ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
F2 Associates, Inc.	)	ASBCA No. 52397
	)	
Under Contract No. F33615-95-C-5515	)	

APPEARANCE FOR THE APPELLANT: Raymond R. Flowers, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DICUS

F2 Associates, Inc. (hereinafter sometimes "F2") filed this appeal from the deemed denial of a demand for payment of $1,514,164 pursuant to its Termination Settlement Proposal. A contracting officer's decision was issued subsequent to the filing of the appeal. The contracting officer denied F2's claim because payment to F2 would have exceeded $3,250,211,* the amount obligated to the contract under the Limitation of Funds clause. Both entitlement and quantum are before us. We deny the appeal.

FINDINGS OF FACT

1. Contract No. F33615-95-C-5515 was awarded to Tetra/F2, a joint venture of Tetra Corporation (Tetra) and F2, on 30 June 1995. The contract called for the "field demonstration of a prototype laser-based system to demonstrate environmentally acceptable component cleaning and coating removal technology and to transition this technology to DoD and commercial users." The system was described as a "Laser Cleaning and Coating Removal System (LCCRS)". The contract was a cost-type contract with a total estimated cost of $3,901,999. Performance was to be in distinct phases, with estimated

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* According to the contracting officer's decision, $3,250,210 was paid to F2. A single dollar was withheld "to keep the financial records open." (R4, tab 94)

cost per phase as follows: Phase 0-$208,244; Phase I-$3,343,165; Phase II-$350,590. Phase 0, "INITIAL CLEANING TESTS," called for testing to determine the most effective laser or lasers and operating parameters. Phase I, SYSTEM INTEGRATION AND TESTING," was to result in the validation and demonstration of the LCCRS. Phase II, "SYSTEM INSTALLATION AND TRAINING," called for installation at a Government depot and included training and preparation of a manual. (R4, tab 1)

2. The contract contained, *inter alia,* the following clauses: FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991); FAR 52.232-22 LIMITATION OF FUNDS (APR 1984) ("LOF clause"); FAR 52.233-1 DISPUTES (MAR 1994); and FAR 52.249-6 TERMINATION (COST REIMBURSEMENT) (MAY 1986). The LOF clause required the contractor to give notice "whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted . . . ." If additional funds are not forthcoming, the clause relieves the contractor of the obligation to continue performance or incur costs in excess of the amount allotted. Except as the clause otherwise provides, the Government "is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted . . . ." This last provision applies with equal force to termination costs. (R4, tab 1)

3. The contract as awarded provided incremental funding of $2,048,000 for the period ending 30 November 1995. Pursuant to 3.5 of the Statement of Work, Tetra/F2 was responsible for administrative and financial management functions, which included "planning, forecasting and making recommendations on funding and funding changes." (R4, tab 1)

4. Tetra/F2 had parceled out the majority of the technical performance responsibilities to Tetra. Of the $3,901,999 estimated cost, about 90 percent was for Tetra's performance. F2 assumed a management role with some integration responsibilities. (Tr. 22-23) At the time of award, Tetra's facilities included a 20,000 square foot facility, of which 15,000 square feet was occupied by a high bay laboratory, while F2, a small business, was operated from the home of the company founders, Joyce and David Freiwald (tr. 33, 164, 236). In its proposal, Tetra had projected provisional billing rates of 122.6 percent for overhead and 22.3 percent for G&A (tr. 27).

5. By unilateral Modification No. P00001, dated 7 July 1995, the Government deobligated $548,000, leaving incremental funding of $1,500,000 through 30 November 1995 (R4, tab 2). Thereafter, a stop work order dated 10 July 1995 was issued because of a protest. Tetra/F2 was informed the protest had been rejected on or about 15 November 1995, and in a letter of that date, informed the Government that the obligated funds would be fully committed by April 1996 (R4, tab 99). The stop work order was rescinded by Modification No. P00002, dated 20 November 1995 (R4, tab 3; tr. 30-31). Tetra and F2 began experiencing difficulties with the joint venture at about the time the stop work order

was lifted. F2 was informed by Tetra that the laser Tetra was developing could not be completed without an additional $200,000. As a result, the joint venture was dissolved in January of 1996. (Tr. 32-33) The Tetra project manager, Ken McDonald, and contract administrator, Judie Youngman, left Tetra and joined F2. Ms. Youngman became responsible for F2's administration, including contract administration and accounting. (Tr. 20, 34) She understood that F2 was responsible for tracking its costs and gave notice pursuant to the LOF clause throughout the contract (R4, tabs 97, 99, 106, 118, 120, 152, 155, 172, 177; tr. 122). Her education and experience are not in accounting (tr. 20, 117).

6. Modification No. P00003, dated 13 March 1996, incorporated into the contract a novation agreement dated 20 February 1996 by which the contract was transferred to F2. Although the agreement provided that Tetra's assets related to the technology to be employed in the contract would be transferred to F2, and that F2 was positioned to perform the contract, Tetra's high bay facility was not transferred. At the time, F2 occupied 4,000 square feet of office space that did not include a high bay, which it knew to be necessary. (R4, tab 4; tr. 33, 38, 149)

7. Ms. Youngman and Ms. Freiwald were F2's primary contacts with the Government (tr. 20, tr. 164). Ms. Youngman, and therefore F2, understood that F2 had the right to request a change in provisional indirect billing rates (tr. 136; *but see* Ms. Freiwald at tr. 227). She nonetheless believed that the Government assumed the risk of an overrun in indirect costs under the contract because of the way the Government incrementally funded it, which she believed made indirect rates "a moving target." However, as we understand her testimony, it is her view that the risk assumed by the Government was that some work would not be completed, not that the Government was bound to pay costs beyond the dollars obligated to the contract. (Tr. 158-61) Ms. Youngman understood it was F2's right to stop work when it was about to spend more than the dollars obligated to the contract and that the Government could terminate the contract at any time (tr. 119-20).

8. F2 did not have an accountant on its payroll or a financial management division. Instead, it used the services of an outside accountant who reviewed the company's financial data from its checking account each month. This ceased in 1998 when F2 ran out of funds. (Tr. 118) Nonetheless, a 23 February 1998 DCAA audit report, which criticized F2's treatment of bid and proposal costs, found F2's accounting system "adequate for government contract purposes" (R4, tab 178).

9. In March 1996 F2 and the Government met to discuss the contract. The Government presented a "funding profile" viewgraph at that meeting. (Tr. 149-50) The profile showed funding at $1,500,000 from June 1995 to September 1996; an increase to $3,000,000 between September and October 1996, where it stayed until September 1997; and, a final increase to $3,900,000 between September 1997 and October 1997. The last date shown on the profile is May 1998. (R4, tab 250) F2 understood the funding profile

made it “difficult to complete the project in an orderly fashion because [F2] . . . could . . . not purchase things until the end.” (Tr. 148)

10. Ms. Youngman had learned prior to the novation that Tetra was forecasting rates of 155 percent for overhead and 26 percent for G&A (tr. 47-48). In March 1996, after the novation, F2 established initial provisional billing rates of 110 percent overhead and 10 percent G&A (tr. 35). The rates were low because F2 anticipated work from commercial sources and the Department of Energy, in addition to the Air Force (tr. 48-49). The funding profile, which never became part of the contract (tr. 150), was used by F2 in the process of formulating provisional indirect billing rates (tr. 49).

11. During contract performance F2 filed monthly status reports. The reports had a “CONCERNS AND ISSUES” section which frequently mentioned the funding profile. It was the “primary concern” in April 1996, but the effect of the schedule of funding on contract performance was reported as “under control” in June and July 1996. In August 1996 “the funding profile issues appear[ed] to be under control, [but] they still remain a concern to this program and must be watched closely.” That statement was repeated by F2 through the March 1997 report. The April 1997 report asserted that the schedule had slipped because of a funding delay. No further mention of a funding profile concern appears through the April 1998 monthly report. (R4, tabs 286-306)

12. In a 29 August 1996 letter Ms. Youngman informed the Government that F2 was approaching its funding limit and requested an additional $390,000 to carry F2 through 31 December 1996 (R4, tab 106). Ms. Youngman knew that F2 never went below the 75 percent level after that point in contract performance (tr. 67-68). Modification No. P00005, which increased funding by the requested amount through 31 December 1996, was issued by the Government on 13 September 1996 (R4, tab 6).

13. Modification No. P00006, executed on 4 November 1996 by F2 and on 12 November 1996 by the Government, converted the contract to cost-plus-fixed fee and increased the contract price to $4,426,725 (estimated cost of $4,137,126 and fixed fee of $289,599) “to reflect Contract Rebaseling [sic].” (R4, tab 7)

14. By FAX of 16 January 1997 F2 informed the Government it had only $11,000 of contract funds remaining and was “currently working at risk.” F2 further stated it would issue a stop work order by 31 January 1997 unless additional funds were forthcoming. (R4, tab 42; tr. 55-56) By letter of 16 January 1997 the administrative contracting officer informed F2 that a notification was due under the LOF clause (R4, tab 43). On that same date the contracting officer responded to F2’s FAX, reminding F2 that “the Limitation of Funds clause contained in the contract . . . states that you are not obligated to continue work on a contract when the allotted funds are exhausted. If you continue to incur costs beyond this point, you do so at your own financial risk” (R4, tab 44). Modification. No. P00007, which obligated another $300,000, was issued on 26 February 1997 (R4, tab 8).

Modification No. P00008 obligated another $600,000 on 20 March 1997, bringing the total obligated amount to $2,790,000 (R4, tab 9).

15. In May 1997 discussions began about "descoping" (reducing the scope) of the program (R4, tab 138, 139). A proposal was requested from F2 in July 1997 (R4, tab 185).

16. F2 apprised the Government that it had exceeded the 75 percent limitation in the LOF clause on 29 July 1997 (R4, tab 155). The contracting officer responded on 8 August 1997, in pertinent part:

> 2. As this contract progresses to completion, it becomes increasingly important to be fully cognizant of the funds available and required to complete the subject contract. With this thought in mind, you are advised that pursuant to the "Limitation of Funds" clause of subject contract, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the funds allotted to this contract unless so notified, in writing, by the Contracting Officer.
>
> 3. The primary criteria used by the Directorate of R&D Contracting in considering "after the fact" overrun requests due to indirect cost adjustment is the question: "Should the Contractor have been aware of the cost situation during the contract's period of performance?" If the Contractor relies on provisional billing, the burden is upon the Contractor to inform the Government of the expected overrun.

(R4, tab 50)

17. An additional $160,000 was added to the contract by Modification No. P00009 on 29 September 1997 to cover contract costs through 1 November 1997. The total allotted was $2,950,000. (R4, tab 10) F2 provided a pricing proposal on 14 November 1997 to complete the contract for an additional $1,146,495, thereby reducing the proposed total estimated cost and fixed fee from $4,426,725 to $4,096,495 (R4, tab 165). Discussions and additional proposals on "descoping" the contract would continue through May 1998 (tr. 151-52).

18. In a 19 December 1997 letter to Steve Fairchild, Air Force program manager for the contract, Ms. Freiwald informed Mr. Fairchild that F2 had been successful in obtaining $5 million in investment funds, which she expected to have a salutary effect on the contract. She informed Mr. Fairchild that problems in obtaining a laser from a German firm had been overcome, but that "variabilities in Air Force funding . . . have had and could

potentially have a much more significant impact on the program schedule than the date of arrival of the laser." (R4, tab 169; tr. 276-77)

19. By Modification No. P00010, an additional $100,000 was added to the contract on 20 January 1998, increasing the total funds allotted to $3,050,000 (R4, tab 11). Pursuant to F2's estimate, the funding would carry F2 through 15 February 1998 (*id*.; R4, tab 172).

20. By FAX dated 27 February 1998 from the contracting officer, Terry Rogers, to Ms. Youngman, F2 was told to stop work on all but packing and shipping (tr. 534). The FAX informed F2 that budgetary constraints rendered "the latest technical requirement iteration . . . irrelevant." As a result, "from a technical standpoint there is no reasonable, utilitarian effort to be obtained beyond that necessary to bring this effort to as quick a closure as possible." F2 was asked to provide "[a] proposal based upon: 1) the end of all effort under subject contract not associated with this submission (Statement of Work Section 3.3.1 change) as of the receipt date of this fax, 2) the provided change, 3) then usage of the Principle [sic] Investigator and no more than 2 other F2 individuals for the indicated change." Attached was a revision of 3.3.1 requiring shipment to the National Defense Center for Environmental Excellence (NDCEE). (R4, tab 62)

21. Modification No. P00011 added another $100,000 on 9 March 1998 and thus increased the funds allotted to $3,150,000. F2 estimated the funds would carry it through 15 April 1998 (R4, tabs 12, 177).

22. Exchanges between the parties between 2 March 1998 and 13 April 1998 attempted to work out the efforts to be undertaken (R4, tabs 63-73). F2's immediate response was "[t]here is no need to discuss Termination [sic]. As always we are more than willing to work budget issues." (R4, tab 63) In a 13 March 1998 FAX Mr. Rogers directed F2 to stop all work not directly related to moving the system to NDCEE (R4, tab 68). F2 stated it was taking immediate steps to comply in a 16 March 1998 FAX (R4, tab 69). A proposal was submitted by FAX of 23 March 1998 in which F2 noted that "recent USAF requests and instructions can be interpreted as a partial termination." Several cost approaches were included, with costs to complete ranging between $224,656 and $978,932. (R4, tabs 72, 203).

23. In a 17 April 1998 letter to F2, DCAA informed F2 that it considered provisional billing rates of 125.22 percent for overhead and 12.55 percent for G&A to be acceptable through 30 December 1998. The letter continued "[p]lease note that the above rates are provisional billing rates only and **SHOULD NOT NECESSARILY BE USED FOR FORWARD PRICING PURPOSES** or be applied to contracts with negotiated ceiling rates." (Emphasis in original) (R4, tab 219)

24. On 24 April 1998 Mr. Rogers sent a FAX to Ms Youngman which he characterized as “the beginning of discussions” on F2’s proposal. He stated that the Air Force negotiation team “assumes $3,134,568 in previous effort as a ‘baseline’. If correct this position is accepted under the understanding that it constitutes an artificially derived amount based upon provisional billing rates and of course subject to close out audit etc.” (R4, tab 74) Mr. Rogers had information from a meeting that “F2 felt that the [audit] was overstating some things” and rates were lower than auditors had indicated (tr. 555).

25. In a 4 May 1998 response to the 24 April 1998 FAX, F2 addressed proposed changes to the contract. F2 generally indicated acquiescence in reduction of the program to a $3,134,568 baseline, with options. F2 stated that it understood the baseline to be derived from use of provisional billing rates “subject to audit.” Attachment 1 showed additional costs and fee to complete as follows: basic-$102,016; option 1-$106,106; option 2-$691,978; total-$900,100. F2 stated “[t]he DCAA is trying to wrap up the FY96 indirect rates audit. There appears to be a substantial rate increase which will have an impact on the contract. It could be as high as $225,000. In light of budget constraints, this needs to be factored in these discussions.” F2 also informed the contracting officer it would “be out of funds pursuant to the ‘Limitation of Funds’ clause by May 1st.” (R4, tabs 74, 230) Ms. Youngman considered this to be F2’s first notice to the Government that costs incurred by F2 exceeded the funds allotted to the contract, and we so find (tr. 127-30).

26. By FAX of 13 May 1998 Mr. Rogers responded to the 4 May submission as follows, in pertinent part:

> We are agreed as to the $3,134,568 baseline. The $225,000 indicated is no more definitive than a preassessment of allowables and/or unallowables. There is no possibility of dealing with past rate increases in conjunction with this current negotiation without a delay of numerous months. Any overrun indication needs to be supported with detailed documentation to facilitate challenges and the required audit.

(R4, tab 75) F2 responded by FAX of 15 May 1998 in which Ms. Youngman stated “I wanted to remind you that we have expended the obligated funds and any work we do is at our risk . . . the lack of funds places a burden on us since we will not be reimbursed in a timely manner without funds being immediately placed on the contract.” (R4, tab 76)

27. On 13 May 1998 F2 proposed to the Government that it be allowed to use the LCCRS to demonstrate a mobile robot depainting system at Florida International University as part of the DOE program (R4, tab 232). Internal Government discussions ensued (R4, tabs 234-37), in which Government personnel expressed concern about F2’s actions which were believed to be in violation of Air Force directions (*see* findings 20, 22). Technical personnel requested the contracting officer to issue a stop work order in a memorandum of

14 May 1998 (R4, tab 234). A further memorandum of 18 May 1998 requested the contracting officer to terminate the contract (R4, tab 236). By FAX of 26 May 1998 the Government terminated the contract for convenience (Amended Complaint, Answer, ¶XVI; R4, tab 240). On 26 June 1998 the contracting officer issued Modification No. P00012 which confirmed the 26 May order and added $100,211 to increase the funds allotted to $3,250,211. The purpose of the additional funds was to provide for disassembly and shipping of certain items. (R4, tab 13)

28. In a 29 June 1998 letter DCAA informed F2 that its audit had established final overhead rates for the fiscal year ending 31 December 1996 as 138.55 percent for overhead and 28.08 percent for G&A. F2 accepted the rates in an agreement executed that same day. (R4, tab 19) No Government representative ever told F2 that F2 would be entitled to more than the funds allotted pursuant to the LOF clause as the result of a DCAA audit (tr. 147-48). Nevertheless, Ms. Youngman believed that F2 would be paid pursuant to a DCAA audit-determined rate despite the provisions of the LOF clause (tr. 146).

29. F2 submitted Voucher No. 31 on 24 August 1998 in which it sought an additional $285,941. The voucher showed obligated funds of $3,250,211, cumulative funds paid through the current billing period of $3,171,996, and cumulative claimed through the current billing period of $3,505,098. On 22 September 1998 F2 sought a contracting officer's decision in regard to Voucher No. 31. (R4, tab 15) Voucher No. 31 remained unpaid and was included in the proposed termination costs (R4, tab 28).

30. In a 24 September 1998 termination settlement proposal F2 sought $796,008 (R4, tab 92). On 1 October 1998 F2 submitted Voucher No. 32, seeking the reduced amount of $31,054, representing the difference between the total previously paid ($3,219,156.79) and the current amount obligated ($3,250,211) rounded to the nearest dollar (R4, tab 16).

31. F2 revised its settlement proposal downward to $764,954 in a 1 October 1998 submission (R4, tab 17) and further downward to $714,557 in a 9 October 1998 submission (R4, tab 93). A final revision was submitted on 22 January 1999. F2 sought the following increases over the $3,219,157 previously paid:

Item	Increase
Direct Material	$ 390
Direct Labor	3,095
Indirect Factory Expense	107,603
Other Costs	1,254,725
G&A	24,540
Fee	90,395
Settlement Expenses	33,417

Net Payment Requested $1,514,164 [sic]

(R4, tab 84)

32. By letter of 22 February 1999 F2 sought a partial payment, which was denied pending the outcome of a DCAA audit (R4, tabs 19, 30).

33. On 5 March 1999 F2's counsel, R. R. Flowers, wrote to the termination contracting officer (TCO), Charles McIntosh of the Defense Logistics Agency (DLA), again requesting a partial payment. Mr. Flowers stated that F2 did not have approved indirect rates that were high enough to recoup the costs incurred in setting up a laboratory after cessation of the joint venture with Tetra. He notes that Tetra's higher indirect rates would have been adequate to recover expenses. He further stated that the Air Force's failure to fund the contract was "of no moment" because the Air Force was obligated to fund contract costs. (R4, tab 20)

34. DCAA issued its audit report on 8 March 1999. The report calculated the "otherwise allowable contract costs," that is, costs incurred above the funding limitations, at $3,788,265. That amount is $569,108 more than the prior payments ($3,788,265-$3,219,157). DCAA, in applying the FAR, questioned costs of $655,458 without regard to contract funding limitations. In the "OTHER MATTERS TO BE REPORTED" section, the report noted deficiencies in F2's accounting system and found it "inadequate for the accumulation, reporting, and billing of costs on government contracts." (R4, tab 21)

35. By letter of 18 March 1999 Mr. McIntosh informed Mr. Flowers that only $31,051 remained on the contract and stated that any release of funds would be limited to that amount (R4, tab 22).

36. A 16 April 1999 letter from Mr. Flowers to Air Force counsel again requesting partial payment resulted in a response of 27 April 1999 which referred F2 to the TCO (R4, tabs 24, 26). Mr. Flowers again wrote to Mr. McIntosh on 19 April 1999 requesting release of the $31,055 remaining in the contract (R4, tab 25). Payment of $31,050 was thereafter made (Amended Complaint, Answer, ¶ XXXII). On 30 July 1999 F2 requested a final decision (R4, tab 32).

37. A Notice of Appeal dated 28 September 1999 was filed from the deemed denial of F2's termination claim when a decision had not been issued (R4, tab 41).

38. A contracting officer's decision was issued on 5 November 1999. The decision noted that $31,050 had been released, bringing total payments to $3,250,210, $1.00 less than the funds obligated, purportedly to maintain the contract in the accounting system in case the Air Force decided to obligate more funds. The decision further stated:

> Since this was an incrementally funded contract which included the Limitation of Funds clause, the contractor is not entitled to an amount greater than that which was funded on the contract at the time of the termination for convenience. This is especially true where the contractor failed to notify the Government that it was overrunning the contract's funding limitation or to take appropriate action in anticipation of this event.

(R4, tab 94)

DECISION

F2 argues that it is entitled to payment because it had no reason to believe that it was incurring costs in excess of the contract's funding limitation. It also argues that the Government is estopped from asserting its rights under the LOF clause. The Government argues that F2 had ample reason to believe it was incurring costs in excess of the funds obligated under the LOF clause, and that F2 has failed to establish the elements of estoppel. We agree with the Government.

Whether the Overrun Was Foreseeable

Although the contracting officer is not required under the LOF clause to increase incremental funding in the absence of the contractually mandated notice, he or she has discretion to do. *General Electric v. U.S.,* 440 F.2d 420, 423 (Ct. Cl. 1971). F2 contends, in effect, that the contracting officer here abused his discretion when he did not provide additional funds. To prevail with this argument, F2 must establish that it had no reason to believe it was incurring costs in excess of the contract's incremental funding. *Id.* at 425.

The evidence of record contains precious little in the way of accounting records. We are told that F2's *modus operandi* was to have an outside accountant review data from the company checking account (finding 8). Even this ceased at an undisclosed date in 1998 (*id*.). DCAA found the system adequate for Government contract purposes in one report and inadequate in another (findings 8, 34). We do not need to resolve this issue, however. Ms. Youngman testified that F2 never fell below the 75 percent level after 1996 (finding 12). Ms. Youngman was the F2 employee who sent the LOF notices, and she was the person responsible for F2's accounting operation (finding 5). From this we conclude that F2 knew contemporaneously that it was routinely operating in an overrun posture at a level beyond 75 percent of obligated funds despite its complaint at trial that indirect rates were a "moving target." (Finding 7) F2 was warned of the requirements of the LOF clause and the risks attendant upon ignoring those requirements at least twice during contract performance (findings 14, 16). Moreover, F2 knew before the novation that Tetra's overhead rate was 155 percent (finding 10), higher than F2's 1996 actual overhead rate of 138.55 percent (finding 28). After the novation, F2 took on Tetra's contractual responsibilities, which required, *inter alia,* additional facilities.

The burden of proof that the cost overrun was not reasonably foreseeable is on F2. *RMI, Inc. v. United States,* 800 F.2d 246, 248 (Fed. Cir. 1986). "Entailed in this burden of proof is a showing that the inability to foresee the overrun was through no fault or inadequacy on its part . . . ." *3C Systems, Inc.,* ASBCA No. 41463, 91-2 BCA ¶ 23,916 at 119,818. This burden is no less because of F2's size. *Titan Corporation v. West,* 129 F.3d 1479, 1482 (Fed. Cir. 1997). We find F2 has not met its burden. The record is bereft of contemporaneous accounting records through which F2 could have demonstrated that the overrun was neither foreseeable nor due to fault on its part. Moreover, Ms. Youngman knew prior to the 20 February 1996 novation agreement that Tetra's rates were higher and, from at least early 1997, knew that F2's cost incurrence level was always more than 75 percent of the contract funding. "The contractor's duty to monitor its cost is accompanied by the obligation to inform the government of probable overruns before they occur." *Id.* Moreover, F2's "moving target" characterization of indirect rates does not explain the claimed overrun of $1,514,164, which far exceeds the difference between actual and provisional rates in 1996. The overrun condition appears to have been not only foreseeable, but a continuing condition in plain view of Ms. Youngman and, thus, F2. Proof of reasonable unforeseeability is simply not present in this record.

<u>Estoppel</u>

F2 argues that the Government is estopped from asserting its rights under the LOF clause. Estoppel is a familiar doctrine:

> Four elements must be present to establish an estoppel: (1) the party to be estopped must know the facts, *i.e.*, the government must know of the overrun; (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 intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e.*, that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110, 1113 (Fed. Cir. 1985). The burden of proof is on F2. *Ebasco Services, Inc. v. United States,* 37 Fed. Cl. 370, 381 (1997).

With respect to the first and third elements, the Government argues that it did not have knowledge of the overrun until after contract termination, but that even if the information in the 4 May 1998 submission constitutes notice of an overrun under the LOF, its prompt termination of the contract prevented an implication of overrun funding. The significance of the 4 May date is, *inter alia*, that F2's Ms. Youngman, who submitted the LOF notices on behalf of F2, testified that she considered the 4 May proposal to be the first notice of an overrun (finding 25). According to the Government, there is "little more [it] can do to let the Appellant know that it is not encouraging further performance than terminating the Contract." (Gov't br. at 21) While there is merit to the Government's argument, we must nonetheless examine relevant communications between the parties, and particularly those from 4 May to the termination notice on 26 May 1998.

The Government had made it unmistakably clear that it wished to reduce the value of the contract by decreasing the work to be done, which the parties called "descoping." Discussions began in May 1997 (finding 15). The Government had issued a "stop work" order on all but packing and shipping on 27 February 1998 (finding 20), and again on 13 March 1998 (finding 22). This was understood by F2, and its correspondence with the Government referred to the actions proposed by the Government as a termination or partial termination (finding 22). The Government's actions do not imply that it was willing to fund an overrun, and further communications continued to focus on descoping. The negotiations were of the type envisioned by the LOF clause:

> . . . the LOF clause should function to induce negotiations between the contractor and the contracting officer as the contractor approaches the contract ceiling. To the extent such negotiations lead to a continuation of the work, any increased amount the government is obligated to pay under the contract can be expected to be in writing and signed by the contracting officer.

Ebasco Services, Inc. v. United States, 37 Fed. Cl. at 379.

The Government's direct response to the 4 May submission effectively questioned the claim of $225,000 in excess indirect costs without additional verification and sought to continue negotiations on the contract based on F2's previous efforts as a "baseline" of $3,134,568 (findings 24, 26) at a time when $3,150,000 was obligated to the contract (finding 21). No implication of overrun funding arises from this communication. Moreover, F2's 15 May reply recognized it was at risk with respect to further work and it sought additional funding immediately (finding 26). This evidences an understanding on F2's part that any future work was at its own, not the Government's, expense, and belies any contention that it was induced to continue by ignorance of the "true fact" that no additional funding had been promised or that such funding was implied. F2's 13 May proposal to use the LCCRS for a DOE demonstration raised doubt among Government personnel that F2 was abiding by the stop work order, and termination resulted on 26 May. We find nothing in the Government's actions that implied it would provide overrun funding, particularly in light of Government warnings as to the effect of the LOF clause. F2 cannot, therefore, persuasively assert that it was unaware of the effect of the LOF clause or unaware that the work, and therefore the estimated cost and fixed fee, were in the process of being reduced. Indeed, F2 was a full participant in the process and, if it continued to work in the face of the stop work orders, can hardly be heard to complain that it did so because of encouragement from the contracting officer who issued the orders. Given these circumstances, no implication of overrun funding reasonably arises from actions intended to reduce the contract cost and scope. F2's argument that it "was not aware of the true facts" has not been established. Accordingly, we hold the

Government is not estopped from asserting its rights under the LOF clause. The appeal is denied.

Dated: 24 July 2001

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

I concur

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

I concur

JACK DELMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

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. 52397, Appeal of F2 Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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