ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
DynCorp	)	ASBCA Nos. 49714, 53098
	)	
Under Contract No. DAKF04-91-C-0072	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals arose from performance of a support services contract at the Army's National Training Center, Ft. Irwin, California ("NTC"). They are back before the Board on remand from the United States Court of Appeals for the Federal Circuit. In *DynCorp*, ASBCA No. 49714, 00-2 BCA ¶ 30,986, *aff'd on recons.*, 00-2 BCA ¶ 31,087 ("*DynCorp I*"),[1] DynCorp had appealed from a contracting officer's decision denying its claim for attorneys' fees and other related costs incurred as the result of government investigative activities into, *inter alia*, allegations of fraud. DynCorp sought recovery under the Major Fraud Act of 1988 ("the Act") and related regulations, which allow for recovery in some circumstances but preclude recovery where there has been a conviction. A DynCorp employee, Larry Marcum, was convicted of unauthorized access to a government computer under 18 U.S.C. § 1030. DynCorp argued that an employee conviction did not bar recovery, advocating an interpretation of the Major Fraud Act as barring recovery only if the company is convicted. We agreed with DynCorp's interpretation and sustained the appeal. We subsequently held that the costs were allocable to the contract in *DynCorp*, ASBCA No. 53098, 01-2 BCA ¶ 31,476 ("*DynCorp II*"). The parties entered into stipulations on costs that led us to issue a

[1] Familiarity with the findings of fact in that decision, which are limited, is presumed.

decision awarding $585,650 plus interest to DynCorp. *DynCorp,* ASBCA No. 53098, May 15, 2002 ("*DynCorp III*")*.*

In *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003) ("*DynCorp IV*"), the Federal Circuit Court reversed *DynCorp I*, and remanded the matter to us for consideration of two issues not resolved in *DynCorp I* – whether the proceedings were separate and, if so, whether they involved the same contractor misconduct. The government requested, and we granted, a hearing. However, as the parties had addressed the single or multiple proceedings question in *DynCorp I*,[2] we considered the evidential record complete on that issue. We limited the hearing to the "same contractor misconduct" issue.

The parties have at times seemed to focus on the merit, or lack of merit, of individual aspects of the government's investigative activities, including the gravity, or lack thereof, of Mr. Marcum's offense, and whether other convictions were or were not warranted. Our task here is not to validate or invalidate the government's inquiries into allegations of fraud, any more than it is to praise or criticize DynCorp. We are here to revisit the question of whether, under the Act and related regulations, the facts as we find them permit or preclude recovery of attorneys' fees and related costs. We must determine whether, in the terms of the Act and implementing regulations, the government conducted more than one investigation at NTC and, if so, whether there was misconduct involved in the other investigation or investigations that was the same as Mr. Marcum's. In this regard, it matters little that Mr. Marcum's conviction was the result of a plea bargain, and that his punishment was probation and a $25 special assessment. What goes to the essence of the case, and has been resolved (*DynCorp IV* at 1346), is that his actions were uncovered during a government investigation of activities under the contract at issue, and he pled guilty to a crime under subparagraph (a)(3) of 18 U.S.C. § 1030, Fraud and related activity in connection with computers. As we interpret the law and the regulations, the facts here lead to the conclusion that there were two investigations. We sustain the appeals in part.

FINDINGS OF FACT

THE CONTRACT AND BACKGROUND TO THE DISPUTE

1. Contract No. DAKF04-91-C-0072, for various base support services at NTC, was awarded to appellant, DynCorp, on 25 September 1991. The contract was a cost-plus-award-fee contract for a base period and four option years. All four options were exercised. The amount of the base period at contract award was $40,475,423.79. The contract contained FAR 52.216-7, ALLOWABLE COST AND PAYMENT (JUL 1991), under which the allowability of costs is to be determined pursuant to Subpart 31.2 of

[2] *See DynCorp I* at 153,932 n.1.

the FAR and the terms of the contract. The contract incorporated by reference FAR 52.233-1, DISPUTES--ALTERNATE I (APR 1984). (R4, vol. 1, tab 1 at 2, B-6, I-2, I-4; tr. 1/172)[3]

2. The contract required DynCorp to provide base operations and maintenance support services as follows:

1. Morale and administrative support services;
2. Installation, supply and transportation services;
3. Engineering and housing services;
4. Combat/tactical vehicle and communication/electronic equipment support services;
5. Medical activity support services;
6. Training support center services;
7. Range and airfield support services;
8. Security services.

(R4, vol. 2, tab 1 at 2.2, 2.6)

3. DynCorp was responsible for having vehicles in "mission capable" status for incoming rotational units (tr. 1/25R). There was controversy as to the contract's interpretation with regard to whether vehicles that were not mission capable could be kept in the issue yard. It was DynCorp's position that vehicles that were mission capable on the first day of a rotational schedule but subsequently were "deadlined" – *i.e.*, identified as not fully mission capable - could be kept in the issue yard. (Tr. 1/26R)

4. Commencing in 1992 and continuing into 1994, the government conducted investigative activities involving functional areas of DynCorp's contract performance at NTC and two of DynCorp's managers. The investigative activities included the death of a soldier (Sgt. Peters), medical activity support services (Biomed), and combat/tactical vehicle and communication/electronic equipment support services (ESD), particularly track vehicles. The managers investigated were Kenneth Gunn and Charles Herring. (JR4, vol. 1A, tab 4 at 3, tab 5 at 1-2, tab 6 at 1-12, tab 7 at 1-2) It is undisputed that the investigative activities involving Herring/Gunn and Sgt. Peters' death did not find misconduct (gov't br. at 113).

[3] Due to the remand, the record in these appeals contains transcripts, Rule 4 (R4) files, Joint Rule 4 (JR4) files and exhibits from the original proceeding, and transcripts and exhibits from the remand proceeding. Unless a reference has an "R" suffix (*e.g.*, tr. 1/100R), it is from the original proceeding.

REGULATIONS AND PROCEDURES – ARMY
CRIMINAL INVESTIGATIVE DIVISION (CID)

5. The CID regulations in effect during the investigative activities at issue describe criminal investigations as extremely specific in intent and limited in purpose. However, the scope of such investigations is to extend to all aspects of the case, and to include related offenses, lesser included offenses, conspiracies and accessories after the fact. Although pursuit of all aspects of a case is not required, investigations are not to be fragmented among multiple agencies unless there is a compelling reason to do so. In this regard, if a second crime (*e.g.*, possession of drugs) is encountered during commission of a principal offense (*e.g.*, robbery), the second crime is to be included as part of the case. A CID investigation may be terminated if the cognizant United States Attorney (USA) declines to prosecute. The regulation prohibits "case splitting," which is manipulation of workload by reporting one incident that encompasses multiple offenses or subjects by listing the offenses or subjects separately. (JR4, vol. 1A, tab 1 at 4-1, 4-11 (1992))[4]

6. A report of investigation (ROI) is the fundamental method of providing results to commanders and others for information and action, as well as providing the means for long-term maintenance of investigative data. ROIs are to contain all relevant information unless there is specific authority to withhold certain information. (JR4, vol. 1A, tab 1 at 7-1 (1990)) ROIs are to be initiated and an initial report transmitted when, after a preliminary inquiry, no information indicates that the allegations are not credible or are beyond the authority of CID (*id.* at 4-2 (1992)). Once a criminal investigation is initiated, an ROI number must be assigned and, once assigned, cannot be used again (*id.* at 4-4, 6-2 (1992)). Using the ROI number for the vehicle probe – 0061-93-CID146-86393-5M3A (JR4, vol. 1B, tab 7 at 1) – the numbering system is as follows: the last block, 5M3A, is the offense code; 86393 is the ROI number; CID146 is the identifier for Fort Irwin; 93 is the year (1993); and 0061 identifies the sequence, meaning that the underlying criminal complaint was the 61st criminal complaint in 1993 (*id.* at 6-1, 6-2; tr. 1/101-02). The offense code 5M3A is "[f]alse official statements not submitted to a finance, personnel, commissary, procurement, AAFES, property disposal activity or non-appropriated fund instrumentality" (JR4, vol. 1A, tab 1 at A-6). An ROI is to be dispatched by close of business of the third working day following the determination that a credible basis exists that an offense within CID authority has been committed (JR4, vol.

[4] The parties have placed in the record as Joint Rule 4, tab 1, several versions of CID Regulation 195-1. The versions range from 1986 to 1994. The record citations include a year, indicating versions or revisions and represent our best efforts to assure that we have relied on the versions or revisions in effect during the time relevant to the dispute. The 1 April 1992 version is, on its face, the most appropriate version. Our efforts to verify the appropriateness and applicability of each citation include, in every instance, comparison of any prior and/or subsequent versions.

1A, tab 1 at 7-6 (1989)). CID regulation requires that fraud not subject to the Uniform Code of Military Justice (UCMJ) be referred to the FBI (*id.* at 4-8 (1992)). Because DynCorp and its employees were civilian, not military, CID had to release credible information developed at NTC to the FBI (tr. 2/99).

7. CID may transfer primary investigative responsibility to another agency. CID will discontinue its investigation except when CID is requested to support the other agency or ordered to continue efforts by a higher authority. CID may undertake a joint investigation when the Army and another agency both have interests and a decision is made to conduct a single, coordinated effort. If the other agency is the FBI, it will normally take the lead. (JR4, tab 1 at 4-6, 4-7, 4-8 (1992))

FEDERAL BUREAU OF INVESTIGATION PROCEDURES

8. The FBI investigates crimes under Title 18 of the United States Code, not the UCMJ (tr. 3/17). FBI investigations end, *inter alia*, when an Assistant USA (AUSA) declines prosecution (tr. 3/34). Form 302 is used by the FBI to record the results of interviews, generally for the benefit of the USA (tr. 2/133R).

INVESTIGATIVE ACTIVITIES AT NTC

9. Investigation of Sgt. Peters' death began with the interviewing of witnesses in July 1992 (JR4, vol. 1A, tab 6 at 2). Other investigative activities were begun by CID in October 1992 (JR4, vol. 1A, tab 5 at 2; ex. G-20R at Bates/000388; tr. 1/261R). CID agent Schnayerson was in charge of the Fort Irwin office of CID at the beginning (tr. 2/95). Early in his tenure, the operations officer at NTC informed him that his office was failing in its work. He was told to bring together an economic crimes team and a program. He and CID agent Mullins put together an economic crimes program, which involved registered and confidential sources "that would walk in, give us information or expert information, to help us out and to monitor what's going on in the community." (Tr. 2/96) As a result of the registered source program, CID began recruiting individuals within DynCorp as part of the program. A registered source came forward with information about falsification of documents and investigation of DynCorp began in or about September 1992. Approximately 55 sources voluntarily provided information. (Tr. 2/97-99) CID management from Ft. Lewis and the Inspector General's office from CID command came to NTC to observe the undertaking. A Chief Warrant Officer 2, Jesse Lewis, was sent to NTC from Alaska to take-over the day-to-day operations of CID investigative activities. (Ex. A-17 at 16, 23) CID agents conduct inquiries to determine if raw information is credible. Often "investigation" or "investigations" is used interchangeably with "inquiry." (*Id.* at 60)

10. Some documents were seized from DynCorp in late October 1992 (tr. 1/204-05). Because of the seizure, counsel from DynCorp's corporate headquarters,

Cheralyn Cameron, traveled to NTC with regard to the allegations of vehicle records falsification (tr. 1/205-06). This is the earliest meeting between DynCorp corporate management and CID or FBI disclosed in the record, and we find it was the first such meeting. During the meeting with CID at NTC, Ms. Cameron was told by CID agent Schnayerson that she could not represent Mr. Herring in the credit card probe and represent DynCorp. Mr. Schnayerson gave Ms. Cameron some information about the allegations against Mr. Herring. Thus, DynCorp was informed of the Herring/Gunn and vehicle inquiries. (Tr. 1/206-08) Thereafter, a number of other areas under the NTC/DynCorp contract were investigated (tr. 1/209-10). Ms. Cameron testified "It seemed like every day there was something new" (tr. 1/208). The Marcum probe began in January 1993 and became known to DynCorp shortly thereafter (FBI report dtd. 5/21/93 at 46). It was the position of DynCorp's general counsel's office that there were multiple investigations (tr. 1/211).

11. Between 6 November 1992 and 9 December 1992 a five percent audit was conducted by an Army employee from Internal Review and two Army sergeants with maintenance expertise. The review indicated records falsification. (Ex. G-20R at Bates/000001; tr. 1/262-66R) Thereafter, there were meetings involving CID, the FBI, and AUSAs wherein it was determined to engage the Army Audit Agency, which conducted a review at NTC from March 1993 to March 1994 and included maintenance records for vehicles and Biomed (JR4, vol. 1A, tab 3; ex. G-20R at Bates/000001; tr. 1/266R). CID referred the matter to the FBI in January 1993 as CID did not have access to the AUSA (tr. 3/10-11, 31, 2/132-33R). The FBI took the lead thereafter, with it and CID continuing investigative activities under control of the United States Attorney's Office (tr. 3/17). The majority of interviewing was done by CID (JR4, vol. 1A, tabs 4-7; FBI reports *passim*). Robert Ladd was the FBI special agent assigned to the task (tr. 3/11). He was able to work on DynCorp only two days a week due to other workload (tr. 3/30). He testified, and we find, the FBI and CID jointly investigated the allegations of misconduct raised at NTC (tr. 3/16-17). He opened one case file and funneled everything involving investigative activities at NTC, including ROIs from CID, into that single file, which was no. 206B-LA-151389 (JR4, vol. 3 *passim*; tr. 3/13-14, 21). In this record, the earliest interview he conducted was in March 1993 when he interviewed Sheila Lile in conjunction with Mr. Marcum's misconduct (ex. G-20R at Bates/000223). SA Ladd prepared five Prosecutive Reports that were provided to the AUSA, Santa Ana, California, and to the CID at NTC, all under the same file number (FBI reports dtd. 5/21/93, 6/29/93, 8/25/93, 1/11/94, 5/4/94, cover pages). He considered all FBI investigative activities at NTC to be part of one investigation (tr. 3/22-23). In this regard, there are memoranda by SA Ladd, Forms 302 and virtually all reports of CID interviews, *inter alia*, throughout the five FBI Prosecutive Reports that address all investigative subjects for which DynCorp seeks attorneys' fees and expenses in these appeals (FBI reports dtd. 5/21/93, 6/29/93, 8/25/93, 1/11/94, 5/4/93 *passim*). Of the four principal areas, specific examples are the Romero interview from the death of Sgt. Peters (FBI report dtd. 6/29/93 at 553-57), the Gunn interview from the Herring/Gunn matter

(FBI report dtd. 8/25/93 at 744-45), the Frongillo interviews from the vehicle maintenance matter (*e.g.*, FBI report dtd. 5/21/93 at 245-55), and the Lile interview from the Marcum matter (*id.* at 303-06).

12. SA Ladd's memorandum in the initial Prosecutive Report of 21 May 1993 includes the following:

> Beginning October, 1992 Special Agents (SA) of the U.S. Army CID, Fort Irwin, California, began investigating a series of allegations that fraudulent activities were being done by personnel of DYNCORP, INCORPORATED, Fort Irwin Division, Fort Irwin, California regarding most activities of their base operations contract for the U.S. Army. On 1/25/93, a preliminary briefing and referral of the CID investigation was made to the FEDERAL BUREAU OF INVESTIGATION (FBI) at Victorville, California with a request for involvement of the United States Attorney regarding criminal fraud violations of federal law. On 2/1/93, a further briefing was conducted for the benefit of supervisory Assistant U.S. Attorney PAUL L. SEAVE, resulting in a joint effort investigation involving the FBI as lead agency with CID and auditors of the U.S. Army audit agency all coordinated by the United States Attorney. Focus of the investigation was established as health and safety issue violations to be followed by inquiries regarding alleged ghost employees; target of the investigation was established as DYNCORP, INCORPORATED, Fort Irwin Division and practices of their personnel. Health and safety issues were first defined as fraudulent activities concerning the DYNCORP Bio-med Department, involving maintenance and repair of hospital medical equipment; and fraudulent DYNCORP claims for payment regarding maintenance and repair of military wheeled and tracked vehicles. The specific allegations regarding vehicles is that most of the work is done not by DYNCORP civilian mechanics but in fact is done by visiting soldiers.
>
> . . . .
>
> Investigation to date has developed allegations of wide spread fraudulent activities on the part of DYNCORP employees including environmental crimes relating to the sewer plant, land fill, drinking water and illegal hidden toxic

> waste dump in the desert; fraudulent activities in the Bio-med Department (hospital), fraudulent activities in the vehicle maintenance departments; fraudulent issue of the current base services contract to DYNCORP as they were apparently not eligible to receive the contract in 1991; a one billion dollar of misappropriation of Gulf War money; a forty million dollar waste and abuse case regarding spare parts for an obsolete U.S. Army battle tank; mismanagement of military inventory systems with no records of inventories on hand; double billing or billing for work not done regarding all real property on Fort Irwin; ghost employees on the payroll; and numerous other matters of alleged illegality.
>
> The environmental crimes have been turned over to California EPA for handling. A representative of the Defense Criminal Investigative Service has joined the investigation. Subjects [two DynCorp managers] were designated by U.S. Attorneys SEAVE AND ARTSON during a meeting on 5/11/93.

(FBI report dtd. 5/21/93 at B-1-B-3) Of the litany of matters investigated, only four are at issue here. The subjects, which also included DynCorp, remained the same throughout (FBI reports; tr. 3/16). Thus, SA Ladd treated the CID's and FBI's efforts at NTC as one continuous investigation in which a variety of people and subject matters were investigated as additional information was developed. Ultimately, the AUSA declined to prosecute except in the case of Mr. Marcum (tr. 3/18-19). However, SA Ladd could not remember doing anything in the Sgt. Peters and Herring/Gunn probes (tr. 3/20, 31-32).

The Death of Sgt. Peters

13. On 16 July 1992 Sgt. James R. Peters was a passenger in an M578, Track Recovery Vehicle, no. 4109, when the vehicle became engulfed in flames. He jumped from the vehicle while it was still moving and died from his injuries on 21 July 1992. Commencing on or about 22 July 1992, various activities, ranging from an autopsy to interviews, to convening an Accident Investigation Board, were conducted by Army personnel and others, including CID agents Mullins and Collins and SA Ladd. The Final/Joint Report prepared by CID lists CID agents Collins and Mullins in the heading "INVESTIGATED BY." The matter was assigned ROI No. 0235-92-CID146-62590-5H8/9T1. Various "Agent's Investigation Reports" contain the following statement or equivalent: "STATUS: This interview was documented in narrative format at the request of the FBI for use in the prosecution packet being forwarded to the Assistant United States Attorney's Office, Santa Ana, CA." (JR4, vol. 1A, tab 6 *passim*) The 5H8/9T1 code identified the offense as "Accidental Death (other than

traffic)" during a field training activity (R4, vol. 1A, tab 1 at A-7, A-46, -47). An 11 September 1992 interview by CID agent Mullins with Gregory B. Bourgeois, Director, NTC Safety Office, reported no signs of criminality or neglect. Mr. Bourgeois stated the fire was caused by a short circuit which "could have happened anywhere at any time." (R4, vol. 1A, tab 6) An Accident Investigation Board was convened and on or about 9 March 1993 issued a report that "reflected the vehicle was in suitable condition for the mission . . . [and] further reflected that after a thorough analysis of the M578's historical maintenance records there were no deficiencies with the operational capabilities of the vehicle" (*id.* at 8). However, CID agent Mullins coordinated with SA Ladd on 26 March 1993, who "related he would incorporate this investigation with other on-going investigations regarding allegations of non-compliance with [the contract at issue]" (*id.* at 9). On 19 July 1993, SA Ladd, Mullins and another investigator discussed the matter with supervisory AUSA (SAUSA) Paul Seave and AUSA Elana Artson. SAUSA Seave stated that, although they were interested in the direction of the investigation, the death of Sgt. Peters appeared accidental. On 9 August 1993, AUSA Artson "related she and SAUSA SEAVES [sic] were requesting this investigation remain open due to the probable connection with other Joint [sic] CID, FBI and AUSA investigations concerning the falsifications of service records by DynCorp . . ." (*id.* at 10). The conclusion of the 5 October 1993 Final/Joint Report was that Sgt. Peters' death was accidental (JR4, vol. 1A, tab 6 at 8). The government concedes there was no misconduct found (gov't br. at 113).

14. On or before 22 July 1992 a number of documents were received by CID. These included the contemporaneous maintenance records from the vehicle used by Sgt. Peters, one of which was a 6 July 1992 DA 2404 signed by Sgt. Peters and noting no deficiencies. There is an undated, unsigned statement from Sgt. Phillip L. Spencer to the effect that an M578 he inspected shortly before Sgt. Peters' death was not mission capable.[5] Sgt. Spencer did not give a vehicle number, while noting that a DynCorp employee told him the vehicle was to be turned in for rebuilding. (JR4, vol. 1A, tab 6 at 7, exs. 11, 12) Sgt. Spencer was subsequently interviewed on 2 March 1993 and expanded on his earlier statement. The March 1993 interview records that "Zeke" of DynCorp, whom we find was Zeke Romero, told him that the vehicle was to be overhauled but the work could not be done at Fort Irwin. Sgt. Spencer further explained that he determined the vehicle was unsafe. However, when he returned several hours later Army personnel were repairing the vehicle. One of the soldiers told him that he, too, considered the vehicle unsafe but he was ordered by his commander to repair it and use it. The interview is included in the FBI reports. (FBI report dtd. 8/25/93 at 853) Technical inspection forms from the period of Sgt. Peters' death were seized in March and April 1993 (JR4, vol. 1A, tab 6 at 9).

15. SA Ladd testified that "it might be construed that the lack of maintenance caused the death of a soldier" (tr. 3/20). In this regard, during the course of investigative

[5] The list of exhibits shows the date as 22 July 1992 (JR4, tab 6 at 11).

activities SA Ladd and CID agent Mullins interviewed Ezequiel "Zeke" Romero on 16 April 1993. Mr. Romero stated that he believed the paperwork on vehicle no. 4109 was inaccurate. Semi-annual maintenance on no. 4109 was shown as performed on 22 June 1992 along with five other units. However, the maintenance record for vehicle no. 4109 shows his signature date as 17 June 1992. Mr. Romero stated that he could not have done semi-annual maintenance on six vehicles in one day. The interview shows both the CID ROI number and the FBI file number (206B-LA-151389). (JR4, vol. 1A, tab 6, ex. 5) In a subsequent interview Mr. Romero stated that any vehicles he placed in the issue yard were "always in good shape." That interview was conducted on 19 April 1993 by CID agents Mullins and Schnayerson and documented in a Summary of Action dated 19 April 1993 which includes the statement "STATUS: This interview was documented in narrative format at the request of the FBI for use in the prosecution packet being forwarded to the Assistant United States Attorney's Office, Santa Ana, CA." (*Id.*, ex. 6). The Romero interviews, which bear the Sgt. Peters ROI number, are also cited in the text of the vehicle maintenance ROI (JR4, tab 7 at 26).[6] CID also interviewed Romualdo Mortel, a former company commander, on 26 May 1993. Mr. Mortel did not present information about vehicle no. 4109. (*Id.*, ex. 8) The Romero and Mortel interviews are listed, with those of three other witnesses, in the "SIGNIFICANT INTERVIEW(S)" section of the CID Final/Joint Report (JR4, vol. 1A, tab 6 at 3-6). Those interviews were included in the FBI prosecutive report of 29 June 1993, which was provided to the AUSA (FBI report dtd. 6/29/93 at 531-32, 553-57).

Herring/Gunn – Use of Credit Cards

16. Kenneth C. Gunn and Charles L. Herring were investigated on the allegation that they submitted false claims and made false official statements. The basis for investigating Mr. Herring and Mr. Gunn was a 14 October 1992 report by a CID source that provided information pertaining to fraudulent use of U.S. government credit cards. CID agents Mullins, Collins, Harris and Schnayerson conducted numerous interviews. The Final/Joint Report prepared by CID lists CID agents Collins and Mullins in the heading "INVESTIGATED BY." The matter was assigned ROI No. 0030-93-CID146-86389-7F2D1/5M3E4/5M4E3. Various "Agent's Investigation

[6] Mr. Mullins answered "yes" when asked, in conjunction with the short circuit in vehicle no. 4109, "were you able to determine whether or not if the service that Zeke Romero was supposed to have conducted that he didn't conduct, would that have caught those problems?" (tr. 2/120R). We are not persuaded by the foregoing testimony, which contradicts, *inter alia*, the report of the Director, NTC Safety Office (finding 13). Moreoever, Mr. Mullins' testimony on the incident was premised on leaking hydraulic fluid catching fire from the short circuit (tr. 2/119-20R). This contradicts the Accident Board report, which found the hydraulic systems were operating normally at the time of the accident (JR4, tab 6, ex. 15 at 3.b.(7); tr. 2/72R).

Report[s]" contain the statement "STATUS: This interview was documented in narrative format via the request of the FBI for use in the prosecution packet being forwarded to the Assistant United States Attorney's Office, Santa Ana, CA." (JR4, vol. 1A, tab 5 *passim*) SA Ladd conducted at least one interview during investigative activities into the conduct of Mr. Herring and Mr. Gunn when, on 3 June 1993, he and CID agent Harris interviewed Mr. Gunn. The memorandum of the interview, prepared by Mr. Harris, is stamped with CID ROI 0030-93-CID146-86389. (*Id.*, ex. 1) That interview, regarding fuel costs and credit cards, is included in the FBI Prosecutive Report of 25 August 1993 and contains the above "STATUS" statement (FBI report dtd. 8/25/93 at E-37, 744-45). SA Ladd testified in 1999 that he had nothing to do with Herring/Gunn "to my memory, anyway" (tr. 3/31-32), an obvious conflict with the documentary record. We find the documentary record more persuasive than SA Ladd's testimony.

17. On 10 February 1993 the CID discussed the matter with SAUSA Seave who stated that his office would assume the Herring/Gunn matter for prosecutive purposes if the amount of false billings exceeded $200,000. On 16 June 1993 a further meeting between the AUSA and CID was held, in which the AUSA stated he would consider prosecution if the amount at issue exceeded $10,000. On 13 October 1993 the AUSA declined to prosecute. (JR4, vol. 1A, tab 5 at 8)

18. The FBI report of 25 August 1993 prepared by SA Ladd also included a 16 November 1992 affidavit from Roxanne LaSalle prepared in addressing the Herring/Gunn fraud allegations (FBI report dtd. at 784-87). The final CID report dated 26 October 1993 found there was no evidence to prove that false claims had been submitted. The allegation of misconduct was determined to be unfounded, as the government concedes. (JR4, vol. 1A, tab 5; gov't br. at 113)

Falsification of Records on Vehicle Maintenance and Repair

19. DynCorp's operations were investigated regarding allegations of records falsification at its ESD, and particularly with respect to track vehicles. CID commenced investigative activities on 28 October 1992 when an unnamed source was interviewed. The source ("Source No. 1") stated that scheduled vehicle services were not being completed by DynCorp mechanics and that records were being falsified with the knowledge of supervisors. (JR4, tab 7 at 1-5) On 29 October 1992 a statement was given by Melvin Cast, a DynCorp employee. Mr. Cast stated that he had witnessed DynCorp supervisors telling section supervisors to document quarterly inspections that they knew would not be completed. He further stated that he had personally falsified documents at the direction of a supervisor. (Ex. G-20R at Bates/000388-91) Ten additional unnamed sources were interviewed thereafter and provided similar allegations. The Final/Joint Report prepared by CID lists CID agent Mullins in the heading "INVESTIGATED BY." The matter was assigned ROI number 0061-93-CID146-

86393-5M3A. (JR4, vol. 1A, tab 7 at 1-13). Investigation reports regarding vehicle maintenance include the "STATUS" statement or equivalent (R4, tab 7 *passim*).

20. Numerous interviews[7] were conducted and documents examined in conjunction with allegations as to false reporting of track vehicle repair and maintenance by DynCorp employees (JR4, vol. 1A, tab 7; FBI reports, *passim*). In a report dated 21 May 1993, SA Ladd listed as part of the investigation fraudulent activities in the Biomed and vehicle maintenance departments (5/21/93 FBI report at B-2). The term "pencil whipping" was used by DynCorp employees in ESD to describe a practice that resulted in inaccurate maintenance records (tr. 3/20). In the 21 May 1993 FBI report, the term is defined as follows:

> 9.2 PENCIL WHIPPING: The falsification of DynCorp's maintenance documents to show DynCorp maintenance personnel conducting maintenance which was never completed, or was completed by Rotational Units.[8]

(FBI report dtd. 5/21/93 at 19)

21. SA Ladd forwarded the Romero interview to the AUSA and CID in the 25 August 1993 report specifically to support the case for falsification of vehicle records (8/25/93 FBI report at page with asterisk).

22. Testimony was received from Steven Amlotte, who was an employee of DynCorp working in the ESD at NTC under the contract at issue (tr. 1/140R). During his tenure at NTC, Mr. Amlotte was asked by a supervisor to sign a report for work he had not performed. He refused, but another employee did sign off for work which that employee had not done. (Tr. 1/149-51R) Mr. Amlotte brought his concerns about this to DynCorp management at NTC but he observed no action being taken by management (tr. 1/153-57R; ex. G-20R). Mr. Amlotte was interviewed on 18 December 1992 by CID about vehicle records falsification at NTC, and again on 13 March 1993, 8 January 1994, 25 January 1994 and 27 January 1994 (ex. G-20R at Bates/000173-210). Mr. Amlotte's 18 December 1992 interview was included in the 21 May 1993 FBI report. In a 20 May 1994 letter to SA Ladd, the AUSA formally declined prosecution (JR4, vol. 1B, tab 7, last two pages).

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[7] SA Ladd estimated that more than 100 people were contacted in investigating various matters (tr. 3/13). The five FBI reports show in excess of 200 witnesses, the lion's share of whom were interviewed in conjunction with the allegations of false reporting of vehicle maintenance and repair (FBI reports dtd. 5/21/93, 6/29/93, 8/25,93, 1/11/94, 5/4/94).

[8] Rotational units were military units coming to NTC for two weeks' training (tr. 1/272R).

Larry Marcum

23. Under the terms of the contract DynCorp personnel were to perform calibrations, safety checks, preventive maintenance, and scheduled and unscheduled maintenance on biomedical and dental equipment (R4, vol. 2, tab 1 at §§ C.5.2.12 to C.5.2.25.6). On 4 January 1993 an unnamed source was interviewed by CID agent Mullins. The source told Mr. Mullins that Larry Marcum, DynCorp's BioMedical Maintenance Branch manager at NTC, had recorded performance of scheduled and unscheduled maintenance which had not been performed. In a second interview on 15 July 1993, the source stated Mr. Marcum's motivation for falsifying records was to ensure his bonus. Four other unnamed interviewees also gave statements confirming falsification of records. The matter was assigned ROI number 0025-93-CID146-36388-5M3A/5M4A/7F1A2/7F2D1/8P3/8P5. (JR4, vol. 1A, tab 4 at 1-4) Mr. Frongillo, who gave interviews on a number of investigative subjects, also provided information on Biomed in several interviews which also included information about vehicle maintenance (FBI report dtd. 5/21/93 at 180, 186, 188).

24. On 9 March 1993 SA Ladd interviewed Sheila Lile, who had been employed by DynCorp at NTC between 11 March 1991 and 13 August 1992. Ms. Lile informed SA Ladd that Mr. Marcum had asked her to document on the computer performance of preventive maintenance or technical inspections that had not actually been performed. She refused but she believed Marcum had made the false reports himself. (Ex. G-20R at Bates/000223-226; FBI report dtd. 5/21/93 at 303-06) Other interviewees provided similar information and CID reports contained the "STATUS" statement (*see, e.g.,* finding 13) (JR4, vol. 1A, tab 4; FBI reports *passim*). On 20 October 1993 the AUSA decided to prosecute Mr. Marcum but declined to prosecute DynCorp (JR4, vol. 1A, tab 4 at 14).

25. In early 1994 Mr. Marcum entered into a plea agreement[9] in which he pled guilty to unauthorized access to a government computer in violation of 18 U.S.C. § 1030(a)(3). The accompanying STATEMENT OF FACTS, dated 25 January 1994, provides as follows:

> From 1986 to the present, DynCorp has held contracts with the United States Army pursuant to which DynCorp is required to perform a variety of services at Ft. Irwin, California. A portion of these contracts relates to biomedical equipment maintenance. As branch manager of DynCorp's

[9] The dissent focuses on the use of the singular, "investigation," in the plea agreement. The majority believes this emphasis could result in pretextual use of the singular or plural in the plea agreement to affect the resolution of a claim under the Act.

Biomedical Maintenance Branch at Ft. Irwin, California, Larry Marcum was the supervisor of the unit responsible for performing the biomedical equipment maintenance portion of the contracts.

According to the contracts, DynCorp is responsible for performing scheduled maintenance (preventive maintenance, safety tests and calibrations) on Army biomedical equipment. The contracts further obligate DynCorp to maintain the maintenance module of a United States Army Health Services Command computer system known as the Army Medical Department Property Accounting System (AMEDDPAS). The maintenance module tracks maintenance history and is used for the management of maintenance activity. The AMEDDPAS system is used by Army hospitals throughout the United States.

On a monthly basis, the AMEDDPAS computer generates a list of scheduled maintenance workorders to be performed by DynCorp during the upcoming calendar month. In order to close out a workorder, the AMEDDPAS system requires certain information to be input into the computer, such as the technician who performed the service and the time expended to perform the service.

The AMEDDPAS system contains estimated hours which represent the average time among all work centers using the AMEDDPAS system for performing a particular scheduled service. The AMEDDPAS system automatically updates the estimated hours annually based upon information input by all work centers. The estimated hours are used for work load control, including analyzing manpower requirements and directing resources toward the accomplishment of maintenance operations.

Beginning in or about 1991 and continuing to in or about January 1993, Larry Marcum directed the biomedical maintenance technicians in DynCorp's Ft. Irwin division not to record their actual hours expended on each scheduled work order, but rather to substitute the estimated hours. Marcum then input the estimated hours into the AMEDDPAS system, or directed a DynCorp biomedical maintenance technician or

> clerk to input the estimated hours, knowing that entering the estimated hours exceeded Marcum's authorized access.

(Ex. G-20R at Marcum Plea) Mr. Marcum received one year of probation and a $25 special assessment as punishment (tr. 3/40-41; ex. A-17, tab 27).

THE CLAIM AND CONTRACTING OFFICER'S DECISION

26. By letter dated 23 January 1996, received by the government on 24 January 1996, DynCorp filed a certified claim in the amount of $755,929.05 plus interest. The letter was signed by Charles Hendershot, Vice President and Controller (R4, tab 32). The claim was for "legal costs incurred in connection with the Company's defense and the defense of its employees in responding to a Government investigation" (*id.* at 1). The claim did not include the costs of defending Mr. Marcum (R4, tab 34, ¶ 10). By letter of 1 February 1996, received by the government on 7 February 1996, a claim letter in the same amount was sent, this time with Mr. Hendershot's title set forth as "Vice President and Controller[,] Federal Sector" (R4, tab 33). The claim was denied in a contracting officer's decision dated 29 March 1996 (R4, tab 36). An appeal was taken by letter of 2 April 1996, received by the Board on 8 April 1996 (R4, tab 37).

APPELLANT'S EXPERT

27. Appellant presented the testimony of Clarence E. Martin, a retired CID investigator and president of C. E. Martin & Associates. Mr. Martin served as a CID agent for 21 years. (Tr. 1/72) He served as a special agent and in a number of supervisory positions while on active duty with the U.S. Army (tr. 1/73-84). He has, however, no training in contract matters (tr. 1/142). The Board inquired as to whether the government objected to acceptance of Mr. Martin as an expert in CID and federal techniques, processes, procedures and administration. The government did not object and he was accepted. (Tr. 1/87) In Mr. Martin's opinion there were multiple investigations jointly conducted by CID and the FBI (tr. 1/90-91).

28. Mr. Martin reviewed various documents in reaching his conclusion, most notably the relevant CID regulations (JR4, vol. 1A, tab 1), CID ROIs (*id.*, tabs 4-7), and FBI reports (JR4, vols. II-IV) (tr. 1/89-90, 93-116, 129-41). He offered the following summary of his conclusions:

> . . . There were multiple reports of investigation numbers assigned to those cases. There were dates initiated and closed for different subject matter, the subject of each investigation was different, the presentations prepared by the case agents to the appropriate United States Attorney or Staff Judge Advocate were different, statements made within those

> case files by CID and FBI referred to multiple investigations, varied investigations, and the scope of each of those investigations was different, meaning the direction, the path that the investigation took was different.

(Tr. 1/91-92)

29. Mr. Martin pointed out that CID investigations are, by regulation, to be specific in intent and scope. According to Mr. Martin it follows that, if there had been one investigation, there would not have been multiple ROI numbers. (Tr. 1/99) Mr. Martin's testimony demonstrated no expertise in FBI investigative practices and procedures. He offered no testimony as to his familiarity with the Act.

30. The parties have stipulated as follows with respect to damages:

STIPULATION

> On June 8, 2005, the Board requested that the parties provide an allocation by investigation of the $585,644 in stipulated damages in Appeal Nos. 49714 and 53098. The parties (having discussed the matter extensively) agree and stipulate that the following represents a reasonable allocation of the stipulated damages by investigation:
>
> | | |
> |---|---|
> | Tracked Vehicle/ESD | $329,132.75 (approximately 56.2 percent) |
> | Herring Gunn | $75,606.36 (approximately 12.9 percent) |
> | Sergeant Peters | $43,922.85 (approximately 7.5 percent) |
> | Biomedical | $136,982.04 (approximately 23.4 percent)* |
>
> *relates to efforts by Crowell & Moring on behalf of DynCorp only in connection with the biomedical investigation – all legal fees for Mr. Marcum's representation by Shepard, Mullins, Richter & Hampton were excluded by DynCorp prior to claim submission.
>
> The foregoing stipulated amounts do not include CDA interest, which commenced on 23 January 1996 and shall apply to the amounts, if any, awarded by the Board to DynCorp.

(Bd. corr. file, vol. 2) These amounts reflect the 80% limitation imposed by the statute and regulations (Bd. corr. file, vol. 1, gov't stipulation dated 6 May 2002).

RELEVANT STATUTES AND REGULATIONS[10]

STATUTES

10 U.S.C § 2324. Allowable costs under defense contracts

. . . .

(k) Proceeding costs not allowable.—(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

(2) A disposition referred to in paragraph (1)(B) is any of the following:

(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

(D) A final decision—
(i) to debar or suspend the contractor;
(ii) to rescind or void the contract; or
(iii) to terminate the contract for default; by reason of the violation or failure referred to in paragraph (1).

[10] Relevant CID regulations are under protective order and are not reproduced verbatim here. They are, however, referred to in the findings.

(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency or Secretary of the military department concerned that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head or Secretary determines, in accordance with the Federal Acquisition Regulation, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency or military department.

(5) (A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

(B) (i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.

(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles

governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

(6) In this subsection:

(A) The term "proceeding" includes an investigation.

(B) The term "costs", with respect to a proceeding--

(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

(ii) includes—

(I) administrative and clerical expenses;

(II) the cost of legal services, including legal services performed by an employee of the contractor;

(III) the cost of the services of accountants and consultants retained by the contractor; and

(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.

18 U.S.C. § 1030. Fraud and related activity in connection with computers

(a) Whoever –

. . . .

(3) intentionally, without authorization to access any nonpublic computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for

such use, is used by or for the Government of the United States and such conduct affects that use by or for the Government of the United States.

REGULATION

FAR 31.205-47 (1991), Costs related to legal and other proceedings.

(a) *Definitions.* As used in this subpart –

"Costs" include, but are not limited to, administrative and clerical expenses; the costs of legal services, whether performed by in-house or private counsel; the costs of the services of accountants, consultants, or others retained by the contractor to assist it; costs of employees, officers, and directors; and any similar costs incurred before, during, and after commencement of a judicial or administrative proceeding which bears a direct relationship to the proceedings.

"Fraud," as used in this subsection, means –

(1) Acts of fraud or corruption or attempts to defraud the Government or to corrupt its agents; (2) Acts which constitute a cause for debarment or suspension under 9.406-2(a) and 9.407-2(a); and (3) Acts which violate the False Claims Act, 31 U.S.C., sections 3729-3731, or the Anti-Kickback Act, 41 U.S.C., sections 51 and 54.

"Penalty," does not include restitution, reimbursement, or compensatory damages.

"Proceeding," includes an investigation.

(b) Costs incurred in connection with any proceeding brought by a Federal, State, local, or foreign government for violation of, or a failure to comply with, law or regulation by the contractor (including its agents or employees), or costs incurred in connection with any proceeding brought by a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is —

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor liability where the proceeding involves an allegation of fraud or similar misconduct or imposition of a monetary penalty where the proceeding does not involve an allegation of fraud or similar misconduct;

(3) A final decision by an appropriate official of an executive agency to —

(i) Debar or suspend the contractor;

(ii) Rescind or void a contract; or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation.

(4) Disposition of the matter by consent or compromise if the proceeding could have led to any of the outcomes listed in subparagraphs (b) (1) through (3) of this subsection (but see paragraphs (c) and (d) of this subsection); or

(5) Not covered by subparagraphs (b) (1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of subparagraphs (b) (1) through (4) of this subsection.

(c)(1) To the extent they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by the United States that is resolved by consent or compromise pursuant to an agreement entered into between the contractor and the United States, and which are unallowable solely because of paragraph (b) of this subsection, may be allowed to the extent specifically provided in such agreement.

(2) In the event of a settlement of any proceeding brought by a third party under the False Claims Act in which the United States did not intervene, reasonable costs incurred by the contractor in connection with such a proceeding, that are not otherwise unallowable by regulation or by separate

agreement with the United States, may be allowed if the contracting officer, in consultation with his or her legal advisor, determines that there was very little likelihood that the third party would have been successful on the merits.

(d) To the extent that they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by a State, local, or foreign government may be allowable when the contracting officer (or other official specified in agency procedures) determines, that the costs were incurred either:

(1) As a direct result of a specific term or condition of a Federal contract; or

(2) As a result of compliance with specific written direction of the cognizant contracting officer.

(e) Costs incurred in connection with proceedings described in paragraph (b) of this subsection, but which are not made unallowable by that paragraph, may be allowable to the extent that:

(1) The costs are reasonable in relation to the activities required to deal with the proceeding and the underlying cause of action;

(2) The costs are not otherwise recovered from the Federal Government or a third party, either directly as a result of the proceeding or otherwise; and

(3) The percentage of costs allowed does not exceed the percentage determined to be appropriate considering the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate. Such percentage shall not exceed 80 percent. Agreements reached under paragraph (c) of this subsection shall be subject to this limitation. If, however, an agreement described in paragraph (c)(1) of this subsection explicitly states the amount of otherwise allowable incurred

legal fees and limits the allowable recovery to 80 percent or less of the stated legal fees, no additional limitation need be applied. The amount of reimbursement allowed for legal costs in connection with any proceeding described in paragraph (c)(2) of this subsection shall be determined by the cognizant contracting officer, but shall not exceed 80 percent of otherwise allowable legal costs incurred.

(f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with —

(1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government (see 2.101).

(2) Organization, reorganization, (including mergers and acquisitions) or resisting mergers and acquisitions (see also 31.205-27).

(3) Defense of antitrust suits.

(4) Defense of suits brought by employees or ex-employees of the contractor under section 2 of the Major Fraud Act of 1988 where the contractor was found liable or settled.

(5) Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either—

(i) an agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or

(ii) dual sourcing, coproduction, or similar programs, are unallowable, except when—

(A) Incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or

(B) When agreed to in writing by the contracting officer.

(6) Patent infringement litigation, unless otherwise provided for in the contract.

(7) Representation of, or assistance to, individuals, groups, or legal entities which the contractor is not legally bound to provide, arising from an action where the participant was convicted of violation of a law or regulation or was found liable in a civil or administrative proceeding.

(8) Protests of Federal Government solicitations or contract awards, or the defense against protests of such solicitations or contract awards, unless the costs of defending against a protest are incurred pursuant to a written request from the cognizant contracting officer.

(g) Costs which may be unallowable under 31.205-47, including directly associated costs, shall be segregated and accounted for by the contractor separately. During the pendency of any proceeding covered by paragraph (b) and subparagraphs (f)(4) and (f)(7) of this subsection, the contracting officer shall generally withhold payment of such costs. However, if in the best interests of the Government, the contracting officer may provide for conditional payment upon provision of adequate security, or other adequate assurance, and agreement by the contractor to repay all unallowable costs, plus interest, if the costs are subsequently determined to be unallowable.

DECISION

As noted, *supra*, these appeals are before the Board on remand from the United States Court of Appeals for the Federal Circuit. The Court has instructed us to determine "whether the proceedings were separate, and, if they were, whether they involved the same contractor misconduct." *DynCorp IV*, *supra*, 349 F.3d at 1356. On the latter issue, we took testimony and additional evidence in a post-remand hearing because the issue was not raised in the original proceeding. The single proceeding issue was raised in the original hearing and the parties offered evidence and argument thereon. That issue is therefore decided based on the pre-remand record.[11]

[11] We have cited to exhibit G-20R, a remand exhibit, for convenience. That exhibit is composed of various documents from the pre-remand record. (Tr. 3/135R)

As to the single proceeding issue, appellant argues that "The Numerous, Varied Investigations of DynCorp At Fort Irwin Were Not A Single 'Proceeding'" (app. br. at 80). Appellant contends there were a number of discrete components of each of the investigative efforts that militate in favor of finding there were multiple proceedings (*id.* at 94). As to whether the contractor misconduct was the same throughout, appellant asserts, *inter alia*, that the language in the Act was intended to apply only in parallel criminal proceedings (*id.* at 99).

The government argues that there was only one proceeding, contending that the Act intended to curtail a contractor's ability to recover legal costs and a broad interpretation of "proceeding" serves this end (gov't br. at 34). The government also argues a version of the facts that fits within its interpretation of the Act (*id.* at 37). As to the "same misconduct" issue, the government argues that the Marcum and vehicle maintenance matters both involved falsification of records (*id.* at 113).

THE SAME CONTRACTOR MISCONDUCT ISSUE

With respect to the "same contractor misconduct" issue, the government concedes, and we have found (findings 13, 18), that there was no misconduct in the Herring/Gunn and Sgt. Peters matters. The attorneys' fees and expenses arising therefrom are, therefore, recoverable unless we find one or both were part of a single investigation. As to the Marcum and vehicle maintenance investigations, both involved falsification of records, and both involved the same offense code, 5M3A (findings 19, 23). In this regard, there are numerous interviews that support the government's contention that vehicle maintenance records were falsified. The interviews and FBI and CID reports in which they are contained are a part of the Joint Rule 4 file. As such, they are imbued with a degree of trustworthiness that permits us to evaluate and assign weight to their content in our analysis of the evidence germane to this issue.[12] When combined with Mr. Amlotte's testimony (finding 22), we are persuaded that, whether or not prosecutable, there was some falsification of records in the vehicle maintenance area. The underlying facts of the Marcum conviction involved entering false data in Biomed computer records (finding 25), and that underlying factual basis for the plea agreement cannot be relegated to the scrap heap because the crime for which Mr. Marcum was convicted was unauthorized use of a government computer (*id.*). We conclude the same misconduct by DynCorp personnel – falsification of records – was involved in both instances.

THE MULTIPLE INVESTIGATIONS ISSUE

[12] We note that the United States Supreme Court has held it error to reject investigative reports because the reports contained opinions and conclusions. *John C. Rainey v. Beech Aerospace Services*, 488 U.S. 153 (1988).

At the outset it is well to state our approach to this analysis. First, we have looked at the issue as one not governed by the technicalities of CID or FBI procedure. This is due to the context of the issue, which arises under a statute and regulation and has, to some degree, been affected by case precedent in the form of *Rumsfeld v. General Dynamics Corp.*, 365 F.3d 1380 (Fed. Cir. 2004), which we address *infra*. Therefore, we believe the contextual fabric is such that the appropriate disposition must come from an assessment of whether the revealed facts describe an investigation of the performance of DynCorp and its employees under the NTC contract, or a fragmented series of investigations into individual complaints. Next, we note we have placed no reliance on the testimony of Mr. Martin. This is, in part, because Mr. Martin did little more than testify to what the CID regulation says, and did so without a particular perspective either brought from the Act or from experience with contracts (findings 27, 29). There were no insights into abstruse meanings which we could not have garnered from a straight-forward reading of the regulation. We consider interpretation of the CID regulation to be our job. As stated above and addressed below, we also consider the proper resolution of the "proceeding or proceedings" issue to involve considerably more than application of FBI or CID procedures. Further, we have conducted a review of the documents that constitute, *inter alia*, the work product of the investigators. We consider the documents the most reliable evidence of what went on at NTC between 22 July 1992 and 20 May 1994 and, ultimately, to whether there is sufficient correlation between FBI and CID efforts to justify a conclusion of "one proceeding." In assessing the documentary record, we are not moved by the use of either the singular "investigation" or the plural "investigations" in the documents, as the context of statements in the documents is generally offhanded (*see, e.g.*, finding 9). Finally, we have looked at the Act from the approach of its overall intent in trying to resolve the narrower question of how to apply the cost disallowance provisions under these facts.

Both the Act and the regulation include "investigation" within the definition of "proceeding." 10 U.S.C. § 2324(k)(6)(A); FAR 31.205-47(a). The facts here involve four separate areas of investigation: Sgt. Peters' death, Herring/Gunn credit card use, vehicle maintenance records, and Biomed records (Larry Marcum). The only conviction was that of Mr. Marcum for unauthorized use of a government computer. It is the government's position that those areas, and others, were all part of a single investigation. Appellant argues the opposite view – that separate investigations were undertaken and proof of this may be found in the assignment of different ROI numbers by CID. In support of its argument, appellant has submitted the following chart to show events and its characterization of those events:

	Herring-Gunn ROI	Tracked Vehicle ROI	Marcum ROI	Peters ROI
Date Investigations Opened	October 14, 1992	October 28, 1992	January 4, 1993	July 16, 1992
Separate ROI Numbers Assigned	Yes; 0030-93-CID146-86389	Yes; 0061-93-CID146-86393	Yes; 0025-93-CID146-86388	Yes; 0235-92-CID-146-62590
Stated Scopes of Investigation	False claims regarding payment of expenses (including gas) for contractor furnished equipment ("CFE") vehicles	Falsification of pre-positioned tactical fleet equipment inspection and maintenance worksheets	Falsification of medical equipment repair times by Larry Marcum	Investigation into death of driver of M578, Track Recovery Vehicle
Area of Contract Involved	General contract administration	Combat/tactical vehicle support services	Medical activity support services	Combat/tactical vehicle support services
Stated Subjects of the Investigations	Charles Herring; Kenneth Gunn; DynCorp Ft. Irwin Division	DynCorp Ft. Irwin Division	Larry Marcum	James Richard Peters
Involvement by FBI	No	Limited	Limited	No
Declinations of prosecution against DynCorp by AUSA	Yes; October 13, 1993	Yes; May 20, 1994	Yes; October 20, 1993	Yes; July 19, 1993
Separate CID Reports Produced	Yes	Yes	Yes	Yes
Dates Investigations Closed	October 26, 1993	May 20, 1994	March 2, 1994	October 5, 1993

(App. br. at 94)

The only significant differences we take with the chart are in its characterization of FBI involvement and deletion of the offense codes.[13] It is true that the CID regulation can be construed as directing a "one ROI number per investigation" rule, although implementation of that direction in practice would appear to be ripe for anomalous

[13] Herring/Gunn tracked vehicle and Marcum ROI numbers all include "5M3" offense codes, which involve "false official statements," while Sgt. Peters includes 5H8, "accidental death" (R4, tab 1 at A-6, A-9).

outcomes by virtue, *inter alia*, of the short period imposed for assignment of an ROI number (finding 6). It is also true that CID did the majority of the interviewing and that SA Ladd did not work full-time on investigating DynCorp. However, the FBI's role was not "limited," in our view. It was the lead agency in a joint investigation. (Finding 11) While CID did most of the interviewing, those interviews and SA Ladd's interviews were included in the FBI reports that went to the AUSA. Moreover, as lead investigative agency, the FBI assigned only one number to all aspects of investigating DynCorp. With respect to Herring/Gunn and Sgt. Peters, it is clear that these matters were not the focus of the FBI. However, and SA Ladd's memory to the contrary notwithstanding, SA Ladd did interview at least one witness in conjunction with each of those inquiries into allegations of misconduct and those interviews were included in the FBI reports to the AUSA (findings 15, 16). Thus, SA Ladd and the FBI played some direct role in all phases of the investigative activities. Nonetheless, the events and CID's involvement in events produced multiple ROI numbers and included multiple targets. From the standpoint of CID procedures, then, appellant's argument cannot be lightly dismissed. Juxtaposed to that argument, and equally compelling, is the FBI's role and the inescapable conclusion that there was only one investigation under the FBI's procedures, the FBI was the lead agency, and the reports forwarded to the AUSA in pursuit of prosecution were FBI reports. While we think the role of the FBI here militates toward a finding of one investigation, it is ultimately the interpretation of the overall facts under the Act that must be analyzed.

In *Rumsfeld v. General Dynamics*, *supra*, the Court rejected an interpretation of the Act as requiring "the apportionment of legal costs for defending against different claims with different outcomes within a single proceeding." *General Dynamics*, 365 F.3d at 1381. In so holding, the Court offered the following with regard to what constitutes a single proceeding:

> As an initial matter, we hold that the term "proceeding" in section 2324(k) must be given a broad meaning, such that it includes all claims or causes of action within a particular case, action or proceeding. This broad interpretation of "proceeding" is supported by the text of section 2324(k)(2)(E), which specifies a "disposition of the *proceeding* by consent or compromise if *such action* could have resulted in a disposition described in subparagraph (A), (B), (C), or (D)," *id*. § 2324(k)(2)(E) (emphases added), thus equating a "proceeding" and an "action." Further, section 2324(k)(6) broadly defines "proceeding" to include an investigation, *id.* § 2324(k)(6)(A), and other sections of the Major Fraud Act of 1988 relating to the allowability of contractor costs incurred in fraud proceedings specifically define a "proceeding" as "a civil, criminal, or an

> administrative investigation, prosecution or proceeding." 18 U.S.C. § 293(c)(2). Such an interpretation of "proceeding" is also confirmed by reference to *Black's Law Dictionary*, which defines a proceeding as the "regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment," and notes that "[a proceeding] is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment." *Black's Law Dictionary* 1221-22 (7th ed. 1999). [Footnote omitted]

Id. at 1386.

The Court also cites favorably from statements in the legislative history that support an interpretation of the Act as curtailing the rights of contractors. Reliance is placed on statements by Senator Grassley that describe recovery of legal expenses by a fraud defendant as an "abusive subsidy" which the amendment he was submitting was intended to end. The Court then quoted with favor from his further description of the amendment as "creating a disincentive to increased legal expenses." *General Dynamics*, 365 F.3d at 1389. The Court then concluded:

> Thus, upon review of the legislative backdrop behind the Major Fraud Act and specific statements of legislative intent, as articulated by the drafter of the amendment, it is clear that Congress intended to significantly curtail a contractor's ability routinely to recover legal costs for fraud proceedings, even in cases where the proceeding was resolved through settlement.

Id.

We interpret *General Dynamics* as holding that the term "proceeding" in the Act is intended to be given a broad meaning and that the purpose of 10 U.S.C. § 2324(k) is to limit contractor recovery for legal costs in fraud proceedings. The combination of those two interpretive elements leads us to conclude that we should not look at the multiple proceedings issue through the narrow prism of whether there were multiple CID or FBI report numbers used. Rather, the issue should be analyzed from the standpoint of whether the facts reveal a reasonably cohesive whole composed of multiple subjects that is ultimately singular in character, or disparate parts in a series too loosely connected to be singular in character. If the facts reveal the former, there was one proceeding; if the latter, there was more than one. Stated alternatively, if we find the purpose of the FBI

and CID was to investigate the possibility of crimes committed by DynCorp, its employees, or both, during performance of the contract at issue at NTC, there was one investigation. If their purpose was to investigate individual complaints within specific DynCorp functions one-by-one without a conscious and consistent effort at coordination with the investigation of complaints within other DynCorp functions, there were multiple investigations.

At the outset of our analysis, we think it is significant that all the investigative efforts took place at NTC, they were under the same contract, took place within 22 months, and all involved DynCorp or its employees. This, under the broad definition articulated in *General Dynamics*, militates strongly towards a finding of one investigation. Appellant argues, *inter alia*, that the timing, and specifically the different starts and finishes of each phase as reflected in the ROIs, is evidence that there were multiple investigations. The government argues that the timing supports its one investigation theory in that there was no break in investigative activity from 22 July 1992 to 20 May 1994. We think the timing is more supportive of the government's position. Although individual subjects were begun and completed at different times in the period from 22 July 1992 to 20 May 1994, which is certainly not an inordinately lengthy period, the evidence shows the continuity one would associate with a single investigation. In this regard, CID agents Schnayerson and Mullins began an economic crimes program in September 1992 (finding 9), after CID had begun investigating the death of Sgt. Peters (finding 13) but before other relevant inquiries. The program registered sources who provided information about falsification of documents. (Finding 9) We construe this to have been a single, coordinated, ongoing effort to investigate the conduct of DynCorp and its employees at NTC. The investigation, in our view, included the Herring/Gunn, vehicle records falsification and Marcum phases. All involved alleged false statements, all were begun via complaints from unnamed CID sources and all were investigated by CID agent Mullins. (Findings 16, 19, 23) Indeed, the Herring/Gunn and vehicle records matters were discussed by CID agent Schnayerson and Ms. Cameron in their initial meeting. This occurred immediately after seizure of records in late October 1992. (Finding 10) Further, Herring/Gunn involved at least one FBI interview and CID interviews that were presented to the AUSA by the FBI (finding 16). We conclude that Herring/Gunn was part of the same, continuous stream of investigative activities at NTC, which Ms. Cameron described as "every day there was something new" (finding 10). We think the record discloses that the CID formed an economic crimes team and program in September 1992 in which there was considerable interest, CID developed sources and seized records, brought in the FBI, and those two agencies and Army auditors, under the direction of the AUSA, began to look into a number of activities under the NTC/DynCorp contract that ultimately led to the Marcum conviction. We hold the actions after formation of the economic crimes team and program were a single, coordinated effort and thus one investigation under the Act.

Appellant's argument that multiple ROI numbers equates to multiple investigations is not compelling. First, CID was not the lead agency. The FBI was the lead agency and it used only one number. As best we can determine, virtually all the CID interviews were forwarded to the AUSA in an FBI report (finding 11). The CID regulation requires that an ROI be initiated with a new number within three days of determining that a credible basis exists that an offense was committed (finding 6). In each phase – Herring/Gunn, vehicle maintenance and repair, and Biomed – there were more than three days between initial complaints (findings 16, 19, 23). We cannot, therefore, conclude that the assigning of different ROI numbers is dispositive, particularly given the broad meaning to be applied pursuant to *General Dynamics*. We note also that CID interviews in all phases contain a legend (or equivalent) stating "STATUS: This interview was documented in narrative format at the request of the FBI for use in the prosecution packet being forwarded to the Assistant United States Attorney's Office, Santa Ana, CA" (findings 13, 16, 19, 24). We consider this to be indicative of a single prosecutorial effort, and to support the government's argument. In our view, the record demonstrates that the Herring/Gunn, vehicle records falsification, and Marcum phases constitute a cohesive whole composed of multiple subjects, and not disparate parts in a series too loosely connected to be singular in character.

With regard to the death of Sgt. Peters, however, we find the record less supportive of the "one investigation" argument. The government recognizes it has problems with its position ("The Board may consider the Government's weakest argument to relate to the Peters accidental death ROI" (gov't br. at 38)). The government nonetheless asserts that vehicle maintenance was the focus of the Sgt. Peters investigation and is tied into the cohesive whole because of this and the 16 April 1993 interview with Mr. Romero (*id.*). It is true that the Romero interviews bear the ROI number of the Sgt. Peters investigation, but are also cited in the vehicle investigation (finding 15). We agree with appellant, however, that the mere inclusion of an interview or interviews in two ROIs is insufficient to establish that the ROIs constitute one investigation. While we do not suggest the Romero interviews were pretextual, to hold otherwise might invite the use of a pretextual interview for the purpose of blocking an otherwise meritorious claim. In this regard, our review of the Sgt. Peters ROI and exhibits indicates that the context of that investigative effort was substantially different from the vehicle ROI. The Sgt. Peters matter was a probe into the death of a soldier which, judging from the offense code, was presumed from the outset to be accidental (finding 13) and thus not criminal. The government now concedes that there was no misconduct involved in Sgt. Peters' death, and an Accident Investigation Board, the NTC Safety Office and the CID's 5 October 1993 report concluded the death was accidental (*id.*). This, at least facially, affirmed the original characterization of the investigation. Moreover, the investigation commenced prior to and was not a part of the economic crimes effort (finding 9) which we have found embraced the other probes, all of which involved false statements as the primary focus (findings 16, 19, 23). Further, appellant's argument for multiple investigations is supported by the 5H8 offense code, which is for Accidental Death (other than traffic)

(finding 13). The offense codes in the other investigations all have to do with false statements (*see, supra,* note 13). The Accidental Death offense code also militates against the government's argument that the focus of the Sgt. Peters investigation was vehicle maintenance.

Further, CID did not coordinate with the FBI until 26 March 1993, after the Accident Board found the death was an accident and there were no operational deficiencies with the vehicle, but prior to the Romero interviews. Agent Ladd "related he would incorporate this investigation with other on-going investigations regarding allegations of non-compliance with [the contract at issue]." (Finding 13) In this regard, the AUSA kept the Sgt. Peters probe open because of its potential connection to assertions of maintenance records falsification in spite of her belief in July 1993 that the death was accidental (finding 13). We do not think that a potential connection and the hand-off of an essentially completed probe to the FBI carry the day for the government's position. What is missing is a logical segue, such as an interview in the Sgt. Peters investigation that led inexorably to the falsification of vehicle records investigation, or an interview in the falsification of vehicle records investigation that led to a reinvigoration of the Sgt. Peters investigation. Instead, the timing was such that the Sgt. Peters investigation was not brought to the FBI's attention until after both the NTC Safety Director and the Accident Investigation Board had effectively cleared DynCorp and its employees (finding 13). As to the Romero interviews relied on by the Army, they were taken months after the vehicle records falsification probe had begun (findings 15, 19). Those interviews and the Mortel interview were inconclusive and did not lead to further efforts to find a link between records falsification and Sgt. Peters' death. While there is an unsigned, undated statement raising potential vehicle maintenance issues included in the final CID report of the Sgt. Peters investigation that addresses the contemporaneous observation of an unsafe M578 (finding 14), it is insufficient on its own to be that segue and support a holding that there was only one investigation. Indeed, that document, from Sgt. Spencer, was expanded in his 2 March 1993 interview which appears to indicate Army personnel were required by their commander to repair the M578 they considered to be unsafe (*id.*). While the vehicle in question cannot be identified, CID must have thought Sgt. Spencer's statements were relevant to Sgt. Peters' death to have included it in the final report. The statements thus appear to offer a scenario that would let both DynCorp and Mr. Romero off the hook, and thereby lend support to DynCorp's multiple investigations argument in that the statements diverge into a dimension having nothing to do with falsification of maintenance records by DynCorp or its employees.

Moreover, the initiation of the Sgt. Peters investigation in July 1992 preceded the September 1992 initiation of a programmatic approach to investigating the conduct of DynCorp and its employees by several months (findings 9, 13). The economic crimes program to investigate DynCorp at NTC set in place the structure that led to Herring/Gunn, vehicle records and Marcum. The investigation into Sgt. Peters' death was just that – an investigation into a soldier's death during training – and was not begun

as part of an overall investigation of DynCorp. Neither was it an investigation into an economic crime, which was the focus of the Schnayerson/Mullins effort (finding 9). As stated above, we are not persuaded that the AUSA's actions in holding the Sgt. Peters investigation open "due to the probable connection with other Joint . . . investigations concerning the falsifications of service records" somehow overcame the different purpose of the Sgt. Peters investigation and combined it with the economic crimes investigation. The AUSA at the time believed Sgt. Peters' death was accidental. On balance, we believe the argument summed up in SA Ladd's testimony that "it might be construed that the lack of maintenance caused the death of a soldier" (finding 15) is too speculative to be probative. The evidence adduced supports the holding that the Sgt. Peters investigation was a separate investigation.

In so holding, we remain mindful of *General Dynamics, supra,* and the broad meaning therein afforded to the term "proceeding." *Id.* at 1386. There, however, General Dynamics had urged the Court "to adopt a rule that the costs associated with different claims within a proceeding must be apportioned." It appears, therefore, that the parties did not place in issue the question of whether there was more than one proceeding. *Id.* In attempting to apply the Court's broad definition elsewhere in this decision, we have said that we would try to discern whether the facts showed "a reasonably cohesive whole . . . or disparate parts in a series too loosely connected to be singular in character." In the matter of the Sgt. Peters investigation, we think the connection is simply too tenuous to be part of the cohesive whole represented by the economic crimes investigation which spawned inquiries into the Herring/Gunn, vehicle maintenance and Marcum matters. The Sgt. Peters investigation was listed as an accidental death investigation, it preceded the economic crimes program, involved review by an Accident Investigation Board, and the falsification of vehicle records was not, in our view, the focus of the investigation into Sgt. Peters' death. Accordingly, we hold that the Sgt. Peters investigation was a separate proceeding.

DAMAGES

The parties have stipulated to the allocation of damages and to the date on which CDA interest commences (finding 30). In accordance with the above holding on entitlement and the parties' stipulation, we hold that DynCorp is entitled to recovery in the amount of $43,922.85, representing the costs incurred as a result of the investigation into the death of Sgt. Peters. CDA interest shall run from 23 January 1996. The appeals are sustained to that extent and otherwise denied.

Dated: 26 January 2006

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result in part and dissent in part and join in the opinion of Judge Thomas

CHERYL S. ROME
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur in result in part and dissent in part (see separate opinion)

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

OPINION CONCURRING IN RESULT IN PART AND
DISSENTING IN PART BY JUDGE THOMAS

I concur in the result with respect to the legal fees incurred in connection with the biomedical and Sergeant Peters investigations. I dissent with respect to the tracked vehicle and Herring/Gunn investigations. I would sustain the appeal in the amount of $448,661.96 plus interest.

In *Brownlee v. DynCorp*, 349 F.3d 1343, 1356 (Fed. Cir. 2003), the Court issued the following instructions on remand:

> A remaining question is whether this case needs to be remanded for a determination of whether the costs sought by the contractor resulted from the same proceeding as that in which Mr. Marcum pled guilty. The contractor argues that the proceedings in which the claimed costs were incurred and in which Mr. Marcum pled guilty were separate and that it is still entitled to recovery of its costs. The Board did not reach the issue of whether there was more than one proceeding in this case . . . . Therefore, we remand to the Board for an initial determination whether the proceedings were separate, and, if they were, whether they involved the same contractor misconduct.

I conclude that the biomedical investigation, in which Mr. Marcum pled guilty, was separate from, and did not involve the same contractor misconduct as, the other investigations.

1. Whether the Proceedings Were Separate

CID opened the biomedical investigation on 4 January 1993 based on allegations that Mr. Marcum, DynCorp's biomedical maintenance branch manager, had recorded performance of maintenance that had not been performed. On 10 February 2003, according to CID, the Supervisory AUSA expressed the view that "there was sufficient probable cause to believe MARCUM, and possibly DynCorp, perpetrated fraud against the U.S. Government." On 20 October 1993, the United States Attorney's office informed CID and the FBI that it would not prosecute DynCorp in connection with this investigation but would prosecute Mr. Marcum. (*Supra*, findings 23-25; R4, vol. 1A, memorandum at 14)

On 14 February 1994, the United States Attorney filed the plea agreement with Mr. Marcum in the United States District Court for the Central District of California.

The plea agreement stated that it "constitutes the plea agreement that has been offered to you [Mr. Marcum] . . . in the investigation of falsification of medical equipment maintenance records at Ft. Irwin, California." Mr. Marcum agreed to plead guilty to one count of unauthorized access to a government computer in violation of 18 U.S.C. § 1030(a)(3). According to the Statement of Facts attached to the plea agreement, beginning in or about 1991 and continuing to in or about January 1993, Mr. Marcum directed DynCorp biomedical maintenance technicians not to record their actual hours expended on work orders, but rather to substitute estimated hours. Mr. Marcum then input the estimated hours into a government computer system (or directed another employee to do so), knowing that entering the estimated hours exceeded Mr. Marcum's authorized access. Mr. Marcum and his attorney signed the plea agreement prior to filing. (Ex. G-20R)

The Major Fraud Act, 10 U.S.C. § 2324(k), provides in paragraph (1) that "costs incurred by a contractor in connection with any criminal . . . proceeding . . . are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal . . . statute . . . and (B) results in a disposition described in paragraph (2)." Paragraph (2) states that such dispositions include "[i]n the case of a criminal proceeding, a conviction . . . by reason of the violation or failure referred to . . . ." The statute further provides that a "proceeding" includes an "investigation" and that "'costs,' with respect to a proceeding . . . means all costs incurred by a contractor, whether before or after the commencement of any such proceeding." 10 U.S.C. § 2324(k)(1), (k)(2), (k)(6)(A), (B).

In *Rumsfeld v. General Dynamics*, 365 F.3d 1380, 1386 (Fed. Cir. 2004), where one issue was whether "proceeding" included all the claims in a particular action in Federal court, the Court stated:

> As an initial matter, we hold that the term "proceeding" in section 2324(k) must be given a broad meaning, such that it includes all claims or causes of action within a particular case, action or proceeding.[] This broad interpretation of "proceeding" is supported by the text of section 2324(k)(2)(E) . . . equating a "proceeding" and an "action." Further, section 2324(k)(6) broadly defines "proceeding" to include an investigation . . . . [Footnote omitted]

Based on the foregoing, "proceeding" includes not only the action in the district court but also the investigation leading to it. Although the action in the district court only involved Mr. Marcum, the underlying investigation included the possibility of a claim against DynCorp. Accordingly, I concur that the biomedical investigation as it related to DynCorp was not a separate proceeding from that in which Mr. Marcum pled guilty.

I part company with the majority to the extent that it holds that the biomedical investigation was not a separate proceeding from the tracked vehicle and Herring/Gunn investigations. The plain language of the plea agreement indicates that the conviction arose from the "investigation of falsification of medical equipment maintenance records," *i.e.*, the biomedical investigation, as opposed to an overall investigation into economic crimes. Each of the CID investigations was a free standing investigation that could have continued or been discontinued without any material impact on the other investigations. The government treated the investigations as such, for example, in connection with its filing of the Marcum action in the district court and its findings of no misconduct or declinations of prosecution of DynCorp with respect to each of the other investigations (*see* findings 13, 17, 18, 22).

2. Whether the Proceedings Involved the Same Contractor Misconduct

The remaining question is whether the tracked vehicle investigation involved the same contractor misconduct as the biomedical investigation. The government concedes that the Herring/Gunn and Sergeant Peters investigations did not involve the same contractor misconduct (gov't br. at 113).

The tracked vehicle investigation involved allegations of records falsification in connection with combat/tactical vehicle and communication/electronic equipment support services, particularly with respect to repair and maintenance of tracked vehicles. The United States Attorney's office declined prosecution in May 2004. (*Supra*, findings 19-22)

The Major Fraud Act provides that "contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such proceeding are not allowable under paragraph (1)." 10 U.S.C. § 2324(k)(5)(C).

In *General Dynamics*, 365 F.3d at 1389-90, the Court addressed the "same contractor misconduct" provision in the course of analyzing the intent of the Act:

> Moreover, we read section 2324(k)(5) to indicate an intent to disallow all costs associated with a single instance of misconduct, even if associated with different proceedings. . . . [U]nder section 2324(k)(5), otherwise allowable proceeding costs become unallowable if the alleged misconduct is the same misconduct alleged in another proceeding, the costs of which are not allowable. The goal of such a provision is clear: to eliminate as allowable costs of a contractor in all

> proceedings involving the same alleged misconduct, once the contractor is found liable for that misconduct in at least one of those proceedings. . . .

The legislative history further elucidates the intent behind this provision. In introducing amendment 3735, later codified as 10 U.S.C. § 2324(k), Senator Grassley noted that the bill as reported out of committee provided that costs were to be disallowed if there were an indictment or criminal information but no conviction. Because of concerns about the presumption of innocence, that provision was deleted and the "same contractor misconduct" provision added:

> Significantly, the compromise language adopted here [in amendment 3735] alters the committee-passed provision that would have imposed a bar on allowable costs in cases where there is an indictment by a Federal grand jury or an information, but no conviction. I agreed to change the committee language to accommodate a concern that this provision was inconsistent with the presumption of innocence in criminal cases.
>
> However, the compromise language offered here provides that in such situations, a disposition favorable to the Government in a parallel, subsequent, or other, criminal, civil or administrative proceeding involving the same contractor conduct will make all proceeding costs unallowable -- both the civil or administrative proceeding and the criminal proceeding, notwithstanding that the result in the criminal proceeding was other than a conviction. Contractor costs otherwise allowable as reimbursable costs will therefore not be allowable where such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil or administrative proceeding.

134 Cong. Rec. S16,703 (1988) (statement of Sen. Grassley), LEXIS 134 Cong Rec S16697p*16703.

The investigation into the falsification of tracked vehicle repair and maintenance records did not result in a conviction. The government argues that the tracked vehicle investigation involved "the same contractor misconduct alleged as the basis for" the biomedical investigation and that investigation resulted in a disposition favorable to the government (10 U.S.C. § 2324(k)(5)(C)). The only conviction in that proceeding, however, was the conviction of Mr. Marcum for unauthorized access to a government computer. I am not persuaded that the government can boot strap this single instance of

unauthorized access to a government computer into disallowance of the costs relating to the tracked vehicle investigation, as to which the United States Attorney's office declined prosecution. Accordingly, I dissent as to the Herring/Gunn and tracked vehicle investigations.

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. 49714, 53098, Appeals of DynCorp, rendered in conformance with the Board's Charter.

Dated:

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