ATTACHMENT II of the SOW and documentation which was to be delivered in accordance with ATTACHMENT III of the SOW. Paragraph 5.0 of the SOW, entitled PREPARATION FOR DELIVERY, stated that MDC was responsible for the preservation, packaging and packing of all items to be delivered under the terms of the subcontract.

The delivery provisions seem straightforward and unambiguous. Under the terms of the subcontract, MDC was required to deliver the hardware items and services listed in the SOW's ATTACHMENT II and the data items set forth in ATTACHMENT III in accordance with ARTICLE VIII-PACKAGING AND DELIVERY. Under the SOW's paragraph 5.0, PREPARATION FOR DELIVERY, MDC was responsible for the preservation, packaging and packing of all items to be delivered. These provisions contemplated the physical transfer of possession at TRW's Redondo Beach, CA facility. The only items which MDC was not required to deliver F.O.B. to TRW's Redondo Beach, CA facility were the test sets and cables identified in the SOW's ATTACHMENT II as "SIP," or Ship in Place, deliverable items under subparagraph 4.1.1 of the SOW. SIP was a form of constructive delivery under which the items, once acquired by MDC, were deemed delivered to TRW ("Buyer-owned property") and turned over to MDC, in "AS IS" condition, for MDC's use in performing the subcontract.

In summary, under this reading of the subcontract provisions, items and services that are listed on Attachments II and III and which were delivered to TRW, either actually or constructively (as in the case of the SIP items), by the date of the partial termination are to be included in the subcontract cost base for purposes of determining profit.

Conversely, those items and services not delivered are not to be included. This basic reading of the subcontract is at the heart of the Air Force's motion for summary judgment on this issue.

In its opposition to the Government's motion, TRW contends that the subcontract contained several delivery provisions. It states, in pertinent part:

> With respect to completed CEIs, TRW and MDC included a formal delivery schedule as Attachment II to the SOW. . . .
>
> The delivery of data, reports, and other documentation was covered by a SDRL appended to the SOW. . . .
>
> To govern the delivery of the supplies and services required by the CLINs of the Subcontract - including the "long-lead materials and subassemblies and . . . fabrication and assembly at the subsystem level" set forth in the CLINs - TRW and MDC relied upon the Liquidation Schedule of the Subcontract. . . .

(App. opp. to Gov't mot. at 28)

In essence, TRW argues that the subcontract contained another set of delivery provisions -- apart from the "formal delivery schedule" -- although not denominated as such. As part of its argumentation, TRW has pointed to FAR 32.503-8, LIQUIDATION RATES – ORDINARY METHOD, for support. It says FAR 32.503-8 provides for liquidation payments only for "contract items delivered and accepted." (App. reply to Gov't opp. to app. mot. at 18-19) The implication is that there must be delivery, though not denominated as such, else there would not be or, perhaps, could not be a liquidation. Though we appreciate the role delivery may play in liquidating progress payments, there are several problems with counsel's reliance on FAR 32.503-8. First, the provision is not in fact referenced in the Progress Payment clause flowed down to the subcontract, although the provision is referenced in one of the FAR instructions concerning the use of the clause. *See* FAR 52.232-16(g) as in effect at the time of award of the subcontract. Second, we do not understand why it must apply "as a matter of law" (app. mot. at 21) and TRW has provided no support for this position, apart from the incorporation by reference argument. Third, in any event, the provision is descriptive, not proscriptive. The pertinent portion of FAR 32.503-8 provides as follows:

> Progress payments are recouped by the Government through the deduction of liquidations from payments that would otherwise be due the contractor for completed contract items. To determine the amount of the liquidation, a

> liquidation rate is applied to the contract price of contract items delivered and accepted.

The description cannot be divorced from a consideration of the terms and conditions of a specific contract, particularly the financing arrangements. To the extent the parties' financing arrangements vary from the description, the implication may simply be that the parties, here a prime and its subcontractor, made special financing arrangements that do not mirror the typical Government-prime contractor financing relationship.

Our basic problem with TRW's proposed delivery provisions, centered on the progress payment liquidation schedule, is that they find no support in the language of the subcontract. The heading of the progress payment liquidation schedule itself states that it is for "billing purposes only," which, we think, is a strong indication that the parties to the subcontract intended it to be used for that purpose. We operate from the premise that the parties knew how to use the terms, "delivery" and "deliver," and did so when they wished. The terms are not used in any of the CLIN descriptions. "Delivery" and "deliver" are used frequently in Articles II and VIII and in the SOW and its Attachments II and III where, as we discussed above, the subcontract's delivery provisions were set forth. The term "deliver" is also used a number of times in the progress payment liquidation schedule to refer to specific actions, not all of which involved delivery of an item to TRW. For example, the liquidation schedule lists as a sub-element: "LCS #5 - MDEC deliver (8) LCS #5 TMBS units to Eastman Kodak." Other sub-elements required MDC to "complete" an item, such as a "PRA Printed Wiring Board" or to "receive" items from an MDC subcontractor, such as "Avalanche Photo Diodes from RCA." Four of the 91 sub-elements on the progress payment liquidation schedule specifically required MDC to deliver the LCSs to TRW and two sub-elements specified that MDC was to deliver a test set and a cable set to TRW. These sub-elements, which specify delivery to TRW, appear on the SOW's ATTACHMENT II, DELIVERY SCHEDULE, while the sub-elements requiring that MDC "receive" or "complete" items or "deliver" items to one of its subcontractors do not. The only exceptions are the items that were to be shipped in place.

TRW has proffered declarations from some of its employees and from an MDC employee which, TRW contends, show that the parties demonstrated by their actions during subcontract performance that they had a shared understanding of the subcontract which must be enforced. TRW argues that the proffered declarations show that TRW and MDC used the subcontract's progress payment liquidation schedule to prove the completion and delivery of required tasks and services from MDC to TRW. It points out that the California Uniform Commercial Code and parol evidence rule state that the written terms of an agreement may be explained by, *inter alia*, the course of performance of the parties.[5]

In its motion, TRW summarized TRW's and MDC's alleged shared understanding of the subcontract in the following terms:

> The Schedule of the Subcontract is made up of numerous CLINs. CLINs 01-07 call upon MDC to deliver to TRW "supplies and services," including "long-lead materials and subassemblies to perform fabrication and assembly at the subsystem level and to realize . . . EOQ . . . benefits." . . .
>
> The Subcontract SOW provides additional specifications - and certain data requirements - with respect to the "supplies and services" required by the CLINs. . . . In addition, the SOW provides specific delivery dates for the delivery of CEIs and SDRLs. There are no specific delivery dates for the "services . . . long-lead materials and subassemblies" encompassed by the CLINs.
>
> The Liquidation Schedule of the Subcontract identifies those hardware items (whether CEIs, CIs, or subassemblies) the "delivery," "completion," or "receipt" of which were defined by TRW and MDC as "milestones" to assess the successful delivery of the supplies and services required by the CLINs. . . . The Liquidation Schedule also sets forth the pre-negotiated subcontract value of the supplies and services "delivered," "completed," or "received" in satisfaction of each "milestone."

(App. mot. at 43-44) TRW asserts that the signed invoices submitted by MDC to TRW represented the successful delivery of material, data, and services encompassed by the subcontract's CLINs and progress payment liquidation schedule.

A fair reading of the declarations of the MDC representatives does not support the "shared understanding" that TRW's counsel seeks to advance. The declarations of MDC's program manager, Mr. Deckelman, and senior contracts administrator, Ms. Goetsch, although the latter declaration was sponsored by the Government, are not in conflict. They both describe a financing arrangement and are focused on completion of milestones for payment purposes. Neither declaration seeks to relate the progress payment liquidation schedule to the delivery provisions of the subcontract. Mr. Deckelman's comments on the delivery provisions are too general to be helpful. He observed, in this regard,

> In sum, the LCS Subcontract called for a wide variety of services, all of which were essential to the successful

> attainment of the objectives of the Subcontract. Simply stated, the LCS Subcontract required McDonnell Douglas to do everything necessary for a successful program – engineering and analysis, proof of designs, parts acquisition, test and analysis, cost/schedule/control, planning internal management external interfaces with TRW, fabrication, assembly, configuration management, and the like. These services were important elements of McDonnell Douglas' delivery obligations under the LCS Subcontract.

With respect to the payment provisions, Mr. Deckelman emphasized that "the effect of [the progress payment liquidation schedule] was to tie payments to McDonnell Douglas to the successful achievement of key stages in the performance of the Subcontract." His focus was on milestones. In addition, MDC's senior contracts administrator, Ms. Goetsch, in her declaration, maintained that the liquidation schedule was used for billing purposes only and that just because an event on the schedule had been completed did not necessarily mean that the goods or services had been delivered to TRW. Ms. Goetsch went on to state that the subcontract's required deliverable items were documented in the SOW's Attachments II and III.

Though Mr. Deckelman's focus was on meeting milestones, he also discussed delivery. He stated, "In effect, the successful achievement of the milestone provided an objective way of determining that the services necessary to 'complete' or 'deliver' an item, such as a CI, had been successfully delivered by McDonnell Douglas." It is clear that milestone events can be the "completion," "receipt," or "delivery" of an item. Mr. Deckelman does speak of the successful achievement of a milestone as a way of objectively determining that the services necessary to complete or deliver an item had been "successfully delivered." This theme is also reflected in TRW's Mr. Pape's declaration. Mr. Pape observed that "McDonnell Douglas personnel often referred to the milestones as 'deliveries,' when presenting the paperwork relative thereto to me for my review, evaluation and approval." We are left with the possible inference that the achievement of a milestone is a delivery event with the same status as a delivery called for by the delivery schedule set forth in the subcontract. We do not believe the inference is a reasonable one because neither declarant relates the use of the term to the express delivery provisions of the subcontract.

In the same vein, we are not persuaded that the declarations of Messrs. McNamara, Kibel, and Base support the understanding of the subcontract urged by TRW's counsel. Since the progress payment liquidation schedule specifically mentions delivery events, the declarations are right to talk about "delivery," as well as "completion" or "receipt." Moreover, they do not address the relationship of the progress payment liquidation schedule to the express delivery provisions in the subcontract. Not one of these declarations addresses the subcontract's SOW's ATTACHMENT II and only Mr. Kibel's

declaration mentions ATTACHMENT III, and then, only in passing. In light of the generality of the declarations and the failure of the declarations to address the obvious implications of the express delivery provisions, we think it is unreasonable to infer that "delivery," as used in the declarations, should be given the same significance as its use in the express provisions of the subcontract.

Finally, we must conclude that even if we were to fully credit TRW's supporting declarations, the parol evidence rule would prevent our reliance on them in this instance. As the Federal Circuit has observed, "[t]he function of the parol evidence rule, a rule of substantive law misnamed a rule of evidence, is the prevention of the variance of integrated agreements, usually written, by inconsistent contemporaneous or prior terms, usually oral." *Sylvania Electric Products, Inc. v. United States*, 458 F.2d 994, 1005 (Ct. Cl. 1972). *See also HRE, Inc. v. United States*, 142 F.3d 1274, 1276 (Fed. Cir. 1998) (where provisions of a contract are clear and unambiguous, court may not resort to extrinsic evidence – primarily the testimony of the official who drafted the contract – to interpret them). California's application of the rule is no different. California's Uniform Commercial Code and its Code of Civil Procedure allow evidence of a course of dealing by the parties to explain or supplement written terms but not to contradict those terms. The rule does not preclude the examination of the proffered evidence, but rather the use that may be made of it. (*See* note 5) However, "after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." RESTATEMENT (SECOND) OF CONTRACTS §212, comment b, *quoted in GTE Government Systems Corp.* at 141,545.

In the final analysis, the language of the subcontract is clear and unambiguous. The progress payment liquidation schedule was part of the financing arrangement between the parties and was not a delivery schedule, although delivery events may have figured in the parties' liquidation scheme. Completion of a milestone on the liquidation schedule may have been, in some instances, a delivery event, but we cannot say that completion of a milestone is synonymous with delivery to TRW. Indeed, the SIP, or Ship in Place, provisions demonstrate that the parties knew how to provide for the kind of delivery that counsel for TRW seeks to find in the progress payment liquidation schedule. For example, if the parties had intended that a "configured item" be constructively delivered to TRW, the SIP provisions were readily available. Why the parties would choose such an oblique approach, when a direct, straightforward solution to the question of when an item was to be considered delivered remains unexplained. In any event, the explanation offered by the declarants is no substitute for the clear language of the subcontract.

Accordingly, the Air Force is entitled to summary judgment on the contract interpretation issue. We grant its motion for partial summary judgment and deny TRW's cross motion, with one exception.

TRW also moves for summary judgment on the Government's refusal to grant TRW profit on data delivered by MDC since it was not separately priced in the subcontract. We grant TRW's motion. The subcontract's CONSIDERATION AND PAYMENT clause at ARTICLE IV contemplated payment for delivery of required reports and data. The fact that an item was not separately priced does not mean that the item has no value. Basic termination for convenience principles require an effort to value the data items. Without evidence that the parties intended that no value was to be associated with delivered data or that a value cannot be determined, the fact that data items were not separately priced should not prevent the payment of profit on the reasonable value of the items. *Cf. Ateron Corporation*, ASBCA No. 46867, 96-1 BCA ¶ 28,165 (in termination for default, it was not reasonably possible to value NSP data items).

CONCLUSION

The Air Force is entitled to judgment as a matter of law on the contract interpretation question presented with respect to the first issue. We grant its motion for partial summary judgment and deny TRW's motion, with one exception. We grant TRW's motion for summary judgment as to its entitlement to profit on data items that were delivered but not separately priced, if a reasonable value can be placed on the items. The matter is returned to the parties for the purpose of negotiating the value of the delivered data items consistent with this decision. The parties have treated the second issue as a quantum issue (prehearing transcript at 18-20) and so do we at this stage of the proceedings. Accordingly, the second issue is also returned to the parties.

The appeal is sustained in part and denied in part as indicated.

Dated: 27 June 2000

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

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] FAR 49.111, "Review of proposed settlements," states, in pertinent part:

> Each agency shall establish procedures, when necessary, for the administrative review of proposed termination settlements. . . .

Air Force FAR Supplement 5349.111, "Review of proposed settlements," states, in pertinent part:

> Establish settlement review boards commensurate with workload and include legal and pricing representatives. Settlement review boards should review and approve settlement agreements, unilateral determinations, . . . if--
>
> (1) The settlement amount, as determined in accordance with FAR 49.002, exceeds $250,000 for fixed-price contracts; . . .

(R4, tab 19)

Air Force Material Command FAR Supplement 5349.111-90, "Termination Settlement Review Board (TSRB)," states, in pertinent part:

> (a) Authority to establish a TSRB is delegated to AFMC field contracting organizations for contracts where administration is retained under FAR 42.203.
>
> (b) Each TSRB should have at least one qualified officer or civilian employee with broad business and contracting experience, a pricing representative, a lawyer, and, if appropriate, an engineer or industrial specialist and an auditor from the Defense Contract Audit Agency (DCAA) should attend.
>
> . . . .
>
> (d) The TSRB shall review and approve if the:
>
> (i) Case is in excess of $250,000.

. . . .

(f) The TSRB's function is to assess the overall reasonableness of the proposed settlement agreement or determination. The size and complexity of the proposed agreement or determination may vary the scope and intensity of the board's review. The TSRB does not have to examine in detail, every element of the proposed agreement or determination, but may review selected elements to ensure that the agreement is competently constructed, is based on adequate information, and protects the Government's interest.

(g) The TSRB shall submit the TCO a written opinion with respect to the proposed settlement agreement or determination and any other appropriate matter. The TSRB will approve/disapprove or give another decision. . . .

(R4, tab 20)

[2] The prohibition against the payment of profit to a contractor for material and services not delivered by a subcontractor, regardless of the percentage of completion, has a long history (R4, tab 14). In 1967 and 1968, the Council of Defense and Space Industry Associations (CODSIA) tried to have the Department of Defense change the way profit was allowed in termination settlements arguing that "it is the work done which should earn full profit, not merely the act of completing the job" (R4, tabs 11-14).

By letter dated 15 October 1968, the ASPR committee informed CODSIA that the committee had re-examined its policy regarding profit on subcontractor effort and that it had "again reached the decision that no allowance for profit to the prime contractor should be made for material or services which, as of the effective date of termination, have not been delivered by a subcontractor." The committee stated that it would make appropriate revisions to the ASPR to reflect its policy. The letter went on to state:

The principal reason for this decision is our conclusion that the duties and responsibilities of a contractor with respect to subcontracted supplies and services, in the event of a termination, are different from those contemplated when the contract was awarded. Among the factors which may change

> are the period of use of the contractor's capital; the risk of failure to meet contract specifications; and similar risks attendant upon the contractor's overall responsibility for timely delivery of supplies or services in accordance with the provisions of the contract.

(R4, tab 15)

By letter dated 1 February 1969, addressed to CODSIA, the Assistant Secretary of Defense (Installations and Logistics) confirmed the determination "to continue the present DOD policy that profit not be allowed on subcontractor work that, although completed, had not been delivered to the prime." (R4, tab 16) The appropriate revisions were made to the ASPR which were then retained in the DAR and were adopted when the FAR replaced the DAR and are set forth in FAR 49.202 (R4, tab 17).

[3] Black's Law Dictionary defines "delivery," in pertinent part, as follows:

> The act by which the res or substance thereof is placed within the actual or constructive possession or control of another. Poor v. American Locomotive Co., C.C.A.Ill., 67 F.2d 626, 630. What constitutes delivery depends largely on the intent of the parties. It is not necessary that delivery should be by manual transfer, Jones v. Young, Tex.Civ.App., 539 S.W.2d 901, 904; *e.g.* "deliver" includes mail. Rev. Model Bus. Corp. Act, § 1.40. . . .

Black's Law Dictionary 428 (6th ed. 1990)

Webster's Third New International Dictionary defines "deliver" and "delivery," in pertinent part, as follows:

> deliver
>
> . . . .
>
> 2 : GIVE, TRANSFER : yield possession or control of: make or hand over : make delivery of . . .
>
> delivery

> . . . 2a : the act of delivering up or over : transfer of the body or substance of a thing . . . c : the act of putting property into the legal possession of another . . . whether involving the actual transfer of the physical control of the object from one to the other or being constructively effected in various other ways (as by the handing over of something symbolical of the thing sought to be delivered) . . .

Webster's Third New International Dictionary 597 (1986)

[4] Section 2319 of California's Uniform Commercial Code provides, in pertinent part:

> 2319. F.O.B. and F.A.S. terms
>
> (1) Unless otherwise agreed the term F.O.B. . . . at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> . . . .
>
> (b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this division . . .

The official comment on this section states that the "section is intended to negate the uncommercial line of decision which treats an 'F.O.B.' term as 'merely a price term.'" (Cal. U. Com. Code § 2219 (Deering 1999))

[5] Section 2202 of California's Uniform Commercial Code provides, in pertinent part:

> 2202. Final written expression; Parol or extrinsic evidence
>
> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior

> agreement or of a contemporaneous oral agreement but may be explained or supplemented.
>
> (a) By course of dealing or usage of trade . . . or by course of performance . . .

The official comment on this section states that the section rejects the requirement that the court must first determine that the language of the agreement is ambiguous before admitting evidence of course of dealing, usage of trade, or course of performance. The comment also states that "the course of actual performance by the parties is considered the best indication of what they intended the writing to mean." (Cal. U. Com. Code § 2202 (Deering 1999))

Section 2208 of California's Uniform Commercial Code provides, in pertinent part:

> 2208. Course of performance or practical construction
>
> (1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.
>
> (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade . . . .

(Cal. U. Com. Code § 2208 (Deering 1999))

Section 1856 of the California Code of Civil Procedure provides, in pertinent part:

> 1856. Parol evidence rule
>
> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by

> evidence of any prior agreement or of a contemporaneous oral agreement.
>
> . . . .
>
> (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.

The official comment to this section notes that parol evidence is inadmissible to contradict the terms of a written instrument intended by the parties as the final embodiment of the terms contained in it. (Cal. Code Civ. Proc. § 1856 (Deering 1999))

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. 51003, Appeal of TRW Inc., rendered in conformance with the Board's Charter.

Dated:

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