ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
TRW, Inc.	)	ASBCA Nos. 51172, 51530
	)	
Under Contract No. F30602-88-C-0058	)	

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OPINION BY ADMINISTRATIVE JUDGE KETCHEN
ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

These consolidated appeals concern the allowability and/or allocability of certain indirect costs that appellant included in its final rate submissions for the 1990, 1991, 1992 and 1995 cost accounting periods. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613. *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407.

Appellant moves for partial summary judgment with respect to ASBCA No. 51172 ("Appellant TRW, Inc.'s Request for Partial Summary Judgment" (TRW's Motion)). Appellant argues that indirect costs incurred from 19 October 1991 to 17 March 1992 relating to an anticipated Air Force procurement were long-range marketing costs pursuant to Federal Acquisition Regulation (FAR) 31.205-12 or selling costs pursuant to FAR 31.205-38 rather than bid and proposal costs (B&P costs) subject to the ceiling limitations of FAR 31.205-18. The Government opposes the motion. We conclude that appellant has not established that it is entitled to judgment as a matter of law based upon undisputed material facts.

STATEMENT OF FACTS
FOR PURPOSES OF APPELLANT'S MOTION

Background

1. Effective 15 August 1988, the Department of the Air Force (Air Force or Government) awarded Contract No. F30602-88-C-0058 to TRW, Inc. Electronics Systems Group, Redondo Beach, CA, for a "Radiation Hardened 32 Bit Processor." The reimbursement-type and flexibly-priced contract, among other items, required TRW to identify individual items of equipment and software necessary for system operation. (R4, tab 1)

2. The following from our decision denying the Government's motion to dismiss for lack of jurisdiction in *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,328-29, provides pertinent background facts and context to our resolution of TRW's motion:

> In 1988, the Government awarded appellant the captioned contract, which was one of a number of cost-reimbursable and flexibly-priced contracts awarded to appellant which required the establishment of final indirect cost rates for each cost accounting period. The contract incorporates by reference standard clauses for such contracts, including the FAR 52.216-7 "ALLOWABLE COST AND PAYMENT (APR 1984)" clause, the FAR 52.230-3 "COST ACCOUNTING STANDARDS (SEP 1987)" clause, and the FAR 52.233-1 "DISPUTES (APR 1984)" clause.
>
> The "Allowable Cost and Payment" clause provides that, based upon contractor invoices, the Government make payments as the work progresses, and that the contractor be reimbursed in amounts determined by the contracting officer to be allowable in accordance with FAR Subpart 31.2. It further provides that final indirect cost rates and the appropriate bases be established by the procedures set forth in the FAR Subpart 42.7. Under those procedures, the contractor submits a final indirect cost proposal, which is then audited and becomes the basis for negotiations between the parties. Unless the Air Force elects to use "[q]uick close-out procedures," an agreement on final indirect rates is generally required before cost-reimbursable and flexibly-priced contracts can be closed out for a specific cost accounting period and final payment authorized. The clause provides that the parties "shall establish

the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal," and that "[f]ailure of the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause."

Appellant submitted to the administrative contracting officer (ACO) its final indirect rate proposals for its 1990, 1991, and 1992 cost accounting periods, and the proposals were audited by the Defense Contract Audit Agency (DCAA).

. . . .

In 1997, appellant and the Government entered into final indirect rate agreements for the 1990, 1991, and 1992 cost accounting periods. The parties attached to the final rate agreements a March 1997 "Addendum to Final Overhead Rate Agreement for Years Ended 1990, 1991 and 1992" (Addendum). The Addendum included the following:

> TRW and the Government acknowledge that certain costs which are being reviewed by the Government have been included in the indirect expense claims covered by this agreement. The [ACO] has made no final determination as to the allowability or allocability of certain indirect costs which are the subject of litigation currently pending in [Bagley I] and [Bagley II] (hereinafter "Litigated Costs"). In order to facilitate the negotiation and settlement of the overhead claims for the years 1990, 1991 and 1992, and the attendant closure of contracts, the Litigated Costs have been provisionally allowed. However, the Government expressly reserves the right to make a final determination as to the allowability and allocability of the Litigated Costs at a later date and TRW expressly reserves the right to appeal any such final determination.[1]

3. The following FAR provisions as in effect on 15 August 1988 are pertinent to resolution of the issues raised by TRW's motion:

FAR 31.205-12 ECONOMIC PLANNING COSTS states in relevant part:

(a) This category includes costs of generalized long-range management planning that is concerned with the future overall development of the contractor's business . . .

FAR 31.205-18 INDEPENDENT RESEARCH AND DEVELOPMENT AND BID AND PROPOSAL COSTS states in relevant part:

(a) *Definitions.*

. . . .

"Bid and proposal (B&P) costs," as used in this subdivision, means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts.[2]

. . . .

(c) *Allowability.* Except as provided in paragraph (d) below, costs for IR&D and B&P are allowable only in accordance with the following:

[Prescribes procedures for establishing cost ceilings for allowability of IR&D and B&P costs.]

FAR 31.205-38 SELLING COSTS states in relevant part:

(a) "Selling" is a generic term encompassing all efforts to market the contractor's products or services, some of which are covered specifically in other subsections of 31.205. Selling activity includes the following broad categories:

. . . .

(3) Bid and proposal costs.
(4) Market planning.

. . . .

(b) . . . . Bid and proposal costs are defined at 31.205-18 and have their allowability controlled by that subsection. Market planning involves market research and analysis and generalized management planning concerned with development

> of the contractor's business. The allowability of long-range market planning costs is controlled by the provisions of 31.205-12. . . .
>
> (c) Direct selling efforts are those acts or actions to induce particular customers to purchase particular products or services of the contractor. . . .

TRW and Air Force Actions Concerning MLV III Acquisition Prior to October 1991

4. Beginning in 1989, TRW began to investigate an expansion of its business base with the potential goal of entering into the space launch vehicle business. TRW initiated a year-long study concerning the development of a new, low-cost launch vehicle design and developed the concept of a family of modular launch vehicles for launching satellites. (Supp. R4, tabs 39, 42) On 7 September 1990, the Air Force announced a need for medium range launch vehicles (MLV III) to replace satellites in its NAVSTAR Global Positioning System II R (GPS II R). The Commerce Business Daily (CBD) notice included detailed information for the launch vehicles concerning payload capability, trajectory, orbit, launch facility information, number of launches per year, and related procurement information. (App. supp. R4, tab 278)

5. The CBD notice stated that the Air Force would issue a draft Request For Proposals (RFP) for the MLV III in February 1991 and projected issuance of a final RFP in June 1991 (app. supp. R4, tab 278). On 21 September 1990, TRW submitted a capabilities statement to the Air Force and requested the Air Force to place TRW on the Air Force's list of interested bidders (supp. R4, tab 42). The Air Force exercised an option on 30 October 1990 under a related Air Force contract for the purchase of 20 GPS II R satellites, resulting in the Air Force's companion need for launch vehicles to place satellites into orbit to replace existing satellites in the GPS II R system. (Supp. R4, tabs 47, 58, 94, 101, 152, 157, 168, 179, 181, 198, 207, 227, 252; app. supp. R4, tabs 278, 292, 318)

6. In announcing the need for the MLV III launch vehicles, the Air Force began a process consistent with its procurement practice. In accordance with Air Force Acquisition Policy and the Air Force Systems Command FAR Supplement, for the MLV III procurement, the Air Force released draft RFP's to give potential offerors insight into the basic requirements, provide offerors an opportunity to comment to be as fair as possible, and maximize competition on the MLV RFP when issued. (Gov't Surreply, ex. 1, Higdon Decl.) The Air Force practice generally involves conducting meetings with potential offerors concerning the Air Force's general requirements for a procurement, developing specifications and technical requirements based on comments by potential offerors, issuing draft RFP's for comments by potential offerors, and revising the RFP specifications and requirements based on potential offerors' comments. (Supp. R4, tabs 73; app. supp. R4, tab 292) A subsequent CBD notice issued on 19 September 1991, projected release of a draft

RFP for the MLV III contract in October 1991 and a final RFP in December 1991 (app. supp. R4, tab 292). On 30 September 1991, TRW attended an Air Force briefing for prospective offerors interested in participating in the Air Force's MLV III acquisition (supp. R4, tabs 94, 95).

Actions Related to the MLV III Acquisition - October 1991 to 17 March 1992

7. Beginning in October 1991, TRW undertook numerous activities related to the anticipated MLV III procurement. On 2 October 1991, TRW met with the Air Force to exchange information concerning the MLV III RFP (supp. R4, tab 101). From 10 October 1991 to 18 October 1991, a team of senior TRW executives, which TRW identified as the "Gold Team," reviewed TRW's launch vehicle initiative (supp. R4, tabs 103, 107). On 19 October 1991, the Gold Team recommended that TRW compete for the MLV III contract, "Go For MLV III," and allocate "Must-Win" type resources of $15 million to $20 million through 15 April 1992 of Independent Research and Development (IR&D) costs and Bid and Proposal costs (B&P costs) broken down as $5 million for 1991 and $10 million to $15 million for 1992 (supp. R4, tab 107). TRW's Space and Technology Group (S&TG) adopted the Gold Team's recommendation and developed a basic strategy to "BID AND WIN MLV III" contract. S&TG forecast an MLV III bid by April 1992 and MLV III award by May 1992 (supp. R4, tab 108).

8. On 19 October 1991, TRW's Executive Vice President and General Manager (Senior Executive Officer (SEO)), Space & Defense Sector (Hannemann) made a decision that triggered numerous TRW efforts related to the anticipated Air Force MLV III procurement, not the least of which involved an S&TG decision to commit TRW financial and personnel resources to MLV III related proposal preparation activities. S&TG assigned personnel and financial resources to efforts related directly to the anticipated MLV III solicitation, including the preparation of a draft proposal. The SEO stated that "[w]e agreed to aggressively proceed with activities directed to bidding the MLV III," indicated the scope of TRW's launch vehicle program would be limited to the single purpose of bidding the MLV III, and approved an increase to the S&TG B&P budget by $3 million for support of the MLV III effort. (Supp. R4, tab 114) The SEO's decision acknowledged that a final decision to submit a proposal in response to an MLV III RFP would require approval by the TRW SEO (Hannemann) as well as TRW's Chief Operating Officer (COO) and TRW's Chief Executive Officer (CEO) because of the financial magnitude of the project (estimated at $150 - $200 million) should TRW become the MLV III launch vehicle contractor. (TRW's Motion, Attach. B, Hannemann Decl. at ¶¶ 4-6; supp. R4, tabs 114, 120) Although the SEO apparently authorized S&TG to go forward with MLV III proposal preparation activities, TRW disagrees that budgeting the funds authorized their expenditure. (TRW Reply at 66-67, appendix ¶¶ 1, 3, 41, 45; supp. Brown Decl. at ¶ 2; supp. R4, tab 114; app. supp. R4, tab 302A)

9. The SEO (Hannemann) also stated that "we want to proceed along a success oriented path . . ." but identified the following conditions, which he labeled as four critical offramps, for TRW to continue with the MLV III related efforts: (1) a successful case-burst test involving TRW's launch vehicle by the end of 1991; (2) successful resolution of any conflict of interest issues involving TRW's systems engineering and technical work under a contract with the Air Force involving the TRW Ballistic Missile Division; (3) successful static firing of the CASTOR 120 rocket motor in time to respond to the MLV III RFP; and (4) completion of a multi-point risk analysis of the potential perils of bidding on the MLV III RFP and a specific plan to address any mitigation requirements (supp. R4, tab 114).

10. TRW developed an MLV III action plan on 28-29 October 1991 and an "MLV III Pre-Proposal Plan on 8 November 1991" (supp. R4, tabs 115-116, 133). On 30 October 1991, TRW released $280,000, which it labeled as B&P funds, to support TRW's MLV III activity through 15 November 1991 (supp. R4, tab 119).

11. On 11 November 1991, TRW executives executed an "Initial Bid Decision Record (IBDR) (Ref. Controllers Manual CMSP 4-5)" based on the 19 October 1991 decision of the SEO (Hannemann) to proceed with TRW's MLV III proposal activities (supp. R4, tab 138). TRW used the IBDR procedure either for authorizing work on a project, as the Government maintains (Gov't Response at 49, ex. 6, Stephenson tr. at 27-30) or for committing funds to a project as TRW maintains (TRW's Motion at 28-37; TRW Reply at 21). The IBDR appears to reflect TRW's initial decision to move forward at least with preparation of a proposal for submittal in response to the anticipated MLV III RFP. However, TRW disagrees that this was a final decision by TRW to submit an offer, since this ultimate decision was reserved for the highest corporate authority and the SEO never requested approval from the CEO and COO to submit an offer, and TRW never processed the IBDR. (Finding 8; supp. R4, tabs 114, 120; TRW's Motion, Attach. B, Hannemann Decl., ¶¶ 4-6; TRW Reply, ex. B-1, Goldin tr at 209; Brown Decl. at 5)

12. The IBDR authorized a current year 1991 B&P budget of $480,000 for S&TG efforts related to the MLV III acquisition for the period from 19 October 1991 to 30 April 1992; assigned job numbers, JN 97JA40 through 97JA59 (although these job numbers were not used according to TRW's representation (TRW Reply at 21)) for the period of 19 October 1991 through 30 April 1992; estimated January 1992 for RFP issuance; described the work as "provide 20 Launch Vehicles for Launch of GPS II R Satellites;" estimated the probability of award to TRW as 30%; indicated a proposal due date of February 1992, and estimated an award date of April 1992 (supp. R4, tab 138).

13. The TRW Proposal Manager (Stephenson) on 5 December 1991 approved an "individual work authorization" (IWA) for William I. Purdy, Jr. The IWA form indicated the Job Number 97JA40, one of the job numbers listed in the IBDR, and described the work as "cost volume activities for MLV III proposal effort." (Supp. R4, tab 189)

14. During the period from 19 October 1991 to 17 March 1992, some, but by no means all, of the significant and numerous MLV III related activities that TRW undertook, in addition to those already mentioned, included formation of a proposal preparation team consisting at one point of approximately 136 personnel overall to prepare an MLV III draft proposal. (Supp. R4, tab 302) The MLV III proposal preparation team was headed by an experienced proposal manager (Stephenson). (Supp. R4, tab 124; Gov't Response at 20-21, ex. 6, Stephenson tr. at 1-14) MLV III related activities also included development of a "strawman proposal" based on an earlier Air Force small launch vehicle program "to try to understand the potential RFP that we're expecting and to get a head start on understanding what it is we have to deal with in the proposal." (Gov't Response at 23-25, ex. 6, Stephenson tr. at 24; supp. R4, tab 129) The TRW MLV III Proposal Manager in deposition testimony stated that ". . . and when they did release their draft RFP, we felt we had what we needed to know" to write a proposal and that ". . . I think we did have a good idea of what the requirements were. We knew how much the satellite weighed; we knew where the orbit was [and where] it had to go to. That was the main set of requirements that drove the launch vehicle design" (Gov't Response, ex. 6, Stephenson tr. at 211, 244). TRW personnel also knew that proposal preparation had to begin well before issuance of the RFP, since RFP's usually have a relatively short response time (Gov't Response, ex. 6, Stephenson tr. at 21, 24, 74, 135, 149). TRW states that "[a]t the October 19, 1991 meeting, TRW decided to proceed with activities directed toward a possible bid on the MLV III" (TRW's Motion at 35; supp. R4, tab 302A).

15. The TRW MLV III activities continued with TRW announcements on several occasions that TRW would submit a proposal on the MLV III procurement (supp. R4, tabs 161, 251); discussions concerning the RFP with the Air Force acquisition team; completion of a draft MLV III proposal plan (including a summary proposal schedule) stating that "[t]he purpose of this organization is to plan, develop, write, produce, and deliver the set of books that comprise the MLV III proposal" (supp. R4, tab 180); communications with at least 30 subcontractors requesting their input and update of their proposals concerning the MLV III procurement because TRW would submit a proposal on the MLV III RFP (supp. R4, tabs 194, 210, 261); comments submitted to the Air Force on the first draft of the MLV III RFP (supp. R4, tab 250); references by TRW personnel to their activities as proposal preparation efforts for the MLV III RFP (supp. R4, tab 246); submittal of comments to the Air Force on the draft MLV III RFP as late as 20 January 1992 (supp. R4, tab 250); and preparation of a draft MLV III proposal of eight volumes consisting of 1,102 pages (supp. R4, tab 24; Gov't Response, ex. 6, Stephenson tr. at 20-25; supp. R4, tabs 150-52, 157).

16. In October - November 1991, a dispute developed within TRW as to the appropriate method for charging the costs incurred for TRW's MLV III related activities. (Supp. R4, tabs 164, 169, 170). Interoffice correspondence (IOC) dated 20 November 1991 by the S&TG Director of Financial Control, Mr. Richard Bagley, expressed that virtually all S&TG activities should be charged to B&P costs because S&TG agreed to

aggressively proceed with activities related to bidding the MLV III. TRW's launch vehicle program was limited to bidding the MLV III, and, therefore, charging MLV III related costs to economic analyses or long-range marketing was no longer appropriate. (Supp. R4, tab 164) The IOC referenced as authority the TRW's Controller's Manual of Standard Practices (CMSP) 4-5 B&P guideline and the CMSP 4-6 guideline, which states that "[t]echnical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal are [sic] B&P. . . ." (Supp. R4, tab 164)

17. On 2 December 1991, TRW S&TG's Vice President and General Manager disagreed with the position of the TRW S&TG Director of Financial Control that TRW's MLV III activities should be charged as B&P costs. (Gov't Response, ex. 2, Bagley Decl.) On 4 December 1991, TRW's Space and Defense Sector Vice President of Finance (Wilson) instructed the S&TG Director of Financial Control not to issue any accounting instructions from then on concerning the MLV III acquisition. (*Id.)*

18. A TRW IOC, dated 4 December 1991, recommended classifying the MLV III work as Other Indirect Technical Effort (OITE) because "[n]one of the launch vehicle activities performed between October 19, 1991 and December 31, 1991 meet the criteria for Bid & Proposal (B&P) effort, because the customer will not have completed an evaluation of the responses to the draft Request for Proposal (RFP) until mid January 1992" (supp. R4, tab 185). A 5 December 1991 IOC explained that "we have reviewed the launch vehicles charging situation and have determined that the effort that has been charged to OITE indirect expense should continue to be charged to OITE" (supp. R4, tab 187). The IOC stated that "B&P is not appropriate because the customer's procurement specifications are still up in the air" (supp. R4, tab 187). TRW executives explained later, in 2000 in support of TRW's motion, that TRW considered the TRW activities related to the MLV III RFP as part of its overall analysis undertaken during the course of its long-range planning and technical marketing activities to determine whether to enter into the launch vehicle business. Thus, TRW believes it appropriately charged its MLV III activities to OITE, *i.e.*, long-range marketing or selling costs. (TRW's Motion, Brown Decl., Hannemann Decl., Kelly tr., 91, 116; Gasca tr. 42, Thole tr. 29-30; app. supp. R4, tabs 286, 302, 330, 346).

19. The Air Force issued the first draft RFP for MLV III on 14 January 1992 (app. R4, tab 318; supp. R4, tab 360). By letter of 21 January 1992, TRW requested assistance of Air Force officials at Patrick Air Force Base in identifying Government-furnished facilities available to TRW for launching satellites, and stated that "TRW is presently preparing a proposal . . . [for MLV III]. . . . As the successful offeror for this procurement, TRW would require facilities from [Patrick Air Force Base, Florida]." TRW's letter closed with the statement that "TRW respectfully requests your support . . . and preparation of an authorization letter that may be included with our proposal." (Supp. R4, tab 251) On 27 January 1991, TRW began to send letters to approximately 30 potential subcontractors requesting that they provide TRW with updated proposals because TRW ". . . has decided to provide the U.S. Air Force with a proposal for the MLV III Program . . ." (supp. R4, tab

261). By 31 January 1992, TRW's proposal preparation team had frozen the Work Breakdown Structure (WBS), "a key item on this proposal because all the volumes depend on it for their organization and content," and noted that a review team would review the first draft of all proposal volumes in February 1992 (supp. R4, tab 269).

20. The TRW MLV III Proposal Operations Activity Report for the week ending 7 February 1992, which identified by name the members of the Proposal Operations Supporting Staff, in a stylized format indicated "Proposal Name: MLV III" and "Proposal Manager: Art Stephenson," and stated:

> Due to internal Air Force reviews, the RFP is delayed three weeks until March 3 (another couple of weeks slip is possible). We were told informally that we will have at least 60 days to prepare the proposal, perhaps longer. We need all the time we can get. Therefore, despite the delay, the team continues to move full speed ahead toward completion of the first draft of the technical, management, launch operations, and past performance volumes . . . .

(Supp. R4, tab 290)

21. On 17 February 1992, a TRW Space Launch Services Operations (SLSO) memorandum stated that "[t]he purpose of this memo is to release $2,400k of B&P/IR&D funds to Space Launch Systems Operations for the MLV III project through the first half of 1992" with the condition that "no [B&P] funds may be spent until a formal bid decision is made" (supp. R4, tab 303; see Gov't Response, ex. 2, Bagley Decl.).

22. During the remainder of February 1992, the TRW MLV III proposal preparation team members continued their efforts to complete the first draft of TRW's MLV III proposal (supp. R4, tab 310). TRW's Proposal Operation Activity Report for the week ending 28 February 1992, stated as follows:

> The first drafts of all proposal volumes except cost and contracts are now complete and are in the process of being produced for the SEI pink team review. . . . The technical volumes are in excellent shape for a first draft. The management volumes (management, IMP, IMS, SOW) suffer in comparison.

(Supp. R4, tab 316)

23. On 9 March 1992, TRW announced its completion of the first draft of the TRW MLV III proposal, and the S&TG Vice President and General Manager requested a meeting

with TRW management to determine whether TRW would submit a proposal on the anticipated MLV III RFP (supp. R4, tabs 334, 335). On 17 March 1992, TRW announced its decision not to compete in the Air Force's MLV III solicitation. Soon after this, TRW disbanded S&TG. (Supp. R4, tabs 336, 337, 339, 345, 346; app. R4, tabs 330, 346)

24. TRW presents evidence that its intent and purpose was to determine whether it should enter into the launch vehicle line of business (*e.g.* TRW's Motion, Hannemann Decl., Brown Decl.). TRW states that its MLV III related proposal preparation activities comported with its purpose of developing the analysis needed by TRW management to make an informed business decision concerning whether to enter into the launch vehicle line of business with the submittal of a proposal on the MLV III RFP as an opportunity to do so. (*Id*.)

Summary of Air Force MLV III Actions

25. Concurrently with TRW's MLV III related activities from September 1991 to 17 March 1992, and continuing until 16 September 1992, the Air Force engaged in numerous activities related to developing the MLV III RFP and obtaining Government approval and funding. These actions included, among many others, completion and release of draft MLV III RFP's; receipt of approval of the required acquisition plan, the program management directive, and the mission needs statement; and receipt of funding for the MLV III program. (Supp. R4, tabs 58, 94, 101, 130, 150-52, 157, 252-53, 306, 347, 352, 368-70; app. supp. R4, tabs 278, 292, 309, 342, 402) The Air Force issued the second draft RFP for the MLV III on 22 May 1992 (app. supp. R4, tab 354), and the final RFP for MLV III on 16 September 1992 (supp. R4, tab 354).

TRW's Other Cost Classification Actions

26. In 1985, the Air Force planned to upgrade its Military Airlift Command (MAC) operations program, which included its Information Processing (IPS) system (MAC-IPS) (app. supp. R4, tab 258). Beginning in 1985, TRW began charging as OITE the costs of generating a strategic plan for pursuing potential MAC-IPS upgrade opportunities for possible bidding on any future Air Force RFP (supp. R4, tab 258; app. supp. R4, tab 261). The Government subsequently issued an RFP for MAC-IPS and TRW submitted a proposal (app. supp. R4, tab 262). DCAA took the position that TRW should have charged as B&P costs certain MAC-IPS indirect costs because the technical effort TRW undertook prior to a decision to submit an offer directly supported tasks required to respond to the potential MAC-IPS RFP, even though the RFP had not been issued (supp. R4, tab 261).

27. On 19 December 1991, the Government Principal Administrative Contracting Officer (PACO) and TRW resolved by a "global settlement" the disagreement concerning TRW's charging of MAC-IPS indirect costs. TRW agreed to treat as unallowable certain MAC-IPS costs previously charged to OITE. The parties dispute whether the generalized

nature of the settlement indicates definitively that the PACO agreed that TRW properly classified any of the MAC-IPS costs as OITE costs rather than B&P costs. The parties also dispute whether TRW's activities were materially similar to TRW's MLV III procurement activities. (App. supp. R4, tab 313; Gov't Response, ex. 3, Jackson Decl.) TRW does not identify specific evidence indicating that it relied directly upon the MAC-IPS cost-charging circumstance in determining the charging method for its MLV III proposal preparation activities.

28. In conjunction with the Government and TRW's disagreement concerning TRW's MAC-IPS charging practice, the DCAA questioned whether TRW's internal cost charging guidelines set forth in the CMSP, particularly CMSP 4-5, comported with the FAR 31.205-18 (and CAS 420) definition of B&P costs. CMSP 4-5, Section 3.2, provides that TRW may authorize charging costs as B&P expense when: (a) there is a substantial degree of confidence that the customer will issue a solicitation or will be receptive to an unsolicited proposal for effort substantially similar to the proposed B&P effort; (b) the TRW entity proposing B&P effort is able to describe sufficiently the technical requirements necessary and begin development of proposal documents and schedules, and (c) TRW has made a formal "yes-bid" decision and properly completed and approved an Initial Bid Decision Record (IBDR) that then is provided to TRW Financial Data Controls, Accounting Operations (FDC). The FDC sets up cost accounts and establishes job numbers for charging B&P effort once it receives the IBDR notice from a TRW unit. (App. supp. R4, tabs 258, 514)

29. The Government and TRW disagree concerning whether: the TRW CMSP guidelines, including CMSP 4-5, constitute an internal TRW work authorization requirement for initiating B&P effort or a B&P cost charging practice, or both; the guidelines comport with FAR 31.205-18 and CAS 420 definitions of B&P costs; the Government conducted an authorized review and approved TRW's CMSP guidelines; TRW followed the CMSP guidelines concerning the MLV III procurement; and the Government audited TRW based on the CMSP guidelines. TRW indicated to the Government in 1989 that its CMSP guidelines did not govern its cost charging practices (app. supp. R4, tab 267). The PACO's view, contrary to TRW's, is that the Government neither reviews nor approves the CMSP guidelines which reflect internal TRW procedures. (Gov't Response, ex. 5, Lee Decl.; app. supp. R4, tabs 265, 269, 313; TRW Reply, ex. E-7, Sanft tr. at 126, ex. E-9, Tranberg tr. at 23-26)

30. During the course of a DCAA 1995 audit of TRW 1992 incurred costs, DCAA requested TRW to provide supporting documentation for a list of transactions in particular accounts (app. supp. R4, tabs 372-73). The record does not contain evidence establishing that DCAA specifically requested supporting documentation related to journal entries for TRW's MLV III launch vehicle activities (app. supp. R4, tab 372; Gov't Surreply at 26). TRW represents that the documents submitted in response to DCAA's request for supporting documentation contained the 5 December 1991 TRW internal memorandum

entitled "Launch Vehicles Charging Practices" (TRW's Motion at 41). This internal memorandum indicated that TRW would continue to charge TRW's MLV III efforts as OITE costs rather than B&P costs because the Air Force had not finalized its MLV III specifications (app. supp. R4, tab 372; Finding 18). According to the Government, the DCAA audit workpapers did not contain a copy of TRW's 5 December 1991 memorandum (Gov't Response, ex. 4, Nora Fong Decl.). The Government and TRW disagree concerning whether the Government became aware of TRW's 5 December 1991 memorandum concerning TRW's MLV III charging method during the 1995 audit of the TRW Space & Technology Systems final indirect rate proposal for fiscal year 1992. The DCAA "Audit of Fiscal Year 1992 Incurred Costs," issued on 15 September 1995, did not take exception to TRW's charging methods for TRW's MLV III activities, but, it is not clear that the audit directly addressed the MLV III charging practices (app. supp. R4, tab 373).

DISCUSSION

Summary judgment is appropriate where there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case and occurs if sufficient evidence exists to permit a decision in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *TRW, Inc.*, ASBCA Nos. 44068, 44473, 97-1 BCA ¶ 28,627. In determining whether a material fact is in dispute, we construe all inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, supra* at 249. We do not weigh evidence so as to determine the truth of a matter or resolve factual disputes in determining whether a material factual dispute exists. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999) *cert. denied*, 530 U.S. 1228 (2000); *Dyn Corp.*, ASBCA No. 49714, 97-2 BCA ¶ 29,233.

The issues raised by TRW's motion concern whether TRW properly charged as indirect OITE costs rather than indirect B&P costs the costs of its proposal preparation efforts between 19 October 1991 and 17 March 1992 for the anticipated MLV III procurement. TRW's motion raises issues concerning the interpretation of FAR 31.205-18 and whether TRW correctly charged its MLV III related activities as indirect OITE costs pursuant to FAR 31.205-12 ECONOMIC PLANNING COSTS or FAR 31.205-38 SELLING COSTS rather than as indirect B&P costs, defined by FAR 31.205-18 as "costs incurred in preparing, submitting, and supporting . . . proposals . . . on potential Government contracts." TRW's motion requests that we determine that FAR 31.205-18 does not cover its MLV III proposal preparation costs where TRW's corporate management never made a decision to submit a proposal on the MLV III RFP and stopped its MLV III proposal effort before the Government had obtained final approval and funding for the MLV III procurement and issued a final MLV III RFP.

FAR 31.205-18 has the force and effect of law requiring application of the appropriate rules of regulatory construction. *Honeywell Inc. v. United States,* 661 F.2d 182, 186 (Ct. Cl. 1981). The primary rule of regulatory construction requires that we review the language and apply the plain meaning of the words used. *Id. See EFG Associates, Inc.*, ASBCA Nos. 50545 *et al*. (22 February 2001). In applying this rule, we determine that FAR 31.205-18 generally focuses on a contractor's actions, not the Government's, in defining B&P costs in plain ordinary terms as the costs a contractor incurs in preparing, submitting, and supporting a proposal on a potential Government contract. FAR 31.205-18 contains neither a requirement that a contractor must make a formal, final decision to submit a proposal nor a requirement that the Government's solicitation requirements must be absolutely firm and final before a contractor may incur B&P costs.

The issue of primary concern raised by TRW's motion is whether TRW should have charged as B&P costs the costs it incurred during the period from 19 October 1991 to 17 March 1992, in the preparation of a draft proposal for the anticipated Air Force MLV III RFP. TRW contends that the costs of its MLV III proposal preparation efforts constitute OITE costs. It maintains that it incurred these costs as part of its analysis and consideration of the risks associated with TRW's ultimate long-range planning and marketing consideration of whether to commit extensive TRW resources to enter into the launch vehicle business, although we have not been pointed to where the record at the time TRW incurred these costs clearly reflects this specific purpose. TRW also maintains that the costs of its MLV III activities did not constitute B&P costs because the Government had not finalized its requirements for the MLV III RFP. It says also that the Government had not obtained the required funding and the related approvals required for the MLV III procurement at the time TRW engaged in its MLV III proposal preparation activities. TRW also points out that its CEO and COO never made a final decision to submit a proposal as required by TRW policy.

The Government counters that TRW's MLV III proposal preparation activities and related costs, which resulted in a TRW draft MLV III proposal, constituted B&P costs under the plain meaning of B&P costs as defined by FAR 31.205-18. The Government contends that the process leading to issuance of the MLV III RFP, including obtaining the necessary funding and internal Government approvals necessary to go forward, did not prevent potential offerors from expending costs in support of proposal preparation efforts. The Government maintains that the Air Force had announced its intended procurement and defined the need for the MLV III to place GPS II R satellites into orbit to a point where offerors could begin preparation of proposals anticipating issuance of the MLV III RFP. Experienced TRW procurement personnel familiar with complex Government procurements agree that a contractor has to begin proposal preparation well before the Government issues an RFP in order to submit a timely competing offer in response to a complex RFP, usually having a relatively short response time of 30 days for submittal of offers. (Finding 14) The Government also maintains that FAR 31.205-18 does not contain

language that restricts a contractor from incurring B&P costs in preparing a proposal in anticipation of a solicitation that the Government has not yet issued or before a contractor makes a final decision to submit an offer.

In resolving the issue of whether TRW should have charged its MLV III related efforts as B&P costs rather than OITE costs, "we must look to the contractual definitions, examine both the overt acts of the parties as well as *expressed* intent, and then determine from all of these how the work concerned and costs incurred should be categorized." *General Dynamics Corp. v. United States,* 202 Ct. Cl. 347 (Ct. Cl. 1973), quoting with approval the Board's statement below. *See also Bill Strong Enterprises, Inc.*, ASBCA Nos. 42946, 43896, 96-2 BCA ¶ 28,428; *General Dynamics Corp. (Convair Division),* ASBCA Nos. 15394 *et al*., 72-2 BCA ¶ 9533 at 44,404; *Allison Division, General Motors Corp.,* ASBCA No. 15012, 71-2 BCA ¶ 9158 at 42,477*; General Dynamics Corp. (Pomona Division),* ASBCA No. 13869, 70-1 BCA ¶ 8143 at 37,835; *General Dynamics Corp.,* ASBCA No. 9842, 65-2 BCA ¶ 5067 at 23,854. The classification of TRW's MLV III proposal preparation activities as B&P costs or OITE costs must be determined based on an objective standard viewed in the context of the regulatory requirements. *General Dynamics Corp. v. United States, supra; North American Rockwell Corp.,* ASBCA No. 13067, 69-2 BCA ¶ 7812 at 36,302.

In this regard, the contemporaneous record, more so than retrospective testimony, provides the objective basis for determining whether a contractor's principal primary purpose was to engage in activities of preparing or supporting a proposal on a potential Government contract. *See General Dynamics Corp. (Pomona Division), supra* at 37,835. Once it is established objectively that B&P effort is underway, the cost of all tasks necessary to prepare a proposal in order to respond to an anticipated solicitation for a potential contract is treated as B&P cost activity regardless of whether a formal corporate decision to bid has been made. *See General Dynamics Corp. (Convair Division),* ASBCA Nos. 15394 *et al*., 72-2 BCA ¶ 9533 at 44,403-404; *North American Rockwell Corp., supra,* at 36,302-303; *General Dynamics Corp. (Convair Division),* ASBCA Nos. 12814, 12890, 68-2 BCA ¶ 7297 at 33,927.

We distinguish *General Analysis*, ASBCA No. 6920, 1962 BCA ¶ 3337, cited by TRW in support of its argument that the disputed MLV III costs amounted to long-range marketing costs or selling costs (*see* TRW's Motion at 54). *General Analysis* applied the cost principles as in effect on 31 March 1958 before the promulgation of a cost principle specifically addressing B&P costs. The Board acknowledged "the time-honored chargeability of bid expense, whether successful or unsuccessful, to Government contracts" (1962 BCA at 17,192). It disallowed certain expenses as "selling" expenses. We do not consider *General Analysis* instructive since it is open to serious question whether the same result would have been reached under the regulations before us in this appeal. *General Analysis* did not address the central issue we are concerned with in the instant appeal of

whether TRW intended to incur B&P costs, as now defined in the cost principles, for the purpose of preparing a proposal for the anticipated MLV III procurement.

Drawing all reasonable inferences in the Government's favor as the nonmovant in resolving TRW's motion, the cost of TRW's MLV III proposal preparation efforts would appear to meet the FAR 31.205-18 definition of B&P costs rather than long-range planning or selling costs. Before it decided not to submit a proposal on the MLV III procurement, among other activities, TRW assigned and funded an MLV III proposal team under an MLV III proposal manager, prepared a draft proposal, and announced on several occasions that it was going to submit a proposal on the MLV III RFP. Thus, a genuine issue of material fact exists that precludes a decision in TRW's favor on its motion since evidence exists that could result in a decision in the Government's favor that TRW's activities reflected its purpose to prepare, submit, and support a proposal and thus the costs of these activities constituted B&P costs. *Anderson v. Liberty Lobby, supra.*

TRW next contends that the Government is estopped from claiming TRW's MLV III related proposal preparation costs should be charged as indirect B&P costs. TRW maintains that the Government may not take a position contrary to a position taken by a Government agent acting within the scope of authority, if the contractor relies to its detriment upon the actions of the Government agent. (TRW's Motion at 68)

To prevail on its estoppel theory, TRW must establish the following elements:

> (1) the party to be estopped must know the facts, . . .; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was to induce continued performance; (3) the contractor must not be aware of the true facts . . .; and (4) the contractor must rely on the government's conduct to its detriment.

American Electronic Laboratories, Inc., 774 F2.d 1110, 1113 (Fed. Cir. 1985). *See TRW, Inc.*, ASBCA Nos. 44068, 44473, 97-1 BCA ¶ 28,627 at 142,931; *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973). TRW either has failed to establish by credible evidence the traditional elements supporting an estoppel that the Government knew the facts, intended its conduct to be acted on, TRW was ignorant of the facts, and TRW relied on the Government's conduct to its injury, or the record indicates that a material dispute exists as to each element, or both.

TRW relies heavily on the MAC-IPS circumstance in support of its estoppel argument. TRW also bases its estoppel argument on the circumstances surrounding DCAA's 1995 audit of TRW's 1992 incurred costs and to other audits in 1995 and 1996 which occurred long after the costs in question here were incurred. TRW maintains that in

the instances it alludes to the Government treated TRW costs as OITE costs rather than as B&P costs under circumstances similar to the MLV III RFP cost situation.

The Government questions the relevance of the MAC-IPS, the 1995 audit, and the other audits to resolution of the MLV III cost-charging issue, as do we. Nevertheless, the Government proffers apparently credible, probative evidence tending to establish that the circumstances surrounding TRW's charging of indirect costs in these other instances differ materially from those related to TRW's MLV III activities. The evidence also is in conflict concerning whether the Government became aware during a 1995 audit of a 1991 TRW IOC concerning TRW's classification of its MLV III related costs (Finding 30). TRW does not point us to specific, undisputed evidence of record that TRW directly considered and relied on these other referenced, cost-charging instances when it considered how to charge its MLV III proposal preparation activities.

In addition, the evidence presently before us establishes that an internal dispute occurred within TRW concerning the appropriate charging method for the costs of TRW's MLV III proposal preparation efforts after 19 October 1991. TRW apparently was aware of facts that raised a question concerning whether its charging of the MLV III costs as OITE was appropriate. (Findings 16-18) Furthermore, the evidence does not reflect that the Government knew that TRW was charging its MLV III proposal preparation activities as OITE costs or advised TRW that it could properly charge its MLV III proposal preparation activities as OITE rather than as B&P costs. TRW does not identify by specific, credible evidence, the Government conduct it relied on to its detriment concerning Government approval of its charging of its MLV III proposal preparation activities as OITE costs rather than B&P costs. Since the proffered TRW evidence does not establish an estoppel, the TRW motion fails on this basis. *TRW, Inc.*, ASBCA Nos. 44068, 44473, 97-1 BCA ¶ 28,627.

As part of its estoppel argument, TRW also maintains that the Government's characterization of TRW's MLV III proposal preparation costs as B&P costs amounts to an attempt to disallow retroactively previously approved costs based on the Government's challenge of TRW's previously disclosed accounting practices set forth in TRW's CMSP guidelines. The Government and TRW materially dispute whether TRW's CMSP guidelines constitute a method of categorizing costs or a work authorization policy and whether the Government reviewed and approved TRW's internal CMSP cost-charging guidelines, particularly CMSP 4-5. (Findings 28-29) Furthermore, the parties agreed that the proper categorization of TRW's MLV III proposal preparation activities in 1991-92 and, thus, their allowability would remain an open question. (Finding 2) In these circumstances, TRW's retroactivity argument fails. The issue before us concerns allowability in the first instance, not a retroactive disallowance of an allowable cost. *See Aydin Corporation West,* ASBCA No. 42760, 94-2 BCA ¶ 26,899 at 133,941, *aff'd in part and rev'd in part, Aydin v. Widnall,* 61 F.3d 1571 (Fed. Cir. 1995); *Data-Design Laboratories,* ASBCA No. 27245, 86-2 BCA ¶ 18,830 at 94,887 (cost disallowances are necessarily retroactive).

In sum, without weighing the evidence as we would under Rule 11, but drawing all justifiable inferences in the light most favorable to the Government as the nonmovant,[3] we could find as a material fact in the Government's favor that TRW's MLV III activities, which looked and sounded like proposal preparation, reflected its principal primary purpose to prepare a proposal on a potential Government contract, the MLV III, and, therefore, that TRW should have charged the costs of its activities as B&P costs pursuant to FAR 31.205-18. Accordingly, TRW has failed to meet its burden of showing the absence of a genuine issue of material fact concerning the appropriate classification of its MLV III proposal preparation costs and that it is entitled to a decision as a matter of law.

DECISION

Based on the foregoing, we deny TRW's motion.

Dated: 30 April 2001

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

NOTES

[1] Bagley I and Bagley II involve related litigation in the United States District Court for the Central District of California, captioned *United States ex rel. Bagley v. TRW, Inc.*, Civil Action No. CV-94-7755-AWT (Bagley I) and *United States ex rel. Bagley v. TRW, Inc.*, Civil Action No. CV-94-A153-RAP (Bagley II) (supp. R4, tab 367).

[2] The Cost Accounting Standards (CAS) as incorporated in the FAR similarly define B&P costs as "the cost incurred in preparing, submitting, or supporting any bid or proposal . . ." (FAR 30.301) and requires their allocation in accordance with CAS 420 (FAR 30.420). FAR 31.205-18(b).

[3] The Government asserts that we should deny the appeal based on appellant's motion, but states explicitly that its response to appellant's motion does not constitute a cross-motion. (Correspondence file, Gov't letter to the Board dated 27 November 2000)

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 51172, 51530, Appeals of TRW, Inc., rendered in conformance with the Board's Charter.

Dated:

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