

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Boeing Company) ASBCA No. 52256
)
Under Contract No. SDIO84-88-C-0015)

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OPINION BY ADMINISTRATIVE JUDGE TING
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The Boeing Company (Boeing), successor to McDonnell Douglas Aeronautics Company (MDAC)¹ of the McDonnell Douglas Corporation, appeals from a contracting officer's (CO) decision denying its certified claim for an increase in the contract amount by \$1,129,046. The amount was for Facilities Capital Cost of Money (FCCOM) that the parties undisputedly failed to include in a bilateral modification when they began their effort to close-out Contract No. SDIO84-88-C-0015 (SDIO contract). Missile Defense Agency, the successor agency to Ballistic Missile Defense Organization (BMDO), and Strategic Defense Initiative Organization (SDIO) moves for summary judgment, contending that MDAC's claim is barred by release. MDAC opposes the motion, and cross-moves for summary judgment on the ground, among others, that there was a mutual mistake in entering into the modification, and that mistake, as a matter of law, negated the release. SDIO opposed MDAC's motion².

The appeal is before us on issues of entitlement only.

UNDISPUTED FACTS

1. When SDIO first began sometime prior to 1987, it did not have a large contracting staff. For work that needed to be done, SDIO used existing contracts of service departments within the Department of Defense or outside agencies such as National Aeronautics and Space Administration (NASA). (Tab 3, McNally, 12-13, 96)³

2. The SDIO contract under which the current disputes arose had its genesis under a contract between NASA and MDAC (Contract No. NAS5-28100) entered into in 1983. Modification No. 173 of that contract, effective 22 February 1988, dealt with a “Feasibility Study for Delta 183 Mission.” The modification required MDAC to “perform a Feasibility Study on a conceptual design involving a modified Payload Adaptor System (PAS) that will be considered for a near-term launch on the Delta 183 vehicle.” Modification Nos. 173R1 and 173R2 extended the study completion date to 18 March 1988 and 25 March 1988 respectively, and increased the not-to-exceed costs to \$6 and \$7 million. (R4, tab 1)

3. Modification No. 173R3, effective 7 April 1988, subsequently revised the previous three modifications as follows:

1. The Contractor is authorized to continue the design, development and associated procurement activity necessary to support the Delta Star Mission payload until the SDIO makes necessary contractual arrangements with MDAC to complete the Delta Star payload effort.
2. All technical direction for this effort will be provided by LtCol. M. Rendine, SDIO.

(R4, tab 1)

4. The NASA contract included the following clause:

ARTICLE 19.0 WAIVER OF FACILITIES CAPITAL COST OF MONEY (MARCH 1982)

The Contractor is aware that facilities capital cost of money is an allowable cost but waives the right to claim it under this contract. (NPR 3.808-7)

(R4, tab 1 at 42) MDAC never claimed any FCCOM under the NASA contract (tab 2, Lesser, 41).

5. In May 1988, the then procuring contracting officer (PCO), Captain (now Colonel) William McNally (PCO McNally) received a request from the Delta Star⁴ program manager to enter into SDIO’s own contract with MDAC (tab 3, McNally, 95). PCO McNally explained the situation:

It wasn’t something that was planned. It was looked at as part of the strategy, but because we have had successfully done

experiments such as Delta 180 and Delta 181 . . . using a NASA contract and since the company best suited to do the experiment was McDonnell Douglas, it was thought to use the same type of approach to do Delta Star. So it was kind of sudden and a change of strategy to utilize - to, quote, have an SDIO contract.

(Tab 3, McNally, 93)

6. On 13 May 1988, MDAC submitted to SDIO its cost plus fixed fee proposal for the effort to design, manufacture, integrate and “test the Delta Star Spacecraft to Spacecraft mate to the Delta 183 vehicle.” The cover letter summarized the proposal:

2. The Contractor’s proposal is for \$44,281,038 consisting of \$38,596,297 target cost and \$5,684,741 target profit. The period of performance for the subject effort is 8 February 1988 through 28 August 1988.

(AR4, tab 123)

7. Unlike the NASA contract, MDAC proposed FCCOM (for the period February through August 1988) as a part of the costs of its contract with SDIO. Section 2.0 of the proposal is MDAC’s “SUMMARY OF COST AND PRICING.” Section 2.3 pertains to “DETAIL COST DATA.” Paragraph 2.3.2 “DD Form 1861 Data Facilities Cost of Money” provides:

The total Cost of Money for MDAC-HB (\$525,801) is shown in this Section. MDAC-STL Cost of Money of \$172,231 is included in the FCOM Cost Shown in Section 2.3.1.

(AR4, tab 123)

8. By letter dated 10 May 1988, PCO McNally requested that the Resident Office of DCAA at MDAC provide a field pricing report (FPR) including an audit on MDAC’s proposal by 24 June 1988 (AR4, tab 124). DCAA Audit Report No. 4461-8A210.113 dated 10 June 1988 found MDAC’s proposal “acceptable for negotiations of a price” (AR4, tab 125 at 4).

9. Because SDIO did not have time to put together a “definized contract” to put the satellite in orbit, SDIO and MDAC entered into a 19-page letter contract⁵. T. D. Burson, Vice President and Deputy General Manager, signed the letter contract for MDAC on 13 June 1988. PCO McNally signed the letter contract for SDIO on 16 June 1988. Block 3 of

the letter contract – Standard Form 26 (REV. 4-85) – indicated 15 June 1988 as the effective date of the letter contract. Section B of the letter contract pertains to “SUPPLIES OR SERVICES AND PRICE/COSTS.” CLIN 0001 pertains to DELTA Star Spacecraft, and refers to Section B-1 for pricing. CLIN 0002 pertains to “Launch Support and On-Orbit Operation.” Pricing on this CLIN is “TBD” or “to be determined.” CLIN 0003 pertains to “Contract Data Requirements List.” This CLIN is “Not Separately Priced (NSP).” (R4, tab 2)

10. Section B-1 “ESTIMATED COST AND FIXED FEE/PRICE” of the letter contract provides:

The total estimated cost and fixed fee for CLINs 0001 and 0003 of this letter contract is a not-to-exceed \$50,000,000.00.

Section F-4 “PERIOD OF PERFORMANCE” provides:

The period of performance (CLINs 0001 and 0003) for this contract shall be from 8 February 1988 through 30 August 1988. The period of performance for CLIN 0002 will be determined at the time of option exercise.

(R4, tab 2 at 2, 4)

11. Section H-16 “PRIOR CONTRACT WORK” of the SDIO contract provides:

The work on this contract includes the work authorized under Change Order Modification 173 to NASA Contract NAS5-28100 authorized [sic]. This encompasses all the work and costs incurred under the above Change Order and shall transfer these costs to this contract. Therefore, the effective date of this contract is 7 February 1988 which represents the date when the above Change Order⁶ was authorized. Because the clauses of this contract did not become effective prior to the execution of this contract they are not effective prior to the execution of this contract but will be effective at the time of and after contract execution.

(R4, tab 2 at 12)

12. Among the Federal Acquisition Regulation (FAR) clauses incorporated by reference into the SDIO contract were: FAR 52.215-30 FACILITIES CAPITAL COST OF MONEY (SEP 1987), and FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) (applicable after definitization) (R4, tab 2 at 16).

13. FAR 52.215-30 FACILITIES CAPITAL COST OF MONEY (SEP 1987), provides:

(a) Facilities capital cost of money will be an allowable cost under the contemplated contract, if the criteria for allowability in subparagraph 31.205.10(a)(2) of the Federal Acquisition Regulation are met. One of the allowability criteria requires the prospective contractor to propose facilities capital cost of money in its offer.

(b) If the prospective Contractor does not propose this cost, the resulting contract will include the clause Waiver of Facilities Capital Cost of Money.

14. FAR 52.216-7 ALLOWABLE COST AND PAYMENT (APR 1984) provides, in part, as follows:

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses . . . in amounts determined to be allowable by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract. . . .

15. At the time PCO McNally negotiated the letter contract, he was unaware of Article 19.0 of the NASA contract – that MDAC had waived FCCOM under that contract (tab 3, McNally, 32). Although PCO McNally was unaware of Article 19.0 of the NASA contract, we find that he was generally aware that the terms and conditions of the NASA contract and the SDIO contract might vary, and he included Section H-16 (see finding 11) in the SDIO contract specifically to ensure that whatever MDAC was entitled to under the SDIO contract would take effect only upon its execution (tab 3, McNally, 46). In addition, both parties clearly understood that until they entered into the SDIO contract, Delta Star work would proceed under the NASA contract (see finding 3). PCO McNally acknowledged that under the terms of the SDIO contract, SDIO was obligated to pay FCCOM (tab 3, McNally, 23).

16. Prior to execution of the SDIO contract in June 1988, the only contract in existence under which Delta Star work was done was the NASA contract. The reference to 7 February 1988 as the effective date in H-16, the “PRIOR CONTRACT WORK” clause, was to recognize and to pay for the cost MDAC incurred for work under the NASA contract. (Tab 1, Childs, 13; tab 3, McNally, 25-26, 46-47, 70, 94, 104-05)

17. MDAC submitted 20 vouchers (Standard Form 1034) under the SDIO contract. Voucher No. 1 was prepared in July 1988. Voucher No. 20 was prepared in September 1993. Each of the vouchers typically listed all of the major cost elements paid under the contract (*e.g.*, direct material, direct labor, overhead and general & administrative expenses). Each of the 20 vouchers included FCCOM as a cost element. In each instance, a resident DCAA auditor approved the voucher for provisional payment subject to later audit. Voucher No. 20 shows that, from inception to the billing date of the voucher, SDIO had provisionally paid \$1,079,922.00 in FCCOM under the SDIO contract. Under voucher No. 1, SDIO provisionally paid MDAC \$294,569.00 in FCCOM for the period February through June 1988. (AR4, tab 101)

18. Since Section H-16 of the SDIO contract provides that the clauses of that contract, including FAR 52.215-30, did not become effective prior to execution of the contract, *i.e.*, 16 June 1988, SDIO has taken the position that:

To the extent that the Government paid any provisional vouchers which contained any amounts for facilities capital cost of money attributable to the NASA contract, such payments were made in error and could be subject to appropriate action for recovery.

(*See* SDIO's answer to MDAC interrogatory no. 8, discussed at tab 7, O'Hern, 22; *see also* Motion Papers No. 3 at 5)

19. Even though MDAC completed the effort under the SDIO contract in 1990, no final voucher under the SDIO contract had been submitted as of 1997. Normally, upon receipt of the final voucher, the ACO would request a DCAA audit. (R4, tab 5; tab 7, O'Hern, 12, 63)

20. A part of the contract close-out process was to establish final contract costs. During that process, MDAC would review its files to ensure that all documents and all costs were properly accounted for, and all Government property properly transferred, returned or dispositioned. Closing out a contract is also the time to "clean up" mistakes in the administration of the contract. (Tab 1, Childs, 21-22) PCO McNally acknowledged that a part of the close-out process is to determine and pay the contractor allowable costs under the contract (tab 3, McNally, 84).

21. On 31 March 1997, over six years after the work under the SDIO contract was completed, MDAC's Manager of Contracts and Pricing, T.C. O'Connell (O'Connell) called the Administrative Contracting Officer of the SDIO contract, Rei Okabayashi (ACO Okabayashi) and advised that Modification No. P00009 of the SDIO contract was never definitized. O'Connell said that he was looking for a supplemental agreement to definitize

the effort. ACO Okabayashi called BMDO⁷ and was told that Marc Lesser (PCO Lesser) was now the PCO on the SDIO contract. (AR4, tab 118)

22. In a letter dated 2 April 1997, MDAC's O'Connell advised PCO Lesser:

. . . . The purpose of this letter is to respectfully request an extension to the period of performance of Contract SDIO84-88-C-0015 in order to allow for the resolution of an outstanding action(s).

Contract Modification No. P00009, dated 23 October 1989 (copy enclosed), authorized certain effort to be performed by MDA. Although this effort was so performed, a supplemental agreement definitizing the work was never issued. . . .

This issue recently came to light when this contract entered the close-out process and we determined close-out was not possible until all outstanding matters had been dispositioned. . . .

(R4, tab 3)

23. MDAC tracks FCCOM and other costs on computer generated ledgers (242 reports) maintained in its Analog 12 record keeping system (A12 reports), and regularly provides the resident DCAA office with copies of the report on microfiche for review (tab 7, O'Hern, 46). The customary treatment of FCCOM on MDAC's A12 reports was to "plus" it in and then "minus" it out for a net result of zero. MDAC showed FCCOM both as a credit and a debit because it was interested in the net amount for each contract or the amount it believed was the actual cash outlay. Debits and credits are reflected in MDAC's A12 reports as "applied" and "contra" entries. (Tab 7, O'Hern, 11-12) DCAA did not have a problem with MDAC's treatment of FCCOM in this fashion (tab 7, O'Hern, 14-15).

24. To recover costs for FCCOM, MDAC's practice was to start with the total costs reflected in the 242 report, then add an additional amount for FCCOM, and to present an invoice which combined these two amounts (tab 6, O'Donnell, 20-23).

25. Patricia A. O'Hern, the resident DCAA auditor at MDAC between 1987 and 1989, testified that MDAC's treatment of FCCOM was "the consistent treatment in all the contracts," and DCAA auditors should have been familiar with the treatment in MDAC's A12 report (tab 7, O'Hern, 24). While DCAA should have been familiar with MDAC's treatment of FCCOM in its A12 reports, O'Hern acknowledged that an ACO might not be familiar with MDAC's treatment because ACOs did not "work with the accounting report as

often as we do on the DCAA side” (tab 7, O’Hern, 24). O’Hern testified that, based on her dealings with PCOs, they knew very little about A12 reports (tab 7, O’Hern, 27).

26. In response to ACO Okabayashi’s verbal request on 2 April 1997, MDAC’s O’Connell by letter dated 28 April 1997 forwarded an “MDA-W A12 242 report” entitled “NTE MODIFICATION P00009 ACTUALS, PCIS WP5, WPN & W6VB1” (AR4, tab 114). After ACO Okabayashi received MDAC’s 28 April 1997 submission, she asked Takumi Mukai, a DCMC price analyst to review the submission. Both ACO Okabayashi and Mukai were familiar with the format of MDAC’s A12 reports. (Tab 8, Okabayashi, 43-44, 45, 55) Mukai’s review shows that he did not forget to add FCCOM back in as a part of the total incurred costs. In comparing the costs paid through Voucher No. 19 (30 September 1990) with the actual costs incurred as reflected in the March 1997 A12 report, and after applying \$100,000 withheld and the appropriate fee, Mukai found that the Government owed MDAC \$393,648. (AR4, tab 121 at 6) ACO Okabayashi testified that Mukai did not report back to her that SDIO owed MDAC money on the contract (tab 8, Okabayashi, 39). PCO Lesser testified that he was not aware of Mukai’s findings, and that had he been aware that SDIO owed MDAC money, he “would have asked for someone to reconcile that” (tab 2, Lesser, 25-26).

27. In a letter dated 26 June 1997 from MDAC’s Principal Contract Administrator for Space Transportation, G. Thomas O’Donnell (O’Donnell) to PCO Lesser, O’Donnell requested that “a reconciliation of the total Contract funding and the total Contract price be concluded based on the actual costs incurred in performance of the contractual effort.” The letter went on to say:

As a result of our review of this Contract, MDA has also determined that through Voucher #20 . . . MDA has been paid a total amount of \$63,257,600. This amount is in excess of the actual costs incurred by \$459,794. MDA will therefore refund this amount to the U.S. Government.

(R4, tab 5 at 1, 3)

28. MDAC’s 26 June 1997 letter included Attachment 1 which, in turn, included Attachment 1a (“The actual costs incurred in performing the subject contract”) and Attachment 1b (“A financial summary of the [SDIO] contract”). Attachment 1a was MDAC’s A12 report for July 1994. The last four pages of this 26-page report were MDAC’s “Monthly Cost Analysis Report.” Four separate “ALLOWABLE COST TOTAL” items added up to \$57,106,700.84 for the contract. FCCOM were “APPLIED” as Item 982 and Item 987 was entered as a “CONTRA” entry at several places. (R4, tab 5). The “ALLOWABLE COST TOTAL” amount of \$57,106,700.84 did not include FCCOM. At her deposition, DCAA auditor O’Hern, who was familiar with the format of MDAC’s A12 reports, recognized right away that the \$57,106,700.84 amount did not include FCCOM

(tab 7, O’Hern, 55). She acknowledged that MDAC’s treatment of FCCOM in the A12 report submitted as a part of its 26 June 1997 close-out proposal--positive line item followed by negative line item in like amount with the net effect of zeroing out each entry--was the customary way in which MDAC accounted for FCCOM (tab 7, O’Hern, 23).

29. Attachment 1b shows that MDAC made two non-FCCOM related adjustments to the \$57,106,701 amount resulting in \$56,958,961. The adjusted \$56,958,961 amount did not include FCCOM. MDAC compared what it believed to be the actual costs (including fee) incurred under the SDIO contract with what was paid under the contract and found that MDAC was overpaid \$459,794:

	<u>ACTUALS</u>	<u>VS.</u>	<u>PAID</u>	<u>DIFFERENCE</u>
COST	\$56,958,961		\$57,550,080	\$591,119 OVERPAID
FEE	<u>5,838,845</u>		<u>5,707,520</u>	<u>131,325</u> UNDERPAID
TOTAL	\$62,797,806		\$63,257,600	\$459,794 OVERPAID

It is undisputed that MDAC’s conclusion that it had been overpaid \$459,794 was based on its mistaken belief that the actual cost and fee incurred under the SDIO contract (\$56,958,961+\$5,838,845=\$62,797,806) included FCCOM. MDAC’s mistake was not that it failed to provide complete and accurate documentation. It did so in its A12 reports under Attachment 1a. As PCO Lesser recognized during his deposition, MDAC’s mistake was “failing obviously to add back in that cost of money figure at the bottom line” (tab 2, Lesser, 108).

30. MDAC’s 26 June 1997 close-out proposal letter also forwarded Voucher No. 20, prepared on 3 September 1993. This voucher showed the cumulative amount from inception of billing under the SDIO contract as follows:

TOTAL COSTS:	56,470,158.00
COST OF MONEY:	1,079,922.00
FEE:	5,749,920.00
LESS: FEE RETENTION:	0.00
	63,300,000.00

As before, this voucher was approved by DCAA on 9 September 1993 for provisional payment subject to later audit. (R4, tab 5)

31. O’Donnell, who submitted MDAC’s 26 June 1997 close-out proposal, prepared Attachment 1b. He testified that he obtained the close-out proposal numbers from MDAC’s accounting. (Tab 6, O’Donnell, 51-52) He also testified that while he was familiar with FCCOM and intended to collect FCCOM for his company, he was not familiar with the treatment of FCCOM in the A12 reports (tab 6, O’Donnell, 18).

32. After receiving MDAC's close-out proposal, PCO Lesser conducted a review and decided not to request an audit of the proposal because "McDonnell Douglas was offering to refund the Government money" (tab 2, Lesser, 64). Inasmuch as SDIO was receiving a refund, PCO Lesser was content to rely on MDAC's representation of the actual costs incurred (tab 2, Lesser, 73-74). He testified:

I was not looking at cost elements in '97. I was taking a document that Boeing gave me as representative of the contract six years after it was complete, and asking me to make changes to the Section B of the contract so we could proceed with closeout.

(Tab 2, Lesser, 69)

33. Subsequent to receipt of MDAC's 26 June 1997 close-out proposal, PCO Lesser called O'Donnell and advised that SDIO was "accepting the proposal as it was submitted." O'Donnell testified that PCO Lesser "was more concerned with where the data had come from . . . how soon would I be able to sign it." (Tab 6, O'Donnell, 30)

34. On 30 June 1997, ACO Okabayashi sent PCO Lesser a facsimile which asked Lesser "to let me know what specifically you want DCAA to audit for you." The message also said "I will be asking MDA for the \$459,794.00 check today--which will go to US Treasury." (R4, tab 6)

35. PCO Lesser did not request an audit. Consequently, neither ACO Okabayashi nor DCAA reviewed MDAC's 26 June 1997 close-out proposal. (Tab 2, Lesser, 22, 73-74) PCO Lesser was the only one who reviewed MDAC's close-out proposal. He acknowledged that he reviewed it only to the extent he understood it. (Tab 2, Lesser, 22-23)

36. On 8 July 1997, MDAC issued Check No. 482865 in the amount of \$459,794.00, made out to the Treasury of the United States. Upon receipt, ACO Okabayashi forwarded the check to Defense Finance and Accounting Service (DFAS) in Columbus, Ohio, on 9 July 1997. (R4, tab 7).

37. By letter dated 6 August 1997, PCO Lesser forwarded to MDAC Modification No. P00012. The letter explained that the purpose of the modification was to:

. . . facilitate contract close-out by definitizing Modification P00009, establishing the final contract cost plus fixed fee for items 0001 and 0003, establishing the final target cost and incentive fee for items 0002 and 0004, and de-obligating excess funds. . . .

(R4, tab 9)

38. Block 14 of Modification No. P00012 set out its purpose: “The Purpose of this modification is to definitize Modification P00009 and establish the final contract cost plus fixed fee for contract line item number (CLIN) 0001 and 0003 and the final cost plus incentive fee for CLIN 0002 and 0004” (R4, tab 11).

39. The text of Modification No. P00012 provides, in part:

In consideration of the modification agreed to herein as complete and equitable adjustment for the Contractor’s proposal for adjustment, McDonnell Douglas proposal dated September 22, 1989, (Proposal No. SDI-000-1452), as revised on November 2, 1989 (letter A3-L351-SDI-892523), April 19, 1990 (letter A3-L351-SDI-900993), and June 29, 1990 (letter A3-L351-SDI-901787), and the Contractor’s request for equitable adjustment dated June 26, 1997 (letter A3-L113-BMDO-971260), the Contractor hereby releases the Government from any and all liability under this contract for any further equitable adjustment attributable to such facts or circumstances given rise to the proposal and request for equitable adjustment.

As a result of the foregoing, Contract SDIO84-88-C-0015 is hereby modified as follows:

1. Part I - The Schedule, Section B, Supplies or Services and Price/Costs:

....

c. B-1

....

3. Total Contract Price, change to read: The Total Contract Price is \$62,797,806^[8].

....

2. This modification P00012 supersedes Modification P00009.

3. The Contractor hereby releases the Government from any and all claims arising out of this modification P00012.

4. All other terms and conditions of the contract remain unchanged.

(R4, tab 11)

40. MDAC's O'Donnell signed Modification No. P00012 on 26 August 1997. PCO Lesser signed the modification on 3 September 1997. (R4, tabs 10, 11) Neither PCO Lesser nor O'Donnell was aware that the total price recited in Modification No. P00012 failed to include any amount for FCCOM (tab 2, Lesser, 112; tab 6, O'Donnell, 56).

41. Although Modification No. P00012 contained a revised total contract price (\$62,797,806), both parties acknowledge that final payment⁹ under the SDIO has not occurred (tab 8, Okabayashi, 63; tab 1, Childs, 30; tab 2, Lesser, 78). PCO Lesser acknowledged that if, as a result of a final audit, DCAA found unallowable costs, SDIO could still disallow them. Notwithstanding the release clauses in Modification No. P00012, neither party considered the modification as the final step in completely closing out the SDIO contract.

42. When MDAC went to close out the contract, it discovered that there were costs that had not been billed. It went back and reviewed the close-out proposal, and discovered that a mistake had been made. (Tab 1, Childs, 24)

43. Over a year after Modification No. P00012 was signed, MDAC's Cynthia M. Childs, Acting Senior Manager for Contract Compliance and Export Compliance, advised PCO Lesser by letter dated 15 October 1998 that:

In the process of preparing the final closeout documentation, it was discovered that in June of 1997 when the analysis on current costs was performed, MDC failed to include Facilities Capital Cost of Money (FCOM), an allowable expense under the contract, in the analysis. As a result, Boeing refunded \$459,794.00 to the government and requested a reduction in contract funding of \$502,194 in error.

(R4, tab 12)

44. In an internal memorandum dated 26 October 1998, PCO lesser set forth his belief that the release clauses in Modification No. P00012 "preclude[s] Boeing/MDC from

seeking additional price adjustments from the Government.” He stated that to allow “the re-establishment of final prices for contract line items 0001 through 0004,” as MDAC requested “would jeopardize the Governments [sic] rights by setting a precedent that contract modifications definitizing final equitable adjustments are not binding on contractors.” (R4, tab 13)

45. PCO Lesser advised MDAC by letter dated 3 November 1998 that based on the release language set forth in Modification No. P00012, “the Government does not have a basis for making further adjustments to the contract.” The letter explained, “The parties mutually agreed that with the execution of P00012 complete and equitable adjustment due McDonnell-Douglas under the contract was accomplished.” (R4, tab 14)

46. MDAC’s 23 December 1998 letter to PCO Lesser stated that “there was an inadvertent omission of Facility Cost of Money from the calculations presented” in the 26 June 1997 letter. The letter points out that the omitted FCCOM data was in fact included in the factual data provided in Attachment 1a (*i.e.*, the A12 report):

Since the FCOM data preexisted the contract modification and was part of the proposal package, and both parties failed to discover the administrative oversight prior to the execution of P00012, MDC believes that such failure of both parties to notice the reconciliation discrepancy constitutes mutual mistake, negating the applicability of the contract modification release language.

Based on its calculation, detailed in the letter, MDAC submitted a certified claim in the amount of \$1,129,046. MDAC requested that “the Government review this data and provide either a contract modification increasing the contract value by \$1,129,046 or provide a final decision on the claim.” (R4, tab 15)

47. By letter dated 15 January 1999, PCO Lesser requested that ACO Okabayashi coordinate with DCAA to perform an audit on MDAC’s close-out proposal. The request explained that “[t]his audit is required to assist BMDO in review of Boeing Claim . . . dated 23 December 1998.” PCO Lesser also requested DCMC/DCAA to:

provide confirmation that CLIN values for contract line items (CLIN) 0001 and 0002 are correct as stated in the Boeing December 1998 claim, [as] opposed to the values in the June 1997 MDC letter. *Additionally, please provide comment on whether-or-not the cost data provided by MDC in A3-L113-BMDO-971260 [the 26 June 1997 close-out proposal], Attachment 1, was in itself sufficient to determine the October 15, 1988, revised CLIN values.*

(R4, tab 16) Even though PCO Lesser had already rejected MDAC's request for relief, he requested the audit because he now faced a claim and he wanted confirmation that the "numbers were correct this time" (tab 2, Lesser, 83).

48. PCO Lesser advised MDAC by letter dated 20 January 1999 that he was "currently reviewing" the claim. The letter sought from MDAC "any authority . . . stating that this sort of calculation error could affect an otherwise valid release." PCO Lesser provided his understanding of when relief might be possible:

Overall, I have been unable to find any authority supporting the premise that omitting a known cost element is grounds to question the validity of a release. My understanding is that a mistake must involve the release language itself to affect release validity

(R4, tab 17)

49. MDAC's 3 February 1999 response explained why it believed there had been a mutual mistake:

. . . . The cost data provided in our original proposal package included the cost of Facilities Capital Cost of Money, but the FCOM costs were left out of the total in error. At no time did the PCO indicate that FCOM should be deleted from the contract value. This arithmetical error is the basis of our claim for mutual mistake. The data was included; both parties failed to notice the omission. Therefore, the contract modification as executed did not reflect the intended contract value.

MDAC stated that it "does not agree that a mutual mistake must involve the release language itself, as opposed to the fundamental facts underlying the Settlement Agreement, in order to legally support contract reformation." MDAC concluded by stating that if the Government elected to deny entitlement, it wanted a final decision as soon as possible so that it could pursue its remedies under the Contract Disputes Act. (R4, tab 18)

50. ACO Okabayashi advised PCO Lesser by letter dated 3 February 1999 that the SDIO contract was not yet closed out because DCAA was reviewing MDAC's claim for FCCOM, and because MDAC had not submitted its final billing (R4, tab 19).

51. DCAA Audit Report No. 4461-99A17900006, issued on 17 March 1999, provided the following comments:

Subject to the qualification stated above, in our opinion, the contractor's 26 June 1997 analysis of Delta Star Contract No. SDIO84-88-C-0015, in the amount of \$56,958,961 for adjusted allowable cost (\$49,244,518 for CLIN 1 and \$7,714,443 for CLIN 2), did not include Facilities Capital Cost of Money (FCCOM). The contractor's cost report used to calculate the incurred costs is the No. 2.40 work-in-process report. The contractor's accounting practice is to book FCCOM and then "contra" delete these costs prior to the subtotal "Total Allowable Cost". For billing purposes the costs are generally added back, if applicable, in accordance with contract terms. The costs are deleted from work-in-process for financial accounting purposes.

In our opinion the report caption "Total Allowable Cost" is misleading, since FCCOM is not included, even when it is an allowable cost. Additionally, several of the No. 2.40 copies we reviewed were missing the last part of the numbers and therefore the minus sign, typically at the end of the numbers, which would have indicated a subtraction. Therefore, it is our opinion that there was little probability that the accounting treatment would have been apparent to the contracting officer, particularly considering the volume of data provided. However, certainly the contractor should be cognitive of its own accounting practices.

(R4, tab 21)

52. The audit report found that "the 10 June 1997 supporting data was sufficient to determine the 15 October 1998 revised contract price subject to the FCCOM issue"¹⁰ (R4, tab 21 at 3).

53. PCO Lesser testified at his deposition that, "[b]ased on their thing [the audit], it appears that Boeing/McDonnell Douglas at the time made a mistake" (tab 2, Lesser, 85). PCO Lesser acknowledged that, under the terms of the SDIO contract, FCCOM was an allowable cost. He testified:

And in effect, the FAR clause says facilities capital cost of money is allowable, and we expect Boeing to have it in their number.

(Tab 2, Lesser, 31-32)

54. PCO Lesser issued his final decision by letter dated 8 April 1999. The decision takes the position that the SDIO contract was not awarded until 16 June 1988, and MDAC's prior spacecraft development work proceeded under the NASA contract. Relying on Article 19.0 of the NASA contract, and Section H-16 of the SDIO contract, the decision stated that even assuming MDAC's claim had not been released by Modification No. P00012, the amount of FCCOM recoverable is estimated to be roughly \$689,970. The decision stated that "[a] final figure would require a detailed audit of [MDAC's] allowable pre-contract costs. At this point, however, it is apparent that the CLIN 0001 FCCOM calculation in [MDAC's] certified claim is excessive." The decision also takes the position that MDAC has failed to prove that there was a mutual mistake so as to negate the effect of the releases contained in bilateral Modification No. P00012. PCO Lesser acknowledged in his final decision that based on MDAC's representation in its close-out letter that it had provided actual costs incurred, "BMDO accepted [MDAC's] proposal without an audit . . . [inasmuch as] an audit would be unnecessary because [MDAC] submitted actual costs." (R4, tab 27)

55. MDAC appealed PCO Lesser's decision by notice dated 6 July 1999.

DECISION

Summary judgment is properly granted only where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-92 (Fed. Cir. 1987). The burden is on the movant to establish the absence of any genuine issues of material fact. A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When both parties move for summary judgment, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration. *Mingus*, 812 F.2d at 1390.

SDIO's Motion for Summary Judgment

In moving for summary judgment in its favor, SDIO asserts that the evidence "clearly establishes that Appellant's claim is barred by the valid release of Modification P00012 and that there are no genuine issues of material fact concerning validity of the release" (Motion Papers No. 1, Memorandum of Points and Authorities at 2).

As a matter of law, however, the validity of a release depends also upon whether there are circumstances under which a claim may be prosecuted despite the execution of a general release. In this connection, the Court of Claims had said "where it is shown that, by reason of a mutual mistake, neither party intended that the release cover a certain claim, the court will reform the release." *J.G. Watts Construction Company v. United States*, 161 Ct. Cl. 801, 806 (1963). Therefore, granting summary judgment for the Government in this case will depend on whether MDAC has made a sufficient showing that a mutual mistake might have been made.

SDIO clearly recognized this legal principle when it framed the legal issue in its motion as follows:

Stated briefly, the legal issue is whether the undisputed facts of this claim, and legal inferences in favor of the Appellant (the party opposing this motion), are sufficient to establish the defense of mutual mistake and thereby permit Appellant to void the otherwise valid release language of Modification P00012. The Appellant has made only an unsupported assertion of mutual mistake as grounds for voiding the release it negotiated and signed in Modification P00012. Further, Appellant has failed to offer any evidence to support the claim of mutual mistake or to raise any genuine factual dispute which would warrant voiding the release.

(Motion Papers No. 1, Motion at 2)

Subsequent to the filing of SDIO's motion for summary judgment in July 2000, counsel for the parties took a number of depositions in October 2000. On 1 December 2000, MDAC filed its opposition to SDIO's motion for summary judgment and its cross-motion for summary judgment (Motion Papers No. 2). As a part of its filing, MDAC submitted as Attachment A, eight depositions of those individuals involved in the dispute.

Our review of the depositions leads to a conclusion that MDAC has presented definite and competent evidence that in signing Modification No. P00012, both PCO Lesser and MDAC's O'Donnell might have made a mistake in assuming that the Total Contract Price (\$62,797,806) reflected in Modification No. P00012 included FCCOM. MDAC has demonstrated by definite and competent evidence that the Total Contract Price amount of \$62,797,806 did not in fact include FCCOM which SDIO acknowledged was an allowable cost under the SDIO contract. In deciding whether to grant a motion for summary judgment, factual inferences are to be drawn in favor of the party opposing summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Because we are required to draw the inferences in favor of MDAC that a mutual mistake might have been made when the parties agreed to the terms of Modification No. P00012, SDIO's motion for summary judgment on the ground of release is denied.

MDAC's Cross-Motion for Summary Judgment

We address next MDAC's cross motion for summary judgment. MDAC's cross-motion is based on several premises: (1) Modification No. P00012 does not bar MDAC's recovery of FCCOM because there existed both mutual and unilateral mistakes of fact; and

(2) The releases SDIO relies upon are invalid and unenforceable because they were not an intentional waiver of a known right, and because they lacked consideration (Motion Papers No. 2 at 18-29).

Mutual mistake is invoked “when the parties to the document are both mistaken as to some fact, and because of their mistake, they make an agreement which they would not have made had they not been so mistaken.” *Harrison Engineers and Construction Corp. v. United States*, 107 Ct. Cl. 205, 208 (1946). Among the remedies granted in the event of a mutual mistake is reformation. This equitable remedy is to “relieve a litigant in a proper case from the legal hardship of a document to which he has committed himself inadvertently and without comprehension of its effect upon his rights. The invention of the remedy by equity was a recognition that a legal document, however formal, must, in some circumstances give way to fairness and justice.” *Harrison Engineering*, 107 Ct. Cl. at 208.

A party seeking reformation of a contract due to mutual mistake must establish: “(1) the parties to the contract were mistaken in their belief regarding a fact; (2) that mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; and (4) the contract did not put the risk of the mistake on the party seeking reformation.” *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990).

In this case, each of the elements required to establish mutual mistake has been met. First, there is no dispute that FCCOM is an allowable cost under the SDIO contract because it was authorized by virtue of FAR 52.215-30 FACILITIES CAPITAL COST OF MONEY (findings 12, 13). MDAC’s O’Donnell testified that he intended to collect FCCOM for his company (finding 31). PCO Lesser acknowledged that, under the terms of the SDIO contract, FCCOM was an allowable cost (finding 53). Both parties in this case were mistaken in their belief that the Total Contract Price of \$62,797,806 reflected in Modification No. P00012 represented the total actual costs incurred under the SDIO contract (finding 40). The \$62,797,806 amount was derived from Attachment 1a to MDAC’s 26 June 1997 close-out proposal. The \$62,797,806 amount, in turn, was derived from the \$56,958,961 amount which did not include FCCOM. (Finding 28). To recover costs for FCCOM, MDAC’s practice was to start with the total costs reflected in the 242 report, then add an additional amount for FCCOM (finding 24). In this case, MDAC failed to add back FCCOM in presenting its close-out proposal, resulting in the mistaken belief that it owed SDIO \$459,794 (finding 29). The mistake on PCO Lesser’s part was his belief that MDAC had presented actual costs incurred under the SDIO contract (finding 32). In actuality, however, the amount MDAC presented in its close-out proposal letter did not include FCCOM (findings 27-29).

Second, both parties’ mistaken belief that the \$62,797,806 amount in Modification No. P00012 included the actual costs incurred under the SDIO contract, including FCCOM, was the basic assumption underlying their agreement in Modification No. P00012.

Third, the mistake, if corrected, would mean that SDIO would have to pay MDAC between an estimated amount of \$689,970 to over \$1 million (depending on whether MDAC is entitled to FCCOM for the period prior to 16 June 1988) as opposed to SDIO receiving a refund of \$459,794 in over-payment. The mistake, therefore, had a material effect on the agreement reached in Modification No. P00012.

As for the fourth element required to establish mutual mistake, SDIO argues the following legal point:

the very nature of P00012 release language was to require that [MDAC] assume risk. In the release, [MDAC] agreed that P00012 was a “complete . . . equitable adjustment.” Also, [MDAC] released the Government from liability for “further equitable adjustment” that could be “attributable to such facts or circumstances given rise to the proposal.” As a result of this language, [MDAC] assumed the risk that its proposal contained errors that, if known, may have led to further equitable adjustment.

(Motion Papers No. 3 at 9)

We reject this argument. As a matter of law, it is contrary to the well-established principle that there are special and limited circumstances in which a claim may be prosecuted despite the execution of a general release. Such circumstances include economic duress, fraud, or mutual mistake. *See J.G. Watts*, 161 Ct. Cl. at 806; *Mingus*, 812 F.2d at 1395; *Jorgensen Forge Corporation*, ASBCA Nos. 45846 *et al*, 94-3 BCA ¶ 27,093 at 134,999.

MDAC correctly points out that in cost reimbursement contracts, such as the one here, the risk of the actual cost of the contract is assumed by the Government. *See Ball Brothers Research Corp.*, NASA BCA No. 1277-6, 80-2 BCA ¶ 14,526 at 71,611, *citing* 20 Comp. Gen. 632, 636. In addition, FAR 52.216-7 ALLOWABLE COST AND PAYMENT, required SDIO to pay all of the costs the CO determined to be allowable (finding 14). The CO has no discretion in paying all of the allowable costs to which MDAC is entitled. The change MDAC now seeks is to include the omitted FCCOM in the total actual costs incurred under the SDIO contract. In this respect, PCO Lesser acknowledged that FCCOM is allowable under the contract (finding 53). Thus, had PCO been made aware that FCCOM was a part of the actual costs MDAC incurred, he would not have refused, but would have agreed, to pay the FCCOM. Consequently, we conclude that the SDIO contract did not put the risk of the mistake on MDAC.

Moreover, “[a] party bears the risk of a mistake when . . . (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.” RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981). In reviewing MDAC’s close-out proposal which ultimately led to Modification No. P00012, PCO Lesser chose not to look at the cost elements (finding 32). Nor did he request an audit (finding 35). Had he done so, the FCCOM omission would have been caught. DCAA auditors and even Mukai, a DCMC price analyst, who worked for ACO Okabayashi, were all familiar with the zeroing out approach MDAC accounted for FCCOM (findings 24, 25).

SDIO’s Other Arguments

Relying on DCAA’s audit opinion that “there was little probability that the accounting treatment would have been apparent to the contracting officer . . . [and] certainly the contractor should be cognitive of his own accounting practices” (*see* finding 51), SDIO appears to suggest that PCO Lesser could not have made a mistake since he did not know about the FCCOM omission (Motion Papers No. 1 at 2, Memorandum of Points and Authorities at 1) SDIO also suggests that MDAC’s O’Donnell was negligent in failing to add FCCOM back in as a part of the total actual incurred costs inasmuch as MDAC should know how its own accounting system worked. The parties’ common ignorance of the actual facts does not bar reformation. *Southwest Welding & Manufacturing Co. v. United States*, 373 F.2d 982, 991 (Ct. Cl. 1967). With regard to the contractor’s negligence, the court stated:

Even if we accept the Government’s premise and assume that plaintiff was negligent in ascertaining the proper price, such conduct does not bar reformation. In most, if not all, cases of mutual mistake, at least one party to the contract has not exercised the highest level of care. But the contractor’s negligence, alone, does not prevent reformation. This is especially true where the other party, rather than being harmed by the plaintiff’s actions, has become an unintended beneficiary as has the Government in this controversy.

To bar reformation in this case would allow SDIO to become an unintended beneficiary of \$459,794.00, to which it is not entitled.

Because SDIO has not shown there are genuine issues of material fact with respect to the existence of a mutual mistake in entering into Modification No. P00012, and because the undisputed facts support a conclusion that there was a mutual mistake made in entering into that modification, we hold that MDAC is entitled to reform the modification to include FCCOM as a part of its total actual costs incurred under the SDIO contract.

Entitlement to FCCOM Prior to Execution of the SDIO Contract

Having decided that MDAC's claim is not barred by release, we turn next to the question of whether it is entitled to claim FCCOM for any period prior to 16 June 1988, prior to PCO McNally's execution of the contract on behalf of SDIO.¹¹ As a part of Voucher No. 1, MDAC had been paid provisionally \$294,569.00 in FCCOM for the period February through June 1988 (finding 17). SDIO has asserted that this was merely a provisional payment subject to adjustment, and in any case, the payment was made in error (finding 18).

Even though MDAC proposed FCCOM as a part of the costs for the period of what ultimately became the SDIO contract, the letter contract that both parties agreed to and signed clearly provided at Section H-16, that the clauses of the contract, including FAR 52.215-30 FACILITIES CAPITAL COST OF MONEY (SEP 1987), would not be effective until the contract was executed. Thus, no FCCOM provision existed prior to 16 June 1988, obligating SDIO to pay FCCOM.

Because the only contract in existence prior to 16 June 1988 under which the Delta Star work was performed was the NASA contract, and because MDAC waived its right to claim FCCOM pursuant to Article 19.0 of that contract (findings 4, 16), we hold that MDAC is not entitled to recover FCCOM incurred prior to 16 June 1988.

CONCLUSION

SDIO's motion for summary judgment on the ground of release is denied.

MDAC's cross-motion for summary judgment is granted to the extent indicated; it is not entitled to FCCOM prior to execution of the SDIO contract (*i.e.*, 16 June 1988).

MDAC's appeal is sustained in part and denied in part as indicated. The appeal is remanded to the parties for determination of quantum in accordance with our decision on entitlement.

Dated: 11 March 2002

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
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 will refer to appellant as MDAC.

² The motion papers the parties filed include: (1) “RESPONDENT’S MOTION FOR SUMMARY JUDGMENT” with “MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT’S MOTION FOR SUMMARY JUDGMENT” (Motion Papers No. 1) filed 7 July 2000; (2) “APPELLANT’S OPPOSITION TO THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT AND APPELLANT’S CROSS-MOTION FOR SUMMARY JUDGMENT” (Motion Papers No. 2) filed 1 December 2000; (3) “GOVERNMENT’S REPLY TO APPELLANT’S OPPOSITION TO THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT AND GOVERNMENT’S OPPOSITION TO APPELLANT’S CROSS-MOTION FOR SUMMARY JUDGMENT” (Motion Papers No. 3) filed 29 December 2000; and (4) “APPELLANT’S RESPONSE TO THE GOVERNMENT’S REPLY TO APPELLANT’S OPPOSITION TO THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT AND APPELLANT’S REPLY TO THE GOVERNMENT’S OPPOSITION TO APPELLANT’S CROSS-MOTION FOR SUMMARY JUDGMENT” (Motion Papers No. 4) filed 26 January 2001.

³ Both parties relied extensively on the deposition testimony of eight witnesses. They are (1) Cynthia M. Childs (MDAC), (2) Marc Lesser (BMDO), (3) Col. William McNally (SDIO), (4) Takumi Mukai (Defense Contract Management Command (DCMC)), (5) T.C. O’Connell (MDAC), (6) George T. O’Donnell (MDAC), (7)

Patricia O'Hern (Defense Contract Audit Agency (DCAA)), and (8) Rei Okabayashi (DCMC). The transcripts of their testimony were submitted as Attachment A of MDAC's opposition to the Government's motion for summary judgment and MDAC's cross-motion for summary judgment (Motion Papers No. 2). Henceforth, reference to the testimony will be by tab number within Attachment A, name and page number, *e.g.*, Tab 2, McNally, 16.

4 As described in the eventual contract between SDIO and MDAC, the objective of the Delta Star program was to "modify and utilize residual assets from the SDIO Delta 180 and Delta 181 programs, together with other required hardware, to develop a new spacecraft capable of supporting an FY88 orbital flight experiment" (R4, tab 2, Statement of Work, ¶ 1.0).

5 The SDIO letter contract was definitized by Modification No. PZ0003, effective 23 November 1988 (AR4, tab 102).

6 Modification No. 173 under the NASA contract was effective 22 February 1988. Modification Nos. 173R1, 173R2 and 173R3 were effective on 10 March, 18 March, and 7 April 1988 respectively. (R4, tab 1) The record does not explain the discrepancy.

7 By 1997, SDIO had changed its name to BMDO.

8 This amount was derived from Attachment 1b to MDAC's 26 June 1997 close-out proposal. As explained in finding 27, this amount mistakenly did not include FCCOM.

9 FAR 52.216-7(h)(2) ALLOWABLE COST AND PAYMENT (APR 1984), provides, in part, that "[b]efore final payment under this contract, the Contractor . . . shall execute and deliver-- . . . (ii) A release discharging the Government, . . . from all liabilities, obligations, and claims arising out of or under this contract"

10 The audit found there was a \$1,129,046 difference between the 10 June 1997 and the 15 October 1998 letters which was the amount MDAC claimed. A part of the difference (\$1,081,991) was due to adding FCCOM back in as allowable costs. There was also a \$33,046 decrease in the 15 October 1998 amount due to incentive fee adjustment. (R4, tab 21 at 3)

11 During a conference call held on 15 February 2002, the parties agreed the issue is one of entitlement and the Board can decide the issue.

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. 52256, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

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