ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Contel Advanced Systems, Inc.	)	ASBCA Nos. 50648, 50649,
	)	51048, 51049
Under Contract No. N60530-90-D-0023	)	

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OPINION BY ADMINISTRATIVE JUDGE HARTY

These appeals arise from a contract awarded by the Department of the Navy in September 1990 to Contel Advanced Systems, Inc. (CASI). The contract called for CASI to design, install, and maintain a new, state-of-the-art telecommunications system, known as the Center Telecommunications System (CTS), at the Naval Weapons Center in China Lake, CA. Performance was divided into two phases: (1) implementation phase; and (2) operation, maintenance and administration phase (OM&A). The implementation phase of the contract was awarded based on CASI's firm fixed-price, 60-month lease to ownership plan (LTOP) price of $30,009,154.80

The present appeals[1] involve a dispute over the contract's LTOP price. In ASBCA Nos. 50648 and 51048, CASI maintains that the Navy breached the contract by failing to timely adjust the LTOP price. The Navy disputes CASI's breach claim and asserts its own claim in ASBCA Nos. 50649 and 51049 based on its understanding of the contract's requirements.

Only entitlement is before the Board. Because we conclude that the Government breached its contractual obligation, and its claim is, therefore, without foundation, the appeals are sustained in ASBCA Nos. 50648 and 50649. The matter is remanded to the parties to negotiate quantum. ASBCA Nos. 51048 and 51049 are dismissed as duplicative.

FINDINGS OF FACT

The CTS Solicitation

In 1987, the Navy issued Request for Proposals No. N60530-87-R-0101 (Revision I) (RFP). The RFP contemplated two phases of contract performance: (1) an implementation phase, during which the contractor would design, build, install, integrate, and test the CTS; and (2) a follow-on period, after the new system was operational, during which the contractor would maintain and administer the CTS. The two phases were to be priced separately. According to the RFP, the implementation phase would be considered complete upon acceptance of the CTS. (SR4, tab 1 at 18, Attach. 1-Statement of Work (SOW) at 1-3, tab 2, Attach. 11-Instructions for Proposal Preparation (IPP) at 29-30, ex. D)

The RFP instructed offerors to quote prices for the implementation phase, defined as Contract Line Item Number (CLIN) 0001, under four different methods of procurement: (1) straight purchase (CLIN 0001AA); (2) lease to ownership (CLIN 0001AB); (3) lease with option to purchase (CLIN 0001AC); and (4) straight lease price (CLIN 0001AD). The Navy planned to select from among these four methods in awarding the contract. (SR4, tab 1 at 5-6; tab 2, Attach. 11-IPP at 19; tr. 5/58-59)

The implementation CLIN, CLIN 0001, was divided into seven sub-CLINs or items:

B001 - switch system and associated software;
B002 - Telecommunications Administration System (TAS) and associated software;
B003 - outside cable plant (OSP);
B004 - inside cable plant (ISP);
B005 - facilities;
B006 - training courses; and
B007 - station/ancillary equipment

(SR4, tab 1, Attach. 3-Initial Installation (Ex. B) at 1-2). Offerors were instructed to quote their best prices for items B001 through B007 under each of the four procurement methods (SR4, tab 2, Attach. 11-IPP at 29). According to the RFP, items B001 through B007 all would be procured as "firm, fixed-price items" (*id.*).[2]

The RFP envisioned that offerors would furnish "1 Lot" each of items B001 through B006 (SR4, tab 1, Attach. 3-Ex. B at 2). Item B007, on the other hand, was further sub-divided into more than 150 sub-CLINs, each corresponding to particular types of station/ancillary telecommunications equipment. These B007 sub-CLINs were labeled B007AA through B007GC. (*Id.* at 3-14)

At the time of the RFP, the Navy was not in a position to know what quantities of station/ancillary equipment ultimately would be purchased for the CTS. Instead, the Navy provided prospective contractors its "best estimate" of its needs for station equipment for each B007 sub-CLIN (SR4, tab 2, Attach. 11-IPP at 29; *see also* tab 1, Attach. 3-Ex. B at 3-14). Offerors were asked to provide a unit price for each B007 sub-CLIN (SR4, tab 2, Attach. 11 at 29). The unit prices would be multiplied by the Navy's estimated equipment needs to arrive at the total price for item B007.

The specific equipment actually needed to implement B007 was to be determined after the contract had been awarded. The contractor was to perform a detailed site survey and provide an equipment inventory in a Station Design Plan (SDP) for the Navy's review and approval. (SR4, tab 1, Attach. 1-SOW at 21, 23, Attach. 2-System Requirements Specification (SRS) at 53; tr. 1/228-29)

Because the quantities of equipment identified by the Navy for item B007 were only estimates, both the RFP and the contract stated that the total price of B007 would subsequently be revised using the quantities of B007 sub-CLINs set forth in the approved SDP. The unit prices proposed by the contractor for each B007 sub-CLIN were to serve as the basis for re-computing the contract price in the event that the Navy's estimated B007 quantities differed from the quantities actually ordered, as reflected in the SDP. Specifically, the RFP and the contract stated that "[t]he total price for B007 shall be redetermined based on the quantity of equipment actually installed in accordance with the Government-approved Station Design Plan. Unit prices shall not change." (SR4, tab 2, Attach. 11-IPP at 29, tab 1, Attach. 3-Ex. B at 1)

The Navy understood, at the time it issued the RFP, that it probably would not order all of the estimated quantities of every item listed as sub-CLINs within B007, and that the final LTOP price would therefore likely be adjusted downward after CASI had completed the station survey and prepared the SDP. At the hearing, the responsible contracting officer, Mr. Richard Hackney, testified that "[i]t was clearly understood by all of the parties concerned that there would be a reckoning at some point in the future." He stated that once the SDP had been approved, "[t]hat would give us a much better indication of how much the actual material cost for this was going to be. And, so anytime after that, we could have made an adjustment." (Tr. 5/61-63) He also admitted that, in retrospect, it was "reasonable to suppose that we would have settled the LTOP before the 'cutover,'" although it was not something he had "given a lot of thought to" at the time (tr. 5/152-55). "Cutover" or "[t]he transfer of telecommunications traffic from the existing system to the newly installed

Center Telecommunications System" (SR4, tab 1, Attach. 5 at 12) was to be followed by system testing within 60 days and system acceptance within 90 days (SR4, tab 1 at 19).

Both the RFP and the contract provided that "the Government may order additions to the CTS at any time following Government approval of the Station Design Plan." Additions or changes were to be requested through delivery orders or change orders, and were to be based on the prices set forth in Exhibit C (Additions) to the contract. (SR4, tab 1, Attach. 1-SOW at 24, 33-4, tab 2, Attach. 11-IPP at 29; AR4, tab 3 at 5) Notably, Exhibit C was based on straight purchase pricing, not LTOP pricing. The Navy concedes that the items considered to be new requirements were to be ordered under Exhibit C. The purpose of Exhibit B items, on the other hand, was to establish the cost of items associated with the implementation phase of the contract, that is, before the OM&A phase. (AR4, tab 726; tr. 6/44-45)

The Contract

In September 1990, the Navy awarded CASI the CTS contract (SR4, tab 1). The contract incorporated by reference standard clauses from the Federal Acquisition Regulation (FAR) and the Department of Defense FAR Supplement (DFARS), including: FAR 52.232-23 ASSIGNMENT OF CLAIMS (APR 1984); FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987) ALTERNATE II (APR 1984); and DFARS 52.243-7001 PRICING OF ADJUSTMENTS (APR 1984) (SR4, tab 1 at 61-62).

The Navy chose to purchase the implementation phase of the contract under the LTOP method of procurement at a firm fixed-price of $30,009,154.80, exercising CLIN 0001AB and including a $37,974.00 trade-in allowance for exchanged property listed in the contract's Attachment 4. The price for the implementation phase of the contract was to be paid over sixty months at $500,152.58 per month. (SR4, tab 1 at 5-6, Attach. 4; tr. 5/59). The Navy's monthly payment was calculated by dividing the total LTOP amount by 60 months (*i.e.* $30,009,154.80/60=$500,152.58) (tr. 4/107, 5/63-64). The 60-month payment period was to begin upon system acceptance and title would not pass to the Navy until the end of the lease period (SR4, tab 1 at 19, 35).

The Navy selected the LTOP method based on a present value analysis—a methodology that tries to evaluate and rank various investment proposals by taking into account the time value of money[3]—using a 10 percent interest rate. Straight purchase was not possible since only $6,700,000 per year was estimated to be available. The LTOP price was evaluated as roughly $20,000 below the Lease with Option to Purchase, and the LTOP price, unlike the Lease with Option to Purchase method, carried no balloon payment at the end of the 60-month period. (Appellant's Supplemental Rule 4 for ASBCA Nos. 50648, 50649, tab 4 at LTOP 0357-58)

The LTOP procurement functioned like an installment sale. The Navy was to make payments every month for five years, while CASI retained ownership of the equipment. At the end of the series of payments, title to the system automatically transferred to the Navy. (SR4, tab 1 at 5-6, 35; tr. 5/64-65) The 60-month payment period would begin upon the Navy's acceptance of the CTS system (SR4, tab 1 at 19).

As an alternative to making all 60 payments, the contract permitted the Navy to cease payments early, and still claim ownership of the equipment, by making one final "buyout" payment. The amount of the buyout payment decreased gradually over time depending on how many LTOP payments had already been made. (SR4, tab 5 at III.4-2, tab 48 at A-16531; tr. 4/108-09)

The difference between the LTOP price and the purchase price is interest, or, in other words, the cost to the Navy of spreading its payments over 60 months (tr. 1/216-17, 4/271-72). As Mr. Hackney put it, "the difference between those two, I believe, is simply the cost to the Government for the privilege of not paying . . . in one lump sum, but rather paying it over a period of time." He acknowledged that the cost difference included some component for the time value of money. (Tr. 5/164-65)

Interest was incorporated into the contract through the Monthly Recovery Charge (MRC). To determine the LTOP price from a straight purchase price, the parties used an MRC factor of .021906, which they treated as corresponding to an annual interest rate of 11.32 percent. By multiplying a purchase price by the factor, one could determine the monthly LTOP price. The total LTOP price could then be computed by multiplying the monthly LTOP price by 60 months. As CASI explained in a letter to the Navy dated 12 April 1991, "the LTOP MRC factor of .021906 was devised in accordance with Section M of the CTS solicitation in conjunction with financial agreements reached with [the finance company] at an interest rate of 11.32%." CASI also recognized that the Government was "without any privity" to its financial arrangements. (AR4, tab 155)

The Navy was aware throughout the life of the contract that interest was incorporated into the LTOP arrangement. It accepted that the MRC factor represented interest at a rate of 11.32% annually and used the factor in making pricing decisions.[4] It understood that the only difference between the purchase price and the LTOP price was that the LTOP price included interest in addition to the purchase price of the equipment. Apart from the recovery of the cost of the equipment, there were no charges other than interest included in the MRC. (AR4, tabs 176, 702, 709, 713, 732, 734, 783; tr. 6/54)

An early example of the Navy's understanding of the financial relationships and the MRC is reflected in a modification memorandum, signed by Mr. Hackney on 23 April 1991, accompanying Modification No. P00004. The modification made a downward adjustment in the overall contract LTOP price by applying the MRC factor to the straight

purchase price of an item. The modification memorandum referenced CASI's 12 April 1991 letter and noted that:

> II. Summary
>
> . . . .
>
> B. The contract was a competitively awarded contract. The purchase price and the LTOP prices were evaluated in accordance with Section M of the solicitation. The Government included a table that provided a present value factor to be used in calculating the price for evaluation.
>
> C. [CASI] has a finance agreement . . . . The LTOP monthly recovery charge factor (MRC) of .021906 is based strictly on the interest rate of 11.32%. There are no other considerations in the MRC.

(AR4, tab 176)

In recommending approval of the modification, the memorandum concluded with the observation that: "It has already been determined that the *contracted for LTOP MRC factor of .021906 is fair and reasonable*" (*id*.) (emphasis added).

CASI's Station Design Plan and Its Impact on the Contract Payment Terms

CASI prepared its initial SDP in January 1991 (AR4, tabs 75, 90) and revised the SDP in March, April, May, and June 1991 (SR4, tab 404; AR4, tabs 133, 148, 198, 212, 248, 274). CASI's SDP was approved in July 1991 (SR4, tab 634).

The Navy did not redetermine the total price for item B007 upon approval of CASI's SDP (AR4, tabs 674, 690). Instead, the parties agreed in the August 1991 time frame that changes to the CTS prior to cutover would be incorporated into the LTOP price, and that the delivery order process would begin after system acceptance (AR4, tab 352 at 1).

After award of the contract, but prior to cutover of the CTS, the parties executed several firm fixed-price modifications that increased or decreased, as appropriate, the LTOP price of the contract (*see, e.g.*, SR4, tab 2027, Modification No. P00016 (increasing LTOP price by $60,812.40) and Modification No. P00023 (decreasing LTOP price by $5,855.04)). The parties executed other modifications under a straight purchase method rather than the LTOP method (AR4, tab 690). Since the Navy paid in full for the modifications, they did not alter the LTOP price. For each modification executed during

this time period, the Navy made a determination whether to pay for the work covered by it under an LTOP pricing mechanism or whether to purchase it outright (tr. 5/66-68).

Modification Nos. P00012 and P00026 were executed prior to cutover, and affected the value of the LTOP. Each modification specified a maximum "not-to-exceed" price that was subject to downward adjustment only. Modification No. P00012 involved a new Main Switch Building. Modification No. P00026 was for changes in outside plant cable (OSP). These two modifications increased the LTOP price (*i.e.*, CLIN 0001) by the maximum price of each modification. However, the two modifications had no bearing on B007 because neither modification pertained to station/ancillary equipment. (SR4, tab 2027, Modification Nos. P00012 and P00026; tr. 5/36, 66)

Insofar as Modification No. P00012 is concerned, we previously found that negotiations to definitize the modification could have been initiated at anytime after the initial audit report was received in May 1991. Moreover, the Navy never met the extended 30 September 1991 definitization schedule and offered no persuasive explanation for why it did not act in a more timely manner. *Contel Advanced Systems, Inc.*, ASBCA No. 49072, 02-1 BCA ¶ 31,808 at 154,135, 154,139.

With respect to Modification No. P00026, effective 21 January 1992, the target date for negotiations was 19 June 1992 and the date for definitization set at 19 July 1992. We previously found that the CTS technical evaluation was completed by 24 March 1992. The DCAA audit was completed by 8 January 1992 and a separate assist audit by 8 April 1992. The contracting officer, however, was unable to recall why negotiations were not initiated after completion of the audits. The definitization date passed and was never extended. We found that the Navy offered no persuasive reason why it did not act in a more timely manner. *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809 at 157,146, 157,151.

Other changes in the Navy's requirements did not result in modifications executed prior to cutover, and thus did not effect the LTOP price of the contract (AR4, tabs 674, 690). However, these changes did increase the work performed by CASI, and CASI considered these changes to be open items requiring resolution.

As a result of the various modifications executed by the parties, the total LTOP price for the implementation phase of the contract as of cutover had increased from $30,009,154.80 to $36,223,371.00. This amount is reflected in Modification No. P00032, the last modification signed before cutover (SR4, tab 2027, Modification No. P00032). Changes that were not yet the subject of an executed modification were not reflected in the LTOP price. Further, the LTOP price of $36,223,371.00 did not include any downward adjustment for the large quantities of B007 station equipment that had been included in the Navy's original estimates but subsequently were not ordered and installed. (AR4, tabs 674,

690) The total LTOP price of the contract as of system acceptance remained at $36,223,371.00 (SR4, tab 2027, Modification No. P00034).

CASI's Financing Arrangements

During the implementation phase of the contract, CASI spent in excess of $20 million to devise and install the CTS at China Lake. These expenditures were funded with a loan from CASI's parent corporation, Contel of California (Contel). Contel agreed to underwrite CASI's costs, with the understanding that it would be repaid by system acceptance. (Tr. 4/153, 251-54) Because CASI would not receive payment of the full contract price from the Navy at the completion of the implementation phase, CASI planned to repay its loan from Contel with funds borrowed from a third-party finance company, Northern Telecom Finance Corporation (NTFC) (tr. 4/110, 153).

CASI obtained a commitment for financing from NTFC prior to contract award (SR4, tab 48; tr. 4/110). It was agreed that CASI would assign the payments on the CTS contract to NTFC. Representatives of CASI and NTFC signed an assignment and security agreement on 14 March 1991 and 11 April 1991, respectively (AR4, tab 715 at A-27479).

The financing arrangements between CASI and Contel/NTFC were not discussed in the contract, although the finance company contemplated that the stream of monthly payments would be assigned to it and indicated that "[s]uch assignment will require the acknowledgment of the government" (SR4, tab 48 at A-16528-9). The Navy did not instruct CASI to borrow money, nor express any opinion as to whether or not CASI should enter into any particular form of financing agreement (tr. 4/148, 284-88, 294, 293-98). However, the Navy was aware that CASI was borrowing to finance the CTS project, at least as early as the time of contract award or as one witness testified, "from day one" (tr. 4/287, 5/31, 109-10).

Efforts to Reach Agreement on LTOP Reconciliation

In the months prior to system acceptance, both CASI and the Navy recognized that the contract price set forth in the agreement was considerably higher than necessary. The LTOP price was too high primarily because it was based on the Navy's estimated quantities of B007 station equipment. The quantities of equipment originally estimated by the Navy greatly exceeded the quantities actually ordered and installed, and the LTOP price had not been adjusted downwards to reflect the fact that the Navy only intended to purchase a fraction of its original estimates. (Tr. 5/61-62, 69-71)

In January 1992, at an Executive Management Meeting, CASI advised the Navy that changes which had not resulted in executed contract modifications must be finalized by cutover in order to establish the correct LTOP monthly payment. CASI requested that open items be negotiated and settled "as soon as possible." (SR4, tab 1122 at 2; tr. 4/112-14)

After that meeting, the issue of finalizing all outstanding Engineering Change Proposals remained an agenda item for the parties' Executive Management Meetings (*see, e.g.*, AR4, tab 626 at 1, tab 665 at 1; tr. 4/113).

On 3 March 1992, CASI met with the Navy to discuss reconciliation of the B-CLINs (tr. 4/113-14; AR4, tab 626). Additional meetings were scheduled to discuss specifically the quantities of sub-CLINs within B007 exercised by the Navy (AR4, tab 665 at 1; tr. 4/127-28).

On 6 April 1992, a few days before cutover of the CTS, CASI provided the Navy with several charts and tables analyzing the impact of the numerous changes ordered by the Navy during the implementation phase. CASI again advised that many changes to the original contract requirements remained outstanding and required resolution. (AR4, tab 674; tr. 4/114-15)

Attachment 1 to CASI's 6 April 1992 letter was titled "CTS Contract Value Recapitulation." This document: (1) listed all changes to the original contract that had an impact on the LTOP price, including those that were unresolved and still pending (column one); (2) identified the modification (if any) associated with each change (column two); and (3) listed the total price impact of each change, including estimates for pending items (column three). A total of 24 changes were identified.

CASI's analysis grouped each of the 24 changes into columns depending on which of the seven implementation phase B-CLINs (*i.e.*, B001 through B007) the work pertained to. In addition, separate columns were included for credits due the Navy and claims by CASI for extra work.[5] According to CASI's analysis, only 4 of the 24 changes pertained to item B007 (Station Equipment). Specifically, CASI reported that Modification No. P00016 (Comm Pole) had increased the price of B007 by $46,267.50. Modification No. P00024 (Shielded Cable & Molding) had increased the price of B007 by $314,320.00. Engineering Change Proposal 92-009.E (Station Equipment Upgrade Chips) was not finalized at the time of CASI's letter, but CASI estimated that this item would increase the price of B007 by $20,232.00. Finally, CASI indicated that B007 should be reduced by $5,067,649.20 for items included in the Navy's original equipment estimates, but not actually ordered by the Navy. According to CASI's calculations, as a result of these four changes, the net price of B007 should decrease from $7,167,412.37 to $2,480,582.67, a total decrease of $4,686,829.70. (AR4, tab 674, Attach. 1)

Attachment 2 to CASI's 6 April 1992 letter was CASI's projected total revenue summary for the implementation phase of the CTS contract. This analysis: (1) lists each change to the implementation phase of the contract, including those still pending (column 1);[6] (2) identifies any modification associated with the change (column 2); (3) shows the method under which the change was priced (*i.e.*, purchase price or LTOP) (columns 3-8); (4) and provides a running tally of the cumulative purchase price, LTOP

price, and total contract value (columns 9-12). Attachment 2 concludes that as of 6 April 1992, taking into consideration the changes to the Navy's requirements since contract award, the correct purchase price of the CTS was $24,523,903.49 and the correct LTOP amount was $32,236,591.20. (AR4, tab 674, Attach. 2)

Attachment 3 to CASI's letter is a revised version of Attachment 3 to the contract, entitled Initial Installation (Exhibit B) (*compare* AR4, tab 674 *with* SR4, tab 1, Attach. 3). For each type of station equipment within item B007, CASI's analysis contrasts the Navy's original estimated quantities (column 1) with the quantities actually installed (column 7).[7] Using the unit prices set forth in the contract, CASI also adjusted the price of each B007 sub-CLIN to reflect the cost associated with the quantities actually installed (column 8). Attachment 3 concludes that the total purchase price of station equipment included in the original contract, but not exercised by the Navy, was $5,067,649.20.[8] This corresponds to an LTOP amount of $6,660,715.40 (*i.e.*, 5,067,649.20 x .021906 (MRC) x 60 months).

Attachment 3 indicates that the Navy did not exercise any quantities (*i.e.*, actual quantities are zero) of 134 of the B007 sub-CLINs included in the original contract. Two of these unexercised sub-CLINs by themselves account for a $2,087,610.00 reduction in the purchase price amount (AR4, tab 674, Attach. 3, B007CS at 4; B007ES at 6). According to CASI, the total purchase price of the B007 sub-CLINs that were not exercised at all is $4,603,668.69. This equates to an LTOP amount of $6,050,877.98 (*i.e.*, $4,603,668.69 x .021906 (MRC) x 60 months).

Attachments 1, 2, and 3 to CASI's letter conclude that the correct purchase price of the CTS as of 6 April 1992 was $24,523,903.49 (AR4, tab 674). This corresponds to a total LTOP amount of $32,236,591.20 and a monthly payment of $537,276.52 (*id.*, Attach. 2 at 2). By comparison, as of 6 April 1992, the total LTOP price of the contract remained at $36,223,371.00 (SR4, tab 2027, Modification No. P00032). Thus, using CASI's calculations, the contract LTOP price required a $3,986,779.80 reduction.

The Navy did not respond in writing to CASI's 6 April 1992 letter (tr. 4/115).

On 24 April 1992, CASI, referencing its 6 April 1992 letter and the revenue summary, provided the Navy a revised revenue summary and requested guidance as to how the Navy wanted "to proceed with respect to the establishment of a Lease to Ownership Plan (LTOP) price." The update identified a revised purchase price of $25,462,671.00 based on a LTOP price of $33,470,470.20, with a corresponding MRC of $557,841.17. CASI's April 24th letter identified 48 items adding to or deleting from the original contract value, and divided those 48 items into six categories, which CASI labeled "A" through "F." (AR4, tab 690)

Category A comprised seven finalized firm fixed-price modifications executed before cutover that resulted in a net increase to the original LTOP price on the contract of $1,096,789.40.

Category B comprised the two unresolved maximum-priced modifications—Modification Nos. P00012 and P00026—and CASI's request for additional compensation for its work on these two modifications, beyond that provided for by the maximum modifications.

Category C included eight pending items for which CASI had submitted ECPs but which were as yet unfinalized by the Navy.

Category D was CASI's estimate of the net decrease in contract value resulting from six specified items about which CASI was preparing claims or requests for an equitable adjustment. The reduction for station equipment not ordered was included in this category.

Category E comprised three pending items associated with additions to the contract requirements for OSP. CASI advised that these three items would have no impact on the LTOP price because the Navy had indicated it would pay for each item by straight purchase price.

Category F included several finalized modifications that did not affect the LTOP amount either because there was no cost impact associated with the modification, or because the Navy chose to pay for the work described in the modifications by straight purchase price.

Following the detailed description of Categories A through F, CASI's 24 April 1992 letter stated that Categories B through D were open items requiring resolution. While CASI considered that some negotiations would be necessary to finalize Categories B and D, CASI advised that the Navy could definitize Categories C and E without further discussions with CASI.

The letter concluded that:

> CASI needs immediate guidance from NAWC as to how the LTOP will be established in light of the open items. We see three possibilities:
>
> 1. Negotiate and settle all open items prior to first LTOP payment.
>
> 2. Establish an interim LTOP price, to be adjusted on final negotiation of the open items.

> 3. Establish a final LTOP price, with a subsequent lump sum payment for the open items upon completion of negotiations.
>
> CASI is prepared to discuss any of the items in Categories B, C, D and E at your convenience. An early resolution will be in the best interest of all parties involved.

(AR4, tab 690; tr. 4/115-26)

The record contains no indication that the Navy responded in writing to the 24 April 1992 letter.

The Station Audit Count

In April and May 1992, CASI performed a station audit count to ascertain the exact quantities and types of station equipment installed during the implementation phase of the contract, on a site-by-site basis (AR4, tab 935; tr. 1/128-30, 2/71-72). The information was gathered to finalize the implementation phase of the contract and determine the final dollar value for the implementation phase (tr. 1/169-70, 2/180-84).

Mr. Babaie, CASI's proposal and implementation manager, testified that, as of May 1992, CASI had sufficiently detailed information on the work completed during the implementation phase of the contract to allow reconciliation of the B-CLINs. According to Mr. Babaie, by May 1992, it was possible to determine the total quantities of B007 sub-CLINs installed during the implementation phase of the contract by reference to the portion of the station audit count entitled "Demark List by Building by Demark," which lists building numbers (column 1), demark or jack numbers (column 2), telephone numbers or circuit identification numbers (column 3), and the type of B007 equipment provided by CASI (column 4). (Tr. 2/71-72, 4/127-28; AR4, tab 935) Another CASI witness, Mr. George Hardy, also testified that the station audit count was an accurate tally of the equipment actually installed and could have been used in May of 1992 to reconcile the B-CLINs (tr. 1/108-09, 129-30, 8/299-300).

No Navy witness disputed that CASI's station audit count was accurate, or offered any explanation why this information could not have been used to reconcile item B007. Nor did any Navy witness identify inadequacies or inaccuracies in CASI's letters of 6 April 1992 and 24 April 1992. The Navy concedes that CASI, as the installer and administrator of the CTS, was best situated to determine the quantities of equipment utilized during the implementation phase of the contract. (Tr. 5/75-76, 6/34-35, 54; AR4, tab 899) We found the testimony of CASI's witnesses persuasive.

Cutover of the CTS occurred on 10 April 1992 and system acceptance was completed on 11 May 1992 (SR4, tab 2027, Modification No. P00040; tr. 5/65). Payment under the LTOP was to commence after system acceptance.

The May 1992 Meeting

When Mr. Babaie was unable to negotiate a final LTOP amount, his corporate superiors initiated a meeting with the Navy to do so. CASI's parent, Contel, wanted to be paid the funds it had advanced CASI for the design and implementation phase of the contract, and CASI, in turn, needed to firm up its financing arrangements with NTFC. (Tr. 4/127-29, 255-56, 308-09) Since successful completion of system acceptance occurred on 11 May 1992, under the terms of the contract the first LTOP performance period started on 11 May 1992 and ended on 11 June 1992. The first payment was due 30 days after receipt of a proper invoice. (SR4, tabs 1 at 19, 2027 at Modification No. P00040)

In May of 1992, representatives from CASI and the Navy met to discuss finalization of the LTOP price. Among those present at the meeting were Mr. Hackney, Mr. Babaie, Mr. Michael Bollinger, who at the time was assistant vice president-controller of Contel, and Mr. George Pope. (Tr. 4/248-49, 256-57, 308-09) The record contains no notes, minutes, or other documentation detailing the substance of the meeting and its precise date is also uncertain. Mr. Hackney recalls it occurring before system acceptance (tr. 5/76-77), while Mr. Bollinger's testimony suggests it may have occurred after system acceptance (tr. 4/256, 258). We need not decide this point.

At the meeting, CASI asked the Navy to resolve the issues raised in CASI's letter of 24 April 1992 and to determine the final LTOP price (tr. 4/257). The Navy, through Mr. Hackney, declined to adjust the LTOP price at that time. At the hearing, Mr. Hackney explained the Navy's position that CASI would be paid based on the LTOP price set forth in the agreement at that time:

> So the conversation was, "Let's adjust the LTOP price downward,["] and . . . I told him that I couldn't do it – I couldn't do it unilaterally.
>
> The Government couldn't do it. My hands were tied. The $36 million figure in the contract was the figure that I had – I the Government –representing the Government, that I had to make.
>
> I had to make the payments based on the amount of money that was in the LTOP, in the Contract at that time.
>
> . . . .

> [I]t's about that time when I said something to the effect of, "I –I'm sorry. My hands are tied. I can't do it. You're going to have to bill us on that number that's there."

(Tr. 5/80, 83) He also testified that while he had no recall of any discussion of financing at the meeting, he did suggest various alternatives to adjusting the LTOP price downward at that time. For instance, CASI might invoice the Navy in lower amounts than called for by the contract or it could invoice at the contract rate, but not submit any invoice at all for selected time periods. According to Mr. Hackney, these alternatives did not appear to receive serious consideration. Mr. Hackney understood that under the regulations, any assignment had to be of all money due the contractor and that payments could not be split between financing institutions. (Tr. 5/76, 79-85, 106-09)

According to various witnesses for CASI, Mr. Hackney indicated that the Navy simply did not have time to review and finalize the issues raised in CASI's letter of 24 April 1992 (tr. 4/129-30, 257-59, 311). Mr. Hackney, on the other hand, recalls that he informed CASI that the Navy could not adjust the LTOP price downward at that time because CASI had not yet provided all the information and documentation necessary to evaluate and quantify various unresolved issues. These items included B007 sub-CLINs, the two unresolved maximum-priced modifications, open ECPs, and future change proposals that were expected but which had not actually been submitted to the Navy. (Tr. 5/81-82) With regard to B007, Mr. Hackney testified that the Navy knew it needed to be changed but lacked "information from CASI with regard to what equipment they had actually installed" (tr. 5/69, 81).

Neither Mr. Hackney nor any other Navy witness explained why CASI's previous submissions to the Navy would not have been acceptable for this purpose.

At the meeting, Mr. Bollinger asked how CASI was going to get its "money, because, we have . . . spent[] over twenty million dollars and we need[] to be paid, since system Cut Over and acceptance had already occurred" (tr. 4/257-58). He testified that everyone associated with the contract on both the Navy and Contel side knew that third party financing was going be arranged because CASI would need the money to operate (tr. 4/287). Along this line, he suggested that CASI might take out a loan from NTFC in an amount lower than the official contract value. According to Mr. Bollinger, Mr. Hackney warned that in order for the Navy to make payments, invoices must exactly match the Navy's records and the official contract value on the Navy's books:

> . . . [T]he Government said, 'you have to have an exact amount match our records', [and] we went into very, very explicit [detail] of how the actual invoice had to come into the Government.

> They had to have every identifier on [the invoices], or they would not pay. They had to have the amounts equal their books, or they wouldn't pay.
>
> The payment had to be the same, or they wouldn't pay. so there was no other amount [CASI] could go out and borrow and get everything to match for the Government.
>
> [CASI] couldn't go borrow twenty-five [million dollars] and then, have some five hundred fifty thousand dollar payment . . . .
>
> . . . [I]t wasn't even an option. The Navy was very strict on you will match what our books say.

(Tr. 4/262-63)

Mr. Bollinger testified that Mr. Hackney was just "dead set" that the Government would only pay on the amount on their books and until another modification was executed to change that number, that's the amount they would have to be invoiced for. (Tr. 4/259) Therefore, according to Mr. Bollinger, while the Navy did not direct CASI to borrow money, it was insistent that the amount borrowed, once the interest over the LTOP term was added, reflect the LTOP contract price of $36,223,371.00 and the corresponding MRC so their records would match, even though this amount was greater than the true value of the contract (tr. 4/295-97, 301-05).

Mr. Bollinger was uncomfortable with the suggestion that CASI take more money than they were due and took a break from the meeting to call CASI's contact person at the finance company, Mr. Thomas D. Chambers, asking how they could set up an amount payable and what they could do to make an adjustment after the correct amount was set and lower the payments (tr. 4/260).

After talking to the financing company, Mr. Bollinger testified that he was "clear to say . . . that the Navy would be liable for this interest and the higher payment until such time as they audited and came to an agreement on the numbers." Once there was an agreement, "whatever the difference was . . . that would be applied to the principal and the remaining payment only would be adjusted." The Navy "would be liable for the interest until that time." He did not recall any reaction on Mr. Hackney's part. (Tr. 4/260-61)

Mr. Pope, CASI's quality assurance and configuration manager, confirmed that there was no doubt in his mind that the Navy understood interest was accruing to its account. He also recalled that no one from the Navy side was really concerned. (Tr. 4/310-11)

Mr. Bollinger assumed that because the Navy would be making a larger payment (as well as the interest associated with a larger amount), the LTOP would be finalized "fairly quickly" after the meeting. While a date was not set, he testified he thought "it was just understood in the next month [or] two they would finalize these numbers." It was hard for him to believe that the Navy would not set the amount quickly because the largest item for them to look at and agree to was "the credit that we were trying to give them for four million dollars, on station equipment." (Tr. 4/259) Mr. Pope, at the time of the meeting, also assumed that the parties would reach an agreement shortly thereafter (tr. 4/311).

It was CASI's plan to hold the extra money "for the next week, month, or two months and pay that exact amount difference from whatever the final price was, in a couple of months, back to principal." There was no discussion at the meeting concerning whether CASI would earn interest on this extra money it was holding until finalization of the LTOP amount (tr. 4/265). In fact, CASI did earn interest on these funds at a risk-free rate of return of 4 percent annually (SR4, tab 1948 at 3).

We find that CASI was ready to reconcile CLIN 0001AB, the implementation phase of the contract, no later than May of 1992, and its 6 and 24 April 1992 letters, coupled with the station audit, provided an ample basis for Government action to reconcile the LTOP pricing.

Moreover, it was understood from the beginning that CASI was going to finance the LTOP option through a financing institution. When the contracting officer refused to reconcile the LTOP in May of 1992, while insisting that invoicing match the MRC due under the contract, he was, in effect, insisting that the amount borrowed reflect the current LTOP contract amount. CASI was left with the need to firm up its financing with its lender, with the understanding that the entire contract proceeds would have to be assigned, while recognizing that the contract price would be subject to a downward adjustment. In order to lock in its financing, while accommodating the need for an expected adjustment to the contract, CASI elected to borrow the principal amount which would equal the contract LTOP price once interest was added, with the expectation that LTOP reconciliation would be accomplished in the very near future. Though the record does not support a finding that there was an agreement to reconcile the LTOP by a particular time, we conclude that CASI reasonably expected that the matter would be resolved within 60 days. In the circumstances, CASI's decision to proceed as it did was a reasonable response to the Navy's failure to act.

Establishing the Payment Schedule

By unilateral Modification No. P00034, dated 21 May 1992, and signed by Mr. Hackney, the Navy funded the OM&A portion of the contract. Paragraph 4 stated that the LTOP remained at $36,223,371.00 (SR4, tab 2027, Modification No. P00034).

Following the May 1992 meeting, Mr. Bollinger provided NTFC with the appropriate numbers, and requested that NTFC generate a payment schedule and finalize the assignment and security agreement. The size of CASI's loan from NTFC was $27,557,137.47 (corresponding to the purchase price of the equipment rather than the LTOP price), $2,049,532.67 larger than CASI believed necessary, under its view of the proper LTOP reconciliation. (AR4, tab 715 at A-27514; tr. 4/261-64) Upon receipt of funds from NTFC, CASI paid Contel the amount it had borrowed to fund the implementation phase of the contract, plus interest (tr. 4/109-10).

On 21 May 1992, CASI executed a notice of assignment stating that the payments to be made under CLIN 0001AB were assigned to NTFC (AR4, tab 700). On 28 May 1992, CASI forwarded the Navy a copy of the assignment and security agreement executed by CASI and NTFC, and the 21 May 1992 notice of assignment (AR4, tab 704; tr. 4/266-68).

In its 28 May 1992 correspondence, CASI formally notified the Navy that the LTOP price on the contract was $36,223.371.00, reflecting, according to Mr. Bollinger, the parties' discussions from the May 1992 meeting that CASI would have to borrow the LTOP amount listed in the contract at that time. Under the repayment schedule, this LTOP figure resulted in a monthly payment by the Navy of $603,722.85. (ARA, tab 704 at 14322; tr. 4/266-68)

Mr. Bollinger testified that this letter repeated CASI's understanding from the May 1992 meeting that the final system price and the LTOP payment schedule would be adjusted to reflect the final price subsequently negotiated with the Navy. "This was required, since we were required to secure twenty-seven million five hundred thousand on the Navy's behalf rather than what we were asking for." (Tr. 4/266-67) CASI's 28 May 1992 letter advised the Navy that upon definitization of all outstanding items, CASI estimated that the LTOP would be $33,529,529.40, with a monthly payment of $558,825.49 (AR4, tab 704 at R-14347).

Modification No. P00035 acknowledged the Navy's receipt of the NTFC notice of assignment (SR4, tab 2027, Modification No. P00035).

On 8 June 1992, CASI and NTFC amended the assignment and security agreement. The purpose of the amendment is stated in its third paragraph: "[w]hereas, although Contel and the Government have agreed upon a Purchase Price of the System equal to $27,557,137.47, such Purchase Price is still subject to negotiation and the final Purchase Price of the System may be less than $27,557,137.47." (AR4, tab 715 at A-27514; tr. 4/268-70, 299-300)

The amendment provided that: "[i]n accordance with Section 11 hereof, Assignee may renegotiate under the Acquisition Agreement the Purchase Price of the System and the

Periodic Payments due from the Government in connection therewith" (AR4, tab 715 at A-27515-16).

Section 11, entitled "Renegotiation of the Purchase Price," provided, in pertinent part, that:

> In the event that the Purchase Price of the System under the Acquisition Agreement is renegotiated by Assignor and the Government and such Purchase Price is reduced, Assignor shall be responsible for negotiating with the Government a revised Periodic Payment ("Revised Periodic Payment"). If the Revised Periodic Payment is less than the Periodic Payment set forth herein, Assignor shall pay to Assignee a portion of the unamortized Purchase Price so that by receiving the Revised Periodic Payment Assignor [sic] will at all times receive payment of the unamortized Purchase Price together with interest at an annual rate of 11.33%.

(AR4, tab 715 at A-27516)

The amendment also specifically references the expected amount of the reduction in purchase price, $2,049,532.67, and the expected final purchase price following agreement by the Navy on a final LTOP amount, $25,507,604.80 (AR4, tab 715 at A-27516). Mr. Bollinger testified that he put this provision in the amendment because he wanted to record the fact that as soon as the Navy finalized the LTOP amount, CASI would pay down the loan from NTFC (tr. 4/299-300).

CASI's agreement with NTFC permitted CASI to repay part or all of the loan early. If the LTOP price were reduced, CASI could have reduced its debt obligations and avoided corresponding interest payments. (AR4, tab 715 at A-27516; tr. 4/270, 299-307)

Following execution of the amendment, CASI and NTFC prepared a revised notice of assignment, and provided the Navy with a formal written notice of the assignment, which was acknowledged by the Navy on 12 August 1992 (AR4, tab 715 at A-27553-54; tr. 4/273).

The Navy commenced making monthly payments in the amount of $603,722.53[9], corresponding to a total LTOP price of $36.2 million (*see, e.g.*, SR4 tab 1465 at G-36827). Subsequently, NTFC sold its right to receive payments under CLIN 0001AB to NationsBank, and the contract was formally modified to reflect the notice of assignment to NationsBank (SR4, tab 2027, Modification No. P00048). NationsBank invoiced the Navy directly after the assignment (*see, e.g.*, SR4, tab 1465 at G-36829-34, 36-85).

Continued Efforts to Reconcile the LTOP Price

On 24 June 1992, CASI sent a letter to the Navy requesting that all outstanding implementation items be negotiated and closed so as to finalize the LTOP amount. CASI again noted that "CASI is receiving a higher payment than would be due from the Government" if all outstanding items were finalized. Finally, CASI requested that the Navy cease ordering work/materials under Exhibit B (*i.e.*, the LTOP pricing method), which was to be used strictly for the implementation phase of the contract. (SR4, tab 1479; tr. 4/133)

The Navy did not respond in writing to CASI's letter of 24 June 1992 (tr. 4/133).

During a meeting on 7 July 1992, CASI again expressed concern about the Navy's failure to finalize outstanding implementation phase ECPs. At the meeting, the Navy agreed to review the outstanding implementation phase ECPs and "try and arrive at an accelerated schedule for completion." (AR4, tab 729 at R-06016)

While other outstanding items were resolved (*see, e.g.*, SR4, tab 2027, Modification Nos. P00042, P00043), despite CASI's efforts to resolve the issue of station equipment, the price of B007 was not, in fact, revised until 1996.

The Navy continued to make payments at the contract rate for 53 months.

The "Counter Problem"

Beginning in 1994 or 1995, CASI discovered that its computerized database, the Telecommunications Administration System (TAS), was experiencing difficulty tracking some of the B-CLIN items. This problem was referred to by the parties as the "counter problem." (Tr. 8/289-90)

The counter problem occurred when an item of station equipment that had already been installed was disconnected and moved to a different location. After the move, the TAS should have reported the moved equipment as being in service at its new location. Instead, because of the counter problem, the TAS reflected the moved item both in its new location and in CASI's warehouse as available to be installed. The counter problem thus caused the TAS to report inaccurate tallies of station equipment. (Tr. 8/290-91)

The counter problem made it difficult for CASI to provide the Navy with accurate counts of station equipment during much of 1993 and 1994 (SR4, tab 1869). The counter problem eventually was resolved by CASI in conjunction with a subcontractor (tr. 8/291). There is no evidence that the counter problem existed in 1992.

The counter problem did not affect station equipment that had never been disconnected. As of June 1992, when the CTS was new, CASI had performed few if any

disconnects. In contrast, by June of 1995, CASI had performed thousands of disconnects. (Tr. 8/293)

Submission of Claims

On 4 February 1994, CASI submitted to the contracting officer a series of claims pertaining to the CTS project (SR4, tabs 2028, 2029, 2030, 2031, 2032). In these claims, CASI sought to recover, *inter alia*, extra costs incurred beyond the cost ceilings on Modification Nos. P00012 and P00026.

From submittal of its claims on 4 February 1994, CASI began to link final LTOP reconciliation to resolution of these claims and to definitization of Modification Nos. P00012 and P00026 (tr. 5/134-36). CASI's internal Monthly Progress Status Report dated 7 January 1994 recorded CASI's intention of reaching a final LTOP reconciliation only after "final settlement" of Modification Nos. P00012 and P00026 as well as of CASI's claims. CASI's report stated:

> B-CLINs - Reconciliation in progress. Government has accepted equipment (B007) count. Ready to "close" LTOP after final settlement of two max. modifications (P00012 and P00026) and claims.

(SR4, tab 1826 at A-03776)

From 4 March 1994 through 10 June 1994, CASI's internal Monthly Progress Status Reports continued to repeat that resolution of the B-CLINs was dependent on "claim resolution" (SR4, tabs 1838 at A-03763, 1842 at A-03754, 1844 at A-03747, 1846 at A-03738).

The Switch Upgrade and LTOP Reconciliation

In early 1996 the Navy learned of the need to upgrade the hardware and software of the nine switches servicing the CTS—the switch upgrade (AR4, tab 881). Shortly after the Navy learned of the need to purchase an upgrade to the CTS switch, the Navy expressed an interest in reconciling the LTOP (tr. 8/297-98). The Navy wanted to adjust the LTOP CLINs to allow the purchase of the switch upgrade without increasing the LTOP amount on the contract. The Navy did not want to deobligate money from the CTS contract as a result of its planned LTOP reconciliation. The Navy associated the switch upgrade with the LTOP reconciliation, and had contemplated that the purchase of the switch upgrade and the LTOP reconciliation would be accomplished in the same modification. (AR4, tab 878; tr. 4/183-87, 6/17-18)

CASI submitted a proposal for the switch upgrade on 29 April 1996 (SR4, tab 1900). On 9 July 1996, the contracting officer notified CASI that the Navy's purchase of the switch upgrade was dependent upon successful completion of the B-CLIN reconciliation (SR4, tab 1916). DCAA issued an audit report on CASI's proposal for the switch upgrade on 19 July 1996 (AR4, tab 870). By letter dated 5 August 1996, CASI submitted revised pricing for the switch upgrade. The revised proposal had a purchase price of $2,277,178.00, plus a $250,591.00 installation and connection option, for a total proposed purchase price of $2,527,769.00 for the switch upgrade. (SR4, tab 1927)

As of July 1996, the interim LTOP amount on the contract had increased to $36,802,685.08 through contract modifications (SR4, tab 2027, Modification No. P00093).

In another letter dated 5 August 1996, titled "B-CLIN Reconciliation," CASI formally advised the Government that CASI's calculation of the final LTOP amount for all B-CLINs was $29,823,860.00 (SR4, tab 1926; tr. 4/182-85). CASI's LTOP amount did not include any adjustment for CASI's claims (tr. 4/185).

On 11 October 1996 the Navy sent Modification No. P00094 to CASI for its signature. The modification purported to reconcile the LTOP by decreasing the LTOP funding by $6,978,825.08. The modification also proposed to purchase the switch upgrade by increasing item B001 (switch system and associated software) by $2,527,769.00, the amount from CASI's 5 August 1996 price proposal, for a net decrease in LTOP value of $4,451,056.08. (SR4, tabs 1933, 1934; AR4, tab 1927; tr. 6/17-18)

As the Navy understood the LTOP agreement, the Government was to have made 60 monthly payments of $603,722.53 and a final settlement payment for any differences resulting from additions and deletions. Since the payment schedule had been set the LTOP funding had increased through various modifications from $36,223,371.00 to $36,802,685.08, an increase of $579,314.08. (SR4, tab 2027, Modification Nos. P00036, P00037, P00038, P00042, P00043, P00050, P00056, P00060, P00065, P00069) The Navy had made 52 payments for a total of $31,393,571.56. It planned to make one more payment of $603,722.53 on 10 November 1996 and a subsequent partial payment of $354,384.91, for a total of $32,351,679. This meant the total LTOP would decrease by $4,451,006.08. (SR4, tab 1933)

The Navy drafted the original Modification No. P00094 to accomplish both an adjustment to the LTOP amount and the purchase of the switch upgrade because the Navy had decided it would use what it perceived to be an overpayment on the LTOP amount to purchase the switch upgrade (tr. 6/15-17, 29).

CASI refused to sign proposed Modification No. P00094. By letter dated 30 October 1996, it noted that payments to the financing institution would stop if

Modification No. P00094 were executed and CASI would find itself in the position of owing over $3.7 million to the finance company, with no source of recovery except the ultimate recovery of its claims. It also noted that the debt incurred was to be paid out based on 60 installments. The effect of Modification No. P00094 was to end those payments. (SR4, tab 1938)

On 25 November 1996, the Navy issued unilateral Modification No. P00094, which purported to reconcile the LTOP amount. The modification stated that it was a unilateral modification in accordance with CASI's letter of 5 August 1996 "and the implied authority of the Contracting Officer." Modification No. P00094 reduced the LTOP amount from its pre-P00094 value of $36,802,685.08 by $6,978,825.08 to $29,823,860.00. (SR4, tab 2027, Modification No. P00094; tr. 4/187, 6/21-22) The Navy did not use the buyout provisions in preparing unilateral Modification No. P00094 (tr. 6/38). The buyout amount after the 53rd payment was $4,085,193.71 (AR4, tab 715, subtab 3 at A-27530). Moreover, the LTOP value established by Modification No. P00094 did not include any money for any of CASI's claims (tr. 4/185, 6/50-52).

On 27 November 1996, CASI objected to unilateral Modification No. P00094 on the grounds that the LTOP reconciliation was erroneous, and the Navy had no authority to unilaterally reduce the contract value (AR4, tab 892; tr. 6/25-26).

On 4 December 1996, the parties executed Modification No. P00097, which purchased an upgrade to the hardware and software of the nine switches servicing the CTS. The switch upgrade was purchased with LTOP funds, and Modification No. P00097 increased the LTOP amount by $2,527,769.00. (SR4, tab 2027, Modification No. P00097; AR4, tab 893)

On 3 December 1996, following the Navy's failure to pay the 54th periodic payment, NationsBank, the assignee of the assignment and security agreement, demanded payment from CASI (AR4, tab 894). CASI, through its attorneys, negotiated a new payment schedule with NationsBank (tr. 4/221). As a result of those negotiations, CASI and NationsBank executed a second amendment to the assignment and security agreement, and CASI paid NationsBank $1,767,554.00 on 23 December 1996 (AR4, tab 895; tr. 4/221-22).

Subsequently, the Navy paid an additional $354,355.00 to NationsBank (AR4, tab 896), bringing its total payments to CASI to $32,351,679.

Because the Navy refused to accept responsibility for payment of the remaining monies due NationsBank, in May 1997, CASI paid NationsBank an additional $2,121,106.00 pursuant to the second amendment to the assignment and security agreement (tr. 4/222).

The Claims Leading to the Appeals

On 4 February 1997, CASI submitted a certified claim for $2,121,106.00 to the contracting officer (SR4, tab 1948). In its claim, CASI maintained that the Navy had breached the contract by failing to timely definitize the LTOP price. It asserted that the $2,121,106.00 represented "the interest on funds which CASI urged the Navy to repay in the Spring of 1992 when it first appeared that the definitized LTOP for the original B-CLIN items might not exceed 33.5 million." (SR4, tab 1948)

The contracting officer understood CASI to be "seeking interest on the amount of funds it contends it financed in excess of the actual final purchase price ($22,682,479.83) of the items installed." The Navy denied the claim by final decision of 14 March 1997, branding the claim a request for "interest on borrowings." The contracting officer observed that how a contractor finances its efforts is not the Government's concern and maintained that there was no agreement for reimbursement of any financing costs incurred by CASI. Moreover, CASI knew at the time it entered into the financing arrangement that the estimated quantities stated in the contract exceeded the Government's requirements. In addition, the contracting officer asserted that CASI took over four years to provide the Navy with an accurate accounting of what it had installed under the LTOP. (SR4, tab 1949)

The same final decision of 14 March 1997 also asserted a Government claim against CASI in the amount of $2,807,233.32. The contracting officer argued that:

> 3. . . . Given the fact that the payments the Government was making were in excess of what they should have been, based on the actual purchase price of the LTOP items, the Government met its financial obligations with its 49th payment. In fact, utilizing the same payment schedule rates established in the contract the Government calculates that, with the 49th payment, it actually overpaid by $38,008.29.

(SR4, tab 1949 at G-36947) The contracting officer alleged that "[u]tilizing the true purchase price and the rates established in the contract payout schedule, it is the Government's position that it overpaid against the LTOP by $2,807,233.32." From the amount sought, the Navy deducted the negotiated price of the switch upgrade ($2,527,769.00), for a net overpayment of $279,464.32. The Navy accordingly demanded a partial refund. (SR4, tab 1949 at G-36947)

CASI filed a timely appeal of the denial of its claim (ASBCA No. 50648) and a timely appeal of the Government's claim (ASBCA No. 50649).

After pleadings were filed in ASBCA Nos. 50648 and 50649, the Navy moved to dismiss various portions of the appeals for lack of jurisdiction on grounds that some of the

allegations involved new claims that were never presented to the contracting officer for decision and instead were raised for the first time in the pleadings. The Board deferred ruling on the motion, and it was agreed that CASI would submit a new claim to the contracting officer, and thereafter would pursue a protective appeal.

On 21 July 1997, CASI submitted another certified claim to the contracting officer. CASI maintained that its 4 February 1997 claim sought the difference between the LTOP price due it under the contract and the LTOP price the Navy wrongly attempted to set in Modification No. P00094, an amount alleged to be $4,451,039.00. In addition, CASI sought reimbursement of $20,115.50 for administrative expenses reportedly incurred by CASI in repairing its financial relations with NationsBank as a result of the Navy's decision to cease LTOP payments. It identified the 21 July 1997 letter as "an alternate theory of recovery" to its present claim. (SR4, tab 1951)

The Navy denied the claim by final decision of 26 September 1997, and reasserted its own claim (SR4, tab 2037). CASI timely appealed the denial of its claim (ASBCA No. 51048) and the Government's claim (ASBCA No. 51049).

DECISION

Jurisdiction

Our jurisdiction is based on CASI's timely appeal from the contracting officer's denial of its 4 February 1997 breach of contract claim (ASBCA No. 50648) and CASI's timely appeal from the Government's $2,807,233.32 overpayment claim (ASBCA No. 50649). Based on our review, we conclude that neither CASI's pleadings nor the 21 July 1997 submission present new claims. The 21 July 1997 submission is based on the same operative facts as CASI's 4 February 1997 claim, but presents an alternate method of measuring CASI's claimed damages and supplements the original, properly certified claim to specifically identify certain costs allegedly incurred in repairing its financial relations with NationsBank when the Navy ceased making the payments called for by the payment schedule. The same is true of the other computations presented by CASI at the hearing and in its briefs. New theories or new damages arising from the same operative facts are not new claims. *See Tecom, Inc. v. United States*, 732 F.2d 935, 937-38 (Fed. Cir. 1984); *D.J. Barclay & Company, Inc.*, 85-1 BCA ¶ 17,922 at 89,741. The Government claims are also based on the same operative facts. Consequently, ASBCA Nos. 51048 and 51049 are duplicative and will be dismissed.

The Merits

The Failure to Undertake LTOP Reconciliation

It is settled law that "[f]ailure to perform a contractual duty when it is due is a breach of the contract." *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995) (*en banc*), *aff'd*, 518 U.S. 839 (1996) (citing RESTATEMENT (SECOND) OF CONTRACTS § 235(2) (1981)); *United Technologies Corp.*, ASBCA Nos. 46880, 46881, 97-1 BCA ¶ 28,818 at 143,801-02. There is compelling support in the record for CASI's claim that the Navy breached the contract.

The Government's basic position with respect to its contract payment responsibilities is found in its description of its claim in its brief. It argues that:

> . . . Because the Government was making regular LTOP payments at a higher than required monthly amount, it met its contractual obligations under the buyout schedule (as adjusted for the actual LTOP) at the buyout crossover point. The Government's continuation of payments past this point resulted in an overpayment which the Government now seeks to recover.

(Gov't br. at VII-1)

Implicit in this position is a computation of the "correct" payment schedule as of inception of the lease period following system acceptance, albeit some four and one-half years later, that ignores the payment provisions that are in the contract. This claimed *nunc pro tunc* reconciliation is viewed as "merely an adjustment of the Contract price to reflect the actual items and quantities ordered by the Government under . . . B007" (Gov't br. at VII-152) and was not required to be accomplished at any particular point in time. Finally, the Government claims that in any event, any delay in the reconciliation is attributable to CASI's failure to provide accurate information to the Government.

The Government has adopted the view that the contract merely required the LTOP price to be finalized sometime after approval of the SDP in July of 1991. Since no exact deadline was specified, it suggests the LTOP price could have been finalized anytime after July of 1991. We agree that the approval of the SDP is the point in time when the parties could have begun the LTOP reconciliation process. At the hearing, the contracting officer acknowledged that the Navy could have reconciled item B007 "anytime" after approval of the SDP.

The price of B007 initially was based on the Navy's preliminary estimates of station equipment. Both the RFP and the contract provided that the LTOP price subsequently would be revised upon approval of the SDP to reflect the Navy's actual equipment needs.

Changes identified during the site survey, as memorialized in the SDP, were to serve as the basis for revising B007. Specifically, the contract stated that B007 pricing would be revised "based on the quantity of equipment actually installed in accordance with the Government-approved Station Design Plan." It further indicated that the agreed-upon unit prices for the station equipment would not change; thus, the only information needed to arrive at the revised price for B007 was that provided in the SDP. The contract also offered a mechanism to price any equipment needs arising after approval of the SDP and the revision of B007. These additional needs were to be requested by change or delivery orders, and were to be based on purchase pricing, not LTOP pricing.

Accordingly, we are persuaded that upon approval of the SDP it would have been a relatively straightforward task to settle the LTOP price of the B007 sub-CLINS, involving the multiplication of the approved quantities of station equipment by the previously agreed-upon unit prices. Subsequent changes in the Navy's equipment needs would have been accomplished through change order and would have been priced separately, without affecting the LTOP price.

Though we believe that the Government should have acted promptly after approval of the SDP, we recognize that no time limit was spelled out in the contract and, in any event, CASI agreed in August of 1991 to delay LTOP reconciliation until cutover. However, when a contract is silent as to a specific deadline, the duty to act within a "reasonable" time will be inferred. *E.g., Franklin Pavkov Constr. Co. v. Roche*, 279 F.3d 989, 997-98 (Fed. Cir. 2002); *Essex Electro Engineers, Inc.*, ASBCA No. 49915, 02-1 BCA ¶ 31,714 at 156,698; *Elter SA*, ASBCA No. 52451, 01-1 BCA ¶ 31,373 at 154,913-14. The view that the LTOP price could be reconciled at some indeterminate time after approval of the SDP is unpersuasive and does not account for the contract's requirements or the contracting officer's testimony. The ability to reconcile the LTOP at any time during performance—which is the implication of the Government's position—is at odds with the LTOP payment provisions in general and the buyout provisions in particular. Moreover, at the hearing, Mr. Hackney admitted that, in hindsight, based on his review of the contract, it was "reasonable to suppose that we would have settled the LTOP before the 'cutover,'" which occurred 30 days before system acceptance. We think this conclusion should have been apparent to him at the time.

In any event, CASI's agreement to defer reconciliation until cutover approaches what we believe to be the reasonable outer limit for reconciling the LTOP price—namely, system acceptance. System acceptance meant that the system met the Government's requirements and under the LTOP method triggered the commencement of its payment obligations. Obviously, the payment schedule had to be set before payments began. We conclude that the Navy had a duty to reconcile the LTOP no later than system acceptance and its refusal without a valid excuse to do so was a breach of its duty to cooperate (*see, e.g., Contel Advanced Systems, Inc.*, ASBCA No. 49074, 03-1 BCA ¶ 32,155 at 158,975-76) and a breach of the contract.

The "No-Interest Rule"

We acknowledge the general applicability of the so-called "no-interest rule:" "the ancient doctrine disallowing interest against the Government, in the absence of an express statute or contractual provision." *The Singer Company, Librascope Division v. United States*, 568 F.2d 695, 698 (Ct. Cl. 1977). As elaborated in *Ramsey v. United States,* 101 F. Supp. 353, 356 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952), "the common law rule that delay or default in payment of money gives rise to a right to recover interest has been held not to be applicable to the sovereign government on grounds of public convenience, unless the sovereign's consent to pay interest has been exhibited by an act of the Congress, or by a lawful contract of its executive officers." (citations omitted) The Court also noted that "[a] provision in a Government contract for the payment of interest must be affirmative, clear cut, and unambiguous," citing *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 91 L. Ed. 512 (1947).

The Contract Requirement for the Payment of Interest

The Navy was not a party to CASI's financial arrangements, although it was certainly aware at the time of award and at system acceptance that CASI was borrowing to finance the LTOP option. CASI itself recognized that the Government was "without any privity" to those arrangements. The Navy was not a party to CASI's arrangements with its financing institutions, and therefore its responsibilities to CASI—insofar as CASI's financial arrangements with its lenders are concerned—did not extend beyond those imposed by the Assignment of Claims Act (31 U.S.C.A. § 3727, 41 U.S.C.A. § 15). However, this conclusion does not end the inquiry.

The payment of interest was an integral part of the parties' contract and it would be disingenuous to suggest otherwise. The solicitation required offerors to propose four methods of procurement: (1) purchase; (2) lease to ownership or LTOP; (3) lease with option to purchase; and (4) straight lease. The Navy chose the LTOP option based on a present value analysis based on a 10 percent interest rate. The LTOP method functioned like an installment purchase. It was no secret that the monthly payment or MRC included a component for interest. Interest and the recovery of interest over the repayment term are established features of the LTOP method in particular and installment purchases in general. Indeed, the absence of money to purchase the CTS outright prompted the Navy's business decision to finance the acquisition over time in the first place.

Our findings show that the Navy understood throughout the duration of the contract that interest was part of the LTOP arrangement, yet, nevertheless, consciously chose the LTOP method knowing that it would be responsible for interest as part of its payments. The parties agreed to an MRC factor of .021906, which they treated as corresponding to an annual interest rate of 11.32 percent. The MRC factor itself was considered an integral part

of the contract. This understanding is reflected in an early modification memorandum, which referred to the "contracted for LTOP MRC" as "fair and reasonable." The Navy used the MRC factor throughout performance in deciding whether to make an immediate purchase or "buy it on time" through the LTOP method.

Finally, there is no dispute that a payment schedule was established by the parties at the time of system acceptance, so that the contractually required LTOP payments could be made. When Mr. Hackney declined to make any adjustment to the LTOP price of $36,223,371.00 in May of 1992 that price became the basis for determining the payment schedule and the associated buyout schedule. On the basis of that schedule, the Navy was required to make 60 monthly payments of $603,722.53, unless it exercised its buyout option or the payment terms were properly adjusted.

In summary, the payment of interest—through the MRC—was required by the contract. The Navy promised to pay CASI not only the purchase price of the equipment, but also interest (representing the cost to the Government of spreading out its payments over five years) when it selected the LTOP method of procurement.

The Reliance on the Pricing of Adjustments Clause

The Government stakes much of its defense on the assertion that the contract "expressly prohibits" payment of a contractor's interest on its borrowings. It reaches this conclusion in two steps. It points first to the Pricing of Adjustments clause of the contract, which provides that when costs are a factor in any determination of a "contract price adjustment pursuant to the Changes clause or any other clause of this contract," the costs shall be "in accordance with Part 31 of the Federal Acquisition Regulation and Part 231 of the DOD FAR Supplement in effect on the date of the contract." Building on the incorporation of the cost principles through the Pricing of Adjustments clause, it then notes that FAR 31.205-20 precludes the recovery of "[i]nterest on borrowings (however represented)" and "costs of financing and refinancing capital (net worth plus long term liabilities)." From this base, it concludes that the prohibition applies to exactly the kind of interest on borrowings that CASI seeks here.

The Government's reliance on the Pricing of Adjustments clause as a defense fails to account for the contract's framework and makes no attempt to harmonize the clause within that framework. The Government does not address the structure of the contract, beyond observing that the contract was awarded at a fixed-price LTOP amount and suggesting that in a fixed price contract how a contractor arrives at its price is of no relevance and the Government is not liable for the payment of any particular cost element that the contractor may have used in arriving at its proposed fixed price (Gov't br. at VII-133, n.59). We think this failure undermines its position.

We acknowledge, of course, that the prohibition on the payment of interest on borrowings, however represented, has been repeatedly upheld in the context of cost reimbursement contracts incorporating the cost principles and in the pricing of equitable adjustments when the Pricing of Adjustments clause is present and controlling. *E.g., Servidone Construction Corp. v. United States*, 931 F.2d 860, 863 (Fed. Cir. 1991); *Environmental Tectonics Corp.*, ASBCA No. 42540, 92-2 BCA ¶ 24,902 at 124,188; *Tomahawk Construction Co.*, ASBCA No. 45071, 94-1 BCA ¶ 26,312 at 130,870-71 (reviewing the development of the Department of Defense's policy regarding the recovery of interest on borrowings and the effect of including or not including the Pricing of Adjustments clause). However, we think Government counsel's suggestion that the only cases that have allowed a contractor's recovery for interest on borrowings are cases in which the contract did not contain the Pricing of Adjustment clause (Gov't br. at III-134) overstates the reach of the Pricing of Adjustments clause here.

The Pricing of Adjustments clause cannot be read in isolation. The contract must be read as a whole, giving effect to all of its provisions (*Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965)), with the view of construing the agreement in a manner that effectuates its spirit and purpose (*Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). In this case, the contract requires the payment of interest through the MRC. However, under the Government's theory, presumably one might argue that the interest component of all MRC payments is suspect. It is important to emphasize in this regard that the Pricing of Adjustments clause itself is focused on price adjustments under the Changes clause or other relief granting clauses of the contract. It is not focused on a breach of contract claim, although the "no-interest" rule—not the Pricing of Adjustments clause—would bar recovery of interest in a breach of contract claim in the absence of a specific statutory or contractual provision.

We alluded to the distinction between an equitable adjustment claim and a breach of contract claim in *D.E.W., Inc. & D.E. Wurzbach, A Joint Venture*, ASBCA No. 50796, 98-1 BCA ¶ 29,374 at 146,010 ("Costs that might be recoverable in a breach of contract action, such as interest on borrowings . . . are prohibited" under the Termination for Convenience clause) (*dicta*)); *but cf., Environmental Tectonics Corp., supra* (rejecting claims including an interest component, whether for equitable adjustment or breach of a contract, that did not explicitly provide for the payment of interest by referencing the Pricing of Adjustments clause without discussion of the distinction). We believe the distinction has to be drawn here. Moreover, when the contracting officer chose to act, he did so without any reference to the Changes clause or any other relief granting provision of the contract. He relied instead on his "implied authority." In addition, Government counsel has specifically argued, albeit in a different setting, that a reconciliation of the CLIN B007 items was not a downward equitable adjustment under the Changes clause (Gov't br. at VII-152).

Thus, when the Pricing of Adjustments clause is placed in the context of the entire contract, it does not trump the Government's payment responsibilities under the LTOP

provisions or insulate it from the consequences of a breach of contract in failing to properly discharge those responsibilities.

Damages for Purposes of Entitlement

When a breach of contract is shown, the general rule is that damages for the breach should place the injured party in as good a position as it would have been had the breaching party fully performed. *Hughes Communications Galaxy, Inc., v. United States*, 271 F.3d 1060, 1066 (Fed. Cir. 2001); *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1562-63 (Fed. Cir. 1997); *International Gunnery Range Services, Inc.*, ASBCA No. 34152, 96-2 BCA ¶ 28,497 at 142,306.

Only entitlement is at issue in these appeals (tr. 4/277-79). Nevertheless, in order to prevail, the contractor must establish some damage associated with the breach. *E.g., Cramer Alaska, Inc.*, ASBCA No. 47725, 96-1 BCA ¶ 27,971. CASI has met that threshold here.

We found that CASI's representatives made clear that it would be incurring additional interest expense because of the Government's refusal to reconcile the LTOP amount. Though CASI's counsel has argued that there was an agreement to settle the LTOP price shortly after system acceptance, our findings support the Government's position that there was no agreement, although there certainly was an expectation on the part of CASI that the LTOP would be settled soon. Nevertheless, we have concluded that CASI acted reasonably in making its financial arrangements in the face of the contracting officer's actions. More importantly, we believe that the Government cannot avoid the consequences of its representative's decision to accept the LTOP price of $36,233,371.00 and the payment schedule developed on the basis of that LTOP price, while deferring LTOP reconciliation until a later date.

The Navy maintains that various unresolved obstacles prevented it from reconciling the LTOP price by system acceptance. Even if we were to agree with the Navy that it was not feasible to reconcile the entire LTOP price (*i.e.*, the entire CLIN 0001AB) by system acceptance, we believe the Navy could have finalized B007, thereby resolving the item with the major unresolved cost impact on the LTOP price. As detailed in CASI's letter of 6 April 1992, it appears that there was only one unresolved issue at the time that pertained to B007, and its value was trivial compared with the B007 total or CLIN 0001 as a whole. Further, this unresolved issue was not in the form of a settled modification, so the parties could easily have ignored it in reconciling the price of B007. The contracting officer's own testimony suggests that reconciliation could have been accomplished based on the information in the SDP. CASI was eager to complete the reconciliation and Messrs. Babaie and Hardy testified credibly for appellant that adequate information was available for the Navy to at least finalize B007 in 1992.

The Navy does not attempt to explain why the equipment count in CASI's 6 and 24 April 1992 letters, or in CASI's station audit count, would not have been acceptable for reconciliation. In arguing that it could not obtain an accurate count of station equipment, the Navy focuses on the "counter problem," which led to inaccurate reporting of station equipment installed. As our findings indicate, however, there simply is no evidence that the "counter problem" existed in 1992. Further, since the problem arose only when equipment was disconnected and moved to a new location, it is plausible to believe that the problem would not have been present as of June 1992, when few if any disconnects had occurred. We conclude that the "counter problem" was not a barrier to reconciliation of the LTOP in 1992.

The Navy offers no contemporaneous evidence that B007 could not have been reconciled in 1992. Thus, the record simply does not support the Navy's contention that there were unresolved issues that would have prevented reconciliation of item B007 in 1992 at system acceptance.

In the circumstances, CASI has shown that it incurred some damages when the Government departed from the payment schedule four and one-half years after system acceptance and unilaterally affected an LTOP reconciliation, without taking into account the additional interest expense incurred by CASI as a result of the Government's failure to act in a timely manner. Since only entitlement is before us, the amount of CASI's damages and whether CASI met its responsibilities to mitigate those damages are issues reserved for quantum. Thus, questions about the reasonableness of CASI continuing to maintain the status quo with its financing institution when several months passed without Government action, the reasonableness of its later insistence, if true, that LTOP reconciliation take into consideration its 4 February 1994 claims, and any credit due the Government for the interest CASI earned on the $2,049,532.47 that it retained in anticipation of LTOP reconciliation are matters to be considered in the context of the parties' quantum negotiations.

In view of our decision in ASBCA No. 50648, we also sustain the appeal in ASBCA No. 50649, because the basis for the assertion of the Government's claim is faulty, although it may be entitled to an adjustment as part of the LTOP reconciliation.

DECISION

The appeals in ASBCA Nos. 50648 and 50649 are sustained and the matter is remanded to the parties to negotiate quantum in accordance with this decision. The appeals in ASBCA Nos. 51048 and 51049 are dismissed as duplicative.

Dated: 11 June 2003

MARTIN J. HARTY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

NOTES

[1] These appeals are several of a series of appeals which arose from the project. The Board has previously issued decisions in the following appeals: *Contel Advanced Systems, Inc.*, ASBCA Nos. 49071, 49164, 49172, 01-2 BCA ¶ 31,576; *Contel Advanced Systems, Inc.*, ASBCA No. 49072, 02-1 BCA ¶ 31,808; *Contel Advanced Systems, Inc.*, ASBCA No. 49073, 02-1 BCA ¶ 31,809; *Contel Advanced Systems, Inc.*, ASBCA No. 49076, 03-1 BCA ¶ 32,110; and *Contel Advanced Systems, Inc.*, ASBCA No. 49074, 03-1 BCA ¶ 32,155. The appeal in ASBCA No. 49063 has been dismissed as duplicative in a 10 February 2003 unpublished Order Confirming Jurisdiction in ASBCA No. 49075. The appeal in ASBCA No. 49075 is pending.

[2] The Navy agrees that items B001 through B006 were firm fixed-price, but insists that B007 was "partially a firm fixed-price and partially a hybrid indefinite quantity-indefinite delivery/fixed price redeterminable price" (Gov't br. at VII-3). There is no support in the record or the contract for this contention. Although the contract did incorporate by reference FAR clause 52.216-22 INDEFINITE QUANTITY (APR 1984), there is no indication that this clause was intended to apply to the sub-CLINs in item B007 (SR4, tab 1 at 59). On the contrary, the record suggests that this clause was incorporated for Exhibit C (Additions) not for B007. (*See* AR4, tab 3 at R-00161 ("NWC has determined that the 'Additions' is based on IDIQ."))

[3] *See Black River Limited Partnership*, ASBCA Nos. 46790, 47020, 97-2 BCA ¶ 29,077 at 144,713, for discussion of the net present value methodology.

[4] The payment schedule CASI presented with its 12 April 1991 letter was based on an interest rate of 11.332173 percent per year on a purchase price of $22,829,211.89 and called for a monthly LTOP payment of $500,152.58, for a total of $30,009,159.28 over the 60-month term (SR4, tab 406 at A-11769). By our calculations, a rate of 11.32 percent would have required a monthly payment of $500,013.39, for a total of $30,000,803.28, a variance of $8351. Application of an MRC of .021906 to a purchase price of $22,829,211.89 would result in a monthly payment of $500,096.72, for a total of 30,005,802.94 and a recovery of $4999.66 in excess of the result produced by a straight 11.32 percent. Moreover, the MRC factor for an 11.32 percent interest rate would be closer to .021902 than .021906.

[5] CASI did not actually submit any claims to the Navy until 4 February 1994. Thus, the amounts referenced in Attachment 1 are projected values for anticipated claims.

[6] The Navy paid for some changes to the contract under the straight purchase procurement method, rather than by inclusion in the LTOP (*see, e.g.*, SR4, tab 2027,

Modifications Nos. 10, 17-21; tr. 5/66). Included in Attachment 2 are those changes to the contract for which the Navy chose to pay the purchase price, as well as those paid by inclusion in the LTOP price (*see e.g.*, AR4, tab 674, Attach. 2, entry 9 for Modification No. P00010). Accordingly, Attachment 2 has more entries than the 24 items listed in Attachment 1.

[7] In its letter, CASI explained: "B007 contains the SubCLINs that were initially proposed to be exercised in addition to SubCLINs that were exercised but not originally proposed. All unit quantities have been adjusted to either actual quantities requested, quantities estimated, actual quantities purchased, or actual quantities installed. All quantities are based on input from the Government, either orally or in writing, by memorandum or modification" (AR4, tab 674 at 1-2).

[8] Unexercised B007 sub-CLINs include sub-CLINs not exercised at all (*i.e.*, actual quantities are zero) and sub-CLINs exercised in smaller quantities than originally estimated by the Government.

[9] While CASI's 28 May 1992 letter to the Navy indicated that monthly payments would be $603,722.85, the invoices in the record indicate payments of $603,722.53, a difference of $.32 which would have potentially amounted to $19.20 if all 60 payments had been made.

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 50648, 50649, 51048, 51049, Appeals of Contel Advanced Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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