ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCES FOR THE APPELLANT: John W. Chierichella, Esq.
Douglas E. Perry, Esq.
Anne B. Perry, Esq.
Fried, Frank, Harris, Shriver & Jacobson
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Thomas B. Pender, Esq.
Chief Trial Attorney
Arthur M. Taylor, Esq.
Carol L. Matsunaga, Esq.
Trial Attorneys
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

TRW submitted a "non-monetary" claim with respect to the allowability of its "Odyssey" project costs in its fiscal year 1995 under the captioned contract. That claim was appealed by virtue of its deemed denial in ASBCA No. 51530. In September 2000 TRW moved for summary judgment, contending that such costs were "allowable bid and proposal" (B&P) costs under FAR 31.205-18(a). In November 2000 the Government replied to TRW's motion and cross-moved for summary judgment. The parties have extensively briefed the motions.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

A. Jurisdiction to Adjudicate Appeal.

1. On 8 July 1988, the Air Force awarded Contract No. F30602-88-C-0058 (contract 58) to TRW, Inc. Contract 58 included line items 1 and 2 for "Radiation-Hardened 32 Bit Processor" on a fixed price basis, and option line items 3 and 4 for microcircuit development models on a cost-reimbursement basis, subject to the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) clause. (R4, tab 1 at 2-4, 23)

2. The FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) clause provided that the Government was to reimburse the contractor in amounts the contracting officer (CO) determined were allowable in accordance with the cost principles prescribed by FAR Subpart 31.2 in effect on the date of contract award, final indirect cost rates and the appropriate bases were to be established by the procedures set forth in FAR Subpart 42.7 in effect for the period covered by the indirect cost rate proposal, and failure of the parties to agree on a final annual indirect cost rate was a dispute within the meaning of the contract's Disputes clause (R4, tab 1).

3. On 23 January 1990, the CO issued unilateral Modification No. P00006 to contract 58, exercising the Government's option for line items 3 and 4 (R4, tab 938). TRW designated contract 58's line items 3 and 4 as "Subsales Number 56589" and recorded costs for Subsales No. 56589 in 1995 (R4, tab 943).

4. In its 5 November 1997 "Supplemental Claim" submitted to the contracting officer, TRW alleged that it properly charged costs of preparing a proposal for its "Odyssey" project incurred between January and May 1995 as B&P costs in accordance with FAR 31.205-18 (R4, tab 18). TRW appealed from a deemed denial of the claim.

B. TRW's "Odyssey" Project.

5. From 1991 to 1995 TRW developed the Odyssey communications system as a network of medium-earth-orbit satellites and ground stations located around the globe to permit telephone communications by special portable handsets from anywhere in the world, including regions without land-line or cellular telephone service (R4, tab 28 at 5-7, tab 112 at 1). TRW envisioned the Odyssey System to have both civilian and defense applications (Sydenstricker decl., ¶ 11).

6. On 8 November 1994, TRW and Teleglobe, Inc., signed a Memorandum of Agreement (MOA) concerning a proposed cooperative effort to commercialize TRW' s Odyssey satellite telephone communications technology (R4, tab 23; Sydenstricker decl., ¶ 2).

7. That MOA included the following relevant provisions:

(a) In ¶ 2, TRW and Teleglobe agreed to form a "Limited Partnership . . . to carry on the development, construction, and operations activities related to the [Odyssey] System, and then to market, sell, lease, and franchise all of the System output capacity . . . if the conditions set forth in this [MOA] are met" (R4, tab 23 at 2).

(b) Paragraph 3.2 required TRW to undertake those actions needed "to submit to the Limited Partnership a firm fixed price proposal for the [Odyssey] System on or before May 1, 1995," and provided that "the value of such work shall be included in the Limited

Partnership's definitive commercial agreement with TRW for the procurement of the System" (R4, tab 23 at 2).

(c) Paragraph 10.1 provided: "This Memorandum will constitute a legally binding obligation of each of the parties hereto with respect to those matters set forth in Sections 3, 4, 5, and 9" (R4, tab 23 at 9).

8. On 7 February 1995, TRW and Teleglobe created the "Odyssey Worldwide Services [OWS] Limited Partnership" (Sydenstriker decl., ¶ 4).

9. On 1 May 1995, the OWS Limited Partnership received TRW's fixed-price proposal for construction of the Odyssey system for a price not identified in the appeal record (R4, tab 28; Sydenstriker decl., ¶ 6).

10. TRW recorded costs of preparing the Odyssey proposal as B&P costs (Sydenstriker decl., ¶ 4).

11. On 6 September 1995, TRW and Teleglobe established a corporation, "Odyssey Telecommunications International, Inc." (OTI) (Sydenstricker decl. ¶ 7, ex. F).

12. "Effective" 31 January 1996 TRW and OTI entered into a contract that required TRW to construct and deliver to OTI specified Odyssey hardware and data for a price of $2,280,924,000. The contract did not expressly provide compensation for TRW's B&P costs incurred to prepare the Odyssey proposal in January-May 1995, or allocate any of the $2,280,924,000 price to such B&P costs. (R4, tab 116 at 1, E-2)

13. After financing for the Odyssey system was sought, there was not "sufficient investor interest" to go forward with the project. "[T]he private offering of OTI stock never closed and the [OTI] contract never became effective" and "expired on 29 February 1996, because financing was not in place." (Sydenstricker decl., ¶ 7)

14. TRW and the OWS Limited Partnership never entered into the "definitive commercial agreement" contemplated by ¶ 3.2 of the MOA. TRW never received any compensation under the MOA, from the OWS Limited Partnership, or from any non-governmental party for its proposal work. (Sydenstriker decl., ¶¶ 6, 9)

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The defense agency predecessor to the FAR was the Armed Services Procurement Regulation (ASPR). The 1960-61 ASPR cost principles stated that "Bidding costs are the costs of preparing bids or proposals on potential Government and non-Government contracts or projects . . . ." and a "contractor's independent research and development is that research and development which is not sponsored by a contract, grant, or other arrangement." ASPR §§

15-205.3, 15-205.35(c) (1960 ed. Rev. 6). As of 1 July 1974 the ASPR cost principles had been revised to provide:

> **15-205.3** *Bid and Proposal Costs*.
> (a) *Definitions*.
> (1) *Bid and proposal (B&P) costs* are the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts . . . .
>
> . . . .
>
> **15-205.35** *Independent Research and Development Costs*.
> (a) *Definitions*. A contractor's independent research and development effort (IR&D) is that technical effort which is not sponsored by, or required in performance of, a contract or grant and which consists of projects falling within the following three areas: (i) basic and applied research, (ii) development, and (iii) systems and other concept formulation studies . . . .

ASPR §§ 15-205.3, 15-205.35 (1974 ed.). The Cost Accounting Standards Board also issued regulations which defined B&P and IR&D costs:

> *Bid and Proposal (B&P) Cost*. The cost incurred in preparing, submitting, or supporting any bid or proposal which effort is neither sponsored by a grant, nor required in the performance of a contract.
>
> . . . .
>
> *Independent Research and Development (IR&D) Cost*. The cost of effort which is neither sponsored by a grant, nor required in the performance of a contract, and which falls within any of the following three areas: (i) Basic and applied research, (ii) Development, and (iii) Systems and other concept formulation studies.

4 C.F.R. § 400.01 (1979).

When first issued on 1 April 1984, the FAR cost principles provided:

> **31.205-18 Independent research and development and bid and proposal costs.**

(a) *Definitions*.

. . . .

Bid and proposal (B&P) costs, as used in this subdivision, means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement or required in contract performance.

. . . .

Independent research and development (IR&D) means a contractor's IR&D cost that is not sponsored by, or required in performance of, a contract or grant and that consists of projects falling within the four following areas: (1) basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies.

48 C.F.R. § 31.205-18 (1984).

The FAR in effect in July 1988 provided that "As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning . . . ." and stated—

"Contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds . . . . Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq.

48 C.F.R. § 2.101 (1988). 31 U.S.C. § 6301 *et seq*. address the selection and use of procurement contracts, grant agreements, and cooperative agreements. 31 U.S.C. § 6305, in effect from 1977 to the present, requires a federal executive agency to use—

. . . a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when--

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry or a public purpose . . . authorized by a law of the United

> States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
>
> (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

The FAR § 31.205-18(a) cost principles for B&P and IR&D in effect on 8 July 1988 were identical to the above-quoted 1984 FAR principles, except that in the B&P definition, "subsection" replaced "subdivision." 48 C.F.R § 31.205-18 (1987). Those B&P and IR&D definitions continued unchanged in the 1988-1992 FAR.

Pub. L. No. 101-510, § 824(a)(1), Nov. 5, 1990, added 10 U.S.C. § 2372, which required the Secretary of Defense to promulgate B&P and IR&D regulations to implement nine provisions in § 2372, none of which defined B&P or IR&D. On 5 December 1991 the Congress enacted Pub. L. No. 102-190, National Defense Authorization Act for Fiscal Years 1992 and 1993, 105 Stat. 1412, whose § 802(a) amended 10 U.S.C. § 2372 to require the Secretary of Defense to prescribe regulations for IR&D and B&P costs on "covered contracts," *inter alia*, so as to encourage contractors to engage in "the development and promotion of efficient and effective applications of dual-use technologies" under § 2372(g)(6). Section 2372 did not define B&P or IR&D. Section 2372(i)(1) provided: "The term 'covered contract' has the meaning given that term in section 2324(m) of this title." Section 2324(m), renumbered § 2324(l) by Pub. L. 104-106, § 4321(b)(11), states:

> **(l) Definitions**.—In this section:
>
> **(1)(A)** The term "covered contract" means a contract for an amount in excess of $500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items.
>
> **(B)** Effective on October 1 of each year that is divisible by five, the amount set forth in subparagraph (A) shall be adjusted to the equivalent amount in constant fiscal year 1994 dollars . . . .

Section 2324 is in Chapter 137 of Title 10, U.S.C. Chapter 137 does not define "contract."

The legislative history of Pub. L. No. 102-190, § 802, set forth in House Conference Report No. 102-311, stated:

> The conferees note that in the past, questions have arisen as to whether such costs [of IR&D and B&P], when incurred by a contractor through participation in consortia or cooperative

> agreement, would be reimbursable. The conferees agree that such costs *should* be reimbursed. Under the conference agreement, such costs would be fully reimbursable *to the extent that they are* reasonable, allocable, and *not otherwise disallowed under applicable laws or regulations*. [Emphasis added]

(1991 U.S.C.C.A.N. 1124)

The 10 December 1991 memorandum of Eleanor R. Spector, then Director, Defense Procurement, to the military services, DLA and DCAA, "SUBJECT: Research and Development Performed Under Cooperative Agreements," stated:

> A number of questions have arisen concerning the allowability of R&D efforts performed under cooperative agreements [including "joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium agreements"]. While the terms and conditions of these agreements may suggest they are contracts, they are not the type of contract contemplated under Federal Acquisition Regulation (FAR) 31.205-18(a) that would preclude the recovery of independent research and development (IR&D) costs.
>
> Accordingly, R&D costs incurred by a defense contractor pursuant to a cooperative agreement may be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative agreement.

(R4, tab 106)

Defense Acquisition Circular (DAC) No. 91-1, issued and effective 31 December 1991, revised DFARS 231.205-18(c)(1)(iii)(2) to provide that allowable IR&D/B&P costs were limited to five specified types of projects "of potential interest to DoD" including "activities that -- . . . (iv) Increase the development of technologies useful for both the private commercial sector and the public sector." 48 C.F.R. § 231.205-18(c)(1)(i)(C)(2) (1993).

In April 1992 the FAR Secretariat gave public notice of proposed changes to the FAR 31.205-18 B&P/IR&D cost principle to implement the revised procedures for limiting B&P/IR&D costs required by 10 U.S.C. § 2372, and to add FAR 31.205-18(e) "to clarify that research and development costs incurred by a contractor pursuant to a cooperative agreement may be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative agreement." The proposed change did not

alter the wording of the definitions of B&P and IR&D in FAR 31.205-18(a). 57 Fed. Reg. 11550, Apr. 3, 1992.

FAC No. 90-13, effective 24 September 1992, added FAR 31.205-18(e), providing:

> (e) *Cooperative arrangements*. IR&D effort may be performed by contractors working jointly with one or more non-Federal entities pursuant to a cooperative arrangement (for example, joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements). IR&D effort may also be performed by contractors pursuant to cooperative research and development agreements, or similar arrangements, entered into under (1) . . . (15 U.S.C. 3710(a)); (2) . . . (42 U.S.C. 2473(c)(5) and (6)) . . . ; (3) . . . 10 U.S.C. 2371 . . . ; or (4) other equivalent authority. IR&D costs incurred by a contractor pursuant to these types of cooperative arrangements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

The FAR regulators substituted the term "arrangement" for the term "agreement" in FAR 31.205-18(e) to avoid confusion with the term "cooperative agreement" in the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301 *et seq*. (48 C.F.R. § 31.205-18 (1993), 57 Fed. Reg. 44258, -64, -65 (Sep. 24, 1992)).

On 14 November 1996 the Government published for public comment a proposed revision, generated under FAR Case 95-032, to extend beyond fiscal year 1995 the B&P and IR&D cost allowability limits prescribed by Pub. L. 102-190, § 802, and implemented in FAR 31.205-18, and to amend FAR 31.205-18(e) to clarify that costs incurred in pursuit of certain cooperative arrangements would be allowable to the extent they were allocable, reasonable, and not otherwise unallowable. Such revision did not alter the wording of the definitions of B&P and IR&D costs. (61 Fed. Reg. 58452; R4, tab 31) FAC No. 97-03, issued on 9 December 1997, stated that all material therein was effective 9 February 1998 (with exceptions not including Item VIII). Citing FAR Case 95-032, Item VIII added subparagraph FAR 31.205-18(e)(3):

> (3) Costs incurred in preparing, submitting, and supporting offers on potential cooperative arrangements are allowable to the extent that they are allocable, reasonable, and not otherwise unallowable.

(R4, tab 41; 62 Fed. Reg. 64,913)

The National Security Industrial Association's (NSIA) 6 January 1997 letter to the Navy Department regarding FAR Case 95-032 renewed the request to amend FAR 31.205-18(e) "to include 'and B&P' after IR&D wherever it appears" (R4, tab 33). The ABA's 14 January 1997 letter to the FAR Secretariat regarding FAR Case 95-032 urged the FAR Council to "correct a disparity in the treatment of B&P costs vis-a-vis IR&D costs . . . ." The ABA quoted the statement (set forth above) in Conference Report No. 102-311 on § 802 of Pub. L. 102-190, and said:

> The current . . . FAR [31.205-18] cost principle does not reflect Congress's intent that IR&D and B&P costs incurred pursuant to cooperative agreements or participation in consortia be treated alike – i.e., as allowable. Although the cost principle specifically provides in 31.205-18(e) that IR&D effort may be performed pursuant to joint ventures, teaming arrangements, or other types of cooperative arrangements, the cost principle makes no provision for B&P effort incurred pursuant to such arrangements. The cost principle's failure to state that the cost of B&P effort incurred pursuant to cooperative arrangements is also an allowable cost is exacerbated by differences in the wording of the definitions of IR&D and B&P. The definition of B&P costs states that B&P does not include costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract. FAR 31.205-18(a). The definition of IR&D, in contrast, states, in pertinent part, only that IR&D does not include effort sponsored by a grant or required in the performance of a contract. Id.

(R4, tab 34) The FAR Case 95-032 Committee rejected the foregoing NSIA and ABA recommendations (R4, tab 36). FAR 31.205-18 has not been revised substantively since 1997.

POSITIONS OF THE PARTIES

TRW argues that its 1995 Odyssey proposal preparation costs are allowable B&P costs because the purpose of the FAR 31.205-18(a) exclusionary phrase "required in contract performance" is to prevent a contractor from recovering B&P costs twice --directly under a contract and also in its indirect costs; TRW did not recover the Odyssey proposal costs under the MOA or any other non-government contract; the legislative history of Pub. L. No. 102-190, § 802, and 1991 "Spector Memorandum" establish that B&P costs related to a "cooperative agreement" like the MOA are allowable; and the TRW-Teleglobe MOA was a "cooperative arrangement" whose B&P costs are allowable pursuant to FAR 31.205-18(e)(3).

Respondent argues that TRW's 1995 Odyssey proposal preparation costs were "required in contract performance," *viz*., the MOA; the plain language of FAR 31.205-18(a)

makes such costs unallowable; the fact that TRW has not been reimbursed under the MOA or other contracts is immaterial to the allowability of such costs; the 1997 amendment adding FAR 31.205-18(e)(3) does not apply retroactively to TRW's 1995 Odyssey costs; and, in any event, the 1995 Odyssey proposal was not an offer on a potential cooperative arrangement under FAR 31.205-18(e)(3).

DECISION

The Board has recited facts from the appeal record (SOF ¶¶ 1-4) to establish that contract 58 is subject to TRW's claim and the Board has jurisdiction of this appeal. Neither party submitted an affidavit or other evidence to dispute the material facts set forth in its opponent's motion (SOF ¶¶ 5-14). Accordingly, these motions present solely issues of law, which are appropriate for summary judgment. *See TRW, Inc.*, ASBCA No. 51530 (17 May 2002) (slip op. at 4).

Based upon the SOF, the parties' contentions, and the pertinent statutory and regulatory provisions set forth above, the legal issue to be decided is whether TRW's 1995 Odyssey proposal preparation costs were either "sponsored by a . . . cooperative agreement" or "required in contract performance" within the meaning of the second sentence of the FAR 31.205-18(a) definition of B&P costs.

I.

The 1988 FAR 2.101 definition of "contract" excluded "cooperative agreements covered by 31 U.S.C. 6301, et seq." Pursuant to 31 U.S.C. § 6305, cooperative agreements are described as legal instruments reflecting a relationship between the United States Government, a State, local government, or other recipient, to which the U.S. Government transfers a "thing of value" for a public purpose authorized by federal law, rather than an acquisition of property or services by the federal government. The United States was neither a party to, nor transferred a thing of value to any recipient under the TRW-Teleglobe MOA. Therefore, that MOA was not a "cooperative agreement" within the FAR 2.101 exclusion nor was it within 31 U.S.C. § 6305. Moreover, the TRW-Teleglobe MOA was not a "cooperative research and development agreement" entered into under 15 U.S.C.§ 3710(a), 42 U.S.C. § 2473(c)(5) and (6), 10 U.S.C. § 22371, or other equivalent authority, within the intendment of FAR 31.205-18(e), added by FAC 90-13 in September 1992. We hold that the disputed 1995 Odyssey proposal costs were not "sponsored by a . . . cooperative agreement."

II.

Respondent argues that the MOA was a "contract" within the plain meaning of "contract" in the exclusionary phrase within the definition of B&P. TRW argues that the word "contract" appears in the exclusionary phrases in the FAR definitions of B&P ("required in contract performance") and of IR&D ("required in performance of, a contract"); both of those

definitions are found in FAR 31.205-18(a); and thus "contract" must mean the same for both B&P and IR&D. TRW seeks to support its contention by the December 1991 legislative history of Pub. L. 102-190, § 802, and argues the interpretation of allowable IR&D costs in the December 1991 Spector memorandum must apply equally to B&P costs. (App. reply br. at 2, n.2)

There are several difficulties with TRW's argument. The Congress did not interpret the word "contract" in Conference Report No. 102-311 on Pub. L. 102-190, § 802. 10 U.S.C. § 2372(i)(1), as amended by Pub. L. 102-190, § 802, defined "covered contract" by reference to 10 U.S.C. § 2324(l), which provides that "covered contract" means a defense agency contract exceeding $500,000. Section 2324 is in Chapter 137 of Title 10, U.S.C., which chapter did not and does not define "contract." Pub. L. 102-190, § 802, did not define B&P or IR&D, but left such task to agency regulations. Therefore, the Congress' view on the reimbursability of B&P and IR&D costs incurred by a contractor participating in consortia or a cooperative agreement sheds no light on interpreting the phrase "required in contract performance" in the FAR 31.205-18(a) definition of B&P.

The Spector memorandum interpreted "contract" in the context of IR&D cooperative agreements (including joint ventures, limited partnerships, or teaming arrangements, all of which TRW contends embrace the MOU). But neither the Spector memorandum, nor the agency implementation thereof by FAC 90-13 in FAR 31.205-18(e) in September 1992, addressed the definition of B&P or its exclusionary phrase "required in contract performance." Moreover, despite the urging of NSIA and ABA in January 1997 that the FAR Council "correct a disparity in the treatment of B&P costs vis-a-vis IR&D costs" by adding "and B&P" after "IR&D" in FAR 31.205-18(e), the agency regulators rejected those recommendations, and instead added FAR 31.205-18(e)(3), providing that "costs incurred in preparing, submitting, and supporting offers on potential cooperative arrangements are allowable to the extent that they are . . . not otherwise unallowable."

TRW further argues that the purpose of the FAR 31.205-18(a) exclusionary phrase, "required in contract performance," is to prevent double recovery of B&P costs as direct and indirect costs. TRW did not recover its 1995 Odyssey proposal preparation costs from any non-federal entity. Thus, TRW concludes, the MOA is not within such exclusionary phrase because there was no double recovery.

TRW's interpretation is incomplete, and its conclusion does not follow. Another purpose of that exclusionary phrase is to assure that contractors charge to a contract directly those costs identified with a specific contract, *e.g.*, if the contract specifically requires preparation of a bid or proposal, and only after charging such direct costs are the remaining costs chargeable to a contractor's indirect cost pool. *See* FAR 31.202(a); 31.203(a); *cf. Boeing Co. v. United States*, 862 F.2d 290, 292 (Fed. Cir. 1988) (contractor's B&P costs, some of which were allocated directly to Air Force contract to the extent such contract expressly so provided, and others of which were allocated indirectly to its IR&D/B&P cost

pool complied with CAS Board's "Interpretation No. 1" of CAS 402, requiring that all costs incurred for the same purposes, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives). Furthermore, the FAR did not and does not provide that if a double recovery of B&P costs is precluded, then the exclusionary phrase has no further meaning, force or effect.

TRW argues that the MOA was not a "contract" as defined by FAR 2.101 in effect on 8 July 1988 – "a mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them"– because the MOA did not obligate a buyer to pay TRW for its proposal preparation services.

The MOA, ¶ 3.2, required TRW to prepare and submit the 1995 Odyssey proposal to the TRW/Teleglobe Limited Partnership, and its ¶ 10.1 provided that the terms in Section 3 constituted legally binding obligations (SOF ¶ 7(b), (c)). The fact that the MOA did not provide therein for compensation for TRW's proposal preparation costs does not exclude that MOA from the FAR definition of a "contract." FAR 2.101 defined "contract" in the context of a commitment to obligate the federal Government to an expenditure of appropriated funds. In the different context of the TRW-Teleglobe MOA, a non-federal, private agreement, the term "contract" requires a different meaning. We conclude that in such private party context, the MOA, whose material terms "constitute a legally binding obligation," is a "contract" within FAR 31.205-18(a)'s B&P cost exclusionary provision.

TRW also contends that the TRW-Teleglobe MOA was a "potential cooperative arrangement" within FAR 31.205-18(e)(3) because it was a preliminary agreement that contemplated that the Limited Partnership would enter into a subsequent "definitive commercial agreement with TRW" for procuring the Odyssey system. Since FAR 31.205-18(e)(3) allowed costs "incurred in preparing, submitting, and supporting offers on potential cooperative arrangements," TRW concludes that its 1995 Odyssey proposal preparation costs are allowable.

The FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) clause requires reimbursement of costs determined allowable in accordance with the FAR cost principles in effect on the date of the contract award (SOF ¶ 2). FAC 97-03, issued on 9 December 1997, added FAR 31.205-18(e)(3) effective 9 February 1998; such provision was not in effect on 8 July 1988, when contract 58 was awarded to TRW. Therefore, it is improper to construe FAR 31.205-18(e)(3) to apply retroactively to July 1988. We therefore need not address or decide respondent's argument that the Limited Partnership, formed in performance of the MOA, was an actual cooperative arrangement, not a "potential cooperative arrangement" within the terms of FAR 31.205-18(e)(3).

Having considered all the parties' arguments on these cross-motions, we deny TRW's motion for summary judgment and grant the Government's motion for summary judgment. We deny the appeal.

Dated: 30 July 2002

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

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. 51530, Appeal of TRW, Inc., rendered in conformance with the Board's Charter.

Dated:

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