ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Western Development Laboratories	)	ASBCA No. 51452
	)	
	)	
Under Contract Nos. F09604-91-C-0026 F09604-92-C-0026	)	

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OPINION BY ADMINISTRATIVE JUDGE TING

Lockheed Martin Western Development Laboratories (WDL[1]) appeals from a contracting officer's decision disallowing $143,272 out of $193,272 in incurred costs claimed for fiscal year 1992 under two Air Force contracts. The disallowed costs were for Settling-In Allowance (SIA) paid to company employees who relocated overseas or returned to the United States. The Government contends that under the applicable FAR regulations, the allowable SIA should be limited to $1,000. WDL contends that the costs should be allowed because they were a part of its long-standing compensation policy, and that they had been approved and accepted by the Government on numerous previous occasions. Although there appears to be no dispute as to quantum, only entitlement is before us.

FINDINGS OF FACT

What Is Settling-In Allowance?

1. SIA had been paid to employees of WDL who undertook overseas assignments since at least 1978. (Tr. 269, 293, 442)

2. The earliest document explaining SIA appears in Ford Aerospace's Industrial Relations Manual (IRM), Topic 701, dated 1 June 1984[2]. Topic 701 deals with "U.S.

Foreign Service Employes - Compensation." Paragraph V, "SETTLING-IN ALLOWANCE," of Topic 701, provides:

> Upon arrival at the overseas location and upon return to the United States for domestic reassignment, the employe will receive a settling-in allowance equal to one month's base salary. It is paid in addition to the reimbursement of reasonable motel and living expenses, and is provided to help cover all other types of settling-in expenses such as the installation of telephones, conversion of electrical appliances, alteration and installation of drapes and carpets, painting, minor alterations, etc. No receipts will be required.
>
> If the employe moves into government provided housing, this allowance will be reviewed for applicability.
>
> The allowance paid upon return to the United States is not subject to tax protection provided by Section 7, Topic 701, Part VI.

(R4, tab 100 at 3-4)

3. SIA is paid to all employees who relocate overseas (tr. 237, 602). It is paid in two installments, at the beginning and conclusion of an employee's tour of duty. If an employee does not complete his or her tour of duty, the second installment will not be paid. (Tr. 30, 96, 276)

4. While it has been its longstanding policy to pay its employees a SIA (one month's base salary) for relocating overseas, WDL does not pay its employees' expenses of the type specified in IRM Topic 701 in connection with relocating or moving overseas. According to Lawrence M. Spanier (Spanier), WDL's Director of Business Operations (tr. 28), this is due to the difficulty involved in getting receipts and in dealing with foreign currencies. (Tr. 58, 220-21)

5. Betty Rosa (Rosa) started with WDL in 1978. After 21 years with the company, she retired in 1999. Rosa became a supervisor of WDL's Compensation Department in 1983, and she worked on the compensation packages included in the contracts at issue. Before her retirement, Rosa was WDL's Director of Compensation Benefits and Employee Relations. (Tr. 289-92) Rosa testified that the reason WDL did not reimburse relocation expenses of employees going overseas such as "converting appliances or hooking up telephones" was "[t]hat's what SIA could be used for" (tr. 340). Rosa explained that SIA could be used to cover a number of up-front expenses associated with moving to a new site

such as getting a driver's license, buying kitchen cabinets, hair dryer, cutting carpets and drapes, etc. (tr. 337).

6. Madeline Tammy Skoog (Skoog) joined WDL in 1979. She was WDL's contract administrator for the contracts at issue, and over the years she assisted in putting together and participating in the negotiation of proposals leading to the contracts at issue and others like them. (Tr. 366-70) Skoog testified that she believed SIA was an incentive or inducement to get employees to move overseas. However, neither she nor WDL conducted any analysis to determine if the company needed an incentive for employees to relocate to Metro Tango, Germany, the location to which WDL employees were assigned under the disputed contracts (tr. 433). She acknowledged that the SIA provision in WDL's Topic 701 is actually a reimbursement of expenses paragraph found in the compensation section of WDL's benefits package submitted as a part of its proposal year after year (tr. 427).

7. A travel authorization, filled out by both the traveling employee and the company official, is the document which requests payment of the SIA. A Travel Expense Report (TER), filled out by the traveling employee, discharges the company's liability upon payment. (Tr. 243-44, 277-78) In order to receive his or her one-month's pay in SIA, a traveling employee must file a TER upon arrival at his or her foreign assignment and upon his or her return to the United States. If the employee does not file a TER, no SIA would be paid. (Tr. 249, 471, 479-80)

8. Unlike the SIA, a traveling employee need not submit a TER to receive his or her salary, foreign service premium, or cost-of-living allowance (tr. 245). In requiring the submission of a TER upon arrival in a foreign country and upon return to the United States to coincide with an employee's relocation, we find that WDL administratively treated the payment of SIA as a relocation expense as opposed to a part of an employee's salary or compensation.

9. Under the contracts involved in this appeal, SIA was treated as a direct cost and charged to the contracts as a direct cost (tr. 71, 236). Since a tour of duty is normally for two years, and since contracts are annually funded, SIAs for employees returning to the United States would be charged to the contract of the year in which the employees are expected to return (tr. 236).

10. In connection with assignments to Metro Tango, Ford Aerospace provided its employees a "WELCOME TO METRO TANGO, WEST GERMANY INFORMATION PACKET." This packet provided "lists, charts and booklets describing what you may expect from this area as well as from Hahn Air Base." (Ex. G-2012; tr. 241) This informational packet treated SIA as relocation expenses:

> 3. MONEY: You will receive your Travel Authorizations to pay you for your settling-in-allowance and any remaining

advance to which you are entitled *as part of your 30-day relocation expenses*.

(Emphasis added) (Ex. G-2012 at 2)

Federal Acquisition Regulation Provisions Relating to Relocation Costs

11. Federal Acquisition Regulation (FAR) 31.205-35, RELOCATION COSTS (the relocation cost principle), effective as of 1 July 1987 and the date of award of the disputed contracts, provides, as follows:

> (a) Relocation costs are costs incident to the permanent change of duty of assignment (for an indefinite or stated period, but in either event for not less than 12 months) of an existing employee or upon recruitment of a new employee. The following types of relocation costs are allowable as noted, subject to paragraphs (b) through (f) below:
>
> . . . .
>
> (5) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.

12. FAR 31.205-35(b) further provides that:

> (b) The costs described in paragraph (a) above must also meet the following criteria to be considered allowable:
>
> (1) The move must be for the benefit of the employer.
>
> (2) Reimbursement must be in accordance with an established policy or practice that is consistently followed by the employer and is designed to motivate employees to relocate promptly and economically.
>
> (3) The cost must not otherwise be unallowable under Subpart 31.2.

> (4) Amounts to be reimbursed shall not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in subparagraph (a)(5) above, a flat amount, not to exceed $1,000, may be allowed in lieu of actual costs.

13. Thus, if a contractor chooses to reimburse its employee's expenses incident to relocation such as "disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains" (FAR 31.205-35(a)(5)), such reimbursement may exceed actual costs, but is limited in that case to no more than $1,000.

14. For domestic relocation, WDL employees are paid miscellaneous expenses of the type mentioned in FAR 31.205-35(a)(5), in accordance with FAR 31.205-35(b) (tr. 193). WDL contends, however, that FAR 31.205-35(b) did not apply to overseas relocation because the SIAs were not relocation expenses but "compensation." Spanier testified:

> We have done this as a longstanding policy. It has been deemed as compensation in the past. We treat it as compensation for tax purposes, for W-2 purposes. It's an incentive to get people to relocate economically and efficiently to the location that their services are required.

(Tr. 30-31) WDL maintains that SIAs are compensation by virtue of the fact that SIA is a part of IRM, Topic 701, which pertains to compensation for U.S. foreign service employees (tr. 30-31, 36).

15. FAR 31.205-6 pertains to "Compensation for personal services" (the compensation cost principle). The regulation, effective as of 7 April 1986, and as of the date of award of the disputed contracts, provides, in part:

> (a) *General*. Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance (except as otherwise provided for severance pay costs in paragraph (g) below and for pension costs in paragraph (j) below). It includes, but is not limited to, salaries; wages; directors' and executive committee members' fees; bonuses (including stock bonuses); incentive awards; employee stock options, stock appreciation rights, and stock ownership plans; employee insurance; fringe benefits; contributions to pension, annuity, and management employee

incentive compensation plans; and allowances for off-site pay, incentive pay, location allowances, hardship pay, severance pay, and cost of living differential. Compensation for personal services is allowable subject to the following general criteria and additional requirements contained in other parts of this cost principle:

. . . .

(5) Costs that are unallowable under other paragraphs of this Subpart 31.2 shall not be allowable under this subsection 31.205-6 solely on the basis that they constitute compensation for personal services. (See 31.205-34(c.))

. . . .

(e) *Domestic and foreign differential pay.*
(1) When personal services are performed in a foreign country, compensation may also include a differential that may properly consider all expenses associated with foreign employment such as housing, cost of living adjustments, transportation, bonuses, additional Federal, State, local or foreign income taxes resulting from foreign assignment, and other related expenses.

. . . .

(f) *Bonuses and incentive compensation.*
(1) Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards and incentive compensation based on production, cost reduction, or efficient performance are allowable provided the awards are paid or accrued under an agreement entered into in good faith between the contractor and the employees before the services are rendered or pursuant to an established plan or policy followed by the contractor so consistently as to imply, in effect, an agreement to make such payment and the basis for the award is supported.

Is SIA Compensation?

16. By way of context, SIA was set up by Ford Aerospace as a part of WDL's compensation plan for its foreign service employees. Topic 701 also included Foreign

Cost-of-Living Allowance, Foreign Service Premium, and Hardship Area Premium. (R4, tab 100 at 1-3)

17. WDL employees receive the "FOREIGN COST-COST-OF-LIVING ALLOWANCE" monthly "[w]hen living costs at a foreign location (excluding rent) exceed comparable costs in the United States." This allowance is based on "Indexes of Living Costs Abroad" prepared by the U.S. Department of State, using Washington, D.C., as the standard. Topic 701, ¶ II A., provides "[t]his allowance will normally be paid by the FACC domestic payroll activity and be included with regular salary and premium payments." (R4, tab 100 at 1)

18. Topic 701 also provides for "FOREIGN SERVICE PREMIUM." This premium is "intended to compensate for changes in culture, living conditions and working conditions." Payment of this premium is included with regular salary payments and is "in addition to base salary." (R4, tab 100 at 2)

19. In addition, Topic 701 provides for "HARDSHIP AREA PREMIUM." Employees are entitled to this premium if an assignment location is designated a "hardship area" by the company. Payment of this premium is included with the employee's regular salary payment. (R4, tab 100 at 3) Subject to certain general criteria and requirements, "hardship area" premium is allowable under FAR 31.205-6(a) as "hardship pay." WDL did not consider Metro Tango, Germany, a hardship area (tr. 326).

20. Spanier takes the position that FAR 31.205-6 gave WDL the authority to charge SIA as compensation. Citing FAR 31.205-6(e)(1) (*see* finding 15), he testified that "It [SIA] could be bonus or it could be other related expenses." (Tr. 196-97)

21. Rosa was less certain, in answer to WDL counsel's question, she testified:

> Q. And you understood from the beginning that it [SIA] was an element of compensation and not a reimbursement for expense?
>
> A. That it was something [compensation] that you didn't need receipts for. I don't get in – I can't get in – the technical terms, I don't – I'm not a finance person, so I don't talk about expenses and compensation. I mean, it's all part of a package that an employee gets when they go overseas.

(Tr. 320-21) In other words, Rosa believed SIA is compensation because no receipt is required to receive the allowance, and because SIA happens to be offered as a part of the compensation package. WDL's Director of Compensation Benefits and Employee

Relations (Rosa) did not offer a persuasive answer to why SIA should be considered compensation in its own right (*i.e.*, pursuant to the applicable FAR).

The Contracts

22. The two contracts involved in this appeal are known as "TSS" contracts. "TSS" stands for "Tactical Reconnaissance System Supplies and Services." The "TSS" program is a part of a larger program known as TREDS (Tactical Reconnaissance Exploitation Demonstration System). (Tr. 311, 355) WDL began the TREDS program in 1980 (tr. 364). It was, at that time, a one-of-a-kind, and state-of-the-art system (tr. 441).

23. The Government and WDL began their "TSS" contracts in 1984 (tr. 364). In 1985, the TREDS system was delivered to Germany and WDL began sending people to Germany. The program was still on-going when the hearing took place in 2000. Similar negotiations would take place each year to continue the "TSS" contract. (Tr. 364) The costs of the "TSS" contracts have steadily risen from $10 million in the mid-1980s to $40 million in 2000. The amount proposed for SIA has been less than 1% of the total costs proposed each year. (Tr. 568) The TSS-91 (F09604-91-C-0026) and the TSS-92 (F09604-92-C-0026) contracts were entered into to continue the existing "TSS" program (tr. 364).

24. Ford Aerospace and the Air Force Logistics Command entered into the TSS-91 contract on 1 October 1990 (R4, tab 1). The TSS-91 contract included as Clause I-153, FAR 52.216-7, ALLOWABLE COST AND PAYMENT (APR 1984). The parties entered into the TSS-92 contract on 19 September 1991 (R4, tab 1b). The TSS-92 contract included as Clause I-153, FAR 52.216-7, ALLOWABLE COST AND PAYMENT (JUL 1991).

Prior Government Review of SIA

(a) Documentary Evidence

25. Each year, the TSS contract was re-negotiated. The process involved proposal audits conducted by the Defense Contract Audit Agency (DCAA), fact-finding discussions between WDL and the Government, followed by negotiations between WDL and the Government. (Tr. 567, 569)

26. In support of its contention that the Government had approved the one month base salary SIA as an allowable cost, WDL provided through its Rule 4 submission documents showing discussions and negotiations of WDL's TREDS Support Program and the benefits incorporated into the annual TSS contracts[3]. These documents go as far back as 1983, and provide insight as to whether charging one month's salary as SIA in the period prior to the disputed contracts (TSS-91 and TSS-92) was done with the Government's knowledge, approval and acquiescence.

27. An internal WDL memorandum dated 20 June 1983 regarding "Proposed Benefits for TREDS Support Program," shows that, in addition to other benefits, WDL proposed "One month of base salary" for SIA (R4, tab 143H).

TSS-85 Contract

28. The documentary record shows that WDL representatives met with Government representatives (Det. 8) at Warner-Robins Air Force Base (AFB) on 2 February 1984. The purpose of the meeting was to "[f]amiliarize Det 8 with Ford Aerospace benefits policy in preparation for FY85 and forward FSR Contracts," and to "[o]btain approval in concept of Ford Aerospace benefits policy." (R4, tab 143F) As reported in a later memorandum dated 21 January 1986, WDL "did receive permission to utilize the TSS Benefit Package 'In Concept' instead of a per diem system." The Government advised WDL at that time, however, that "further discussion would be necessary and that all benefits in the TSS package would not automatically be paid for by them." (R4, tab 143D)

29. The benefit package discussed at the 2 February 1984 meeting was a "TREDS SUPPORT PROGRAM" document marked effective as of 1 October 1983. The document included at Section II.D. a SIA provision similar to the version set out in Topic 701 (*see* finding 2). The provision included an additional paragraph relating to "forced" moves:

> If employes are forced to move during the course of their assignment, an amount up to one-half of monthly salary, not to exceed $1,000, will be reimbursed, based on receipts, for expenditures required to make improvements and/or repairs to the house/apartment itself which may be necessary to establish reasonable quarters.

(R4, tab 143G at 4)

30. Handwritten notes indicate that while a question was raised with respect to the "forced" move paragraph at the 2 February 1984 meeting, no question was raised with respect to providing SIA equal to one month's base salary. Notes taken by a WDL representative (Dave Dinelli) stated:

> 20) Our objectives were realized. After reviewing some 19 pages of data, the Det. 8 personnel were familiar with our allowance package and in effect concurred in our proposing the "redlined" package in the upcoming proposal.

(R4, tab 143F)

31. Following up the Warner-Robins AFB discussions held on 2 February 1984, H. D. Chiswick (Chiswick), WDL's Contract Administrator for Special Programs Operation, submitted to PCO Charles Harrison (PCO Harrison) by letter dated 13 April 1984 for his review and approval WDL's "TREDS Support Program, U.S. Foreign Service Employes Practices, dated 01 March 1984."[4] The letter stated:

> Your comments are respectfully requested in writing on or before 01 June 1984, because, as you know, compensation benefits are an important factor in our hiring profile. Accordingly, it is in everyone's best interest to reach an agreement with the Government regarding these benefits at the earliest possible time.

(R4, tab 143F)

32. In response to WDL's 13 April 1984 submission, Lt. Col. Kenneth H. Kagiyama, Chief of Contracting and Manufacturing Division, advised WDL in a 21 May 1984 memorandum:

> 2. The compensation benefits identified in the TREDS Support Program pamphlet dated 1 March 1984 are satisfactorily described and there is no major disagreement. However, the two subject matters highlighted in my letter and discussed during your visit pertaining to travel and shipment of personal property is highly recommended for adoption.
>
> 3. We look forward to a satisfactory negotiation and a successful deployment.

(R4, tab 143F)

33. A "telecon" record kept by WDL's Chiswick dated 23 May 1984 bearing the subject "TSS-85 Proposal" indicated that Lt. Col. K. Kagiyama called that day and said:

> Col. K: The Support Program is approved, with the exceptions (shipping and storage of personal property and travel) previously outlined in his April letter[5]. He is still open to discussion about the weight differences in the shipping.

(R4, tab 143F)

34. WDL submitted its proposal for the TSS-85 contract by letter dated 25 May 1984 (R4, tab 143F). According to a later memorandum dated 21 January 1986 by Clark G.

Hill, WDL's TREDS Support and Services Program Manager, prior to submission of the FY85 proposal, WDL made a "great effort" to "identify those sections of the benefits package for which the customer did not wish to pay." The Hill memorandum reported that "[t]his effort resulted primarily in the changes to the relocation (section 3.4) and travel, moving, and living expenses (section 3.5) sections of the TSS package." (R4, tab 143D)

35. After reviewing WDL's TSS-85 proposal, the Government raised a number of questions. At a meeting held on 25 June 1984, WDL addressed the questions posed. WDL's responses were set out in a memorandum by Hill entitled "Responses to the TSS-85 Informal Fact-Finding Meeting Held 25 June 1984." We have reviewed this memorandum and find that the subject of SIA was neither raised nor discussed. (R4, tab 143F) WDL updated its TSS-85 proposal by letter dated 29 June 1984. The Government provided further fact-finding comments by letter dated 17 July 1984, and WDL responded to the Government's comments to PCO Harrison by memorandum dated 27 July 1984. Following WDL's "TREDS Support Program Proposal Update" submitted by letter dated 2 August 1984, the parties negotiated the terms of the TSS-85 contract on 14-16 August 1984. WDL's 23 August 1984 memorandum confirming the results of the negotiation shows that WDL agreed to perform the FY85 TREDS Support and Services effort for $6,539,000. (R4, tab 143F)

36. The 23 August 1984 confirmation memorandum shows that the parties agreed to make certain changes to the terms and conditions of WDL's proposal, among them:

> c. Proposal Section 5.6.4, TREDS Support program:
>
> The TREDS Support Program as submitted as Attachment D to the reference b) proposal [Proposal submitted via letter F496-84-HDC-0033 dated 25 May 1984] and as undated by reference d) Change pages [TREDS Support Program Proposal Update submitted via letter F496-84-HDC-0052 dated 02 August 1984] is approved and negotiated. Costs for language Instruction (Section C) will be borne by the Contractor.

(R4, tab 143F) The "TREDS SUPPORT PROGRAM" as negotiated and approved 16 August 1984 for the TSS-85 contract included at II.D., "SETTLING-IN ALLOWANCE" providing for SIA equal to the recipient's one month's base salary upon arrival in a foreign country and upon return to the United States (*see* R4, tab 143E).

37. WDL's Hill wrote in a 21 January 1986 memorandum regarding the negotiations that took place in August 1984:

> At that time the customer decided that tax preparation fees (Section 2.6) and transportation costs in the event of the death

> of a grandparent (Section 3.6) would not be reimbursed, as written, as an allowable cost. The customer still was considering the issue of language instruction (Section 3.3). During the August 1984 negotiations, the customer decided that language instruction would NOT be a contract allowable cost, therefore, all costs associated with language instruction were deleted from the proposal cost negotiations.
>
> The customer reiterated his position that just because an item was Ford policy as evidenced in the benefit package, it did not mean that its cost would be paid for by them. At that time, however, it generally was considered that the TSS Benefit Package was "approved" by the customer.

(R4, tab 143D) As for the TSS-85 contract, the Government took no exception during negotiation with respect to the payment of SIA equal to recipient's one month's base salary, and accepted it as a part of the TSS-85 contract.

TSS-86 Contract

38. An inter-office WDL memorandum dated 3 April 1985 from Carlos G. Utriarte (Utriarte), WDL's TSS-85 Contract Administrator to R. A. Crosson of WDL's Industrial Relations office forwarded "a copy of the overseas benefits for the TSS-85 contract which were approved by our corporation and negotiated with the customer." The memorandum indicate that it was WDL's intention "to renegotiate this same benefits package with the customer on the follow-on contract - TSS-86." (R4, tab 143E)

39. WDL submitted its proposal for the TSS-86 contract on 28 May 1985 (R4, tab 143E). On 26 June 1985, PCO Harrison forwarded to WDL "a list of questions that require additional information in order to complete evaluation of your proposal." PCO Harrison cautioned that "just because a task is FACC policy it does not necessarily mean that the cost is allowable." (R4, tab 143E)

40. A fact-finding conference on WDL's TSS-86 proposal was held at Warner-Robins AFB on 10-11 July 1985. Paragraph 19.c. of the notes taken by a WDL participant at the conference reflects:

> 19.c. The whole issue of benefits in general was discussed at this point.
>
> . . . .

3) Benefits package is not currently a part of contract. Their goal is to do so for the TSS-86 effort.

4) As it stands they do not accept the statement that the benefits package has been approved.

Note: The whole issue as to whether or not the current benefits package has or has not been approved was left undecided. It was not the customer's intention to discuss benefits per se at this time. However, I'm sure this topic will be brought up during negotiations.

20. Part of benefits package that will be a point for negotiations.

(R4, tab 143E)

41. With regard to the Government's assertion made during the 10-11 July 1985 fact-finding meeting to the effect that the Government was not in agreement that the benefits described in WDL's 28 May 1985 proposal had been approved, WDL advised PCO Harrison by memorandum dated 29 July 1985:

> It should be noted that with some minor clarifications the benefits package submitted in Reference c) [TSS-86 proposal dated 28 May 1985] is the same benefits package negotiated and approved for the TREDS Support Services 1985 contract.

WDL asked PCO Harrison for his comments on or before 9 August 1985. (R4, tab 143E)

42. The parties negotiated the terms of the TSS-86 contract on 13-14 August 1985. WDL's confirming memorandum of the negotiations dated 23 August 1985 to PCO Harrison included the following statement:

> 4.0 TERMS AND CONDITIONS
>
> The Terms and Conditions as contained in Reference c) [Request for Proposal F09604-85-Q-0126] remain unchanged with the following exceptions:
>
> . . . .
>
> c. All compensation to contractor personnel shall be in accordance with the TREDS Support Program as stipulated in

> Attachment C of Reference b) [Proposal dated 28 May 1985] and shall be considered allowable costs in accordance with Contract Clause entitled "Allowable Cost and Payment."

(R4, tab 143E)

43. In response to WDL's confirming memorandum of 23 August 1985, PCO Harrison advised WDL by memorandum dated 4 September 1985:

> 3. Exception is taken to the position that the TREDS Support Program as proposed is considered allowable costs. We recognized certain costs agreed to between the Defense Contract Audit Agency (DCAA) and the Compensation and Benefits Office (IRM 701) of Ford Aerospace and Communication Corporation as allowable costs. I would like to re-emphasize, just because a cost is FACC policy does not mean that the cost is allowable.

(R4, tab 143E)

44. While the PCO did not accept WDL's entire benefit package as proposed and reserved his right to disallow specific benefits, no exception was taken with respect to the payment of SIA equal to recipient's one month base salary, and such payment was a part of the TSS-86 contract. We infer that these costs were among the costs agreed to between DCAA and the WDL benefits office.

TSS-87 Contract

45. In a memorandum dated 21 January 1986 to R. A. Crosson, Hill urged that the company "take an early position on our benefit package and ensure that it is in a format the customer will accept at negotiation." Hill complained that the existing benefit package was not sufficiently flexible for negotiation purposes:

> . . . As you are aware, our difficulty on TSS Contract has been in part because our benefits package was given to us by your office, and with the exception of the minor adjustments made in May 1984 and listed above, we have not been permitted to deviate from it, even if the customer requests a change or refuses to cover the costs. Additionally, if we can increase benefits through customer negotiation, we are not permitted to do so. In short, we are given a benefit package by your office and told to make it fit with our customer regardless of the customer's desires. I do not believe that the situation this

> policy creates is capable of keeping customer satisfaction and company profits in balance, but we have followed that course because it is the only one open to us.

(R4, tab 143D)

46. Attachment I to Hill's 21 January 1986 memorandum was the "BENEFITS PAYMENT PROFILE" of the "TREDS SUPPORT PROGRAM." This profile shows the then current status of various benefits in WDL's TREDS Support Program. A partial list shows:

SECTION	DESCRIPTION	FUNDINGS AND COMMENTS
2.2.1	COLA	Customer
2.3.1	Foreign Service Premium	Customer
2.4	Settling-in Allowance	
	1) Upon arrival	Customer
	2) Upon return to us	Customer
	3) Forced move	Customer approval required

(R4, tab 143D) We find that, as of January 1986, the Government had not raised any objections to the payment of one month's base salary as SIA, and SIA was a part of WDL's overall TREDS Support Program.

47. Among the documentary evidence WDL submitted for FY87 was a second memorandum dated 15 April 1986 from Hill to Crosson. This memorandum itemized and discussed changes WDL made to its benefit package for the TSS-87 contract. No changes were made to SIA. (R4, tab 143D)

FY88 and FY89 Contracts

48. No documentary evidence relating to the benefit packages negotiated for the TSS-88 and TSS-89 contracts was submitted.

TSS-90 Contract

49. For the TSS-90 contract, WDL submitted the "Negotiation Minutes TSS FY90" dated 28 August 1989. The minutes show the parties negotiated the TSS-90 proposal from 31 July to 2 August 1989. The minutes do not show SIA to be of concern. The minutes contain the following statement on the "DFS [Contract Field Services] benefits package":

> Det 8 accepted our proposed benefits package as a basis for the costs that were negotiated, but the benefit package will not be

> incorporated in the contract. The government believes they cannot dictate Ford policy regarding benefits.

(R4, tab 143C) We find that, although the Government continued to resist accepting WDL's benefit package as a whole, it accepted payment of one month's base salary of WDL foreign service employees as SIA.

TSS-91 Contract

50. For the TSS-91 contract, WDL submitted its Memorandum of Negotiations dated 2 August 1990. According to this memorandum, WDL's proposal was submitted in Mid-June 1990. After two fact-finding sessions, the parties negotiated the TSS-91 proposal from 30 July to 1 August 1990. The parties did not have a disagreement with respect to whether SIA of one month's base pay was allowable. The summary of changes in the memorandum shows WDL agreed to reduce SIA from $28,368 to $12,608 "BASED ON 4 CFS REPS VICE 9." (R4, tab 143B)

TSS-92 Contract

51. For the TSS-92 contract, the documentary evidence WDL provided shows that it submitted its proposal on or about 26 April 1991. On 20 May 1991, WDL received an inquiry from DCAA on whether the SIA proposed was company policy or whether it was specific to the TSS-92 contract. WDL's confirming memorandum dated 19 August 1991 show that negotiations took place from 13 to 15 August 1991. The memorandum contain no discussion or indication of changes in connection with SIA. (R4, tab 143A)

52. From the documentary evidence in the record, we find that notwithstanding its many attempts, WDL never successfully obtained the PCO's unqualified agreement to accept its TREDS Support Program benefit package as presented. The Government, on the other hand, never totally rejected WDL's benefit package, adopting a decide-as-we-go approach, identifying benefits it did not want to pay as the parties negotiated their contract each year. As for paying one month's base salary as SIA, WDL had the provision as a part of its benefit package and proposal since 1984. The Government raised no objections to this provision and accepted and approved the provision as a part of its annual contract from 1984 (TSS-85 contract) until at least 1991 (TSS-92 contract).[6]

(b) Testimonial Evidence

53. WDL's allegation that the Government had previously approved SIA as allowable costs also rests on the testimony of a number of witnesses it called.

54. Spanier -- WDL's chief proponent that SIA was a form of compensation and had been approved by the Government year after year -- acknowledged that he was not involved

in putting together the proposals submitted for negotiations; nor did he have any role in the negotiation of any TSS contracts over the years (tr. 77). He admitted that his understanding was derived from "discussions with people who were present during the negotiations" (tr. 75). He identified Skoog and Carlson as being present during the negotiations of the TSS-91 and TSS-92 contracts (tr. 76-77), and presumably these individuals contributed to his understanding that SIA was, and should be considered, allowable compensation.

55. Carlson became WDL's TSS and TREDS program manager in 1986 (tr. 346). He participated in the fact-finding and negotiation aspects of the TSS contracts from 1986 to 1996 (tr. 345). Carlson testified that SIA was incorporated into the benefits package each year, and he became familiar with SIA because he was "responsible for the proposal development" (tr. 346). As previously indicated, Carlson was on WDL's negotiation team during the negotiations of the TSS-91 and TSS-92 contracts. He sat through the negotiation sessions at which the benefits package was discussed each year (tr. 350). According to Carlson, during the negotiation sessions, the Government negotiator would go through the benefits package by line item, ask questions of those pages of the proposals "that he had put tags on" (tr. 351). Each year there was a discussion on "the number of people" to whom SIA would be applied (tr. 350).

56. The only specific inquiry Carlson recalled had to do with a DCAA written fact-finding question on the TSS-92 contract with regard to "whether or not it [SIA] was a standard company policy" (tr. 350). Carlson acknowledged that when he came to the negotiation table, his role was not to evaluate whether benefits were allowable. It was his understanding that WDL would have already screened claimed costs to see if they were allowable. (Tr. 358)

57. Skoog is a long-time WDL employee (tr. 366). She was assigned to the TSS contracts in 1989 (tr. 412). She acknowledged that she had not spoken to anyone about SIA prior to 1989 (tr. 412-13). Skoog recalled during fact-finding in preparation for negotiation of the TSS-92 contract, the Government had asked "whether the Settling-In Allowance was a longstanding policy" (tr. 375). In response to the inquiry, WDL provided IRM, Topic 701, and no action resulted form the Government (tr. 375-76, 387). The only discussion Skoog had with the Government negotiators between 1989 and 1992 related to the number of people who were eligible to receive SIA (tr. 416-20; ex. 2018). Skoog gave the following answer to her counsel's question on direct examination:

> Q. When -- when you reviewed the costs that were being proposed in the negotiations with Gloria Corraly [sic], did you also review the settling-In Allowance?
>
> A. It was reviewed in the context of how many people it was going to be applicable to. By the time we got to actual negotiations, the Settling-In Allowance was not at issue. There

> were other things that were issues, but this was not an issue at that particular time. It was never brought up as an issue.

(Tr. 376)

58. Rosa first became involved in the negotiations of the TSS contracts in 1989 (for the 1990 contract) (tr. 329). Prior to 1989, she was not made aware of any issue relating to whether SIA was allowable (tr. 329). Although Rosa was familiar with the FAR cost principles, it was not her responsibility to ensure that the compensation packages she put together met the requirements of the FAR cost principles (tr. 329). Her role during negotiations with the Government was to explain the company's policy with respect to compensation or benefits (tr. 330). Rosa testified that during negotiations she would be "called to the table and sit there" when the benefits package of the proposal was reviewed (tr. 302). While she believed that SIA "normally would have [been] reviewed," just as "everything that was in the package," she did not remember "specifically reviewing that [SIA] paragraph" (tr. 301).

59. In addition to Spanier, Carlson, Skoog and Rosa, WDL also called John Fidel Gow (Gow) as its witness (tr. 439). Gow was hired by WDL in 1978 specifically for the TREDS program, and later became its chief engineer. Gow testified that SIA was presented to him as part of an overall compensation package which also included Foreign Service Premium and COLA as an incentive for him to relocate to Metro Tango. He described Metro Tango as a very remote area in the middle of farmland in Germany "probably a good hour away from any major city." (Tr. 445-46)

(c) Proposal Audits

60. In evaluating the reasonableness of a contractor's proposal, contracting officers often ask DCAA to conduct proposal audits (tr. 566-67). Due to the "time pressures" which often accompany such audits, auditors normally make a "risk assessment," and focus on specific costs rather than all costs (tr. 567). According to Brian Martinson (Martinson), a DCAA supervisory auditor stationed at WDL since 1994 (tr. 565), SIAs constituted less than one percent of the total proposed costs of the contracts involved in the present dispute (tr. 518). In preparing for the hearing, Martinson reviewed "all the available" proposal audits conducted on the TSS program. He found that prior to 1993, the auditors did not review or conduct any tests on SIA. There is no showing of how far back records existed, however. He acknowledged that DCAA did ask whether SIA was company policy in 1991. (Tr. 569)

(d) Incurred Cost Audits

61. DCAA also conducts incurred cost audits to determine whether costs claimed are reasonable, allowable and allocable. Incurred cost audits are generally conducted two to

three years after the costs have been incurred. (Tr. 570) Incurred cost audits tend to focus far more on indirect costs as opposed to direct costs because DCAA historically has taken far more exceptions to indirect costs (tr. 571). WDL maintains well in excess of 30 accounts for the TSS contracts (tr. 572). Which account to review is, again, a matter of risk assessment on the part of DCAA auditors (tr. 573). Martinson reviewed the incurred costs audits conducted on the TSS-contracts in prior years and found no "specific tests were done on the Settling-In Allowance account" prior to 1992 (tr. 574).

The CAS 405 Audit

62. In 1992, Jacqueline Rolly (Rolly) was Corporate Administrative Contracting Officer (CACO) over six Loral divisions in the Bay Area, including WDL (tr. 708). As CACO, her responsibility included evaluation of Cost Accounting Standard (CAS) compliance and forward pricing rates of "the company as a whole" (tr. 708). As CACO, Rolly had no cognizance over whether a direct cost, such as the SIA, was allowable (tr. 709-10). The PCO had cognizance over whether a direct cost under the TSS contracts was allowable. Although the PCO could have delegated to the CACO the authority to decide whether a direct cost was allowable, Rolly had not been delegated that authority. (Tr. 495)

63. About 90 percent of WDL's efforts were classified. The only contracts Rolly would have been aware of would have been the unclassified contracts "which were very few" (tr. 709). Rolly testified that she did not "know anything about TSS contracts" at that time because they were classified (tr. 708). Moreover, she had no ability to access any information from the TSS program (tr. 710).

64. On 13 July 1994, DCAA issued "REPORT ON NONCOMPLIANCE WITH COST ACCOUNTING STANDARD 405 DISCLOSED DURING AUDIT OF 1990 INCURRED COSTS" (Audit Report No. 4291-94W19200004) (R4, tab 102). The audit found WDL "in noncompliance with CAS 405, by claiming settling-in allowance on government flexibly-priced contracts," and recommended that WDL "comply with CAS 405 and submit timely cost impact proposals to the government per FAR 52-230.3(a)(5)" (R4, tab 102 at 1-2).

65. DCAA's 13 July 1994 audit report was based on the following findings:

> Contrary to CAS 405.40(a) [7], WDL claimed unallowable settling-in allowance on government flexibly-priced contract costs. *In addition to* reimbursing the employee for all relocation expenses, WDL provides the equivalent of one-month's base salary to employees relocating to an offsite outside of United States. FAR 31.205-35(b)(4) states, in part, that "Amounts (Relocation) to be reimbursed shall not exceed the employee's actual expenses, except that

> for miscellaneous cost of the type discussed in subparagraph (a)(5), above (other necessary and reasonable expenses normally incident to relocation), a flat amount, not to exceed $1,000, may be allowed in lieu of actual costs." Since WDL's settling-in allowance is not a flat amount and exceeded the ceiling $1,000; it is unallowable. Furthermore, *we believe WDL is making duplicative payments for miscellaneous costs by reimbursing actual miscellaneous costs under its relocation policy and providing a lump sum amount under its compensation policy*.

(Emphasis added) (R4, tab 102 at 2)

66. The audit reported that WDL disagreed with DCAA's conclusion and took the position that "the settling-in allowances are compensation costs and, therefore, are allowable." Additionally, WDL was said to have asserted that the SIA was not "specifically for reimbursement of costs incurred" but was "added inducement to compensate the employee for the hardship and inconvenience of relocation to a foreign site." (R4, tab 102 at 3)

67. In her 20 July 1994 letter to WDL, CACO Rolly made her "initial determination of WDL's noncompliance with CAS 405, Accounting for Unallowable Costs." She provided the following reason for her determination:

> Contrary to CAS 405.40(a) WDL claimed unallowable settling-in allowance on government flexibly-priced contracts. In addition to reimbursing the WDL employee for all relocation expenses as listed under FAR 31.205-35, WDL provides the equivalent of one month's base salary (to employees relocating outside the US) to cover such expenses as installation of telephones, alteration and installation of drapes and carpets, painting, etc. It appears WDL is making duplicative payments for miscellaneous costs by reimbursing actual miscellaneous costs under its relocation policy and providing a lump sum amount under its compensation policy for the same costs.
>
> . . . .
>
> In order to resolve this issue, request WDL submit, within 30 days, documentation to show *whether or not the overseas employees are being compensated twice for miscellaneous expenses* such as telephone installation (FAR 31.205-35(a)(5) and 31.205-35(b)(4)).

(Emphasis added) (R4, tab 102A)

68. WDL's 19 August 1994 response stated "WDL policy does not allow duplicate reimbursement of miscellaneous relocation expenses, and there are no instances of duplicate payments to WDL employees." The letter went on to explain "Employees relocating to foreign locations may receive compensation equal to one month's salary . . . , but are not eligible to receive reimbursement for the types of miscellaneous relocation expenses described in FAR 31.205-35(a)(5)." WDL attached a summary of its "reimbursement policy for foreign location assignments and domestic relocations." The attachment, "Miscellaneous Relocation Expense Policy," consisted of a chart. Under the heading "Type of Costs," costs such as connect/install telephones were listed. Under the heading "Foreign Location Assignments," the word "No" appeared opposite each cost. Under a further heading "Compensation," the chart stated that WDL paid a "Foreign Location Allowance (formerly called Settling-In Allowance)." WDL also attached a copy of "a draft of changes" to its Guideline K-45.0 on Overseas and Domestic Site Assignments" dated 17 November 1992. WDL manually crossed out an item identified as "Settling In Allowance" and inserted "Misc. Relocation Expenses (Ref: FAR 31.205-35(5) [sic])" and added a new item, "Foreign Location Allowance." Effective 14 December 1994, WDL issued a revised Guildeline K-45.0 which provided for SIA "capped at $1,000 but not to exceed the amount for miscellaneous expenses in accordance with FAR" and, separately, Foreign Location Allowance. (Underscore in original) (R4, tab 4, ref. (e) at 37, 39, 41; tab 125 at 12)

69. Based on her review of WDL's 19 August 1994 response, CACO Rolly notified WDL by letter dated 4 October 1994 that there was no CAS 405 noncompliance "and any misunderstanding of classification of costs has been resolved with WDL's corrections to their compensation and relocation policies" (R4, tab 4, ref. (d) at 36). Spanier testified that, with the CACO's 4 October 1994 determination, the conflict of whether SIA was compensation or miscellaneous relocation expenses was put to rest (tr. 133).

70. Rolly testified that her determination was based on her finding that WDL's accounting system was adequate to capture costs once they were identified (tr. 713). She testified that she did not rule on whether SIA was allowable (710, 712, 719-20, 726). Rolly testified cost disallowances were "handled separately," "either in an incurred cost claim or by DCAA issuing . . . what is called a form one" (tr. 715).

Incurred Cost Audit of FY 1992 SIA

71. In 1996, DCAA conducted an incurred cost audit on the TSS-91 and TSS-92 contracts. The audit (Audit Report No. 9753-95H10160210) covered a 15-month (1 January 1991 to 31 March 1992) fiscal year period [8]. Of the $193,272 claimed for SIA for FY 1992, the audit questioned $143,272. Of the questioned amount, $116,097 related

to the TSS-91 contract and $27,175 related to the TSS-92 contract. The audit set out its grounds for the questioned amount as follows:

> Questioned costs represent settling-in allowance costs that WDL paid in excess of FAR limitations to employees who were relocated to and from foreign off-site locations. WDL claimed costs in excess of $1,000 per employee; such excess costs are unallowable in accordance with FAR 31.205-35(a)(5) and FAR 31.205-6(a)(5), and unreasonable in accordance with FAR 31.201-3.

(R4, tab 5 at 3)

72. Based on the audit, DCAA issued a DCAA Form 1 on 21 March 1997. It provided WDL notice that DCAA had disapproved $143,272 in FY 1992 SIA as unallowable and unreasonable. (R4, tab 5 at Appendix 3) On 24 March 1997, DCAA forwarded the audit and Form 1 to the PCO (R4, tab 5).

Events Leading to Issuance of Final Decision by the PCO

73. In March 1997, at about the time DCAA was finishing up its SIA audit, DCAA and WDL were having regular meetings on the issue (tr. 586). At the exit conference, Spanier was told that one reason DCAA believed SIA was unallowable was because WDL's employees were already being paid a foreign service premium. At the time, Spanier believed, erroneously, that TSS contract employees did not receive a foreign service premium. (Tr. 587)

74. Believing that the issue should be addressed by the ACO, Spanier by letter dated 20 March 1997, raised the issue with Mark Hellmer. Hellmer succeeded Rolly as the cognizant ACO when Loral WDL became Lockheed Martin WDL. (R4, tab 4; tr. 147-48, 151, 154)

75. Spanier's letter to ACO Hellmer framed the issue as whether the one month's salary which WDL provides to its employees "as an incentive to move to a foreign site," is an element of compensation (as defined in FAR 31.205-6) or a relocation benefit (as defined in FAR 31.205-35) which limits allowability to $1,000. Spanier's letter reiterated the points that he had argued on numerous previous occasions: (1) that SIA is an incentive to move similar to the domestic Relocation Allowance Plan (RAP)[9] approved as allowable compensation by a former Ford Aerospace CACO (Marvin E. Davenport); (2) that the SIA is found in IRM, Topic 701, which deals exclusively with compensation; (3) that SIA is specifically allowed under FAR 31.205-6(e) of the compensation cost principle; (4) that WDL had demonstrated to CACO Rolly that WDL's compensation and relocation policies do not allow for duplication of payments; and (5) that SIA is a part of WDL's total

compensation package which has been "routinely reviewed by DCAA and accepted in all contract negotiations." (R4, tab 4 at 1-2)

76. ACO Hellmer advised Spanier by letter dated 6 April 1997:

> Due to the sensitive nature of the contract(s) and the fact that these are direct costs, my involvement in this matter is inappropriate. You should be resolving this matter with the ACO who has cognizance over the contract(s).

(R4, tab 7; tr. 151, 159) The record does not indicate who the cognizant ACO was. It appears that except for purposes of administration of cost accounting standards, the cognizant ACO was actually the PCO.

77. By letter dated 11 February 1998 to the current PCO, Wanda Verrett, WDL requested "a final decision with respect to the allowability" of SIA costs under current and future contracts. The letter contends:

> . . . SIA is not a relocation cost reimbursement device. Rather, it is a permissible form of foreign differential compensation within the meaning of FAR 31.205-6(e)(1). Consequently, FAR 31.205-35 does not apply to the SIA and the DCAA erred in relying on this FAR provision to question WDL's SIA costs.

WDL asked for "an immediate determination," because the issue "affects all contracts under which this type of compensation is charged and affects WDL's general accounting and charging policies." (R4, tab 22)

78. PCO Verrett issued her final decision by letter dated 23 March 1998. The decision demanded payment of the questioned amounts ($143,272) which allegedly were in excess of the $1,000 limitation per employee, and therefore unallowable in accordance with FAR 31.205-35(a)(5) and FAR 31.205-35(b)(4). The decision stated that characterizing the SIA as compensation did not change the nature of the costs which resembled those delineated in FAR 31.205-35(a)(5). The PCO contended that even if SIAs constituted compensation for personal services, they were unallowable because they were unallowable under FAR 31.205-6(a)(5) of the FAR compensation cost principle. She disagreed that SIAs were "related expenses" under FAR 31.205-6(e)(1) on the basis that those expenses related to other foreign location incentives provided by WDL such as "Foreign Service Premium Pay Differential, Foreign Cost of Living Allowance & Tax Reimbursement, Housing Allowance, and Home & Emergency leave." With respect to WDL's contention that SIA was much like the RAP approved by a CACO in 1989, the PCO contended that SIA and RAP were "two completely separate policies," and SIA was not a part of RAP and was not considered in the CACO's ruling. She contended that the Foreign

Service Premium was the foreign equivalent of the domestic RAP. The PCO denied that the CACO determined that SIA was allowable in conjunction with CACO Rolly's 4 October 1994 CAS 405 determination. She took the position that she and not the CACO was the cognizant determining official on whether SIA was allowable because direct costs were involved and the costs were incurred under two classified contracts. (R4, tab 23) Moreover, she found no evidence that the Government reviewed and accepted SIA as allowable costs in any past negotiations.

DECISION

The Government has the burden of proof in establishing the unallowability (by operation of specific contract provision or regulation) of a cost. *Lockheed-Georgia Company, A Division of Lockheed Corporation,* ASBCA No. 27660, 90-3 BCA ¶ 22,957 at 115,276; *Rockwell International Corp.*, ASBCA No. 20304, 76-2 BCA ¶ 12,131 at 58,302 (where the Government has justified its disallowance upon the ground of unallowability (by statute, regulation or contract), the Board has looked to whether the Government has met its burden of establishing "the propriety of such disallowance").

The PCO's final decision disallowed $143,272 of the $193,272 WDL claimed as SIA for FY 1992. In disallowing WDL's SIA, the Government relied upon FAR 31.205-35, RELOCATION COSTS. FAR 31.205-35(a) identified several types of relocation costs as allowable, subject, however, to paragraphs (b) through (f). The types of cost specifically identified as allowable under FAR 31.205-35(a)(5) are:

> (5) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property in transit.

As provided in FAR 31.205-35(a), these miscellaneous relocation costs are further subject to the limitations of FAR 31.205-35(b) through (f). FAR 31.205-35(b)(4) provides that "for miscellaneous costs of the type discussed in subparagraph (a)(5) above, a flat amount, not to exceed $1,000, may be allowed in lieu of actual costs."

The plain language of Paragraph V makes clears that SIA's purpose is for "settling-in." This term is normally associated with moving or relocating from one place to another. As reflected in IRM, Topic 701, Paragraph V, WDL's SIA included such expenses as "the installation of telephones, conversion of electrical appliances, alteration and installation of drapes and carpets, painting, minor alterations, etc." (Finding 2) In comparing the type of expenses enumerated in FAR 31.205-35(a)(5) with the type of SIA expenses enumerated in WDL's IRM, Topic 701, Paragraph V, we conclude they are similar or identical. That being

the case, it follows that the payment of SIA is covered by FAR 31.205-35(a)(5) of the relocation cost principle, and subject to the $1,000 limitation imposed by FAR 31.205-35(b)(4) of the same cost principle. Moreover, since SIA deals with the reimbursement of specific types of expenses which are clearly associated with foreign relocation, it should not have been a part of Topic 701, and is more appropriately a part of Topic 702.

WDL contends that its SIAs are not relocation costs but a form of compensation designed as "an incentive to get people to relocate" (finding 14), and in any event qualified as "bonuses" or "other related expenses" under the compensation cost principle – FAR 31.206-6(e) (app. br. at 42) (findings 15, 20). That SIAs serve as an inducement to get WDL's people to relocate overseas, however, does not disqualify them from being relocation costs. FAR 31.205-35(b)(2) of the relocation cost principle provides that, to be reimbursable, the relocation costs must be "designed to motivate employees to relocate promptly and economically" (finding 12).

The fact that employees can spend their $1,000 as they wish is necessarily a part of the regulatory scheme of the miscellaneous relocation cost principle, and does not make SIA compensation. The purpose of paying a flat amount in lieu of actual cost is clearly to avoid the inconvenience of establishing actual costs by receipts. Since the $1,000 paid may exceed the actual expenses incurred, the cost principle cannot restrict how SIA recipients spend their $1,000.

Moreover, characterizing SIAs as compensation does not make them allowable if the costs (in excess of $1,000) are unallowable, as here, under FAR 31.205(b)(4) of the relocation cost principle. This is the case because FAR 31.205-6(a)(5) of the compensation cost principle provides that "Costs that are unallowable under other paragraphs of this Subpart 31.2 shall not be allowable under this subsection 31.205-6 solely on the basis that they constitute compensation for personal services" (finding 15).

WDL argues that "FAR 31.205-6(a)(5) applies to unallowability provisions directly related to compensation; it was never intended to change the basic nature of a cost" (app. br. at 43). Following through with its argument limiting the application of FAR 31.205-6(a)(5), WDL asserts that the provision was "intended as a recognition of the fact that, within FAR, other limitations are placed on allowable compensation in FAR 31.2." WDL tells us that the appropriate application of FAR 31.205-6(a)(5) include FAR 31.205-22, LEGISLATIVE LOBBYING COSTS, and FAR 31.205-27, ORGANIZATION COSTS. WDL argues that, "In both of these situations, despite the fact that these types of compensation meet all of the criteria of FAR 31.205-6, they may still be unallowable because the activity for which this kind of compensation is being paid had been specifically designated as an unallowable form of compensation." (App. br. at 48-49)

There is no support for this proposition. Subpart 31.2 encompasses all of the "Selected costs" under FAR 31.205, from FAR 31.205-1 to FAR 31.205-52 (as of 1991),

including FAR 31.205-6, COMPENSATION FOR PERSONAL SERVICES, and FAR 31.205-35, RELOCATION COSTS. If FAR 31.205-6(a) were intended to apply only to specific cost principles, it would have referred specifically to them rather than to "other paragraphs of this Subpart 31.2" generally. Furthermore, no regulatory history or witness testimony was offered to support the alleged intent WDL wants us to read into the application of FAR 31.205-6(a)(5). The plain language of FAR 31.205-6(a)(5) does not support the limitation of application WDL attempted to advance here. For the foregoing reasons, we reject WDL's argument that FAR 31.205-6(a)(5) of the compensation cost principle does not operate as a barrier to SIAs being recognized as an allowable form of compensation.

As a matter of practice, WDL treated SIA more as relocation expense than as a part of its overseas employees' salary or compensation. WDL did not separately reimburse relocation expenses of the type provided in FAR 31.205-35(a)(5) because "[t]hat's what SIA could be used for" (finding 5). WDL also required the submission of a TER upon arrival in a foreign country and upon return to the United States to coincide with the employee's relocation. We have found that WDL administratively treated the payment of SIA as relocation expenses as opposed to a part of salary or compensation. (Findings 7, 8, 9, 17-19) On the basis of the foregoing analysis, we conclude that the Government has proved that SIA in excess of $1,000 is unallowable pursuant to FAR 31.205-35(b)(4) of the relocation cost principle and FAR 31.205-6(a)(5) of the compensation cost principle.

CAS 405 Review

WDL also contends that the SIA was specifically approved as an allowable cost in connection with a 1994 CAS 405 review (app br. at 3). This contention is totally unsupported and is in direct contradiction with the evidence in the record. In this regard, CACO Rolly testified that she did not rule on whether SIA was allowable (finding 70). She did not do so because SIA was a direct cost and she had no cognizance over whether a direct cost, such as the SIA, was allowable. Although the PCO could have delegated to the CACO the authority to decide whether a direct cost was allowable, CACO Rolly had not been delegated that authority. (Finding 62)

Government Acceptance and Approval Of SIA

WDL contends that "the SIA was annually examined, accepted and approved by DCAA, the Air Force, and other Government customers, as an allowable cost. . . . All parties to these many negotiations understood and accepted the SIA as a form of allowable compensation." (App. br. at 3)

It is well established that where the Government has consistently accepted and allowed a cost in the past, the Government may not retroactively disallow the cost. *Litton Systems, Inc. v. United States*, 449 F.2d 392 (Ct. Cl. 1971); *Sanders Associates, Inc.*, ASBCA No. 15518, 73-2 BCA ¶ 10,055 (holding contractor was entitled to actual prior

notice that the Government would no longer approve the inclusion of overhead even though there was only a short history of Government approval); *Data-Design Laboratories,* ASBCA No. 21029, 81-2 BCA ¶ 15,190, *recon. denied,* 82-2 BCA ¶ 15,932 (holding retroactive disallowance of costs after a change in Government policy was improper because the Government with knowledge had routinely accepted and allowed a cost submitted by the contractor).

In *Litton,* the parties' dispute centered around whether the contractor's long-standing cost of sales method of allocating general and administrative expense (G&A) between its fixed price contracts and its cost reimbursement contracts was inequitable under the applicable Armed Services Procurement Regulations. Although the court agreed with the Government that the cost of sales method of allocating G&A was inequitable, it held that the Government could not retroactively impose upon the contractor a new allocation method. The court said at 449 F.2d 401:

> In view of plaintiff's long and consistent use of the cost of sales method with the Government's knowledge, approval and acquiescence, plaintiff was entitled to reasonably adequate notice that the Government would no longer approve the use of that method with respect to the CPFF contracts. . . .
>
> . . . Consequently, we hold that, under the peculiar facts of this case, the Government was required to give plaintiff adequate notice that its cost of sales allocation base would no longer be accepted, so that plaintiff could thereafter negotiate its contracts accordingly. We also conclude that the Government's issuance of the DD Form 396 on December 3, 1962, constituted an adequate, authoritative notice, and that it was unreasonable for plaintiff to expect that the Government would permit plaintiff to allocate its G&A expenses to its CPFF contracts entered into after that date on the cost of sales basis.

In this case, we have found that, notwithstanding its many attempts, WDL never successfully obtained the Government's unqualified agreement to accept its TREDS Support Program benefit package as presented. The Government, on the other hand, never totally rejected WDL's benefit package, adopting instead, a decide-as-we-go approach, identifying benefits it did not want to pay as the parties negotiated their contract each year.

As for paying one month's base salary as SIA, WDL had the provision as a part of its proposals since 1984. We have found that the Government raised no objections to this provision, and accepted the provision as a part of its annual contract from 1984 (TSS-85 contract) until at least 1991 (TSS-92 contract). WDL witnesses testified each year there

was only a discussion on the number of people to whom SIA would be applied, and whether SIA was allowable was not in issue.

The evidence shows that prior to 1993, DCAA did not review or conduct any tests on SIA through proposal audits. DCAA's CAS 405 non-compliance audit issued on 13 July 1994 first brought into focus that SIA exceeding $1,000 might be contrary to the relocation cost principle (FAR 31.205-35) and therefore unallowable. We therefore conclude that WDL did not receive adequate and authoritative notice that the Government would no longer allow SIA equal to one month's base salary until it received DCAA's CAS 405 non-compliance audit sometime in July 1994.

CONCLUSION

Because the Government raised no objections to WDL's SIA provision providing SIA equal to one month's base salary upon arrival in a foreign country and upon return to the United States, and had accepted the provision since 1984, and because WDL did not receive adequate and authoritative notice that the Government considered any SIA exceeding $1,000 unallowable until it received DCAA's CAS 405 non-compliance audit in July 1994, we hold that the Government is not entitled to disallow the SIA claimed as incurred cost under the TSS-91 and TSS-92 contracts.

For the foregoing reasons, this appeal is sustained.

Dated: 21 March 2002

PETER D. TING
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
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

[1] We refer to appellant simply as "WDL" because it was involved with the issues that gave rise to this appeal over the years regardless of which of three companies owned it. Western Development Laboratories was originally a division of Ford Aerospace & Communications Corporation (Ford Aerospace or FACC). Ford Aerospace was a subsidiary of Ford Motor Company. In 1990, Loral Aerospace Corporation (Loral) purchased Ford Aerospace, and WDL became a division of Loral. In 1996, Lockheed Martin Corporation (Lockheed Martin) purchased a majority of Loral, including WDL. This appeal was brought by Lockheed Martin Western Development Laboratories. But it involves a corporate policy that goes back to Ford Aerospace.

[2] This version of Topic 701 supersedes IRM, Topic 701, dated 1 January 1981, which has not been found, and is not a part of the record in this case. In addition to Topic 701, IRM Topic 702 deals with reimbursement of expenses for U.S. foreign service employees (R4, tab 101). Both Topic 701 and Topic 702 were superseded by Directive K-45.0, dated 17 November 1992 issued by Loral (R4, tab 4, ref. (e) at 40). The parties do not disagree that the Topic 701 language quoted herein was in effect during FY 1992.

[3] The documents were compiled by fiscal year under R4, tab 143A through J. The documents were not addressed by either party at the hearing. Based on our reading of the documents, we have made findings of the events relating to SIA from 1983 through 1991 in this section of our opinion.

[4] The 1 March 1984 version of the benefit package -- "TREDS SUPPORT PROGRAM U.S. FOREIGN SERVICE EMPLOYES PRACTICES 01 March 1984" – included an SIA provision with the "forced" move paragraph (R4, tab 143G). It is the same provision as the version marked effective 1 October 1983, discussed at the 2 February 1984 meeting.

[5] Lt. Col. Kagiyama's 17 April 1984 memorandum to WDL is included at R4, tab 143F. It said nothing about SIA.

[6] Even though WDL submitted no documentary evidence for the TSS-88 and the TSS-89 contracts, the fact that SIA allowance did not change in the TSS-90, -91, and -92 contracts is strong indication that the Government allowed SIA equal to one month's base salary as a part of the TSS-88 and TSS-89 contracts.

[7] CAS 405 pertains to accounting for unallowable costs. CAS 405.40(a) provides that "Costs expressly unallowable or mutually agreed to be unallowable, including costs

mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract."

[8] After Loral purchased WDL from Ford Aerospace, WDL went through a 15-month fiscal year so that its next fiscal year would coincide with Loral's (tr. 172).

[9] RAP is a domestic relocation plan established by Ford Aerospace in 1981 (R4, tab 104). In 1989, the CACO advised Ford Aerospace that RAP was not subject to the cost principles covered by FAR 31.205(b)(4) and was a part of the corporation's total compensation package (R4, tab 11 at 5). WDL contends SIA is similar to RAP, and therefore should be treated the same way, as compensation. The Government contends there are major differences. We need not resolve this dispute to decide whether SIA is governed by the relocation cost principle (FAR 31.205-35) or the compensation cost principle (FAR 31.205-6).

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. 51452, Appeal of Lockheed Martin Western Development Laboratories, rendered in conformance with the Board's Charter.

Dated:

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