ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Safeco Insurance Company of America	)	ASBCA No. 52107
	)	
Under Contract No. F08650-88-C-0170	)	

APPEARANCES FOR THE APPELLANT: Julian F. Hoffar, Esq.
Kathleen Olden Barnes, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: COL Anthony P. Dattilo, USAF
Chief Trial Attorney
Robert C. Allen, Esq.
Senior Trial Attorney
LT COL Dwight K. Keller, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY

At issue in this appeal is appellant's revised claim for $755,196.06 in extra costs it alleges it incurred as the result of differing site conditions, work suspensions, changes and delay, disruption and inefficiency, ultimately culminating in the termination of the contract for the convenience of the Government. Evidence on both entitlement and quantum was presented at a four-day hearing. We sustain the appeal to the extent indicated and make a termination award to Safeco in the amount of $733,934.17.

FINDINGS OF FACT

Contract Performance

Contract No. F08650-88-C-0170 in the amount of $1,075,000.00 was awarded to Manning Electric & Repair Co., Inc. (Manning) by the U.S. Air Force on 30 September 1988 to replace the primary electric distribution system at Patrick Air Force Base, Florida. The work entailed the construction of a new switchgear building, installation of a new switchgear, replacement of all existing overhead primary and secondary electrical distribution lines with underground conductors in a concrete encased ductbank, and the installation of seven vacuum switches, two high voltage disconnects and 15 concrete poles and associated lighting. Approximately 9,000 linear feet of underground cable was required, some 5,000 feet of which was to be pulled through existing ductbank and the

balance through new ductbank that was to be installed as part of the contract work. (R4, tab 1)

The contract contained the following standard FAR clauses of relevance to the issues in this appeal: 52.212-6 TIME EXTENSIONS (APR 1984); 52.212-12 SUSPENSION OF WORK (APR 1984); 52.233-1 DISPUTES (APR 1984); 52.236-2 DIFFERING SITE CONDITIONS (APR 1984); 52.243-4 CHANGES (AUG 1987); and 52.249-2 TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (ALTERNATE I) (APR 1984).

On 5 October 1988, Manning executed payment and performance bonds with its surety, Safeco Insurance Company of America (R4, tabs 172, 173). It previously had executed a general indemnity agreement (R4, tab 177 at 1; tr. 33-34). Notice to proceed was issued on 30 November 1988, establishing a completion date of 30 November 1989 (R4, tab 22).

Paragraph 8A of section 01020, the general contract provisions, required submittals within 30 days after the issuance of the notice to proceed. Many of Manning's submittals were untimely. (R4, tabs 12, 15; tr. 523-26). Of relevance are the submittals for the new 15 KV switchgear and the vacuum switches and pad mounted transformers.

Manning obtained a quote for the switchgear and other materials from Westinghouse Electric Supply Company (Westco) on 9 November 1988, and ordered the materials on 12 January 1989 (app. supp. R4, tab 498, ex. B). According to the approved Contract Progress Schedule, installation of the switchgear represented 18.5 percent of the contract work and required two weeks and was to begin the week of 31 July 1989 (app. supp. R4, tab 498, ex. 5). Westco made at least two inquires about the switchgear specifications. The first was by a letter dated 22 February 1989, which Manning forwarded to the Government on 24 February 1989, and to which the Government responded on 13 March 1989 (R4, tabs 24, 25). Manning's material submittal for the switchgear is dated 13 April 1989, and was approved 16 May 1989 (R4, tab 15). The second Westco inquiry was by a fax dated 7 August 1989, which Manning forwarded to the Government on 11 August 1989. The Government's response was that it had already provided answers to the inquiry in its 13 March 1989 letter (R4, tab 32). The switchgear was delivered on 11 December 1989 (R4, tab 167, ex. 7 at 36) and installation was completed by 18 January 1990 (R4, tab 13).

Manning's submittal, dated 28 February 1989, for the vacuum switches and transformers was also late; however, the Government did not act on the submittal until 30 June 1989, some four months after submittal (R4, tab 15; tr. 255-57). Installation of the vacuum switches and transformers represented 26 percent of the contract work and had been scheduled to be performed during a six week period beginning the week of 1 May 1989 (app. supp. R4, tab 498, ex. 5).

By 2 June 1989, Manning had completed only 22.4 percent of the work. In a letter dated 12 June 1989, the contracting officer advised Manning that its approved Contract Progress Schedule (which reflected an early completion date) indicated that 51 percent should have been completed. (R4, tab 27; app. supp. R4, tab 500) Manning responded on 20 June 1989, explaining that the delay was associated with installation of the new ductbank, caused by the need to hand-dig several areas, and the vacuum switches and transformers. The new ductbank accounted for 30.2 percent of the contract work, 20.3 percent of which had been completed. None of the work associated with installation of the vacuum switches and transformer had been accomplished because the submittal was still pending with the Government (R4, tabs 13, 15, 28).

Manning began pulling 15 KV cable through the ductbanks on 2 August 1989 (R4, tab 167, ex. 5). It had planned to set up its equipment and crew at one end of the cable run and pull cable through to the other end, moving the equipment and crew forward in one direction (R4, tab 498 at 12). On 7 August 1989, it discovered that sections of the existing ductbanks had collapsed (R4, tab 167, ex. 5). The existing ductwork was Orangeburg duct, commonly used during World War II (tr. 171-72). Manning notified the Government of the duct problem on 9 August 1989 and requested direction as to how to proceed (R4, tab 31). While waiting for direction, Manning's subcontractor, Woodbine Construction, Inc. (Woodbine), continued construction of the new switchgear building and Manning worked on the installation of the vacuum switches and transformers (R4, tabs 13, 167, ex. 5; app. supp. R4, tab 499, ex. O).

The Contract Progress Schedule shows that pulling the 15 KV cable represented 11.3 percent of the contract work, and was scheduled to begin the week of 24 July 1989, and be completed in six weeks. Splicing the 15 KV cable represented 2.1 percent of the work, and was scheduled to begin during the week of 31 July 1989, and be completed in 11 weeks. (App. supp. R4, tab 498, ex. 5)

Thus, according to the schedule, pulling the cable was the critical path construction activity. Installation of the switchgear and splicing of the cable were to begin after Manning began pulling cable and, for two weeks, were to be performed at the same time that cable was being pulled. Cable splicing became the critical path activity after all the cable had been pulled. Installation of the switchgear was not a critical path activity. (App. supp. R4, tab 498, ex. 5)

Safeco's Takeover of the Contract

In August, both Safeco and the Government received letters and telephone calls complaining about nonpayment from some of Manning's suppliers and subcontractors (R4, tabs 30, 33 through 36, 40, 43; tr. 36-38, 85-86). In a 30 August 1989 letter to Safeco, Manning voluntarily defaulted and asked Safeco to pay its outstanding material and subcontractor invoices under its payment bond (R4, tab 176).

At the time Manning voluntarily defaulted, it had completed 58.8 percent of the contract work (R4, tabs 13, 41). A comparison of the scheduled and completed work reflects that, apart from pulling and splicing the cable and installing the new switchgear, Manning had timely completed all but 5.9 percent of the scheduled work, 2.1 percent of which was associated with construction of the new switchgear building and 2.6 percent with installation of the vacuum switch and transformer (R4, tab 13; app. supp. R4, tab 498, ex. 5). Construction of the new ductbanks and installation of the vacuum switches and transformers, which had caused Manning to be behind schedule in June, were now 96 percent and 92 percent complete, respectively (R4, tab 13).

Mr. Donald Reedy, a senior Safeco claims representative, met with Manning's management (tr. 38-40). Including the Patrick Air Force Base contract, Safeco had issued payment and performance bonds for Manning on some 29 projects (R4, tab 177 at 12-15). Manning also had a number of unbonded projects and Mr. Reedy learned that Manning had been "robbing Peter to pay Paul," *i.e.*, it was using monies received on one project to pay expenses on other projects (tr. 92).

Mr. Reedy engaged Mr. Ronald Cox, Executive Vice President of Ackerman Construction Consultants, Inc. (Ackerman), to investigate the status of the bonded projects (tr. 42, 165). In conjunction with his investigation, Mr. Cox evaluated the Patrick Air Force Base contract. He reviewed Manning's bid and found it reasonable, verified delivery and installation of the materials reflected on Manning's job cost records, determined that there was no defective work, calculated the amount of unpaid bills, and estimated what he thought it would cost to complete the Patrick Air Force Base work. (Tr. 165-66, 169-75) He determined that there was enough contract money, and, with extensions he thought should be granted, enough time to complete the project work (tr. 261, 267, 279, 281). Mr. Reedy also hired accountants to review Manning's financial records and to determine whether Manning's equipment was encumbered by any liens (tr. 44-46, 75).

On 8 September 1989, Safeco and Manning executed a takeover agreement covering the bonded projects, including the Patrick Air Force Base contract. Paragraph 2 of the takeover agreement required Manning and its principals to "convey, set over or assign" to Safeco both real and personal property, and paragraph 3 required, at Safeco's option, the execution of additional assignment agreements attached as Exhibits B and C (R4, tab 177 at 2). Both were executed on 9 September 1989 (*id*. at 17-21).

Exhibit B to the takeover agreement was an assignment of Manning's contracts. Pursuant to the Exhibit B contract assignment agreement, Manning transferred and assigned to Safeco all of its "right, title and interest in" Manning's contracts, "specifically including . . . all monies [d]ue or to become due . . . together with the right to receive the same;" "[a]ll inventories of material, equipment and supplies . . . contracted for or intended for the" contract work, and "[c]laims, demands or causes of action referenced in Schedule 1" to the

agreement, together with the proceeds derived from any judgment entered in its favor in connection therewith (R4, tab 177 at 17). Schedule 1 listed the 29 bonded contracts, including the Patrick Air Force Base contract, but no pending claims were identified for any of the contracts on the schedule (*id*. at 12-16). The power of attorney provision contained in the Exhibit B contract assignment agreement authorized payments by the Government on all of the Schedule 1 contracts to Safeco and specifically appointed Safeco as Manning's "true and lawful attorney, irrevocably with full power of substitution . . . [to] prosecute any claim" on Manning's behalf and to "demand and receive . . . all such monies due or to become due . . . in payment thereof" (*id*. at 17-19).

In paragraph 4 of the takeover agreement, Manning and its principals assigned, transferred and set-over to Safeco a "lien upon and a continuing security interest in collateral described in Exhibit 'I' attached" thereto. Exhibit I was a list of equipment which Manning represented and warranted in paragraph 5(a) of the takeover agreement that it was the lawful owner of and had "the full right to pledge, sell, assign and transfer the same and grant a security interest therein." (*Id*. at 2, 3, 31-62) Paragraph 6(a) provided that the equipment identified by Exhibit "I" was to be used "solely" in the conduct of Manning's business and in completion of projects bonded by Safeco (*id*. at 4).

Exhibit C was an agreement to assign Manning's equipment. Pursuant to the Exhibit C equipment assignment agreement, Manning pledged, sold, assigned and transferred to Safeco "all right, title and interest to the equipment" listed in Exhibit I to the takeover agreement and again warranted that it was the lawful owner of that equipment with "good right" to assign and transfer it to Safeco as collateral security for the repayment of obligations (*id*. at 20-21; tr. 276-77). The power of attorney provision contained in the Exhibit C equipment assignment agreement specifically authorized Safeco "to take control and exercise possession of" the equipment listed in Exhibit I and "to sell, pledge, and do any and every thing as necessary or desirable . . . without limitation" with the equipment (R4, tab 177 at 20).

Both Manning and Safeco advised the Government of their action by letters dated 9 September 1989 and Western Union Mailgrams dated 11 September 1989. Manning's notices stated that it had "assigned all contract rights" in the Patrick Air Force Base contract to Safeco and that: "[w]e relinquish all right, title and interest in [the contract] to our surety" (R4, tab 38, 178; tr. 58-59). Safeco's notices stated that: "Safeco has been assigned and has taken over all contract rights of Manning" and requested that it be paid all contract funds "due or to become due" (R4, tab 39, 179; tr. 60-61).

On 19 September 1989, representatives of the Government, Safeco and Ackerman met to discuss Safeco's desire to execute a takeover agreement with the Government and to name Ackerman as the completion contractor for the Patrick Air Force Base project. During this meeting, the Government was advised that Manning had given Safeco a power of attorney. (R4, tab 41) On 10 October 1989, the Government and Safeco executed a Surety

Takeover Agreement, incorporated into the contract by Modification No. P00001, pursuant to which Safeco agreed to complete performance in accordance with the original terms and conditions of the contract and Ackerman was approved by the Government as the completion contractor. The "WHEREAS" paragraphs recite that: "MANNING has . . . executed its Power of Attorney in favor of SAFECO" and "has relinquished all of its right, title and interest in and to the contract . . . including specifically the right to receive contract balances, retainages or other sums or payments from the AIR FORCE." Modification No. P00001, effective 27 November 1989, also changed the name and address of the contractor from Manning to Ackerman and extended the performance date to 5 January 1990. The contract balance at that time was $350,629.25. (R4, tab 2)

Following the takeover, Safeco paid-off the bank liens on two bucket trucks and two pickup trucks owned by Manning (ex. A-8; tr. 76). It also filed security interests against the construction equipment that was not suitable for road use and liens with the Florida Department of Motor Vehicles for the road vehicles (tr. 77). Ackerman obtained insurance for the construction equipment on site and titles, tags and registrations for the road vehicles as they expired (tr. 183, 251-54). Safeco eventually expended approximately $6 million to complete the 29 bonded Manning contracts (tr. 276-77).

Differing Site Conditions, Suspensions of Work, Changes and Delay

During the 19 September meeting with Safeco and Ackerman, the Government acknowledged that Manning's progress had been impacted by the "duct problem" (R4, tab 41). There had been no response to Manning's request for direction from the Government on the "duct problem" when Mr. Cox initially met with the Government before the takeover and expressed his concern that the remaining Orangeburg duct might not be useable (tr. 185-86).

After the takeover, Ackerman discovered that additional sections of the ductbank had collapsed and were otherwise deteriorated and unusable (tr. 186-87). It notified the Government about its difficulties, and was unsuccessful with a further attempt to pull cable undertaken at the Government's direction (R4, tabs 6, 51; app. supp. R4, tabs 505, 507).

The Government acknowledged in an internal memorandum dated 9 November 1989 that sections of the existing duct could not be used and that it had been notified of the problem by Manning on 9 August 1989 (R4, tab 187). On 13 November 1989, Ms. Jean N. Robertson, the contracting officer, directed the engineering division to determine what changes were necessary to proceed with the contract work. Ackerman requested as much prior notification of the changes as possible to allow sufficient time for delivery of materials. (R4, tabs 58, 188; app. supp. R4, tab 507) A new statement of work was ultimately issued on 28 November 1989, revising the contract to require Ackerman to furnish and install new ductbank systems to replace those that could not be used (app. supp. R4, tab 509).

By a letter dated 30 November 1989, Ackerman notified the Government that it had discovered still more areas in which it was unable to pull cable due to the deterioration of the existing ductbank (R4, tab 63). The Government did not incorporate these additional areas into the new statement of work and, instead, directed Ackerman to prepare a cost proposal based upon the 28 November 1989 statement of work (app. supp. R4, tab 510). Ackerman complied with the direction (app. supp. R4, tab 516).

1 December 1989 to 10 April 1990

At least 75 percent, if not more, of the existing ductbank could not be used (R4, tab 13; app. supp. R4, tab 506). As of 1 December 1989, Ackerman had pulled cable through as much of the new and existing ductbank as was possible. On 9 December 1989, Ackerman implemented a revised schedule reflecting a re-sequencing of the remaining contract work and began performing non-critical path work (R4, tabs 13, 194). The revised schedule shows that 28 percent of the original contract work was remaining (R4, tab 13).

Bilateral Modification No. P00002, effective 5 January 1990, extended the performance period to 28 February 1990 "due to government delay until a pending change order can be processed" (R4, tab 3). The Government again acknowledged that it had delayed "the contractor by not expeditiously providing him change orders" (app. supp. R4, tab 513).

By 2 February 1990, Ackerman had completed 14.7 percent of the re-sequenced non-critical path contract work, including installation of the new switchgear, bringing the contract to 86.7 percent completion. Effective 20 February 1990, the contracting officer issued bilateral Modification No. P00003, which increased the contract price by $10,337.90, and extended the performance period by 14 days, to 14 March 1990, for additional work that was not associated with the collapsed ductbank. The Modification No. P00003 work represented only 0.8 percent of the final, modified contract work. (R4, tabs 4, 13, 167, ex. 9)

On 27 February 1990, Ackerman advised the Government that it needed to order materials to replace the collapsed ductbanks, that material prices were escalating and that "[e]very day of delay to simply negotiate [sic] this modification is impacting this project." The letter asserted that Ackerman had "tried to accomplish every line item of work on this project whether it was a critical path job function or not . . . [and had] been forced to work this electrical system from both ends to the middle and the middle is full of gaps caused by failed ductbank." (App. supp. R4, tab 498, ex. 25 at 3) The next day, 28 February 1990, the contracting officer inquired about the status of the Government's engineering review of Ackerman's proposal and suggested deletion of the work if timely review could not be accomplished because Ackerman could not complete contract work due to the delay (app. supp. R4, tab 516).

On 13 March 1990, the Government revised its statement of work and requested a new proposal from Ackerman (R4, tab 80). Effective 14 March 1990, the contracting officer issued bilateral Modification No. P00004, extending the contract performance period to 10 April 1990, "until a pending change order can be negotiated" (R4, tab 5).

The parties met on 2 April 1990, following which, on 5 April 1990, Ackerman presented a revised proposal in the amount of $220,280.00 to the Government. In response to her inquiry, Ackerman advised the contracting officer that the proposal did not include delay costs which it had been incurring since early August. Another meeting on 9 April 1990 failed to result in a price agreement on the proposed changes. (R4, tab 83) After considering various options, the contracting officer issued Modification No. P00005, effective 10 April 1990, pursuant to FAR 52.212-12, suspending the work "INDEFINITELY UNTIL FURTHER NOTICE." Ackerman was given no direction regarding demobilization or the anticipated length of the suspension. (R4, tab 6; ex. A-44 at 25-26)

Ackerman responded that, because the suspension was of indefinite duration, it would be required to maintain supervisory personnel onsite and incur increased costs, and requested direction from the Government (R4, tab 86). It laid-off its hourly work force and reassigned personnel and equipment to other available work to the extent possible, although most of the other Manning work at which the equipment could have been used had already been completed (tr. 202-06). Mr. Cox explained that the equipment remaining at the site was necessary for completion of the contract work. It would have been used by Ackerman, but for the suspension of work. (Tr. 205-06, 227-28, 297, 467) Some was specialized equipment which could not be readily rented commercially (tr. 180). The contracting officer, however, advised that "there are no additional directions at this time" (R4, tab 89). The lack of information impacted Ackerman's efforts to mitigate its costs (tr. 203-04).

We find that, beginning 1 December 1989 and continuing through 10 April 1990, Ackerman experienced delay, disruption and inefficiency resulting from performing work out of sequence while it was waiting for the Government to issue a contract modification providing direction on how to proceed with the contract work impacted by the collapsed ductbank. Additionally, the Government's Daily Inspection Records indicate that, from 10 January 1990 through 10 April 1990, Ackerman reduced its work force and performed very little, or no, contract work apart from that directed by Modification No. P00003 (R4, tabs 13, 167, exs. 8, 9). We further find that the Government's failure to promptly issue a contract modification addressing the outstanding differing site condition issues was the cause of the delay, disruption and inefficiency experienced by Ackerman and that Ackerman was required to stay on the jobsite, performing such out-of-sequence work as it could, while it waited for the Government to provide direction on how to proceed.

10 April 1990 to 10 December 1990

Between 21 May 1990 and 16 November 1990, the Government revised its proposed statement of work for the new ductbank several more times (R4, tabs 103, 106, 108, 109; app. supp. R4, tab 526; tr. 210). Ackerman submitted cost proposals and further labor cost break-outs as requested for each of these revisions (R4, tabs 92, 98; exs. A-11, -13, -14; tr. 213-15). Funding became an issue during this time period, and in June 1990 the contract administrator again acknowledged that the Government was delaying Ackerman (app. supp. R4, tabs 529, 530).

The cost proposals submitted on 5 June 1990, in the amount of $846,923.00, on 24 August 1990, in the amount of $885,733.00, on 10 September 1990, in the amount of $885,180.00, and on 24 September 1990, in the amount of $812,399.00, all included costs for the "added and deleted direct work and also the cost of delay time," but not the "costs for rescheduling, re-sequencing, lost [sic] of efficiency, etc. resulting from the failure to issue this change order in a timely manner. . . ." The delay costs claimed consist largely of extended equipment, job site and warranty costs. (R4, tab 92; exs. A-11, -13, -14)

Also on 5 June 1990, Ackerman submitted a cost proposal seeking $58,856.98 for the suspension period 11 April through 25 May 1990 (R4, tab 93). When the contracting officer returned the proposal as premature, Ackerman advised that it reserved its right to proceed under the Contract Disputes Act (CDA) (R4, tabs 94, 95).

Finally, on 3 December 1990, the Government unilaterally issued Modification No. P00006, with an effective date of 30 November 1990, terminating the work suspension, directing Ackerman to proceed with work beginning 10 December 1990, and increasing the contract price by $130,087.00, consisting of an equitable adjustment of $94,000.00 for changed work to be performed in accordance with the 16 November 1990 statement of work to furnish and install new ductbank systems and a new window air conditioner and $36,087.00 for 12 days of Government-caused delay. The modification extended contract performance to 15 February 1991. (R4, tab 7) The revised Contract Progress Report shows that the additional work represents 10.7 percent of the final, modified contract work (R4, tab 13).

10 December 1990 to 17 April 1991

Ackerman began work as directed and immediately encountered more problems (R4, tab 167, ex. 12). On 11 December 1990, it learned that much of the trench would have to be hand-dug (R4, tab 115). It next discovered, after sawcutting the asphalt, that the resurfacing requirements indicated on the drawing attached to Modification No. P00006 conflicted with the contract specifications (R4, tabs 117, 119). On 4 January 1991, it encountered unmarked, unanticipated ductbank (R4, tab 121). When Ackerman began removing the ductbank as directed, it discovered that there was an iron pipe inside which appeared to be a live sprinkler and sought direction about how to proceed (R4, tab 124; app.

supp. R4, tab 535). An internal Government memorandum prepared by the contract administrator after a visit to the work site that same day commented that the abandoned ductwork would have to be removed, that plywood forms (which had been deleted by Modification No. P00006) would be required to shore the sides of the trenches when concrete was poured and that many feet of hand-digging would be required because the locations of utility lines were not known (app. supp. R4, tab 534).

Meanwhile, on 20 December 1990, Ackerman submitted a cost proposal seeking $214,073.00 for the work suspension imposed by Modification No. P00005. Equipment costs were included in the proposal. (R4, tab 118). And, by a 3 January 1991 letter, it notified the Government that it did not agree with either the amount of money or the contract time extension provided by Modification No. P00006 and that it did not anticipate completing the remaining contract and changed work until 30 March 1991 (R4, tab 120; tr. 223-24).

On 23 January 1991, Ackerman notified the contracting officer that, while sawcutting the asphalt for the trench, it had encountered an old reinforced concrete taxiway, approximately 1,100 feet of which would have to be jackhammered and removed for the new ductbank path (R4, tab 133; app. supp. R4, tabs 537, 539; tr. 224). Minutes of a meeting of Government personnel on 25 January 1991, prepared by the chief, contract management section, at which the various difficulties encountered by Ackerman were discussed, confirm that there were also "numerous pipes, conduits, storm sewers, sanitary lines, etc.; . . . criss-crossing the excavation" which had not been anticipated and had not been taken into account by Modification No. P00006 (app. supp. R4, tab 540; tr. 224-25).

In another memorandum prepared that same day, the chief, contract management section, commented that the contract "design was based upon inaccurate and outdated 'As-Builts'" which did not reflect "the collapsed existing ductbank," recalled that he had recommended terminating the contract "[o]nce the magnitude of the problem was clearly identified," and lamented about "a claim for delays stemming directly from our indecisiveness and lethargy which nearly equals the original awarded value of this project." He recommended that another suspension of work be requested from the contracting officer. (App. supp. R4, tab 541)

The recommendation was followed: Modification No. P00007 was issued, again suspending work under FAR 52.212-12 as of 1 February 1991, per the Government's 29 January 1991 letter (R4, tab 8). Unlike the earlier suspension of work, the Government, in the 29 January letter, directed Ackerman to "totally demobilize and remove from government property all personnel, equipment, staging area, fencing and materials that have not already been paid for by the government" and estimated that the work would be "in suspense for not less than 90 days nor more than 180 days" (R4, tab 135).

Effective 17 April 1991, pursuant to FAR 52.249-2, the Government issued Modification No. P00008, terminating the contract for convenience (R4, tab 9). At the

time of termination, Ackerman had already submitted several cost proposals and an invoice for additional direct and delay costs associated with the Modification No. P00006 work and the contracting officer was aware that it anticipated negotiation of future claims associated with the other suspensions of work, disruption and delay issues (R4, tabs 9, 92, 93, 147 through 151; app. supp. R4, tab 546; exs. A-11, -13, -14).

Ackerman's final Contract Progress Report and invoice, which was approved by the Government, reflects that 97.3 percent of the revised contract work had been completed when the contract was terminated (ex. A-25). The revised contract price was $1,294,888.90 and the parties stipulated that the Government made $1,259,564.47 in contract payments, leaving a balance of $35,324.43 (R4, tab 10; stip. 1).

Costs Claimed for Modification No. P00006

Mr. Kenneth Painter was responsible for maintaining all project costs for Ackerman (tr. 323-27). During performance of Modification No. P00006, he was at the work site daily to monitor the costs associated with the changed work (tr. 327). He compiled and verified all costs associated with it (tr. 327-31). Ackerman submitted a certified claim to the contracting officer seeking its actual direct costs for the Modification No. P00006 work, a total of $176,588.36, on 10 April 1991 (app. supp. R4, tab 546). The claim was revised to $173,464.06 on 24 June 1991. The claim did not include "any amounts for suspension, delay, and disruption cost incurred" by Ackerman in conjunction with Modification No. P00006, or for "contract administration, rescheduling, resequencing, or loss of efficiency costs attributable to the Air force's [sic] failure to issue [P00006] in a timely manner." (App. supp. R4, tab 553; tr. 335)

Ackerman did not maintain an "owned equipment" account for the Patrick Air Force Base project (tr. 326). Nevertheless, its claim included owned equipment operational costs for the Manning equipment it had used. The costs were computed using a list of blended rates taken from the U.S. Army Corps of Engineers predetermined published rates, Ackerman's experience, and cost guides sponsored by the Associated General Contractors (AGC). (App. supp. R4, tabs 546, 553; tr. 333-34) The same list of blended rates was also used for the equipment costs included in Ackerman's 20 December 1990 cost proposal for the first work suspension imposed by Modification No. P00005 (R4, tab 118).

The Air Force price analyst, who reviewed the claimed costs twice, advised the contracting officer that the price "objective of $173,464 is fair and reasonable" and, with respect to the equipment costs, recommended that:

> . . . The owned equipment was questioned by DCAA audit because it had been acquired at no cost to the contractor. However; the equipment was used on the job and the Air Force

> received the benefit of its use. The contractors [sic] [equipment] estimates are reasonable and should be accepted.

(App. supp. R4, tab 551)

The contracting officer followed the recommendation (ex. A-44 at 45-46). Bilateral Modification No. P00009, effective 24 July 1991, awarded Ackerman an additional $79,464.00, bringing the total amount paid to Ackerman for Modification No. P00006 to the full amount of its claim, $173,464.00 (R4, tab 10). The costs paid by Modification No. P00009 included a profit factor of 15 percent for Ackerman and equipment operational costs (app. supp. R4, tab 553; ex. A-44 at 65; tr. 333).

Modification No. P00009 did not include any payment for costs incurred during the two suspensions of work or for delay, disruption and inefficiency associated with the Government's failure to issue a change order to resolve the differing site condition issues associated with the existing ductbank in a timely manner (app. supp. R4, tabs 546, 553; ex. A-44 at 53, 57; tr. 334-35).

Termination for Convenience Settlement Proposal

On 27 June 1991, Ms. Robertson was identified as the termination contracting officer and, in that capacity, approved the submission of a termination settlement proposal using the total cost method (stips. 2, 5). Safeco submitted a "Termination Settlement Proposal as a Result of the Termination for Convenience Order of April 17, 1991" on the Standard Form 1436 to the Government on 27 November 1991, receipt of which Ms. Robertson acknowledged on 19 December 1991 (stips. 6-8).

Mr. Painter participated in the preparation of the termination for convenience settlement proposal (tr. 341). The proposal was submitted on a total cost basis with the contracting officer's permission (tr. 342). The cover letter accompanying the proposal stated that it was being submitted on a total cost basis and that: "The costs [claimed] are those actually incurred by Ackerman and Manning in the completion of the original contract, all change orders, the suspension of work claim that was submitted on December [20], 1990, and preparation of the settlement proposal" (R4, tab 250).

The only job cost report Mr. Painter was able to locate for Manning was dated September 1989 (tr. 343-45). However, he was able to compile documentation of Ackerman's job costs (tr. 345-46). Using the total cost methodology, the proposal he prepared sought a net payment of $911,951.00 in costs for direct material, direct labor, job expenses, equipment, subcontractors, General and Administrative (G&A) expenses, profit and bond, and settlement expenses. Except for claimed settlement expenses, each of the cost categories includes costs incurred while Manning was performing the contract. (Ex. G-14)

The proposal was forwarded to the Defense Contract Audit Agency (DCAA) and, following review by Ms. Eldaa Roman, DCAA issued Audit Report No. 1301-92L17100083 on 21 February 1992 (*id*.; tr. 612-14). The audit report notes that the "termination settlement proposal was issued to cover Ackerman's costs, as well as Manning's and Safeco's" (ex. G-14 at 2). It separately addresses the various cost elements claimed on behalf of each, but does not question whether costs incurred by Manning are recoverable by Safeco. It also does not question Safeco's use of the total cost basis. (*Id.*)

Effective 21 January 1992, Ms. Sandra K. Willis was appointed the new contracting officer (app. supp. R4, tab 555). On 25 August 1992, she provided a copy of the audit report to Ackerman and requested further documentation of the proposed costs. She also advised Ackerman that it was the Government's intent to settle the matter promptly upon receiving the requested information. (R4, tab 161) Mr. Cox responded on 28 September 1992 that all available data had been provided (R4, tab 163).

On 8 January 1993, Safeco filed suit under the CDA against the Government in the United States Court of Federal Claims seeking $911,950.60, plus CDA interest (R4, tab 253). The case was dismissed on 6 October 1994, in an unpublished decision, the court finding that "[n]o termination claim pursuant to the CDA or the FAR ha[d] been submitted to the contracting officer." With respect to the use of a total cost method, the court stated:

> Finally, the plaintiff argues that prior to the termination for convenience, several claims had been filed with the Air Force which had gone unresolved. The government argues that because Safeco did not submit a claim to the contracting officer for contract modifications under the "Changes" and "Differing Site Conditions" terms of the contract, no valid claim was filed with the contracting officer based on contractual requirements. However, once a contract is terminated for convenience of the government, all previous claims submitted to the contracting officer or invoices submitted for payment are, of necessity, subsumed in the termination settlement proposal. *Nolan Bros., Inc. v. United States*, 186 Ct. Cl. 602, 608-10 [402 F.2d 1250] (1969); *PBI Elec. Corp. v. United Sates*, 17 Cl. Ct. 128, 130 (1989); *Ralcon, Inc. v. United States*, 13 Cl. Ct. 294, 296 (1987). In this circumstance, to require the contracting officer to issue a decision for each separate claim would serve no useful purpose. Thus, the costs underlying any claims which Ackerman may have previously submitted to the contracting officer may be considered as part of the overall termination settlement, rather than assigned to other separate claims.

(R4, tab 263, ex. 8 at 7-8)

Thereafter, in response to an inquiry from Safeco seeking resolution of the matter, Ms. Willis, by letter dated 14 December 1994, advised Safeco that the Government's "objective has always been to settle the [matter] fairly and expeditiously," but again requested more cost data. She also asserted for the first time that Safeco had not complied "with appropriate FAR and DFAR provisions" and requested detailed information about all of the costs claimed, including "[a]ctual costs incurred for claimed suspensions" and a "[d]etailed explanation and breakdown of any delay costs claimed . . . ." (R4, tab 165)

On 31 July 1995, Safeco revised the amount requested in its termination settlement proposal and submitted a "Claim for Equitable Adjustment for Costs Associated with Termination for Convenience" in the amount of $1,028,416.88 under the Changes, Termination for Convenience, Disputes and other applicable clauses, certified by both Ackerman and Safeco. The claim contained the same cost elements, including costs claimed for Manning, as those contained in the termination settlement proposal, together with a narrative explaining the basis for the claim and requesting that the claim be processed by the contracting officer under the CDA. Supporting documentation was attached and referenced. (App. supp. R4, tab 498; tr. 548-53) The equipment costs were computed using the same list of blended rates that had been used by Ackerman in its 20 December 1990 cost proposal for the first suspension of work imposed by Modification No. P00005 and its cost proposals for the additional work required by Modification No. P00006 (app. supp. R4, tab 498 at 1019, 1071-75).

On 18 September 1995, the contracting officer acknowledged receipt of the claim and advised, with reference to her 14 December 1994 letter, that she had determined it still did not satisfy the FAR. She stated:

> . . . One of the areas of noncompliance with FAR is the inclusion of profit on suspension of work claims. Additionally, preparation of claim costs are not allowed for equitable adjustments. Therefore, costs other than those associated with the termination for convenience should be segregated and submitted separately in accordance with guidance provided in the FAR.

(R4, tab 556) Safeco, through counsel, responded that the Court of Federal Claims had resolved the issue of segregating costs that were not associated with the termination, having found that no such segregation was necessary (R4, tab 257). On 18 March 1996, Government counsel replied, expressing the Government's "continuing interest in seeking an expeditious settlement," and his view that the court's decision did not address the issues raised in the contracting officer's 14 December 1994 letter (R4, tab 263, ex. 5).

On 25 June 1996, the claim was forwarded to DCAA where another audit was performed by Ms. Roman and Audit Report No. 1301-96L17100186 was issued on 31 October 1996 (R4, tab 557; ex. G-16; tr. 623-24). The audit report again states that costs are requested for Manning, Ackerman and Safeco (ex. G-16 at 2). Like Audit Report No. 1301-92L17100083, it addresses the various cost elements claimed on behalf of each, but does not question whether Safeco can recover costs incurred by Manning. It also does not question use of the total cost method. (Ex. G-16)

The parties met to discuss settlement sometime in 1996 at which time the contracting officer raised three specific questions about the costs claimed by Safeco; namely, a disparity in the material costs, the profit rates, and labor costs claimed as settlement expenses following the termination. Counsel responded in a letter dated 10 February 1997, and the contracting officer forwarded the information provided to DCAA (app. supp. R4, tab 558, 559).

Attached to the Government Response's to appellant's Statement of Costs is a 10 July 1997 letter from Safeco's counsel summarizing additional settlement discussions during which the contracting officer used the list of equipment rates contained in Ackerman's 20 December 1990 cost proposal as the basis of a settlement offer for the first work suspension (R4, tab 263, ex. 6).

Settlement discussions continued through 1998, both parties preferring to continue discussions prior to issuance of a contracting officer's final decision (R4, tab 261). No final decision was ever issued on Safeco's 31 July 1995 claim (tr. 554, 558). This appeal from a deemed denial was filed on 23 March 1999. From the submission of the first termination for convenience settlement proposal on 27 November 1991 to the filing of the notice of appeal, we find no evidence that the contracting officer ever sought to exclude costs claimed on behalf of Manning or refused to consider payment of claimed equipment costs.

Cost Issues

On 5 May 2000, the Board directed the parties to comply with its Order on Proof of Costs which required appellant to furnish to the Government a complete and detailed Statement of Costs it claimed to be due and owing, organized in schedule format with a separate listing for each cost item. The Government was directed to submit a complete and detailed Response to the Statement of Costs, organized in the same schedule format. With respect to the Government's Response, the Board's order further stated: "The lack of response to any cost item or component thereof claimed by appellant shall be deemed an admission." The Government's Response to Safeco's Statement of Costs did not contest either Safeco's right to recover costs incurred by Manning or its use of the total cost approach (R4, tab 263).

Safeco's Statement of Costs reflects virtually no claimed costs for Manning after 30 August 1989 or for Ackerman before 1 December 1989 (ex. A-35). Ackerman was not able to pull much 15 KV cable, which was the critical path work, because of the collapsed ductbank, and its minimal costs were charged to another contract Safeco had taken over for Manning (*id*; tr. 425-28). However, the new switchgear building was completed by Woodbine during this time period (ex. A-35).

The parties stipulated that the following costs were incurred in performance of the contract: $783,921.18 for direct materials, $102,590.97 for job expenses, $65,046.90 for subcontractors, and $7,556.70 for Manning's bond (stip. 1).

Safeco's Statement of Costs lists a total of $784,372.02 in direct material costs. The difference between the stipulated and claimed amounts is $450.84. The Statement of Costs indicates that $361,287.72 of the costs, approximately 46 percent, are claimed for Manning and $423,084.50, approximately 54 percent, for Ackerman. Absent any explanation as to the difference, we apportion 46 percent of the stipulated amount, $360,603.74, to Manning and 54 percent, $423,317.44, to Ackerman. None of these costs were incurred during the work suspensions. (Ex. A-35 at 9)

Safeco's Statement of Costs lists a total of $123,249.73 in job and miscellaneous expenses. The difference between the stipulated amount of $102,590.97 and the claimed amount is $20,658.76. The Statement of Costs indicates that $7,454.79 of the difference, approximately 6 percent, is claimed for Manning and $115,794.94, approximately 94 percent, is claimed for Ackerman. Of the Ackerman costs, $44,210.59 was incurred during the first work suspension and $10,309.97 during the second, a total of $54,520.56. (*Id*. at 58) Absent any explanation of the difference between the claimed and stipulated amounts, we apportion 6 percent of the stipulated amount, $6,155.46, to Manning and 94 percent, $96,435.52, to Ackerman. Finally, because there is nothing to establish whether the stipulated amount reflects a reduction of any of the costs claimed for Ackerman during the two work suspensions, we make no adjustment to the $54,520.56.

With respect to the stipulated subcontractor costs, $17,425.00 was incurred by Manning and $47,621.90 by Ackerman. None of the stipulated subcontractor and bond costs were incurred during the suspension periods. (*Id*. at 91, 97)

The parties further stipulated that the applicable G&A rates in this appeal are 9.78 percent for Manning and 2.82 percent for Ackerman (stip. 2). They were unable to stipulate to costs relating to direct labor, equipment, profit and settlement expenses.

Direct Labor

Safeco's Statement of Costs asserts entitlement to a total of $360,550.60 in direct labor costs, including burden, for Manning and Ackerman (ex. A-35 at 51). The Government's Response to the Statement of Costs concedes that $295,213.33 was incurred (R4, tab 263 at 13).

Safeco seeks $69,399.37 in direct labor for Manning's cost code 14910, for the period 15 January 1989 through 3 September 1989 (ex. A-35 at 52-53). Based upon Audit Report No. 1301-96L17100186, the Government challenged costs claimed from this cost code, which were identified as "Office Payroll but listed as Certified," for lack of proper, auditable support (R4, tab 263 at 13). The Government's computation of the disputed amount is $8,727.60; the correct computation is $9,851.68. It did not challenge the 18.42 percent labor burden rate Manning applied to cost code 14910. (R4, tab 263 at 13; ex. G-16 at 5) With applicable burden, the amount at issue for Manning's direct labor is $11,666.36. No further support or explanation of the direct labor costs still at issue was presented at the hearing by appellant.

Safeco also seeks $227,908.85 in direct labor costs for Ackerman, of which $73,376.34 was incurred during work suspensions ($54,353.19 during the first suspension and $19,023.15 during the second suspension) (ex. A-35 at 51). Based upon Audit Report Nos. 1301-92L17100083 and 1301-96L17100186, the Government challenged $40,613.00 claimed from Ackerman's direct labor cost code 40600 during the first suspension of work. Both audit reports incorporated the recommendation of Audit Report No. 1271-91L21000063-1-2121, dated 25 February 1991, which had been prepared by Mr. Gregory Jackson following his audit of Ackerman's cost proposal for Modification No. P00005, the first suspension of work (ex. G-12; tr. 573-74).

DCAA was of the view that Ackerman was required to mitigate its costs, irrespective of whether the contract contained the FAR 52.212-13 STOP-WORK ORDER (AUG 1989) clause it relied upon, and had recommended that only "the project manager or other employee be allowed to travel [during the contract suspension] to the base from the contractor's home office . . . one day a week to maintain or service the equipment" (ex. G-12 at 7; tr. 590-91). According to DCAA, the labor "should have been diverted to other contract [work] until the suspension was lifted" (ex. G-12 at 7). Mr. Jackson conceded, however, that he never received information he had requested from the contracting officer regarding the circumstances of the work suspension (tr. 582-84). The Government did not challenge Ackerman's 22.14 percent labor burden rate (R4, tab 263). With applicable burden, the amount at issue for Ackerman is $49,604.72.

Equipment

Safeco's Statement of Costs asserts entitlement to $350,331.80 in equipment costs for construction equipment and vehicles, consisting of: (a) $4,568.54 in rental expenses and $128,148.72 in equipment operational expenses, a total of $132,717.26 for Manning; and (b) $32,243.02 in rental expenses and $185,371.52 in equipment operational and stand-by expenses, a total of $217,614.54, for Ackerman. Ackerman incurred $615.54 in rental costs during the first suspension of work. The breakdown of the remaining Ackerman equipment costs includes $150,079.20 in equipment operational expenses and $35,292.32 in standby equipment expenses for the first suspension of work. (Ex. A-35 at 84-89) The total equipment standby costs claimed for Ackerman is $35,907.86 (*id.* at 84). The Government's Response to the Statement of Costs concedes that the Manning and Ackerman equipment rental costs, a total of $36,811.56, were incurred (R4, tab 263 at 11).

Mr. Painter prepared a comprehensive construction equipment and vehicle list for all of Manning's projects and compiled information regarding the type, location and number of days equipment owned by Manning was used for the Patrick Air Force Base project (tr. 322-23, 467-69). He determined that 16 pieces of equipment owned by Manning (*i.e.*, a backhoe/loader, various trucks and trailers, a loader, air compressor, generator and pump) were used at various times by Manning and Ackerman at the Patrick Air Force Base project (ex. A-35 at 87-89; tr. 508-09). The use of this equipment on the contract provided a benefit to the Government (tr. 311).

The evidence established that, following the takeover, Safeco had full control of Manning's construction equipment. It filed Uniform Commercial Code (UCC) security interests in the equipment and liens with the Florida Department of Motor Vehicles for the road vehicles and Ackerman used this construction equipment on the project, performed maintenance work on it, paid the insurance as it came due, and obtained necessary titles, tags and registrations when they expired. (Ex. A-39; tr. 77, 182-83, 312)

Mr. Reedy explained that, as a surety, Safeco's primary intent was to obtain an equitable interest in Manning's equipment and vehicles so that they could be sold when the project was finished (tr. 146-47). Thus, there are no acquisition cost records or certificates of title showing either Ackerman or Safeco as the actual owner of any of this equipment (exs. G-14, -16; tr. 325-26, 422, 616-17, 625-26). Manning's equipment was auctioned by King Auction & Realty Co., Inc. on 25 June 1991 for a total of $153,126.00, exclusive of commission (R4, tabs 219, 243, 244; ex. A-23 at 13; tr. 254-55).

All of the equipment costs claimed by Safeco in its Statement of Costs were calculated using only the rates contained in the U.S. Army Corps of Engineers CONSTRUCTION EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE - EP 1110-1-4 (VOL. 3) 1 June 1986 for Region III (ex. A-35 at 84-89; tr. 363-64). The contracting agency did not specify use of the Corps predetermined equipment rates in the contract and

neither of the contracting officers specified their use in conjunction with the termination settlement proposal (ex. G-19; tr. 561). The operating and standby equipment rates taken from the Corps manual are lower than the blended equipment rates on the list used by Ackerman in its 20 December 1990 cost proposal for the first suspension of work, its cost proposals for the Modification P00006 work, and its 31 July 1995 claim (R4, tabs 92, 118; app. supp. R4, tabs 498, 499; exs. A-11, -13, 14, -24, -35).

The Government placed the 1988 version of the Corps rate schedule manual in the Rule 4 file (R4, tab 170). The only relevant difference between the 1986 and 1988 versions of the manual is that the rates for 1988 are higher (tr. 678-79).

Both versions of the Corps rate schedule manual state in the introductory GENERAL paragraph: "The rates and percentages shown in this pamphlet are based on equipment in sound workable condition owned or controlled and furnished by a contractor or subcontractor" (R4, tab 170; ex. A-24 at 14). Additionally, paragraph 2-2.c. explains that the "ownership portion of the [hourly use] rate consists of allowances for depreciation and cost of facilities capital . . . computed from a predetermined 'equipment cost.'" Paragraph 2-2.d.(1) explains "Operating Cost" and paragraph 2-2.e., "Standby," explains how standby rates are computed. (R4, tab 170 at 2-1, 2-3, 2-6)

The Government contests both the $128,148.72 claimed for Manning and the $185,371.52 claimed for Ackerman. Audit Report Nos. 1301-92L17100083 and 1301-96L17100186, like Audit Report No. 1271-91L21000063-1-2121, questioned owned equipment costs for both Manning and Ackerman because there was a lack of auditable documentation relating to Manning's actual equipment operating costs and because neither Safeco nor Ackerman had out-of-pocket acquisition costs. (R4, tab 251; exs. G-12, -14, -16; tr. 574-75, 591-92, 612, 615-18, 624-25, 640) DCAA did not, however, question either the use of the blended equipment rates, or the rates themselves, to compute the claimed costs (exs. G-12, -14, -16).

Ms. Roman acknowledged that it was appropriate to use published or established schedules to determine equipment costs where actual costs were not available, but thought the contracting officer's approval was required (tr. 640-42). Mr. Jackson agreed that the Corps predetermined rates could be used for negotiation purposes and acknowledged that he had used the 1986 version of the Corps rate manual when he was performing the audit of the equipment costs claimed in Ackerman's proposal for Modification No. P00005 (exs. G-12, A-24; tr. 579-80, 594-99). He expressed the view that, even if ownership was not established, operating costs might be allowable (tr. 606-07). Mr. Painter explained that Safeco used the Corps operating and standby rates in its Statement of Costs because DCAA had used them (tr. 447-48).

In Audit Report No. 1301-92L17100083, Ms. Roman noted that $109,843 of the amount Safeco recovered from the sale of Manning's equipment "should be considered as a

credit for any reimbursement made to Safeco" (ex. G-14 at 13). She explained, generally, that her suggestion was based upon FAR termination for convenience provisions which permit discounts for credits or payments to the contractor. She was not able to verify whether only the equipment used for the Patrick Air Force Base contract was included in the $109,843 credit and she did not include the recommendation for the credit in Audit Report No. 1301-96L17100186. (Ex. G-16; tr. 643-45)

Safeco called Mr. Patrick McGeehin, a certified public accountant, as an expert in the application of the FAR cost principles as they relate to the construction industry, and he so testified (tr. 667). Mr. McGeehin has extensive accounting experience, has testified as a cost accounting expert on behalf of both contractors and the Government on many occasions at the Boards of Contract Appeals and elsewhere, and has written numerous articles addressing proper construction accounting practices (ex. A-38; tr. 660-67).

Mr. McGeehin considers the Government's contention that Safeco did not own the equipment because there was no purchase agreement or transfer of a certificate of legal title to be unduly simplistic because it does not consider the nature of the surety business and the true cost to Safeco to complete the project (ex. A-38 at 5; tr. 686-87).

He explained that it is customary and usual for both the Government and contractors to adopt the Corps predetermined equipment rates, even where a contractor has actual cost data (*i.e.*, acquisition data and fixed asset detail) (ex. A-38 at 4; tr. 673-75). Mr. McGeehin believes the practice is consistent with FAR 31.105, which cites the Corps rate manual as an example of appropriate predetermined rate schedules to be used where actual cost data is not available, and opined that the use of the Corps rates is appropriate here, irrespective of whether Safeco owned the equipment (ex. A-38 at 4; tr. 700-01). In his experience, the Corps rates are used when contractors do not have legal title to the equipment, and even for rental items (tr. 675-76). Thus, it is his opinion that the use of the Corps rates is particularly appropriate here because it "properly addresses what would otherwise be a virtually impossible attempt to re-categorize certain Safeco expenditures and assign them to equipment 'purchases' from Manning as part of the take-over process" (ex. A-38 at 5). He finds no basis in the FAR for the Government to penalize a contractor who does not have actual cost data by denying reimbursement for the use of equipment on the contract (ex. A-38 at 4; tr. 676-77).

In Mr. McGeehin's view, Safeco's use of the rates contained in the 1986 version of the Corps manual resulted in lower equipment costs than use of the version in effect during contract performance, but was reasonable given the varying equipment ages, a conclusion he explained had also been reached in the DCAA working papers (ex. A-38 at 5-6; tr. 678-79). He did not consider Safeco's failure to obtain the contracting officer's approval to use the Corps rates to be a bar to recovery because FAR 31.105 permits their use and the contracting officer previously approved the use of equipment rates (which were based in

part upon the Corps rates) in computing the payments made under Modification No. P00009 (ex. A-38 at 6; tr. 681-82).

Mr. McGeehin is not aware of any provision in FAR Parts 31 or 49 which would entitle the Government to a credit from the sale of Manning's equipment and believes that none is due because the Government did not own the equipment and the Corps rates include salvage value estimates (ex. A-38 at 6; tr. 679-81).

Profit

Safeco's Statement of Costs seeks $205,167.47 in profit, computed to be $65,985.19 at 10 percent for Manning and $139,182.28 at 15 percent for Ackerman (ex. A-35 at 97). These percentages reflect the normal profit factors each used for bidding and change order work (tr. 333, 348). The Government's Response to the Statement of Costs claims a credit of $446,221.85, as a loss adjustment under FAR 49.203 (R4, tab 263 at 11).

Audit Report Nos. 1301-92L17100083 and 1301-96L17100186 questioned the profit claimed for Manning because of the lack of records. The reports also questioned the profit claimed for Ackerman because DCAA had concluded it was in a loss position at the time of termination. Both compute lost adjustments under FAR 49.203, using a contract balance of $570,518.00 (the original contract price plus modifications, $1,294,889.00, less the amount paid to Manning, $724,371.00), but make no allowance for additional costs incurred as a result of the differing site conditions, work suspensions, changes and delay, disruption and inefficiency. (Ex. G-14 at 12, ex. G-16 at 9; tr. 619-20, 649-54) Mr. McGeehin was of the view that all of the Government's loss adjustment calculations had been performed incorrectly because they do not include any entitlement for the extra contract relief Safeco requested in its claim (ex. A-38 at 7; tr. 682-84).

The record contains at least four different Government estimates of the cost to complete. The estimates contained in Audit Report Nos. 1301-92L1700083 ($82,387) and 1301-96L17100186 ($79,360) and an internal memorandum dated 6 October 1996 ($104,616) are based upon an evaluation prepared by Mr. Ronald E. Roman, a technical advisor to the contracting officer, who was listed as a potential witness on the Government's witness list, but was not called to testify. The auditor conceded that there were errors in the technical evaluation and in the DCAA loss adjustment calculations. (Exs. G-14 through -16; tr. 647-49) There was no testimony explaining how the Government calculated the loss adjustment, which includes $72,142 for the cost to complete, contained in the Government's Response to Safeco's Statement of Costs (R4, tab 263). On the basis of the foregoing, we find the Government's estimates of the cost to complete and the loss adjustment calculations to be unreliable.

There are a number of Ackerman Job Status Work Sheets for the Patrick Air Force Base contract in the record (R4, tab 175). Mr. Cox explained that the Job Status Work Sheet was a tool to help Safeco keep track of projected losses (tr. 176). Line 13 of the Job Status Work Sheet is labeled "Profit or Loss on Job" and reflects the amount required to pay bills and complete the work, less the remaining contract amount (R4, tab 175; tr. 93-99). Mr. Cox was involved in the preparation of the Job Status Work Sheets and explained that line 13 had "nothing to do with the profit position of the contract," but rather was only an indication of what Safeco might have to pay over and above the remaining contract funds (tr. 178-79).

The Job Status Work Sheet dated 30 October 1989, near the beginning of Ackerman's performance, indicates a loss of $47,284.62 on line 13 (R4, tab 175). Mr. Cox explained that he calculated the entry for line 11, the cost of performance for the remaining work from the original contract, to be $271,075.00, using materials on site. The entry on line 9 shows unpaid labor and material bills in the amount of $126,838. Mr. Cox further explained that Manning had already received payments from the Government for these expenses, but had not paid these bills, and that he recorded $126,838.62 on line 9 because Safeco was now obligated to pay these bills for Manning. (Tr. 174-79) He was of the opinion that, with $350,629.25 in contract funds remaining and an estimated cost to complete of $271,075.00, Manning would have made a profit if it had used the $126,838.26 the Government had paid it for expenses already incurred on the project (tr. 178). In assessing Manning's profitability, Mr. Cox did not consider possible change orders (tr. 179). He did not think that Manning's failure to pay its suppliers, including Westco, had "impacted this job at all" (tr. 259-60).

The Job Status Work Sheets are the only evidence introduced by the Government to show that Ackerman was in a loss position when the contract was terminated. The last work sheet in the record is dated 5 March 1990 and shows a loss of $445,094.67 on line 13 (R4, tab 175). The Job Status Work Sheets do not reflect any adjustment for any contract changes or claims (tr. 179).

Settlement Expenses

Safeco's Statement of Costs asserts entitlement to $50,284.47 in settlement expenses (ex. A-35 at 101). The Government's Response concedes that $26,035.48 was incurred (R4, tab 263 at 18).

Based upon Audit Report Nos. 1301-92L17100083 and 1301-96L17100186, the Government contested $700.00 of the $13,056.00 sought for direct labor because it was not incurred by Ackerman and had been incorrectly included in its cost code 40680, together with $2,483.00 of the $11,114.00 sought for other direct expenses. Thus, the total amount conceded by the Government for these two cost items is $20,987.00. The Government did not challenge Safeco's application of a G&A rate of 2.82 percent to the

direct labor and other direct expense categories. (R4, tab 263 at 18; ex. G-14 at 11, ex. G-16 at 12) Mr. Painter's testimony on the corresponding direct expense tabs from the 31 July 1995 claim identified as support for these cost items did not address the specific items questioned by DCAA (app. supp. R4, tab 499; ex. A-35 at 101; tr. 359-60).

The Government relied upon Audit Report No. 1301-96L17100186 in disputing $32,146.00 of the claimed $36,605.00 in legal and professional expenses for lack of explanation and support. The amount claimed for these expenses was adjusted downward by Safeco to $25,432.71 in its Statement of Costs (ex. A-35 at 101, 103; R4, tab 263 at 12). Mr. Painter credibly explained that the tab identified as support for these costs reflects fees associated with the termination for convenience (tr. 360).

DISCUSSION

Preliminary Jurisdictional Issue

Ten days before the hearing of this appeal, the Government filed a motion *in limine* seeking to exclude all evidence relating to claims associated with Manning's performance of the contract on grounds Safeco had no standing to assert any claims arising prior to the takeover. Safeco filed a response. The presiding judge took the motion under advisement, treating it as one to dismiss, and directed the parties to address the issue in their post-hearing briefs (tr. 5-6). They have done so.

The Government asserts that Safeco's prosecution of Manning's claim is barred by the Assignment of Claims Act, 31 U.S.C. § 3727. Relying principally upon *Fireman's Fund Insurance Co.*, ASBCA No. 50657, 00-1 BCA ¶ 30,802, r*econsid. denied*, 00-1 BCA ¶ 30,905, *aff'd*, 313 F.3d 1344 (Fed. Cir. 2002), it argues that Manning never assigned to Safeco the right to pursue any claim or appeal on its behalf that arose prior to the 10 October 1989 surety takeover agreement. Absent a valid assignment, the Government continues, Safeco lacks standing to prosecute Manning's claims under the CDA because it had no privity of contract with the Government at the time the claims arose.

Safeco has the burden of establishing that it has standing. *Hackney Group and Credit General Insurance Company*, ASBCA No. 51453, 00-2 BCA ¶ 30,931 at 152,682. It points out that, unlike the circumstances in *Fireman's Fund*, the facts in this case show that Manning executed an express assignment and an irrevocable power of attorney to Safeco, assigning all of its rights, title and interest in the contract, including the right to prosecute claims, and that the Government was aware of, and consented to, the assignment.

We agree that this appeal is distinguishable from *Fireman's Fund.* There, we questioned whether a general indemnity agreement actually assigned any claims belonging to the original contractor to the surety and found no evidence that the Government was party to, aware of, or consented to the general indemnity agreement. *Fireman's Fund*, 00-1 BCA

at 152,071. On appeal, the court concluded that any assignment of potential claims in the general indemnity agreement was invalid under the two statutory provisions commonly referred to as the Anti-Assignment Act, 31 U.S.C. § 3727(a)(1)(b) and 41 U.S.C. § 15(a), and further concluded that the surety could not otherwise maintain a suit for pre-takeover agreement claims under the doctrine of equitable subrogation. *Fireman's Fund*, 313 F.3d at 1349-52.

Here, in contrast, in Exhibit B to the takeover agreement with Safeco, Manning explicitly assigned to Safeco all of its "right, title and interest" in the Patrick Air Force Base contract, "specifically including . . . all monies [d]ue or to become due . . . together with the right to receive the same; . . . [and a]ll inventories of material, equipment and supplies . . . contracted for or intended for the contract work." (R4, tab 177) Further, by an irrevocable power of attorney, Manning authorized payments of contract funds to Safeco and appointed Safeco to "prosecute any claim" on its behalf and to "demand and receive . . . all such monies due or to become due . . . in payment thereof." (*Id*.)

Moreover, the Government was aware that Manning was having difficulty paying its suppliers and subcontractors and was advised by letters dated 9 September 1989 and mailgrams dated 11 September 1989 from both Manning and Safeco that Safeco had taken over the contract and that Manning had relinquished and assigned all of its contractual rights to Safeco. Indeed, the takeover agreement executed between Safeco and the Government on 10 October 1989 expressly recited that Manning had executed a power of attorney in favor of Safeco and had relinquished "all of its right, title and interest in and to the contract" (R4, tab 2). Thereafter, the contracting officer issued Modification No. P00001, replacing Manning with Ackerman as the contractor in accordance with the takeover agreement the Government had executed with Safeco, a copy of which was attached thereto.

When the contract was ultimately terminated for convenience on 17 April 1991, the contracting officer authorized Safeco to submit a total cost termination for convenience settlement proposal. The settlement proposal was converted into a CDA claim on 31 July 1995. The record reflects that the Government was not only aware of Manning's assignment of its contract rights and claims, but also that it knew that Safeco's termination settlement proposal and its CDA claim included Manning costs. Indeed, the DCAA audits performed on both the settlement proposal and the claim evaluated the costs claimed for Manning and Ackerman separately. Moreover, there is no evidence that the contracting officer ever disputed Safeco's right to seek recovery of costs claimed for Manning. On the contrary, the record establishes that the contracting officer repeatedly expressed her willingness and interest in negotiating an expeditious settlement of the claimed costs. And, finally, the Government made no challenge to Safeco's right to seek recovery of Manning's costs in its Response to Safeco's Statement of Costs.

Title 31 United States Code § 3727 prohibits the assignment of any claims against the Government and 41 U.S.C. § 15(a) prohibits the transfer of "any interest" in a contract

involving the Government. *Fireman's Fund*, 313 F.3d at 1349. The concern of the two statutes and the legal concepts involved in their application are the same. *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980). Both were intended to prevent fraud and avoid multiple liability. *Id.* at 744. In this case, there has been no suggestion of either fraud or multiple litigation. Moreover, the assignments to Safeco executed by Manning, together with the passage of more than ten years, are sufficient to dispel any concerns about any future litigation.

In any event, it has long been recognized that the Government can waive the protection and procedures of the statutes by its overall course of conduct and recognize an assignment. *Tuftco Corp.*, 614 F.2d at 745. *See also, Healy Tibbits Builders, Inc.*, ASBCA No. 45269, 94-1 BCA ¶ 26,409 and *Insurance Company of the West*, ASBCA No. 35253, 88-3 BCA ¶ 21,056. As the Court of Claims concluded in *Tuftco*, 614 F.2d at 746:

> It is unnecessary to identify any one particular act as constituting recognition of the assignments by the Government. It is enough to say that the totality of the circumstances presented to the court establishes the Government's recognition of the assignments by its knowledge, assent, and action consistent with the terms of the assignments. . . .

We are satisfied that, in this case, there was a valid assignment of Manning's contractual rights and claims to Safeco and that, as is evidenced by its course of conduct before this case came to trial, the Government recognized and consented to the assignment, thereby waiving application of the statutes. We conclude that Safeco has standing to pursue Manning's pre-takeover agreement claims. *See Security Insurance Co. of Hartford and National American Insurance Co.*, ASBCA No. 51813, 01-2 BCA ¶ 31,588.

Differing Site Conditions, Work Suspensions, Changes, and Delay, Disruption and Inefficiency

Safeco contends that the collapsed and deteriorated underground ductbank encountered by Manning and Ackerman and the underground and unmarked ductbank, concrete runway and utilities encountered by Ackerman during contract performance constitute Type 1 differing site conditions. We take the Government's lack of a response to these contentions to reflect its concession on this issue. To the extent it has not so conceded, the evidence fully supports Safeco's position. The contract documents indicated and required that the existing, underground ductbank would be used in contract performance; however, the deteriorated condition of the ductbank precluded its use. Indeed, the Government conceded in a number of internal memoranda that the ductbank could not be used as intended and that there were other unmarked, underground obstructions "criss-crossing the excavation" that had not been anticipated. On these facts, we have no difficulty concluding that the conditions encountered during contract performance were

materially different than those indicated in the contract documents. *See Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987).

Safeco further contends that, although it gave the Government notice of the differing site conditions, the Government's failure to provide timely direction on how to proceed and its suspensions of work caused delay, disruption and inefficiency to contract performance. The Government responds that Manning's late submittals, in particular for the switchgear and the vacuum switches and transformers, contributed to the delay and that, after the takeover, Ackerman imposed its own work stoppage until the end of November 1989.

The evidence established that Manning began pulling the 15 KV cable on 2 August 1989, and that its work was disrupted almost immediately when it discovered that the existing ductbank through which the cable was to be pulled had collapsed. On 9 August 1989, Manning notified the contracting officer that it had encountered a differing site condition and requested direction on how to proceed. The approved schedule reflects that pulling the 15 KV cable was the critical path activity. Installation of the switchgear and cable splicing activities were to begin concurrently two weeks later. After the switchgear was installed and all the cable was pulled, cable splicing became the critical activity. While waiting for direction from the contracting officer, Manning continued construction of the new switchgear building and installation of the vacuum switches and transformers.

On 30 August 1989, Manning voluntarily defaulted. At the time, it had completed 58.8 percent of the contract work. It had been unable to proceed with critical path work, the pulling and splicing of the cable, because the contracting officer had not resolved the differing site condition issue.

On 10 October 1989, Safeco and the Government executed a Surety Takeover Agreement pursuant to which Safeco agreed to complete the contract work and Ackerman was approved as the completion contractor. Mr. Cox, who had evaluated the status of the contract for Safeco, thought that, with appropriate extensions, the contract would have been completed on time.

After the takeover, Ackerman completed the work that had not been impacted by the differing site condition within the remaining contract performance period. And, although it had encountered still more collapsed and deteriorated ductbank, it had also managed to pull some additional cable, so that about 28 percent of the original contract work was remaining. A new statement of work had been provided to Ackerman, but the contracting officer had still not resolved the differing site condition issue when the original contract time expired on 30 November 1989. Thus, she issued Modification No. P00001, extending contract performance to 5 January 1990.

Based upon the foregoing, we reject the Government's contention that Manning and Ackerman were responsible for any delay in contract performance. While Manning's

submittals for the switchgear and the vacuum switches and transformers were late, this did not delay contract completion. According to the approved Contract Progress Schedule, installation of the switchgear was not a critical path activity. And, for reasons not explained by the record, the Government delayed acting on Manning's submittal for the vacuum switches and transformers for four months. Nevertheless, installation of the vacuum switches and transformers was 92 percent complete when Manning defaulted and 100 percent complete at the end of the original contract performance period.

Thus, we conclude that the differing site condition problems that precluded both Manning and Ackerman from pulling cable and prevented them from performing critical path work and the contracting officer's failure to resolve the differing site condition problem caused the delay in contract performance and the inability to complete the contract work by 30 November 1989. As the court observed in *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (*en banc*), delay to a critical path activity "usually results in a corresponding delay to the completion of the project" and only delay to critical path work has an impact upon project completion.

Finally, as to Manning's difficulty in paying suppliers and subcontractors, Mr. Cox was clear in his testimony that this problem had not "impacted this job at all." His view is supported by evidence establishing that Manning had completed virtually all of the work that had been behind schedule and had led to the Government's 2 June 1989 letter.

In the context of these facts, the contracting officer's issuance of Modification No. P00001, extending the contract completion date to 5 January 1990, amounts to a recognition that the overall project had been delayed and an administrative determination that the delay was not caused by Manning/Ackerman. It also raised a rebuttable presumption that the Government was responsible for the delay. *See DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184 at 145,151; and *Robert McMullen & Son, Inc.*, ASBCA No. 19023, 76-1 BCA ¶ 11,728. The Government did not overcome that presumption.

On 9 December 1989, Ackerman implemented a revised Contract Progress Schedule that changed the sequence of the remaining contract work and began performing non-critical path work. The contracting officer then issued Modification No. P00002, extending the performance period to 28 February 1990, "due to government delay until a pending change order can be processed" and the Government further acknowledged that it was delaying Ackerman's performance "by not expeditiously providing him change orders." (R4, tab 3; app. supp. R4, tab 513)

By 2 February 1990, Ackerman completed another 14.7 percent of the contract work including installation of the new switchgear. Thereafter, apart from the additional work not related to the ductbanks directed by Modification No. P00003, there was almost no contract work available for it to perform.

Modification No. P00003 extended performance to 14 March 1990. By Modification No. P00004, the contracting officer further extended the performance period to 10 April 1990, "until a pending change order can be negotiated," after the Government issued a 13 March 1990 revision to the new statement of work for replacing the ductbanks. (R4, tab 5) Effective 10 April 1990, she then issued Modification No. P00005, suspending work until further notice, but without giving Ackerman any direction regarding demobilization or the anticipated duration of the suspension.

In sum, the evidence relating to Ackerman's work efforts during the time period 1 December 1989 through 10 April 1990 establishes that Ackerman was further delayed by the Government's failure to issue a change order addressing the differing site condition that impacted critical path work and that Ackerman was able to perform only another 14.7 percent of the contract work (for a total of 86.7 percent) before the contracting officer suspended performance. There is no evidence that Ackerman either contributed to, or was in any way responsible for, any of the difficulties it encountered during this time period. Rather, the Government alone, by its indecision and inaction, is wholly responsible for keeping Ackerman on the jobsite, performing such work as it could, while remaining ready to proceed with the changed work at the Government's direction. The Government's indecision and inaction also caused inefficiency during this time period resulting from the need to perform the remaining contract work out-of-sequence.

On 3 December 1990, the contracting officer finally issued Modification No. P00006, lifting the work suspension, extending the contract completion date to 15 February 1991, and directing Ackerman to furnish and install new ductbank systems in accordance with the revised statement of work dated 16 November 1990.

Unfortunately, this was not the end of the differing site condition problems. Shortly after work resumed, Ackerman encountered abandoned ductwork containing a live sprinkler, a concrete runway under the asphalt it was sawcutting, and underground utilities, the locations of which had not been indicated in either the original contract documents or the Modification No. P00006 statement of work. The contracting officer responded by issuing Modification No. P00007, suspending work as of 1 February 1991, for an estimated 90 to 180 days and directing Ackerman to demobilize its personnel and equipment. At the time, Ackerman had completed 97.3 percent of the contract work, as modified. On 17 April 1991, the contract was terminated for convenience by Modification No. P00008. There is no evidence that Ackerman contributed to, or was in any way responsible for, any delay in the prosecution of the remaining contract work, as modified, after the first suspension of work was lifted.

The memoranda prepared by the chief of the Air Force's contract management section acknowledge the Government's responsibility for both the differing site conditions encountered at the work site and "a claim for delays stemming directly from [the

Government's] indecisiveness and lethargy." (App. supp. R4, tab 541) We agree with his assessment.

Safeco's Claim

Safeco's claim is subject to the TERMINATION FOR CONVENIENCE clause of the contract, FAR 52.249-2 (ALTERNATE I) (APR 1984), and the general principles applicable to fixed-price contracts terminated for convenience contained in FAR Part 49.

The termination clause requires a contractor to submit a termination settlement proposal in the form prescribed by the contracting officer. FAR 52.249-2(d). The general provisions of FAR 49.201 require, in subpart (a), that a contractor be compensated "fairly for the work done" and explain that "[f]air compensation is a matter of judgment and cannot be measured exactly" and that "various methods may be equally appropriate for arriving at fair compensation." Subpart (b) advises that agreement upon the total amount to be paid to the contractor may be reached "without agreeing on or segregating the particular elements of costs or profit comprising [the settlement] amount." Subpart (c) concludes that "[c]ost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation" and that, "[i]n appropriate cases, costs may be estimated," and that "[o]ther types of data, criteria, or standards may furnish equally reliable guides to fair compensation."

"[S]ubject to the general principles in 49.201," FAR 49.113 instructs that the cost principles set forth in FAR Part 31 are to be used in determining the quantum of Safeco's recovery. In doing so, we are to give due consideration to fairness and apply our judgment, and not merely a strict application of the cost principles. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,112; *D.E.W., Inc. and D.E. Wurzbach, A Joint Venture*, ASBCA Nos. 50796, 51190, 00-2 BCA ¶ 31,104 at 153,632, *modified on recon. on other grounds*, 01-1 BCA ¶ 31,150. It is within our discretion to balance the FAR Part 49 "fairness concept" with the FAR Part 31 standards and fashion an appropriate termination award to Safeco. *See Fiesta Leasing and Sales, Inc.*, ASBCA No. 29311, 87-1 BCA ¶ 19,622 at 99,292.

Under FAR 52.249-2(e), the amount of the termination award "may not exceed the total contract price as reduced by (1) the amount of payments previous made and (2) the contract price of work not terminated." *See also* FAR 49.203(c). The total contract price includes any equitable adjustments to which Safeco is entitled. *See* FAR 49.114(a); *Wolfe Construction Co.*, ENG BCA No. 5309, 88-3 BCA ¶ 21,122 at 106,655. Such equitable adjustments should compensate Safeco for its reasonable, actual costs. *See Bruce Construction Corp. v. United States*, 324 F.2d 516, 518-19 (Ct. Cl. 1963).

In this case, there are a number of areas of disagreement between the parties which we must resolve in evaluating Safeco's claim and fashioning an appropriate termination award.

Quantum Issues

The parties stipulated that direct materials costs in the amount of $783,921.18, job expenses totaling $102,590.97, subcontractor costs of $65,046.90 and $7,556.70 in bond expenses were incurred in performance of the contract work. They further stipulated that the applicable G&A rates were 9.78 percent for Manning and 2.82 percent for Ackerman. The remaining cost issues are contested.

Direct Labor

The Government has conceded that Safeco incurred all labor costs claimed, except for $9,851.68 (the corrected amount) claimed for Manning and $40,613.00 claimed for Ackerman, which are still at issue.

As to the disputed Manning costs, Safeco did not supplement the documentation previously presented as part of its claim with any additional evidence at the hearing, absent which we conclude that it incurred $59,547.69 ($69,399.37 - $9,851.68). With the accepted burden rate of 18.42 percent, Manning's total direct labor is $70,516.37 ($59,547.69 x 18.42 percent = $10,968.68 + $59,547.60).

We reach a different result with respect to the $40,613.00 in disputed direct labor costs for Ackerman. The costs were challenged by the Government because the DCAA auditor concluded that Ackerman did not adequately mitigate its costs during the first suspension of work. The evidence established, however, that Ackerman advised the contracting officer that supervisory personnel would remain at the site. It requested directions to the contrary and information regarding the length of the work suspension. Neither were provided. Moreover, the auditor conceded that the contracting officer had not provided him with the information he requested regarding the circumstances of the suspension. The costs questioned are the direct result of the suspension of work and the contracting officer's failure to provide direction to Ackerman so that it could further mitigate its costs. We decline to adopt the DCAA reduction in the amount to which Safeco is entitled for Ackerman's direct labor.

The direct labor claimed for Ackerman is $227,908.85. With the accepted burden rate of 22.14 percent, Ackerman's total direct labor is $278,367.87 ($227,908.85 x 22.14 percent = $50,459.02 + $227,908.85). Of this amount, $89,621.86 was incurred by Ackerman during the work suspension periods ($73,376.34 x 22.14 percent = $16,245.52 + $73,376.34).

The total amount incurred for direct labor is $348,884.24 ($70,516.37 + $278,367.87).

Equipment Costs

The Government's Response to Safeco's Statement of Costs concedes that Manning incurred $4,568.54 and Ackerman incurred $32,243.02, a total of $36,811.56, in equipment rental costs. Ackerman's costs include $615.54 in rental costs during the first suspension of work.

Remaining in dispute is a total of $313,520.24 in equipment costs, consisting of $128,148.72 in operational costs for Manning and $185,371.52 for Ackerman. The Ackerman costs include $150,079.20 in operational expenses and $35,292.32 for standby costs during the first work suspension. All of these costs were calculated using rates taken from the Corps equipment ownership and operating expense rate manual. The Government's primary contentions regarding the disputed equipment costs relate to matters of "ownership."

The Ownership Issue

Manning owned all of the equipment for which the disputed operational and standby costs are claimed. The Government's position with regard to Safeco and Ackerman is that, absent proof of legal ownership, Safeco is not entitled to compensation for owned equipment costs and that, under *Lamar v. Wheels Unlimited, Inc.*, 513 So. 2d 135 (1987), there is no equitable ownership of motor vehicles in Florida. The Government goes on to assert that, under the Corps rate manual, ownership costs are a "function of both depreciation and cost of facilities," neither of which Safeco can claim without legal ownership (Gov't br. at 47).

Safeco's position is that "all of its right, title and interest to the equipment" was assigned and transferred to it by Manning, the capital outlay for which includes the amounts it expended to pay-off liens, together with the more than $6 million it incurred to complete Manning's 29 bonded projects (app. br. at 63). Safeco asserts that, after the takeover and notwithstanding the lack of a certificate of title, it and Ackerman had full and complete control over the equipment, exercising all the rights and fulfilling all the obligations of ownership. It argues that *Wheels Unlimited* held only that, under the Florida Contraband Forfeiture Act, the word "owner" was limited to holders of a vehicle certificate of title. 513 So. 2d at 137.

We agree with Safeco that the Florida decision does not resolve the equipment ownership issue we must decide inasmuch as it applies only to motor vehicles seized under the Florida Contraband Forfeiture Act. Here, the disputed construction equipment costs involve both non-road construction equipment as well as road vehicles and were incurred

during performance of a contract subjected to differing site conditions, work suspensions, changes and delay, disruption and inefficiency, a takeover by the surety and, ultimately, the termination for convenience by the Government.

The cost principles applicable to the disputed equipment costs are found in FAR 31.105 CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS which provides in pertinent part:

> [(d)](2) "Construction equipment," as used in this section, means equipment . . . either owned or controlled by the contractor . . . and furnished for use under Government contracts.
>
> (i) Allowable ownership and operating costs shall be determined as follows:
>
> (A) Actual cost data shall be used when such data can be determined for both ownership and operations costs for each piece of equipment . . . from the contractor's accounting records. When such costs cannot be so determined, the contracting agency may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment . . . .
>
> (B) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment.

FAR 31.105(d)(2) thus authorizes the recovery of costs associated with construction equipment that is either "owned or controlled" by the contractor and "furnished for use under Government contracts." The Corps rate manual likewise applies to equipment "owned or controlled and furnished by a contractor." (R4, tab 170; ex. A-24 at 14) Mr. McGeehin characterized DCAA's disallowance of the equipment costs claimed by Safeco for lack of ownership as simplistic. We are persuaded that, contrary to the Government's view, Safeco is not precluded from recovery of equipment costs simply because it never acquired certificates of title. As part of the takeover agreement, Manning transferred "all right, title and interest to the equipment" to Safeco and authorized Safeco "to take control and exercise possession" of it, without limitation. (R4, tab 177) Safeco incurred substantial costs to complete the

29 projects it had bonded for Manning. It also paid-off bank liens against four pieces of Manning's equipment, and filed security interests and liens to perfect its equitable interest in Manning's equipment so that it could sell the equipment when the project was completed. Ackerman, the completion contractor, used and maintained the equipment on the project until the contract was terminated for convenience. We conclude, therefore, that Safeco, in conjunction with Ackerman, had both a sufficient ownership interest and full control over the equipment, to satisfy the "owned or controlled by" requirements of FAR 31.105(d)(2) to recover both operational and standby equipment costs. In this regard, we note that even Mr. Jackson acknowledged that actual ownership was not necessarily required to recover operational equipment costs.

The Corps Rates

We are also persuaded that it is appropriate to use the predetermined Corps rates to compute the quantum of the ownership and operating equipment costs claimed. As to this issue, the Government's contentions consist of general complaints about Safeco's use of the Corps rates, principally because they are estimates.

As FAR 31.105(d)(2) plainly recognizes, owned construction equipment has a value associated with its use in the performance of work and the generation of income. *See M.E. Brown*, ASBCA No. 40043, 91-1 BCA ¶ 23,293 at 116,819. Thus, DCAA did not question whether equipment costs are recoverable. It also did not question either the use, or the reasonableness, of the blended rates that were based, in part, upon the Corps predetermined rates. Rather, it questioned the claimed costs because there was no actual equipment ownership or operational cost data. Under such circumstances, FAR 31.105(d)(2)(i)(A) provides that the contracting agency may specify the use of predetermined rates to compute the ownership and operating costs and FAR 31.105(d)(2)(i)(B) identifies the Corps manual as an acceptable predetermined schedule of construction equipment rates.

In this case, the lack of the contracting agency's specification or approval of the Corps rates case does not preclude their application. Notably, the Government did not challenge the use of the Corps rates on grounds they were not specified and approved. Thus, there was no evidence explaining either why the rates were not specified or, more significantly, why the contracting officer would not have agreed to their use. What the record evidence does establish, though, is that both contracting officers used the blended rates originally proposed by Safeco. The first contracting officer applied the blended rates when paying Safeco its equipment costs in Modification No. P00009. She did so after the rates were evaluated by the Government's price analyst, who advised: "[T]he equipment was used on the job and the Air Force received the benefit of its use. The contractors estimates are reasonable and should be accepted." (App. supp. R4, tab 551) The second contracting officer used the blended rates as the basis for a settlement offer after Safeco converted its termination settlement proposal into a CDA claim.

The evidence established that the blended rates approved and used by the contracting agency are higher than the Corps rates. Safeco, however, did not use the blended rates in the Statement of Costs it submitted in this appeal in response to the Board's Order and now relies upon. Instead, it used only the predetermined Corps rates. It did so because these are the rates DCAA used in conjunction with its audit of standby equipment costs Safeco claimed for the first suspension of work.

FAR 49.201 instructs that fair compensation may be accomplished by various methods, that "[i]n appropriate cases, costs may be estimated," and that standards other than cost and accounting data may "furnish equally reliable guides to fair compensation." In our view, use of the Corps rates in this case falls squarely within these FAR termination guidelines. In this regard, we are mindful of Mr. McGeehin's belief that use of the Corps rates here is particularly appropriate because it is virtually impossible to assign costs to equipment purchases as part of the takeover. His testimony that use of the Corps rates is the customary and usual practice in the construction industry was not refuted.

Nor do we consider the use of the 1986 version of the Corps rate manual, instead of the 1988 version of the manual included in the Rule 4 file by the Government, to be a valid reason to find the rates unreasonable. Mr. McGeehin thought that use of the 1986 version of the manual was reasonable given the varying equipment ages. Moreover, it reduces the amount of Safeco's recovery. It is also the same version used by the DCAA auditor in conjunction with the audit of Ackerman's cost proposal for the first suspension of work.

Finally, the Government offered no alternative method of computing the equipment costs. Accordingly, we conclude that the Corps predetermined rates provide a reasonable estimate of the equipment costs Safeco incurred. To reject use of the Corps rates would deprive Safeco of any recovery for equipment costs, even though these rates have been specifically approved by FAR 31.105(d)(2)(i)(B), were used by DCAA, are customarily used in the construction industry and are lower than the blended rates used by both contracting officers. Such a result would be a total contradiction of the FAR 49.201 guidelines.

In sum, it was appropriate for Safeco to use the 1986 version of the predetermined Corps rates to reasonably quantify the costs it claims for the construction equipment it furnished for use on the contract.

The Credit Issue

The Government also argues that it is entitled to a credit for the auction sale of Manning's equipment under FAR 31.201-5. The DCAA auditor suggested the credit in the 1992 audit of the termination settlement proposal (Report No. 1301-92L17100083), under the FAR Part 49 termination for convenience provisions, not FAR 31.201-5. She could not, however, verify whether the credit included only the Manning equipment used for the contract at Patrick Air Force Base and the Government did not come forward with

confirming evidence. Significantly, she did not carry her recommendation forward in the 1996 audit of Safeco's claim (Report No. 1301-96L17100186). These facts, together with Mr. McGeehin's explanation that the Government is not entitled to a credit because it did not own the equipment and because the Corps rates included salvage value, convince us that no credit is due.

Standby Equipment Costs

The last equipment issue involves $35,907.86 in standby equipment costs claimed for the first work suspension. The Government argues that Safeco is not entitled to recover standby equipment costs because Ackerman had no other use for the equipment during the suspension and because the equipment could easily have been transported elsewhere. It points out that paragraph 6(a) of the takeover agreement restricted use of the equipment to completion of Manning's bonded projects, that most of the Manning work at which the equipment otherwise could have been used had been completed, and that Safeco never intended to secure other construction contracts on which the equipment could be used. It relies upon *J. D. Shotwell Company*, ASBCA No. 8961, 65-2 BCA ¶ 5243 at 24,687, where we said:

> An allowance of standby ownership expense must be supported by a showing that the equipment for which compensation is claimed was reasonably and necessarily set aside and awaiting use in performing the contract. Stated differently, we must be able to conclude that a contractor would prudently have held the equipment for which claim is made in readiness to perform the Government contract rather than making some other disposition of it, in order to find that the Government should pay the charges for that equipment.

Safeco's position is that the equipment on-site was necessary to complete the work, that it could not be redeployed because of the indefinite nature of the suspension, and that the specialized equipment could not be replaced easily. It relies upon *U.A. Anderson Construction Co.*, ASBCA No. 48087, 99-1 BCA ¶ 30,347, *aff'd on recon*., 99-2 BCA ¶ 30,565, in which we found the contractor entitled to recovery of idle equipment costs because the equipment was required to perform the work and the contractor "could not reasonably remove its equipment and use it elsewhere and did not leave the equipment idle on site merely for its own convenience." *Id.* at 150,084.

We believe this case is controlled by *U.A. Anderson.* When the contracting officer issued Modification No. P00005, she suspended the work "indefinitely until further notice." Although Ackerman was given no direction regarding demobilization or the anticipated length of the suspension, it laid-off hourly workers and reassigned personnel and equipment to other available work to the extent possible. The equipment remaining at

the site was necessary to completion of the contract work. Some of it was specialized and could not be easily rented commercially. Ackerman requested direction from the contracting officer; none was provided.

Contrary to the Government's suggestion, the restriction on the use of the equipment to the completion of Manning's projects imposed by the takeover agreement and the fact that most of Manning's other work had been completed do not make the standby costs unrecoverable under paragraph 2-2.e. of the Corps manual. It was the Government's suspension of work and unreasonable delay in resolving the differing site condition issues that caused the equipment to be idle, absent which the contract work would have been completed and Safeco would have proceeded with the sale of the equipment. As in *U.A. Anderson*, Safeco did not leave the equipment idle at the site for its convenience.

In summary, the total amount incurred for equipment costs for Manning is $132,717.26 and for Ackerman, $217,614.54.

Total Cost Methodology

The Government argues that Safeco has improperly used a total cost methodology for its claim (Gov't br. at 62). In essence, the Government's argument is that Safeco was required to segregate the costs associated with its claims based upon differing site conditions, work suspensions, changes, and delay, disruption and inefficiency from the contract work costs associated with the termination for convenience. It relies upon cases emanating from *WRB Corp. v. United States*, 183 Ct. Cl. 409 (1968), none of which involved claims that combine requests for equitable adjustments with termination for convenience settlement costs.

Safeco responds that, as the parties stipulated, the terminating contracting officer approved submission of its total cost termination settlement proposal, which it subsequently converted into a CDA claim. Safeco also points out that FAR 49.206-2(b)(4) directs the submission of a total cost proposal for construction contracts that are completely terminated.

We conclude that the Government's contentions are without merit for a number of reasons. First, the termination for convenience regulations provide contracting officers with wide discretion in achieving settlements with terminated contractors. *See Allied Materials and Equipment Co.*, ASBCA No. 17318, 75-1 BCA ¶ 11,100. In this case, we are convinced that the contracting officer acted within her discretion when she approved the submission of a total cost termination settlement proposal and that her actions are consistent with the applicable FAR provisions.

There is no requirement in the FAR for a contractor to segregate equitable adjustment claims and termination for convenience costs in its termination settlement

proposal. Indeed, FAR 49.114 directs the contracting officer to obtain a list of "all related unsettled contract changes" and to settle them as "part of [the] final settlement." Moreover, FAR 49.201 authorizes contracting officers to use their judgment in determining an appropriate method for arriving at fair compensation "without agreeing on or segregating the particular elements of costs." And, as Safeco points out, FAR 49.206-2(b)(4) requires submission of a total cost proposal when a construction contract is completely terminated and the contracting officer approved the submission of such a proposal in this case. Safeco thus submitted its termination settlement proposal "in the form . . . prescribed by the Contracting Officer" as required by the Termination for Convenience clause, FAR 52.249-2(d).

When she approved the use of the total cost settlement proposal, the contracting officer was well aware that it would include equitable adjustment costs resulting from the Government's failure to resolve the differing site condition problems encountered by Manning and Ackerman. The record reflects that it took the Government nearly 16 months (from 9 August 1989 to 3 December 1990) to issue Modification No. P00006. During this 16-month period, the contracting officer issued three modifications extending the contract completion date before she suspended performance on 10 April 1990. She was in frequent contact with Ackerman regarding the Government's many revisions to the new statement of work it had provided to Ackerman on 28 November 1989. At her direction, Ackerman provided cost proposals for these revisions, and, in April 1990, in response to her inquiry, Ackerman advised her that its proposal for $220,820.00 did not include the costs of delay, which it asserted began when Manning encountered the collapsed ductbank in August 1989. Ackerman's next four proposals, submitted in June, August and September 1990, explained that delay, but not inefficiency, costs were included. Each of these proposals was in excess of $800,000.00.

Additionally, when she finally issued Modification No. P00006 in December 1990, Ackerman was quick to advise her that it did not agree with either the amount of money or the contract time extension that had been provided. Ackerman's subsequent proposal for its actual costs associated with the changed work clearly stated that the proposal did not include costs associated with the work suspension and delay, disruption and inefficiency attributable to the Government's failure to issue Modification No. P00006 in a timely manner.

Similarly, when contract work was suspended, Ackerman immediately advised the contracting officer that it would continue to incur costs because the suspension was of indefinite duration. It submitted a proposal on 5 June 1990 for almost $60,000.00 in costs incurred during the first six weeks of the first suspension, which the contracting officer determined was premature and returned to Ackerman. After the work suspension was lifted, Ackerman submitted another proposal, this time seeking $214,073.00.

And, finally, after Ackerman resumed work in December 1990 and encountered still more unexpected site conditions, the chief, contract management section, recommended that the contracting officer issue another suspension of work in a memorandum that lamented about the contractor's claim for delays which nearly equaled the original contract price.

As is abundantly clear, not only was the contracting officer fully aware that there would be equitable adjustment claims, she was also well-apprised of the quantum of the costs associated with them when she approved submission of a total cost termination proposal. The subsequent contracting officer attempted to countermand the approval of a total cost submission several years later, by asking that costs other than those associated with the termination for convenience be segregated and submitted separately after Safeco submitted its 31 July 1995 "Claim for Equitable Adjustment for Costs Associated with the Termination for Convenience" using the same total cost approach it had used in its termination settlement proposal. While it is not altogether clear what the contracting officer meant by her letters, the record reflects that Safeco, through counsel, took the position that the Court of Federal Claims had resolved the issue, finding that no such segregation was necessary. Government counsel apparently disagreed with this interpretation of the court's decision, although DCAA had never questioned Safeco's use of the total cost approach, and the issue was not raised in the Government's Response to Safeco's Statement of Costs, which under the Board's Order on Proof of Costs would seemingly qualify as an admission that the method was appropriate.

In any event, if we were to adopt the Government's position, the Government would avoid payment of equitable adjustment costs it concedes were incurred by Safeco on this contract, notwithstanding our conclusion that it is responsible for the differing site conditions, work suspensions, changes, and delay, disruption and inefficiency experienced by Manning/Ackerman during contract performance. Such a result would, again, be contrary to FAR 49.201, in particular the direction that terminated contractors may be compensated by methods that do not necessarily require agreement on, or segregation of, the particular elements of the costs comprising the final compensation and that "various methods may be equally appropriate for arriving at fair compensation" which is "a matter of judgment and cannot be measured exactly."

Finally, we addressed, and rejected, a similar argument advanced by the Government in *Astro Dynamics, Inc.*, ASBCA No. 41825, 91-2 BCA ¶ 23,807. We said:

> [A] termination for convenience settlement should compensate an appellant fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. (FAR § 49.201(a)). *M. E. Brown*, ASBCA No. 40043, 91-1 BCA ¶ 23,293 . . . . Therefore, upon conversion of a termination for default to a

> termination for convenience of the Government, the fixed price contact is essentially converted in to [sic] a cost reimbursement contract and appellant becomes entitled to recover its allowable costs in performance of the terminated contract. *M. E. Brown, supra; R. G. Robbins & Company, Inc.*, ASBCA No. 27516, 83-1 BCA ¶ 16,420; *Paul E. McCollum, Sr.*, ASBCA No. 23269, 81-2 BCA ¶ 15,311, *aff'd* 6 Cl.Ct. 373 (1984); *Seven Sciences Industries*, ASBCA No. 23337, 80-2 BCA ¶ 14,518.

Id. at 119,208.

We concluded in *Astro Dynamics* that additional costs resulting from constructive changes were among the costs recoverable by the contractor as part of its total cost termination settlement reimbursement. *Id.* We reached a similar conclusion regarding additional costs resulting from suspensions of work. *M.E. Brown*, 91-1 BCA at 116,816. *See also Foremost Mechanical Systems, Inc. v. General Services Administration*, GSBCA Nos. 13250-C (12335), *et al.*, 98-1 BCA ¶ 29,652 (total cost termination for convenience settlement proposal included costs claimed for defective specifications and differing site conditions).

Profit

FAR 49.201(a) and 52.249-2(f) provide for a "reasonable allowance for profit." However, recovery of profit is precluded by FAR 49.203(a) and FAR 52.249-2(f) if it appears that the contractor would have sustained a loss on the entire contract had it been completed. FAR 52.249-2(f) directs that the amount paid the contractor is to be reduced "to reflect the indicated rate of loss" and FAR 49.203(c)(2) provides the formula for computing the loss adjustment.

The Government argues that Manning was in a loss position when Safeco took-over the contract and that the losses continued until the contract was terminated. It blames Manning and Ackerman for the delay and points to Ackerman's Job Status Work Sheets as evidence that both operated at a loss during contract performance. It asserts that Safeco is not entitled to a profit and that a loss adjustment in the amount of $446,221.85 should be applied. The Government bears the burden of proving Safeco was operating in a loss position in order to apply the convenience termination loss adjustment. *E.g., R&B Bewachungs GmbH*, ASBCA No. 42214, 92-3 BCA ¶ 25,105.

Safeco responds that the Government failed to prove that the contract was in a loss position, that the Job Status Work Sheets have no bearing on the profitability of the contract, and that the Government continues to refuse to recognize the equitable adjustments to the contract price to which it is entitled.

We addressed application of the loss adjustment in *Astro Dynamics*. There we said:

> . . . [A]lthough FAR § 49.203(a) states that in the negotiation or determination of any settlement, the contracting officer shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed, we have held that when a contract is terminated for convenience, this requirement to disallow profit in a case of loss is not applicable to situations in which the Government substantially contributed to the increased costs and it is not possible to separate that portion of the loss from possible losses caused by the contractor. *M. E. Brown, supra; Scope Electronics, Inc.*, ASBCA No. 20359, 77-1 BCA ¶ 12,404, *mot. for recon. denied* 77-2 BCA ¶ 12,586. Thus, a determination that there were constructive changes is significant in two respects. First, it allows the reimbursement of costs resulting from the constructive changes notwithstanding the fact that such costs cannot be specifically related to work that was required and performed in accordance with the contract. Second, it eliminates the application of the loss adjustment required by FAR § 49-203(a).

91-2 BCA at 119,208-09.

In this case, we have concluded that the Government alone is responsible for increased costs resulting from differing site conditions, work suspensions, changes, and delay, disruption and inefficiency and that Safeco properly submitted a total cost termination settlement claim, thereby dispensing with any need to separate any possible losses caused by Safeco. Under *Astro Dynamics*, our conclusions eliminate application of the loss adjustment required by FAR 49.203(a). *See also D.E.W.*, 00-2 BCA at 153,633 (loss adjustment not applicable where recovery not limited to contract price because default termination was converted to one for convenience on basis of impossibility).

In any event, the Government did not carry its burden of proof. It relies upon the Job Cost Work Sheets prepared by Ackerman to support its contention that the contract was in a loss position. Mr. Cox, however, explained that the Job Cost Work Sheets have "nothing to do with the profit position of the contract," but rather were management tools provided to the surety. Moreover, a finding that the contract is in a loss position is to be made as of the time of termination. *See* FAR 49.203(a). Thus, even if the Job Cost Work Sheet dated 30 October 1989 is evidence that the contract was in a loss position shortly after Manning voluntarily defaulted, it is largely irrelevant to whether the contract was in a loss position at the time it was terminated. The last Job Cost Work Sheet in the record, which is dated 5

March 1990, is no more reliable as proof that Ackerman was in a loss position inasmuch as it (like all of the others) does not include the value of any contract changes and claims.

Further, we found the estimates of the cost to complete prepared by DCAA to be unreliable and there was no evidence supporting the estimate contained in the Government's Response to Safeco's Statement of Costs. Even more significantly, none of the Government's various computations of the loss adjustment (including the $446,221.85 adjustment it now urges us to apply) considered the additional costs of performance attributable to differing site conditions, work suspensions, changes and delay, disruption and inefficiency for which the Government alone bears responsibility.

The facts in *Wolfe Construction, supra*, are analogous to the facts in the present appeal. In *Wolfe*, the Government's "pervasive maladministration" of five contracts resulted in some 23 claim events and associated delays and impacts which warranted equitable contract adjustments, just as the Government's "indecisiveness and lethargy" here resulted in work suspensions, changes and delay. The Board in *Wolfe* concluded that none of the contracts were in a loss position and that no loss formula should be applied because the amounts it awarded under the Termination for Convenience clause did not exceed the contract prices, as properly adjusted for compensable claims. In reaching that conclusion, the Board found it unnecessary to determine the precise amount of the adjustments due because, as we have found in this case, the Government had failed to establish that appellant was in a loss position and was "directly responsible for what is, at best, a chaotic pricing situation." 88-3 BCA at 106,655.

For all of these reasons, we conclude that Safeco's recovery is not subject to a loss adjustment under FAR 49.203.

The evidence established that Manning and Ackerman applied 10 and 15 percent profit factors, respectively, for bidding and change order work, and we adopt those percentages as reasonable. Under the Suspension of Work clause, however, profit is not allowable on increased costs of performance caused by the Government's work suspensions and delay. FAR 52.212-12. Therefore, when computing profit for Ackerman, the costs it incurred during the two work suspensions must be excluded. *See U.A. Anderson*, 99-1 BCA at 150,085. Our findings reflect that Ackerman incurred $185,127.70 in costs during the two work suspensions ($89,621.86 for direct labor, $54,520.56 for job expenses, and $35,907.86 for equipment, a total of $180,050.28, plus $5,077.42 in G&A on these amounts at the stipulated 2.82 percent rate). Thus, no profit will be applied to $185,127.70 of Ackerman's costs.

In sum, under FAR 52.249-2(e), appellant's recovery exclusive of settlement costs may not exceed the contract price less payments previously made. Here, the contract price as of Modification No. P00009 was $1,294,888.90 and previous payments were $1,259,564.47. Accordingly, unless appellant could prove that it was entitled to a further

adjustment to the contract price, the maximum amount it could recover, exclusive of settlement costs, was $35,324.43. In essence, we are holding that appellant has proved it is entitled to an adjustment on a modified total cost basis. Appellant has proved the impracticability of proving its actual losses from the delay, disruption and inefficiency directly, the reasonableness of Manning's bid, the reasonableness of Manning and Ackerman's actual costs (which have been adjusted by the parties to allow for the payments diverted by Manning), and the lack of Manning and Ackerman's responsibility for the added costs. Appellant has proved its actual losses from the suspensions, and we have reduced the allowable profit to reflect that. *See Servidone Construction Corp. v. United* States, 931 F.2d 860 (Fed. Cir. 1991) (modified total cost method); *WRB Corp. v. United States*, 183 Ct. Cl. 409, 426 (1968) (total cost method). As a result, consistent with our findings as summarized below, we are considering the price to be not less than $1,946,487.10, the total of cost and profit.

Settlement Costs

The Government's response to Safeco's Statement of Costs concedes that $20,987.00 was incurred for direct labor and other direct costs and that the stipulated G&A rate of 2.82 percent is applicable. Safeco did not come forward with evidence explaining the costs disputed by the Government. Thus, we conclude that Safeco is entitled to recover $21,578.83 for these settlement expenses ($20,987.00 x 2.82 percent = $591.83 + $20,987.00 = $21,578.83).

The Government's challenge to professional and legal fees does not correspond to the revised costs included in Safeco's Statement of Costs. Mr. Painter participated in the preparation of the Statement of Costs and explained that the professional and legal fees claimed were associated with the termination. Based upon his testimony, we are satisfied that Safeco is entitled to recover the adjusted amount, $25,432.71, for professional and legal fees it now claims.

Safeco is entitled to recover a total of $47,011.54 in settlement costs.

Summary

The following is a summary of the costs we have found Safeco incurred in the performance of the contract and is entitled to recover as to a total cost termination award.

	Manning	Ackerman
Materials	$360,603.74	$ 423,317.44
Direct Labor	70,516.37	278,367.87
Job & Misc.	6,155.46	96,435.52
Equipment	132,717.26	217,614.54

Subcontractors			17,425.00		47,621.90
			$587,417.83		$1,063,357.27
G&A	@	(9.78%)	57,449.46	(2.82%)	29,986.68
Total Costs			$644,867.29		$1,093,343.95
Standby Costs					(185,127.70)
			$644,867.29		$908,216.25
Profit	@	(10%)	64,486.73	(15%)	136,232.43
Bond			7,556.70		
Standby Costs					185,127.70
Totals			$716,910.72		$1,229,576.38

The recovery for both Manning and Ackerman is a total of $1,946,487.10. With settlement costs of $47,011.54, Safeco's total recovery is $1,993,498.64. Applying the credit for the stipulated contract payments of $1,259,564.47, Safeco's net recovery is $733,934.17.

CDA Interest

Finally, the Government seeks to limit the amount of CDA interest to which Safeco is entitled. It asserts that Safeco never submitted a properly certified CDA claim to the contracting officer, that its termination settlement proposal never ripened into a CDA claim, and that CDA interest should not begin to accrue prior to the 23 March 1999 filing of the notice of appeal with the Board (Gov't br. at 56-57).

While the 27 November 1991 termination for convenience settlement proposal was not a CDA claim, an impasse was reached when nearly four years had passed without a resolution and Safeco evidenced its desire to begin the disputes process. The contracting officer's repeated requests for additional information after having been advised that all available data had been provided did not deprive Safeco of its right to convert its termination settlement proposal into a CDA claim. *See James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996); *Central Environmental, Inc.*, ASBCA No. 51086, 98-2 BCA ¶ 29,912.

On 31 July 1995, Safeco submitted a CDA claim to the contracting officer: its submission was a nonroutine written demand to the contracting officer under the CDA seeking payment of a sum certain as a matter of right under the Changes, Termination for Convenience, Disputes and other applicable clauses. *See* 48 C.F.R. § 33.201*; Ellett*, 93 F.3d at 1544-45; *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (e*n banc*). The claim was properly certified; CDA interest began to accrue when the contracting officer received the 31 July 1995 claim. 41 U.S.C. §§ 605, 611.

CONCLUSION

Safeco is entitled to recover a termination award of $733,934.17, plus CDA interest running from the date upon which the contracting officer received the 31 July 1995 claim. The appeal is sustained to the extent indicated, and is otherwise denied.

Dated: 30 July 2003

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 52107, Appeal of Safeco Insurance Company of America, rendered in conformance with the Board's Charter.

Dated:

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