ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of –	)	
	)	
JJM Systems, Inc.	)	ASBCA Nos. 51152, 52159
	)	
Under Contract No. N62269-93-C-0534	)	

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OPINION BY ADMINISTRATIVE JUDGE ROME

JJM Systems, Inc. (JJM) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 605(c)(5), 606, from the contracting officer's (CO) deemed denial and denial, respectively, of its two equitable adjustment claims under its research and development contract with the Navy. The Board consolidated the appeals, denied appellant's summary judgment motion, *JJM Systems, Inc.*, ASBCA Nos. 51152, 52159, 00-2 BCA ¶ 31,106, and conducted a hearing. We decide entitlement only. For the reasons that follow, we deny the appeals.

FINDINGS OF FACT

1. On 21 September 1993 the Naval Air Warfare Center (NAWC), Aircraft Division, Warminster, Pennsylvania, awarded the subject negotiated cost-plus fixed-fee, level-of-effort contract to JJM for research and development engineering services and material. NAWC led a tri-service community which shared the goal of "maturing" non-cooperative target identification (NCTI) technology. The contract's Statement of Work (SOW) required technical support for four tasks: NCTI (Task 1); Multi-Sensor Integration (MSI) (Task 2); Embedded Training Systems (Task 3); and Technical Planning and Documentation Support (Task 4). For NCTI processor development, commercial off-the-shelf (COTS) technology was to be used to the maximum extent possible. MSI included services with respect to F-14D and F-18 aircraft and AEGIS shipboard weapons systems. The Navy had four options to extend the contract. The estimated cost, plus fixed-fee, was $1,881,874 for the base year; $1,937,618 for the first option year; $1,995,747 for the

second; $2,055,617 for the third; and $2,117,286 for the fourth. Initial funding was $225,000. The Navy ultimately exercised three of its options. (R4, tabs 1, 9, 18, 41; tr. 26, 488, 634-35)

2. The contract incorporated by reference FAR 52.232-22 LIMITATION OF FUNDS (LOF) (APR 1984) (R4, tab 1 at 16), which provides in part:

> (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 Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered . . . and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. 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 . . . . 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.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed-upon date, upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract . . . .

(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 . . . or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government . . . until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount . . . .

. . . .

(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.

. . . .

(j) Change orders shall not be considered an authorization to exceed the amount allotted by the Government specified in the Schedule, unless they contain a statement increasing the amount allotted.

3. The contract included the following pertinent clauses: H32-9400 LIMITATION OF LIABILITY - INCREMENTAL FUNDING (JAN 1992) (NAVSUP 5252.232-9400) (Incremental Funding clause); H43-9400 AUTHORIZED CHANGES ONLY BY THE CONTRACTING OFFICER (JAN 1992) (NAVSUP 5252.243-9400) (Authorized Changes clause) and H99-9039 CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (COTR) (NAWCADWAR) (COTR clause). The Incremental Funding clause states:

> This contract is incrementally funded and the amount currently available for payment hereunder is limited to *$225,000.00* inclusive of fee. It is estimated that these funds will cover the cost of performance through *30 Nov 1993*. Subject to the provisions of the clause entitled "Limitation of Funds" (FAR 52.232-22) of the General Provisions of this contract, no legal liability on the part of the Government for payment in excess of *$225,000.00* shall arise unless additional funds are made available and are incorporated as a modification to this contract.

(R4, tab 1 at 5) The Authorized Changes clause states in part:

> (a) Except as specified in paragraph (b) below, no order, statement, or conduct of Government personnel who visit the Contractor's facilities or in any other manner communicates (sic) with Contractor personnel during the performance of this contract shall constitute a change under the "Changes" clause of this contract.
>
> (b) The Contractor shall not comply with any order, direction or request of Government personnel unless it is issued in writing and signed by the Contracting Officer, or is pursuant to specific authority otherwise included as a part of this contract.
>
> (c) The Contracting Officer is the only person authorized to approve changes in any of the requirements of this contract and notwithstanding provisions contained elsewhere in this contract, the said authority remains solely the Contracting Officer's. In the event the contractor effects any change at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract price to cover any increase in charges incurred as a result thereof.

(R4, tab 1 at 14) The COTR clause states in part:

> The COTR will act as the Contracting Officer's representative for technical matters, providing technical direction and discussion as necessary with respect to the . . . statement of work, and monitoring the progress and quality of contractor performance. The COTR is not an Administrative Contracting Officer and does not have authority to take any action, either directly or indirectly, that would change the pricing, quantity, quality, place of performance, delivery schedule, or any other terms and conditions of the contract . . . or to direct the accomplishment of effort which goes beyond the scope of the statement of work in the contract . . . .
>
> When, in the opinion of the contractor, the COTR requests effort outside the existing scope of the contract . . . the contractor shall promptly notify the contracting officer . . . in writing. No action shall be taken by the contractor under such direction until the contracting officer . . . has issued a modification to the contract . . . or has otherwise resolved the issue.

(R4, tab 1 at 15)

4. CO S.J. Barber executed the contract award document. Seven other COs were assigned to the contract through 23 May 1997 (collectively, the eight COs).[1] None of the seven issued a notice to JJM when his or her contract tenure began, and none of the eight COs issued such a notice when his or her tenure ended, or notified JJM of the replacement CO. However, the contract contained the address and telephone number of the CO's office. JJM was aware of the address and, during the contract, occasionally wrote to COs; received correspondence from at least one CO; and received contract modifications executed by the various COs. (Stips. 1, 12, 13; R4, tab 1 at 1, 4, tabs 2-49; SR4, tabs S42, S61, S63, S103; tr. 145-47)

5. John W. Davis, JJM's president, who was responsible for managing its Government contracts, signed the contract documents. He was familiar with the LOF clause based upon his past experience with cost-plus fixed-fee contracts and had read it prior to signing JJM's proposal. He knew that, based upon the clause, the Navy was not obligated to reimburse JJM for costs incurred in excess of the funds allotted to the contract and that JJM was not required to work when allotted funds were exhausted or otherwise to incur costs in excess of the allotted amount. He also knew that the CO was the only one with authority to change the contract's terms and to increase the funds allotted to the contract, and that any notification that the funds had been increased was to be in writing from the CO. No Government employee ever told him that any Government entity would

pay JJM in excess of the contract's funding limit, or not to be concerned about it. (R4, tabs 1, 4; tr. 102-06, 112, 119)

6. Under the contract, JJM was to provide monthly progress and funding status reports in accordance with Contract Data Requirements List (CDRL) Form 1423, Sequences A005 and A006. The contract provided that these CDRLs were to be submitted to code 5024, the COTR. David Davis was the COTR from contract inception until the Warminster facility closed in September 1996, when contract administration moved to Patuxent River (PAX River), Maryland. Modification No. P00031, issued on 29 February 1996, had noted the forthcoming change and provided the contracting office's new address. (R4, tab 1 and SOW ¶ 3.4, tab 32; tr. 146, 418, 468-69, 471, 633-34, 652)

7. JJM submitted Progress and Cost Reports, intended to satisfy the contract's CDRL requirements. Until September 1996, JJM submitted the reports to NAWC's Commander, Warminster, to the attention of the "Receiving Officer," with "Distribution" to COTR Davis, who received and reviewed them. Thereafter, it submitted them to the "Receiving Officer" at PAX River, with distribution to the assigned COTR. As of JJM's report dated 28 December 1993, covering the period 1 November through 30 November 1993, which reported a negative balance of $284,068, the reports of record continuously depict a negative balance, including each time the Navy exercised an option to extend the contract, a process initiated by the COTR. A negative balance meant that costs JJM reported internally as incurred under the contract had exceeded allotted contract funding. The negative balances fluctuated, but mostly increased. COTR Davis did not discuss the negative balances with any CO. At his request, starting with its third report, JJM segregated its cost summaries by SOW Tasks 1 through 4. (R4, tabs 9, 18, 41; SR4, tabs S6, S9, S10, S13, S15, S16, S21, S22, S26, S29, S31, S32, S35, S38, S41, S44, S57, S68, S72, S75, S80, S83, S88, S90, S94, S98, S100, S101, S104, S107, S108, S110, S120; ex. A-2; tr. 43-47, 406, 427, 482-86, 489-90, 492-94, 496, 648)

8. The Navy added funds to the contract from time to time by unilateral modifications which stated that the contract's terms otherwise remained unchanged; repeated the strictures of the Incremental Funding clause; and, except for the first modification, stated that they were pursuant to the LOF clause. JJM's president Davis understood that JJM was not to exceed the total funded amount stated in a given modification. Funding came from the Navy or other military services. Sometimes a sponsor would seek specific work; other times the COTR and/or JJM would propose work to a potential sponsor. Before a funding modification was issued, the COTR's office would price the work with the sponsor and JJM. In some circumstances, the COTR had discretion whether to apportion funds among various contracts or his branch's operations.[2] When funding arrived for JJM's contract, it was assigned a Navy job order number and the COTR would initiate the modification process. The funding modifications often included the ending date of the applicable performance period, but they did not describe any contract task to be performed. However, they contained accounting and appropriations data,

including the Navy's job order number(s), which identified the funding source(s), at least to Government personnel. Although JJM could not necessarily interpret the funding data on its own, COTR Davis would discuss the work involved with JJM and the funding available for a given job. JJM also on occasion obtained that information directly from sponsors. The COTR and the sponsors provided direction to JJM regarding the work to be performed. (R4, tabs 2, 3, 5-11, 13-32, 34, 36-42, 45-49; SR4, tab S126, app. 2 at 1; tr. 57-58, 71, 141-42, 193-94, 210-11, 231-34, 305, 310, 476-82, 635-39, 644-45)

9. Except for about the first two months of the contract, funding did not precede the work. JJM was aware of the risk; had operated that way under a prior Warminster Navy contract; and had made the business decision to proceed in that manner. (Tr. 123, 128-29, 520-22, 546)

10. The contract provided that invoices were to be submitted to the Defense Contract Audit Agency (DCAA) in Philadelphia, Pennsylvania. During the contract, JJM submitted 44 invoices to DCAA, with a copy of each to the COTR. Based upon DCAA guidance under a prior contract, JJM did not invoice in excess of the amount allotted to the contract. Beginning with JJM's third invoice, dated 11 January 1994, covering the period 6 November through 3 December 1993, all of its invoices showed negative "contract reserves," indicating negative funding balances. Except that travel charges stated the destination and purpose of the travel in general terms, the invoices did not specify contract tasks performed. (R4, tab 1 at 4, 10 § G and SOW; SR4, tabs S1, S2, S5, S8, S12, S14, S19, S20, S25, S28, S34, S45, S47, S49, S53, S55, S58, S59, S64, S65, S69, S70, S74, S76, S78, S81, S82, S84, S87, S91, S92, S93, S95, S96, S99, S105, S109, S111, S115, S117, S119, S121; tr. 69-70, 76, 142-45; *see also* tr. 187)

11. By letters dated 20 December 1993 and 22 February 1994, entitled "Limitation of Cost or Fund Notification," Administrative Contracting Officer (ACO) Richard B. Jackson of the Defense Contract Management Agency, who worked at DCAA's office in Philadelphia, Pennsylvania, and reviewed JJM's invoices, wrote to JJM that his office's records indicated that contract funds had been substantially expended. He noted the unliquidated amounts remaining. Each letter advised JJM that if the total costs expected to be incurred under the contract exceeded the contract's estimated costs, JJM was to submit a revised total cost estimate within 15 days of receipt of the letter to an address identified in the contract as the CO's office and that "[a]ny work beyond the funding limits as established by the contract is performed at the contractor's own risk." (SR4, tabs S4, S7; tr. 53-54) The record does not include any response by JJM or any other such letters from the ACO or Navy to JJM.

12. Starting in about the fall of 1994, the Office of Naval Research (ONR) and PMA (Program Manager, Air) 213, two of the main contract sponsors, cut their funding substantially. PMA 213, an air traffic control management office that sponsored target identification work for the Navy, Army and Air Force, had been funding the contract's

support of SARTIS (Shipboard Advanced Radar Target Identification System), a program to place NCTI processors on AEGIS class ships. COTR Davis informed JJM about the funding cuts. JJM started what Richard Steven Ianieri, a division manager at JJM prior to leaving the company in January 1997, described as a "pretty focused marketing campaign," to identify other sponsors that might want to utilize the target identification technology in which JJM specialized. (Tr. 85, 206, 219, 510-11, 514-17, 522-24, 639-41)

13. Under contract Task 3, funded by CINCLANTFLT (Commander in Chief, Atlantic Fleet) in the amount of approximately $1.3 million, JJM provided training in conjunction with SHARP (Shipboard Assessment of Required Proficiency), an embedded training system program involving a Radar Warning Receiver (RWR). JJM's liaison with CINCLANTFLT was Senior Chief Lewis. In about the fall of 1994, JJM raised the prospect with Lewis of CINCLANTFLT's using COTS NCTI on ships instead of the more expensive SARTIS system. JJM conducted a "low level" briefing with Lewis and Dr. Roger Whiteway, a science advisor for CINCLANTFLT. Thereafter, JJM briefed CINCLANTFLT's senior Admiral Flanagan and conducted demonstrations of COTS NCTI in February 1995 on the USS WASP and the USS TICONDEROGA. COTR Davis was aware of JJM's efforts and, at a minimum, provided security clearances, equipment and set-up assistance. (SR4, tabs S43, S66, *see* tab S72, encl. at 2; tr. 59-60, 210, 212-18, 221-22, 260-65, 385, 475, 524, 527, 650)

14. JJM alleges that Lewis and Dr. Whiteway "directed" its activities in connection with its COTS NCTI proposal; it informed Lewis that the shipboard demonstrations and associated costs would be $75,000 per ship, for a total of $150,000; both Lewis and Dr. Whiteway promised that JJM would be paid; and it was not (*see, e.g.*, app. proposed findings 36, 40, 45). In its 1997 equitable adjustment request and first claim (below), JJM claimed $127,420 for the USS TICONDEROGA and $68,606 for the USS WASP and associated briefings, among other CINCLANTFLT and COTS NCTI costs (R4, tabs 50, 53). Neither Lewis nor Dr. Whiteway was called to testify at the hearing. There is no evidence that either was authorized to commit Navy funding. JJM's president Davis acknowledged that neither had authority under the contract to direct JJM to perform work, and the record does not contain any contemporaneous record of the alleged promises (tr. 118; *see also* tr. 270-71). We find no probative evidence that any Government official, authorized under the contract, promised to pay JJM for its USS WASP and USS TICONDEROGA work or any other unreimbursed CINCLANTFLT work, or demanded and obtained such work, knowing JJM to be in a cost overrun position.

15. Appellant further alleges that it has not been paid in full for its work in 1995 in connection with ASCIET (All Service Combat Identification Evaluation Team), a major, periodic, military exercise involving tri-service airborne, shipboard and land-based platforms, simulated combat and NCTI. JJM seeks $216,446, plus other associated costs, for this work. (R4, tabs 50, 53 at 6-8; tr. 222, 530; app. proposed finding 59) In the spring of 1995, as part of its campaign to acquire more funding, JJM marketed its COTS NCTI

technology to Admiral Altweg and John Blincoe of PEO TAD (Program Executive Office, Theater Air Defense). Mr. Blincoe informed JJM about ASCIET-95. JJM deemed it essential to demonstrate its COTS NCTI capability at ASCIET-95, a proving ground for target identification technology. (Tr. 222-23, 276, 282, 284-85, 525-30, 552) JJM advised COTR Davis that it would participate in ASCIET-95. He helped JJM obtain equipment and security clearances. JJM placed its NCTI system on the AEGIS ship USS CAPE ST. GEORGE and on a Hawk missile site. JJM alleges that it informed Mr. Blincoe and COTR Davis orally that it would cost about $750,000 for the USS CAPE ST. GEORGE demonstration and that COTR Davis responded that funding must be obtained. JJM began its ASCIET-95 work before any moneys for it were placed on the contract. Mr. Blincoe did not promise any amount but attempted to get funding through the AEGIS PMS (Program Manager, Ship). JJM ultimately received between $30,000 and $88,000 for its ASCIET-95 work, due to Mr. Blincoe's efforts. The record does not establish whether JJM received any funding for its work on the Hawk missile site. (*See* R4, tab 56; tr. 85, 223-26, 286, 289, 292-94, 296-97, 299-300, 384, 531, 546) Mr. Blincoe was not called to testify at the hearing. We find no probative evidence that any Government official, authorized under the contract, promised to pay JJM for its participation in ASCIET-95, or demanded and obtained such work, knowing JJM to be in a cost overrun position.

16. The USS TICONDEROGA, USS WASP and ASCIET-95 demonstrations caused the negative balance JJM reported on its cost summaries to increase, but JJM was already reporting negative balances prior thereto (*see* finding 7; tr. 319, 528-29). We find no probative evidence that any COTR purported to authorize JJM to continue to work while in an overrun position.

17. Appellant also alleges that the Navy did not fully fund the work of its employee, Mr. Robert Melby, resulting in a $267,704 shortfall. Mr. Melby, who was not called to testify at the hearing, had worked for the Navy at Warminster. Upon his retirement, JJM hired him to perform services for the COTR, on site, largely under contract Task 4. He worked for JJM from about August 1994 until JJM terminated his employment just prior to Warminster's September 1996 closing. COTR Davis directed at least some of Mr. Melby's work. According to DCAA, JJM invoiced for all of Mr. Melby's work through 19 April 1996, and the Navy paid those invoices. JJM's reported direct costs for on-site labor from 20 April through 4 October 1996 were $11,271. It is unclear whether they were all for Mr. Melby. There is insufficient evidence of record to establish that any Government official, authorized under the contract, demanded and received unfunded work from Mr. Melby, knowing JJM to be in an overrun position. (R4, tabs 50, 53 at 8; SR4, tab S124 at 12; tr. 88-89, 114-15, 120-21, 173, 501-02, 504, 506, 651)

18. From about November 1995 through early August 1996, JJM performed work, funded by the Navy's F-14 PMA in the amount of about $450,000, regarding a COTS RWR. JJM claimed increased work and costs and, after the work had been performed, sought an

additional $559,300 from the PMA's office, which ultimately agreed to pay $475,000 more than the original funding. By letter to CO Mark Drager dated 22 October 1996, JJM asked that the $475,000 be applied to the contract. CO Drager did so by unilateral Modification No. P00044, dated 18 December 1996. Prior thereto, he had telephoned JJM's president Davis to inquire about the matter, expressing annoyance that he had not been timely notified of the excess costs issue. The CO warned Mr. Davis that it was risky to expend company moneys for unfunded work and not to do it again. Mr. Davis did not mention JJM's other alleged cost overruns, which at the time totaled over $1 million, and the CO was unaware of any other overruns. Apart from his inquiry into the F-14 PMA matter, the CO did not investigate JJM's contract status. (R4, tab 45; SR4, tabs S103, S108, S110; tr. 84-85, 110, 422-24, 434, 445-48)

19. On 5 August 1996 the CO issued unilateral Modification No. P00040, which, *inter alia*, exercised the Government's third option, extending the contract term to 20 September 1997; increased the contract's total estimated cost-plus fixed-fee to $7,870,856; and increased funding by $108,700, to a total of $5,882,728. JJM's 5 August 1996 cost summary reported a negative balance of $1,701,492 through 19 April 1996. JJM did not stop work, despite the negative balance, because the third option had been exercised; it was still receiving funding, including from PAX River sponsors; and all sponsors expected the work they funded to be accomplished. (R4, tab 41; SR4, tab S98 at 7, tabs S108, S110; tr. 173-74, 622-23)

20. On 18 November 1996, John Andujar became the Contracting Officer's Representative (COR) at PAX River. Although the title changed, he performed the same function as a COTR. COR Andujar observed from JJM's cost summaries that they were reporting a high negative contract balance, but he did not discuss this with any CO. He assumed the CO(s) already knew about it. He determined to recommend that the Navy not exercise its fourth option. By January 1997 JJM had learned informally that the Navy would not exercise the option. By letter dated 30 April 1997, the CO notified JJM that the option would not be exercised. (R4, tab 44; SR4, tab S118; tr. 378-79, 617, 620, 625-26, 630-31)

21. On 25 April 1997, JJM submitted an equitable adjustment request to the CO, for "work performed within the scope of the contract, and for the additional costs incurred in order to comply with numerous directed and constructive changes" (R4, tab 50 at 1). JJM stated that, to respond to its customer's needs, it "did not always insist on the prompt definitization of these various items of additional work" (*id*.). It claimed $1,188,744 in unreimbursed costs, plus fee, for a total of $1,271,956, which included the foregoing, and other, CINCLANTFLT COTS NCTI efforts; the ASCIET-95 and related matters; and Mr. Melby's work (R4, tab 50 at 3-8).

22. JJM's final cost summary, dated 23 July 1997, covering the period 31 May through 27 June 1997, reported a $1,345,110 negative balance (SR4, tab S120 at 4).

23. Unilateral Modification No. P00048, dated 21 August 1997, added $15,353 to the contract, to cover performance through the contract's 20 September 1997 termination date, resulting in total contract funding of $6,750,629 ($6,361,727 costs, $388,902 fee). Of that amount, $976,601 (including the $475,000 funded by the F-14 PMA) had been added to the contract during the Navy's third option period. (R4, tabs 42, 45-49)

24. The Navy paid JJM's contract invoices, through its final invoice, dated 26 August 1997, in the amount of $14,347, which covered the period 6 April through 19 April 1996. JJM's billing had fallen behind the current time period and costs that it was charging internally to the contract because its invoices did not exceed contract funding, per DCAA's guidance. The Navy did not pay any amounts to JJM in excess of the allotted contract funding. (SR4, tabs S121, S124 at 2; tr. 144-45, 184-85; app. proposed finding 77)

25. On 16 October 1997 the CO denied JJM's equitable adjustment request and, on 20 October 1997, JJM submitted a certified CDA claim to the CO in the same amount of $1,271,956. JJM alleged that it had performed work pursuant to Navy directives that was within the contract's scope or constituted constructive changes (R4, tabs 52, 53 at 8). It claimed: "Though all of the changes may not have been directly ordered by the [CO], there certainly was knowledge that this work was being requested, as well as acquiescence, if not explicit agreement, that it should be performed, and subsequently ratification by responsible Navy personnel" (R4, tab 53 at 9). On 12 November 1997, JJM appealed to the Board based upon a deemed denial, alleging that a decision period cited by the CO was unreasonable. The Board docketed the appeal as ASBCA No. 51152. By final decision dated 8 December 1997, the CO denied JJM's claim on the grounds that it had not submitted the required LOF notice; the CO had not authorized the work; and JJM had exceeded contract funding without the CO's authorization. (R4, tabs 60, 61; Board corresp. file)

26. DCAA's 1 June 1998 audit report on JJM's claim questioned some specific costs, such as travel; and questioned the entire claim on the ground that JJM had billed for its costs in the order they had been incurred, rather than on the basis of contract effort funded, and had been paid the majority of its billed costs pertaining to the matters cited in its claim. DCAA noted that JJM had incurred a significant amount of costs in excess of the contract's funded value that could not be billed. (SR4, tab S124 at 2, 5, 7, 9, 12; *see also* tr. 193-94, 200-01)[3]

27. On 14 July 1998, JJM submitted a second certified CDA claim to the CO, this time in the amount of $1,496,865, for work after 19 April 1996, the end date of its final invoice, through July 1997 (R4, tab 62; tr. 76-77). JJM asserted the same theories of recovery as in its first claim (R4, tab 62 at 5-6). JJM had disputed DCAA's conclusion that it had been paid for most of the costs in its first claim, and had submitted its second claim

only in response to what it considered to be DCAA's erroneous chronological approach to JJM's billing. As expressed by JJM's president Davis:

> Well, we thought the second claim was unfair in terms of - - the work covered here was requested by individuals in the Navy, by the COTR and . . . a lot of it came from [PAX] River, and they paid for it. The work that was not paid for was the work that was on the first claim.
>
> However, this was submitted as a result of the DCAA argument that the Navy really didn't care about the way we tracked the work as tasks; that they were only interested in the chronological application of money to the contract and the chronological invoicing of that money, which indicated that we had been paid through voucher 44 . . . .

(Tr. 77) By final decision dated 21 April 1999, the CO denied the second claim on the grounds that JJM had not complied with the LOF clause and the alleged additional work was not authorized by the CO (R4, tab 66 at 1). On 26 April 1999, JJM appealed to the Board, which docketed the appeal as ASBCA No. 52159 (Board corresp. file).

28. DCAA's 28 September 1999 audit report on JJM's second claim questioned specific costs of $429,483, including costs allegedly claimed in excess of costs incurred and overtime. DCAA stated that JJM had billed costs as they were incurred chronologically, rather than in accordance with funding modifications, such that costs had been billed and paid that were not officially funded and costs for some funded efforts had not been billed. (SR4, tab S126 at 2, 7-10)

The following findings 29-36 are based upon the parties' stipulations concerning seven of the eight COs, six of whom did not testify, and upon the testimony of COs Barber and Drager.

29. The eight COs never received, and were not aware of any other person or entity receiving, any notice, correspondence, representation or communication of any kind from JJM concerning, or required by, the LOF clause (stips. 2, 3; tr. 160-61, 429). Appellant concedes that "JJM did not provide the written notice required by" the LOF clause (app. br. at 7, ¶ 26).

30. The eight COs never received any notification from JJM, in writing or otherwise, that any COTR had requested JJM to undertake any effort that JJM considered outside of the contract's scope (stip. 4; tr. 431).

31. The eight COs never saw or discussed with anyone JJM's Progress and Cost Reports (stip. 5; tr. 426-28, 570-71).

32. Except to the extent that CO Drager discussed the above $475,000 modification, the eight COs never discussed contract funding with JJM. They never asked JJM to perform work for which no such funding existed. (Stip. 6; tr. 429)

33. The eight COs did not direct JJM, in writing or orally, to perform work on the contract, nor did they assign tasks to JJM to perform under the contract (stip. 7).

34. No one at JJM ever communicated in any way to the eight COs that any Navy or Government employee had promised JJM that funding would be added to the contract and then failed to live up to, or follow through with, that promise, in whole or in part, except to the extent that JJM communicated this in its request for an equitable adjustment (stips. 8, 9; tr. 430).

35. The eight COs never communicated to JJM in any way that the Navy would pay JJM any funds in excess of the amount then allotted to the contract (stip. 10; tr. 431).

36. No one from JJM ever told the eight COs that JJM expected to be paid for any work under the contract in excess of the amount then allotted to the contract, except to the extent that JJM communicated this in its request for an equitable adjustment (stip. 11; tr. 107).

DISCUSSION

The Navy apparently does not now contend that any of appellant's activities were beyond the contract's scope of work (*see* tr. 65) and the parties have not briefed the change, constructive change, or ratification theories mentioned in appellant's claims. Rather, they have focused upon whether the contract's LOF clause precludes appellant from recovering its unpaid costs. Appellant admittedly did not comply with the clause's notice provisions (finding 29), but it alleges that its CDRLs – its Progress and Cost Reports, which went to the COTRs and depicted its overrun status (findings 6, 7), were sufficient notice, citing *Wind Ship Development Corp.*, DOT CAB No. 1215, 83-1 BCA ¶ 16,135. Appellant's reports are not equivalent to the cost notices in *Wind Ship* (one to the COTR that 75% of the contract period had expired but that funds were inadequate to complete; two to the CO). This Board has held, in an opinion adopted by the Federal Circuit, that such reports are not substitutes for the required LOF notice:

> [N]ot every kind of notice complies with the LOF clause. Not only must the notice be in writing and addressed to the CO, but, according to its terms, it must also set forth the amount of additional funds which the contractor believes is

> required. A notice addressed to administrative personnel and not to the CO does not comply with the LOF or LOC clause. . . . Nor is the notice in compliance with the contract clause if it omits a revised estimate of total performance cost. [Citation omitted]
>
> . . .
>
> . . . Nor does it help appellant to point to its MLER's[4] and other reports as sources of information for the missing LOF notice information, since such other data and vouchers are not substitutes for a complete LOF notice.

Falcon Research & Development Co., ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,336-37, *aff'd,* 831 F.2d 1056 (Fed. Cir. 1987).

Pursuant to the LOF clause's unambiguous language, the Government generally is not liable to pay anything beyond the funded contract amount, particularly when the contractor fails to give the notification required by the clause. *See Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997), involving the Limitation of Cost (LOC) clause. As relevant here, the LOC clause is substantially the same as the LOF clause. *Falcon Research & Development, supra*, 87-1 BCA at 98,336, n.7. Appellant contends, however, that the Navy induced it to continue performance and that its noncompliance with the LOF clause is a "technicality" that does not justify the Navy's failure to pay its overrun costs (app. br. at 23). Citing *Flight Dynamics Research Corp*., ASBCA Nos. 35248, 35755, 88-3 BCA ¶ 20,861, appellant alleges that the LOF clause does not bar recovery because the Navy, aware of appellant's cost overruns, nonetheless obtained appellant's performance and benefited from it. Alternatively, appellant alleges that the Navy is estopped from asserting the clause as a defense to payment.

In *Flight Dynamics* the Board applied an exception to the operation of the LOF clause previously expressed (but not applied) in *North American Rockwell Corp*., ASBCA No. 14329, 72-1 BCA ¶ 9207 (LOC clause). As stated in *Flight Dynamics*:

> In [*North American Rockwell*], the Board ruled concerning the following principle:
>
> The general rule is that where the Government demands and obtains the fruits of the Contractor's efforts under a cost reimbursement type contract knowing the contract to be in an overrun condition, the Contractor is entitled to recover its costs in spite of the limitation provisions of the [LOC] clause.

The Board ruled as follows:

> This principle has been applied when the Government has demanded and received separate or separable items or units produced entirely at costs incurred by the contractor after the contract funds were exhausted. . . . However, this principle cannot be invoked so as to prevent the Government from obtaining delivery of Government-owned property which it has paid for without reimbursing the contractor for costs of nonseverable increments to such property which the contractor added voluntarily with full knowledge that it was in a cost overrun situation.

88-3 BCA at 105,499-105,500, citations omitted. The Board noted in *North American Rockwell* that "[a] contractor cannot create an obligation on the part of the Government to reimburse it for a cost overrun by voluntarily continuing performance and incurring costs after the cost limit has been reached." 72-1 BCA at 42,722. Knowledge on the part of the Government that a contractor may be in an underfunded condition but has continued work is not enough to waive a contract's cost limitation provisions. *Hughes Aircraft Corp*., ASBCA No. 24601, 83-1 BCA ¶ 16,396 at 81,520 (LOC clause).

Assuming, but not deciding, that appellant's claimed costs were properly allocable to the contract, the *Flight Dynamics* exception to the LOF clause does not apply. Appellant mainly contends that its briefings and demonstrations of its technology in 1995 for CINCLANTFLT were not funded; and its ASCIET-95 work, and Mr. Melby's work at the COTR's office, were not fully funded. Appellant raised the prospect of CINCLANTFLT's using COTS NCTI and pursued the ASCIET-95 opportunity as part of its marketing campaign to get more money placed on its contract (findings 12, 13, 15). No authorized official promised to pay it for its CINCLANTFLT or ASCIET-95 work, or demanded and obtained such work, knowing appellant to be in an overrun position, and appellant did not prove that that any such official knowingly demanded and received unfunded work from Mr. Melby (findings 14-17). Appellant's contract work during the period of its second claim was funded by its sponsors, whether or not appellant billed for it (findings 19, 27, 28).

Appellant's estoppel argument suffers from the same impediments, and more. Appellant bears the burden to prove that the Navy's actions should estop it from asserting the LOF clause. *Arbiter Systems, Inc.*, ASBCA Nos. 47403, 47404, 97-2 BCA ¶ 29,183 at 145,124, *aff'd*, 178 F.3d 1311 (Fed. Cir. 1998) (Table), *cert. denied*, 527 U.S. 1003 (1999). Because Government personnel are involved, as a prerequisite to estoppel, appellant must show that their actions or representations upon which it professes reliance were within the scope of their actual authority. *American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985); *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973); *HTC Industries, Inc.*, ASBCA No. 40562, 93-1

BCA ¶ 25,560 at 127,311, *aff'd on recon*., 93-2 BCA ¶ 25,701, *aff'd,* 22 F.3d 1103 (Fed. Cir. 1994) (Table). Estoppel with respect to contractual cost limitation provisions applies only in "very limited circumstances." *Hughes Aircraft, supra,* 83-1 BCA at 81,516. In addition to proving authority, appellant must prove four factors:

> (1) [T]he party to be estopped must know the facts, *i.e*., the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e*., that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

American Electronic Laboratories, supra, 774 F.2d at 113, citations omitted.

Concerning factor (1), appellant never notified any CO about the overruns at issue (findings 18, 29). However, the contract designated the COTRs to receive appellant's CDRLs. The COTRs, within the scope of their authority, reviewed them and knew that appellant was in an overrun condition. (Findings 6, 7, 20) Appellant alleges that this knowledge, as well as COTR Davis' knowledge of its CINCLANTFLT and ASCIET-95 work, and of Mr. Melby's work, should be imputed to the CO. Accepting for the sake of argument that knowledge of appellant's CDRLs and, thus, of its overrun condition, should be imputed to the COs, appellant still has not satisfied estoppel factors 2 and 3.

Regarding factor (2), there is no evidence that the Government intended to induce appellant to perform overrun services, in contrast to the circumstances in *Dynamics Concepts, Inc.*, ASBCA No. 44738, 93-2 BCA ¶ 25,689, cited by appellant, where the Government continued to pay the contractor's invoices when the CO and others knew that they exceeded the contract ceiling. Here, although appellant's invoices showed negative funding balances, appellant never billed, and the Government never paid, in excess of the allotted contract amount (findings 10, 24). The vouchers were not substitutes for the required LOF notice, *Falcon Research & Development, supra,* and the fact that the Government funded some work post-performance did not bind it to fund all overruns. *Textron Defense Systems, A Division of AVCO Corp*., ASBCA Nos. 47352, 47950, 96-2 BCA ¶ 28,332 at 141,492, *aff'd*, 143 F.3d 1465 (Fed. Cir. 1998); *North American Rockwell, supra,* 72-1 BCA at 42,722. Appellant alleges that COTR Davis induced its overrun performance. The Board in *Dynamics Concepts* confirmed that even a CO's actual knowledge of overruns did not, *per se*, waive the LOF clause notice requirement and that the COTR lacked authority to do so. 93-2 BCA at 127,804. There is no probative evidence that any COTR purported to authorize appellant to continue performance in an overrun position (finding 16). The contract's Authorized Changes and COTR clauses warn that the

COTR is not authorized to change the contract (finding 3). Even if there had been an authorized contract change, the LOF clause notes that a change order is not an authorization to exceed the amount allotted to the contract, unless it contains a statement increasing that amount (finding 2). Thus, any reliance by appellant upon the COTR's actions or inactions would be unreasonable and would not bind the Government to fund any part of its overrun. *Textron Defense Systems*, *supra*, 96-2 BCA at 141,492; *HTC Industries, supra,* 93-1 BCA at 127,311*; Falcon Research & Development, supra,* 87-1 BCA at 98,340-41.

Concerning factor (3), appellant was familiar with the requirements and restrictions of the LOF clause. It knew that: the Government was not obligated to reimburse it for costs in excess of the amount allotted to the contract; it was not required to perform when allotted funds were exhausted; the CO was the only one with authority to increase allotted funds; and any increase notification had to be in writing from the CO. (Finding 5) Appellant was aware of the risk of working before funding was applied to its contract and had made the business decision to proceed in that manner (finding 9). ACO Jackson and CO Drager had warned appellant about that risk (findings 11, 18). The COs never communicated to appellant that the Navy would pay it any funds in excess of the amount allotted to the contract (finding 35). Appellant was responsible for its own overrun conduct. The LOF clause places the affirmative obligation upon the contractor, not the Government, to monitor its costs to ensure that it stays within allotted funding. *Textron Defense Systems*, *supra*, 96-2 BCA at 141,492; *Flight Dynamics, supra,* 88-3 BCA at 105,499. Even if appellant had submitted a proper LOF notice to the CO, the CO would not have been required under the clause to fund its overruns. Rather, if the CO had failed to increase the amount allotted to the contract, appellant's option would have been to halt performance, or to continue to work at its own risk, just as it elected to do in this case. *Flight Dynamics, id*.; *Falcon Research & Development, supra,* 87-1 BCA at 98,336.

The unreasonableness of any reliance by appellant upon the COTR's actions, as set forth above, undermines its ability to satisfy factor (4), which we need not address further.

In sum, appellant has not established the authority of the officials upon whose alleged actions or representations it relies, nor at least three of the four factors necessary to estop the Government from relying upon the contract's LOF clause in declining to fund appellant's cost overruns.

DECISION

The appeals are denied.

Dated: 24 February 2003

CHERYL SCOTT ROME
Administrative Judge
Armed Services Board
of Contract Appeals

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] This excludes the COs who later denied JJM's equitable adjustment request and claims.

[2] JJM alleged at the hearing that COTR Davis diverted funds intended for its contract elsewhere (*see* app. proposed finding 94). JJM did not so allege in its claims to the CO. Thus, the matter is not properly before us. *Paragon Energy Corp. v. United States*, 645 F.2d 966, 97l (Ct. Cl. 1981). Even if the claims had included the allegation, there is insufficient evidence of record to support it (*see* tr. 303-10).

[3] At the hearing, the Navy moved to dismiss ASBCA No. 51152 on the ground that DCAA had established that JJM had been paid in full for the claimed work (*see* tr. 198-200). The matter was left for post-hearing briefing, in which the Navy renewed its contention (Gov't br. at 37). In view of our disposition of these appeals, we do not separately address the Navy's motion.

[4] The MLERs were Monthly Level of Effort Reports, a copy of which the Requiring Activity Contract Administrator was to send to the CO. 87-1 BCA at 98,325.

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. 51152, 52159, Appeals of JJM Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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