ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Moshman Associates, Inc.	)	ASBCA No. 52868
	)	
Under Contract No. 290-90-0031	)	

APPEARANCE FOR THE APPELLANT: Mr. Jack Moshman
President

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Robbins, Esq.
Martha C. Craig, Esq.
Trial Attorneys
Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE KIENLEN

Appellant, Moshman Associates, Inc., seeks payment for services, under a cost-plus-fixed-fee contract, in an amount in excess of "allotted" funds. The Government asserts that the Limitation of Funds (LOF) clause transferred the risk of excess costs to the appellant. Appellant argues that it could not have reasonably anticipated the cost overrun, which was caused after contract performance by an unexpected increase in its indirect costs. The appeal is decided on the record under Board Rule 11. We sustain the appeal.

FINDINGS OF FACT

On 28 September 1990, the Department of Health and Human Services (HHS) awarded this contract for support services in its health care policy and research functions.[1] The period of performance was to end on 27 September 1995. The estimated final cost of this cost-plus-fixed-fee contract was $5,808,487. Funds were allotted from time to time, and fully allotted on 31 March 1994, by Modification No. 7. (R4, tab B)

The contractor was to provide "all necessary personnel, materials, services, [and] facilities" required by the Project Officer. The contract work included the preparation of "substantive health services research and health policy materials and documents" up to 20 times per year. The contract work also included the planning, scheduling, and arranging (including transportation, lodging, and meals) for "approximately 25 meetings per year of normally one to three days duration," where attendees could number as many as two hundred individuals including state legislators, state and local officials, senior health industry representatives, and health services researchers. (R4, tab B, § C.3 at 4 of 30)

The contract provided for negotiated final indirect cost rates following each of the contractor's fiscal years. Pending the negotiation of final indirect cost rates, the contractor was directed to bill at provisional rates. The contract established the initial provisional indirect cost rates at 70.0 per cent for overhead and 14.0 per cent for G & A. (R4, tab B, § G.4, at 10 of 30) The appellant's fiscal year (FY) begins on 1 March and runs through the end of February. (Compl. and ans. ¶ 6; R4, tab A)

Among the standard clauses incorporated by reference was the clause entitled ALLOWABLE COST AND PAYMENT (JUL 1991), located at FAR 52.216-7 (R4, tab B at 29 of 30). That clause set forth requirements for invoicing, for provisional indirect cost billing rates, and for negotiating final indirect costs rates. It read in pertinent part as follows:

> ALLOWABLE COST AND PAYMENT (JUL 1991)
>
> (a) *Invoicing*. The Government shall make payments to the Contractor when requested as work progresses . . . .
>
> . . . .
>
> (d) *Final indirect cost rates*. (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.
>
> (2) The Contractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by the Contracting Officer, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by agency procedures, to the cognizant audit activity[,] proposed final indirect cost rates for that period and supporting cost data specifying the contract and/or subcontract to which the rates apply. The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.
>
> (3) The Contractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. . . .

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(e) *Billing rates*. Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates –

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

Another pertinent standard clause, included in full text, was entitled LIMITATION OF FUNDS (APR 1984), located at FAR 52.232-22. That clause required the contractor to give notice when it had reason to believe that contract costs it expected to incur will exceed 75 per cent of the funds allotted within the next 60 days, and to provide an estimate of the amount of additional funds that are required to continue performance for the period specified in the contract. The clause relieved the contractor from continued performance after the allotted funds had been spent, unless the contracting officer allotted more funds. That clause read in relevant part:

LIMITATION OF FUNDS (APR 1984)

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule . . . . The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost . . . .

(b) . . . The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government or, (2) if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor's corresponding share. The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

. . . .

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause –

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government or, (ii) if this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

. . . .

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect

> the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

(R4, tab B at 15-17 of 30)

The parties agreed to final indirect cost rates for FY 1991 in July 1994. Those negotiated rates were 66.51 per cent for overhead and 7.18 per cent for G & A. These were less than the provisional rates. The parties also agreed to continue the original provisional indirect cost rates for all succeeding years until those provisional rates were amended. (R4, tab B, Modification 8)

By letter of 12 January 1995, the appellant notified the Government that “the most recently submitted invoice, No. 49, brought the cumulative amount of our billings in excess of 75 percent of the sums obligated in the referenced contract.” The appellant also stated that it “believe[d] that the existing contract amount will suffice for us to complete all outstanding assignments and any additional new assignments that we may reasonably expect.” (App. reply br., ex. A) Invoice No. 49 covered the service period for the month of November 1994.

On 30 June 1995, in order “to provide for additional funding for additional work assignments issued under the contract” the Government increased the estimated costs by $292,443 and the fixed fee by $39,149, for a total increase of $331,592. This raised the total cost under the contract to $6,140,079, of which $446,904 was the fixed fee. At the same time, additional funds were allotted to fully fund the contract.[2] The completion date remained 27 September 1995. Neither the contract modification, nor other documents in the record explain the nature of those “additional work assignments.” (R4, tab B, Modification 11) On 28 August 1995 the parties extended the term of the contract for six months, through 27 March 1996, with no change in funding. (R4, tab B, Modification 12) The record is silent as to why the contract period was extended.

On 18 January 1996, in the eleventh month of appellant’s fiscal year, the appellant requested a three month extension until 27 June 1996. That request was granted in Modification No. 14, dated 28 February 1996. That modification also changed the contract number, from 282-90-0031 to 290-90-0031, incident to a reorganization of the cognizant HHS agency. (R4, tab B)

The appellant had been performing these services under various contracts for HHS since September 1982, and had decided during the performance of this contract not to bid on the follow-on contract, but “to provide [its] services to a new client with new challenges." By early January 1996 the appellant had submitted "various proposals . . . to different federal agencies for work that would take up the slack left at the conclusion of the [subject] contract." (Supp. R4, tab A-1, ¶¶ 11, 12)

The appellant's FY 1996 ended on 29 February 1996. During April 1996, the second month of the appellant's FY 1997, the appellant relocated to smaller and less expensive facilities in order to reduce its indirect costs. On 16 April 1996 the contract was modified to reflect the appellant's new location and mailing address. During the remainder of the contract and during the months following contract completion, the appellant also undertook other cost-cutting actions, including eliminating salary increases and bonuses, travel to professional meetings, and changing its insurance carrier in order to reduce the costs of company medical insurance. (R4, tab B; supp. R4, tab A-1, ¶ 14)

The appellant had an adequate accounting and financial reporting system which timely monitored its costs. (Supp. R4, tab A-2, ¶ 4, A-3, ¶ 4) The appellant did not, at any time during contract performance, advise the Government that additional funds would be required to complete the contract. The contract was completed on 27 June 1996, four months into appellant's FY 1997 (R4, tabs B, C).

During the remaining eight months of the appellant's FY 1997 the appellant was successful in securing some new contracts in FY 1997; however, the new work was small compared to an anticipated contract with the HHS' Assistant Secretary for Planning and Evaluation (ASPE), which was to be "for up to $1 million annually for up to five years." Appellant was awarded the ASPE contract; however, the award was not made until March 1997, *i.e*., after the beginning of appellant's FY 1998, "which was too late to have had any effect on the indirect cost rates for fiscal year 1997, which was the period that so affected the [subject] contract . . . ." (Supp. R4, tab A-1, ¶¶ 12, 13)

For reasons not explained by the record, no final indirect rates had been negotiated since the FY 1991 rates were negotiated back in July 1994 (R4, tab B, Modification 8). Finally, as approved on 29 September and 3 October 1997, the parties negotiated final indirect rates for the 1992 through 1996 fiscal years. That agreement left appellant's FY 1997 (1 March 1996 through 28 February 1997) indirect rates set at new provisional rates. (R4, tab C)

By letter dated 23 December 1997, some 18 months after the end of performance, appellant submitted a request for "approval of final indirect rates for the fiscal year which ended February 28, 1997," *i.e*., FY 1997. The rates requested were: headquarters overhead – 153.71%, field overhead – 46.69%, and G&A – 121.37%. Appellant stated that the "sharp increase in our rates reflects a drastic reduction in the level of business during the fiscal year while retaining a basic core capability to attract new business." Appellant offered to negotiate a "reasonable compromise" as final rates. In a follow-up letter, dated 9 April 1998, appellant further explained that "the rates for the last year jumped up precipitously primarily because of the reduction in our direct charges for all work done following the termination of the subject contract." (R4, tab C)

By letter of 29 July 1998 the contracting officer advised the appellant that the audit was nearly complete and requested the appellant to submit a final invoice:

> Our Senior Staff Accountant has just about completed his desk audit on the closeout of the subject contract and it appears that there are funds remaining unspent in the contract.
>
> Therefore, it is requested that you submit a final invoice for any outstanding costs incurred in performance of the contract.

(R4, tab D) On 24 August 1998 the appellant submitted its final invoice in the amount of $280,559.67, reflecting its revised final indirect rates for the FY 1997 as follows:

Type of Cost	Provisional Rate	Revised Final Rate
Headquarters Overhead	78.50 %	78.50%
Field Overhead	30.00%	46.69%
G & A	10.00%	121.37%

(R4, tabs C, E)

Thereafter, the parties continued to negotiate the final indirect rates for the FY 1997. Final negotiated rates were proposed by the Government on 12 January 1999 and formally approved by the parties on 9 and 10 February 1999 (R4, tab L). Those final negotiated indirect cost rates for the FY 1997 were reflected in a revised final Voucher No. 70, dated 10 February 1999, in the amount of $186,084.99. Those revised final negotiated rates were as follows:

Type of Cost	Provisional Rate	Final Rate
Headquarters Overhead	78.50 %	102.09%
Field Overhead	30.00%	46.69%
G & A	10.00%	102.49%

(R4, tabs A, C, F)

Appellant submitted its "final voucher" dated 10 February 1999, requesting $186,084.99. That amount included adjustments, based on changes in the negotiated final indirect rates, for most of the FYs of the contract period. By letter dated 3 June 1999, the Government returned the voucher because it "represent[ed] a cost overrun." The

Government stated that $15,369.05 remain "unspent" under the contract, and invited appellant to submit an invoice in that amount. (R4, tab A)

The Government's letter pointed out that the contract performance period had been extended three months on 28 February 1996 at appellant's request, and that the request had specifically not asked for any additional funds. The Government also noted that only one work assignment had been issued after that date, and the tasking letter had asked appellant to notify the Government "at once" if sufficient funds were not available. The Government reasoned that appellant's "financial situation (which created a significant increase in indirect costs) should have been known at the time the modification was requested and the work assignment was accepted." Thus, the Government concluded that since appellant "knew or should have known of the impending cost overrun and did not notify the" Government, there was no obligation to make any payment in excess of the final allotted contract amount. (R4, tab A)

By letter dated 2 July 1999, appellant responded to the denial of its voucher, asserting it could not have known of the subsequent cost overrun. Among the reasons given, appellant stated that it had been negotiating a large contract with another HHS agency in January 1996, when it made its request for a three month extension. According to appellant, if work under the new contract had materialized "as expected," appellant's indirect costs would have been consistent with the contract's provisional rates. Appellant also asserted that part of the costs levied against the contract were for airline tickets paid for with Government charge cards, and for which appellant did not have timely access to information concerning the amount of charges. (R4, tab G)

On 18 August 1999 the appellant appealed from the contracting officer's 3 June 1999 denial of appellant's 10 February 1999 voucher. That appeal was docketed at the Board and subsequently dismissed without prejudice for lack of jurisdiction. *Moshman Associates, Inc.*, ASBCA No. 52320, 00-1 BCA ¶ 30,906.

By letter dated 19 May 2000, appellant resubmitted its voucher as a claim, with a proper certification of the amount claimed (R4, tab O). By decision dated 6 July 2000, the contracting officer denied appellant's claim because the claim represented an overrun and appellant had failed to provide proper notice of the overrun in accordance with the contract terms (R4, tab N). Appellant timely filed its notice of appeal.

The total dollar variances in billings between application of the provisional billing rates and the final negotiated rates for each of the fiscal years, as reflected in the appellant's final voucher, are as follows:

Fiscal Year	Change in Billings
1991 (ending Feb 91)	$0.00
1992 (ending Feb 92)	$(4,252.72)

1993 (ending Feb 93)	364.58
1994 (ending Feb 94)	1,059.59
1995 (ending Feb 95)	1,025.19
1996 (ending Feb 96)	4,436.51
1997 (ending Feb. 97)	183,451.84
Total Change	186,084.99

(R4, tab A)

If the actual cumulative year-to-date indirect cost rates for the period of March through May 1996, *i.e*., the first three months of appellant's FY 1997, had been applied to the four months of contract performance from March through June 1996, instead of the provisional billing rates, the total billings for those four months would only have been increased by $7,868. (App. reply br., ex. C, accountant's aff.)

Thus, if the appellant's fiscal year had ended on 30 June 1996, instead of February 1997, the total dollar variances in billings would, instead, have been as follows:

Fiscal Year	Change in Billings
1991 (ending Feb 91)	$0.00
1992 (ending Feb 92)	$(4,252.72)
1993 (ending Feb 93)	364.58
1994 (ending Feb 94)	1,059.59
1995 (ending Feb 95)	1,025.19
1996 (ending Feb 96)	4,436.51
1997 (if ending Jun 96)	7,868.00
Total Change	10,501.15

This total of $10,501.15 is less than the $15,369.05 which the contracting officer said was remaining on the contract. We find that the appellant, based on actual cumulative year-to-date indirect rates, was not operating at a cost overrun at the end of the contract, or at any time during contract performance.

Of course, the appellant's fiscal year did not end on the day the contract ended, the fiscal year ended eight months later on 28 February 1997. That fact, and the fact that the appellant was not successful in obtaining all the expected new business, resulted in a steep rise in the appellant's indirect costs, as retroactively applied to the four months of contract performance. We find that the re-computation of indirect rates, as required by the contract, resulted in a cost overrun solely as a result of an increase in indirect rates subsequent to contract completion.

Appellant was founded in 1970, and has had the same president, Mr. Moshman, during that time. In addition to being the chief executive officer, Mr. Moshman serves as Treasurer. (Supp. R4, tab A-1, ¶ 1) In that capacity, he is responsible for "overall financial management which includes cash and investment management, financial budgeting and supervision of the accounting operations of the company." (*Id*.) Mr. Moshman's educational background is in mathematical statistics (BA, MA, PhD) and economics (BA). (*Id*. at ¶ 2)

Since its inception, appellant "has concentrated on having, at any one time, one or two dominant projects on which the management and staff could concentrate[,] and a varying number of smaller assignments to provide further challenges and diversity in work to the staff." (*Id*. at ¶ 5) During the period from September 1982 through completion of the referenced contract in June 1996, appellant worked continuously on a series of contracts with the same federal agency. (*Id*. at ¶ 6) Those contracts usually "extended for periods of three to six years[,] and were valued in the low to middle seven digit amounts." (*Id*.)

DECISION

Appellant seeks reimbursement of a cost overrun incurred when its end of fiscal year actual indirect costs proved to be higher than the negotiated indirect costs used for billing purposes during contract performance. The Government refused to pay the total amount of appellant's final voucher because it represented a cost overrun for which appellant had failed to provide notice as required under the contract. Appellant argues that, during contract performance, it could not have reasonably foreseen that there would be an overrun and thus it could not provide such notice.

This case involves the application of the LOF clause where (1) the contract terminates during, rather than at the end of, the contractor's accounting or fiscal year; (2) the contract provides for the use of provisional indirect overhead rates for billing purposes; (3) the contract provides for the negotiation of the final indirect overhead rates at the end of the contractor's fiscal year; and, (4) this final reconciliation of the contractor's actual indirect overhead rates causes an overrun of the funding limitation.

The landmark decision governing such circumstances is the case of *General Electric Company v. United States*, 440 F.2d 420 (Ct. Cl. 1971), *rev'g General Electric Company*, ASBCA No. 12466, 69-1 BCA ¶ 7708. The Board, in rejecting the contractor's claim for an overrun, held that:

> [A]bsent either Government fault or intervention causing post-performance overhead rate increases within the contractor's accounting period, the risk of such increases in overhead cost ratio, whether or not foreseeable during performance, clearly must be the contractor's . . . .

69-1 BCA at 35,780. The Court of Claims held that this allocation of risk by the Board was erroneous. *General Electric Company v. United States*, 440 F.2d at 425.

General Electric Company did not provide any notice of an overrun because during the period of contract performance its current actual indirect rates did not give it reason to believe a cost overrun would occur. It was only after the end of contract performance that, "because of substantial losses of expected business which would have enlarged the direct engineering labor costs for the period," the actual indirect rates increased, causing an overrun after the indirect costs were re-computed on a fiscal year basis. *General Electric Company*, 69-1 BCA at 35,767.

As the Court said, the "current cumulative expenditures and commitments, based in part upon its then cumulative year-to-date actual overhead rates, were [during the final months of contract performance] within the total estimated cost of the contract and therefore there was no revised estimate of the total estimated cost which could then be given." *General Electric Company v. United States*, 440 F.2d at 424, quoting 69-1 BCA at 35,779.

The issue in such cases, where there is a limitation of costs or LOF clause, as in this case, is whether the overrun was reasonably foreseeable. The burden of proving that a cost overrun was not reasonably foreseeable rests on appellant. "However, in carrying its burden of proof, the contractor must only prove that it could not have reasonably foreseen the cost overrun during the time of performance of the contract." *RMI, Inc. v. United States*, 800 F.2d 246, 248 (Fed. Cir. 1986) (vacating and remanding ASBCA No. 28831, 85-3 BCA ¶ 18,231, which was settled and then dismissed by unpublished order of 7 January 1988). The essential test is whether the contractor "knew or should have known," prior to the end of contract performance that there would be a total cost overrun at the end of its fiscal year. *RMI, Inc. v. United States*, 800 F.2d at 248; *General Electric Company v. United States*, 440 F.2d 420, 424 (Ct. Cl. 1971).

The predicate for carrying its burden to prove that the contractor did not know, or should not have known, of the overrun during contract performance, is the contractor's "attendant duty to maintain an accounting and financial reporting system to secure timely knowledge of probable overruns before costs are incurred. The contractor is also responsible for failing to properly evaluate the financial data which the accounting system does generate." *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 311 (Fed. Cir. 1997), quoting with approval from *Lansdowne Steel & Iron Company, Inc.,* ASBCA No. 41110, 95-1 BCA ¶ 27,506 at 137,081.

Thus, as the Government correctly notes, the appellant is responsible for having an adequate accounting system and for monitoring its costs. *3C Systems, Inc.*, ASBCA No. 41463, 91-2 BCA ¶ 23,916. If the appellant fails to do so, it bears the risk of failing to provide notice because of its ignorance. In considering the contours of such a system, the

Government cites *Stanwick Corporation*, ASBCA No. 14905, 71-2 BCA ¶ 9115, *aff'g* 71-1 BCA ¶ 8777, for the proposition that the contractor has an obligation to endeavor to predict future events and "to provide the requisite notice where an overrun is foreseen." (*Id.* at 42,244)

In understanding the *Stanwick* case it is important to note that the original decision concluded that the overrun resulted from an increase in indirect overhead rates; and, based its holding on the Board's earlier decision in *General Electric Company*, ASBCA No. 12466, 69-1 BCA ¶ 7708. The original *Stanwick* decision, 71-1 BCA at 40,760, had quoted approvingly from the *General Electric* case where the Board said:

> [A]bsent either Government fault or intervention causing post-performance overhead rate increases within the contractor's accounting period, the risk of such increases in overhead cost ratio, whether or not foreseeable during performance, clearly must be the contractor's . . . .

In reversing the Board's *General Electric* decision, the Court of Claims expressly rejected the Board's allocation of risk. *General Electric Company v. United States*, 440 F.2d at 424-25. Based on that latter decision, Stanwick Corporation filed a motion for reconsideration. The Board found on reconsideration that the overrun was not, as it had previously found, the result of understated overhead rates. Instead, the Board found, on further review of the record, that the direct costs, in and of themselves, caused the overrun. (71-2 BCA at 42,242). Thus, the Board's statement in *Stanwick*, in its decision on reconsideration, must be understood in the context that the overrun was caused by direct billings which the contractor knew or should have known, during contract performance, would exceed the total estimated cost. This is so because the direct costs did not change after contract performance.

The Government also argues, citing *Messer Associates, Inc.*, ASBCA No. 22365, 78-1 BCA ¶ 13,059, that the contractor's failure to obtain "[hoped] for new business did not excuse the contractor's obligation to give notice." In support of that proposition the Government also cites *Defense Systems Concepts, Inc.*, ASBCA No. 45920, 94-2 BCA ¶ 26,721, *aff'd*, 41 F.3d 1520 (1994) (table); *Datex, Inc.*, ASBCA No. 24794, 81-1 BCA ¶ 15,060; and, *Planar Corporation*, ASBCA No. 21060, 77-1 BCA ¶ 12,269. In those, and many other cases, the contractor unsuccessfully argued that it was excused from giving notice of an existing overrun (based on cumulative year-to-date actual overhead rates) because the contractor expected new business to eliminate the overrun by the end of its fiscal year. The contractors argued in those cases that the overrun would be eliminated because the new business would add to the direct cost base and thus lower the indirect overhead rates, which were the cause of the overruns.

With respect to those cases where the Board has addressed the issue of expected future business, the Board's statements must be understood in the context of contractors hoping to eliminate current overruns, due to higher than expected current indirect overhead rates, by obtaining new business that would lower the indirect rates. In those cases, the Board found that the current monthly and cumulative indirect costs revealed that the current indirect rates were higher than the provisional rates used for billing purposes. When the current monthly and cumulative indirect rates were applied to the direct costs, it was apparent that there would be an overrun. The contractor failed to provide a notice of that foreseeable overrun, arguing that it expected that new business would so increase the direct billings that the indirect costs would be spread among the larger pool of direct costs, thus lowering the indirect rates and eliminating the overrun. The Board has consistently rejected such arguments as a valid basis for failing to give notice of the expected overrun based on current accounting data during contract performance. *E.g., John I. Thompson Company*, ASBCA No. 17462, 74-1 BCA ¶ 10,412; *Systems Engineering Associates Corporation*, ASBCA Nos. 38592 *et al*., 91-2 BCA ¶ 23,676 at 118,577-78; *Defense Systems Concepts, Inc.*, ASBCA No. 45920, 94-2 BCA ¶ 26,721, *aff'd*, 41 F.3d 1520 (1994) (table).

In this case the facts are clear. We found that if the appellant had billed, during the first four months of its FY 1997 (March through June), at the then available actual cumulative year-to-date indirect rates, instead of the lower adjusted provisional rates, the total billings would still have been less than the total funds remaining on the contract. At no time during contract performance did the then current actual cumulative year-to-date indirect rates cause an overrun of the funds allotted to the contract. Thus, the instant case is unlike the cases discussed above, where the current monthly and cumulative year-to-date indirect rates caused a current overrun.

Nevertheless, when the actual indirect rates were calculated for appellant's entire fiscal year (appellant's fiscal year ended on 28 February 1997, eight months after completion of the contract on 27 June 1996) and those rates were applied to the direct billings under the contract, a contract overrun did occur. This overrun was caused solely by an increase in the indirect overhead rates. The overrun did not develop until after performance under the contract was completed. The overrun was caused by an increase in the indirect overhead rates as a result of events that occurred solely after completion of the contract.

This increase in the indirect overhead rates was caused, not by an increase in indirect costs, but by an unexpected decrease in total business over which the indirect costs could be spread. The appellant expected to be awarded a major new contract after completion of the current contract. However, that new contract was not awarded until the following March, during appellant's FY 1998. Thus this new business was not available to absorb the overhead costs during FY 1997. With fewer direct costs to absorb the overhead, the overhead rates increased and were borne increasingly by those fewer direct costs, including the last four months of direct costs under the instant contract.

The Government argues that the appellant should have foreseen the possibility that the expected new business might not materialize; and, thus the appellant should have provided the notice required by the LOF clause. That is not the test. What the Board said in *ARINC Research Corporation*, ASBCA No. 15861, 72-2 BCA ¶ 9721, applying the rule of *General Electric Co. v. United States, supra*, is instructive. The Board in *ARINC* held that "An accurate forecast of actual overhead rates nine months in advance could only be attributable to just plain luck or to the possession of clairvoyance of a magnitude which we are unwilling to say ARINC should have possessed." 72-2 BCA at 45,407.

The correct rule established by the Court of Claims in *General Electric Co. v. United States, supra*, and reiterated by *RMI, Inc. v. United States, supra*, is that where the contractor's accounting system shows that current expenses, accounting for the one month lag time inherent in accounting systems, *RMI, Inc.*, 800 F.2d at 248, are within the funding allocation, a decline in expected business after the end of contract performance, but before the end of the contractor's accounting period, will not require a notice, since the contractor does not know during contract performance that there will be an overrun. Because a notice is not required, the limitation of the LOF clause does not apply. We have consistently followed this rule. *ARINC Research Corporation*, ASBCA No. 15861, 72-2 BCA ¶ 9721; *General Electric Company*, ASBCA No. 18980, 75-1 BCA ¶ 11,287 at 53,794; *Carltech Associations, Inc.*, ASBCA No. 42576, 93-1 BCA ¶ 25,267 at 125,855; *accord Bissett-Berman Corporation*, NASA BCA No. 1270-19, 73-2 BCA ¶ 10,346; *Metametrics, Inc.*, IBCA No. 1552-2-82, 82-2 BCA ¶ 16,095; *cf., Marine Design Technologies, Inc.*, ASBCA Nos. 43142, 43914, 99-1 BCA ¶ 30,224 at 149,530-32 at ¶¶ 9-14, 149,535 (notice not required for completed delivery orders, but required for *ongoing orders* after contractor reasonably knew *during performance* that current and expected orders were insufficient to prevent a cost overrun - contractor was not seeking other business). The appellant is entitled to be paid at its negotiated final indirect overhead rate.

The appeal is sustained. The parties are to determine quantum.

Dated: 6 May 2002

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

NOTES

[1] The original contract designation was 282-90-0031, but was changed by Modification No. 14 on 28 February 1996 (R4, tab B).

[2] The amount billed versus the total amount allotted never fell below 75 per cent after the initial 12 January 1995 notice in accord with the LOF clause. At the end of April 1995, according to Voucher No. 54, the total funds expended amounted to over 85.25 per cent of the allotted funds. By the end of May 1995, according to Voucher No. 55, the total funds expended amount to over 86.76 per cent of the allotted funds. Even allowing for the infusion of the additional funding that came on 30 June 1995, the expenditures during the month of May would have resulted in total funds expended of over 82.08 per cent of what was to become the new level of funding. (R4, tab B; app. reply br., ex. B)

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. 52868, Appeal of Moshman Associates, Inc., rendered in conformance with the Board's Charter.

Dated:

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