ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kearfott Guidance & Navigation Corporation	)	ASBCA Nos. 49271, 49532
	)	51873, 52521
Under Contracts Nos. N00030-88-C-0146	)	
N00030-89-C-0058	)	
N00030-90-C-0011	)	
N00030-90-C-0037	)	
N00030-90-C-0038	)	
N00030-91-C-0052	)	
N00030-91-C-0061	)	
N00030-91-C-0043	)	
N00030-92-C-0043	)	
N00030-93-C-0042	)	
N00030-93-C-0047	)	
N00030-94-C-0039	)	
N00030-94-C-0041	)	
N00030-95-C-0047	)	
N00030-87-C-0014	)	
N00030-92-C-0040	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In these cost cases, appellant challenges respondent's claims aggregating over $37 million for failure to provide the Quarterly Limitation on Payments Statements required

by the INCENTIVE PRICE REVISION – FIRM TARGET clause in the form prescribed at Federal Acquisition Regulation (FAR) 52.216-16(g), or for failing to show underruns on those statements. The appeals relate to 16 fixed-price incentive contracts for the guidance systems used in Trident missiles. Respondent contends that appellant's failure to make the filings precluded adjustments to interim billing rates, resulting in overpayments. Respondent seeks the claimed overpayments, plus interest. Appellant principally defends on the grounds that the contracting officers' decisions are void because they do not represent independent consideration, that respondent waived the requirement to file the statements, and that the claimed damages were improperly calculated. We sustain the appeals in part, deny them in part, and remand in part to the parties.

FINDINGS OF FACT

A. *The Contracts*

1. Each of these appeals relates to contracts awarded by respondent to Kearfott Guidance & Navigation Corporation or its predecessor entities between 1986 and 1995. There are 16 such contracts at issue. Each contract was a fixed-price incentive (firm target) contract in whole or in part. In each contract, Kearfott agreed to supply, and respondent agreed to acquire, various components used in the guidance systems of Trident missiles, including inertial measurement units, gyroscopes and other critical parts (tr. 1407-08; app. ex. 1). Arranged by the appeal numbers in which they are at issue, the contracts bear the following award dates or effective dates:

(a) *ASBCA Nos. 49271 and 49532*

CONTRACT	DATE
N00030-88-C-0146	1 January 1988
N00030-89-C-0058	2 January 1989
N00030-90-C-0011	28 February 1990
N00030-90-C-0037	1 January 1990
N00030-90-C-0038	1 February 1990
N00030-91-C-0052	15 January 1991
N00030-91-C-0061	6 June 1991

We find that four of the foregoing contracts were competitively awarded in whole or in part. They are: Contract Nos. N00030-88-C-0146, N00030-89-C-0058, N00030-90-C-0011, and N00030-91-C-0061 (app. ex. 1; tr. 1408). In addition, with respect to contract No. N00030-89-C-0058, neither the award date nor the effective date appears on the face of the copy of the contract in the record. Nonetheless, the record does contain modification P00001, among whose stated purposes was to retitle the

solicitation "which was contemporaneously awarded with the signing of this modification," and which the contracting officer appears to have signed on or after 2 January 1989. From the contract documents and the testimony of Stephen Givant, Kearfott's vice president of finance and former corporate counsel, we find that the only contractor awarded this contract was Kearfott Guidance & Navigation Corporation, not The Singer Company or Bicoastal Corporation. (R4 ASBCA 51873, tab 1 at 1, 10, 18, 21A, 22, 28, 34, 53, 61; tr. 1440; *see also* tr. 1253-54)[1]

(b) *ASBCA No. 51873*

CONTRACT	DATE
N00030-91-C-0043	1 February 1991
N00030-92-C-0043	1 March 1992
N00030-93-C-0042	1 March 1993
N00030-93-C-0047	2 April 1993
N00030-94-C-0039	1 February 1994
N00030-94-C-0041	1 March 1994
N00030-95-C-0047	26 September 1995

(R4 ASBCA 51873, tab 1 at 1, 3, 5, 7, 11, 14, 16) We find that three of the foregoing contracts were competitively awarded. They are: Contract Nos. N00030-93-C-0047, N00030-94-C-0041 and N00030-95-C-0047 (app. ex. 1; tr. 1408).

(c) *ASBCA No. 52521*

CONTRACT	DATE
N00030-87-C-0014	1 October 1986
N00030-92-C-0040	11 February 1992

(R4 ASBCA 52521, tab 1 at 1, 3) We find that Contract No. N00030-30-92-C-0040 was competitively awarded (app. ex. 1; tr. 1408).

[1] In its copy of the Rule 4 file for these two appeals, the Board has rearranged Tab 1, which contains copies of portions of the contracts, so that (a) all pages pertaining to a particular contract are together; and (b) the contracts are grouped in the order listed in finding 1(a) (starting with Contract No. N00030-88-C-0146 and ending with Contract No. N00030-88-C-0061). The Board has also numbered the pages thus rearranged consecutively. The Board has followed the same procedure for Tab 1 in each of the Rule 4 files pertaining to ASBCA No. 51873 and ASBCA No. 52521.

2. The contracts included various standard clauses. It is undisputed that each of the 16 contracts included the INCENTIVE PRICE REVISION - FIRM TARGET (APR 1984) clause in the form prescribed at FAR 52.216-16 (tr. 22, 118, 272, 300, 417-18, 963, 1439). Contracting officers are required to insert this clause in "solicitations and contracts when a fixed-price incentive (firm target) contract is contemplated." FAR 16.405(a). As the clause appeared at the time that each of the contracts at issue was awarded, paragraph (b), DEFINITION, provided that "'Costs,' as used in this clause, means allowable costs in accordance with Part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract." In addition, paragraph (g) contained the following provision that is at the heart of this dispute:

> (g) *Quarterly limitation on payments statement.* This paragraph (g) shall apply until final price revision under this contract has been completed.
>
> (1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and for each quarter thereafter, the Contractor shall submit to the contract administration office (with a copy to the contracting office and the cognizant contract auditor) a statement, cumulative from the beginning of the contract, showing –
>
> (i) The total contract price of all supplies delivered (or services performed) and accepted by the Government and for which final prices have been established;
>
> (ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocated solely to, the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established;
>
> (iii) The portion of the total target profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by the Government and for which final prices have not been established–increased or decreased in accordance with subparagraph (d)(2) above [relating to profit or loss adjustments to total final negotiated costs] . . . ; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(2) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (1)(iv) above exceeds the sum due the Contractor, as computed in accordance with subdivisions (1)(i), (ii), and (iii) above, the Contractor shall immediately refund or credit the Government the amount of this excess. The Contractor may, when appropriate, reduce this refund or credit by the amount of any applicable tax credits due the Contractor under 26 U.S.C. 1481 and by the amount of previous refunds or credits effected under this clause. If any portion of the excess has been applied to the liquidation of progress payment, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(App. supp. R4, tab 530 at 1-2)

3. The record contains testimony from witnesses called by both parties that paragraph (g) of the INCENTIVE PRICE REVISION - FIRM TARGET (APR 1984) clause is for the benefit of both parties inasmuch as it provides a mechanism for adjustments, without waiting for final price revision at the end of performance, if the contractor has experienced either overruns or underruns of actual costs to target costs during a preceding quarter in which deliveries have been made (tr. 352, 405-06, 428-29, 1439; *see also* tr. 588-89).

4. Both the April 1984 edition, and the January 1986 edition, of the DOD FAR Supplement (DFARS) contained the identical provision for DFARS 1.403(a), INDIVIDUAL DEVIATIONS. It provided:

> Except where elsewhere prohibited, deviations from the FAR or this supplement or a Department of Defense Directive which affect only one contract or procurement may be made or authorized in accordance with Departmental procedures, provided such circumstances justify a deviation, and written notice of such deviation, describing its nature and the basis for its justification, is furnished to [designated officials in the component agencies of the Department of Defense].

In addition, both the April 1984 and January 1986 editions contained DFARS 1.404, CLASS DEVIATIONS, which provided that "[e]xcept as authorized in 1.403, deviations from this supplement or a Department of Defense directive will not be effected unless approved in advance by [a designated DoD official]," with an exception not relevant here. DFARS 1.404 also provided that "[w]ritten requests for such approval will be submitted to [the designated DoD official] through the DAR Council as far in advance as the exigencies of the situation will permit."

5. Each contract contained a Schedule, which in turn included a section G, CONTRACT ADMINISTRATION DATA. For the seven contracts at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), section G contained a subparagraph entitled COGNIZANT CONTRACT ADMINISTRATION OFFICE which designated the Defense Contract Administration Services offices at Kearfott's plant as the office that would administer the contract. In six of these seven contracts, the subparagraph then provided that "[a]pproval of Waivers and Deviations from contractual requirements is not authorized except to the extent delegated by official correspondence or directives from" the Navy's office of Strategic Systems Programs (SSP)." (R4 ASBCA 49271, tab 1 at 7, 15, 25, 31, 50, 57-58) In the seventh contract – Contract No. N000030-90-C-0061 – the subparagraph provided that "[a]pproval of Waivers and Deviations from contractual requirements is not authorized except to the extent delegated by official correspondence from either the Director Strategic Systems Programs (DIRSSP) or the Program Management Office/Strategic Systems Programs (PMO/SSP), SPG" (*id*. at 66). The record does not contain the provisions of section G either in the seven contracts at issue in ASBCA No. 51873 (*see* finding 1(b)), or in the two contracts at issue in ASBCA No. 52521 (*see* finding 1(c)).

6. Each contract contained a performance incentive plan, which provided a mechanism to enhance profit for ensuring technical capability (tr. 18, 35-36). From the portions of the contracts in the record, we find that, typically, the contracts contained a paragraph in section B providing that designated contract line items (CLINs) were "subject to the Incentive Plan, attached hereto as" a designated exhibit (R4 ASBCA 49271, tab 1 at 14, 21, 24, 49). Thus, Exhibit I to Contract No. N00030-88-C-0146, which is at issue in ASBCA Nos. 49271 and 49532, is the Incentive Plan for that contract. For CLIN 0001, Exhibit I sets forth both positive and negative profit for incentive parameters relating to schedule, reliability performance and flight performance. It also sets forth cost and schedule incentives. Performance incentives were not guaranteed; they were earned post-performance, sometimes several years after deliveries were completed (tr. 36-39, 1242-44). With respect to the flight test incentive, the plan provides that the incentive "shall be inoperative if less than three flights are flown with the [inertial measurement units] produced under this contract." It further provides that, if three flights do not occur within 18 months of the delivery of the last unit under the contract, "the period shall be considered extended for an additional six (6) months or until three (3) flights have transpired; whichever occurs first." (App. supp. R4, tab 555 at 103346-352) While Exhibit I does not expressly provide that performance incentives were to be included or excluded from other claims or payments under the contracts, we find that it was the contracting practice of the parties that Kearfott would submit a separate claim for performance incentives; the PCO and others assisting him would score and otherwise evaluate the claim and formulate respondent's position; the parties would negotiate; and the parties would enter into a contract modification embodying the results of the negotiations (tr. 41-42, 72, 76-78, 263-67, 1196-97; *see also* app. supp. R4, tabs 773-79). In consequence, it was the practice of the parties to pay performance incentives separately from total profit in the contract (tr. 72-74, 263-64).

B. *The Parties*

1. *Kearfott*

7. Before March 1968, Kearfott was part of a corporation known as General Precision Equipment Company. In or about March 1968, The Singer Company (Singer) acquired all of the stock of General Precision Equipment Company, and Kearfott then became a division of Singer. (Tr. 1178)

8. By date of 2 February 1987, Singer announced a restructuring whereby it divided its Kearfott Division into two operating entities. The entity relevant here was known as Kearfott Guidance and Navigation Division. That Division was responsible for Singer's programs in inertial guidance and navigation, and its product lines included the guidance system for the Trident missile (tr. 1256-57; app. supp. R4, tab 300).

9. On or about 22 December 1987, Singer established a wholly-owned subsidiary known as Singer Acquisition Company No. 4 (tr. 1258; app. supp. R4, tab 301 at 1-2).

10. Thereafter, in April 1988, Singer transferred the business of the Kearfott Guidance and Navigation Division into Singer Acquisition Company No. 4 and renamed it "Kearfott Guidance & Navigation Corporation" (tr. 1258-59; app. supp. R4, tab 301 at 4-5). Mr. Givant (*see* finding 1(a)) testified, and we find, that this transaction constituted a transfer of assets (tr. 1259). It was accomplished by a Bill of Sale and Assignment and Assumption Agreement dated 25 April 1988 whereby Singer conveyed its right, title and interest in, its Kearfott Guidance and Navigation Division, and all related assets and liabilities, to Kearfott Guidance & Navigation Corporation (tr. 1259; app. supp. R4, tab 301 at 6-16).

11. Kearfott underwent a further ownership change in 1988. By date of 4 October 1988, Astronautics Corporation of America (Astronautics) acquired the new Kearfott Guidance & Navigation Corporation. The acquisition was accomplished by a series of transactions, the first of which was that Astronautics established a wholly-owned subsidiary, called KG&N Sub, Inc. Astronautics then made an equity contribution to KG&N Sub, Inc. In turn, KG&N Sub, Inc. purchased all of the outstanding capital stock of Kearfott with equity coming from Astronautics, together with debt. Immediately thereafter, KG&N Sub, Inc. was merged into Kearfott, its corporate existence ceased, and Kearfott became the sole surviving entity. As a result of the merger, by operation of law, Astronautics, the sole owner of KG&N Sub, Inc., became the owner of all of its outstanding capital stock in Kearfott. (Tr. 1264-65; app. supp. R4, tab 337) At the time of trial, Kearfott remained a separate corporation and a wholly-owned subsidiary of Astronautics (tr. 1255, 1263-65).

12. Mr. Givant testified, and we find, that the purchase method of accounting "is the set of rules that pertained" to determining the value of the assets that Kearfott acquired in the business combination (tr. 1267). Pursuant to section 338 of the Internal Revenue Code, Kearfott elected to treat the purchase of stock as if there had been a liquidation of the corporation and as if the 4 October 1988 transaction were a purchase of assets. For both financial and tax accounting purposes, Kearfott wrote up its asset costs as a result of the transaction. (Tr. 1268-69)

2. *Relevant Government Agencies*

13. Respondent's procuring contracting office that awarded all 16 contracts at issue was the Navy's SSP, which was responsible for the development, production and operational support of the Trident missile system, including the larger fire control ships navigation system, the missile itself, and the guidance system (tr. 10-11, 15, 951). The procuring contracting officers (PCOs) for the contracts at issue were employed at SSP.

Their responsibilities included requesting and obtaining proposals from prospective contractors; analyzing proposals; and negotiating and awarding contracts to those contractors that had submitted proposals (tr. 10). Part of the negotiation and award function entailed inserting the required contract clauses in the contracts according to guidance in the FAR (tr. 19). For the contracts at issue, the PCOs included Graham Wright, John Dunegan, and Roger Larkin (tr. 10, 23, 24, 44).

14. Following award of the contracts at issue, the contract administration function was transferred to a secondary level field activity of respondent's Defense Contract Management Agency (DCMA) office, located at BAE Systems/Kearfott in Wayne, New Jersey. As a contract administration office, it had the "normal" post-award administration responsibilities set forth in FAR Part 42, CONTRACT ADMINISTRATION, and particularly in subpart 42.3, CONTRACT ADMINISTRATION OFFICE FUNCTIONS (app. supp. R4, tab 533). The administrative contracting officers (ACOs) for the contracts at issue were warranted individuals employed at that office. The ACOs assigned to the contracts at issue included John Schoening, as well as his immediate successor, A. Major Bey, who was the ACO for the contracts at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), and Henry Jelinek, whom Mr. Bey supervised, and who was the ACO rendering the final decisions for the contracts at issue in ASBCA Nos. 51873 and 52521 (*see* findings 1(b), 1(c); tr. 212, 452, 579).

15. The Defense Contract Audit Agency (DCAA) served in the role of financial advisor to the contracting officer, reviewing contractor data and issuing audit reports to both the PCO and ACO concerning contract costs. The tasks performed by DCAA in these appeals included auditing incurred costs, auditing Quarterly Limitation on Payment Statements (QLOPS) that were submitted on certain contracts, and for contracts on which QLOPS were not submitted, computing overbillings and interest that would have been reflected on the QLOPS had they been submitted (tr. 584-85, 596, 851, 860). Mary Ellen Richards, a DCAA auditor of long tenure at DCAA's Kearfott suboffice (tr. 581, 583-85), conducted or oversaw many of the audits in the record.

C. *Alleged Waiver of the QLOPS Requirement*

16. It is undisputed that Kearfott stopped submitting QLOPS (*see* finding 2), but the record does not establish when. The record contains several QLOPS submitted by Singer between February 1982 and May 1986, but none of the contracts at issue in these appeals was awarded until October 1986 (resp. supp. R4, tab 1; *see* findings 1(a), 1(b), 1(c)). The record also contains expressions identifying 23 June 1988 as the date upon which Kearfott stopped submitting QLOPS, but we find no support for that date (tr. 183-84). The record contains some support that Singer, and then Kearfott, submitted QLOPS until in or about February 1989. By letter to ACO Bey dated 13 July 1994, Kearfott's executive vice president stated that, as of August 1992, "three and one-half

years had passed without submittal of [QLOPS]," *i.e.*, since in or about February 1989 (R4 ASBCA 49532, tab 11 at 2).

17. By letter to Kearfott dated 11 August 1992, ACO John Schoening "instruct[ed] Kearfott . . . to begin submitting the [QLOPS]" for ten of the contracts at issue in these appeals, noting that "[t]his requirement is being re-instituted as per discussions with the PCO" (R4 ASBCA 49532, tab 4). With respect to this letter, we find that: William R. McFadden, one of respondent's contract administrators, drafted it for ACO Schoening's signature; although it predated Mr. McFadden's FY92 Internal Control Review (*see* finding 18), it reflected the results of that effort; and when he wrote the letter, Mr. McFadden "believed that Kearfott had been told by the PCO that they don't [sic] have to file QLOPS any more" (tr. 310, 312, 339, 356).

18. By date of 14 August 1992, Mr. McFadden prepared a FY 92 Internal Control Review of DCAA's procedure for analyzing QLOPS. He found that:

> . . . During discussions with an ACO it was revealed that there was an agreement between the contractor (KG&NC) and the procuring office (SSPO, Washington, DC) that this report did not have to be submitted. Correspondence to this effect could not be found in the contract files.
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> . . . There are currently 11 [fixed price incentive] Contracts in house . . . , on which this report is required. Five (5) of the 11 contracts were reviewed and no evidence could be found of report submitted. Both the Contractor and Procuring Office personnel were unfamiliar with this requirement.
>
> . . . .
>
> . . . A letter has been written to [Kearfott] instructing them to begin submitting the [QLOPS] report to the ACO. The ACO will monitor the report to insure that overpayments are being recovered and that all requirements are being met.

(App. supp. R4, tab 377 at 1-2) Mr. McFadden observed that "[t]he Internal Controls currently in effect in this area are weak due to the fact that this [QLOPS] report has not been submitted" (*id*. at 1). He made two recommendations, one of which was that "internal guidance be issued reminding ACOs to follow the procedure as outlined in" the Defense Logistics Agency's Contract Administration Manual setting forth procedures to be followed by ACOs regarding QLOPS (*id*. at 1). Mr. McFadden signed his report, and it was countersigned by the chief of the Contract Management Division (*id*. at 2).

19. We find no credible evidence that respondent waived the requirement that Kearfott submit QLOPS because:

(a) The record contains no evidence of a written waiver. Mr. McFadden stated in his 1992 report that correspondence waiving the QLOPS requirement "could not be found in the contract files" (finding 18), and at trial he testified that he had "not to this day ever seen a written document with the PCO's signature indicating that Kearfott was absolved of their responsibility to file the QLOPS" (tr. 302). The record contains no writing. The record also contains evidence that there was no writing (app. supp. R4, tab 391 at 3; tr. 170-71). In addition, Ms. Richards (*see* finding 15) testified that, in her experience at Kearfott, verbal agreements between Kearfott and the Government typically were documented afterwards (tr. 741).

(b) The record contains no evidence of consideration for the alleged waiver. While the alleged waiver meant that respondent would forsake the right to refunds or credits, as well as interest, under FAR 52.216-16(g)(2) and (3) (*see* finding 2), the record presents no credible reason to find that PCO Dunegan would have done so gratuitously.

(c) The record contains no testimony from any witness with personal knowledge of the alleged waiver, and contains scant information regarding what transpired. Mr. McFadden was the most knowledgeable witness, having investigated the matter in 1992. At trial, he testified that the ACO to whom he referred in his report as having told him of the waiver was ACO John Schoening (tr. 302). Mr. McFadden further testified that ACO Schoening was himself told of the alleged waiver by one Carl Lawton, a Kearfott employee (*id*.). ACO Schoening told Mr. McFadden that the individual in the procuring office who advised Kearfott that it did not have to submit QLOPS "may have been Mr. Dunegan," a PCO (*id*.; *see also* tr. 46, 401). Of the three individuals thus identified by Mr. McFadden and other witnesses -- ACO Schoening, Mr. Lawton and PCO Dunegan -- none testified. Mr. Schoening had died in or about 1998 (tr. 303, 444). Mr. Lawton did not testify. PCO Dunegan did not testify. Respondent had listed him as a witness in its pretrial statement, appellant objected (tr. 8-9), and the record does not establish why he was not called. His employment records were not introduced (tr. 947-50), but from other evidence in the record, we find that PCO Dunegan retired from SSP, and from the Government, in or about June 1984 (tr. 951-522, 1014-16, 1226). Neither Mr. McFadden, nor any witness who did testify, spoke to PCO Dunegan about the issue (tr. 308, 425, 448-49, 1227, 1437-38), although Kearfott had identified him as the waiving official in October 1992 (finding 20). Mr. McFadden also testified that, in preparing his report, he inquired of both Mr. Lawton and Ken Chapnick, Kearfott's then-current contract administrator, but neither seemed aware of the alleged waiver (tr. 304).

(d) The record does not establish the date of the alleged waiver. Mr. McFadden speculated that the referenced agreement occurred in or about 1986 (tr. 303). Harvey Truppi, Kearfott's former vice president of business development and contract management, testified that he learned of the alleged waiver "sometime in the mid-80s, five, six time frame" (tr. 1219), and that 1985 or 1986 was when the waiver occurred (tr. 1225-26). The dates proffered by Mr. McFadden and Mr. Truppi would post-date Mr. Dunegan's 1984 retirement and would pre-date all 16 of the contracts at issue, except perhaps Contract No. N00030-87-C-0014, which was effective by date of 1 October 1986 (*see* finding 1(c)). Mr. McFadden's and Mr. Truppi's dates would also pre-date Kearfott's July 1994 statement that it ceased submitting QLOPS in or about February 1989 (*see* finding 16).

(e) The record also contains testimony attributing the alleged waiver to both PCO Dunegan and ACO Schoening. Mr. Givant testified that "both PCO [Dunegan] and ACO [Schoening] have waived or agreed not to require QLOPS" (tr. 1366). We find no corroboration for this attribution to both the PCO and the ACO and the claim that both individuals waived the requirement makes less credible the testimony that PCO Dunegan did so.

20. By letter to ACO Schoening dated 15 October 1992, Kearfott responded to ACO Schoening's 11 August 1992 letter. Kearfott's contract specialist asserted that the QLOPS requirement had been waived. In seeking an extension of time in which to submit QLOPS, Kearfott stated that its request was necessitated in part because "[t]he requirement for the [QLOPS] are [sic] being reinstated after being stopped (J. Dunnegan to C. Lawton) years ago" (app. supp. R4, tab 378 at 1). The contract specialist also stated that "[t]he only person (R. Jansen) who knew how to do the statements has recently left the company requiring new people to learn the proper procedures" and he proposed discussion of "a rolling schedule for the submissions" (*id*.).

21. By letters to ACO Schoening dated 29 October 1992, 14 January 1993 and 14 April 1993, Kearfott submitted QLOPS on Contract No. N00030-90-C-0038 for the quarters ending 29 August 1992, 28 November 1992 and 27 February 1993, respectively (app. supp. R4, tab 379).

22. We find that, as of the date of ACO Schoening's 11 August 1992 letter, Kearfott had not submitted QLOPS for any of the seven contracts at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), or for one of the two contracts at issue in ASBCA No. 52521 (*see* finding 1(c)). We further find that, as of the date of ACO Schoening's 11 August 1992 letter, no deliveries had become due for the seven contracts at issue in ASBCA No. 51873 (*see* finding 1(b)), and that Kearfott provided QLOPS for those contracts on a timely basis (tr. 965-66).

23. The parties held a 10 June 1993 meeting regarding QLOPS. PCO Markus and Kearfott's representatives orally agreed that Kearfott need only submit QLOPS on four of 11 contracts then outstanding. (App. supp. R4, tab 382; tr. 149-50)

24. Each contract contained a contract data requirements list (CDRL). This list showed mandatory contract data items that Kearfott was required to submit to respondent. The reports included the Cost Schedule Status Report (CSSR), the Cost Performance Report (CPR) and other reports, including the Contract Fund Status Report (CFSR). These reports were colloquially and collectively referred to as C-square reports. (Tr. 633-35; app. supp. R4, tab 464) They are relied upon by the Government to monitor schedule and cost performance of the contractor against target cost (tr. 661).

25. During performance, Kearfott submitted CSSRs to respondent. In general, the CSSRs were designed to measure a contractor's actual performance. In terms of cost, the object of the CSSRs was to show actual cost of performance against target cost and to identify and explain any positive or negative cost variances (tr. 637-38, 642-45, 710). The CSSRs contained similar cost information to that shown on progress payment requests, but affords more detail in that it also shows schedule variances (tr. 645-47). It is undisputed that the CSSRs typically are relied upon by the PCO, the ACO and DCAA to monitor schedule and cost performance (tr. 661). Unlike the QLOPS, however, the CSSRs contained no requirement that the contractor repay respondent the amount of any contract overpayment (tr. 54, 267-68, 405-06, 428-29, 1241, 1251). In addition, CSSRs and QLOPS have timing differences because the former are issued every two months and QLOPS are issued quarterly, and hence the data frequently differ by relatively small amounts (tr. 1122-23).

26. During performance, Kearfott also submitted CPRs. The CPRs are virtually interchangeable with the CSSRs (tr. 662). Like the CSSRs, the CPRs also were designed to show the actual cost of performance against target cost and to identify and explain any positive or negative cost variances (tr. 639). By contrast to the QLOPS, the CPRs also contained no requirement that the contractor repay respondent the amounts of contract underruns (tr. 1241, 1251).

27. During performance, Kearfott also submitted CFSRs (tr. 635; app. supp. R4, tab 744). The CFSRs show the status of funding by CLIN and reflect the funding status of a contract in a manner similar to that in which the CSSRs and CPRs provide cost and schedule information (tr. 667).

28. It is undisputed that DCAA audited Kearfott's CSSRs and CPRs during performance and generally expressed the opinion that they accurately portrayed actual and projected costs and the progress of the work (app. supp. R4, tab 469 at 223248; tab

470 at 223320; tab 471 at 23897 5-8; tab 474 at 210848; tab 475 at 229648; tab 476 at 115117; tab 477 at 115070; tr. 702-11).

29. By date of 30 August 1994, the head of the SSP Contracts Office forwarded to the Defense Logistics Agency an undated opinion from the SSP legal counsel stating, in part, that "[t]he fact that the Government received the same information on the CPRs [as that called for on the QLOPS] could make a strong case for equitable estoppel" (app. supp. R4, tab 403 at 101010).

30. We find no credible evidence that, for the eight contracts that were competitively awarded in whole or in part (*see* findings 1(a), 1(b), 1(c)), Kearfott raised the alleged waiver of the requirement to submit QLOPS at the time of bid.

31. We find no evidence that ACO Schoening or PCO Dunegan engaged in misconduct in connection with the contracts that are at issue in these appeals.

D. *Novation Agreement*

32. By date of 19 August 1988, Singer, as transferor, Kearfott, as transferee, and the United States entered into a novation agreement, whereby the parties confirmed that Singer conveyed to Kearfott, as of 25 April 1988, "substantially all of the assets and liabilities of the Transferor relating to the operation of Kearfott Guidance & Navigation Division," including various Government contracts. The novation agreement provided that "[t]he assets so transferred were transferred at depreciated book value, and the Transferee has not written up the value of those assets." (App. supp. R4, tab 333 at 2)

33. The parties defined the government contracts covered by the novation agreement to include:

> . . . the above contracts and purchase orders [listed in Exhibit A to the novation agreement] and all other contracts and purchase orders, including all modifications, made between the Government and the Transferor relating to the Transferor's Kearfott Guidance & Navigation Division before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term "the contracts" are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government

> and the Transferee, on or after the effective date of this Agreement.

(*Id*. at 1)

34. Paragraph 16 of the novation agreement provided that:

> Solely with respect to calculation of costs charged to Government contracts, Transferee will not write-up the value of depreciated assets transferred to it by Transferor with respect to any current contracts or any contracts entered into with the Government between April 25, 1988 and April 25, 1991.

(*Id*. at 10-11)

35. Contemporaneous with and following the Astronautics transaction, Kearfott and the government addressed whether a further novation agreement was required. By letter dated 11 May 1989 to ACO Schoening, Kearfott's president stated that "there has been no transfer of any Government contracts by Kearfott to Astronautics" and hence there was no need for a novation agreement transferring Kearfott's contracts to Astronautics. He added:

> . . . There was no transfer to Astronautics of any of the assets or liabilities of Kearfott. Astronautics and Kearfott continue to function as separate entities. . . .
>
> . . . Astronautics has not acquired any of the assets of Kearfott and has not assumed any of Kearfott's obligations and liabilities. . . .
>
> . . . Astronautics is not a successor in interest to any of the Government contracts of Kearfott, and no assets of Kearfott have been transferred to Astronautics. . . .
>
> Under the Novation Agreement entered into as of April 25, 1988 between The Singer Company as Transferor, Kearfott as Transferee, and the Government, Kearfott assumed all the obligations and liabilities of The Singer Company under Government contracts. Kearfott has the capacity of fulfilling all of its obligations under the Government contracts and will continue to do so.

(Supp. R4, tab 4 at 1-2)

36. By letter to Kearfott dated 3 July 1991, DCAA stated its opinion that

> the Novation Agreement (entered into between the Government and the former Singer Company in August 1988) which provides for the non-recognition of any asset write-up for a three year period following the agreement, only applied to the transfer of assets from The Singer Company to [Kearfott]. There is no advance agreement between the Government and Astronautics Corporation of America or, Kearfott pertaining to the purchase of [Kearfott] by Astronautics. Accordingly, there does not exist any prior agreement as to the recognition of asset write-up costs relating to Astronautics acquisition of [Kearfott].

(App. supp. R4, tab 349)

E. *Asset Write-Up Costs*

37. In late 1992, Kearfott and ACO Schoening became involved in a dispute regarding respondent's failure to pay asset write-up costs on progress payments on Contract No. N00030-92-C-0043, which is at issue in ASBCA No. 51873 (*see* finding 1(b)). Kearfott requested a contracting officer's decision regarding the failure to pay such costs. After a further dispute over certification, Kearfott certified its claim and on the same date appealed ACO Schoening's failure to render a decision to this Board. We docketed the appeal as ASBCA No. 45536. Thereafter, by decision dated 21 June 1993, ACO Schoening denied Kearfott's claim for $97,828, representing amounts associated with asset write up costs on progress payments Nos. 4 through 8 on Contract No. N00030-92-C-0043 (app. supp. R4, tab 365). We subsequently granted respondent's motion for summary judgment and denied the appeal. Kearfott thereupon sought review in the Federal Circuit.

38. By letter to Kearfott dated 18 May 1993, ACO Schoening stated that respondent had reviewed QLOPS submitted for five contracts that are at issue in these appeals. He asserted that the QLOPS:

> . . . were found to be inaccurately computed due to the fact that they were computed by using overhead rates including the write up of assets under Section 338 of the Internal Revenue Code. Accordingly it is requested that the [QLOPS] be revised to reflect the overhead rates exclusive of the write up of assets.

(R4 ASBCA 49271, tab 5) He requested a meeting to reach an understanding and a schedule for resubmission of the QLOPS, and that subsequent QLOPS "be reviewed to insure that stepped up rates have not been utilized" (*id*.).

39. The parties met on 10 June 1993. By letter to the PCO dated 1 July 1993, Kearfott summarized its understanding of the 10 June 1993 meeting, stating that it had explained that "it was justified in not submitting [QLOPS] on the 11 fixed-price incentive contracts which were discussed, because the Government had waived the requirement," but that it had agreed to submit them when requested to do so. Kearfott also restated its

> position that all costs associated with the write-up of assets, as a result of the acquisition of Kearfott by a wholly-owned subsidiary of Astronautics Corporation of America, are allowable costs and should be included in future [QLOPS]. However, at the meeting, Kearfott agreed that future [QLOPS], including such costs, will be accompanied by a separate presentation on the impact of the asset write-up.

(R4 ASBCA 49271, tab 6 at 1) Kearfott thereafter began a practice of making cost submissions calculated in two ways, with and without the inclusion of asset write-up costs in its indirect costs (tr. 882).

40. By date of 30 November 1993, DCAA issued its audit report on interim submissions of costs and profit earned on the seven contracts at issue in ASBCA Nos. 49271 and 49532. DCAA questioned Kearfott's asset write up costs on contracts awarded after the three year restriction in the novation agreement (*see* finding 34), stating:

> [Kearfott] wrote up its asset values as of 31 May 1989 as a result of the acquisition of Kearfott by Astronautics Corporation of America from the former Singer Company on 4 October 1988. Kearfott originally did not claim write-up costs for government contract purposes, since a Novation Agreement between the Singer Company, [Kearfott], and the Government precluded any asset write-up costs on "current contracts or any contracts entered into with the Government between April 25, 1988 and April 25, 1991." The contractor has claimed asset write-up costs on government contracts awarded after the lapse of the 3 year restriction of the Novation Agreement, i.e., after 25 April 1991. We have questioned such costs since FAR 31.205-52, "Asset Valuation

> Resulting from Business Combinations", dated 23 July 1990, provided that any increase in value of acquired assets as a result of a business combination would not be allowed on government contracts. . . . [Kearfott] is now claiming the write-up of asset costs on those subject contracts generally entered into within the Novation Agreement time frame . . . However, in view of the aforementioned provision of the Novation Agreement and the FAR 31-205.52, the asset write-up costs, in our opinion, are not allocable to subject contracts.

(R4 ASBCA 49271, tab 7 at 7) We find that both Kearfott and DCAA changed their positions regarding the applicability of the novation agreement to the Astronautics acquisition (tr. 935-36).

F. *Bicoastal Bankruptcy Release*

41. On or about 10 November 1989, Bicoastal Corporation initiated chapter 11 proceedings in the United States Bankruptcy Court for the Middle District of Florida denominated as *In re Bicoastal Corporation f/k/a The Singer Company*, No. 89-8191-8P1 (Bankr. M.D. Fla.). Thereafter, on or about 1 February 1990, the United States filed proof of claim No. 3074 (the Navy proof of claim) in those proceedings. The Government alleged in paragraph 5 of its proof of claim that "[t]he debtor may . . . be liable for a currently unknown amount of unliquidated progress payments and excess reprocurement costs under the following Department of the Navy contracts . . . . " Of the contracts listed, only Contract Nos. N00030-88-C-0146 and N00030-89-C-0058, which are at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), correspond to those at issue in these appeals. The government also alleged in paragraph 7 of its proof of claim:

> The Navy also reserves the right to amend its proof of claim in the event the cost of reprocurement exceeds the cost of any of the above contracts, including [another contract not at issue in these appeals], which, under the provisions of the Bankruptcy Code, the debtor may reject, or which the Government may terminate for default.

(R4 ASBCA 49271, tab 2 at 1, 2)

42. By date of 13 July 1992, the United States, Bicoastal Corporation, CAE-Link Corporation and others entered into a settlement agreement of the Bicoastal chapter 11 proceedings, as well as of an action brought under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b), denominated as *United States ex rel. Taxpayers*

Against Fraud and Christopher Urda v. Link Flight Simulation Corp., CAE-Link Corporation and Singer Company, No. 91-CV-0493 (N.D.N.Y.), and other actions. The settlement agreement recognized that Bicoastal had formerly been known as Singer. Paragraph 5 of the settlement agreement provided in part:

> Release by United States. Effective as of the Closing, and subject only to the exceptions provided in paragraph 6 below, the United States hereby releases Bicoastal and CAE-Link ("the Defendants"), and any of the Defendants' divisions or affiliates, including subsidiaries, and all of their successors and assigns, from:
>
> . . . .
>
> (b) Any and all civil or administrative monetary claims that have or could have been brought by the United States arising from or in any way relating to the allegations contained in the Navy Claim.

(R4 ASBCA 49271, tab 3 at 17-18) The Navy Claim was defined in Recitals, paragraph P.(2) as "Proof of Claim No. 3074 [filed in Bicoastal's chapter 11 proceedings (*see* finding 41)] relating to the contracts identified in the Schedule" attached to the settlement agreement. Of the contracts identified in the schedule, only Contract Nos. N00030-88-C-0146 and N00030-89-C-0058, which are at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), correspond to those at issue in these appeals. (*Id.*, at 6, 29)

43. Paragraph 6 of the Bicoastal settlement agreement, Reservation of Claims, provided that "[i]t is expressly agreed that the release set forth in paragraph 5 above shall not include . . . (vii) claims and causes of action other than those as described in paragraph 5." (*Id.*, at 19)

44. We find that no other claim, beyond that for unliquidated progress payments and excess reprocurement costs, is asserted in the proof of claim, and the record contains no credible evidence that any other claim was asserted or resolved (tr. 1310-16; *see also* tr. 1437). At the time of Bicoastal's chapter 11 proceedings, Kearfott and Bicoastal were completely separate entities (tr. 1436-37).

45. The record does not disclose any basis for including Contract No. N00030-89-C-0058 in the Bicoastal bankruptcy release. Mr. Givant testified that he had no idea why that contract, which was not awarded to either The Singer Company or to Bicoastal Corporation (finding 1(a)), was included in the release (tr. 1440).

G. *Audit Determinations and Demand Letters*

1. *ASBCA Nos. 49271 and 49532*

46. For the seven contracts at issue in ASBCA Nos. 49271 and 49532 (*see* finding 1(a)), Kearfott had not submitted QLOPS. Accordingly, in December 1993, PCO Larkin requested DCAA to reconstruct the situation had Kearfott made the submissions. As Ms. Richards testified:

> we were asked to go back and try and figure out what the costs would have been on the QLOPS had they been performed. . . . [W]e were supposed to go back and find out if the QLOPS had been prepared, what would the overbilling or underbilling be. And in addition to that, what would the interest be on that overbilling.

(Tr. 596) Thereafter, DCAA conducted the requested audit using Kearfott's CSSRs, CPRs, together with DD 250s (reflecting Government acceptance of delivered items) and other contract information "to construct data which would have been reflected on [QLOPS] not prepared by [Kearfott]" (R4 ASBCA 49532, tab 8 at 5).

47. By date of 29 April 1994, DCAA issued its audit report, calculating from its reconstruction of the QLOPS that Kearfott had overbilled a total of $26,631,688 on the seven contracts, and that the interest aggregated $5,153,764 (R4 ASBCA 49271, tab 8 at 8). This amount was said to represent ongoing overbillings during the life of the contract, rather than at the end of performance; because the government was not reimbursed sums during performance, interest was calculated on a period-by-period basis (tr. 915-16). DCAA stated that it had used Kearfott's CSSR and CPR reports and had been advised by Kearfott representatives "that the costs on all [such] reports for all contracts except Contract No. N00030-91-C-0061 exclude costs associated with the write-up of assets" (R4 ASBCA 49271, tab 8 at 8). DCAA also stated that it had computed overbillings and interest "exclusive of the write-up of assets for each contract" (*id*.) (underscoring in original). Although excluding asset write-up costs in this audit report, DCAA otherwise used Kearfott's indirect rates, rather than audit adjusted rates (tr. 906). DCAA cautioned that it had not performed a detailed audit, but took Kearfott's records at face value (R4 ASBCA 49271, tab 8 at 5; tr. 597-98). DCAA also excluded performance incentives in this audit report (tr. 918), and we find that it was not until after DCAA reconstructed the QLOPS that Kearfott submitted performance incentive claims on some or all of the contracts at issue in ASBCA Nos. 49271 and 49532 (R4 ASBCA 49271, tab 13 at 1, tab 11 at 1; app. supp. R4, tabs 773-84, 786-87).

48. By date of 3 May 1994, DCAA amended its April 1994 audit report to reflect "not only the interest due based on costs with and without the write-up of assets but also [to] project[] the overbilling of delivered sales based on costs with and without" those same variables (R4 ASBCA 49532, tab 9 at 1). As recomputed without asset write-up costs, the new principal amount for cumulative overbilling on all seven contracts was $27,353,743, with interest unspecified (*id*. at 2).

49. By letter dated 8 June 1994, ACO Bey advised Kearfott that it was indebted to the government for $32,507,507, consisting of $27,353,743 in principal and $5,153,764 in interest computed for an unspecified period (R4 ASBCA 49532, tab 10 at 1). ACO Bey advised that, "[d]ue to the size of the debt a proposal for deferment of collections or installments may be submitted to this office as per FAR 32.613."

50. By letter to ACO Bey dated 13 July 1994, Norma Z. Paige, Kearfott's executive vice president, responded to ACO Bey's demand letter, proposing "a plan to reimburse the Government for its claim on the underruns" on the seven contracts. She challenged the claim for interest, first, on the ground of waiver. She asserted that it should not accrue until 30 days after final cost submissions on the contracts, stating that "the requirement to submit [QLOPS] was eliminated by Mr. John Dunnegan [sic]." Ms. Paige added that "[i]t was not until 11 August 1992" that ACO Schoening "instructed Kearfott 'to begin submitting [QLOPS]' and wrote that 'This requirement is being re-instituted as per discussions with the PCO.'" She asserted that ACO Schoening "confirmed the elimination of [QLOPS] by PCO [Dunegan] in a telephone conversation memorialized" in an October 1992 letter from Kearfott to DPRO (*see* finding 20). She opined that, until ACO Schoening's 11 August 1992 letter, "three and one-half years had passed without submittal of QLPS and without a request from the ACO or PCO [which] clearly supports the elimination of the requirement." She also disputed the interest claim on the ground that Kearfott had "reported the underruns on its monthly [CPRs], no demand for payment was ever made by the ACO or PCO until" ACO Bey's 8 June 1994 letter. She also noted that Kearfott had computed sums relating to asset write-up costs on the contracts at "approximately $7 million" and urged that collection of such sums be deferred "pending a decision on this issue" in ASBCA No. 45536 (*see* finding 37). She added that "Kearfott recognizes its obligation to pay the correct share of the claim, which Kearfott estimates to be approximately $13.6 Million, exclusive of approximately $7 Million attributable to write-up of assets" and set forth a payment schedule. (R4 ASBCA 49532, tab 11 at 1-3)

51. By date of 11 August 1994, DCAA issued a supplemental audit report, incorporating the comments in Ms. Paige's letter. DCAA again computed cumulative overbillings on all seven contracts at $27,353,743, but corrected the interest due as of March 1994 to $4,404,428. (R4 ASBCA 49532, tab 18 at 5; tr. 604-06).

2. *ASBCA No. 51873*

52. ACO Jelinek testified, and we find, that with respect to the seven contracts at issue in ASBCA No. 51873, Kearfott "submitted the [QLOPS] reports on a timely basis" (tr. 966). He further testified, and we further find, that Kearfott typically "submitted two [QLOPS] reports on one contract" (tr. 967-68), one showing calculations including asset write-up costs, and another excluding such costs.

53. DCAA audited the QLOPS. DCAA issued two or more audit reports for each contract. When he made demand upon Kearfott, ACO Jelinek relied on the audit report for each contract that was closest in time to his demand letter (tr. 970). The contracts, the overpayments determined by DCAA, and the citation to the audit report in the record are as follows:

CONTRACT	OVERPAYMENT
N00030-91-C-0043	$1,011,002.00
N00030-92-C-0043	$ 143,587.00
N00030-93-C-0042	$ 31,849.00
N00030-93-C-0047	$1,076,836.00
N00030-94-C-0039	$ 531,631.00
N00030-94-C-0041	$1,732,361.00
N00030-95-C-0047	$1,256,072.00

(R4 ASBCA 51873, tabs 32 at 3; 33 at 2; resp. supp. R4, tab 9 at 3; R4 ASBCA 51879, tab 35 at 3; tab 36 at 3; resp. supp. R4, tab 8 at 3; R4 ASBCA 51879, tab 34 at 3)

54. Aside from adjustments for asset write-up costs, DCAA made two other adjustments to Kearfott's costs for the contracts at issue in ASCBCA No. 51873. For these seven contracts, DCAA made adjustments falling into two other categories: (1) the use of DCAA audit adjusted recommended rates from incurred cost audits and rate surveillance folders; and (2) an across-the-board decrement adjustment to Kearfott's G&A rate for "potentially unallowable costs" using rate surveillance files (tr. 1127, 1129). As DCAA stated regarding its audit of Contract No. N00030-92-C-0043, "[t]he audit adjusted rates represents [sic] actual costs excluding 338 asset write-up costs and other unallowable or potentially unallowable (based on history) costs" (ASBCA 51873 R4, tab 33 at 4). Respondent proffered the testimony of its expert, David Gotlib, who is himself a DCAA senior auditor (tr. 1117), regarding the propriety of these adjustments.

55. Mr. Gotlib testified, and we find, that, although DCAA made adjustments to Kearfott's rates on the basis of unallowability, it did not do a FAR Part 31 allowability review because that review would be done at the end of performance (tr. 1134-35, 1151, 1164-65, 1171). He also testified, and we further find, that the two adjustments for audit

adjusted rates and decrement factor, together with the asset write-up adjustment, differentiate Kearfott's calculations from DCAA's calculations in ASBCA No. 51873 (tr. 1129-30).

56. With respect to audit adjusted rates, Mr. Gotlib testified that DCAA "adjusted various rates, everything from engineering labor rate, manufacturing labor rate, G&A rate, based on our incurred cost audit reports, and based on our rates, which we have in our surveillance files" (tr. 1102; *see also* tr. 1160). Mr. Gotlib tendered an expert report regarding the adjustments, but he disavowed most or all of the opinions in that report on cross examination. Thus, in his report, he opined that the rates "have been determined in accordance with Generally Acceptable Government Auditing Standards" (gov't ex. 3 at 2), but he admitted that he neither knew when he wrote his report nor at trial if that statement was true (tr. 1147, 1162-64). Similarly, he opined in the same report that, "in general, the indirect rates which the DCAA auditors are using in the QLOPS audit reports, are appropriate" (gov't ex. 3 at 2), but he admitted at trial that he did not know if the rates were appropriate (tr. 1167-70). He acknowledged that he could not say if any of the adjustments made in the audit reports and reflected in respondent's claim in ASBCA No. 51873 was legitimate, accurate or valid, except with respect to mathematical accuracy (tr. 1130-31, 1139-1141, 1152, 1165). He also conceded that DCAA does not expect that its recommended rates in incurred cost audit reports will be entirely sustained by an authoritative person or entity (tr. 1135-36, 1166-67).

57. With respect to the use of a decrement factor, Mr. Gotlib testified that it is a numerical adjustment for potential unallowables based upon what DCAA thinks the ACO should negotiate as a year-end G&A rate (tr. 1142, 1144). At trial, Ms. Richards testified about the decrement factor in reference to a $500,000 figure in the audit workpapers under the heading "Misc. DCAA Provision" relating to a DCAA review of Kearfott's indirect rates for FY 1990:

> That's essentially like an estimate or a projection of additional unallowable costs that we would expect to find once you do a detailed audit. For example, every year you do a detailed audit, and while some items are repeating, other things just pop up. You know, something new pops up this year and that goes away and something else pops up this year, the next year. To give effect to these miscellaneous unknown things that historically you always wind up with, we threw in an amount for these "potential unallowables" even though we don't know what it is. We just know in the past things always arose and we wanted to give that consideration.

Q . . . So where does the $500,000 figure come from?

A I believe that might have been just an estimate.

Q How would we end up arriving at that figure?

A I guess just based on like prior history and what we had seen in the past. It's a judgment call.

(Tr. 940-41) She testified that the $500,000 was to be deducted from Kearfott's expense pool and would be reflected in the G&A rate (tr. 942; *see also* tr. 735-36). We find no persuasive evidence that the adjustment was reasonable. Mr. Gotlib testified that DCAA made adjustments to Kearfott's G&A of $600,000 per year up to 1995, and thereafter of $300,000 per year (tr. 1141-42; *see also* tr. 1039-40). The reduction in the adjustment figures was attributable to a study revealing that the $600,000 amount was overstated (tr. 1142-44). Although Mr. Gotlib relied upon the study to support his opinion that the decrement factor adjustment accounted for "amounts that are expected to become unallowable based on trends disclosed during our review of incurred costs" (gov't ex. 3 at 2), the study was not in evidence, was not made available to Kearfott, and Mr. Gotlib had not seen it when he formulated the opinion in his expert report (tr. 1144-46).

58. In February 1998, ACO Jelinek issued two demand letters to supercede demand letters that he had previously issued in December 1997 regarding the contracts at issue in ASBCA No. 51873, as follows:

(a) by letter dated 3 February 1998 regarding Contracts Nos. N00030-93-C-0042, N00030-93-C-0047, N00030-94-C-0039 and N00030-94-C-0041, he demanded that Kearfott pay $3,458,748.86, consisting of $3,372,677 in principal and $86,071.86 in interest (R4 ASBCA 51873, tab 41 at 1); and

(b) by letter dated 5 February 1998 regarding Contracts Nos. N00030-91-C-0043, N00030-92-C-0043 and N00030-95-C-0047, he demanded that Kearfott pay $2,472,012.93, consisting of $2,410,931 in principal and $61,081.93 in interest (R4 ASBCA 51873, tab 42 at 1).

3. *ASBCA No. 52521*

59. DCAA issued audit reports regarding each of the two contracts at issue in ASBCA No. 52521 (*see* finding 1(c)). In both reports, DCAA used Kearfott's unadjusted data for costs incurred (R4 ASBCA 52521, tab 2 at 2, tab 3 at 2). With respect to Contract No. N00030-87-C-0014, DCAA found that Kearfott had not submitted QLOPS

and recreated QLOPS that would have been filed for quarters in which deliveries were made, noting that QLOPS "would have provided the contracting officer the opportunity to reduce the billing price of the units, and thus preclude an overbilling (*id*., tab 2 at 1, 2). DCAA computed cumulative overbillings of $1,892,853, as well as interest through December 1994 of $722,642 (*id*., tab 2 at 2). With respect to Contract No. N00030-92-C-0040, DCAA used QLOPS that had been filed, as well as CSSRs, to compute cumulative overbillings with and without asset write-up costs (*id*., tab 3 at 2). DCAA computed cumulative overbillings of $2,028,539 excluding asset write-up costs, and $418,652 including asset write up costs, together with interest through December 1994 of $84,831 and ($7,844) on the two principal figures, respectively (*id*., tab 3 at 4).

60. By letter to Kearfott dated 10 April 1995, ACO Bey stated that Kearfott was indebted to the Government for a total of $4,728,865 on the two contracts. In arriving at this figure, he adopted DCAA's calculation of principal on Contract No. N00030-87-C-0014, and of principal excluding asset write-up values on Contract No. N00030-92-C-0040 but switched the interest demanded on the two contracts. He later corrected this error, leaving the total amount demanded the same. (R4 ASBCA 52521, tabs 4, 5)

H. *Claims and Appeals*

1. *ASBCA Nos. 49271 and 49532*

61. By notice of appeal dated 26 October 1995, Kearfott invoked our deemed denied jurisdiction under 41 U.S.C. § 605(c)(5) to appeal from ACO Bey's failure to issue a decision following Kearfott's letters dated 26 January 1995, 28 February 1995, and 7 June 1995 (R4 ASBCA 49271, tab 38). We thereafter docketed the appeal as ASBCA No. 49271.

62. By decision dated 21 December 1995, ACO Bey issued his final decision demanding that Kearfott repay $27,353,743, plus accrued interest aggregating $4,404,428, on seven contracts for failure to submit QLOPS and reimburse overpayments within 15 days of making deliveries, as follows:

CONTRACT	OVERPAYMENT	INTEREST
N00030-88-C-0146	$6,077,696	$1,644,696
N00030-89-C-0058	$7,935,688	$1,541,734
N00030-90-C-0011	$5,616,849	$599,578
N00030-90-C-0037	$2,009,775	$261,127
N00030-90-C-0038	$212,226	$73,122
N00030-91-C-0052	$1,731,608	$98,628
N00030-91-C-0061	$3,769,901	$185,543

(R4 ASBCA 49271, tab 37 at 1, 9) ACO Bey's decision was predicated upon the calculations contained in DCAA's 29 April 1994 audit report and 11 August 1994 supplemental audit report (*see* findings 47, 48, 51; tr. 436-37).

63. Following ACO Bey's decision, appellant filed a separate appeal of that decision. We docketed the appeal as ASBCA No. 49532.

64. ACO Bey testified, and we find, that he issued his final decision independently after reviewing all the facts (tr. 453). With respect to the issue of waiver, we find that, whatever may have been the opinions of others, ACO Bey strongly disagreed with the statement in Mr. McFadden's report that there had been an agreement that Kearfott did not have to submit QLOPS (*see* finding 18) inasmuch as it was based on "secondhand information from someone else, . . . which is unusual. . . . And I don't think that an ACO can rely on such secondhand information." (Tr. 417; *see also* tr. 424-25, 432-34, 448-49, 457-58, 469-74, 483, 513-14, 519-20, 535, 560-62, 573-74, 578) With respect to cost issues resulting from Kearfott's failure to submit QLOPS, ACO Bey testified, and we find, that:

> DCAA is responsible for calculating and reviewing the QLOPS. They would go and ascertain the information from the contractor. They would go and ascertain all the documentation, all the DD-250s [Government delivery documents], all the public vouchers, everything that they needed to make an evaluation and determination on whether the contractor provided adequate numbers within the QLOPS, an[d] whether or not the contractor was overpaid or underpaid. And DCAA would submit a report to the ACO.

(Tr. 418-19) He noted that, commonly "[f]or all kinds of accounting issues, the ACO generally goes to DCAA for advice. DCAA would write a report and issue it to the ACO on all accounting issues." (Tr. 419; *see also* tr. 451) Rodney W. Mateer, Kearfott's expert on Government contract cost accounting, agreed (tr. 1446-47). The record accordingly contains testimony from ACO Bey regarding his reliance on DCAA's advice and reports on particular issues in these appeals (tr. 419, 451, 527, 548-49, 554, 570-71), inasmuch as "I'm not an accountant and I rely upon them to come up with the figures for me" (tr. 571). But ACO Bey also testified that: he read over DCAA's audit reports (tr. 422); he would read the applicable contract clause in conjunction with DCAA's opinion, "[a]nd if something glared out to me, I probably would go back to them and ask them a question," adopting DCAA's opinion "if they clarified it for me" (tr. 527); and he issued his final decision independently after reviewing all the facts (tr. 453). ACO Bey cited

DCAA audit reports upon which he relied in his decision itself (R4 ASBCA 49271, tab 37 at 4; *see also* tr. 436-37).

65. With respect to alleged pressure from superiors and elsewhere, we find no persuasive evidence that ACO Bey's decision was dictated by others. The record does contain ACO Bey's agreement to generalized statements on cross examination that: in early 1994, he was feeling or experiencing "some amount of pressure" from senior level DLA management to issue a demand letter to Kearfott (tr. 511); the pressure was "even more evident" in April 1994 (tr. 512); and "the heat really was on the issue" from early 1994 following issuance of DCAA's November 1993 audit report (tr. 518).

66. At trial, respondent's claim was based upon substantially the same methodology as that employed in DCAA's August 1994 supplemental audit report (*see* finding 51). For six of the seven contracts at issue in ASBCA Nos. 49271 and 49532, we find that Kearfott's CSSRs and CPRs, which DCAA utilized to make computations had Kearfott submitted QLOPS (*see* finding 46), did not include asset write-up costs. The only contract of the seven for which Kearfott used rates which included asset write-up costs was Contract No. N00030-91-C-0061. For that contract, DCAA adjusted Kearfott's rates to exclude those costs. DCAA then computed overbillings on all seven contracts at issue in the two appeals to total $27,353,743, plus interest to 31 March 1994 of $4,404,428. (Gov't ex. 2 at 1; tr. 615). Other than the adjustment to exclude the asset write-up costs on Contract No. N00030-91-C-0061, DCAA made no other adjustment to Kearfott's rates (tr. 623).

2. *ASBCA No. 51873*

67. By date of 22 September 1998, ACO Jelinek issued his final decision demanding that Kearfott repay $3,820,853.28, plus accrued interest, on the seven contracts at issue in this appeal. ACO Jelinek asserted that DCAA audits showed that Kearfott "overbilled the Government due to individual contract underruns." He stated that, while it submitted QLOPS during contract performance, "Kearfott failed to refund or credit the Government the amount of the excesses." He demanded that Kearfott repay the $3,820,853.28, plus accrued interest, as follows:

CONTRACT	OVERPAYMENT	INTEREST
N00030-91-C-0043	$1,011,002.00	$75,679.43
N00030-92-C-0043	$ 143,857.00	$10,768.55
N00030-93-C-0042	$ 31,849.00	$1,577.48
N00030-93-C-0047	$ 397,949.98	$27,291.68
N00030-94-C-0039	$ 531,631.00	$26,326.67
N00030-94-C-0041	$ 448,492.30	$78,808.48
N00030-95-C-0047	$1,256,072.00	$94,024.49

(R4 ASBCA 51873, tab 50 at 3-4) In his decision, ACO Jelinek stated that, in arriving at these figures, he had taken into account payments made by Kearfott for Contract No. N00030-94-C-0041 and for Contract No. N00030-93-C-0047 (*id*. at 3). Appellant thereafter filed a timely appeal, which we docketed as ASBCA No. 51873.

68. In his decision, and in respondent's claim in ASBCA No. 51873, ACO Jelinek adopted the methodology and calculations in DCAA's autit reports on the seven contracts at issue, taking into account payments made by Kearfott as of that time (tr. 981-82, 1081-82).

69. Both Mr. Gotlib, and Mr. Mateer, Kearfott's expert, testified, and we find, that the use of audit adjusted rates in calculating respondent's claim in ASBCA No. 51873 is inconsistent with the accounting treatment underlying respondent's claim in ASBCA No. 52521, where DCAA accepted Kearfott's indirect rates (tr. 1155-58, 1464-65; app. ex. 3 at 6-2). (*See* finding 74)

70. With respect to the issue of waiver of the QLOPS requirement, ACO Jelinek testified, and we find, that when he rendered his decision, he believed that there had been no waiver because, after inquiring within the Government about it, he could find no evidence of an agreement, and respondent's files contained no document memorializing any such agreement (tr. 1045-52). He testified that "[t]he QLOPS, themselves, as far as I was concerned, spoke for themselves in that the only issue at hand was the overhead rates. And I deferred the amounts of the overhead rates to DCAA. To me the [QLOPS] statement itself was quite clear." (Tr. 1093) With respect to cost issues, ACO Jelinek was not an accountant (*see* tr. 957). He cited DCAA audit reports upon which he relied in his decision itself (R4 ASBCA 51873, tab 50 at 2; tr. 1081). The record contains testimony regarding his reliance on DCAA in connection with the demand letters and decisions in this appeal and in ASBCA No. 52521 (tr. 970-74, 979, 1021, 1027, 1030, 1032, 1034-35, 1038-39, 1066, 1070, 1074, 1076, 1081, 1087), although he did some of the interest computations for the demand letters (tr. 974). While he agreed with the characterization of his role at some points as that of a "rubber stamp" of DCAA's positions (tr. 1021, 1039, 1070, 1087), we understand that testimony to mean that, once DCAA reached its conclusions regarding the amounts in dispute or the amounts of the underruns, he adopted those positions without further inquiry (*see* tr. 1093). We find no credible evidence that ACO Jelinek's final decision was directed by others (*see* tr. 453).

3. *ASBCA No. 52521*

71. By date of 3 August 1999, Kearfott submitted a certified claim to the administrative contracting officer for $4,642,662.34, plus interest, for amounts either collected or alleged to be due under the two contracts at issue in ASBCA No. 52521 (R4

ASBCA 52521, tab 22). Kearfott asserted that, as of the date of the claim, it had paid $2,631,207.42 in response to ACO Bey's 10 April 1995 demand letter (*see* finding 60). Subsequently, by notice of appeal dated 26 October 1995, Kearfott appealed from the administrative contracting officer's failure to issue a decision on its claim (R4 ASBCA 52521, tab 31). We thereafter docketed the appeal as ASBCA No. 52521.

72. By date of 6 January 2000, ACO Jelinek issued his decision demanding that Kearfott repay $2,011,454.92, plus accrued interest, on Contract Nos. N00030-87-C-0014 and N00030-92-C-0040 for failure to submit QLOPS and reimburse overpayments within 15 days of making deliveries, as follows:

CONTRACT	OVERPAYMENT	INTEREST
N00030-87-C-0014	$1,869,651.00	$768,291.39
N00030-92-C-0040	$141,803.92	$ 20,652.63

(R4 ASBCA 52521, tab 33 at 7) ACO Jelinek stated that the principal amount for Contract No. N00030-87-C-0014 included deferred claimed overpayments aggregating $279,493, and that the principal amount for Contract No. N00030-92-C-0040 included deferred claimed amounts aggregating $141,803.92 (*id*.).

73. We find that, in rendering his final decision in this appeal, ACO Jelinek relied on DCAA's audit reports and the calculations contained therein. He cited DCAA audit reports in the decision itself (R4 ASBCA 52521, tab 33 at 3-4). We further find that he made his decision in this appeal on substantially the same basis as he did in ASBCA No. 51873 (*see* finding 68), and that his decision is premised upon the exclusion of asset write-up costs for both contracts at issue (R4 ASBCA 52521, tab 2 at 2, tab 3 at 3, 4, tab 33 at 7; tr. 1155).

74. Mr. Gotlib testified, and we find, that, in arriving at the amounts comprising respondent's claim in ASBCA No. 52521, DCAA excluded asset write-up costs, but otherwise did not use its audit adjusted indirect rates, accepting instead Kearfott's rates (tr. 1099, 1155-57).

I. *Payments*

75. Between 1994 and 2000, DLA and SSP, through the ACO and PCO, made differing and, at times, conflicting demands upon Kearfott for the return of overpayments, plus interest, allegedly due to Kearfott's failure to file QLOPS on the contracts at issue. Mr. Larkin testified, however, and we find that the disagreement between DLA and SSP regarding the disposition within the Government of claimed overpayments received from Kearfott was irrelevant both to the issue of whether the money was owed, and to the amount owed (tr. 276-77).

76. We find that, between June 1994 and September 2000, Kearfott paid respondent a total of $37,110,646 in installments, by administrative offset, and by application of performance incentives, as follows:

Contracts	Principal	Interest	Adm. Fee	Total
(a) ASBCA Nos. 49271 & 49532				
N00030-88-C-0146	$ 3,619,117	$ 1,441,685	$ 25	$ 5,132,827
N00030-89-C-0058	6,518,214	1,981,706	—	8,499,920
N00030-90-C-0011	4,723,163	1,180,179	—	5,903,342
N00030-90-C-0037	1,312,197	381,334	—	1,693,531
N00030-90-C-0038	80,339	40,919	—	121,258
N00030-90-C-0052	1,065,697	312,210	—	1,377,907
N00030-91-C-0061	3,047,847	738,977	—	3,786,824
Total –	$ 20,438,574	$ 6,077,010	$ 25	$ 26,515,609
(b) ASBCA No. 51873				
N00030-91-C-0043	$ 1,011,002	$ 1,011,002	$ 25	$ 1,099,232
N00030-92-C-0043	260,268	260,268	25	274,115
N00030-93-C-0042	31,849	31,849	25	34,982
N00030-93-C-0047	1,076,836	1,076,836	25	1,151,134
N00030-94-C-0039	531,631	531,631	25	583,538
N00030-94-C-0041	1,732,361	1,732,361	25	1,879,624
N00030-95-C-0047	1,333,129	1,333,129	25	1,441,205
Total –	$ 5,977,076	$ 486,579	$ 175	$ 6,463,830
(c) ASBCA No. 52521				
N00030-87-C-0014	$ 511,959	$ 1,211,230	$ 25	$ 1,723,215
N00030-92-C-0040	1,886,735	521,233	25	2,407,993
Total –	$ 2,398,694	$ 1,732,463	$ 50	$ 4,131,207
Total	$ 28,814,345	$ 8,296,051	$ 250	$ 37,110,646

(Tr. 1413-15; app. ex. 2)

J. *Consolidation*

77. By orders dated 8 March 2000, 22 October 1999, and 1 February 1996, we consolidated all four appeals for trial.

DECISION

A. *Contentions of the Parties*

In seeking alleged overpayments and interest on the sixteen fixed price incentive contracts at issue, respondent contends principally that the Incentive Price Revision - Firm Target clause (*see* finding 2) was required to be inserted in each contract. (Respondent's Post Hearing Brief (gov't br.) at 48-55) Respondent insists that there is no credible evidence that any of its representatives waived paragraph (g) of the clause, which pertains to QLOPS. (*Id*. at 55-70) In any event, respondent urges that the clause, including paragraph (g), expresses a "deeply ingrained strand of public procurement policy" under *G.L. Christian and Associates v. United States*, 312 F.2d 418, 426 (Ct. Cl.), *reh'g den*., 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963), which cannot be waived. (*Id*. at 71-75) Respondent also argues that, inasmuch as the alleged waiver predates formation of the integrated contracts at issue, the parol evidence rule prohibits alteration of their terms. (*Id*. at 78-81) Finally, respondent defends the methodology underlying its quantum calculations, and attacks Kearfott's release defense. (*Id*. at 81-114)

For its part, Kearfott argues two principal points. First, Kearfott stresses that the three contracting officers' decisions before us are void because they do not represent the independent judgment of the ACOs who issued them. (Appellant's Initial Post-Trial Brief (app. br.) at 332-45) Second, Kearfott insists that the three decisions are arbitrary, capricious and an abuse of discretion. (*Id*. at 345-401) Kearfott dismisses respondent's *Christian* doctrine and parole evidence rule arguments as irrelevant, chiefly because: paragraph (g) of the Incentive Price Revision - Firm Target clause was indisputably incorporated in the contracts at issue; in any event, paragraph (g) does not rest on the necessary legislative basis to require its incorporation by operation of law; and Kearfott's position that that QLOPS were not required rests on a course of conduct after contract formation, and not solely upon a statement by PCO Dunegan before execution by the parties. (*Id*. at 380-86) Kearfott also attacks respondent's quantum calculations, and proffers its own, which incorporate, *inter alia*, its asset write-up costs and the effect of the release in the Bicoastal settlement agreement. (*Id*. at 386-92, 405-37)

These contentions are advanced against the background of the Incentive Price Revision – Firm Target clause. We outlined the scheme of the clause, and of the role the QLOPS requirement played in it, in *CTA Inc.*, ASBCA No. 47062, 00-2 BCA ¶ 30,947 at 152,754-55. As we said, a fixed-price incentive (firm target) contract:

> does not contain a final price when issued. Rather, it specifies a target cost, a target profit, a price ceiling (but no profit ceiling or floor), and a profit adjustment formula.

> Parties negotiate each of these elements at the outset, and their contract schedule sets forth a "target" cost, profit, and price for each item subject to incentive price revision. Their contract's price ceiling is the maximum that may be paid the contractor, except for any adjustment under other contract clauses. When the contractor completes performance, the parties negotiate the final cost and establish the contract's final price by applying the formula. If the final cost is less than the target cost, application of the formula results in a final profit greater than target profit. Conversely, if the final cost is more than target cost, application of the formula results in a final profit less than target profit, or even a net loss. When the final negotiated cost exceeds the contract's price ceiling, the contractor absorbs the difference as a loss. Because profit varies inversely with cost, this type of contract gives contractors a positive, calculable profit incentive to control costs. . . .

During performance, and before establishment of the final price, "the contractor submits invoices or vouchers in accordance with 'billing prices,' *i.e.*, the target prices shown in its contract." *Id*. at 152,754. We noted that "[b]illing prices may be adjusted, within ceiling limits, upon request of either party to the contract, when it becomes apparent that final negotiated cost will be substantially different from target cost. FAR 16.403(d), 52.216-16(f)(1), (2)." *Id*. The principal mechanism provided for in the clause by which it becomes apparent that the parties need to adjust billing prices is the QLOPS, which the contractor is to submit "[w]ithin 45 days after the end of each quarter of [its] fiscal year in which a delivery is first made (or services are first performed) and accepted by the Government . . . , and for each quarter thereafter" (finding 2).

B. *Status of the ACOs' Decisions*

Kearfott argues that the three final decisions at issue (*see* findings 62, 67, 72) are void because they do not represent the independent consideration of the administrative contracting officers who issued them. In support of its argument, Kearfott relies upon the long-established principle that "[i]n order for a decision of a contracting officer to be valid it must be based upon his or her independent judgment." *Inter-Continental Equipment, Inc.*, ASBCA No. 36807, 94-2 BCA ¶ 26,708 at 132,863 citing *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698 (Ct. Cl. 1955). Kearfott recounts ACO Bey's testimony regarding his final decision in ASBCA Nos. 49271 and 49532 (*see* findings 62, 64), contending that he had no basis for analyzing the requirements of FAR 52.216-16(g) "unless DCAA told him what those requirements were," and that he abdicated "his regulatory duty to DCAA." (App. br. at 336-37)

Kearfott also argues that "the pressure from his superiors and other government agencies for ACO Bey to issue a demand letter was . . . enormous." (App. br. at 340) While not alleging that ACO Jelinek was pressured, Kearfott makes similar arguments regarding ACO Jelinek's reliance upon DCAA in connection with his final decisions (*see* findings 67, 68, 72, 73). Kearfott urges that ACO Jelinek could not have made a personal and independent judgment because he "issued these final decisions without thinking about or understanding the requirements of FAR 52.216-16(g)." (App. br. at 341) Although these appeals have been fully tried and exhaustively briefed, Kearfott insists that that the ACOs decisions are "legal 'nullities'" and now "should be reversed" (app. reply at 21, 22), with all monies collected from Kearfott returned with interest.

Respondent counters with the flat assertion that Messrs. Bey and Jelinek both "exercised their independent judgment in preparing and issuing the final decisions" (resp. reply at 13). Respondent chiefly contends that, while both ACOs "relied extensively upon [DCAA's] audit reports in reaching their decisions" (resp. reply at 14), that reliance upon financial advisors was permissible and did not render the decisions void. Respondent also urges that a determination that the ACOs' decisions are void would avail Kearfott nothing, given the Board's *de novo* consideration of the appeals. (Resp. reply at 18)

We reject Kearfott's argument for two principal reasons. First, we agree that our *de novo* consideration renders Kearfott's argument moot. By its terms, the Contract Disputes Act provides that "[s]pecific findings of fact [by the contracting officer] . . . shall not be binding in any subsequent proceeding," 41 U.S.C. § 605(a), and we have long regarded the Act as continuing the longstanding *de novo* nature of our proceedings. *E.g.*, *Space Age Engineering, Inc.*, ASBCA No. 26028, 82-1 BCA ¶ 15,766 at 78,032-33; *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495, *reconsid. denied*, 03-1 BCA ¶ 32,193; *see also Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987) (perceiving no reason to believe that Contract Disputes Act changed established rule that an appeal to the Board vacated contracting officer's decision and entitled contractor to *de novo* hearing before the Board). Nonetheless, despite *de novo* consideration here, the contracting officer is still required to "put his own mind to the problem" when rendering his decision, *New York Shipbuilding Corp. v. United States*, 385 F.2d 427, 435 (Ct. Cl. 1967). In the event that he does not, and the decision was in fact rendered by someone else, it is a nullity; however, "[w]e can act . . . as if, prior to bringing [its appeal] here, [Kearfott] received no determination at all." *New York Shipbuilding*, *supra*, 385 F.2d at 436.

Our decisions reflect these principles. Thus, in *Human Resources Management, Inc.*, ASBCA Nos. 27444, 27445, 83-2 BCA ¶ 16,797 at 83,502-03, the appellant contended that the contracting officer's decision "was not based on his discretion or judgment and was not independently arrived at." While we found the contentions

unsupported, we also noted that "[o]ur proceedings are *de novo* and our findings in these appeals were reached after considering the record as a whole. The contents of the final decisions, while of interest to us, are neither conclusive nor in any way binding insofar as our decision is concerned." *Human Resources Management* involved cost reimbursement issues, as did *Page Airways, Inc.*, ASBCA No. 21065, 1977 ASBCA LEXIS 323 at *1 (Aug. 17, 1977), where we declined to reconsider our previous decision on the ground that the appealed-from decision did not reflect the contracting officer's independent judgment because of improper influence by higher authority. In *Page Airways*, we distinguished cost from default termination cases, such as *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. 698 (Ct. Cl. 1955), that call for the exercise of far greater discretion by the contracting officer. We expressly declined to follow *Digital Simulation Systems, Inc.*, NASA BCA No. 175-1, 75-1 BCA ¶ 11,336, where the NASA Board had remanded a cost decision to the contracting officer for lack of evidence of independent consideration. In so doing, we said that "we would not consider such action to be necessary where, as here, appellant had full and ample opportunity to present its evidence and arguments to the Board." *Page Airways*, at *7-8. We followed our disposition in *Meeks Transfer Co., Inc.*, ASBCA No. 11819, 67-2 BCA ¶ 6567 at 30,470, where we had found after trial that the contracting officer "acceded to the guidance and direction of his higher headquarters and agreed to change his position" and assert a Government monetary claim against the appellants. We had rejected the appellants' challenge to the validity of the decisions in *Meeks*, concluding that, "as the Board grants de novo consideration of all appeals, this aspect of appellants' presentation becomes moot and we will not further consider this contention." *Meeks*, *supra*, 67-2 BCA at 30,472.

We cannot reach a different conclusion here. In these appeals, we have already held a six-day trial in which both parties adduced extensive testimonial and documentary evidence. The appeals have been exhaustively briefed. Hence, even if we accepted Kearfott's contentions that the ACOs decisions are "legal 'nullities'" that "should be reversed" (app. reply at 21, 22), dismissal of the appeals at this juncture "would result only in the reiteration of [the parties'] positions and re-filing of the papers herein." *Germain Land & Timber Co.*, ASBCA No. 9413, 1963 BCA ¶ 3953 at 19,578.

Second, we cannot say that the record establishes that the ACOs entirely abdicated their responsibility to render independent decisions. The nub of Kearfott's complaint regarding both ACOs is that they ceded decision-making responsibility to DCAA and, in the case of ACO Bey, that he also yielded to pressure from superiors and other government agencies. (App. br. at 336-37, 340, 341) In *BAE Systems, supra*, 01-2 BCA at 155,524, we rejected a similar contention that an ACO had "simply adopted the DCAA and DLA – directed conclusions, without question" and failed to make his own determination of cost allowability. We relied upon settled authority holding that:

> The Disputes clause requirement for a decision by a CO on all disputes arising under or relating to a contract, FAR 33.215, does not bar a CO from obtaining advice from others. A CO may, for the purpose of forming his or her independent judgment, obtain information and advice from advisors and staff offices, particularly in the fields of accounting, engineering and law, areas in which he or she may have little or no expertise. Indeed, it would reflect poor judgment on the part of a CO if he or she did not do so.

BAE Systems, supra, 01-2 BCA at 155,525. We also noted that "[h]igh-level concern regarding the issue presented does not demonstrate that the ACO lost his independent judgment," *id*., citing *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1323-24, 1328-29 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000). *See also, Pacific Architects and Engineers, Inc. v. United States*, 491 F.2d 734, 744 (Ct. Cl. 1974) (holding it unreasonable to construe requirement for decision by contracting officer to preclude obtaining and agreeing with legal advice); *Ruffin's A-1 Contracting, Inc.*, ASBCA No. 38343, 90-3 BCA ¶ 23,243 at 116,243 ("heavy reliance on the opinions of counsel" acceptable); *Baltimore Electronics Associates, Inc.*, ASBCA No. 23741, 81-1 BCA ¶ 15,091 at 74,681 (perceiving in the contracting officer's adoption of an engineering board's reasons for rejecting value engineering change proposal involved "no surrender of independence").

Measured against these standards, we disagree with Kearfott that the ACOs abdicated their decision-making responsibility to others. With respect to the waiver issue, ACO Bey strongly believed that Mr. McFadden's 1992 report had no basis, regardless of what anybody else thought (finding 64). ACO Jelinek thought that the waiver issue was straightforward (finding 68). With respect to cost issues, neither ACO Bey nor ACO Jelinek was an accountant (findings 64, 70). Both relied upon DCAA, as their auditors, to examine, as ACO Bey put it, "all the documentation, . . . all the public vouchers, everything that they needed to make an evaluation and determination" regarding the QLOPS (finding 64), which fundamentally relate to cost issues. Although Kearfott makes much of ACO Jelinek's "rubber stamp" testimony, we understand it to be consistent with his deference to DCAA's expertise with cost issues (finding 70).

With respect to the alleged involvement of superiors and others in the decision in ASBCA Nos. 49271 and 49532, ACO Bey's testimony contains agreement to generalized references to "pressure" or "heat" at the demand letter stage, but we have found no persuasive evidence of dictation by others at the final decision stage (finding 65). Interest by officials at higher levels is no more than is to be expected given the number of contracts and amounts involved (*see* findings 1, 47) and "does not demonstrate that the ACO lost his independent judgment." *BAE Systems, supra*, 01-2 BCA at 155,525.

Finally, viewing the record as a whole, we are satisfied that the decisions of ACOs Bey and Jelinek were not "pretextual or unrelated to obligations under the parties' contract[s]." *BAE Systems, supra*, 01-2 BCA at 155,525.

C. *Alleged Waiver of the QLOPS Requirement*

The parties advance multiple arguments regarding whether the record and the law establish that the QLOPS requirement contained in FAR 52.216-16(g) (*see* finding 2) was rendered inapplicable to these contracts. Thus, as indicated above, respondent strenuously insists that the *Christian* doctrine is dispositive, and Kearfott's position is that the *Christian* doctrine is irrelevant "because no one disputes that FAR 52.216-16(g) was incorporated in the contracts" and "these appeals are governed by the law of waiver, estoppel and ratification." (App. br. at 384-85) We address below the contentions of the parties that we conclude are relevant to the disposition of these issues. We conclude that respondent did not waive the QLOPS requirement.

1. *Christian Doctrine*

Despite respondent's strenuous insistence that the *Christian* doctrine is dispositive of any claim of waiver, we agree with Kearfott that the doctrine is inapplicable. Regardless of whether paragraph (g) of the Incentive Price Revision clause does or does not reflect "a deeply ingrained strand of public procurement policy," *Christian*, *supra*, 312 F.2d at 426, we have found that the clause was included in each of the contracts at issue (finding 2). There is accordingly no occasion for reading the clause in to the contracts by operation of law, and we therefore do not consider respondent's *Christian* doctrine argument further.

2. *Waiver and Deviation*

Kearfott argues that "these appeals are governed by the law of waiver." (App. br. at 384-85) We understand Kearfott's contention that the QLOPS requirement was waived to apply only to ASBCA Nos. 49271, 49532 and 52521. We do not understand it to apply to ASBCA No. 51873, where, as we have found, Kearfott submitted QLOPS on a timely basis (finding 52). In any event, we conclude that there was neither a waiver of the QLOPS requirement, nor a deviation from that requirement, for the reasons set forth below.

First, there is no credible evidence of a waiver or deviation. "Waiver is an affirmative defense and the burden of persuasion to establish it is upon the person asserting or claiming the benefit of the waiver. The burden here is upon the appellant," *Clark Cable Corp.*, ASBCA No. 17090, 72-1 BCA ¶ 9463 at 44,080, inasmuch as

Kearfott seeks the benefit of avoiding liability on respondent's affirmative monetary claims, which are predicated upon the contract clause allegedly waived.

The quality of the evidence regarding waiver requires us to conclude that Kearfott has failed to meet that burden. The key evidence on this issue comes from Mr. McFadden, the most knowledgeable witness. That evidence consists of (a) Mr. McFadden's 1992 Internal Control Review recounting that "discussions with an ACO . . . revealed that there was an agreement between [Kearfott] and [SSP] that this [QLOPS] report did not have to be submitted" (finding 18); and (b) Mr. McFadden's trial testimony amplifying what he was told in 1992. At the heart of his testimony is the multiple hearsay that ACO Schoening said to him that Mr. Lawton of Kearfott had said that PCO Dunegan had said that QLOPS need not be submitted on Kearfott's contracts (finding 19(c)).

Our findings set forth the major reasons why this showing falls short of a preponderance of the evidence. The record contains no contemporaneous modification, letter, file memorandum, or other writing evidencing the claimed waiver (finding 19(a)). No one with personal knowledge of the undocumented waiver testified (finding 19(c)). Neither Mr. Lawton of Kearfott, nor PCO Dunegan, was called (*id*.). ACO Schoening, to whom Mr. Lawton is said to have recounted the alleged waiver, also did not testify, having died in 1998 (*id*.). The date of the alleged waiver is highly imprecise; a Kearfott witness testified that he heard about PCO Dunegan's statement "sometime in the mid-80s, five, six time frame" and there is little evidence of a more certain date (finding 19(d)). The proffered dates are difficult to harmonize with PCO Dunegan's tenure (*id*.).

Other considerations lead us to conclude that the waiver evidence is not credible. Kearfott's account gives rise to the counterintuitive inference that, for a then-unknown number of contracts, PCO Dunegan made an open-ended commitment to give Kearfott something for nothing – the something being respondent's right to recover refunds, credits and interest on overpayments under FAR 52.216-16(g)(2) and (3) (*see* finding 2), and the nothing being the absence of any consideration flowing to respondent (finding 19(b)). In addition, eight of the sixteen contracts were competitively awarded in whole or in part (finding 30). Inasmuch as all sixteen contracts at issue contained the Incentive Price Revision clause, it is reasonable to expect Kearfott to have raised a waiver of part of that clause at bid time on these eight contracts, but the record contains no credible evidence that it did so for them, or for any other contract until October 1992 (finding 20), in response to ACO Schoening's 11 August 1992 letter.

In reaching these conclusions regarding the strength of the waiver evidence, we decline Kearfott's repeated invitations to ascribe probative value to the terminology employed in ACO Schoening's 11 August 1992 letter (*see* finding 17). In particular, we do not find persuasive ACO Schoening's comment that the QLOPS requirement "is being

re-instituted" (*id.*). The letter was drafted by Mr. McFadden, who at the time believed that PCO Dunegan had, in fact, suspended the QLOPS requirement (*id.*). Whether PCO Dunegan actually did so is, on this record, still not established (*see* finding 19), and, without ACO Schoening's testimony, we are unwilling to treat the use of the verb "re-instituted" as evidence of an informed determination.

Kearfott relies upon *Gresham & Co., Inc. v. United States*, 470 F.2d 542 (Ct. Cl. 1972) for the proposition that "the government's prior course of conduct established a waiver" of paragraph (g) of the Incentive Price Revision clause, at least with respect to the 11 contracts entered into before Mr. Schoening's 11 August 1992 letter (*see* findings 1(a), 1(b), 1(c)) (app. br. at 346, 355). In *Gresham*, the court held that "a contract provision for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead." *Gresham, supra*, 470 F.2d at 554. The court stressed that such a "waiver of a contract provision requires a decision by a responsible officer assigned the function of overseeing the essentials of contract performance." *Id*. at 555. The record in *Gresham* reflected that fifteen contracts for dish washing machines were in dispute; those contracts were preceded by 21 others not in dispute. Both the earlier contracts and those in dispute were "under the same specification," calling for the machines to be fitted with automatic detergent dispensers. *Id*. at 556. The court concluded that the Government's acceptance of machines on the earlier contracts without dispensers reasonably led Gresham to believe that "enforcement of the requirement had been suspended and in effect, it was waived until further notice." *Id*. at 554. In reaching this conclusion, the court relied upon evidence of Gresham's bidding assumptions. Thus, there was evidence that, after losing bids on earlier contracts and ensuing exchanges with Government officials, Gresham had "concluded that its interpretation was correct and did not include the cost of dispensers in subsequent bids." *Id*. at 549. There was also evidence, particular to six of the contracts in dispute, that Gresham had bid "without including the cost of automatic detergent dispensers." *Id*. at 552.

We reject Kearfott's argument that *Gresham* demonstrates that "the government's prior course of conduct established a waiver" (app. br. at 355) for three principal reasons. First, *Gresham* involved the waiver of a specification requirement that was demonstrably for the Government's benefit. By contrast, the alleged waiver here relates to part of a mandatory FAR clause (*see* finding 2), and the record contains evidence that the clause benefited both parties (finding 3). As discussed below, the FAR contemplates a far more formalized approval process for waiving – or deviating from – a mandatory FAR clause than the undocumented action of either the ACO or the PCO. Second, the record will not support the conclusion that there was a "decision by a responsible officer assigned the function of overseeing the essentials of contract performance." The most that can be said from this record is that there is hearsay evidence years after the event that ACO Schoening was told, at some time, by Mr. Lawton of Kearfott that PCO Dunegan had

waived the QLOPS requirement, and that ACO Schoening seemingly accepted that representation as true without further inquiry (finding 19(c)). In the absence of any testimony by any of the participants to these conversations – ACO Schoening, Mr. Lawton or PCO Dunegan – or any contemporaneous memorialization by these principals regarding what was said and decided, we decline to elevate evidence of this quality to the level of a "decision by a responsible officer," as contemplated by *Gresham*. Third, there is no credible evidence that, in the eight contracts that were competitively awarded in whole or in part here, Kearfott relied on the presence or absence of the QLOPS requirement in its bidding assumptions (finding 30). *See, e.g., David B. Lilly Co., Inc.*, ASBCA Nos. 34678 *et al.*, 92-2 BCA ¶ 24,973 at 124,472 (holding conclusory evidence of bid reliance insufficient to apply *Gresham*).

Second, any waiver or deviation from the QLOPS requirement as portrayed by Kearfott would not be effective in any event. The claimed waiver of the QLOPS requirement would constitute a deviation. FAR 1.401 (1984), DEFINITION, provides:

> "Deviation" means any one or combination of the following:
>
> . . . .
>
> (b) The omission of any solicitation provision or contract clause when its prescription requires its use.
>
> (c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the FAR (see definitions of "modification" and "alternate" in 52.101(a)).
>
> . . . .
>
> (e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy, or procedure prescribed by the FAR.

The Incentive Price Revision-Firm Target clause was undeniably prescribed for the contracts at issue. All of the contracts were fixed-price incentive contracts in whole or in part, and all involved firm targets (finding 1). In these circumstances, FAR 16.405(a) required the contracting officers to insert the clause (finding 2). Each contract did in fact contain the clause (finding 2).

"Departures from the FAR are permitted." *Johnson Management Group CFC, Inc. v. Martinez*, 308 F.3d 1245, 1256 n.2 (Fed. Cir. 2002). FAR 1.402 provides that "[u]nless precluded by law, executive order, or regulation, deviations from the FAR may be granted as specified in this subpart when necessary to meet the specific needs and requirements of each agency." The FAR distinguishes between individual deviations, which affect a single contracting action, FAR 1.403, and class deviations, FAR 1.404, which affect more than one contracting action. Thus, FAR 1.403, INDIVIDUAL DEVIATIONS, provides:

> Individual deviations affect only one contracting action . . ., may be authorized by agency heads or their designees. The justification and agency approval shall be documented in the contract file and a copy of the approved deviation shall be furnished to the FAR Secretariat through a central agency control point.

FAR 1.404, CLASS DEVIATIONS, looks to whether a class deviation will be required on a permanent basis. If so, an agency "should propose an appropriate FAR revision to cover the matter."

The DFARS was consistent with the FAR's authorization and documentation requirements for deviations. Either the April 1984 edition, or the January 1986 edition, of the DFARS, would have been in effect when either PCO Dunegan, or ACO Schoening, or both, are said to have told Kearfott "sometime in the mid-80s, five, six time frame" that it need not submit QLOPS (finding 19(d)). In both editions, DFARS 1.403(d) permitted individual deviations "made or authorized in accordance with Departmental procedures," and required that "written notice of such deviation, describing its nature and the basis for its justification" be furnished to designated officials within the Department of Defense (finding 4). Similarly, in both editions, DFARS 1.404 permitted class deviations if "approved in advance" by a designated DoD official, but after "[w]ritten requests for such approval" were submitted through the DAR Council (*id.*). From these two DFARS provisions, it is evident that a PCO or an ACO could not have lawfully acted alone to exempt Kearfott from its QLOPS obligations, and that either an individual or a class deviation would have left a paper trail.

The dispositive consideration is that "[a] contracting officer is not authorized to deviate from the requirements of procurement regulations when the necessary authorization to do so has not been given." *Johnson Management Group, supra*, 308 F.3d at 1256 n.2. Kearfott

> [h]as produced nothing to indicate that such authorization was granted or that proper notice was furnished, and we can take it that they were not given. In this case, therefore, any deviation from the prescribed wording was a violation of the regulation and beyond the authority of the contracting officer. Actions taken by that officer beyond his authority are, of course, not binding on the Government.

McDonnell Douglas Corp. v. United States, 670 F.2d 156, 159 (Ct. Cl. 1982).

D. *Ratification*

Kearfott also contends that "these appeals are governed by the law of . . . ratification." (App. br. at 384-85) Kearfott argues that that "the facts demonstrate that ACO Schoening explicitly ratified SSP's acts," *i.e.*, PCO Dunegan's alleged agreement with Kearfott that it need not submit QLOPS. (App. br. at 374) Kearfott asserts that the ratification is evident principally from ACO Schoening's acquiescence in not directing it to submit QLOPS before his 11 August 1992 letter (*see* finding 17), and in his failure to mention in that same letter any violation of a FAR or contract provision. (App. br. at 375)

FAR 1.602-3 (1988), RATIFICATION OF UNAUTHORIZED COMMITMENTS, sets forth certain principles regarding ratification. The regulation defines ratification as "the act of approving an unauthorized commitment by an official who has the authority to do so." FAR 1.602-3(a). The regulation further provides:

> (b) *Policy*.
>
> . . . .
>
> (2) Subject to the limitations in paragraph (c) . . . , the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.
>
> (3) The ratification authority in subparagraph (b)(2) . . . may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.
>
> (c) *Limitations*. The authority in subparagraph (b)(2) of this subsection may be exercised only when—

> (1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
>
> (2) The ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has the authority to do so;
>
> . . . .
>
> (7) The ratification is in accordance with any other limitations prescribed under agency procedures.

The record does not support the conclusion that ACO Schoening ratified PCO Dunegan's acts. ACO Schoening was not "the head of the contracting activity" within the meaning of FAR 2.101, as contemplated by FAR 1.602-3(b)(2). Similarly, the record does not establish that ACO Schoening was the "chief of the contracting office" within the meaning of FAR 2.101, as contemplated by FAR 1.602-3(b)(3). There is no reason to believe that ACO Schoening "could have granted authority to enter or could have entered into" an agreement to waive or deviate from part of the Incentive Price Revision clause, as contemplated by FAR 1.602-3(c)(2).

Two other considerations merit mention. "Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them." *United States v. Beebe*, 180 U.S. 343, 354 (1901); *see also Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999) (following *Beebe*); *Dolmatch Group, Ltd. v. United States*, 40 Fed. Cl. 431, 438 (Fed. Cl. 1998) (holding that "ratification can only occur where the person ratifying the agreement has knowledge of the material facts pertaining to the agreement"). With respect to ACO Schoening's knowledge, the most that can be said from this record is that Mr. Lawton told him that PCO Dunegan had waived the QLOPS requirement (finding 19(c)). Given that none of these three individuals testified or left any contemporaneous memorialization (findings 19(a), 19(c)), we are not persuaded that PCO Dunegan made the claimed undertaking in the first instance. Finally, these appeals do not present "the rare circumstance of 'institutional ratification.'" *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,922, *reconsid. denied*, 03-1 BCA ¶ 32,130, *aff'd*, 82 Fed. Appx. 226 (Fed. Cir. 2003). Kearfott has neither established either the alleged unauthorized bargain to waive the QLOPS requirement, nor that respondent received a benefit from the alleged waiver. *See Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998).

E. *Estoppel*

Kearfott further contends that "these appeals are governed by the law of . . . estoppel." (App. br. at 384-85) Kearfott's estoppel argument is not well developed, but appears to be based chiefly on the proposition that "ACO Schoening's knowing recognition of the agreement not to submit QLOPS [when asked by Mr. McFadden (*see* findings 17, 18, 19(c))] is a waiver under *Gresham* sufficient to estop the government now" from reviving the QLOPS requirement. (App. br. at 355) Kearfott also quotes the SSP legal counsel's opinion that "[t]he fact that the Government received the same information on the CPRs [as called for on the QLOPS] could make a strong case for equitable estoppel." (*Id*. at 358; app. reply at 4 n.1; *see* findings 24, 26, 29)

We reject this argument. While the argument is not articulated in terms of either promissory or equitable estoppel, we consider the latter to be the applicable doctrine, especially given Kearfott's reliance on *Harvey Radio Laboratories, Inc. v. United States*, 115 F. Supp. 444, 448-49 (Ct. Cl. 1953), *cert. denied*, 346 U.S. 937 (1954). This being the case, Kearfott's argument must fail because "if equitable estoppel is available at all against the government[,] some form of affirmative misconduct must be shown in addition to the traditional requirements of estoppel." *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000); *see also H. Bendzulla Contracting*, ASBCA No. 51869, 01-2 BCA ¶ 31,655 at 156,391-92 (reciting elements of equitable estoppel). As we have found, the record contains no evidence that ACO Schoening, or PCO Dunegan, engaged in misconduct (finding 31).

In addition, we reject Kearfott's related argument that respondent's claims result from "the government's failure to monitor the underruns of actual costs to target costs reported on the CSSRs and CPRs" (*see* findings 24-26), rather than from a failure to submit the QLOPS (app. br. at 356-57). Subparagraphs (g)(2) and (g)(3) of the Incentive Price Revision clause imposed affirmative obligations on Kearfott to refund or credit excess payments to the Government, and to pay interest on any excess that is unpaid within the specified period (finding 2). We give effect to the plain meaning of this language, *e.g., C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993). By its terms, the language in the clause employs the mandatory "shall," rather than a hortatory or subjunctive form. We see nothing in this language conditioning the Government's right to recover overpayments and interest upon a showing of causation, or upon any other factor. Moreover, Kearfott's argument that the submission of more extensive cost information on the CSSRs and CPRs is dispositive contravenes the principle that we are to prefer interpretations that do not leave portions of the contract – in this case, the QLOPS requirement – meaningless. *E.g., United States v. Johnson Controls, Inc*., 713 F.2d 1541, 1555 (Fed. Cir. 1983).

F. Q*uantum Adjustments*

In defending its quantum calculations, respondent first addresses three of the four appeals, ASBCA Nos. 49271, 49532 and 52521. Respondent contends that its auditors properly excluded both asset write-up costs and unearned performance incentives in recreating the QLOPS that had not been filed for the contracts at issue in ASBCA Nos. 49271 and 49532, and for one of the contracts at issue in ASBCA No. 52521. (Resp. br. at 81-98) Respondent then argues that the Bicoastal settlement agreement did not release Kearfott from liability for overpayments on the two contracts at issue in ASBCA Nos. 49271 and 45932 that are specified in that agreement. (Resp. br. at 98-104) Respondent also addresses ASBCA No. 51873, asserting that its auditors properly adjusted Kearfott's overhead billing rates. (Resp. br. at 104-14) For its part, Kearfott largely argues the negative of these propositions. (App. br. at 405-37; app. reply at 29-48) We address these contentions in turn.

1. *Asset Write-Up Costs*

Contending that its auditors were required to exclude asset write-up values in recreating QLOPS that were not filed during performance of the contracts at issue in ASBCA Nos. 49271, 49532 and 52521, respondent draws a distinction between contracts entered into during the three-year moratorium provided by the novation agreement (*see* finding 34), and those entered into after the promulgation of FAR 31.205-52 in July 1990. (Resp. br. at 84-85, 94-95) FAR 31.205-52 (1990), ASSET VALUATIONS RESULTING FROM BUSINESS COMBINATIONS, provides:

> When the purchase method of accounting for a business combination is used, allowable amortization, cost of money and depreciation shall be limited to the total of the amounts that would have been allowed had the combination not taken place.

For its part, Kearfott insists that the novation agreement is inapplicable to the asset write-up costs chiefly because it related only to assets transferred to Kearfott by Singer in the April 1988 transaction (*see* finding 10). The agreement did not preclude the asset write-up costs at issue, which result from the October 1988 Astronautics transaction (*see* finding 11), according to Kearfott. (App. br. at 408-18) Kearfott contends that, having been promulgated in July 1990, FAR 31.205-52 cannot be retroactively applied to the October 1988 transaction and, in any event, the issue has not been finally decided in respondent's favor. Hence, Kearfott argues, FAR 31.201-6(b) (1984) applies to the asset write-up costs. (App. br. at 419-22) That regulation provides:

> Costs which specifically become designated as unallowable or as unallowable directly associated costs of unallowable costs as a result of a written decision furnished by a contracting officer shall be identified if included in or used in computing any billing, claim, or proposal applicable to a Government contract. This identification requirement applies also to any costs incurred for the same purpose under like circumstances as the costs specifically identified as unallowable under either this paragraph or paragraph (a) above [pertaining to costs that are "expressly unallowable or mutually agreed to be unallowable"].

Considering the novation agreement first, we conclude that the agreement precluded asset write-up costs resulting from the April 1988 Singer transaction, but not such costs resulting from the October 1988 Astronautics transaction. Under the plain terms of the agreement, the transferee, Kearfott, agreed not to "write-up the value of depreciated assets *transferred to it by Transferor*," *i.e.*, Singer, in accounting for current contracts or those entered into between 25 April 1988 and 25 April 1991 (finding 34) (emphasis added). The agreement is silent regarding Kearfott's accounting for assets resulting from the business combination with Astronautics (*id.*), which did not occur until two months after execution of the agreement (finding 11). The stepped-up assets at issue here are those resulting from this latter transaction with Astronautics (findings 39, 40).

Turning to the reach of FAR 31-205.52, we regard the issue as resolved in respondent's favor by *Kearfott Guidance & Navigation Corp.*, ASBCA No. 45536, 01-2 BCA ¶ 31,496, *aff'd*, 320 F.3d 1369 (Fed. Cir. 2003). That case involved a progress payment request submitted on Contract No. N00030-92-C-0043, which is at issue in ASBCA No. 51873 (*see* findings 1(b), 37). We had granted the Government's motion for partial summary judgment, rejecting Kearfott's position that it was entitled to include asset write-up costs on progress payment requests under that contract because those costs were attributable to the sale of Kearfott to KG&N Sub, Inc. (*see* finding 11). *Kearfott, supra*, 01-2 BCA at 155,554. We followed our decision in *BAE Sys. Info. & Elec. Sys. Integration, Inc.*, ASBCA No. 44832, 01-2 BCA ¶ 31,495, *reconsid. denied*, 03-1 BCA ¶ 32,193, and rejected Kearfott's position that FAR 31.205-52 "is not applicable to business combinations which occurred prior to its effective date." We concluded that the dispositive consideration was whether the "purchase method of accounting" was used at the time of the combination to adjust asset valuations. *Kearfott, supra*, 01-2 BCA at 155,555-56.

Before the Federal Circuit, the issue was whether we had "erred when [we] construed FAR 31.205-52 (1990) to apply to a claim for payment that is based on an asset write-up from a business combination that took place prior to the FAR provision's

effective date." *Kearfott, supra,* 320 F.3d at 1372. In affirming our decision, the court explained that:

> [t]he date that is critical for determining whether the regulation applies is the date on which the cost claim is submitted, not the date on which the circumstance or condition that triggers the application of the regulation arose. For that reason, the regulation is best understood as providing that if the amount claimed for any one of the three referenced cost elements is premised on a valuation of assets based on the purchase method of accounting for a business combination, the regulation bars the claim. That is, the term "is used," in reference to the purchase method of accounting, means that the regulation governs any claims based in part on a valuation that is the product of the purchase method of accounting.

Id. at 1373.

The court's reference to "the date on which the cost claim is submitted" would appear to support the conclusion that the date of submission of the QLOPS – which we treat as a "cost claim" for these purposes – is dispositive. A closer reading of *Kearfott* makes clear, however, that the premise of the decision is that the date of the contract controls. Thus, in rejecting the argument that its construction gave the regulation impermissible retroactive application, the court explained that no new obligation was imposed:

> because the relevant "transaction" is not the 1988 business combination but rather the 1992 defense contract. Because use of the purchase method of accounting for a business combination was a condition or circumstance necessary for application of FAR 31.205-52, the regulation affected only those government contracts executed after 1990 in which that condition had been satisfied.

Kearfott, *supra*, 320 F.3d at 1375. The court also quoted with approval from a 1987 memorandum by the chairman of the DAR Council's Cost Principles Committee that the then-proposed prohibition on asset write-up costs "'should phase in just like any cost principle, appearing in all contracts executed after its effective date.'" *Id*. at 1373.

Treating the contract date – rather than the claim date – as the touchstone for application of the regulation is consistent with the terms of the INCENTIVE PRICE

REVISION – FIRM TARGET clause itself, which defined "Costs" to mean "allowable costs in accordance with Part 31 of the [FAR] in effect on the date of this contract" (finding 2). This contract language "is crystal clear and lends itself to only one reasonable interpretation," *General Dynamics Corp. v. United States*, 47 Fed. Cl. 514, 547 (2000), and treating the contract date as controlling for application of FAR 31.205-52 (1990) gives it effect. We accordingly conclude that Kearfott is not entitled to include asset write-up costs for the Astronautics transaction on QLOPS submitted for contracts awarded or with an effective date after 23 July 1990.

Applying FAR 31.205-52 to contracts that postdate 23 July 1990 poses some difficulties on the present record. With respect to the contracts at issue in ASBCA Nos. 49271 and 49532, five were awarded or have effective dates that preceded 23 July 1990 (finding 1 (a)). By contrast two were awarded or have effective dates after the regulation took effect. They are: Contract Nos. N00030-91-C-0052 and N0030-91-C-0061 (*id*.). The latter contract was the only one in these two appeals for which Kearfott sought asset write-up costs (findings 47, 66). Kearfott is not entitled to have the reconstructed QLOPS for this contract adjusted to reflect asset write-up costs on the Astronautics transaction. Kearfott is, however, entitled to have the reconstructed QLOPS adjusted to reflect such costs on the five contracts preceding the effective date of the regulation.

In ASBCA No. 51873, the situation is more straightforward. All seven of the contracts at issue in that appeal were entered into or became effective after 23 July 1990 (finding 1(b)), and hence all seven contracts were subject to the regulatory bar. For the contracts at issue in this appeal, therefore, we conclude that Kearfott is not entitled to premise the costs reflected on its QLOPS on stepped up asset values for the Astronautics transaction.

With respect to the two contracts at issue in ASBCA No. 52521, the situation is split. Contract No. N00030-92-C-0040 was entered into or became effective in February 1992 (finding 1(c)), after the regulatory change. Accordingly, Kearfott is not entitled to include stepped up asset values on the QLOPS for this contract. Contract No. N00030-87-C-0014, however, was entered into in October 1986 (*id*.), and hence Kearfott is entitled to claim asset write-up costs on the QLOPS for this contract.

2. *Performance Incentives*

"Performance incentives are considered in connection with specific product characteristics or other specific elements of the contractor's performance, and relate profit or fee to results achieved by the contractor." *Northrop Grumman Corp. v. United States*, 41 Fed. Cl. 645, 647 n.4 (1998). Each contract at issue here contained a performance incentive plan providing for both positive and negative impact on profit

depending upon whether Kearfott achieved, or failed to achieve, specified goals (finding 6).

Although recognizing that "the FAR 52.216-16(g) calculations inherently required discretion and judgment" (app. br. at 363), Kearfott faults respondent for arbitrarily excluding amounts for such incentives from the QLOPS calculations, thereby increasing the claimed overpayments (app. br. at 361-63). In its quantum position, Kearfott has itself excluded performance incentives "because the parties negotiated a number of such incentives during the pendency of this litigation" (app. reply br. at 27). Nonetheless, Kearfott continues to attack respondent's calculations, stressing alleged conflicts between DCAA and SSP regarding the issue (*id*.). Respondent denies any conflict in the testimony of its witnesses and maintains that the uncertainty of the incentives and the protracted time periods that can be involved in earning them warrants their exclusion from the QLOPS calculations (resp. reply br. at 55-59).

We conclude that performance incentives were properly excluded from respondent's QLOPS calculations. The performance incentive plans incorporated in the contracts do not speak to the issue one way or the other. They neither require that the incentives be included in, or treated separately from, QLOPS or other cost calculations (finding 6). Nonetheless, it was the contracting practice of the parties that Kearfott would submit a claim for performance incentives and, after scoring, evaluation and negotiation, that claim would be paid through modification (*id*.). We give effect to this contracting practice. *See QES, Inc.*, ASBCA No. 22497, 78-2 BCA ¶ 13,462 at 65,790 (looking to "other contractual arrangements between the parties in the same general time period" to supply missing term in oral contract); *cf.*, *Lockheed Georgia Co.*, ASBCA No. 27660, 90-3 BCA ¶ 22,957 at 115,274-75 (finding insufficient evidence of a contracting practice of the parties regarding cost treatment). Moreover, we are not persuaded that it was arbitrary, as a matter of contract administration, to treat performance incentives separately from QLOPS calculations, given the scoring involved and the post-performance time periods in which the incentives can be earned (*see* finding 6). Accordingly, we decline to override respondent's exclusion of performance incentives from the QLOPS calculations.

3. *Scope of the Bicoastal Release*

In raising the defense of release, Kearfott argues that the Bicoastal settlement agreement bars respondent's claims regarding Contract Nos. N00030-88-C-0146 and N00030-89-C-0058, which are at issue in ASBCA Nos. 49271 and 49532. Kearfott asserts that respondent's claims are barred on these two contracts principally because "the Navy Claim – Proof of Claim No. 3074 – related to terminations for default." Drawing upon paragraph 7 of the Navy's proof of claim (finding 41), appellant asserts that "a government claim based on allegations of a failure to file QLOPS, which allegations

could have constituted a potential default termination claim, is barred by the Bicoastal Settlement Agreement's release language." (App. br. at 388, 389) For its part, respondent contends that the release extends only to claims for excess reprocurement costs and unliquidated progress payments on the two contracts. Respondent also urges that Contract No. N00030-89-C-0058 was erroneously listed on the proof of claim, inasmuch as it was awarded to Kearfott after Kearfott and Bicoastal had become separate corporations. (Resp. reply at 74-80)

We agree with respondent. With respect to the scope of the release, we have previously rejected an analogous argument in *Kearfott Guidance & Navigation Corp.*, ASBCA No. 49623, 99-2 BCA ¶ 30,518 at 150,695. There, Kearfott argued that a similar government claim on an Air Force contract was also barred by the Bicoastal settlement agreement. Kearfott asserted that paragraph 5(a) of the agreement, which contained parallel release language to that in paragraph 5(b) relating to the Navy claim (*see* finding 42), barred a government claim for overpayments on the Air Force contract. Construing the Bicoastal settlement agreement to give a reasonable meaning to all its parts, *e.g., Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965), we concluded that "it is clear that the Government's claim for overpayment did not arise from or relate to the allegations contained in the Air Force Claim. That claim related to contract negotiations whereas the overpayment claim related to invoices submitted during performance."

Comparable reasoning applies here. Paragraph 6 of the Bicoastal settlement agreement excluded from the release "claims and causes of action other than those described in paragraph 5" (finding 43). The only claims and causes of action described in paragraph 5 were those "arising from or in any way relating to the allegations contained in the Navy Claim" (finding 42). As we have found, the Government only asserted claims for unliquidated progress payments and excess reprocurement costs in the Navy claim (finding 44), not failure to submit QLOPS. Kearfott's proposed construction of the release is too attenuated to be reasonable. We are not persuaded that the parties to the release intended, without saying so explicitly, that the references to unliquidated progress payments and excess reprocurement costs in the proof of claim would be a shorthand for default terminations, so that the release would encompass "any and all claims . . . arising from or in any way relating to the allegations of a termination for default" of the two contracts. (App. br. at 388) It may be that failure to file QLOPS would be a ground for default termination, but we do not read the release, and the proof of claim to which it refers, to cover anything broader than money claims for unliquidated progress payments and excess reprocurement costs.

With respect to Contract No. N00030-89-C-0058, we cannot treat the release as a bar in any event. That contract was awarded solely to Kearfott Guidance & Navigation Corporation -- not to Singer or Bicoastal -- on or after 2 January 1989 (finding 1(a)).

That date was after the April 1988 transaction whereby Singer, which later became Bicoastal Corporation, had conveyed its right, title and interest in its Kearfott Division to the newly-formed Kearfott Guidance & Navigation Corporation (finding 10). Neither Singer nor Bicoastal, who were parties to the release, ever had any interest in the contract (finding 1(a)). While Kearfott, which bears the burden of proof on the defense, *see Catel, Inc.*, ASBCA No. 52224, 01-2 BCA ¶ 31,432 at 155,227, insists that "[t]he inclusion of that contract in the release must have some meaning" (app. br. at 392), Mr. Givant could shed no light on that meaning (finding 45), and the record commits it to speculation.

4. *Rate Adjustments*

The parties' dispute regarding adjustments to Kearfott's rates applies to the contracts at issue in ASBCA No. 51873. In its audits on those contracts, DCAA: (a) adjusted Kearfott's actual overhead billing rates to remove unallowable costs; and (b) applied a decrement factor to the overhead based upon a study of past experience with Kearfott's inclusion of unallowable costs in its overhead pool (finding 54). We address both adjustments below.

a. *Substitution of Adjusted Rates*

In defending its substitution of audit adjusted indirect rates in ASBCA No. 51873, respondent notes that "the sole issue . . . is whether the adjustments in [Kearfott's] overhead rates were appropriate irrespective of the stepped-up asset values" (resp. br. at 111). Respondent argues that "DCAA was doing what it was required to do by the [Incentive Price Revision] clause in utilizing rates that it believed were closer to the rates that accurately excluded unallowable costs instead of the actual rates that included them." (*Id.*) Respondent points to the definition of "costs" in FAR 52.216-16(b) as "allowable costs in accordance with Part 31 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract" (*see* finding 2) and asserts that Kearfott "was not able to provide evidence [of] a single rate that DCAA utilized that had erroneously removed anything other than unallowable costs." (Resp. reply at 66-67, 68) For its part, Kearfott vigorously disputes all of these contentions. (App. reply at 42-46)

We conclude that, considering only the evidence offered by respondent, DCAA's audit adjusted rates should not be substituted for Kearfott's actual rates. We agree with respondent that the sole issue is whether the adjustments were appropriate, but disagree that it was Kearfott's burden to prove error in the DCAA rates. Rather, it was respondent's burden of proof, as the party asserting the Government claim in ASBCA No. 51873, to establish that its quantum calculations were supported. *E.g., United Technologies Corp.*, ASBCA Nos. 51410, 53059, 53349, 04-1 BCA ¶ 32,556 at 161,023 (noting that, in a Government claim for price reduction under the Truth in Negotiations Act, "the government has the burden of proof and assumes the risk of non-persuasion on

all elements of the claim"). Hence, even if we were to accept respondent's contention that only allowable costs under FAR Part 31 may be used on QLOPS, we could not accept the adjusted rates because respondent has failed to prove that they represent proper adjustments. Mr. Gotlib was respondent's witness on the issue, and he disavowed key propositions from his own expert report on the witness stand. Thus, although he had asserted in his report that, in his opinion, "in general, the indirect rates, which the DCAA auditors are using in the QLOPS audit reports, are appropriate," he admitted on cross-examination that he did not know if the rates were appropriate (finding 56).

We also are not persuaded that the audit adjusted rates should be used because it involves inconsistent accounting treatment. While DCAA adjusted Kearfott's indirect rates on the seven contracts at issue in ASBCA No. 51873, it accepted Kearfott's rates on the seven contracts in ASBCA Nos. 49271 and 49532, and on the two contracts in ASBCA No. 52521 (findings 47, 69, 74). Both parties' experts testified that such treatment is inconsistent (finding 69). The record does not establish any persuasive reason for the inconsistent treatment, and we decline to adopt it, as we have elsewhere. *See United Technologies, supra,* 04-1 BCA at 161,028 (finding "no basis in fact or in law for the government's inconsistent treatment of appellant's defective cost or pricing data"); *Cubic Corp.,* ASBCA No. 8125, 1963 BCA ¶ 3775 at 18,825-26 (rejecting inconsistent treatment of selling costs as, in part, not in accord with good accounting practices).

b. *Decrement Factor*

Respondent insists that it was entitled to utilize a decrement factor in ASBCA No. 51873 to Kearfott's G&A rate based upon historical experience with Kearfott's unallowable costs because the factor was "applied in order to approximate the rates that would be used at final price revision." (Resp. reply at 73) Respondent relies upon Ms. Richards' testimony to stress the reasonableness of the decrement factor as an estimate (*see* finding 57) and urges that, in any event, "the effect of the potential unallowables on the total amount owed by Kearfott . . . is relatively small." (Resp. reply at 73) In contrast, Kearfott contends that there is no evidence that the decrement factor is rooted in any historical experience with, or study of, Kearfott's unallowable costs. (App. reply at 46-47) Kearfott also argues that Mr. Gotlib, who testified regarding the audits underlying the Government's claim in ASBCA No. 51873, did not in the end support the asserted bases of the decrement factor. (App. reply at 47)

We conclude that respondent is not entitled to apply a decrement factor to adjust Kearfott's G&A rate in ASBCA No. 51873. The adjustment is concededly an estimate, but it is unsupported by any credible evidence in the record of reasonableness (finding 57). The possibility of error in the estimate is underscored by DCAA's own conclusion that the $600,000 figure that it had employed until 1995 was overstated by half (*id.*).

G. *Quantum Computations*

1. *ASBCA Nos. 49271 and 49532*

We have concluded above that Kearfott: is not entitled to include asset write-up costs for QLOPS that would have been submitted on Contract No. N00030-91-C-0061, but is entitled to include such costs on five contracts awarded or effective before the effective date of FAR 31.205-52 (1990); is not entitled to claim performance incentives; and is not entitled to use the Bicoastal settlement agreement to bar respondent's claims regarding Contract Nos. N00030-88-C-0146 and N00030-89-C-0058. The record does not permit calculation of the cost impact of the effective date of the regulatory change on the asset write-up costs and accordingly these appeals are remanded to the parties.

2. *ASBCA No. 51873*

We have concluded that Kearfott is not entitled: to include asset write-up costs; or to claim performance incentives. In addition, respondent is not entitled: to substitute DCAA's audit adjusted indirect rates for Kearfott's rates; or to apply a decrement factor. We find that, with interest computed to December 1997, the cost impact of these conclusions for each contract is as follows:

CONTRACT		OVERPAYMENT	INTEREST
N00030-91-C-0043		$ 564,271.00	$ 14,296.04
N00030-92-C-0043		$ (80,186.00)	
N00030-93-C-0042		$ (113,585.00)	
N00030-93-C-0047		$ 728,680.00	$ 18,596.16
N00030-94-C-0039		$ 44,902.00	$ 1,145.91
N00030-94-C-0041		$1,416,320.00	$ 36,144.97
N00030-95-C-0047		$1,250,465.00	$ 31,681.04
	Total	$3,810,867.00	$ 101,864.12

(Resp. ex. 4 at 2; tr. 1172-73) The total amount of $3,912,731.12 to which respondent is entitled is less than the total of $6,463,830 in principal, interest and administrative fees that Kearfott has already paid to respondent (*see* finding 76). Appellant is entitled to recover this difference, which aggregates $2,551,098.88.

3. *ASBCA No. 52521*

We have concluded that: Kearfott is not entitled to claim asset write-up costs for Contract No. N00030-92-C-0040, but is entitled to claim such costs for Contract No. N00030-87-C-0014; and is not entitled to claim performance incentives. The record does

not permit calculation of the cost impact of the effective date of FAR 31.205-52 (1990) on the asset write-up costs, which were excluded for both contracts (finding 73), and accordingly these appeals are remanded to the parties.

CONCLUSION

The appeals in ASBCA Nos. 49271 and 49532 are remanded to the parties for stipulation regarding quantum or, failing that, for further proceedings within 60 days of receipt of this decision. The appeal in ASBCA No. 51873 is sustained in part and denied in part in accordance with the above. The appeal in ASBCA No. 52521 is remanded to the parties for stipulation regarding quantum or, failing that, for further proceedings within 60 days of receipt of this decision.

Dated: 27 September 2004

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 49271, 49532, 51873 and 52521, Appeals of Kearfott Guidance & Navigation Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals