ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
General Dynamics Decision Systems, Inc.	)	ASBCA Nos. 51789, 54978
	)	
Under Contract No. DAAK20-84-C-0879	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
Jones & Donovan
Newport Beach, CA

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
CPT Peter G. Hartman, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES UNDER RULE 11

This dispute first arose from the contracting officer's (CO) defective pricing claim with respect to Aydin Computer Systems Division's (Aydin) subcontract No. C-064 under Modification No. P00031 to the captioned prime contract (contract 879) with Motorola, Inc. (novated to General Dynamics Decision Systems, Inc. (GDDSI) in January 2002). The Board decided entitlement, sustaining the appeal as to the 1986 G&A rate element, and denying it as to the facilities capital charge (FCC) defective pricing element. *Motorola, Inc.*, ASBCA No. 48841, 96-2 BCA ¶ 28,465 at 142,172, *aff'd*, 125 F.3d 1470 (Fed. Cir. 1997) (*Motorola I*).

After remand, the parties failed to agree on the amount of damages that arose from the FCC defective pricing, and the CO's 2 September 1998 final decision demanded $888,995, consisting of an adjustment to the contract price of $452,486 and interest of $436,509. We docketed the appeal therefrom as ASBCA No. 51789. On 15 December 2000 the Board granted partial summary judgment to appellant, holding that any interest for overpayment arising from defective cost or pricing data under contract 879 is to be charged in accordance with the contract's DAR 7-104.39 INTEREST (1983 FEB) clause. *Motorola, Inc.*, ASBCA No. 51789, 01-1 BCA ¶ 31,233 at 154,154 (*Motorola II*).

The Board's October 2002 decision on quantum held that Aydin's inclusion of the FCC cost in its subcontract cost or pricing data entitled respondent "to disallow the $253,295 cost element of contract 879 pursuant to its DAR 7-104.29(a) clause." In addition, "appellant shall pay interest . . . commencing 5 August 1993" on the amount of $253,295. *Motorola, Inc*., ASBCA No. 51789, 02-2 BCA ¶ 32,043 at 158,363, 158,365,

recon. denied, 03-1 BCA ¶ 32,195, *aff'd*, 82 Fed. Appx. 670 (Fed. Cir. 2003) (*Motorola III*).

Appellant's 28 June 2004 letter to the Board stated that the parties had been unable to agree upon the amount of refund payable to the government as a result of the $253,295 disallowance determined in *Motorola III*, and requested reinstatement of ASBCA No. 51789 to determine "finite dollar amounts of 1) final price, 2) progress payments made, 3) refund or additional payment due and 4) interest due in accordance with DAR 7-104.39, if any." The Board reinstated ASBCA No. 51789, but on 2 March 2005 wrote to the parties expressing concern that the record contained no CO's final decision on the "total final price" of the incentive items in accordance with the DAR 7-108.1 INCENTIVE PRICE REVISION (FIRM TARGET) (1980 FEB) clause in contract 879. On 28 March 2005 the CO issued a final decision determining the total cost incurred, firm target cost, total final profit, and total final price for the incentive items in contract 879. On 1 April 2005 appellant took an appeal from that final decision, which it attached to its notice of appeal, and which the Board docketed as *General Dynamics Decision Systems, Inc.*, ASBCA No. 54978. The Board granted the parties' motion to consolidate ASBCA Nos. 51789 and 54978.

Respondent submitted a "STATEMENT OF COSTS" (SOC). Appellant submitted a "RESPONSE TO THE GOVERNMENT'S STATEMENT OF COSTS" (RSOC). The parties agreed to submit these quantum appeals on the record pursuant to Board Rule 11. The record includes the hearing transcript and consolidated Rule 4 file with 141 tabs in *Motorola III*, the Supplemental Rule 4 file with tabs 200-220, the parties' five "STIPULATIONS OF FACT" and their legal briefs. The Board does not repeat the findings of fact in *Motorola I*, *Motorola II*, and *Motorola III*, except as necessary to the decision. We make the following additional findings.

FINDINGS OF FACT

1. The DAR 7-104.29(a), PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN) clause incorporated in contract 879 provided:

> If any price, including profit or fee, negotiated in connection with this contract or any cost reimbursable under this contract was increased by any significant sums because:
>
> . . . .
>
> (ii) a subcontractor, pursuant to the clause of this contract entitled "Subcontractor Cost or Pricing Data" or "Subcontractor Cost or Pricing Data—

> Price Adjustments" or any subcontract clause therein required, furnished cost or pricing data which was not complete, accurate and current as certified in the subcontractor's Certificate of Current Cost or Pricing Data;
>
> . . . .
>
> the price or cost shall be reduced accordingly and the contract shall be modified in writing as may be necessary to reflect such reduction. However, any reduction in the contract price due to defective subcontract data of a prospective subcontractor when the subcontract was not subsequently awarded to such subcontractor, will be limited to the amount (plus applicable overhead and profit markup) by which the actual subcontract, or actual cost to the Contractor if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor, *provided* the actual subcontract price was not affected by defective cost or pricing data.

(R4, tab 1, "BASIC" at 186)

2. The raster display subsystems in contract sub-line items (SLINs) 0001AK through 0001AT added by Modification No. P00031 to contract 879 were fixed-price incentive SLINs (R4, tab 1, Mod. P00031 at ¶¶ 1-2) and were to be provided by Aydin under subcontract No. C-064 (*Motorola I*, findings 2, 11).

3. Motorola delivered all supplies and services under the fixed-price incentive items of contract 879 except for six SLINs. The calculations herein take the deductions relating to those SLINs into account. (SOC at 9-10)

4. Bilateral contract 879 Modification No. P00091, executed 26 June 2001, reduced a proposed interim payment to Motorola by $500,000 for "AYDIN (potential defective pricing)" and stated:

> Note: . . . Upon resolution of the AYDIN defective pricing issue, Motorola will submit a final close out proposal and appropriate adjustments will be made.

(Supp. R4, tab 220 at 2) As of this modification, authorized interim payments to appellant for the fixed price incentive items apparently totaled $94,624,306.

5. On 28 March 2005 the CO issued a final decision, based on Defense Contract Audit Agency (DCAA) calculations, determining the total cost incurred, firm target cost, total final profit, and total final price for the incentive items in contract 879 and demanded payment of $8,309.

6. To the subcontract defective pricing amount of $253,295 found by the Board in *Motorola III*, DCAA added a $95,598.66 mark-up at appellant's final negotiated indirect expense rates for 1987-91 material overhead, G&A and cost of money, resulting in a $348,893.66 adjustment, which DCAA rounded to $348,894 (supp. R4, tab 209 at 3-4).

7. The total target cost of the fixed-price incentive portion of contract 879 (without any reduction or adjustment for defective pricing) is $79,298,030 (stip., ¶ 1).

8. DCAA reduced the $79,298,030 total target cost by the $253,295 amount found by the Board in *Motorola III*, producing an adjusted target cost of $79,044,735 (SOC at 11). Appellant accepts that $79,044,735 adjusted target cost (RSOC at 4).

9. (a) The total cost incurred by the prime contractor for the fixed-price incentive portion of contract 879 (without any reduction or adjustment for defective pricing) is $89,219,907 (stip., ¶ 5; R4, tab 209 at 3). (b) The total cost Motorola incurred for the fixed-price incentive portion of contract 879, as adjusted by the $348,894 DCAA calculated for defective pricing of contract 879, is $88,871,013 ($89,219,907 – $348,894) (SOC at 8).

10. The share ratio for the fixed-price incentive portion of contract 879 is 80/20 (government/contractor) (stip., ¶ 3) when the total negotiated cost is greater than the total target cost, pursuant to contract 879's section I.197, the DAR 7-108.1 INCENTIVE PRICE REVISION (FIRM TARGET) (1980 FEB) clause, ¶ (d)(2).

11. The total target profit for the fixed-price incentive portion of contract 879 (without any reduction or adjustment for defective pricing) is $7,863,225 (stip., ¶ 2).

12. (a) DCAA calculated a $9,826,278 cost overrun on contract 879 ($88,871,013 adjusted total costs incurred - $79,044,735 adjusted target cost) and $1,965,256 as Motorola's 20% share of that $9,826,278 overrun, and an adjusted target profit of $5,897,969 ($7,863,225 - $1,965,256) (supp. R4, tab 209 at 4). (b) Appellant calculates a $10,175,172 cost overrun ($89,219,907 - $79,044,735), derives $2,035,034 as its 20% share of such overrun, and calculates an adjusted target profit of $5,828,191 ($7,863,225 - $2,035,034) (RSOC at 4).

13. (a) DCAA computed a $94,768,982 "total final price" for contract 879's fixed-price incentive portion, by adding the $88,871,013 adjusted total cost incurred (finding 9(b)) to its $5,897,969 adjusted target profit (finding 12(a); supp. R4, tab 209 at 3). (b) Appellant computed a $95,048,098 final price by adding its $89,219,907 total costs incurred (finding 9(a)) and its $5,828,191 adjusted target profit (finding 12(b)) (RSOC at 4).

14. The total of government payments to the prime contractor for the fixed-price incentive portion of contract 879 is $94,777,291 (stip., ¶ 4).[1]

15. Respondent calculates that appellant owes the government the net amount of $8,309 ($94,777,291 paid - $94,768,982 adjusted total final price), plus interest under the DAR Interest clause on the $253,295 amount found by the Board in *Motorola III* from 5 August 1993 (the date of the CO's initial final decision) until such amount is paid in full. Respondent calculates that the interest due on the $253,295 amount was $168,631 as of 15 November 2004 and increasing daily. (SOC at 12-13)

16. Appellant calculates that respondent owes it the $270,807 difference between its $95,048,098 final price (finding 13(b)) and the $94,777,291 amount paid (finding 14), and so no interest is due on any amount, or at most interest under DAR 7-104.39 is due only on the $8,309 respondent calculated (finding 15) (RSOC at 4, 6, 8-9).

17. On the $253,295 principal amount determined under *Motorola III*, appellant accrued $128,828 in interest up to 30 June 2001 (supp. R4, tab 210). Thus, at the 6.375% interest rate for the first half of 2001 applied to the four days from 26 to 30 June 2001, $128,651 in cumulative interest was due up to 26 June 2001, the date of Modification No. P00091 ($128,828 – ($8,007 ÷ 181 x 4)).

PERTINENT STATEMENTS AND HOLDINGS IN *MOTOROLA III*

> Our analysis of the 7.2% [subcontract] G&A rate differential, derived by comparing the reported December 1986 30.3% G&A rate including COF costs with our reconstructed G&A rate of 23.1% excluding COF costs, indicates that subcontract C-064's price was increased by $253,295 (findings 13, 15). Since the defective pricing as of 3 April 1987 did not affect the original price of Modification No. P00031 negotiated on 24 September 1986, we do not

[1] The appeal record does not allow us to reconcile this amount with the interim billing authorized by Modification No. P00091.

> apply prime contract mark-ups to the disallowed cost. See DAR 3-807.10(d)(3) or FAR 15.804-7(f)(2).
>
> We hold that respondent has the right to disallow the $253,295 cost element of contract 879 pursuant to the DAR 7-104.29(a) [PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (1970 JAN)] clause. We express no view on the effect of such disallowance upon the mechanics of determining the "total final price" of contract 879 pursuant to the DAR 7-108.1 [INCENTIVE PRICE REVISION (FIRM TARGET) (1980 FEB)] clause.
>
> . . . .
>
> We hold that appellant shall pay interest, in accordance with the DAR 7-104.39 INTEREST (1983 FEB) clause, commencing 5 August 1993 on the principal amount of the cost disallowance of $253,295.

02-2 BCA at 158,363, 158,365.

> . . . [W]e held [in *Motorola III*] that the Government had the right to disallow the cost of the Aydin subcontract, to the extent of $253,295, for purposes of determining allowable prime contract costs relating to Modification No. P00031. . . .
>
> . . . .
>
> In the relevant context of a fixed-price incentive fee prime contract such as contract 879, the CO's claim for an adjustment of the contract price starts with disallowance or non-recognition of the defective COF subcontract costs. . . .
>
> . . . .
>
> . . . The record contains no evidence that the parties have already established the "total final price" of contract 879 under the DAR 7-108.1 clause. Thus, the Board's holding that "respondent has the right to disallow the $253,295 cost element of contract 879 pursuant to its DAR 7-104.29(a) clause" complied with the DAR 3-807.10(d)(3) provision to disallow or not to recognize defective subcontractor cost or

> pricing data, and with the DAR 7-108.1(j) clause, which requires an adjustment in the "total target cost" of contract 879.

03-1 BCA at 159,124-26.

DECISION

After our decision in *Motorola III*, affirmed by the Federal Circuit in 2003, there remains only one issue to be decided: what is the effect of the $253,296 defective subcontract pricing upon the prime contract's total costs incurred, total final profit and total final price?[2] We also calculate the amount of interest due under *Motorola III* in light of the $500,000 withholding.

I.

Appellant argues that prime contract mark-ups cannot be applied to the $253,295 subcontract defective pricing amount decided in *Motorola III*, and deducted from the total incurred costs under contract 879 by DCAA, because the Board stated: "Since the defective pricing as of 3 April 1987 did not affect the original price of Modification No. P00031 negotiated on 24 September 1986, we do not apply prime contract mark-ups to the disallowed cost." 02-2 BCA at 158,363. Appellant concludes that by the principle of *res judicata*, the Board has already decided that a prime contract mark-up on the disallowed $253,295 cost was not applicable (app. br. at 9-11).

Prime contract mark-ups are only one element of the present claim, so we treat appellant's argument under the principle of "issue preclusion." The elements of proof of issue preclusion were identified in *Thomas v. GSA*, 794 F.2d 661, 664 (Fed. Cir. 1986):

> (1) the issue previously adjudicated is identical with that now presented, (2) the issue was "actually litigated" in the prior case, (3) the determination of that issue was necessary to the earlier judgment, and (4) the party being precluded was fully represented in the prior action.

Motorola III decided the issue of prime contractor mark-ups to the defective $253,295 pricing amount with respect to contract 879's "total target cost." 03-1 BCA at

---

[2] Thus, the Board does not revisit issues of original defective pricing liability, decided in *Motorola I*, or the effect of the defective pricing on target cost or appellant's liability for interest on the $253,395 commencing 5 August 1993 in accordance with the DAR 7-104.39 INTEREST (1983 FEB) clause, decided in *Motorola III*.

159,126. Appellant accepts respondent's reduction of contract 879's $79,298,030 target cost by $253,295 to an adjusted target cost of $79,044,735 without mark-ups pursuant to *Motorola III* (finding 8). The issue of excluding mark-ups in the total target cost is not identical to the issue of adding mark-ups to the total final costs incurred and total final price in the instant appeals. This issue was not litigated and was not necessary to the earlier judgment in *Motorola III*. Because the facts regarding the status of completion, the total costs appellant incurred and the total final price of contract 879 were not in the appeal record of *Motorola III*, this issue could not be litigated or decided therein. *See* 03-1 BCA at 159,126. Indeed, because the CO had not decided such issues, on 28 March 2005 the CO issued a new final decision, appealed in ASBCA No. 54978 (finding 5). Only the fourth element of issue preclusion is present: respondent was fully represented in *Motorola III*. Therefore, issue preclusion does not foreclose deciding the applicability of prime contractor mark-ups to the defective subcontract cost in determining the contract's total final costs incurred and total final price.

DAR 15-102 provided that the "cost principles . . . set forth in Part 2 . . . shall be used in the pricing of negotiated supply . . . contract modifications with commercial organizations whenever cost analysis is to be performed . . . [and] shall be incorporated by reference in such contract as the basis . . . for the price revision of fixed price incentive contracts . . . ." DAR 15-203(c) provided that "[a]ll items properly includable in an indirect cost base should bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs." 32 C.F.R. §§ 15-102, -203(c) (1984). Thus, when the government does not recognize a particular direct cost, it is entitled not to recognize a proportionate share of indirect costs. *See Rice v. Martin Marietta Corp.*, 13 F.3d 1563, 1571 (Fed. Cir. 1993) (DAR 15-203(c) operates to disallow a share of G&A expenses proportionate to unallowable costs). Accordingly, we hold that GDDSI's indirect cost mark-ups should be added to the $253,295 Aydin unallowable subcontract cost in determining contract 879's total final costs incurred and total final price.

II.

Appellant further argues that respondent is limited to a reduction of the total target cost due to the defective pricing of the Aydin subcontract, and cannot reduce the total final cost incurred on contract 879, on three grounds: (1) The CO's 2 September 1998 final decision demanded an adjustment only in contract 879's target price. (2) The "law of the case" is that the $253,295 adjustment found in *Motorola III* required an adjustment "in the total target cost." (3) Respondent is limited to revision of the total target cost by judicial estoppel because it so argued on appeal to the Federal Circuit in August 2003. (App. br. at 11-15) Respondent disagrees with appellant's grounds (gov't br. at 38-40).

Appellant's first ground is immaterial. The CO's 28 March 2005 claim and final decision unilaterally determined the total cost incurred, firm target cost, total final profit,

and total final price of contract 879 (finding 5). That March 2005 claim in conjunction with the 2 September 1998 final decision defines the scope of issues in these appeals.

With respect to appellant's second ground, the Board in *Motorola III* did not expand the effect of its holding of the $253,295 adjustment in the "total target cost" to "the mechanics of determining the 'total final price' of contract 879" due to the limited facts in evidence in *Motorola III*. That holding cannot be the law of the case with respect to the distinct issues of total cost incurred, total final profit, and total final price of contract 879, which were neither presented nor decided in *Motorola III*, and which *Motorola III* expressly declined to reach. 03-1 BCA at 159,126. *See Augustine v. Principi*, 343 F.3d 1334, 1339 (Fed. Cir. 2003) (issue never decided in earlier phase of litigation was not law of the case).

With respect to appellant's third ground, appellant contends that in the appeal of *Motorola III*, respondent's August 2003 brief to the Federal Circuit stated:

> . . . In reviewing the [CO's 2 September 1998] final decision, the Board determined that Motorola was entitled to reduce the target cost of the contract by $253,295, but did not determine the effect of that disallowance upon the target price or the final price.
>
> . . . .
>
> It now becomes apparent that the board's scope of jurisdiction extended to revision of the target cost, the target profit, and target price of the Motorola contract, but did not include revision of the contract ceiling price, the final cost, or the final price. The board acted within its scope of jurisdiction because it determined only that the Government was entitled to revise the target cost by $253,395.

(App. br., Appen. C at 10-11, 14) Respondent's November 2004 SOC (at 6) states: "In its . . . 2002 decision in [*Motorola III*] the Board affirmed the Government's right to reduce Appellant's *actual costs* by $253,295 for defective subcontractor cost or pricing data" (emphasis added). Appellant argues that respondent's SOC position is inconsistent with its 2003 appeal position quoted above, and "is a classic case for application of judicial estoppel," citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) and *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) (app. br. at 13-15).

The Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) did not "establish inflexible prerequisites or an exhaustive formula" to determine the

applicability of judicial estoppel. Instead, it discussed several "considerations" that "may inform the doctrine's application in specific factual contexts." Those considerations include:

> First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," . . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . . and thus poses little threat to judicial integrity. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. . . .

Id., citations omitted.

In *Motorola III*, on the jurisdictional basis of the CO's 2 September 1998 final decision demanding a "contract price" reduction, the Board decided a defective pricing adjustment of the contract's total target cost. Respondent's SOC statement that *Motorola III* "affirmed the Government's right to reduce Appellant's *actual costs* by $253,295" was mistaken insofar as "actual costs" meant "total final costs incurred," since *Motorola III* equated respondent's "right to disallow the $253,295 cost element of contract 879" to respondent's right to adjust the "total target cost" of contract 879. *See* 03-1 BCA at 159,126.

From the foregoing it does not follow, as appellant argues, that respondent is limited *in the present appeals* to revision of the contract target cost, and cannot revise appellant's total final costs incurred, by application of judicial estoppel. The difference in the factual contexts is determinative. Neither respondent's arguments in 2003 to the Federal Circuit in *Motorola III* about the limited scope of the CO's September 1998 final decision, nor its mistaken statement in November 2004 about its right to reduce appellant's *actual costs*, precluded the CO's 28 March 2005 final decision from determining, *inter alia*, the total cost incurred for the incentive items in contract 879 (finding 5), nor do they preclude the Board from deciding the proper adjustment of appellant's total actual costs incurred, as well as the total final profit, and total final price, arising from the defective Aydin subcontract pricing data, for the incentive items in contract 879. Respondent's present litigation position and its previous position in *Motorola III* are not "clearly inconsistent" because they address different CO final

decisions and different defective pricing reductions, the first partial, the second complete. See *Data General, supra* (judicial estoppel inapplicable because issues and factual bases for GSA's two decisions differed).

III.

Appellant argues that respondent is entitled to no interest on the amount of the defective pricing adjustment on contract 879 because it has had the use of $500,000 deducted from a proposed interim payment in Modification No. P00091 for the Aydin potential defective pricing liability, and such amount exceeds the total final price reduction to which respondent is entitled, or at most it will be entitled to interest on the $8,309 net price reduction it has calculated (SOC at 5).

Motorola III held that "appellant shall pay interest, in accordance with the DAR 7-104.39 INTEREST (1983 FEB) clause, commencing 5 August 1993 on the principal amount of the cost disallowance of $253,295." 02-2 BCA at 158,365. On 26 June 2001 by contract Modification No. P00091, $500,000 was withheld from payment to Motorola for "AYDIN (potential defective pricing)" (finding 4). On the $253,295 principal amount due under *Motorola III*, appellant accrued $128,651 in interest by 26 June 2001 (finding 17).

Therefore, on 26 June 2001 the government's withholding of $500,000 was sufficient to cover appellant's $253,295 principal debt and the $128,651 interest thereon, totaling $381,946. *Cf. United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1946) ("The government has the same right that belongs to every creditor to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."). Consequently, appellant is correct to the extent that interest ceased to accrue on the amount of $253,295 as of that date.

Appellant is incorrect to the extent it suggests that, due to the June 2001 $500,000 withholding, the Board's calculations netting out the amounts finally due each party for the incentive items need not consider the interest due on the defective pricing for the period from 5 August 1993 to 26 June 2001. Such a suggestion is a *non-sequitur*. The withholding did not eradicate the accrual of interest before 26 June 2001, because the government did not have the beneficial use of the principal and interest before that date. Rather, the withholding reduced appellant's ultimate liability.

IV.

We tabulate the effects of the $253,295 defective Aydin cost or pricing data on contract 879's final costs incurred, profit and price for the fixed-price incentive items and sub-items, and the net amount due, after allowing for interim payments, as follows:

Item	Amount	Finding
1 Total incurred costs	$ 89,219,907	9(a)
2 Less: subcontract adjustment	(253,295)	6
3 Less: prime mark-ups thereon	(95,599)	6
4 Adjusted total incurred costs	88,871,013	9(b)
5 Adjusted target cost	79,044,735	8
6 Cost overrun	9,826,278	12(a)
7 Target profit	7,863,225	11
8 GDDSI's 20% share of overrun	(1,965,256)	10, 12(a)
9 Final profit	5,897,969	12(a)
10 Final price (items 4 + 9)	94,768,982	13(a)
11 Previous payments to GDDSI	94,777,291	14
12 Overpayment (items 11 – 10)	$ 8,309	15

In addition to the $8,309 overpayment, interest on the defective subcontract pricing must be considered. As of 26 June 2001, the date of Modification No. P00091, $128,651 in interest had accrued (finding 17). Therefore, the total amount which appellant has the duty to pay the government is $136,960 ($8,309 + $128,651), exclusive of any interest due on the $8,309.

Our foregoing calculations are based on the following premises. First, the $500,000 withholding reduced the total amount respondent paid to appellant, but did not adjust the total incurred costs, cost overrun, total final profit, and total final price of contract 879, as expressly stated in Modification No. P00091: "Upon resolution of the AYDIN defective pricing issue, Motorola will submit a final close out proposal and appropriate adjustments will be made" (finding 4). Second, in netting out the amounts finally due each party, one must include the obligation to pay interest on the defective pricing even though an interim payment was reduced to allow for the defective pricing adjustment.

The validity of these premises is confirmed by considering the following scenario. Suppose Modification No. P00091 had made no withholding. There can be no doubt under *Motorola III* that interest would continue to accrue on the $253,295 principal amount of the defective pricing until such amount was repaid.

The monetary effect of the $500,000 withholding, therefore, was to reduce to $136,960 the amount payable to the government by appellant, rather than what would have been a $636,960 amount plus continuing interest on the defective pricing principal amount, if the $500,000 had not been withheld.

Appellant is not being required to pay such interest twice. If one gives appellant credit for paying the $128,651 in interest accrued at the time of the withholding, one must also give the government credit for an additional payment of $128,651, which would have had the effect of reducing the amount of the $500,000 withheld. Neither party actually wrote a check to the other for such amount.

CONCLUSION

We hold that respondent is entitled to payment of the net amount of $136,960, exclusive of any interest due on the $8,309, and deny the appeals to that extent.

Dated: 5 October 2005

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

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. 51789 and 54978, Appeals of General Dynamics Decision Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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