ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
AM General LLC	)	ASBCA Nos. 53610, 54741
	)	
Under Contract Nos. DAAE07-89-C-0998	)	
DAAE07-95-C-R021	)	
DAAE07-96-D-X001	)	

APPEARANCES FOR THE APPELLANT: Daniel J. Riley, Esq.
O. Kevin Vincent, Esq.
Robert J. Wagman, Jr., Esq.
Baker Botts LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: E. Michael Chiaparas, Esq.
Acting Chief Trial Attorney
Sharon K. Parr, Esq.
Trial Attorney
Defense Contract Management Agency
Manassas, VA

OPINION BY ADMINISTRATIVE JUDGE TING
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND
THE GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Prior to 1 September 1995, AM General LLC (AM General)[1] had allocated manufacturing overhead on a direct labor base and material overhead on a direct material base. Effective 1 September 1995, AM General changed its accounting method and began allocating manufacturing overhead costs on a "unit of production" base. All manufacturing overhead, fixed and variable, was included in a single pool and allocated to each vehicle produced, military or commercial. The government contends that AM General's single-pool overhead allocation method was in noncompliance with Cost Accounting Standard (CAS) 418 since it cost more to manufacture a commercial vehicle than a military vehicle. The parties have been unable to resolve their dispute since 1995. On 23 August 2001, the Administrative Contracting Officer (ACO) issued a final decision demanding payment from AM General in the amount of $23,768,315. This

[1] By letter dated 24 September 2004, appellant asked that the name of the appellant be changed from "AM General Corporation" to "AM General LLC." The letter stated that AM General LLC is the successor in interest to AM General Corporation, and the name change occurred after the filing of ASBCA No. 53610.

amount was comprised of $18,007,452 in principal and $5,760,863 in interest. The principal was the government's estimate of the cost impact of all CAS-covered prime contracts for the period of noncompliance through 31 July 2001. The interest was calculated in accordance with the CAS clauses in the affected contracts. AM General timely appealed the decision by letter dated 15 November 2001. This appeal was docketed as ASBCA No. 53610.

While ASBCA No. 53610 was pending, counsel for the parties apparently engaged in settlement discussions. On 14 June 2001, AM General's counsel submitted a settlement proposal that sought to reduce the CAS cost impact amount as calculated by the Defense Contract Audit Agency (DCAA) by $10,833,524. The proposal was based on the theory that if the military vehicle prices were adjusted downward using the direct material and direct labor bases method of allocating overhead, AM General would be entitled to an upward adjustment to the change order prices, since they were priced at less than full pre-1995 overhead rates.[2] The parties apparently were not able to agree on an offset. On 17 March 2004, AM General submitted a certified claim. The claim incorporated the 14 June 2001 proposal. By final decision dated 30 August 2004, the ACO denied the claim. Thereafter, by letter dated 24 September 2004, AM General filed a timely notice of appeal. By a joint motion of the same date, the parties requested that the appeal be consolidated with ASBCA No. 53610 on the basis that the parties and contracts in both appeals were "identical" and the issues presented in both appeals were "intertwined." Pursuant to an order issued on 28 September 2004, ASBCA Nos. 53610 and 54741 were consolidated.

AM General did not address its "Full Overhead Cost Analysis" claim—the subject of ASBCA No. 54741—in its motion for summary judgment. The government addressed the claim as a part of its cross-motion for summary judgment "in anticipation that [AM General] will raise the offset claim in its reply" (gov't cross-motion at 63). The government contends that AM General's offset claim should be denied for a number of reasons, among them:

> . . . [T]his issue is completely separate and distinct from the CAS 418 noncompliance. The CAS 418 noncompliance involves the allocation of costs between Government and commercial vehicles (48 CFR § 9904.418). On the other hand, AM General's offset claim involves the recovery of

[2] As explained by the government, the parties negotiated an incremental rate (122.4%) to compensate AM General for the increase to its overhead solely resulting from the increase in direct labor and material costs needed to perform extra work (gov't cross-motion at 64). If this is true, it does not appear to have any bearing on whether AM General's single-pool overhead allocation method complied with CAS 418.

> fixed versus variable costs for the Government vehicles upon modifications, which is different from the issue of allocating costs using a non-homogeneous cost pool. Thus, AM General's offset claim does not necessitate a reduction to the cost impact calculated as a result of the CAS 418 violation (PFF 72).

(Gov't cross-motion at 65) AM General's opposition to the government's cross-motion for summary judgment did not address the offset claim. If what the government claims is true, the parties probably should not have jointly requested that ASBCA Nos. 53610 and 54741 be consolidated. In retrospect, the Board probably should not have granted the parties' motion to consolidate.

Nonetheless, since AM General has not raised the offset claim as a part of its motion for summary judgment, or replied to this issue when the government raised it in anticipation in its cross-motion for summary judgment, we are uncertain whether AM General still considers its offset claim a viable issue. Since the underlying basis of its offset claim has not been fully addressed, it is premature for us to decide ASBCA No. 54741 on the record before us.

The disputes which are the subject of ASBCA No. 53610 involved three fixed price contracts: (1) Contract No. DAAE07-95-C-R021 (Contract R021); (2) Contract No. DAAE07-89-C-0998 (Contract 0998); and (3) Contract No. DAAE07-96-D-X001 (Contract X001). More specifically, on 23 December 1994, the government awarded Letter Contract No. R021 to AM General. A total of 1,201 vehicles would eventually be produced under this contract. On 29 September 1995, the government and AM General definitized this contract by means of Modification No. PZ0004. Modification No. PZ0004 included as Clause H-23, a "reopener" clause entitled "Manufacturing Overhead Allocation Reopener." On 3 March 1995, the government issued Modification No. P00336 (undefinitized) to Contract 0998 which added 309 vehicles to the contract. On 28 June 1996, the government definitized Modification No. P00336 by means of Modification No. PZ0392. Modification No. PZ0392 contained a "reopener" clause similar to the one in Modification No. PZ0004. On 14 December 1995, the government awarded Contract X001 to AM General. A total of 15,521 vehicles would eventually be produced under this contract. Contract X001 contained a "reopener" clause similar to the one contained in Modification No. PZ0004. (R4, tab 32)

On 14 October 2004, AM General filed a motion for summary judgment (Motion Papers No. 1). On 22 December 2004, the government filed an opposition to the motion and filed a cross-motion for summary judgment (Motion Papers No. 2). Thereafter, on 18 February 2005, AM General replied to the government's opposition and filed an opposition to the government's cross-motion (Motion Papers No. 3). This was followed

by the government's reply to AM General's opposition to the government's cross-motion, filed on 14 April 2005 (Motion Papers No. 4).

In deciding AM General's motion for summary judgment and in deciding the government's cross-motion for summary judgment, we rely on the facts provided by the parties and undisputed by the other party. Although there are disputed facts, as highlighted in the subsequent paragraphs, they are not material to the issues we are asked to decide. Nonetheless, they provide the context in which the parties' dispute arose.

THE PARTIES' STATEMENTS OF FACT

AM General has set out its statements of fact in support of its motion for summary judgment in narrative form (Motion Papers No. 1 at 5-15). To make its task more manageable, the government, in opposing AM General's motion, has sequentially numbered each sentence. The government has numbered 77 assertions of fact or sentences. (*See* Motion Papers No. 2, ex. G-7) Of the 77 sentences, the government has agreed with some of the facts asserted and disputed others (Motion Papers No. 2, at 22-25). We quote all 77 sentences in the numbered paragraphs below, with each numbered sentence preceded by the letter "A" to indicate AM General's version of the facts. We omit footnotes to the sentences. We put in bold type those assertions of fact the government disputes. We follow each disputed sentence with the government's version of the facts.

AM General's Statements of Fact

A1. "In the early 1990's the Government's requirements for HMMWVs [High Mobility Multipurpose Wheeled Vehicles] diminished from its earlier needs."

A2. "At that time, AMG built HMMWVs exclusively for the military."

A3. "Thus, the roll-back in military requirements threatened AMG's ongoing viability."

A4. "In 1992, the Army commissioned a study to determine AMG's minimum sustaining rate—*i.e.*, the daily number of HMMWVs that AMG needed to produce to have its plant remain economically viable—which revealed that the Government's needs would not meet AMG's minimum sustaining rate."

A5. "The Government's requirements alone, therefore, could not keep AMG in business."

A6. "Applying AMG's costs of operating the plant to the Government's diminished requirements would have made TACOM's price per vehicle prohibitive."

A7. "Thus, AMG and the Army were faced with shutting down the factory—and ending the HMMWV program altogether—or paying an exorbitant price per vehicle to maintain the program's industrial base."

A8. "Neither option was attractive."

A9. "Nevertheless, TACOM desired to maintain a source for HMMWVs, and AMG desired to remain in business."

A10. "In response to this mutual dilemma, with the Government's encouragement, AMG entered the commercial marketplace and began selling HMMWVs to the general public under the commercial trade name 'HUMMER'®."

A11. "AMG elected to launch the commercial program at that time in order to subsidize the Government's diminished requirements so that AMG could continue to produce HMMWVs at an affordable price."

A12. "The parties incorporated AMG's commercial program into their negotiations whereby each agreed to take responsibility for a certain amount of daily production to meet AMG's minimum sustaining production rate."

A13. "Cost projections, and therefore prices, were predicated on a total daily production of 25 vehicles."

A14. "TACOM accepted responsibility for purchasing 10 vehicles per day, and AMG undertook responsibility for selling 7.5 vehicles per day in direct foreign military sales and selling 7.5 vehicles per day in the commercial marketplace."

The government does not dispute the facts as stated in sentences 1 through 14 above (Motion Papers No. 2 at 22, ¶ 1).

A15. **"The *quid pro quo* for AMG undertaking responsibility for selling 60% of the HMMWV sustaining-rate production in the foreign and commercial marketplace was TACOM needed to agree to price the Army's HMMWV contract in a manner that would allow AMG to produce a commercially viable vehicle."**

A16. **"More specifically, from the outset AMG continually identified that an essential element of AMG's strategy to commercialize the HMMWV required allocating manufacturing overhead on a per-vehicle basis."**

A17. **"That is, each HMMWV absorbed the same amount of manufacturing overhead regardless of the model or purchaser."**

A18. **"Otherwise, AMG would not be able to produce a commercially viable vehicle, and therefore, would not be able to undertake responsibility for selling 7.5 HMMWVs per day in the commercial marketplace."**

A19. **"This would preclude pricing based on the 25 vehicles per-day sustaining rate and would, in turn, make the Army's price prohibitive."**

A20. **"Thus, AMG offered TACOM substantially lower prices by basing the contract on a daily production of 25 vehicles even though TACOM's requirements only satisfied 40% of that production, in exchange for TACOM agreeing to employ AMG's pricing methodology."**

The government disputes sentences 15 through 20 as misleading. It asserts that it "agreed to purchase a minimum of 10 vehicles a day and to pay AM General according to the prices set forth in the contracts. TACOM met and actually exceeded this requirement." (*See* Motion Papers No. 2 at 22, ¶ 2)

A21. "Legally, however, TACOM could not accept that offer because it could not award the contract without submission of certified cost and pricing data because TACOM believed the HMMWVs did not qualify under any exemption at that time."

A22. "Thus, while AMG was willing to continue producing HMMWVs and subsidize TACOM's requirements with commercial production to offer significantly lower prices to the Government, legally TACOM could not agree to AMG's pricing strategy that was necessary for its commercial program."

A23. "On October 13, 1994 Congress provided the answer by enacting FASA, which revamped several federal procurement statutes to make it easier for the Federal Government to purchase commercial items."

A24. "Based on FASA's new 'commercial item' definition, TACOM requested that the Department of the Army grant a waiver to permit TACOM to pursue AMG's pricing strategy."

The government does not dispute sentences 21 through 24 (Motion Papers No. 2 at 22, ¶ 1).

A25. **"TACOM always intended that the Waiver would overcome legal hurdles and have little practical effect."** The government disputes the assertion that "TACOM always intended that the Waiver would overcome legal hurdles." It counters that "TACOM had no authority to waive CAS and the waiver that TACOM obtained was not meant to waive, and did not waive, CAS." The government does not dispute that

"TACOM always intended that the Waiver would . . . have little practical effect" inasmuch as "the waiver did not waive or otherwise exempt AM General from CAS coverage, it did have little practical effect in these appeals." (*See* Motion Papers No. 2 at 22, ¶ 3)

A26. "As TACOM noted in its field pricing support request to the ACO, '[w]e have referred the waiver request to DA.'"

A27. "However, our position is that we still require a review of AMG's cost or pricing data; if the waiver is approved, we will not require a Certificate of Current Cost or Pricing Data."

A28. "TACOM had initially intended to award a five-year requirements contract with a maximum quantity of 10,000 vehicles."

A29. "However, faced with an imminent break in production at AMG, which threatened the program's continued existence, TACOM issued a letter contract to AMG to produce 1,201 HMMWVs on December 23, 1994."

A30. "The letter contract was intended to be part of the requirements contract and the quantity represented TACOM's first delivery order."

A31. "In January of 1995, TACOM then issued a solicitation for the remaining 8,799 vehicles."

The government does not dispute sentences 26 through 31 (Motion Papers No. 2 at 22, ¶ 1).

A32. **"After TACOM issued the letter contract and the solicitation for the remainder of the requirements contract, on March 23, 1995, the Army Acquisition Executive issued 'Authority to Waive Submission of Certified Cost or Pricing Data.'"** The government disputes this assertion because "the date that the waiver was signed by Gilbert Decker is unknown." The government asserts that "[b]ased upon the record, the Government has narrowed the date of signature to after February 1995 but before May 25, 1995." (*See* Motion Papers No. 2 at 23, ¶ 4)

A33. **"In relevant part, the Waiver stated '[w]hile the HMMWV does not meet the standards for the commercial item exemption in FAR 15.804-3(a)(2), it does meet the definition of a commercial item as established by Sec. 8001 of Pub. L. 103-355 [FASA].'"**

A34. **"Based on this commerciality determination, the Army Acquisition Executive stated "I am waiving the requirement for certification of the [cost or pricing] data."**

A35. **"The Waiver went on to provide that because of commercial sales information and 'the availability of historical cost and pricing data, a fair and reasonable price can be negotiated without obtaining certified cost or pricing data on the non-military unique items in the proposed contract.'"**

A36. **"After determining that the HMMWVs were non-military unique items, the Waiver then identified the models it covered by providing:"**

A37.

> **"The proposed contract action procures the below HMMWV models (configured with the new A2 Block modification changes):**
>
> | | |
> |---|---|
> | **M1097A2,** | **General Purpose Vehicle 97A2,** |
> | **M1025A2,** | **Armament Carrier, Basic Armor** |
> | **M997A2,** | **Maxi-Ambulance, 4 Litter** |
> | **M1043A2,** | **Armament Carrier, Supplemental Armor** |
> | **M1045A2,** | **Two Missile Carrier** |
> | **M1035A2,** | **Soft Top Ambulance, 2 Litter** |
> | **XM1113,** | **Expanded Capacity Vehicle (ECV)** |
> | **NONE,** | **ECV Baseline Chassis for Up-Armored Vehicle."** |

A38. **"This list represented every HMMWV model that the Army planned to purchase under its requirements contract."**

A39. **"For military-unique items—*e.g.*, gun turrets—AMG was still required to provide certified cost or pricing data."**

The government disputes AM General's assertions in sentences 32 through 39 on the basis that "the language contained in the Decker Waiver does not support AM General's contentions" (Motion Papers No. 2 at 23, ¶ 5).

Inasmuch as this case requires a legal interpretation of the so-called Decker Waiver, this is as good a place as any to set out the full text of that waiver:

DEPARTMENT OF THE ARMY

Authority to Waive Submission of Certified Cost or Pricing Data

1. The U.S. Army Tank-Automotive and Armaments Command (TACOM) proposes to enter into a five year requirements contract with AM General Corporation for the acquisition of various models of the High Military Multi-purpose Wheeled Vehicle (HMMWV) and associated kits.

2. Pursuant to FAR 15.804-2, the proposed contractor and subcontractors meeting the pertinent threshold are required to submit cost or pricing data, and to certify that such data is current, complete and accurate. However, for the following reasons, I am waiving the requirement for certification of the data:

a. TACOM has procured the HMMWV family of vehicles from AM General, the developer and sole manufacturer since 1983. Since that time, AM General has produced approximately 118,000 HMMWVs. AM General's HMMWV current business volume consists of a mix of 75% military and 25% commercial vehicles. AM General's projected sales (1995 - 1999) reflects a mix of 46% military and 54% commercial vehicles, for a total of approximately 32,000 vehicles.

b. Notwithstanding the current and projected commercial sales of the HMMWV, the volume of their commercial sales does not meet the "substantial sales" test to exempt AM General under FAR 15.804-3(a)(2) from the requirement to provide certified cost or pricing data. However, they have made a significant investment in facilities and marketing expenses in promoting commercial sales and they are in the process of establishing a viable commercial market. Because of this, and the availability of historical cost and pricing data, a fair and reasonable price can be negotiated without obtaining certified cost or pricing data on the non-military unique items in the proposed contract.

c. This waiver is consistent with 10 U.S.C. 2306a(d)(2) as amended by Sec. 1204 of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103-355). While the HMMWV does not meet the standards for the commercial item exemption in FAR 15.804-3(a)(2), it does meet the definition of a commercial item as established by Sec. 8001 of Pub. L. 103-355.

d. The proposed contract action procures the below HMMWV models (configured with the new A2 Block modification changes):

M1097A2,	General Purpose Vehicle
M1025A2,	Armament Carrier, Basic Armor
M997A2,	Maxi - Ambulance, 4 Litter
M1043A2,	Armament Carrier, Supplemental Armor
M1045A2,	Tow Missile Carrier, Supplemental Armor
M1035A2,	Soft Top Ambulance, 2 Litter
XM1113,	Expanded Capacity Vehicle (ECV)
-NONE-	ECV Baseline Chassis for Up-Armored Vehicle

e. This waiver authority is applicable to the non-military unique items produced by AM General and their subcontractors. The following items (and any other military unique items) being procured under the contract action are specifically excluded from the waiver:

XM1113 Expanded Capacity Vehicle (ECV)
ECV Chassis
Winch Kit for HMMWV A2 vehicles
2-Man and 4-Man Soft Top Kits
Troop Seats Kits
Bulkhead Kits
Pod Boxes
HMMWV A1 and HMMWV A2 Engineering Change Proposals
HMMWV A2 Block Mod Hardware Changes

3. The requirement for certification of cost or pricing data for non military unique items from the prime contractor and subcontractors for the proposed contract action is hereby waived, provided AM General submits all adequate cost and

price data and fully cooperates with the Government's audit and review. I make this waiver under the authority of 10 U.S.C. 2306a (b)(1)(B) as implemented by FAR 15.804-3(i).

Date

Gilbert F. Decker
Army Acquisition Executive

(Motion Papers No. 1, tab 1)

A40. "AMG first submitted a proposal on January 20, 1995 based on its commercial model pricing."

A41. "That is, AMG proposed prices based on discounts from manufacturer suggested retail price ('MSRP')."

A42. "TACOM, however, was not able to determine whether the prices were fair and reasonable."

The government does not dispute sentences 40 through 42 (Motion Papers No. 2 at 22, ¶ 1).

A43. **"After the Army issued the Waiver, TACOM informed AMG that it could not accept its pricing based on MSRP and that AMG needed to submit a revised proposal."** The government disputes this fact on the basis that "the date that Gilbert Decker signed the waiver is unknown." According to the government, the waiver was signed "sometime after February 1995 and before May 25, 1995." The government asserts that "[o]n or about April 25, 1995, it was determined that commercially pricing the HMMWV contracts was not an achievable acquisition strategy." (Motion Papers No. 2 at 23, ¶ 6)

A44. **"On June 26, 1995 AMG submitted a revised definitization proposal based on uncertified cost data for the HMMWVs."** The government disputes this assertion. It contends that "[a]ccording to DCAA's Audit Report dated September 18, 1995, AM General executed a Certificate of Current Cost and Pricing Data on June 26, 1995 for AM General's proposal dated June 26, 1995." (Motion papers No. 2 at 23, ¶ 7)

A45. "The cost data were predicated on 25 vehicles per day, which implemented the agreed-to daily production allocation."

A46. "Parallel to its negotiations with TACOM, AMG notified the cognizant ACO, in a letter dated May 25, 1995, that AMG intended to change its accounting practice in order to implement the pricing strategy that it had negotiated with TACOM."

A47. "In July of 1995, DCAA issued its draft audit report, which objected to the proposed accounting change as non-compliant with CAS 418 and estimated that AMG's changed accounting practice would result in a $1,650 increase to TACOM for each vehicle it purchased."

The government does not dispute sentences 45 through 47 (Motion Papers No. 2 at 22, ¶ 1).

A48. **"Despite the CAS non-compliance determination, TACOM elected to price the contracts based on AMG's proposed overhead allocation because pricing the contracts based on a daily production rate of 25 vehicles per day instead of the Government's requirements presented a much better deal for the Government."** The government disputes that it "elected" or "knowingly elected" to price the contracts based upon AM General's proposed overhead allocation. The government asserts:

> AM General refused to give TACOM a proposal for the HMMWVs incorporating the accounting practice of allocating manufacturing overhead using a direct labor base (PFF 16). TACOM was forced to negotiate the contracts based upon the new "per unit" method. Given the circumstances, TACOM, in order to meet the Government's need for HMMWVs, prudently decided to proceed and included the CAS clauses and the Reopener Clause in the contracts which indicated that the Government reserved its right to make a downward adjustment, including rollups, in the contract price once cost impact was determined.

(Motion Papers No. 2 at 23-24, ¶ 8)

A49. "As noted in TACOM's records, "[w]e have decided to accept the proposed per-vehicle allocation of Mishawaka direct labor overhead expenses, even though DCAA will write it up as a CAS 418 violation." The government does not dispute this sentence (Motion Papers No. 2 at 22, ¶ 1).

A50. **"Consistent with TACOM's decision to accept AMG's overhead allocation methodology, the PCO requested that DCAA evaluate AMG's proposal based on a per-unit allocation, even though it has already been determined to be CAS non-compliant."** The government disputes that TACOM "accept[ed]" AM General's overhead allocation methodology. The government contends that "TACOM

had no choice but to negotiate based upon the 'per unit' method since AM General refused to price its proposal using the 'prior to September 1995' basis (PFF 16). AM General at this time was the sole provider of the HMMWVs." (Motion Papers No. 2 at 24, ¶ 9)

A51. "DCAA complied with TACOM's request."

A52. "In its proposal audit report, DCAA again set forth the CAS 418 non-compliance determination that it reached in July of 1995 but noted '[a]s requested by the PCO, we have evaluated the manufacturing expense pool.'"

A53. "'To compare our audit results with the proposal, we have presented the cost questioned using the unit method.'"

A54. "Further, DCAA confirmed that the PCO was also fully aware of its CAS non-compliance cost impact estimate."

A55.

> "The CAS 406 and 418 noncompliance are considered significant; however, we have provided the cost impact of the CAS 406 noncompliance (Note 2) and the CAS 418 noncompliance in Audit Report No. 1621-95G19100001. As discussed with Mr. K. Bousquet, PCO, and at his request, we have evaluated the proposed amounts to the extent possible in the circumstances."

A56. "The parties concluded negotiations premised on AMG's CAS non-compliant per-vehicle overhead allocation and corresponding 25 vehicle-per-day production rate."

The government does not dispute sentences 51 through 56 (Motion Papers No. 2 at 22, ¶ 1).

A57. **"Based on the available information at that time—including DCAA's preliminary cost impact of $1,650 per vehicle resulting from the CAS 418 non-compliance—TACOM concluded that it had negotiated a fair and reasonable price."** The government disputes the assertion that "TACOM concluded that it had negotiated a fair and reasonable price." It asserts that it "made it clear at the time of negotiations that it would analyze whether AM General's accounting practice violated CAS 418 and that, if it was, it would use the CAS and reopener clauses to downwardly adjust the contract price once the cost impact was ascertained. After the contracts were executed, Ms. Ordaz (ACO) on August 12, 1996 advised AM General of her initial finding of noncompliance. Clearly, the Government was questioning whether the

contract it had entered into with AM General was based upon a fair and reasonable price." (Motion Papers No. 2 at 24, ¶ 10)

A58. **"Prior to executing the contract, TACOM introduced a 'Manufacturing Allocation Reopener' to AMG and incorporated it into the price-definitization modification to reserve TACOM's rights in case subsequent information concerning use of AMG's non-compliant overhead allocation upset the fair-and-reasonable price determination."**

A59. **"In the event that TACOM no longer concluded that it had received a fair and reasonable price after receiving DCAA's final cost impact, the Reopener Clause specified 'the Contracting Officer has the right to determine a reasonable final price.'"**

The government disputes sentences 58 and 59. The government says that "the language contained in the Reopener clause does not support AM General's contention." Moreover, the government asserts that "through the CAS clauses and the Reopener Clause, it reserved the right to make a downward only adjustment in the contract price once cost impact is determined. The Reopener clause does not contain 'fair-and-reasonable price determination' language." (Motion Papers No. 2 at 25, ¶ 11)

A60. "Accordingly, the Reopener Clause provides that because TACOM used AMG's CAS non-compliant overhead allocation, 'the Government reserves the right to make a downward price adjustment, including rollups, in the contract price once cost impact is determined.'"

A61. "TACOM's documents describing the Reopener Clause for senior Department of Defense officials explain that '[w]e included a downward only reopener clause to simply show the mutually agreed upon calculation to use once the CAS violation issues were resolved.'"

A62. "TACOM and AMG definitized the R021 Contract [by Modification No. PZ0004 (R4, tab 2)] on September 29, 1995."

A63. "Consistent with the Waiver, AMG did not certify its cost or pricing data for non-military unique items."

A64. "Six weeks after the parties definitized the R021 Contract, they executed the five-year requirements contract [Contract No. DAAE07-96-D-X001 (R4, tab 8)] for HMMWVs on December 14, 1995."

A65. "As with the R021 contract, the X001 Contract contained an identical Reopener Clause and AMG's certification again expressly excluded non-military unique items."

A66. "Finally, in June of 1996, the Government definitized a modification to the previous contract [Modification No. PZ0392 to Contract No. DAAE07-89-C-0998] to convert 309 base models into expanded capacity vehicles ('ECVs') and the Government likewise included the Reopener Clause."

A67. "Nearly seven months after receiving AMG's notice concerning its change in accounting practice the ACO issued a notice of CAS noncompliance."

A68. "After more than five years of discussions, on August 23, 2001, the ACO issued a final decision seeking CAS damages on TACOM's contracts."

A69. "In the Final Decision, the ACO echoed the conclusion reached by DCAA and TACOM in July of 1995 stating, 'it is my decision that the unit-of-production method of allocating overhead expenses to the HMMWV contracts is a violation of CAS 418.'"

A70. "The ACO also adopted DCAA's revised calculation that the Government is entitled to a $979 price adjustment under the CAS clause for each HMMWV purchased under TACOM's contracts."

A71. "In other words, the Government's claim in this case is based entirely on the alleged CAS noncompliance related to the prices paid for HMMWVs under TACOM's contracts."

A72. "The ACO's final decision, however, makes no mention of the Waiver and fails to recognize the Waiver's legal effect to TACOM's contracts."

The government does not dispute sentences 60 through 72 (Motion Papers No. 2 at 22, ¶ 1).

A73. **"Likewise, the Final Decision does not address the fact that the PCO knowingly elected to use AMG's non-compliant overhead allocation to negotiate prices with AMG."** The government disputes Sentence 73 for the same reasons it disputes Sentence 48 (Motion Papers No. 2 at 23-24, ¶ 8).

A74. **"That is to say, even assuming the ACO's conclusion that AMG's overhead allocation violates CAS 418 is correct, that determination does not apply here."**

A75. **"Further, the Government confirms that it is pursuing a claim and remedy under the general CAS clause, despite the specific negotiated Reopener Clause."**

A76. **"Thus, even if the Government is entitled to a remedy, it is not entitled to the remedy it is seeking in this claim."**

A77. **"Accordingly, the Government's claim must be rejected."**

The government disputes AM General's assertions in sentences 74, 76, and 77 because "they are AM General's legal conclusions not statements of fact." The government disputes the assertion in Sentence 75 because "it is AM General's expression of its interpretation of the Government's position." (Motion Papers No. 2 at 25, ¶¶ 13, 14)

AM General's statements of fact are defensive in nature. That is to say, they seek to persuade us why the government's CAS violation claim should not be granted. Reading AM General's statements of fact alone does not provide the full context in which the appeal (ASBCA No. 53610) arose. We therefore set forth next the government's statements of fact in support of its cross-motion for summary judgment, recognizing that some of the facts the government advances might not be material to AM General's motion. Those facts, however, provide a fuller picture of the setting which led to the appeal. We follow the practice we used before. We use the letter "G" in each numbered paragraph to indicate that it is the government's statement of fact, and we follow each paragraph which AM General disputes (in bold) with its version of the facts.

The Government's Statements of Fact[3]

In support of its cross-motion for summary judgment, the government sets out the following statements of fact.

G1. "AM General produces the military High Mobility Multipurpose Wheeled Vehicle ('HMMWV') for the Government as well as a commercial version of the HMMWV known as the HUMMER (Ex. G-4 at 3)." AM General does not dispute this fact (Motion Papers No. 3 at 5, ¶ 1).

G2. "AM General conducts the majority of its production of both military HMMWVs and commercial HUMMERs at its Mishawaka, Indiana plant (Ex. G-4 at 4)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 5, ¶ 2)

[3] The government's statements of fact are set out in Motion Papers No. 2 at 2-22.

G3. **"After the commercial HUMMER comes off the production line at the Mishawaka plant, it is completed at AM General's Armour, Indiana plant (Ex. G-4 at 4). The Armour building cost is 11 percent of the total manufacturing overhead expense and this cost can be segregated and charged to the commercial program (SR4, tab 42 at 2)."** AM General disputes this fact. It states in answer that "AMG does not have a facility in Armour, Indiana. The Armour building is part of AMG's production line at its Mishawaka, Indiana facility. Because a majority of the Mishawaka facility overhead costs are fixed, the 11 percent estimate requires allocations and estimations which will vary over time." AM General contends that this fact is immaterial to its motion. (Motion Papers No. 3 at 5, ¶ 3)

G4. "The military HMMWV is assembled and finished entirely in AM General's main plant in Mishawaka and is not worked on at the Armour plant (Ex. G-4 at 4)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 5, ¶ 4)

G5. **"On or about December 23, 1994, the United States Army, Tank-Automotive and Armament Command ('TACOM') awarded a five-year, firm fixed price with Economic Price Adjustment ('EPA') Letter Contract No. DAAE07-95-C-RO21 (hereinafter 'Contract RO21') to AM General for the delivery of HMMWVs (R4, tab 2)."** AM General disputes this statement contending that "[t]he R021 letter contract for 1,201 vehicles was intended to be definitized as the first delivery order issued under a proposed five-year requirements contract. (R4, tab 2)." (Motion Papers No. 3 at 5, ¶ 5)

G6. "On or about March 3, 1995 [sic], Bilateral Modification No. P00336 (undefinitized) to Contract No. DAAE07-89-C-0998 (hereinafter "Contract 0998") was executed for AM General to upgrade 309 HMMWVs to the Expanded Capacity Vehicles ('ECV') configuration (R4, tab 1)." AM General does not dispute this fact (Motion Papers No. 3 at 5, ¶ 6).

G7. "Bilateral Modification No. P00336 to Contract 0998 incorporated not-to-exceed unit ceiling prices for the 309 ECV configuration of the HMMWVs (R4, tab 1)." AM General does not dispute this fact (Motion Papers No. 3 at 5, ¶ 7).

G8. "After February 1995 but before May 25, 1995, Gilbert F. Decker, Army Acquisition Executive, signed a waiver of submission of certified cost or pricing data for 'non-military unique items produced by AM General and their subcontractors' (hereinafter 'Decker Waiver') (R4, tab 13; SR4, tab 35; ex. G-8)."[4] AM General does not dispute this fact (Motion Papers No. 3 at 5, ¶ 8).

[4] By letter dated 17 November 2004, the Board asked the parties to explain the position of "Army Acquisition Executive" and establish that he was delegated the requisite

G9. "The Decker Waiver states, in pertinent part:

* * *

> e. ***This waiver authority is applicable to the non-military unique items*** **produced by AM General and their subcontractors. The following items (and any other military unique items) being procured under the contract action are *specifically excluded from this waiver:***
>
> **XM1113 Expanded Capacity Vehicle**
> **ECV Chassis**
> **Winch Kit for HMMWV A2 vehicles**
> **2-Man and 4-Man Soft Top Kits**
> **Troop Seats Kits**
> **Bulkhead Kits**
> **Pod Boxes**
> **HMMWV A1 and HMMWV A2**
> **Engineering Change Proposals**
> **HMMWV A2 Block Mod Hardware**
> **Changes**

(R4, tab 13; SR4, tab 35) (emphasis added)." AM General disputes this fact contending that "[t]his proposed fact misquotes paragraph e. of the Decker Waiver which excluded 'HMMWV A1 and A2 Engineering Change Proposals' and 'HMMWV A2 Block Mod Hardware Changes.'" AM General also notes that the government did not quote the entire Decker Waiver and referred us to its motion at Ex. 1 and SR4, tab 35. (Motion Papers No. 3 at 5, ¶ 9)

G10. "Department of the Army General Orders indicate that the Assistant Secretary of the Army (Research, Development and Acquisition), acting as the Army Acquisition Executive, is responsible for 'the procurement and contracting functions, to include exercising the authorities of the agency head for contracting, procurement and

---

authority to waive submission of certified cost or pricing data. Counsel for AM General responded by letter dated 5 January 2005. The letter advised that "Gilbert F. Decker was sworn in as the Assistant Secretary of the Army for Research, Development and Acquisition in 1994, which additionally carried the title of Army Acquisition Executive." The U.S. Army General Orders delegating authority to the Army Acquisition Executive are included in the Government's Rule 4 file at tabs 34 and 37.

acquisition matters pursuant to laws and regulations' (SR4, tab 34 at 1, 5-6, tab 37 at 1, 6)." AM General does not dispute this fact (Motion Papers No. 3 at 6, ¶ 10).

G11. **"AM General initially proposed the HMMWVs cost based upon commercial pricing but TACOM rejected this method because AM General failed to meet the substantial quantity test (Ex. G-1 at 54-60)."** AM General disputes this fact. It contends that "TACOM could not reach a determination as to whether AMG's proposed prices based on Manufacturer Suggested Retail Price ('MSRP') were fair and reasonable because other automobile manufacturers offered more substantial discounts from dealer price. (Ex. 32 attached hereto). AMG could not offer discounts based on dealer price because its dealer price was less than AMG's cost. (Ex. 33 attached hereto). The Waiver was issued expressly to overcome any concerns that AMG did not satisfy the substantial quantity requirements." AM General asserts that this proposed fact is immaterial to its motion. (Motion Papers No. 3 at 6, ¶ 11)

G12. **"On or about April 25, 1995, TACOM determined that commercially pricing the HMMWV contracts was not an achievable acquisition strategy because it concluded that AM General's proposed price was not fair or reasonable (R4, tabs 14-15; SR4, tab 36)."** AM General disputes this fact on the same basis as in ¶ 11. It says that the fact is not material to its motion. (Motion Papers No. 3 at 6, ¶ 12)

G13**.** "On or about May 25, 1995, AM General submitted to the Administrative Contracting Officer ('ACO'), Ms. Lydia Ordaz, changes to its disclosure statement pertaining to the manufacturing overhead base and the incremental overhead rate on the HMMWVs contracts. These changes became effective September 1, 1995. In accordance with its new method, AM General intended to accumulate all proposed manufacturing overhead costs, including fixed and variable expenses for both the commercial and military vehicles, into one single indirect cost pool. (R4, tab 3)" AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 6, ¶ 13)

G14. "In accordance with the disclosure statement, in effect prior to September 1, 1995, AM General had allocated manufacturing overhead using a direct labor base and allocated material overhead using direct material cost as a base (Ex. G-4 at 3)." AM General does not dispute this fact. It asserts that the fact is immaterial to its motion. (Motion Papers No. 3 at 6, ¶ 14)

G15. "After September 1, 1995, AM General's method for allocating manufacturing overhead and material overhead used the number of vehicles manufactured, whether commercial HUMMERs or military HMMWVs (also referred to as the 'unit method' or 'unit-of-production base') (Ex. G-4 at 3)." AM General does not dispute this fact. It asserts that the fact is immaterial to its motion. (Motion Papers No. 3 at 6, ¶ 15)

G16. **"As part of the definitization negotiation of Letter Contract R021, AM General's negotiator refused to give TACOM a cost proposal for the HMMWVs using the accounting practice in existence prior to September 1995 of allocating manufacturing overhead using a direct labor base (Ex. G-2 at 150-55)."** AM General disputes this fact. It contends that "TACOM never requested a proposal using the accounting practice in existence prior to September 1995, and AMG never refused to provide such a proposal. AMG did inform TACOM that it could not agree to price the HMMWVs based on a daily production rate of 25 vehicles per day if TACOM insisted that its proposal be priced based on a labor hour allocation method. (Ex. G-2, 153:9 - 154:13)." It asserts that this fact is immaterial to its motion. (Motion Papers No. 3 at 6, ¶ 16)

G17. **"AM General felt that its prior accounting practice was unfair and unreasonable because, under that method, the commercial vehicles (HUMMERs) bore twice as much overhead as the military vehicles (HMMWVs) (Ex. G-1 at 54-60, ex. G-3 at 67-73). AM General admitted, however, that if the reverse situation were to occur, and the Government bore more than its fair share of the indirect costs, that this would also be unfair (Ex. G-3 at 157-59)."** AM General disputes this fact, contending what Mr. Wldoarski testified, in part, was that "AMG's prior account [sic] methodology was unfair and unreasonable because 'allocating fixed costs using direct labor as a base—there's no causal [or] benefit relationship. Absolutely none at all.'" AM General says that the government's statement—it would be unfair if a party bore more than its fair share of indirect cost—is simply a statement of the obvious. AM General says that this fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 17)

G18. **"After September 1, 1995, AM General included military and commercial costs in a single indirect cost pool for allocation to the HMMWVs and HUMMERs (R4, tab 3; ex. G-1 at 60)."** AM General disputes this fact and contends that "AMG had included overhead costs related to both its military and commercial production in the same costs pools prior to September 1, 1995." AM General says this fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 18) We note that AM General has not addressed or disputed the fact that after 1 September 1995, it included military and commercial manufacturing overhead costs in a single indirect cost pool for allocation to the military and commercial vehicles.

G19. **"Indirect costs associated solely with the commercial vehicles are separately identified in AM General's chart of accounts as are indirect costs associated solely with the military vehicles (Ex. G-3 at 66-69)."** AM General disputes this fact on the basis that it "mischaracterizes the witness' testimony." AM General says that this fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 19)

G20. "According to AM General's revised disclosure statement, effective September 1, 1995, any modification or amendment to the vehicles will be proposed with

incremental overhead costs (also referred to as variable overhead costs) required as a result of the change to the vehicles affected (R4, tab 3 at Continuation Sheet 24 of 45)." AM General does not dispute this fact. It asserts that the fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 20)

G21. "During negotiations for Contract R021 in September 1995, the contracting officer relied upon the cost or pricing data submitted by AM General (R4, tab 4 at 17)." AM General does not dispute that "the Government's Price Negotiation Memorandum (PNM) reflects that the Army relied upon certified cost or pricing data for the military-unique items for which AMG submitted certified cost or pricing data." AM General notes that the contracting officer did not sign the PNM. AM General says that this fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 21)

G22. **"In its Price Negotiation Memorandum ('PNM') for the definitization of Contract R021, dated September 19, 1995, TACOM stated that it would separately address the potential CAS 418 noncompliance caused by AM General's accounting change, and it advised AM General of the potential for a contract price adjustment after the cost impact was ascertained (R4, tab 4 at 8)."** AM General disputes this proposed fact on the basis that it mischaracterizes the document. The PNM of 19 September 1995 stated, in part, on page 8:

> . . . DCAA took issue with AMG's proposed per-vehicle method of allocating Mishawaka overhead expenses. DCAA said that under this proposed method, "the expense pool would not be allocated to the cost objectives (vehicles) in reasonable proportion to the benefits received from the expense pool." DCAA continued that "In our opinion, the contractor's revised practice would be in noncompliance with CAS 418 and FAR Part 31." *The PCO determined that we would negotiate vehicle prices using the proposed allocation method. We plan to address the cost impact of the CAS issue separately.* DCAA's report said "We will separately issue a CAS 418 noncompliance report if the proposed accounting change becomes effective on 1 Sep 95." In later discussions with DCAA, the auditor said the noncompliance report will be issued as soon as he has actual notice of the change. The purpose of the noncompliance report will be to generate a cost impact estimate for use in adjusting contract vehicle prices. We advised AMG of the potential for contract price adjustment. [Emphasis added]

(R4, tab 4 at 8) AM General says that this proposed fact is immaterial to its motion (Motion Papers No. 3 at 7, ¶ 22).

G23. **"On September 25, 1995, the Defense Contract Audit Agency ('DCAA') notified Ms. Ordaz, the ACO, that AM General's May 25, 1995 revised disclosure statement adequately described its proposed accounting change but this change would result in a CAS 418 noncompliance (R4, tab 5 at 1)."** AM General disputes this fact contending that "DCAA advised Ms. Ordaz of its conclusions in July 1995 (AMG Mot. Ex. 18) and again on September 18, 1995 (AMG Mot. Ex. 20)." AM General says this fact is immaterial to its motion. (Motion Papers No. 3 at 7, ¶ 23)

G24. "On or about September 29, 1995, Bilateral Modification No. PZ0004 was issued definitizing Contract R021. This modification was funded for 1,201 A2 High Mobility Multipurpose Wheel Vehicles ('A2 HMMWVs') and incorporated Clause H-23, entitled 'Manufacturing Overhead Allocation Reopener.' (R4, tab 2)" AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 24).

G25. "Contract R021 incorporated by reference the following pertinent Federal Acquisition Regulation ('FAR') clauses:

52.215-22	Price Reduction for Defective Cost or Pricing Data (JAN 1991)
52.230-2	Cost Accounting Standards (AUG 1992)
52.230-5	Administration of Cost Accounting Standards (AUG 1992)

(SR4, tab 41)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 8, ¶ 25).

G26. "The negotiated manufacturing overhead per vehicle for Contract R021 is $7,994.92 which was calculated by dividing $47,369,899 by 5,925 vehicles. The total negotiated manufacturing overhead for Contract R021 is $9,601,898.02 [sic], which is $7,994.92 multiplied by the 1,201 HMMWVs procured. (R4, tabs 2, 22, tab 4 at 7)" AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 26).

G27. "On September 29, 1995, E. L. Peters, AM General's Vice President, Contracts and Subcontract, signed and executed the 'Certificate of Current Cost or Pricing Data' for Modification PZ0004 definitizing Contract R021, which states:

> This is to certify that, to the best of my knowledge and belief, cost or pricing data (as defined in Section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR Subsection 15.804-2) submitted either actually or by specific identification in writing, to the contracting officer or the contracting officer's representative in support of

> Modification PZ0004 to Letter Contract DAAE07-95-C-R021 for 1,201 HMMWV A2 trucks are accurate, complete, and current as of September 15, 1995. This certification excludes non-military unique items produced by AM General and their subcontractors.
>
> This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

(SR4, tab 38)" AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 27).

G28. **"Although initially contemplated as a five-year requirements agreement, Contract R021 became the 'bridge' contract between Contract 0998 and Contract X001 (R4, tabs 2, 13)."** AM General disputes this fact and refers to its response to ¶ 5. In ¶ 5, AM General states "The R021 letter contract for 1,201 vehicles was intended to be definitized as the first delivery order issued under a proposed five-year requirements contract." AM General says this fact is immaterial to its motion. (Motion Papers No. 3 at 8, ¶ 28)

G29. "TACOM and AM General agreed that the negotiations for Contract R021 would act as a baseline for the negotiations of Contract X001 (Ex. G-2 at 112-15)." AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 29).

G30. "TACOM conducted negotiations with AM General from October 31, 1995 through December 13, 1995 on Request for Proposal ('RFP') No. DAAE07-95-R-R013 (Contract X001) for a separate five year requirements contract for HMMWVs (R4, tab 6)." AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 30).

G31. **"In its Business Clearance Memorandum ('BCM') dated December 8, 1995, for RFP No. DAAE07-95-R-R013 (Contract X001), TACOM developed a cost per vehicle for purposes of negotiating a contract price. TACOM intended to separately address the CAS 418 noncompliance, and it put AM General on notice of the potential for a contract price adjustment after contract award. (R4, tab 6 at 6)"** AM General disputes this fact contending that it "mischaracterizes the document." AM General also says that the fact is immaterial to its motion. (Motion Papers No. 3 at 8, ¶ 31)

G32. "By letter dated December 13, 1995, Ms. Ordaz notified AM General of DCAA's opinion that its proposed accounting practice change would result in a CAS 418 noncompliance and requested a cost impact proposal (R4, tab 7)." AM General does not

dispute this fact. It contends that the fact is immaterial to its motion (Motion Papers No. 3 at 8, ¶ 32).

G33. "On December 13, 1995, Mr. Peters, AM General's Vice President, Contracts and Subcontract, signed and executed the "Certificate of Current Cost or Pricing Data" for Contract X001, which states:

> This is to certify that, to the best of my knowledge and belief, cost or pricing data (as defined in Section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR Subsection 15.804-2) submitted either actually or by specific identification in writing, to the contracting officer or the contracting officer's representative in support of Five-Year A2 Requirements Contract DAAE07-96-X001 for A2 HMMWV Trucks and Kits are accurate, complete, and current as amended on attachment. This certification excludes non-military unique items proposed by AM General and their subcontractors.
>
> This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

The Attachment to the Certificate of Current Cost or Pricing Data listed the certification exceptions pertaining to the costs for Soft Top Kits and Bulkhead Kits. (R4, tab 8; SR4, tab 40)" AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 33).

G34. "On or about December 14, 1995, TACOM awarded Contract X001 under RFP No. DAAE07-95-R-R013 to AM General (R4, tab 8)." AM General does not dispute that "the X001 Contract was awarded on December 14, 1995" (Motion Papers No. 3 at 8, ¶ 34).

G35. "Contract X001 incorporated by reference the following pertinent FAR clauses:

52.215-22	Price Reduction for Defective Cost or Pricing Data (JAN 1991)
52.230-2	Cost Accounting Standards (AUG 1992)
52.230-5	Administration of Cost Accounting Standards (FEB 1995)

(R4, tab 8 at Section I)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 8, ¶ 35)

G36. "Contract X001 incorporated Clause H.12, entitled 'Continuation of Performance' which states what occurs when 'the delivery rate falls below a monthly rate equal to ten per work day'[5] and Clause H.20, entitled 'Manufacturing Overhead Allocation Reopener' (R4, tab 8 at H-10, H-28)." AM General does not dispute this fact (Motion Papers No. 3 at 8, ¶ 36).

G37. "The negotiated manufacturing overhead per vehicle on Contract X001 is $7,994.92 for Year One and Years Two through Five included this per vehicle cost (*i.e.*, $7,944.92 [sic] plus escalation. The negotiated variable rate (also referred to as the incremental overhead rate) is 122.4 percent. (R4, tab 6 at 6 and 9, tabs 13, 15; SR4, tab 39; ex. G-3 at 180-81)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 8, ¶ 37)

G38. "AM General delivered 15,521 HMMWVs under Contract X001 meeting and exceeding the rate of 10 vehicles per day (R4, tab 32; SR4, tab 46 at 10; ex. G-2 at 129)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 38)

---

[5] H.12 CONTINUATION OF PERFORMANCE provides:

> a. If, after the first delivery order of production A2 HMMWVs is issued, the rate of delivery falls below a monthly rate equal to ten (10) per work day, and the Government requires the contractor to continue performance under this contract, then the contract may be subject to equitable adjustment. Failure to agree to any adjustment shall be a dispute under the Disputes Clause.
>
> b. If, after the first delivery order of production A2 HMMWVs is issued, the rate of delivery falls below a monthly rate equal to ten (10) per day, and the Government does not require the contractor to continue performance under this contract, then no further delivery orders will be issued under this contract and the contract shall not be subject to an equitable adjustment.

(R4, tab 8 at H-10)

G39. "AM General in a letter to DCAA dated January 31, 1996, stated that the criteria for selection of an allocation method under CAS 418 is based upon the materiality of the costs and the beneficial or casual relationship with the method chosen (SR4, tab 42)." AM General does not dispute this fact except that the government did not quote the entire letter. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 39)

G40. "On June 3, 1996, Mr. Camblin, AM General's Director, Contracts Management, signed and executed the 'Certificate of Current Cost or Pricing Data' for Modification PZ0392 to [Contract 0998[6]], which states:

> This is to certify that, to the best of my knowledge and belief, cost or pricing data (as defined in Section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR Subsection 15.804-2) submitted either actually or by specific identification in writing, to the contracting officer or the contracting officer's representative in support of modifying M1097A1 vehicles into expanded capacity vehicle chassis vehicles on Contract DAAE07-89-C-0998 are accurate, complete, and current. This certification excludes non-military unique items produced by AM General and their subcontractors.
>
> This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

(SR4, tab 43)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 40)

G41. "On or about June 28, 1996, Bilateral Modification No. PZ0392 to Contract 0998 was issued definitizing Modification No. P00336 and incorporated unit prices for the 309 ECV configuration to the HMMWVs (R4, tabs 1, 9)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 41)

G42. "Contract 0998, including Modification PZ0392, incorporated by reference the following pertinent FAR clauses:

---

[6] The certificate under SR 43 pertains to Contract 0998. We believe the government mistakenly referred to Contract X001.

52.215-22	Price Reduction for Defective Cost or Pricing Data (APR 1988)
52.230-3	Cost Accounting Standards (SEP 1987)
52.230-4	Administration of Cost Accounting Standards (SEP 1987)

(SR4, tab 33)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 42)

G43. "Bilateral Modification PZ0392 to Contract 0998 incorporated the 'Manufacturing Overhead Allocation Reopener' clause (R4, tab 9)." AM General does not dispute this fact (Motion Papers No. 3 at 9, ¶ 43).

G44. "Contract R021, Contract X001, and Modification PZ0392 to Contract 0998 contain basically the same 'Manufacturing Overhead Allocation Reopener' clause, with one exception. Unlike Contract R021 and X001, the reopener clause contained in Modification PZ0392 shows a quantity of 5,925 vehicles instead of 1,201 vehicles. (R4, tab 1, tab 2 at H-39, tab 8 at H-28, tab 9 at 1D)." AM General does not dispute this fact. It contends that "[t]hose documents speak for themselves." (Motion Papers No. 3 at 9, ¶ 44)

G45. "Contract R021, Contract X001, and Modification PZ0391 [sic] to Contract 0998 *did not contain* FAR 52.212-4, Contract Terms and Conditions – Commercial Items (R4, tab 8; SR4, tabs 33, 41) (emphasis added)." AM General does not dispute this fact. It notes that "this proposed fact is misleading because FAR 52.212-4 Contract Terms and Conditions – Commercial Items was not promulgated until October 1, 1995, which is after Contract 0998 and Contract R021 were awarded. 60 Fed. Reg. 48254 (Sept. 18, 1995). Further, 'TACOM and AM General agreed that the negotiations for Contract R021 would act as a baseline for negotiations of Contract X001.' (Opposition PFF 29)." AM General contends that this fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 45)

G46. "The 'Manufacturing Overhead Allocation Reopener' clause on Contract R021 states, in pertinent part:

> By submission of a revised disclosure statement dated May 25, 1995, AM General voluntarily changed its method of allocating overhead manufacturing costs at the Mishawaka manufacturing plant, effective September 1, 1995. The change eliminated the material handling overhead that was allocated to vehicles based on material cost, and the direct labor overhead that was allocated to vehicles based on direct labor cost, by combining both of these overhead pools and

> then allocating the total overhead expenses over the quantity of vehicles produced, military and commercial during the contractor's accounting period.
>
> The prices agreed to under this Modification PZ0004 were negotiated based on the per unit allocation method described above, resulting in a manufacturing overhead of $7,994.92. However, Defense Contract Audit Agency (DCAA) has indicated that this is a Cost Accounting Standard (CAS) 418 violation. A cost impact for this change has not been determined as of the date of this Modification PZ0004.
>
> The Government reserves the right to make a downward adjustment, including rollups, in the contract price once cost impact is determined. The Contractor will have the right to dispute the DCAA findings and discussions will take place. If agreement on a definitive amount is not reached within 90 days from date of the DCAA Audit Report, the Contracting Officer has the right to determine a reasonable final price for the downward adjustment due under this clause in accordance with Subpart 15.8 and Part 31 of the FAR subject to appeal by the Contractor pursuant to the clause of this contract entitled 'Disputes.'
>
> The Total Reopener Adjustment Amount is the difference between the $9,601,898.92 amount included in the Government's pro-forma settlement amount and the final amount determined reasonable by the Contracting Officer.
>
> The Per-Vehicle Reopener Adjustment Amount will be determined by dividing the Total Reopener Adjustment Amount by a quantity of 1,201 vehicles, carrying the quotient to two decimal places.
>
> The per-vehicle contract price adjustment amount will be determined by multiplying the per-vehicle Reopener Adjustment Amount by the Contract Price Adjustment Factor of 1.2403, carrying the product to two decimal places.
>
> * * *

(R4, tab 2 at H-39)." AM General does not dispute this fact (Motion Papers No. 3 at 9, ¶ 46).

G47. "On July 16, 1996, DCAA issued Audit Report No. 1621-99G19200001 to Ms. Ordaz. **DCAA concluded that AM General was in noncompliance with CAS 418 and FAR 31.201-4. (R4, tab 10)**" AM General does not dispute that DCAA issued the audit report on 16 July 1996. It disputes the conclusions reached by DCAA. It contends that this fact is immaterial to its motion. (Motion Papers No. 3 at 9, ¶ 47)

G48. "On August 12, 1996, Ms. Ordaz made an initial finding of noncompliance and forwarded AM General a copy of DCAA Audit Report No. 1621-96G19200001 (R4, tab 12)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 48)

G49. "By letter dated August 27, 1996, AM General responded to Ms. Ordaz's noncompliance letter. In its letter, AM General states, in pertinent part:

> . . . . Only the unique costs were certified as to currency, accuracy and completeness. Reliance was placed upon the Department of Army's Waiver to submission of cost or pricing data signed by Gilbert F. Decker for M1097A2, M1025A2, M997A2, M1043A2, M105A2 and M1035A2. . . .

(R4, tab 13)" AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 49)

G50. "From September 1995 through August 2001, the ACO, AM General, and DCAA exchanged correspondence and had discussions that addressed the CAS 418 non-compliance issue. Ms. Ordaz requested AM General to submit a cost impact proposal. After receiving input from DCAA and AM General, Ms. Ordaz, on October 9, 1996, made a final determination that AM General was in noncompliance with CAS 418. (R4, tabs 4-10, 12-32)." AM General does not dispute that it and the ACO exchanged correspondence; it asserts that "[t]hose documents speak for themselves." It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 50)

G51. "**According to AM General, the waiver for the submission of certified cost and pricing data upon the production of non-military unique items resulted in at least 80 percent of all costs in the vehicle being based upon commerciality at the time that Contracts R021 and X001 were being negotiated. Some (up to 20 percent) of the HMMWVs costs were based upon certified cost and pricing data during the negotiations of Contract R021 and X001. (R4, tabs 22, 26)"** AM General disputes this fact as "misleading." It asserts that "[a]ccording to the terms of the Decker Waiver, the 'military-unique items' purchased under the contracts at issue here were negotiated based on certified cost or pricing data. The 'non-military unique items' were not

negotiated based on certified cost or pricing data." AMG also asserts that this fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 51)

G52. **"On or about June 30, 2000, AM General, upon the recommendation of the Government, calculated a CAS 418 cost impact of $7,585,552 using the 'Three Tiered Method.' AM General did not agree with this methodology. (R4, tab 22)"** AM General disputes this fact and asserts that "AMG prepared an analysis at the Government's direction dated June 30, 2000, in which, AMG expressly stated that 'AM General has not agreed to the Three Tiered Method and as such this letter does not constitute a cost impact statement." AM General asserts that this fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 52)

G53. **"The 'Three Tiered Method' segregates the manufacturing overhead into three separate pools, which are (1) an overhead cost pool comprised of only commercial activities; (2) an overhead cost pool comprised of common activities; and (3) an overhead cost pool comprised of only Government activities (R4, tabs 22, 27)."** AM General disputes this fact as only "the Government's damages estimate." It contends that "AMG has never segregated its costs in the manner suggested by the Government's damages estimate." AM General also contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 53)

G54. **"Under the single indirect cost pool, the manufacturing overhead per vehicle cost for FY 1996 is $7,994.92. Under the 'Three Tiered Method,' the manufacturing overhead per vehicle cost for FY 1996 is $7,260 for the military HMMWVs. The Government bears $734.92 more than its fair share of manufacturing overhead costs if the CAS non-compliant, single indirect cost pool method is used. Under the 'Three Tiered method,' the manufacturing overhead per vehicle cost for FY 1996 is $9,713 for the commercial HUMMERs. (R4, tabs 4, 6; SR4, tab 46 at 2 and 8)"** AM General disputes this fact, contending that it is only the government's damages estimate. It also contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 54)

G55. **"When manufacturing overhead costs are allocated to vehicles via the single indirect cost pool, the Government subsidizes AM General's costs as the commercial HUMMERs bear less costs than they otherwise would under the three tier method. (R4, tab 22; SR4, tab 46 at 2)."** AM General disputes this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 10, ¶ 55)

G56. "On December 18, 2000, DCAA issued Audit Report No. 1621-2001D1950002 on the estimated cost impact of AM General's CAS 418 noncompliance**. DCAA concluded that the estimated cost impact was $16.4 million (R4, tab 27).**" AM General does not dispute that the DCAA audit is dated 18 December 2000. It disputes the

conclusions reached by DCAA. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 56)

G57. "By letter dated June 14, 2001, counsel for AM General forwarded AM General's uncertified offset proposal to the Government's trial attorney. This offset proposal was not considered by DCAA in its December 18, 2000 audit report. (R4, tab 27; SR4, tab 44)" AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 57)

G58. **"**On August 23, 2001, the new ACO, Ms. Dreama Schmidt, issued her final decision regarding AM General's accounting practice of allocating overhead expenses to firm fixed price Contract R021, Contract X001 and Modification PZ0392 to Contract 0998**. Ms. Schmidt determined that AM General's use of a single indirect cost pool based upon units-of-production for allocating overhead expenses to these HMMWV contracts was a violation of CAS 418. (R4, tab 32)"** AM General does not dispute the fact that ACO Schmidt issued the final decision. It disputes Ms. Schmidt's conclusions. (Motion Papers No. 3 at 11, ¶ 58) The Board finds that AM General timely appealed the decision by notice dated 15 November 2001. The Board docketed the appeal as ASBCA No. 53610.

G59. **"**By memorandum dated January 29, 2004, DCAA issued its analysis of AM General's uncertified offset proposal of June 14, 2001**. DCAA concluded that AM General failed to demonstrate that the CAS 418 downward price adjustment to HMMWV production contracts would entitle it to an upward price adjustment for contract modifications that were negotiated using the incremental/variable overhead rate of 122.4 percent. DCAA also questioned the proposal in its entirety due to duplication of costs. (SR4, tab 45)"** AM General does not dispute that DCAA issued the 29 January 2004 memorandum. It disputes the conclusions reached by DCAA. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 59)

G60. "On or about February 2, 2004, DCAA, performed a recalculation of Audit Report No. 1621-2001D19500002 dated December 18, 2000. **DCAA recalculated its cost impact and reorganized the computations to conform to the format used in AM General's analysis dated June 30, 2000. (R4, tabs 22, 27) DCAA determined that the cost impact resulting from the CAS 418 violation was $16,952,338 (SR4, tab 46).**" AM General does not dispute that DCAA issued the February 2004 memorandum. It disputes the conclusions reached by DCAA. It also contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 60)

G61. **"AM General's June 30, 2000 calculations differ from DCAA's February 2, 2004 computations in only two ways: (1) DCAA used the actual number of HMMWVs delivered through October 2001 (*i.e.*, 17,137 units) instead of the number of vehicles delivered through May 2000 (*i.e.*, 15,256 units) and (2)**

DCAA used FY 1996 actual costs instead of FY 2000 forecasted data. By using FY 1996 actual costs instead of FY 2000, the percent of costs in each of the three pools differ (*e.g.*, the Government's percent for the Commercial only pool is 12.32% and AM General's percent for this pool is 9.31%). (R4, tab 22; SR4, tab 46)" AM General does not dispute that it prepared an analysis "at the Government's direction dated June 30, 2000," and that DCAA issued the February 2004 memorandum. AM General disputes how the government characterized these documents. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 61)

G62. "On February 25, 2004, Mr. Camblin of AM General revised and certified AM General's Full Overhead Cost Analysis [FN omitted] in the amount of $10,833,523.98 (SR4 tab 47)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 62)

G63. "On March 9, 2004, Ms. Schmidt sent AM General a letter requesting any additional information concerning AM General's February 25, 2004 revised 'Full Overhead Cost Analysis' (SR4, tab 48)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 63)

G64. "By letter dated March 17, 2004, AM General informed Ms. Schmidt that it intended to rely upon the narrative accompanying its original submission dated June 14, 2001 (SR4, tab 49)." AM General does not dispute this fact. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 11, ¶ 64)

G65. "AM General's Full Overhead Cost Analysis used a manufacturing overhead rate of 271.22 percent and a material handling rate of 7.86 percent which were the indirect rates AM General used prior to September 1, 1995 (SR4, tabs 44, 47-49)." AM General does not dispute this fact. In contends that the fact is immaterial to its motion. (Motion Papers No. 65 at 11, ¶ 65)

G66. **"The negotiated manufacturing overhead of $7,994.92 per vehicle (which is based upon AM General's accounting practice after September 1, 1995) included fixed and variable costs. Of the $7,994.92 per vehicle costs, a substantial amount (approximately 70 percent) were [sic] fixed costs. (Ex. G-3 at 70-71, 104; SR4, tab 42 at AMG 0402)"** AM General disputes this fact. It contends that "[t]he negotiated manufacturing overhead amount of $7,994.92 was based on estimated manufacturing overhead costs for an agreed-to daily production rate." It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 66)

G67. **"After negotiating the $7,994.92 per vehicle rate and 122.4 percent incremental rate, AM General's proposed Full Overhead Cost Analysis would violate its own May 25, 1995 Disclosure Statement and CAS if it used the manufacturing overhead rate of 271.22 on the Options, ECP Activity, Corrosion, and Retrofit**

contract modifications. If the $7,994.92 per vehicle is used to allocate manufacturing overhead on Contract R021, Contract X001, and Modification PZ0392 on Contract 0998, there is no circumstance where AM General would use the 271.22 rate because the difference in the indirect methods are the 'bases' (*i.e.*, 'per vehicle' base versus the 'direct labor' base) that allocate the indirect cost pool expenses. (Ex. G-3 at 191-95)" AM General disputes this fact contending that "[t]he Government is attempting to repudiate its commitment to price the vehicles based on the negotiated $7,994.92 per vehicle while simultaneously attempting to enforce the 122% incremental rate." AM General asserts that its incremental rate of 122% was proposed as a part of the May 25, 1995 Disclosure Statement, and accordingly, "the Government cannot enforce the 122% incremental rate after the ACO has rejected the change." AM General contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 67)

G68. "**After negotiating the per vehicle rate of $7,994.92, AM General would recover fixed cost twice if it were to use the 271.22 manufacturing overhead rate upon its contract modifications (Ex. G-3 at 175-76, 191-95)."** AM General disputes this fact for the reasons stated in its response to ¶ 67 above. It contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 68)

G69. "In a letter dated January 29, 2004 and in Audit Report No. 01621-2004D19500001 dated July 21, 2004, DCAA provided its analysis stating why AM General's June 14, 2001 proposal and February 25, 2004 certified claim should be questioned in its entirety due to 'duplicate cost recovery method' (SR4, tab 45 at 6-7, tab 50 at 21)." **In the audit report, DCAA stated:**

> **The abated/variable rate (122.4%) was negotiated based on the premise that the labor on change orders for ECPs, etc. would cause the contractor to incur fringe benefits costs (and other manufacturing expenses) above and beyond the amount included in the negotiated overhead expenses of $47,369,899. These incremental expenses were recovered on the change orders for ECPs, etc. using the labor-based overhead rate of 122.4% (for most change orders).**
>
> **If the change orders for ECPs were renegotiated using full absorption rates (e.g., 271.22%), the contractor would recoup the incremental expenses (described above) plus a portion of the overhead expenses of $47,369,899 that were already allocated to (and recovered on) the vehicle contracts. In other words, if all of the $47,369,899 is allocated to vehicle contracts and a portion of the same $47,369,899 is recovered again when the change orders**

> **for ECPs are repriced using full absorption rates (e.g., 271.22% vs. 122.4%), there is a duplicate recovery of the aforementioned portion of the $47,369,899 (representing a windfall to the contractor). This was recognized by the contracting parties in negotiating the vehicle contracts; consequently the abated/variable rates were used in pricing the change orders, etc.**

(SR4, tab 50 at 21)." AM General does not dispute that DCAA issued the 29 January 2004 memorandum and the 21 July 2004 audit report. It disputes the conclusions reached by DCAA. It also contends that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 70)

G70. **"In its July 21, 2004 audit report, DCAA further stated that, in its opinion, AM General failed to demonstrate that the CAS 418 downward price adjustment to HMMWV production contracts would entitle AM General to an upward price adjustment to Options/ECP Activity/Corrosion/Retrofit contract modifications that were negotiated using the incremental/variable overhead rate of 122.4 percent. DCAA also questioned, in its entirety, AM General's February 25, 2004 certified amount of $10,833,524 and indicated that, although the data was mathematically correct, AM General's analysis was based upon flawed logic and resulted in duplication of costs (over-recovery). (SR4, tab 50 at 7)"** AM General does not dispute that DCAA issued the 21 July 2004 audit. It disputes the conclusions reached by DCAA. It also asserts that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 70)

G71. **"DCAA also stated:**

> **In pricing the HMMWV production contracts, the indirect rates were negotiated using the total Mishawaka indirect expenses allocated over total production vehicles. The contracting parties recognized that there would be incremental effort that would not result in additional vehicle units. Since all Mishawaka overhead costs (both fixed and variable) were included in the negotiation of the production contracts, the contracting parties agreed that the incremental effort would be priced using an abated rate (122.4%) consisting of the incremental/variable overhead costs. The contractor's Disclosure Statement was revised to reflect these practices regarding the use of the abated rate.**

(SR4, tab 50 at 7)." AM General does not dispute that DCAA made the quoted statement. It disputes the conclusions reached by DCAA. It asserts that the fact is immaterial to its motion. (Motion Papers No. 3 at 12, ¶ 71)

G72. "On August 30, 2004, Ms. Schmidt issued her final decision denying AM General's February 25, 2004 certified 'Full Overhead Cost Analysis' claim in its entirety. Ms. Schmidt concluded that AM General's claim had no effect upon the estimated cost impact associated with the CAS 418 noncompliance. (SR4, tab 51)" AM General does not dispute this fact. It contends that the fact is immaterial to its motion (Motion Papers No. 3 at 12, ¶ 72) The Board finds that AM General timely appealed this final decision by notice dated 24 September 2004. The appeal was docketed as ASBCA No. 54741.

DECISION

Summary judgment is granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Where both parties move for summary judgment, we must evaluate each party's motion on its own merits. *McKay v. United States*, 199 F.3d 1376, 1380 (Fed. Cir. 1999); *Mingus Constructors*, 812 F.2d at 1390.

The burden of demonstrating that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law is on the moving party and the non-moving party is entitled to have all reasonable inferences drawn in it favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976). Mere conclusory assertions do not raise a genuine issue of fact. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). On cross-motions for summary judgment, "counsel are deemed to represent . . . that all the relevant facts are before the court and a trial is unnecessary." *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982).

In deciding the parties' motions for summary judgment, we are mindful and apply the following well-established principles: The interpretation of CAS is an issue of law, not an issue of fact. *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1012 (2003). When interpreting provisions of the CAS, our task is "to ascertain the CASB's intended meaning when it promulgated the CAS." *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1137 (Fed. Cir. 1995). This is accomplished by looking at the text of the relevant provisions and "any guidance that the [CASB] has published to aid in interpretation." *Allegheny Teledyne Inc. v. United States*, 316 F.3d 1366, 1373-74 (Fed. Cir. 2003). In addition, the interpretation of regulations

which are incorporated into government contracts is a question of law. *United States v. Boeing Co.*, 802 F.2d 1390, 1393 (Fed. Cir. 1986). Pure contract interpretation is also a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984).

I.

Was AM General Exempt from CAS by Virtue of 48 C.F.R. § 9903.201-1(b)(15)?

We start with AM General's motion for summary judgment. In that motion, AM General points out that "[t]he CAS exempt from their applicability a number of enumerated contract categories" (Motion Papers No. 1 at 15). It contends in this case that it was exempt from CAS by virtue of 48 C.F.R. § 9903.201-1(b)(15), as amended in November, 1993. Prior to 4 November 1993, pursuant to 48 C.F.R. § 9903.201-1(b)(15), CAS was not applicable to:

> (15) Firm-fixed price contracts and subcontracts awarded without submission of *any* cost data; provided, that the failure to submit such data is not attributable to a waiver of the requirement for certified cost or pricing data.

(Emphasis added) (Motion Papers No. 1, tab 4) Effective 4 November 1993, the Cost Accounting Standards Board (CASB) amended 48 C.F.R. § 9903.201-1(b)(15) to read as follows:

> (15) Firm-fixed-price contracts and subcontracts awarded without submission of *any* cost data.

(Emphasis added) (Motion Papers No. 1, tab 3)

The CASB gave the following reasons for amending 48 C.F.R. § 9903.201-1(b)(15):

> The Board has also determined that the exemption paragraph appearing at § 9904.201-1(b)(15) [sic] should be expanded to eliminate the requirement for a separate Cost Accounting Standards Board waiver in circumstances *where the relevant procuring agency has determined to waive the requirement for submission of certified cost or pricing data.* The Board believes that adequate safeguards exist within the procuring agencies with respect to this issue so as to preclude the need for the approval of individual CAS contract waivers by the Board. *The elimination of this requirement should significantly ease the administrative burdens (for both the Government and contractors/subcontractors) associated with*

> *obtaining CAS coverage exemptions in those instances where the agency has already waived the requirements of the Truth in Negotiations Act, Public Law 87-653.*

(Emphasis added) (58 Fed. Reg. 58800 (Nov. 4, 1993); Motion Papers No. 1, tab 2)

Based on the language it italicized above, AM General contends that "[t]he Army Invoked the Exemption in 48 C.F.R. § 9903.201-1(b)(15) When it Affirmatively Made a Determination to Waive the Requirement for AMG to Submit Certified Cost or Pricing Data" (Motion Papers No. 1 at 16). AM General's argument continues:

> The CAS Board thus made clear that a waiver from the requirements of TINA should go hand-in-hand with a corresponding CAS exemption. Accordingly, the CAS Board clearly dictated that the triggering event for waiving TINA—the procuring agency's determination to waive the requirement for the submission of certified cost or pricing data—also triggered waiving CAS under section 9903.201-1(b)(15). That is, once a procuring agency made an affirmative determination that sufficient safeguards were in place to ensure a fair and reasonable price without certified cost or pricing data, those safeguards were sufficient to waive both TINA and CAS coverage. Therefore, the Waiver's legal effect was to invoke section 9903.201-1(b)(15) on the Army's contracts.

(Motion Papers No. 1 at 17)

In opposing AM General's motion, the government argues that: (a) the Decker Waiver is a partial waiver of the Truth in Negotiations Act (TINA); (b) only the CAS Board is authorized to waive CAS; and (c) no CAS exemption is applicable. (Motion Papers No. 2 at 28-35) We find these arguments persuasive.

(a) The Decker Waiver is a Partial Waiver of TINA

The government argues that the post-4 November 1993 regulation would not operate to exempt AM General's contracts from CAS coverage because there was no "full and complete waiver of all current cost or pricing data." The government points out that the Decker Waiver explicitly stated that "this Waiver authority is applicable to the non-military unique items" and the Waiver did not include military unique items. (Motion Papers No. 2 at 28)

Under the pre-November 1993 regulation, a firm-fixed price contract awarded without submission of any cost data would be exempt from CAS coverage only if the failure to submit such data was not the result of the government's waiver of the requirement for certified cost or pricing data. 48 C.F.R. § 9903.201-1(b)(15) (1993). The post-November 1993 regulation would exempt a firm-fixed price contract awarded without submission of any cost data. The regulation eliminated the prior requirement that the failure to submit any cost data was the result of the government's waiver of the requirement for certified cost or pricing data. 48 C.F.R. § 9903.201-1(b)(15) (1994). Thus, to fit within the purview of the post-November 1993 regulation for exemption from CAS coverage, a firm-fixed price contract must be awarded "without submission of *any* cost data" (emphasis added). On this point, the Decker Waiver stated specifically at ¶ e that "[t]his waiver authority is applicable to the non-military unique items produced by AM General and their subcontractors." The waiver specifically excluded from its coverage a list of items and "any other military unique items." (Fact A39)

Without waiving the submission of *any* cost data, as 48 C.F.R. § 9903.201(b)(15) (1994) required, we cannot conclude that the government in executing the Decker Waiver, triggered a waiver from CAS coverage. Accordingly, we hold that the HMMWV contracts were not exempt form CAS coverage by virtue of the Decker Waiver.

(b) Only the CASB Was Authorized to Waive CAS Coverage

In opposing AM General's motion, the government also argues that "even though TACOM was permitted to waive TINA in 1995, only the CASB was permitted to waive CAS" (Motion Papers No. 2 at 30).

Under the statute which created the CASB within the Office of Federal Procurement Policy, the CASB was given "the exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof." 41 U.S.C.A. § 422(a) and (f)(1) (1995). This was to "achieve uniformity and consistency in the cost accounting standards governing measurements, assignment, and allocation of costs to contracts with the United States." *See* 41 U.S.C.A. § 422(f)(1). Under 41 U.S.C.A. § 422(f)(4), the CASB is authorized "(A) to exempt classes or categories of contractors and subcontractors from the requirements of this section; and (B) to establish procedures for the waiver of the requirements of this section with respect to individual contracts and subcontracts."

While the CASB had been urged in the past to delegate its waiver authority to the procuring agencies, the CASB had declined to do so. Its rationale is reflected in Preamble C to the 13 February 1973 Amendments to Part 331 of the CAS. At that time, the CASB took the position:

> Several commentators urged that the Board delegate its waiver authority to the procuring agencies, stating essentially that waivers could thus be granted more expeditiously. The Board has not accepted this suggestion, since it believes that it should retain control over a matter as important as a total exemption from the requirements of section 719 of the Defense Production Act of 1950, as amended, and also because the Board is convinced that its retention of its waiver authority will not unduly delay action on waiver requests. . . . If experience shows that delegation of this authority is warranted, the Board will, however, reconsider this suggestion.

(Motion Papers No. 2, ex. G-5)

The CASB did not delegate its waiver authority until June 2000. Section 802 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. 106-65, revised 41 U.S.C. 422(f) to permit the head of an executive agency to waive the applicability of CAS under certain conditions. Thereafter, effective 6 June 2000, FAR 30.201-5(a)(1) was revised to provide that the head of the agency "[m]ay waive the applicability of CAS for a particular contract or subcontract under the conditions listed in paragraph (b) of this subsection; . . . " 65 Fed. Reg. 36014 (June 6, 2000).

Because the Decker Waiver was signed sometime "after February 1995 but before May 25, 1995," (fact A32) before 6 June 2000 when the Army was delegated the authority to waive CAS coverage, and because at the time the Decker Waiver was signed, the Army did not have the authority to waive CAS coverage, we hold that the Decker Waiver did not, and could not have, waived CAS apart from the exemption in 48 C.F.R. § 9903.201-1(b)(15) (1994) established by the CASB itself.

(c) No CAS Exemption is Applicable

The government also argues that the post-November 1993 regulation (48 C.F.R. § 9903.201-1(b)(15) (1994)) "did not give procuring contracting officers the authority to waive CAS when cost or pricing data is submitted and relied upon during negotiations" (Motion Papers No. 2 at 31). The government says in this case, "Clearly cost data was submitted and used during negotiations to set the contract price" (Motion Papers No. 2 at 35).

We note that in revising 48 C.F.R. § 9903.201-1(b)(15) (1993), the CASB provided the following comments:

> *. . . The Board continues to believe that the requirements of the Cost Accounting Standards should generally be applied to negotiated contracts that exceed certain dollar thresholds as determined by the Board, in which contract cost or price is determined through the submission of cost or pricing data. . . .* The Board is amending its rules in order to modify the CAS exemption paragraph appearing at 9903.201-1(b)(15). This will serve to eliminate the requirement for a separate Cost Accounting Standards Board waiver in circumstances where the relevant procuring agency has determined to waive the requirement for submission of certified cost or pricing data. The Board believes that this amendment should assist commercial companies in cases where they would ordinarily be subject to TINA, *but the requirement for submission of certified cost or pricing data has been waived by the relevant procuring agency.* [Emphasis added]

58 Fed. Reg. 58801 (Feb. 4, 1993).

We read the CASB's comments to say: (1) that waiver of cost or pricing data and waiver of CAS coverage are separate and distinct; (2) that CAS should apply to negotiated contracts in which contract cost or pricing is determined through the submission of cost or pricing data; and (3) that only in circumstances where the procuring agencies has waived submission of certified cost or pricing data would 48 C.F.R. § 9903.201-(b)(15) (1994) operate to exempt the contractor from CAS coverage.

In this case, AM General does not dispute that it submitted certified cost or pricing date for military unique items in support of Modification PZ0004 to Contract R021 for 1,201 HMMWV A2 trucks, although non-military unique items produced by it and its subcontractors were specifically excluded from the certificate (fact G27). Nor does it dispute that the parties negotiated a $7,994.92 manufacturing overhead per vehicle (fact G26), and on 29 September 1995, Bilateral Modification No. PZ0004 was issued definitizing Contract R021 (fact G24).

Similarly, AM General does not dispute that it submitted certified cost or pricing data for military unique items in support of Five-Year A2 requirements of Contract X001 for A2 HMMXV Trucks and Kits, although non-military unique items produced by it and its subcontractors were specifically excluded from the certificate (fact G33). Nor does AM General dispute that the parties negotiated a $7,994.92 manufacturing overhead per vehicle for Year One and Years Two through Five plus escalation (fact G37), and that Contract X001 was awarded on 14 December 1995 (fact G34).

Also, AM General does not dispute that it submitted certified cost or pricing data for military unique items in support of modifying M1097A1 vehicles into ECV chassis vehicles for Contract 0998, although non-military unique items produced by it and its subcontractors were specifically excluded from the certificate (fact G40). On 28 June 1996, Bilateral Modification No. PZ0392 to Contract 0998 was issued definitizing Modification P00336 and incorporated unit prices for the 309 ECV configuration to the HMMWVs (fact G41).

Because 48 C.F.R. § 9903.201-1(b)(15) (1994) exempts from CAS coverage FFP contracts and subcontracts awarded "without submission of *any* cost data," and because in the contracts involved here (Modification No. PZ0004 to Contract R021, Contract X001 and Modification No. PZ0392 to Contract 0998) certified cost or pricing data for military unique items were submitted, we hold that 48 C.F.R. § 9903.201-1(b)(15) does not operate to exempt AM General from CAS coverage. *Cf. Aydin Corp. (West) v. Widnall*, 61 F.3d 1571, 1579 (Fed. Cir. 1995) (informal cost information qualified as "any cost data" under pre-November 1993 provision).

Recognizing this is not a case where no cost or pricing data was submitted, AM General argues that once the Army Acquisition Executive waived the submission of cost or pricing data, subsequent submissions of cost or pricing data for the three procurements involved in this appeal could not invalidate the waiver. In support of this argument, AM General relies on our decision in *City of Albuquerque*, ASBCA No. 49698, 98-2 BCA ¶ 30,018. AM General says that case confirms that "the Army Acquisition Executive's Waiver here remained in effect until the Army Acquisition Executive—or someone at a higher level—reversed that exemption decision." According to AM General, "[s]o long as the Army Acquisition Executive's Waiver determination remained in effect, the PCO did not have the authority to override that determination. Thus, even if the PCO wanted to apply CAS or TINA to the Army's HMMWV acquisitions, he did not have authority to alter the Waiver's legal effect, and therefore could not rescind the CAS exemption." (Motion Papers No. 1 at 22-23)

The facts in *City of Albuquerque* are these: In 1973, the government awarded a contract to the City of Albuquerque (the City) for water and sewer services. The estimated annual cost for the services was expected to exceed the threshold for submission of certified cost or pricing data. Prior to award of the contract, the chief of the purchasing office determined that water and sewer services constituted an exceptional case and waived the submission of cost or pricing data that would otherwise be required under the TINA and its implementing regulations. The contract awarded did not contain any of the standard defective pricing clauses. From 1973 through 1993, the contract was modified 12 times by mutual agreement. None of the 12 modifications included the standard defective pricing clauses.

In 1989, after negotiations were completed and after agreement on price setting new rates for the next three years, the CO requested the City to sign and return a certificate of current cost or pricing data. The City complied. In 1994, DCAA found that the costs proposed by the City in 1989 were significantly overstated in that the City failed to disclose the existence of "specific charge revenues and other revenue offsets" that would have significantly reduced the costs claimed in its proposal. 98-2 BCA at 148,520. The CO concluded that the modification negotiated in 1989 was defectively priced, and by a final decision issued in 1995 demanded payment in excess of $800,000.

In granting the City's motion for summary judgment, we held that "the decision of the head of the contracting office made in exempting this contract continues until the head of the contracting office reverses that exemption decision," and absent evidence of abuse of discretion not alleged by the government, "sending of the certificate by the contracting officer is too thin a reed to overcome an exemption in existence for 16 years issued by a procurement official at a higher level than the contracting officer." 98-2 BCA at 148,521.

City of Albuquerque is inapplicable because the Army Acquisition Executive did not have the authority to waive CAS at the time. The authority to waive CAS, remained with the CASB until 41 U.S.C. 422(f) was revised by Section 802 of the National Defense Authorization Act for Fiscal Year 2000. It is undisputed that the Decker Waiver was executed before 25 May 1995, over five years earlier (fact G8).

Moreover, unlike *City of Albuquerque*, where none of the 12 modifications over a 20-year period contained the standard defective pricing clause, it is undisputed that Contract R021, Contract X001, and Contract 0998 all included not only the defective pricing clause (FAR 52.215-22), but the standard CAS clauses (FAR 52.230-2, 52-230-5) (facts G25, G35, G42). Thrice including the standard CAS clauses could not be accidental.

AM General also argues that waiving CAS coverage was not an oversight. It points out that in drafting a justification for the Army Acquisition Executive, TACOM recognized "[t]he latest Cost Accounting Standards (CAS) Board regulations state that a separate CAS waiver is no longer needed where a cost and pricing data waiver is obtained" (Motion Papers No. 1 at 23). The justification memorandum AM General relied upon is found under exhibit 9 of its motion. The memorandum was undated and unsigned. Thus, we do not know whether it was in fact forwarded to the Commanding General to whom it was addressed, and whether he in fact signed the memorandum. In any event, the statement AM General quoted merely paraphrased what was in 48 C.F.R. § 9903.201-1(b)(15) (1994). The waiver that was ultimately signed by the Army Acquisition Executive however, did not authorize a waiver of submission of "any cost data." Rather, it only waived "[t]he requirement for certification of cost or pricing data for non military unique items from the prime contractor and subcontractors for the

proposed contract action" (fact A39). Thus, what TACOM stated in the justification memorandum did not appear to bear any relation to what was actually waived, or not waived. What is clear, however, is that the Decker Waiver did not waive submission of "any cost data," which, if true, might have invoked 48 C.F.R. § 9903.201-1(b)(15) (1994).

II.

Could the Government Have Elected and Did It Elect Not to Apply CAS to the HMMWV Contracts?

As a separate ground for summary judgment, AM General contends that TACOM elected not to apply the CAS to its contracts when it elected to accept the allegedly CAS non-compliant methodology (Motion Papers No. 1 at 24). According to AM General, TACOM's ability to make the election was derived from the Federal Acquisition Streamlining Act (FASA) amendment to Section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. § 422(f)(2)). The amendment provided that the requirement for mandatory use of the CASB's rules does not apply to any "firm-fixed price contract or subcontract (without cost incentives) for commercial items." AM General contends that "while FASA did not prohibit the PCO from applying the CAS regulations to TACOM's contracts, he was no longer statutorily required to apply CAS." (Motion Papers No. 1 at 25)

In support of its contention that the PCO "elected" not to apply CAS to the HMMWV contracts, AM General cited the following documents in the record. First, AM General cites a TACOM memorandum for record dated 1 September 1995 entitled "Issues to Discuss and Resolve with AM General for Definitization of Letter Contract 95-C-R021 (Pricing Job No. 95-1594)." This 2-page memorandum stated in one place:

> 2. Direct Labor Overhead:
>
> a. We have decided to accept the proposed per-vehicle allocation of Mishawaka direct labor overhead expenses, even though DCAA will write it up as a CAS 418 violation.

(Motion Paper No. 1, ex. 19)

Second, AM General cites DCAA's 18 September 1995 audit report of AM General's definitization proposal which allegedly "confirms that TACOM was aware of DCAA's determination and cost impact estimate, but nevertheless 'requested' that DCAA review AMG's proposed per-vehicle allocation" (Motion Papers No. 1 at 24-25). The specific passage AM General refers to on page 19 of the audit report reads:

> As requested by the PCO, we have evaluated the manufacturing expense pool. To compare our audit results with the proposal, we have presented the cost questioned using the unit method.

(Motion Papers No. 1, ex. 20 at 19)

Third, AM General refers to an earlier draft of the Reopener clause which shows that TACOM changed the language providing: "If, based on further review by the Government, it is determined that the contractor's change in the method of allocating overhead manufacturing costs is in noncompliance with CAS 418 . . ." to "Defense Contract Audit Agency (DCAA) has indicated that this is a Cost Accounting Standard (CAS) 418 violation." (Motion Papers No. 1 at 26, and ex. 21)

The government counters that it was "concerned that it would be incurring more than its fair share of the manufacturing overhead costs if there was a CAS noncompliance and, through reopener and CAS clauses, the Government made clear its position to AM General that it would pursue a contract price reduction if costs were unfairly borne by the Government" (Motion Papers No. 2 at 41).

Prior to the enactment of the FASA of 1994, 41 U.S.C. § 422(f)(2) provided that:

> (2) Cost accounting standards promulgated under this section shall be *mandatory* for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, *all negotiated prime contract and subcontract procurements with the United States in excess of $500,000, other than contracts or subcontracts where the price negotiated is based on (A) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (B) prices set by law or regulation*.

(Emphasis added)

Section 8301 of the FASA amended 41 U.S.C. § 422(f)(2) to the following:

> (A) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing

> and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of $500,000.
>
> (B) *Subparagraph (A) does not apply to the following contracts or subcontracts*:
>
> (i) Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.
>
> (ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.
>
> (iii) *Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items*.
>
> . . . .
>
> (C) In this paragraph, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(Emphasis added) (Motion Papers No. 4 at 15-16) Thus, Congress did not change the general provision that mandated the application of CAS for all negotiated contracts in excess of $500,000. On the other hand, with the enactment of FASA, Congress no longer mandated the application of CAS for commercial items.

The government contends that 41 U.S.C. § 422(f)(2)(B)(iii) does not apply because "the [HMMWV] contracts were negotiated procurements, not commercial item procurements" (Motion Papers No. 4 at 13). We do not read 41 U.S.C. § 422(f)(2)(A), as amended, to mean that procurement by negotiation and procurement of commercial items are mutually exclusive propositions. Thus, even though the HMMWV contracts were negotiated procurements, the procuring officials would be given the discretion to apply, or not to apply, CAS when they procured FFP commercial items. In this regard, the Decker Waiver states that "[w]hile the HMMWV does not meet the standards for the commercial item exemption in FAR 15.804-3(a)(2), it does meet the definition of a commercial item as established by Sec. 8001 of Pub. L. 103-355 [FASA]" (Motion Papers No. 1, ex. 1, ¶ c; fact A39). While there is no evidence other than what we have

quoted above that supports the case that the government treated the HMMWV procurements as "commercial item" procurements, we examine whether the government could, in any event, have elected not to apply CAS under the FASA amendment discussed above.

Contract R021

Despite enactment of the FASA on 13 October 1994, the implementation of the law for commercial item procurement depended upon the issuance of final regulations implementing the law. Section 10002(f) of Pub. L. 103-355, entitled "SAVING PROVISIONS," provides:

> (1) Nothing in this Act shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 10001(b)(3) except to the extent and in the manner prescribed in such regulations.
>
> (2) Except as specifically provided in this Act, nothing in this Act shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act.
>
> (3) *Except as otherwise provided in this Act, a law amended by this Act shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until –*
>
> (A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or
>
> (B) if no such date is specified in regulations, October 1, 1995.

(Emphasis added)

The CASB did not issue a final rule implementing the FASA change. On 18 September 1995, Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) issued final rules pursuant to the FASA to "implement those portions of Pub. L. 103-355 that make

specific changes to the Truth in Negotiations Act (TINA) or that impact other areas of the FAR that affect contract pricing." The effective date of the DoD, GSA, and NASA final rules was 1 October 1995. 60 Fed. Reg. 48208 (Sept. 18, 1995).

Also on 18 September 1995, DoD, GSA and NASA issued final rules to "implement the revised statutory authorities in Title VIII of the Act for the acquisition of commercial items and components by Federal Government agencies as well as contractors and subcontractors at all levels." The effective date for these rules was also 1 October 1995. FAR part 12 was completely revised to address the acquisition of commercial items. 60 Fed. Reg. 48231 (Sept. 18, 1995). FAR Part 52 was amended to include several new provisions and clauses to be inserted in all situations and contracts for the acquisition of commercial items. 60 Fed. Reg. 48232 (Sept. 18, 1995). Among the new clauses prescribed was FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (OCT 1995). 60 Fed. Reg. 48254 (Sept. 18, 1995).

AM General does not dispute that Bilateral Modification No. PZ0004 was issued definitizing Contract R021 on 29 September 1995, two days prior to the effective date of final rules implementing the FASA amendment to 41 U.S.C. § 422(f)(2) (fact G24). Because the final regulations implementing the FASA amendment to 41 U.S.C. § 422(f)(2) became effective on 1 October 1995, and because the CASB had not implemented the FASA amendment, we hold that 41 U.S.C. § 422(f)(2) in effect on the day before the enactment of the 1994 FASA amendment (13 October 1994) continued to apply, and Contract R021, being a negotiated contract, was CAS covered.

Contract X001

Contract X001 was awarded on 14 December 1995 (fact G34). Even though DoD, GSA and NASA had issued final regulations implementing the FASA amendment, as of 14 December 1995, the CASB had not done so. The record shows that at a CASB meeting held on 8 December 1995, the following took place:

> The Chairman discussed with the Members the continuing perceived conflicts between CAS and TINA coverage. The Chairman related to the Board, industry's concerns with the FAR rule regarding the Acquisition of Commercial Items. The Chairman stated that if CAS changes were not implemented in a timely manner, it could create a situation where a contractor is covered by CAS, even though the contractor submitted no certified cost or pricing data (e.g., provided cost data for purposes of evaluating cost realism). After some discussion, the Board determined that they would delegate to Federal procuring agencies the authority to waive the application of CAS to individual firm fixed-price

> contracts for the acquisition of commercial items when uncertified cost or pricing data (i.e., information other than cost or pricing data) is obtained. The Members also noted that the waiver authority was intended to permit agencies to more efficiently award contracts for the acquisition of commercial items in accordance with the Federal Acquisition Streamlining Act, Pub. L. 103-355. The Executive Secretary was asked to prepare and distribute an appropriate agency waiver authorization as soon as practicable.

(Motion Papers No. 1, ex. 5)

On 18 December 1995, Steven Kelman, Chairman of CASB, sent the following memorandum to agency senior procurement executives:

> Subject: Waiver of Cost Accounting Standards
>
> The Cost Accounting Standards Board has delegated to Federal procuring agencies the authority to waive the application of the Cost Accounting Standards to *individual firm fixed-price contracts for the acquisition of commercial items when cost or pricing data is not obtained.* This authority may be redelegated to Heads of Contracting Activities in accordance with agency procedures.
>
> This waiver authority is intended to permit agencies to more efficiently award contracts for the acquisition of commercial items in accordance with the Federal Acquisition Streamlining Act, Pub. L. 103-355.

(Motion Papers No. 1, ex. 6)

As the foregoing CASB memorandum made clear, prior to its issuance on 18 December 1995, Federal procuring agencies were required to obtain a waiver from CASB to waive the application of CAS to individual FFP contracts for the acquisition of commercial items when cost or pricing data was not obtained, even though DoD, GSA, and NASA had already issued final regulations implementing the FASA amendment to 41 U.S.C. § 422(f)(2). Therefore, even assuming that Contract X001 procured commercial items, and even assuming no cost or pricing data was obtained, which was not true, agencies such as TACOM were still required to obtain a waiver from CASB to waive the application of CAS.

Because Contract X001 was awarded on 14 December 1995, prior to CASB's 18 December 1995 delegation of authority to Federal procuring agencies to waive application of CAS "to individual firm fixed-price contracts for the acquisition of commercial items when cost or pricing data is not obtained," we hold that TACOM did not waive, and could not have waived, the application of CAS to Contract X001.

Bilateral Modification No. PZ0392 to Contract 0998

Congress enacted the Federal Acquisition Reform Act ("FARA") on 10 February 1996 (Pub. L. 104-106). Section 4205 of FARA amended 41 U.S.C. § 422(f)(2)(B) so that CAS did not apply to:

> (i) Contracts or subcontracts for the acquisition of commercial items.
>
> (ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

FARA included at section 4402(e) a Savings Provision that continued the application of pre-existing law until the effective date of final regulations implementing the change to the law:

> (1) VALIDITY OF ACTIONS.--Nothing in this division shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 4401(b)(3) except to the extent and in the manner prescribed in such regulations.
>
> (2) RENEGOTIATION AND MODIFICATION OF PREEXISTING CONTRACTS.--Except as specifically provided in this division, nothing in this division shall be construed to require the renegotiation or modification of contracts in existence on the date of enactment of this Act.
>
> (3) CONTINUED APPLICABILITY OF PREXISTING LAW.--Except as otherwise provided in this division, a law amended by this division shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until--

> (A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or
>
> (B) if no such date is specified in regulations, January 1, 1997.

CASB Implementation of FARA

By interim rule published on 29 July 1996, CASB promulgated a regulation that exempted FFP contracts for the acquisition of commercial items from CAS coverage. CASB also rescinded its memorandum dated 18 December 1995 which authorized CAS waivers for individual firm fixed-price contracts for the acquisition of commercial items when cost or pricing data was not obtained. 61 Fed. Reg. 39360 (July 29, 1996). Thereafter, on 6 June 1997, CASB issued final rules effective the same day exempting FFP contracts for the acquisition of commercial items from CAS requirements. 62 Fed. Reg. 31294 (June 6, 1997).

When two industry association commentators recommended that CASB authorize contracting officers to retroactively waive all CAS requirements, for all commercial item contracts, entered into since 13 October 1994, the date of enactment of FASA, the CASB declined, and gave the following response:

> The Board believes that the present CAS exemption for commercial item contracts, as well as the agency CAS waiver authority that was previously in effect prior to the promulgation of the interim rule, were sufficient to address CAS commercial item contracting issues under both FASA and FARA. In this regard, the Board notes that the effective date of the interim rule [29 July 1996] was some five months prior to the effective date of the commercial item [1 January 1997] contracting changes made in the FAR as a result of the enactment of FARA. In addition, the Board is unaware of any contracts in which CAS has served as an impediment with respect to the acquisition of commercial items since the effective date of the FASA commercial item contracting rule on October 1, 1995.

62 Fed. Reg. 31294 (June 6, 1997).

DoD, GSA, and NASA implemented FARA on 20 December 1996 by publishing final rules which became effective on 1 January 1997. 61 Fed. Reg. 67418 (Dec. 20, 1996).

It is undisputed that Bilateral Modification No. PZ0392 under Contract 0998 was issued on 28 June 1996 (fact G41), before the CASB interim rule and the DoD, GSA, and NASA final rules became effective on 29 July 1996 and 1 January 1997 respectively. Thus, under the Savings Provision of FARA (sec. 4402(e)), the pre-FARA rules discussed above remained in effect for Modification No. PZ0392.

Here again, even assuming Modification No. PZ0392 was for the procurement of commercial items and covered by 41 U.S.C. § 422(f)(2)(B), the CASB's 18 December 1995 delegation to Federal procuring agencies of the authority to waive the application of CAS was only for "individual firm fixed-price contracts for the acquisition of commercial items *when cost or pricing data is not obtained"* (emphasis added). In the case of Modification No. PZ0392, cost or pricing data was obtained for military unique items although they were not obtained for non-military unique items (fact G40).

As a part of its contention that TACOM elected not to apply CAS to the HMMWV contracts, AM General asserts the "[t]he *quid pro quo* for AMG undertaking responsibility for selling 60% of the HMMWV sustaining-rate production in the foreign and commercial marketplace was TACOM needed to agree to price the Army's HMMWV contract in a manner that would allow AMG to produce a commercially viable vehicle" (fact A15). AM General also asserts that it "offered TACOM substantially lower prices by basing the contract on a daily production of 25 vehicles even though TACOM's requirements only satisfied 40% of that production, in exchange for TACOM agreeing to employ AMG's pricing methodology" (fact A20). The government disputes these assertions. In opposition, the government takes the position that it "agreed to purchase a minimum of 10 vehicles a day and to pay AM General according to the prices set forth in the contracts. TACOM met and actually exceeded this requirement." (Motion Papers No. 2 at 22)

The Supreme Court of the United States has said that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex, supra,* 477 U.S. at 323-24. The Court said that the summary judgment rule (FED. R. CIV. P. 56(c)) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322-23.

In this case, AM General will bear the burden of proving at trial that TACOM, in fact, agreed to accept AM General's CAS non-compliant per-vehicle manufacturing

overhead allocation method in exchange for the prices AM General agreed to sell the HMMWVs. On this proposition, AM General provided no proof. None of the three documents AM General relied upon, whether read individually or together, supports such an agreement between the parties. Moreover, AM General has provided no deposition transcripts or affidavits from those who participated in the negotiations of the HMMWV contracts to support its claim that TACOM elected not to apply CAS or elected to accept AM General's CAS noncompliant manufacturing overhead in exchange for lower HMMWV prices. Were AM General to offer what it offered here at trial, it would have failed to make out a sufficient showing for its election/*quid pro quo* case. Mere assertions on the part of counsel do not raise a genuine issue of fact. *Pure Gold*, 739 F.2d 627. In this connection, AM General must be deemed to have put forth everything in its favor to support a summary judgment in its favor, and to the extent it did not, it must expect an adverse decision on its motion. *Aydin Corp.*, 669 F.2d at 689.

Objective evidence in the record also does not support AM General's contentions. It is undisputed that Contract R021, Contract X001, and Contract 0998 all included the standard CAS clauses (*i.e.*, FAR 52.230-2, FAR 52.230-3, FAR 52.230-4, FAR 52.230-5) (facts G25, G35, G42). Moreover, if TACOM had elected or agreed not to apply the CAS to the HMMWV contracts, and to accept AM General's proposed per-vehicle overhead allocation, the contracts would not have included a reopener clause reserving "its right to make a downward adjustment . . . once cost impact is determined" (facts G24, G36, G43, G44, G46). The reopener clauses in the HMMWV contracts would have been superfluous and served no purpose.

III.
Could the Government Pursue CAS Damages?

As its third basis for summary judgment, AM General contends that the government cannot pursue damages relating to a CAS violation when it has waived CAS coverage for the HMMWV contracts (Motion Papers No. 1 at 27). This basis for summary judgment assumes that AM General prevails on the first two bases for summary judgment. Since we have denied AM General's motion on the first two bases for summary judgment, we must necessarily deny the third basis for summary judgment as well.

IV.
Could the Government Pursue CAS Damages Under the Standard CAS Clause?

As its fourth basis for summary judgment, AM General contends that the specific reopener clause incorporated into the contracts precludes the ACO from pursuing a remedy under the CAS clause (Motion Papers No. 1 at 28).

Two versions of the CAS clause are involved in these appeals: Contract 0998 included FAR 52.230-3, COST ACCOUNTING STANDARDS (SEP 1987); Contracts R021 and X001 included 52.230-2, COST ACCOUNTING STANDARDS (AUG 1992). We have compared the two versions. There are minor but insignificant differences not material to the cases before us. The reopener clause is set out in full in the government's statement of facts (fact G46). AM General does not dispute that all three of the reopener clauses are essentially the same (fact G44).

AM General's motion argues that even if CAS applies to the HMMWV contracts, the reopener clause in the contracts would preclude the government from pursuing a CAS 418 claim under the CAS clause because the government waived its remedy under that clause when it bargained for the reopener clause remedy. In support of this argument, AM General relies on *Teledyne Continental Motors (General Products Division)*, ASBCA No. 22571, 85-3 BCA ¶ 18,472. (Motion Papers No. 1 at 28-29)

AM General argues alternatively that application of the fundamental canons of contract interpretation would lead to the same result. In this connection, AM General points out that the CAS clause requires contractors to "[a]gree to an adjustment of the contract price or cost allowance, as appropriate," *citing* FAR 52.230-2(a)(5). AM General says in this case, "AMG and the Army as the contracting parties have specifically agreed to the CAS adjustment—if any—and have manifested that agreement in the Reopener Clause's plain language" (Motion Papers No. 1 at 31). AM General argues that it would have been very simple to say "in the event that AMG's per-vehicle allocation is determined to violate CAS 418, then the Government reserves its rights under the CAS clause," but the government instead drafted a nearly page-long calculation defining the Government's "reserve[d] right to make a downward adjustment [ ] in the contract price" because "DCAA has indicated that this is a Cost Accounting Standards 418 violation." AM General concludes that "[i]n order for the Government's claim to be viable under the CAS clause, the Reopener Clause would have to mean nothing." (Motion Papers No. 1 at 31-32)

Finally, AM General cites another rule of contract interpretation – that specific provisions will control over the general – and argues this will lead us to the same conclusion that the government's remedy is limited to that in the reopener clause (Motion Papers No. 1 at 32-33).

With respect to the issue of waiver of the CAS clause remedy, the government in opposition contends that AM General's reliance on the *Teledyne* case is misplaced (Motion Papers No. 2 at 54-57). With respect to the contract interpretation issue that the reopener clause, being the more specific clause, should control over the more general CAS clause, the government argues in opposition that "[t]he cases cited by AM General (App. mot. at 32-33) for the proposition that specific clauses control over general clauses are inapposite since there is clearly no conflict between the CAS provisions and the

reopener clause" (Motion Papers No. 2 at 61). The government argues that the reopener clauses embodied the concepts of the CAS clause and "adds the data needed to ascertain one of the components (*i.e.*, the contract price agreed to) used in calculating a contract price adjustment." The government asserts therefore that "the reopener clause in each contract is not superfluous or meaningless as it provides that the agreed to contract price for manufacturing overhead cost per vehicle incorporated into the contract for FY 1996." (Motion Papers No. 2 at 60-61)

AM General relies on the *Teledyne* case in support of its contention that the reopener clauses in the HMMWV contracts would preclude the ACO from pursuing a CAS 418 claim under the CAS clause. In this connection, AM General again argues that the government "waived its remedy under the CAS clause when it bargained for its Reopener Clause remedy" (Motion Papers No. 1 at 28).

In *Teledyne*, a successor ACO demanded repayment of $1.2 million on the basis that the contractor had failed to abide by the accounting practices contained in its CAS disclosure statement in effect at the time of contract award. In that case, "[t]he parties have in effect stipulated . . . that appellant's change in its disclosed accounting practices would increase the cost of Contract No. -0117 over what it would have been had such accounting change not been instituted by appellant." *Teledyne*, 85-3 BCA at 92,778.

In *Teledyne*, the contractor and TACOM executed a letter contract for various types of tank engines. The definitization clause of the letter contract contemplated eventual execution by the parties of a firm fixed-price contract. The clause also contemplated that if the parties could not reach agreement, the CO could unilaterally determine a reasonable price and the contractor had the right to appeal from the unilateral decision. The contractor's existing disclosure statement indicated that it was funding its past service pension obligation over a 30-year period. In June 1975, the contractor notified the ACO that it would make an accounting change to reduce the past service pension cost to 10 years or less to take effect beginning in fiscal year 1976. During definitization negotiations, the contractor submitted a proposal which indicated that effective 1 January 1976 it would go to a 10-year funding of its basic pension program. 85-3 BCA at 92,779.

In the course of definitization negotiations, the PCO expressed concern as to the cost impact of the contractor's accounting change. In response, the contractor indicated a willingness to accept a "price redeterminable clause" regarding pension costs. The parties agreed to include such a clause in the contract that would provide for a downward adjustment and thus "[p]assing the ball to the Resident ACO" as to "approval of the funding method change." 85-3 BCA at 92,780.

Thereafter, the PCO drafted a pension cost clause prepared on a 10-year funding basis. The clause set out a method for price adjustment in the event the government were

to disapprove the cost accounting change. At a subsequent meeting, the contractor wanted the pension clause to be effective even if the government were to reject its pension funding change. After further negotiations, the contractor proposed a special clause providing for a higher manufacturing overhead rate of which the pension costs were a part to compensate for the added costs from compressing the funding of pension liability from 30 to 10 years. Paragraph b of the clause provided for a price adjustment if the actual pension cost varied from the forecast amount. TACOM accepted this proposal and thereafter the parties executed a modification definitizing the letter contract. The modification the parties signed provided that "it set forth the complete intent and agreement of the parties and cancelled their obligations created by the provisions of the letter contract which were inconsistent with Modification No. 17." The modification included the Administration of CAS clause, and under the "Special Provisions," the pension clause accepting costs based on 10-year funding. 85-3 BCA at 92,781.

Under this set of facts, we found that:

> . . . [T]he Pension clause states clearly that the estimated pension cost includes the past service cost liability; that the latter is estimated on the basis of 10-year funding; and equally clearly avoids any reference to Government approval or otherwise refers to the reduction of the previously used (30-year) funding period or to any connection between the 30-year period's lesser cost and a price adjustment under paragraph b of the Pension clause (*ibid*).

85-3 at 92,781

Based on the foregoing findings, we decided:

> . . . Rather than making a unilateral decision on the definitization of the contract under section 3c. thereof, the PCO at TACOM entered into an agreement under which respondent included in the contract cost and price the increased cost of past service pension liability due to funding it over 10 rather than 30 years as in the past. This was accomplished by incorporating in the definitization modification of Contract No. -0117 a pension clause which establishes the estimated past service pension liability of appellant as having been based on a 10-year funding period. The history of the parties' negotiation and the various drafts of the pension clause, set forth in the Findings of Fact, establish that the clause was based on 10-year funding and that no provision for adjustment was made if 10-year funding

> should thereafter not be accepted as a proper accounting practice by respondent. The adjustment provision of the clause applies only to the situation where actual past service pension funding costs differ from the estimate, both having been computed and compared on a 10-year funding basis.
>
> Therefore, the pension clause of Modification No. PZ0017 which definitized contract No. -0117 bars the claims asserted by the successor ACO . . . .

85-3 BCA at 92,785-86.

In stark contrast to the facts in *Teledyne*, the sole basis on which AM General sought from us a summary judgment decision precluding the ACO from pursuing a CAS clause remedy is its unsupported allegation that TACOM, knowing the DCAA's CAS 418 determination, nonetheless "elected to use AMG's pricing strategy and bargained for a specific remedy" (Motion Papers No. 1 at 30). The few documents AM General relied upon do not support its contentions. Additionally, it has submitted no sworn statements or affidavits from its contract managers or negotiators who would be in a position to know. Simply put, AM General has failed to make out a sufficient case for summary judgment in its favor. As the Supreme Court stated in *Celotex*, "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the . . . [party's] case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

AM General argues that it is "not advocating that the Reopener Clause eviscerates or otherwise supplants the CAS clause," but that the Reopener Clause was drafted "to simply show the mutually agreed upon calculation to use once the CAS violation issues were resolved" (Motion Papers No. 1 at 31). It simply does not follow that just because the parties agreed to a specific formula for adjustment of the contract price in the event of a CAS violation as the parties have done in this case, they have also agreed to forego the other remedies specified in the CAS clause (*e.g.*, interest). This in effect is what AM General is alleging. It has, however, offered no evidence of any sort to support this allegation.

Because AM General has utterly failed to show, by any evidence, that in incorporating the reopener clauses in the HMMWV contracts, the parties had also agreed to waive the remedies in the standard CAS clause, AM General's motion to preclude the government from pursuing the remedies in the CAS clause is denied.

There is no doubt that the reopener clauses are more specific in terms of the numbers to use in computing an adjustment in the event of a CAS violation. The CAS clause, however, is more specific in other respects which the reopener clauses do not

address. For example, FAR 52.230-2(a)(5) provides that interest on the recovered amount shall be computed "at the annual rate established under section 6621 of the Internal Revenue Code of 1986 (26 U.S.C. 6621) for such period, from the time the payment by the United States was made to the time the adjustment is effected."

As the parties themselves memorialized, the formula they are going to use to effectuate the downward adjustment in the contract price per vehicle, known as the "Per-Vehicle Contract Price Adjustment Amount" is to multiply the "Per-Vehicle Reopener Adjustment Amount" by a factor of 1.2403 (fact G46). The "Per-Vehicle Reopener Adjustment Amount" is determined by dividing the "Total Reopener Adjustment Amount by 1,201 vehicles." AM General does not dispute that the 1,201 vehicles was simply the number of vehicles procured through Bilateral Modification No. PZ0004, definitizing Contract R021 (fact G24). The "Total Reopener Adjustment Amount" is "the difference between the $9,601,898.92 . . . and the final amount determined reasonable by the Contracting Officer" (fact G46). AM General does not dispute that the $9,601,898.92 is simply the FY 1996 manufacturing overhead per vehicle amount of $7,994.92 multiplied by the 1,201 vehicles purchased under Bilateral Modification No. 0004, definitizing Contract R021 (fact G26).

Being a standard clause, the CAS clause naturally cannot be specific to the degree spelled out in the reopener clauses. FAR 52.230-2(a)(5) provides generally that the contractor shall "[a]gree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard . . . and such failure results in any increased costs paid by the United States."

We do not apply the specific over the general rule anytime there are two contract provisions on the same subject, one being more specific than the other. Noticeably absent from AM General's argument on this issue is any explanation why we should invoke the rule. AM General has cited no conflict between the reopener clauses and the CAS clause. Nor has it drawn our attention to any inconsistencies. AM General cites *Abraham v. Rockwell International Corp.*, 326 F.3d 1242, 1254 (Fed. Cir. 2003). That case is not helpful to AM General's position. In that case, the rule the Federal Circuit articulated is that "*[w]here specific and general terms in a contract are in conflict*, those which relate to a particular matter control over the more general language," *citing Hills Material Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) (emphasis added). *See also C Construction Co.*, ASBCA No. 47928, 96-2 BCA ¶ 28,499 at 142,313 ("when a contract contains general and specific provisions that are in conflict, the provision directed to a particular matter controls over the more general provision.")

Because AM General has not established that the provisions of the reopener clauses are in conflict with the provisions of the CAS clause, we hold there is no reason

for us to apply the specific over the general rule here to preclude any remedy in the CAS clause that the government might be entitled to should it prevail in these appeals.

V.

Was AM General's Single-Pool Method of Allocating Manufacturing Overhead in Compliance with CAS 418?

We address next the government's motion for summary judgment. In this regard, the government has the burden of proving that a contractor has failed to comply with CAS. *Litton Systems, Inc., Guidance and Control System Division,* ASBCA No. 37131, 94-2 BCA ¶ 26,731 at 133,022 It is, however, "a contractor's obligation to achieve compliance with CAS and with newly issued standards as they become applicable." *PACCAR, Inc.,* ASBCA No. 27978, 89-2 BCA ¶ 21,696 at 109,079.

In this case, the Cost Accounting Standards clause[7] in all three HMMWV contracts specifically provided that AM General, as the contractor shall:

> (5) Agree to an adjustment of the contract price or cost allowance, as appropriate, if the Contractor or a subcontractor fails to comply with an applicable Cost Accounting Standard, or to follow any cost accounting practice consistently and such failure results in any increased costs paid by the United States. Such adjustment shall provide for recovery of the increased costs to the United States, together with interest . . . .

CAS 418 relates to "ALLOCATION OF DIRECT AND INDIRECT COSTS," and is the subject of these appeals (48 C.F.R. § 9904.418). Its purpose is stated in 48 C.F.R. § 9904.418-20:

> The purpose of this Cost Accounting Standard is to provide for consistent determination of direct and indirect costs; to provide criteria for the accumulation of indirect costs, including service center and overhead costs, in indirect cost pools; and, to provide guidance relating to the selection of allocation measures based on the beneficial or causal relationship between an indirect cost pool and cost objectives. Consistent application of these criteria and guidance will improve classification of costs as direct and indirect and the allocation of indirect costs.

[7] FAR 52.230-3 (SEP 1987) is in Contract 0998, and FAR 52.230-2 (AUG 1992) is in Contracts R021 and X001.

Among the fundamental requirements of CAS 418 are:

> (b) Indirect costs shall be accumulated in indirect cost pools which are homogeneous.
>
> (c) Pooled costs shall be allocated to cost objectives in reasonable proportion to the beneficial or causal relationship of the pooled costs to cost objectives . . . .

48 C.F.R. § 9904.418-40.

CAS 418 provides the following techniques for application:

> (b) *Homogeneous indirect cost pools*.
>
> (1) An indirect cost pool is homogeneous if each significant activity whose costs are included therein has the same or a similar beneficial or causal relationship to cost objectives as the other activities whose costs are included in the cost pool. It is also homogeneous if the allocation of the costs of the activities included in the cost pool result in an allocation to cost objectives which is not materially different from the allocation that would result if the costs of the activities were allocated separately.
>
> (2) An indirect cost pool is not homogeneous if the costs of all significant activities in the cost pool do not have the same or a similar beneficial or causal relationship to cost objectives and, if the costs were allocated separately, the resulting allocation would be materially different. The determination of materiality shall be made using the criteria provided in 9903.305.
>
> (3) A homogeneous indirect cost pool shall include all indirect costs identified with the activity to which the pool relates.

48 C.F.R. § 9904.408-50(b)(1)-(3).

Prior to 1 September 1995, AM General had allocated manufacturing overhead using a direct labor base and allocated material overhead using direct material cost as a base (fact G14). In May 1995, AM General notified the ACO that effective 1 September 1995, it would accumulate all manufacturing overhead costs, including fixed and variable expenses for both the commercial and military vehicles, into one single indirect cost pool—the "one pool" method (fact G13). After 1 September 1995, AM General's method for allocating manufacturing overhead and material overhead used the number of vehicles manufactured, whether commercial HUMMER or military HMMWV as the allocation base—referred to as the "unit-method" or "unit-of-production base" (fact G15).

AM General conducted the majority of its production of the commercial HUMMERs and military HMMWVs at its Mishawaka plant (fact G2). The Armour building was a part of AM General's production line at the Mishawaka plant (answer to fact G3). While the military HMMWVs were assembled and finished entirely in AM General's Mishawaka plant (fact G4), the commercial HUMMERs were finished in the Armour building after they came off the production line at the Mishawaka plant (fact G3)[8].

AM General does not dispute that the Armour building cost was 11 percent of the total manufacturing overhead expense and this cost could be segregated and charged to the commercial program. It points out that since a majority of the Mishawaka facility overhead costs were fixed, "the 11 percent estimate requires allocations and estimations which will vary over time" (answer to fact G3).

The manufacturing overhead of $7,994.92 per vehicle for Contract R021 was calculated by dividing $47,369,899 by 5,925 vehicles (fact G26). Under AM General's "one-pool" method, the $7,994.92 per vehicle manufacturing overhead was allocated to each military HMMWV and each commercial HUMMER alike. Thus, under the "one-pool" method, costs associated purely with the production of the commercial vehicles (*e.g.*, Armour building costs) were allocated to the military vehicles, and costs associated purely with the production of military vehicles were allocated to the commercial vehicles.

While the government takes no exception to the new allocation base (*i.e.*, "unit-of-production base"), it contends that "[t]he 'one pool' methodology of combining

[8] The government states in footnote 10 of Motion Papers No. 4 that it "did not mean to imply in its PFF 3 that the commercial HUMMER was finished at a separate plant in Armour, Indiana. Instead, the HUMMER is completed in the Armour building at the Mishawaka facility. The Armour building is a separate building at the Mishawaka facility from that where the military HMMWV is assembled and finished." (Motion Papers No. 4 at 37, n.10)

all manufacturing overhead in a single pool causes an inequitable allocation of costs and the Government carries more than its fair share of these expenses" (Motion Papers No. 2 at 47). Since the military HMMWVs did not use the Armour building, there was no causal or beneficial relationship between that building and its associated indirect costs and the military vehicles which were the subject of the three contracts involved in this dispute. As the government observed, "[t]he Armour [building] costs are 'commercial only' costs and do not benefit the Government contracts" (Motion Papers No. 4 at 37).

AM General's post-1 September 1995 method of accumulating all manufacturing overhead costs, including fixed and variable expenses for both the commercial and military vehicles, into one single indirect cost pool fits squarely within the example of a single overhead cost pool that is not homogeneous, as illustrated in 48 C.F.R. § 9904.418-60(d):

> (d) Business Unit D includes the indirect costs of machining and assembling activities in a single manufacturing overhead pool. The machining activity does not have the same or similar beneficial or causal relationship to cost objectives as the assembling activity. Also, the allocation of the cost of the machining activity to cost objectives would be significantly different if allocated separately from the cost of the assembling activity. Unit D's single manufacturing overhead pool is not homogeneous in accordance with the provisions of 9904.418-50(b), and separate pools must be established in accordance with 9904.418-40(b).

In opposition, AM General cites CAS 418-50(d)(2)(iii) and argues that its units-of-production base was CAS-compliant. It also argues that "[w]hat constitutes a 'common production' and 'comparable units' is necessarily a fact-based inquiry," and that "[t]he Government has offered no proposed facts establishing that AMG's HMMWV production does not satisfy these requirements." (Motion Papers No. 3 at 25) CAS 418-50(d)(2)(iii) states "A units-of-production base is appropriate if there is common production of comparable units." It is one of four bases that can be selected to measure the allocation of the pooled costs to cost objectives when an indirect cost pool includes a material amount of the costs of management or supervision of activities involving direct labor or direct material costs. It is one of the techniques for application of CAS 418. In reply, the government points out that it takes no exception to AM General's new allocation base (*i.e.,* "per vehicle"), as it had stated in its cross-motion (Motion Papers No. 2 at 47-48). The government says that in any event "[w]hat constitutes a 'common production' and 'comparable units' is irrelevant because these terms deal with the base and not the pool" (Motion Papers No. 4 at 41).

We agree with the government that the issue here is whether AM General's new manufacturing overhead pool is compliant with CAS 418. As to that issue, we have concluded that maintaining a single pool that was not homogeneous is not compliant with CAS 418. In this connection, 48 C.F.R. § 9904.418-40(b) requires "Indirect costs shall be accumulated in indirect cost pools which are homogeneous."

In its opposition, AM General argues that "CAS does not define 'homogeneous indirect cost pools' by the class of customer, but rather homogeneity is a function of the causal or beneficial relationship to the cost objectives. [FN omitted] 'Homogeneity' is as fact-driven as 'common production' and 'comparable units,' and is equally in dispute." (Motion Papers No. 3 at 26) The government counters that its position is not based upon the class of customer but based upon homogeneity which relates to the functions and activities of each indirect pool (Motion Papers No. 4 at 39).

In this case, it is undisputed that AM General's indirect manufacturing overhead cost pool included the indirect costs from the Armour building. It is also undisputed that the military HMMWV derived no benefit from the costs incurred in the Armour building because none of the military HMMWVs were manufactured in that building. Consequently, we agree with the government that the indirect manufacturing overhead cost pool was not homogeneous because the costs included therein did not have the same or bear a similar beneficial or causal relationship to all activities whose costs were included in the cost pool.

Because AM General's single manufacturing overhead pool included indirect costs from both the Mishawaka plant activities (both HMMWVs and HUMMERs) and the Armour building activities (HUMMERs only), and because the Mishawaka plant activities did not have the same or similar beneficial or causal relationship to the cost objective (vehicles) as the Armour building activities, we hold AM General's single manufacturing overhead pool was not homogeneous in accordance with the requirements of 48 C.F.R. § 9904.418-40(b).

VI.
Has AM General Established that the Parties Agreed to a Special Allocation Under 48 C.F.R. § 9904.418-50(f)?

In its opposition, AM General also argues that "[e]ven if CAS does apply, the parties have still agreed to a special allocation for purposes of these contracts, which is expressly contemplated and allowed under CAS 418" (Motion Papers No. 3 at 26).

48 C.F.R. § 9904.418-50(f) or CAS 418-50(f), Special allocation, provides:

> Where a particular cost objective in relation to other cost objectives receives significantly more or less benefit from an

> indirect cost pool than would be reflected by the allocation of such costs using a base determined pursuant to paragraphs (d) and (e) of this subsection, the Government and contractor may agree to a special allocation from that indirect cost pool to the particular cost objective commensurate with the benefits received. The amount of a special allocation to any such cost objective made pursuant to such an agreement shall be excluded from the indirect cost pool and the particular cost objective's allocation base data shall be excluded from the base used to allocate the pool.

Beyond counsel's conclusory assertions, there is not a scintilla of evidence that supports this claim. As the government observed, if there had been a special allocation agreement, there would have been a paper trail memorializing such an agreement, excluding the special allocation amount from the indirect cost pool, and adjusting the allocation base. AM General provided none of these as support for defeating the government's claim. *See Celotex,* 477 U.S. at 322-24; *Walker American Motorists Insurance,* 529 F.2d at 1165; *Pure Gold,* 739 F.2d at 627. Moreover, if there had been a special allocation agreement, none of the HMMWV contracts would need to have a reopener clause reserving "the right to make a downward adjustment . . . in the contract price once the cost impact is determined" (fact G46).

Because AM General has failed to make a showing sufficient to establish that the parties had entered into a special agreement authorized by 48 C.F.R. § 9904.418-50(f), we hold that AM General is not excused from its agreement to an adjustment of contract price as stipulated in the applicable Cost Accounting Standards clauses.

VII.
Is the Government's Claim Under the CAS Clause Barred by the Equitable Doctrine of Laches?

Finally, in its opposition to the government's cross-motion for summary judgment, AM General contends that the "Government's claim under the CAS clause is unenforceable under the equitable doctrine of laches" (Motion Papers No. 3 at 28). AM General alleges that: (1) It provided its formal notice to the ACO on 25 May 1995, that it intended to change its accounting practice; (2) In July 1995, DCAA issued its draft audit report concluding that AM General's proposed change violated CAS 418; (3) The ACO did not make her initial finding of CAS noncompliance until 13 December 1995, contrary to FAR 30.602-2(a) which required "[w]ithin 15 days of the receipt of a report of alleged noncompliance from the cognizant auditor, the ACO shall make an initial finding of compliance or non-compliance and advise the auditor;" (4) The ACO did not issue her final finding of non-compliance until 12 August 1996. (Motion Papers No. 3 at 28) AM General charges that the ACO "took over five months to do what she was required to do

within 15 days." AM General maintains that it can establish "(1) unreasonable and unexcused delay by the claimant, and (2) prejudice to the other party, either economic prejudice or 'defense prejudice' – impairment of the ability to mount a defense," citing *Cygnus Corp. v. United States*, 63 Fed. Cl. 150, 154 (2004). (Motion Papers No. 3 at 28-29)

While AM General provided its formal notice of its intended change to its accounting practice on 25 May 1995, and while DCAA issued its draft report on 25 July 1995 concluding that AM General's proposed accounting change violated CAS 418 (Motion Papers No. 1, ex. 18), DCAA did not issue its formal audit report finding that AM General was in violation of CAS 418 until 16 July 1996, almost a year later (R4, tab 10; fact G47). Thereafter, the ACO made an initial finding of noncompliance on 12 August 1996 (R4, tab 12; fact G48), 27 days later.

We do not believe that the ACO should make an initial finding of compliance or noncompliance based on a draft audit. We believe the ACO acted appropriately when she waited for the issuance by DCAA of a formal report of CAS noncompliance on 16 July 1996 before making her initial finding of noncompliance on 12 August 1996.

FAR 30.602-2(a), *Determination of noncompliance*, provides:

> Within 15 days of the receipt of a report of alleged noncompliance from the cognizant auditor, the ACO shall make an initial finding of compliance or noncompliance and advise the auditor.

This regulation was clearly for CAS administration purposes within the government, and as such it conferred no enforceable rights on the contractor. *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1454 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998). In any event, AM General has yet to explain how it was prejudiced when the ACO made her initial finding of CAS noncompliance in 27 days as opposed to the 15 days required by FAR 30.602-2(a).

In this case, AM General received a copy of the July 1995 DCAA draft audit report of CAS noncompliance (Motion Paper No. 1, ex. 18) on or before 17 July 1995,[9] and knew about the CAS concern then (Motion Papers No. 4 at ex. G-11), two months before the parties executed Modification PZ0004 of Contract R021 on 29 September

[9] A memorandum in the record dated 17 July 1995 indicated that a government representative received a call from two AM General representatives. The memorandum stated that "[t]hey [AM General] had received a draft copy of an audit report dated 14 July from Dave Ruedi [DCAA] which concluded that the per unit allocation was unacceptable, wrong, etc." (Motion Papers No. 4, ex. G-11).

1995 (R4, tab 2). That modification included a reopener clause which explicitly stated that "Defense Contract Audit Agency (DCAA) has indicated that this is a Cost Accounting Standard (CAS) 418 violation. A cost impact of this change has not been determined as of the date of this Modification PZ0004" (fact G46). Thus, as early as July 1995, AM General was on notice that the government might assert a CAS 418 claim, and should have taken steps to preserve all evidence to defend against a potential claim from the government.

Laches is an equitable doctrine under which relief is denied to one who unreasonably and inexcusably delays in the assertion of a claim, thereby causing injury or prejudice to the adverse party. *S.E.R. Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 5 (Fed. Cir. 1985). Whether the defense of laches may be asserted against the government is not entirely clear. *JANA, Inc. v. United States*, 936 F.2d 1265, 1269 (Fed. Cir. 1991) ("At the outset we note that it is not entirely clear whether the defense of laches may be asserted against the government.") Even if laches is available as a defense against the government's claim, such a defense requires a showing of "(1) unreasonable and unexcused delay by the claimant, and (2) prejudice to the other party, either economic prejudice or 'defense prejudice' – impairment of the ability to mount a defense due to circumstances such as loss of records, destruction of evidence, or witness unavailability." *Id.* at 1269-70.

In asserting the laches defense, AM General provided no support that it had been prejudiced; its counsel merely assert that they "can establish" all of the elements required to make out a case of laches. This promise is not good enough. As the Court of Claims stated in *Aydin Corp.*, 669 F.2d at 689:

> . . . We therefore do not remand for trial on the basis of our supposed ability to conceive of the existence of further documents or testimony that might, if produced, develop or close fact issues. If on a party's own presentation, resolving all actual and present evidentiary conflicts in his favor, he fails to make a case, he must expect summary judgment against him.

We assume when AM General moves for summary judgment on the grounds of laches, it will put forth sufficient proof. On the basis of what it has presented, we must conclude that it has failed to show prejudice for application of laches even if that equitable doctrine can be applied against the government.

VIII.

Contract Price Adjustment

Section 422(h)(1)(B) of Title 41 of the United States Code ("U.S.C.") (1995) required contractors and subcontractors as a condition of contracting with the United States to –

> (B) agree to a contract price adjustment, with interest, for any increased costs paid to such contractor or subcontractor by the United States by reason of a change in the contractor's or subcontractor's cost accounting practices or by reason of a failure by the contractor or subcontractor to comply with applicable cost accounting standards.

Section 422(h)(3) and (4) of Title 41 of U.S.C. further provides:

> (3) Any contract price adjustment undertaken pursuant to paragraph (1)(B) shall be made, where applicable, on relevant contracts between the United States and the contractor that are subject to the cost accounting standards so as to protect the United States from payment, in the aggregate, of increased costs (as defined by the Board). In no case shall the Government recover costs greater than the increased cost (as defined by the Board) to the Government, in the aggregate, on the relevant contracts subject to the price adjustment . . . .
>
> (4) The interest rate applicable to any contract price adjustment shall be the annual rate of interest established under section 6621 of Title 26 for such period. Such interest shall accrue from the time payments of the increased costs were made to the contractor or subcontractor to the time the United States receives full compensation for the price adjustment.

In implementing 41 U.S.C. § 422(h)(3), the CASB promulgated the following interpretation explaining the term "increased costs" at 48 C.F.R. § 9903.306:

> (a) Increased costs shall be deemed to have resulted whenever the cost paid by the Government results from a change in a contractor's cost accounting practices or from failure to comply with applicable Cost Accounting Standards,

> and such cost is higher than it would have been had the practices not been changed or applicable Cost Accounting Standards complied with.
>
> (b) If the contractor under any fixed-price contract, including a firm fixed-price contract, fails during contract performance to follow its cost accounting practices or to comply with applicable Cost Accounting Standards, increased costs are measured by the difference between the contract price agreed to and the contract price that would have been agreed to had the contractor proposed in accordance with the cost accounting practices used during contract performance. The determination of the contract price that would have been agreed to will be left to the contracting parties and will depend on the circumstances of each case.
>
> (c) The statutory requirement underlying this interpretation is that the United States not pay increased costs, including a profit enlarged beyond that in the contemplation of the parties to the contract when the contract costs, price, or profit is negotiated, by reason of a contractor's failure to use applicable Cost Accounting Standards, or to follow consistently its cost accounting practices. In making price adjustments under the Cost Accounting Standards clause at 9903.201-4(a) in fixed price or cost reimbursement incentive contracts, or contracts providing for prospective or retroactive price redetermination, the Federal agency shall apply this requirement appropriately in the circumstances.

The record shows that, as a result of discussions between the government and AM General on the CAS 418 issue, AM General performed an analysis using what the government considered to be a CAS compliant method of allocating manufacturing overhead. The parties have referred to this method as the "Three Tiered Method." This methods collects manufacturing overhead in three pools: (1) military HMMWV only pool; (2) commercial HUMMER only pool; and (3) common pool for both military and commercial. Based on its analysis, AM General advised the government by letter dated 30 June 2000 that had the Three Tiered Method "been accepted by both parties at the inception of the contract, the cost to the Government through May, 2000 would have been $7,585,552 less than what has been invoiced through that period of time." AM General's letter stated that, notwithstanding the analysis, it "has not agreed to the Three Tiered Method and as such this letter does not constitute a cost impact statement." (R4, tab 22)

On 18 December 2000, DCAA issued an audit report (No. 1621-2001D19500002) updating its estimate of the cost impact due to AM General's CAS 418 noncompliant accounting practice of "allocating all Mishawaka manufacturing overhead expenses on a units-of-production base, using a noncompliant single pool." The report estimated "a cost impact of $16.4 million on contracts for military HMMWV deliveries which were priced using a 'units of production' allocation base as described in AM General's September 1995 accounting change." (R4, tab 27 at 1-2)

In its cross-motion for summary judgment, the government contends that:

> Splitting the manufacturing overhead into three pools prevents the commercial unique costs from being allocated to Government vehicles and Government unique costs from being allocated to commercial vehicles. The separate pools ensure that neither the military nor the commercial vehicles bear more than their fair share of the costs. Using the "Three Tiered Method" complies with CAS 418 as each of the three pools has a beneficial or causal relationship to the cost objective of producing either the HMMWVs or the HUMMER.

(Motion Papers No. 2 at 50)

After the ACO issued her final decision dated 23 August 2001 (R4, tab 32), DCAA performed a recalculation of its 18 December 2000 estimate (Audit Report No. 1621-2001D19500002) (R4, tab 27). DCAA reorganized the computations to conform to the format used in AM General's analysis dated 30 June 2000, and determined that the cost impact resulting from the CAS 418 violation was $16,952,338 (fact G60). In its cross-motion for summary judgment, the government sought this amount, plus interest (Motion Papers No. 2 at 61).

In opposing the government's cross-motion for summary judgment, AM General argues that the government had not demonstrated how the various formulas such as "Total Reopener Adjustment Amount," "Per-Vehicle Reopener Adjustment Amount," and "per-vehicle contract price adjustment" as set forth in the Reopener Clauses had been used to compute its CAS damages. AM General also argues that the government has not established, and is not going to be able to establish, "that the price the Army would have agreed to is anything different than what it did agree to." AM General contends that, "[a]t the very least, there is a dispute as to a material fact that precludes judgment in the Government's favor." (Motion Papers No. 3 at 27-28)

In its reply, filed on 14 April 2005, the government attached as exhibit G-12, a DCAA memorandum that took into consideration the language of the reopener clauses in the contracts. The government says that, for each contract, DCAA has computed (i) the "total reopener adjustment amount," (ii) the "per-vehicle reopener adjustment amount," (iii) the "per-vehicle contract price adjustment amount," and (iv) the contract price adjustment amount. DCAA determined the cost impact to be $16,901,763.52. (Motion Papers No. 4, ex. G-12)

On 29 April 2005, AM General filed a motion to strike ex. G-12 on the grounds that the DCAA memorandum "was not in existence when the Government submitted its proposed findings of fact, and therefore cannot possibly support the basis for its cross-motion for summary judgment, nor respond to AMG's Opposition." The Board's 3 May 2005 letter advised counsel that "[t]he Board plans to decide entitlement only. If and when it becomes necessary to refer to Exhibit No. 12 of the government's reply, the parties will be contacted beforehand for further comments."

The record shows that the ACO had been requesting AM General to submit a cost impact proposal since December 1995 to no avail (*see* R4, tabs 7, 12). AM General had steadfastly refused to acknowledge there was any cost impact on the basis there was no entitlement. While we believe the "Three Tiered Method" AM General reluctantly advanced in June 2000 at the urging of the government would result in a CAS 418 compliant method of allocating its manufacturing overhead, there may be other methods that would work as well. Now that entitlement has been decided in favor of the government, AM General should have no reason to continue to refuse to submit a cost impact proposal. Notwithstanding the government's effort to reconcile its claim with the formula set out in the reopener clauses, AM General has not had the opportunity to check DCAA's computations. So that AM General is afforded the opportunity to submit a cost impact proposal to the ACO on the one hand, and to check DCAA's computations on the other hand, ASBCA No. 53610 is remanded to the parties for determination of the quantum of adjustment.

CONCLUSION

For the reasons stated, AM General's motion for summary judgment is denied, and the government's motion for summary judgment on ASBCA No. 53610 is granted as to entitlement. ASBCA No. 53610 is denied and remanded to the parties for determination of the quantum of adjustment. ASBCA No. 54741 is retained on the Board's docket

pending further proceedings.

Dated: 2 February 2006

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 53610, 54741, Appeals of AM General LLC, rendered in conformance with the Board's Charter.

Dated:

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