ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --		)
		)
ICI Americas, Inc.		)
		) ASBCA Nos. 54877, 55078
Under Contract Nos.	DAAA09-72-C-0170	)
	DAAA09-73-C-0086	)
	DAAA09-78-C-3003	)
	DAAA09-78-C-3001	)
	DAAA09-86-Z-0001	)
	DAAA09-86-Z-0007	)
	DAAA09-92-E-0011	)
	DAAA09-93-E-0001	)
	DAAA09-94-E-0017	)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

ICI Americas, Inc. (ICIA) appeals two contracting officer final decisions on the disposition of actuarial surpluses in government-funded pension plans at the Indiana Army Ammunition Plant (INAAP) and the Volunteer Army Ammunition Plant (VAAP). These plants were government-owned, contractor-operated (GOCO) facilities for which ICIA was the operating contractor for approximately 25 years. The first decision held ICIA liable to the government under the captioned contracts for Cost Accounting Standard (CAS) 413 pension cost segment closing adjustments. The second decision held ICIA liable to the government under the captioned contracts for the actuarial surpluses in the plans when they were merged with other ICIA pension plans. On entitlement only, we sustain the appeal (ASBCA No. 54877) on the first decision to the extent of the claimed segment closing adjustment for the INAAP pension plans, and the appeal (ASBCA No. 55078) on the second decision to the extent of the claimed actuarial surplus on the merger of the VAAP plan. The appeals in all other respects are denied.

FINDINGS OF FACT

A. The INAAP Contracts and Pension Plans

1. From 24 March 1972 (date of contract) to 1 February 1978, ICIA operated the Indiana Army Ammunition Plant (INAAP) under cost-reimbursement Contract No. DAAA09-72-C-0170 (the 1972 INAAP GOCO Contract) (R4, tab 256, answer, ¶ 11).[1] The contract included among other provisions the ASPR 7-203.4(a), ALLOWABLE COST, FIXED FEE AND PAYMENT (JAN 1972) clause.[2] The contract was not subject to CAS 413.[3]
On 3 April 1984, the parties agreed in bilateral Modification No. P00083 to "closeout" the 1972 INAAP GOCO Contract at a total contract amount of $287,213,887.46 without exceptions or reservations (R4, tab 406).

2. From 1 February 1978 (date of contract) through 31 March 1986, ICIA operated INAAP under cost-reimbursement Contract No. DAAA09-78-C-3003 (the 1978 INAAP GOCO Contract) (R4, tab 401; answer, ¶ 13). The contract included among other provisions the ASPR 7-203.4(a), ALLOWABLE COST, FIXED FEE AND PAYMENT (APR 1974) clause (R4, tab 401 at 93). During its initial term of one year, the contract was not subject to CAS 413.[4] The parties dispute whether subsequent extensions of the contract made CAS 413 applicable to the extended periods.[5] On 1 August 1988, the parties agreed in bilateral Modification No. P00224 to "closeout" the 1978 INAAP GOCO Contract at a total contract amount of $614,993,424.38 without exceptions or reservations (R4, tab 410).

3. From 31 March 1986 (date of contract) to 17 March 1993, ICIA operated INAAP under cost-reimbursement Contract No. DAAA09-86-Z-0001 (the 1986 INAAP GOCO Contract) (answer, ¶ 15; R4, tab 407). The contract included among other

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[1] References to the complaint and answer are to those filed in ASBCA No. 55078.

[2] The complete contract document is not in evidence. However on the date of contract, the cited clause was mandated by regulation for this type of contract.

[3] Under the Cost Accounting Standards Board (CASB) regulations and contract clauses specified therein, contracts subject to CAS are required to comply with only those CAS in effect on the date of contract. 4 C.F.R. § 331.5, reproduced in Defense Procurement Circular (DPC) No. 99 at 19-21 (4 May 1972); 48 C.F.R. § 9903.201-4 (2006). The effective date of CAS 413 was 10 March 1978. 42 Fed. Reg. 37191 (July 20, 1977).

[4] See note 3 above.

[5] The contract modifications extending performance are not in evidence and the parties have reserved for the quantum phase of these appeals the issue of the applicability of CAS 413 to the extended periods (R4, tab 309-B, ¶ 16 n.1).

provisions the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (APR 1984) clause (Bd. corr. file, 12 Jan. 2006). The contract was subject to CAS 413 (R4, tab 309-B, ¶ 16).[6] On 21 August 1998, the parties agreed in bilateral Modification No. P00385 to "CLOSE-OUT" the 1986 INAAP GOCO Contract at a total contract amount of $616,532,230.54 with no exceptions or reservations, and with a further statement that: "ALL CONTRACTUAL ACTIONS HAVE BEEN COMPLETED AND THERE ARE NO OUTSTANDING BALANCES ON THIS CONTRACT" (R4, tab 293).

4. As part of the final payment process under the Allowable Cost clauses of the 1972, 1978 and 1986 INAAP GOCO Contracts, ICIA submitted to the government for each contract a "Contractor's Assignment of Refunds, Rebates, Credits, and Other Amounts" (hereinafter "the assignment of refunds"). The assignment of refunds under the 1986 INAAP GOCO Contract was executed by ICIA on 15 September 1997. With the exception of the last sentence in the first paragraph which was not in the assignment of refunds for the 1972 INAAP GOCO Contract, the assignments of refunds for all three contracts read in relevant part as follows:[7]

> [The contractor] does hereby:
>
> 1. Assign, transfer, set over and release to [the Government] all right, title and interest to all refunds, rebates, credits, and other amounts (including any interest thereon), arising out of the performance of the said contract, together with all the rights of action accrued or which may hereafter accrue thereunder. Notwithstanding the above, Contractor shall be required to pay to [the Government] any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor under this contract only to the extent that such amounts are properly allocable to costs for which the Contractor has been reimbursed by the Government.

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[6] The parties' stipulation at R4, tab 309-B, ¶ 16 states that the 1986 INAAP GOCO contract was subject to "full CAS." The term "full CAS" means compliance is required by the CASB regulations with all CAS in effect on the date of contract. Compliance with CAS 413 is required by the CASB regulations only when full CAS is specified. *See* 48 C.F.R. § 9903.201-2(a), (b) (1996).

[7] The full text of the assignments is relevant because the government argues that they preserved its rights to a CAS 413 segment closing adjustment after bilateral contract "close-out" and "total contract amount" agreements were entered into by the parties (gov't reply br. at 20).

> 2. Agree to take whatever action may be necessary to effect prompt collection of all refunds, rebates, credits, and other amounts (including any interest thereon) due or which may become due, and to promptly forward to the Contracting Officer checks . . . for any proceeds so collected. The reasonable costs of any such action to effect collection shall constitute allowable costs when approved by the Contracting Officer . . . and may be applied to reduce any amounts otherwise payable to the Government . . . .
>
> 3. Agree to cooperate fully with the Government as to any claim or suit in connection with refunds, rebates, credits, or other amounts due (including any interest thereon); to execute any protest, pleading, application, power of attorney, or other papers in connection therewith; and to permit the Government to represent him at any hearing, trial, or other proceeding, arising out of such claim or suit.

(R4, tab 405 at 6, tab 409 at 8, tab 424 at 4)

5. From 1972 through 1987, ICIA made contributions to a stand-alone defined benefit pension plan for INAAP salaried employees. From 1972 through 1990, ICIA made contributions to a stand-alone defined benefit pension plan for INAAP bargaining unit employees. The contributions to both plans were reimbursed by the government pursuant to the Allowable Cost clauses of the 1972, 1978, and 1986 INAAP GOCO Contracts. After 1987, no further contributions were made to the INAAP Salaried Plan due to the funded status of the plan. After 1990, no further contributions were made to the INAAP Bargaining Plan due to the funded status of the plan. (R4, tab 309-A, ¶¶ 1, 2)

6. In 1991, the government reviewed the INAAP pension plans for ICIA fiscal years 1988-89 and concluded that the salaried plan was overfunded (*i.e*. the market value of assets exceeded the actuarial liabilities) (R4, tab 264 at 8, 24). In August 1992, ICIA provided actuarial reports to the government showing that both of the INAAP pension plans were overfunded. From that time forward until separate actuarial accountability of the plans was lost in their mergers with other ICIA corporate affiliate pension plans, both INAAP plans had a surplus of assets over actuarial liabilities and the government knew that there were surpluses in both plans. (R4, tabs 267, 268, 270, 271, 272, 274, 275, 276, 278, 412, 414; tr. 1/150-51)

7. On 17 February 1993 (date of contract), ICIA and the government entered into Contract No. DAAA09-92-E-0011 (the 1993 INAAP Facilities Use Contract). This contract, among other things, provided that ICIA, in exchange for rent-free use of the property for purposes approved by the contracting officer, would maintain the INAAP

plant at no cost to the government except that "abnormal maintenance" of machinery and equipment as approved by the government would be at government expense. (R4, tab 415 at 1-3, 8) The contract included, among other provisions, the FAR 52.216-14, ALLOWABLE COST AND PAYMENT – FACILITIES USE (APR 1984) clause, applicable to the work "specified in this contract to be at Government expense." (R4, tab 415 at 20) No pension plan contributions were made by ICIA, or reimbursed by the government under this contract (*see* finding 5). There is also no evidence that any work was performed by ICIA under the contract that was specified to be at government expense, or that any reimbursable costs were otherwise incurred by ICIA or paid by the government under this contract. The parties have stipulated that the contract was not subject to CAS 413 under the CASB regulations,[8] but they dispute whether it was otherwise applicable under FAR 31.205-6(j) (R4, tab 309-B, ¶ 16).

8. Attachment 2 to the 1993 INAAP Facilities Use Contract was an "ADVANCE AGREEMENT" executed by the parties on the date of the contract. The Agreement stated in relevant part:

> The following is hereby agreed to between the Parties identified below, and shall be applicable to any and all contracts entered into by the parties for the use of Indiana Army Ammunition Plant and shall be in effect for the duration of such contract.
>
> . . . .
>
> ICI Americas Inc. assumes total fiscal liability for pension plans which were in existence under the current cost-reimbursement operating contract and which continue under the fixed-priced facility use contract(s). Provisions of clause entitled "Termination of Defined Benefit Pension Plans" will be applicable at any future date if and when such applicable pension plans are terminated.

(R4, tab 415 at 41)

9. The FAR 52.215-27, TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEPT 1989) clause referred to in Attachment 2 to the 1993 INAAP Facilities Use Contract stated in relevant part:

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[8] The parties' stipulation at R4, tab 309-B, ¶ 16 states that the contract was not subject to "full" CAS. The CASB regulations included CAS 413 only in "full" CAS. *See* 48 C.F.R. § 9903.201.2(a)-(b) (1996).

> The Contractor shall promptly notify the Contracting Officer in writing when it determines that it will terminate a defined benefit pension plan or otherwise recapture such pension fund assets. If pension fund assets revert to the Contractor or are constructively received by it under a termination or otherwise, the Contractor shall make a refund or give a credit to the Government for its equitable share as required by FAR 31.205-6(j)(4).

(R4, tab 415 at 47)

10. On 26 March 1993 (date of contract), ICIA and the government entered into Contract No. DAAA09-93-E-0001 (the 1993 INAAP CTR Contract). This was a combined fixed price/cost reimbursement contract for ICIA to perform various capital type rehabilitation tasks at INAAP as required by subsequent contract modifications. (R4, tab 416 at 1-2) The contract included among other provisions the FAR 52.216-13, ALLOWABLE COST AND PAYMENT (FACILITIES) (APR 1984) clause, the FAR 52. 215-22, PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (JAN 1991) clause and the FAR 52.215-27, TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEP 1989) clause (R4, tab 416 at 14-15). The parties have stipulated that CAS 413 was not applicable to this contract under the CASB regulations, but they dispute whether it was otherwise applicable under FAR 31.205-6(j) (R4, tab 309-B, ¶ 16).[9] The latest modification of the 1993 INAAP CTR Contract (P00197) was issued effective 18 June 1999. As of that modification, the total contract amount was $50,864,484.37 of which approximately $20,393,635 was cost-reimbursement work. (R4, tabs 66-246) No pension plan contributions were made by ICIA, or reimbursed by the government, under the contract. (*See* finding 5) There is no evidence of a bilateral close-out agreement on this contract as was executed by the parties for the 1972, 1978 and 1986 INAAP GOCO Contracts.

B. The VAAP Contracts and Pension Plan

11. From 1972 through 28 February 1978, ICIA operated the Volunteer Army Ammunition Plant (VAAP) for the government under cost-reimbursement Contract No. DAAA09-73-C-0086 (the 1972 VAAP GOCO Contract) (answer, ¶ 29). The contract included among other provisions the ASPR 7-203.4(a), ALLOWABLE COST, FIXED FEE AND PAYMENT (JAN 1972) clause.[10] CAS 413 was not applicable to this contract.[11] In bilateral Modification No. P00053, effective 29 January 1981, the parties established the "Final Contract Amount" of the 1972 VAAP GOCO Contract (R4, tab 404 at 1, 4 of 5). Modification No. P00053 included no exceptions or reservations to the

[9] *See* note 8 above.
[10] *See* note 2 above.
[11] *See* note 3 above.

stated final contract amount. There was, however, no bilateral close-out modification for this contract as there was for the 1972 INAAP GOCO Contract (*see* finding 1).

12. From 1 March 1978 (date of contract) through 31 March 1988, ICIA operated VAAP under Contract No. DAAA09-78-C-3001 (the 1978 VAAP GOCO Contract) (R4, tab 402; answer, ¶ 31) The contract included among other provisions the ASPR 7-203.4(a), ALLOWABLE COST, FIXED FEE AND PAYMENT (APR 1974) clause (R4, tab 402 at 63 of 152). During its initial term of one year, the contract was not subject to CAS 413.[12] The parties dispute whether subsequent extensions of the contract made CAS 413 applicable to the extended periods.[13] Pursuant to the final payment provisions of the Allowable Cost clause, ICIA on or about 20 March 1989 submitted a "FINAL BILLING" voucher showing a total contract amount of $83,992,013.69 with no amount due (R4, tab 431 at 8-10). A government audit report dated 23 April 1999 on the final billing voucher questioned $70,425 of the claimed amount (R4, tab 431 at 2, 4). On 20 March 2000, ICIA sent a check for the questioned amount to the contracting officer and requested acknowledgement that the contract was "closed" (R4, tab 441). The contracting officer did not reply.

13. From 1972 through 1987, ICIA made and the government reimbursed contributions to a single VAAP employee defined benefit pension plan as a component of the ICI Americas Pension Plan. No contributions were made by ICIA to this plan for the VAAP employees, or reimbursed by the government, after 1987. The assets and liabilities of the ICIA Americas Pension Plan attributable to the VAAP employees were separately calculated "for CAS purposes" by the actuary as a "stand alone segment" of the Plan until 1997. (R4, tab 309-A, ¶¶ 6, 7, tab 282 at 18)

14. From 1 April 1988 (date of contract) through "portions" of 1996, ICIA operated VAAP under Contract No. DAAA09-86-Z-0007 (the 1988 VAAP GOCO Contract) (R4, tab 408; answer, ¶ 33; ex. G-1C at 8; tr. 2/223). The contract included, among other provisions, the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (APR 1984) clause (R4, tab 408 at 65). The contract was subject to CAS 413 (R4, tab 309-B, ¶ 17). On 4 September 1997, ICIA submitted to the government a "FINAL BILLING" voucher for the 1988 VAAP GOCO Contract showing total costs and fees of $36,394,797.61, with no amount due (R4, tab 423 at 1-2).

15. The 4 September 1997 voucher was initially found unacceptable and returned for correction on 7 January 2000 (R4, tab 437). However, on 3 March 2000, the contracting office told ICIA that on further review the voucher was correct and that the

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[12] *Id.*

[13] The contract modifications extending performance are not in evidence and the parties have reserved for the quantum phase of these appeals the issue of the applicability of CAS 413 to the extended periods (R4, tab 309-B, ¶ 17 n.3).

application of funds in a previous modification was in error (R4, tab 439). Bilateral Modification No. P00101 effective 16 March 2000 corrected the error and set the "CURRENT ESTIMATED CONTRACT AMOUNT" for the 1988 VAAP GOCO Contract at the amount in ICIA's 4 September 1997 voucher. Modification No. P00101 included no exceptions or reservations with respect to the total contract amount established therein. (R4, tab 440) There was, however, no bilateral close-out modification for this contract as there was for the 1986 INAAP GOCO Contract (*see* finding 3).

16. As part of the final payment process under the Allowable Cost clauses of the 1978 and 1988 VAAP GOCO Contracts, ICIA submitted to the government for each contract an assignment of refunds similar to the assignments submitted in connection with final payment under the 1972, 1978 and 1986 INAAP GOCO Contracts, with the exception that the assignment of refunds submitted for the 1988 VAAP GOCO Contract was limited to refunds, credits etc. "arising out of the materials portion of the said contract" (R4, tab 431 at 11, tab 423 at 6).

17. On 22 November 1994, ICIA and the government entered into Contract No. DAAA09-94-E-0017 (the 1994 VAAP Facilities Use Contract). This contract included substantially the same provisions as the 1993 INAAP Facilities Use Contract including the FAR 52.216-14, ALLOWABLE COST AND PAYMENT - FACILITIES USE (APR 1984) clause with the same limited applicability, but not including the FAR 52.215-27, TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEP 1989) clause. (R4, tab 420 at 1, 4-8, 14) No pension plan contributions were made by ICIA, or reimbursed by the government, under this contract (*see* finding 13). There is no evidence that any work was performed by ICIA under the contract that was specified to be at government expense, or that any reimbursable costs were otherwise incurred by ICIA or paid by the government under this contract. The parties have stipulated that the contract was not subject to CAS 413 under the CASB regulations, but they dispute whether it was subject to CAS 413 under FAR 31.205-6(j) (R4, tab 309-B, ¶ 17).[14]

18. On 15 March 1995, the parties entered into Basic Ordering Agreement No. DAAA09-95-G-0003 (the 1995 VAAP BOA). This was a combined fixed-price/cost-reimbursement BOA for various maintenance and rehabilitation tasks as ordered by the government. (R4, tab 422; answer, ¶ 35) Subsequent cost-reimbursement Delivery Orders Nos. 8, 10, 21, 26 and 33 issued under this BOA incorporated by reference the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (APR 1984) clause and the FAR 52.217-27, TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEP 1989) clause as specified in the BOA. The latest of these delivery orders (No. 33) was issued on 25 July 1997. (R4, tab 422 at 45, 11 at 3, 12 at 34, 16 at 4, 17 at 14, 25 at 17-18, 29)

[14] The parties stipulated that the contract was not subject to full CAS. Contracts not subject to full CAS under the CASB regulations are not subject to CAS 413 under those regulations. *See* note 6 above.

The parties have stipulated that the 1995 VAAP BOA and orders thereunder were not subject
to CAS 413 under the CASB regulations, but they dispute whether they were otherwise subject to CAS 413 pursuant to FAR 31.205-6(j) (R4, tab 309-B, ¶ 17).[15] No pension plan contributions were made by ICIA, or reimbursed by the government, under any of the VAAP BOA delivery orders (*see* finding 13). There is no evidence of a bilateral close-out modification on any of the five cost-reimbursement VAAP BOA delivery orders cited above (R4, tab 436).

C. Disposition of the INAAP and VAAP Pension Plan Surpluses

19. On 8 August 1994, ICIA submitted to the government a "PROPOSAL FOR ADVANCE AGREEMENT REGARDING TREATMENT OR [sic] PENSIONS UNDER THE COST ACCOUNTING STANDARDS AND FEDERAL ACQUISITION REGULATIONS" (R4, tab 282 at 2). The proposed agreement, among other things, provided that (i) the INAAP and VAAP segments would be considered closed for purposes of CAS 413.50(c)(12) as of 1 January 1994, (ii) a net pension adjustment of a $2,500,000 credit to the government and other concessions would be considered fair and adequate consideration under CAS 413.50(c)(12) for the closures, and (iii) "no amount is due now or will be due in the future to [the government] with respect to any surplus attributable to CAS pension expense . . . for any period of time prior to January 1, 1994" (R4, tab 282 at 39-40).

20. On 1 November 1994, the government rejected the proposed agreement with a detailed 14-page, paragraph by paragraph critique (R4, tab 283). On 8 November 1994, ICIA responded to the government rejection with a one page, three paragraph letter. This letter alleged that the government's response "neither provided items for clarification nor identified areas for rework to enable a resubmission" and requested the "recommended alternative offered by the Government regarding the pension plans." (R4, tab 284) The government did not provide the requested recommended alternative, and ICIA took no action thereafter to resubmit its proposal to address the substantive criticisms in the government's 1 November 1994 rejection letter.

21. As of 1 January 1997, the VAAP component of the ICI Americas Pension Plan had a surplus of assets over actuarial liabilities. After 1997, the assets and liabilities of the VAAP component were no longer separately calculated by the plan's actuary. (R4, tab 309-A, ¶¶ 6, 8)

22. On 29 September 1998, the contracting officer requested ICIA to provide detailed information "for review of the ICIA/INAAP/VOAAP [sic] pension plans." The requested information included, among other items, CAS 413.50(c)(12) segment closing proposals "as of 12/31/98" for the INAAP and VAAP pension plans, plus actuarial

[15] *Id.*

valuation reports, audited financial statements, IRS Form 5500 annual reports and trustee reports for those plans from 1990 through 1997. (R4, tab 39 at 1, 3-4)

23. CAS 413.50(c)(12) as initially promulgated effective 10 March 1978 and in effect through 29 March 1995 provided for segment closing adjustment proposals in relevant part as follows:[16]

> (c) *Allocation of pension cost to segments*.
>
> . . . .
>
> (12) If a segment is closed, the contractor shall determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. . . . The calculation of the difference between the market value of the assets and the actuarial liability shall be made as of the date of the event (e.g., contract termination) that caused the closing of the segment. If such a date cannot be readily determined, or if its use can result in an inequitable calculation, the contracting parties shall agree on an appropriate date. The difference between the market value of the assets and the actuarial liability for the segment represents an adjustment of previously-determined pension costs.

42 Fed. Reg. 37,191, 37,196-98 (July 20, 1977); 48 C.F.R. § 9904.413-50(c)(12) (1994).

24. On 31 December 1998, ICIA ceased performing work under the 1993 INAAP CTR Contract and the 1994 VAAP Facilities Use Contract (compl. and answer, ¶¶ 25, 41) By letter dated 2 March 1999, ICIA refused to provide the segment closing adjustment proposals and other information requested by the contracting officer on 29 September 1998. The stated reason was that "both facilities have been and are subject to modified rather than full CAS coverage" and that "there is no contractual or other requirement that ICI furnish the information." (R4, tab 40)

25. On 31 March 1999, the contracting officer again requested the pension plan information stating that:

> You are required to provide the requested data regardless of whether the facilities are subject to modified or

[16] There is no contention that CAS 413 as revised effective 30 March 1995 applies to the contracts in these appeals. *See* 48 C.F.R. § 9904.413 (1995).

> full CAS coverage. In accordance with FAR 31.205-6(j), Pension costs, all pension plans must be accounted for in accordance with CAS 412 and 413. The information requested from [ICIA] is needed by the Government in order to calculate an adjustment of pension costs in accordance with CAS 413-50(c)(12).

(R4, tab 41)

26. On 15 April 1999, ICIA again refused to provide the requested information. ICIA argued that (i) FAR 31.205-6(j)(2) did not require application of the CAS 413-50(c)(12) segment closing adjustment for pension costs to non-CAS covered or modified CAS covered contracts, and (ii) since the INAAP and VAAP pension plans had not been terminated, the FAR 31.205-6(j)(4), "Termination of defined benefit pension plans" provisions, did not apply. (R4, tab 42)

27. On 5 July 2001, the contracting officer made a third request for CAS 413.50(c)(12) segment closing proposals for the "contract closeout proceedings" at INAAP and VAAP (R4, tab 45 at 1, 4). By letter dated 17 August 2001, ICIA suggested a meeting with "experts" to discuss the issue, but did not comply with the information request (R4, tab 46).

28. On 31 December 2001, all assets and liabilities of the two INAAP pension plans were merged into other pension plans of ICIA corporate affiliates. Both of the INAAP plans were overfunded (*i.e.*, assets exceeded actuarial liabilities) at the time of their mergers. On 1 January 2005, various components of the ICI Americas Pension Plan, including the VAAP component, were transferred to another ICIA corporate affiliate pension plan. (R4, tab 309-A, ¶¶ 3, 4, 8, 12)

29. The INAAP and VAAP pension plans were not terminated and the assets of those plans after the mergers remained in the same master trust. However, with the cessation of separate actuarial accounting for the VAAP component of the ICI Americas Pension Plan after 1997, and with the mergers of the INAAP plans with other plans on 31 December 2001, the assets and liabilities of the INAAP and VAAP plans were commingled with the assets and liabilities of the other pension plans. As a result, the surpluses in the INAAP and VAAP plans were made available to pay benefits to all participants in the merged plans regardless of whether the participants were formerly employed at INAAP or VAAP, and the government "lose[s] track" of the surpluses (R4, tab 309-A, ¶¶ 3, 4, 5, 6, 12, 13; tr. 2/50).

30. ICIA and not the government will be liable for any future shortfall in the merged pension plans. However, any future surplus after liquidation of all remaining pension liabilities of the merged plans would likely revert to ICIA or its corporate

affiliate sponsors of the merged plans. Under applicable law and the terms of the plans, no surplus assets of the merged plans would revert to the government upon liquidation. (R4, tab 309-A, ¶ 14)

D. The Final Decisions

31. By letter dated 17 December 2003 the contracting officer made a "final" request for the pension plan information necessary to compute CAS 413 segment closing adjustments for the INAAP and VAAP pension plan costs (R4, tab 47). The requested information was not provided.

32. By letters dated 26 January 2004, the contracting officer made an initial finding of CAS non-compliance and demanded immediate payment of $80 million as the estimated amount of the surplus assets in the INAAP and VAAP pension plans due the government as a segment closing adjustment (R4 tabs 48, 49). In further correspondence and meetings, ICIA contested the government's claims and no resolution of the issue was reached (R4, tabs 50-52, 54-56).

33. By final decision dated 21 September 2004, the contracting officer made a formal claim and demand for payment against ICIA for a CAS 413 segment closing adjustment in "an amount equal to the excess of pension plan assets over liabilities in pension funds provided for ICI employees at Indiana Army Ammunition Plant and Volunteer Army Ammunition Plant for which the government reimbursed ICI's contributions under contract numbers DAAA09-93-E-0001 at Indiana and DAAA09-94-E-0017 at Volunteer and predecessor contracts." The final decision estimated the amount due as $80,000,000 plus interest. (R4, tab 57 at 4)

34. By final decision dated 22 April 2005, the contracting officer supplemented the 21 September 2004 final decision with a claim in the estimated amount of $80,000,000 plus interest for the alleged "constructive reversion" to ICIA of the surplus assets in the INAAP and VAAP pension funds "for which the government reimbursed ICI's contributions under contract numbers DAAA09-93-E-0001 at Indiana and DAAA09-94-E-0017 at Volunteer and predecessor contracts." This claim alleged that the "constructive reversion" occurred sometime after March 1999 when "ICIA exercised control over the INAAP and VAAP pension plan assets by merging the INAAP and VAAP plan assets with other funds covering other employees." The final decision asserted liability under the ASPR 15-201.5, "Credits" or the FAR 31.201-5, "Credits" and the FAR 31.205-6(j)(4), "Termination of defined benefit pension plans" provisions of ICIA's contracts. (R4, tab 444 at 4-5)

35. The 1995 VAAP BOA (Contract No. DAAA09-95-G-0003) and delivery orders issued thereunder were not included in the contracts under which either the 21 September 2004 or the 22 April 2005 claims were made. The contracting officer's

final decisions were timely appealed and the appeals were docketed as ASBCA No. 54877 for the 21 September 2004 decision and as ASBCA No. 55078 for the 22 April 2005 decision.

36. The parties have stipulated that: (i) ICIA's INAAP and VAAP operations were at all times accounted for as two separate segments for government cost accounting purposes; (ii) if CAS 413.50(c)(12) was applicable to either the 1993 INAAP Facilities Use Contract or the 1993 INAAP CTR Contract by virtue of FAR 31.205-6(j), then the INAAP segment closed on 31 December 1998; and (iii) if CAS 413.50(c)(12) was applicable to either the 1994 VAAP Facilities Use Contract or the 1995 VAAP BOA delivery orders by virtue of FAR 31.205-6(j), then the VAAP segment closed on or about 31 December 1998. (R4, tab 309-B, ¶¶ 18-20) In their post-hearing briefs, the parties agree that if CAS 413 was applicable only to the GOCO contracts, then the segment closings occurred in December 1993 at INAAP and June 1996 at VAAP (app. reply br. at 71; gov't reply br. at 36).

DECISION

A. Objections to Evidence

In pre-hearing motions, ICIA moved to strike portions of the expert reports of the government's expert pension and accounting witnesses, Mr. Isler and Ms. West on the grounds of *Rumsfeld v. United Technologies Corp.*, 315 F.2d 1361 (Fed. Cir. 2003) (Board should not have received expert evidence on interpretation of CAS). By order dated 9 January 2006, the Board preliminarily granted these motions in part. By motion dated 13 January 2006, ICIA moved to strike additional portions of the Isler and West reports on the same grounds. At hearing the Board received the reports in evidence as government exhibits 2, 3, 4 and 8, subject to further consideration of ICIA's objections (tr. 2/61-63, 123, 156-57). ICIA renews its motions in its post-hearing brief (app. br. at 63). ICIA also requests the Board to disregard those portions of the testimony of Mr. Isler and Ms. West that "simply offer legal conclusions or purport to explain the meaning of regulations" (app. br. at 64). ICIA does not, however, identify specific transcript pages. On 17 January 2006, the government moved to strike portions of the expert reports of ICIA's expert pension and accounting witnesses, Mr. McQuade and Mr. Rosen on similar grounds. In response to appellant's brief, the government renews its objections (gov't reply br. at 34). We have reviewed the expert reports in question. Rather than excluding various portions of the reports, rendering it difficult to understand the context of the remaining portions, we decide in our discretion to admit them in their entirety and afford individual portions the appropriate weight in light of the parties' objections. We overrule the objections to admissibility of the testimony on the same basis.

ICIA further states that the Board should decline to consider most of the substance of six memoranda of the DAR Council, Cost Principles Committee on the grounds that they contain post-promulgation assertions and do not reflect the intent of the promulgating entity, [17] and that we should disregard the extracts of the Defense Contract Audit Agency (DCAA) Contract Audit Manual ("DCAM") at exhibit 1 to the West report (gov't ex. 4), and the testimony of a government auditor (Mr. Friend) (R4, tab 461) on relevance and other grounds (app. br. at 64-69). We admit the Cost Principles Committee memoranda and the DCAM extracts. ICIA's objections go to weight rather than admissibility. We exclude the testimony of Mr. Friend on the ground that it was not offered as expert testimony and does not meet the requirements of Federal Rule of Evidence 701 for lay opinion testimony.

B. ASBCA No. 54877

Although CAS 413.50(c)(12) contemplates a look back to past contracts to determine the recoverable amount of a segment closing adjustment, it calls for an adjustment in the current period at the time of the segment closing. *Teledyne Inc. v. United States*, 50 Fed. Cl. 155, 181-83 (2001), *aff'd, Allegheny Teledyne, Inc. v. United States*, 316 F.3d 1366, 1382-83 (Fed. Cir. 2003). Accordingly, there must be an open, flexibly priced contract subject to CAS 413 in the current period of the segment closing to which the adjustment can be made as an increase or decrease in allowable cost.

The parties have stipulated that neither the 1993 INAAP Facilities Use Contract, nor the 1993 INAAP CTR Contract, nor the 1994 VAAP Facilities Use Contract was subject to CAS 413 under the CASB regulations (*see* findings 7, 10, 17). Nevertheless, the government argues that all three contracts were subject to CAS 413 pursuant to the FAR 31.205-6(j)(2) cost principle. We do not agree. The FAR Part 31 cost principles were applicable to the facilities use contracts only to the extent of government ordered work to be performed at government expense. There is no evidence of any such work being ordered under either of the facilities use contracts. (*See* findings 7, 17) Moreover, the cited cost principle states in relevant part: "The cost of all defined benefit pension plans shall be measured, allocated, and accounted for in compliance with the provisions of 48 CFR 9904.412, Composition and Measurement of Pension Costs, and 48 CFR 9904.413, Adjustment and Allocation of Pension cost." 48 C.F.R. § 31.205-6(j)(2) (1992). Under those terms, where CAS 413 is mandated, not by a CASB regulation, but by a FAR cost principle for determining allowable cost, it is applicable only to, and if, there are pension costs incurred under the contract to be "measured, allocated, and accounted for." It is not disputed that there were no such costs paid by ICIA or reimbursed by the government under either the 1993 INAAP Facilities Use Contract or the 1994 INAAP CTR contract, or the 1994 VAAP Facilities Use Contract (*see* findings 5, 7, 10, 13, 17). We therefore find no basis in those contracts under either the CASB

[17] The memoranda in question are at R4, tabs 257, 258, 260, 263, 269, 290.

regulations or the FAR cost principles for CAS 413.50(c)(12) segment closing adjustments at either INAAP or VAAP.

The parties have agreed that if CAS 413 is applicable only to one or more of the GOCO contracts, the relevant segment closing dates are December 1993 at INAAP and June 1996 at VAAP (*see* finding 35). Of the three INAAP GOCO contracts, the 1972 contract was not subject to CAS 413 (*see* finding 1). The 1978 contract was not subject to CAS 413 for its initial term[18] and was in any event closed out by mutual agreement without exceptions or reservations on 1 August 1988, five years before the INAAP segment closing date (*see* finding 2). Only the 1986 contract was subject to CAS 413 for its full term and was still open on the segment closing date. However, it was closed out by mutual agreement more than four years later on 21 August 1998, with no adjustment having been made and with an express statement that "ALL CONTRACTUAL ACTIONS HAVE BEEN COMPLETED AND THERE ARE NO OUTSTANDING BALANCES ON THIS CONTRACT." (*See* finding 3) A CAS 413 segment closing adjustment was a contractual action and clearly within the scope of the express language of the 21 August 1998 bilateral close-out agreement. Moreover, when it signed that agreement, the government had been aware since as early as August 1992 that both of the INAAP pension plans were overfunded, yet it failed to include any exception or reservation in the close-out agreement for a CAS 413 segment closing adjustment under that contract (*see* findings 3, 6).

The cases in our line of governing precedent cited by the government for the proposition that a CAS 413 segment closing adjustment is not barred by a close-out agreement are cases of "final payment" with no express bilateral close-out agreement. *See American Western Corp. v. United States*, 730 F.2d 1486, 1488-89 (Fed. Cir. 1984); *Powerine Oil Co. v. United States*, 837 F.2d 1581, 1583-84 (Fed. Cir. 1988); *Coral Petroleum, Inc.*, ASBCA No. 27888, 86-1 BCA ¶ 18,533 at 93,111-12. Final payment procedures under the Allowable Cost and Payment clause discharge only the government's payment obligations. The bilateral close-out agreement for the 1986 INAAP GOCO Contract expressly discharged all further obligations of both parties with respect to "contractual actions" and "outstanding balances" under that contract.

The government argues that its CAS 413 claim survives the mutual close-out agreement because it is within the scope of the assignment of refunds executed by ICIA in connection with final payment on the 1986 INAAP GOCO Contract (gov't reply br. at 20). We do not agree. The distribution of an actual pension fund surplus to ICIA by the trustee would be within the scope of the assignment of refunds and recoverable by the government under that assignment without regard to the closed-out status of the contract. *See NI Industries, Inc.*, ASBCA No. 34393, 92-1 BCA ¶ 24,631 at 122,915. The

[18] The parties dispute, and have reserved for the quantum phase of these appeals, the question of whether the extensions of the 1978 Contract were subject to CAS 413 (*see* finding 2).

government's CAS 413 claim, however, is not a claim for an actual pension fund surplus distributed by the trustee to ICIA, but for a contract price reduction in the amount of an actuarial (estimated) surplus that has not been (and may never be) distributed to ICIA. As such, the claim is not within the scope of the assignment of refunds, and does not survive the bilateral contract close-out agreement.

While we find the government not entitled to a CAS 413 segment closing adjustment with respect to the INAAP pension funds, we reach a different result with respect to the VAAP pension fund. We have held above that there was no contractual basis for the adjustment in the 1994 VAAP Facilities Use Contract. Therefore, as stipulated by the parties, the VAAP segment closing date was June 1996 (*see* finding 36). The 1988 VAAP GOCO Contract was subject to CAS 413, was open at that time, and has never been the subject of a bilateral close-out modification as was the 1986 INAAP GOCO Contract (*see* findings 14-15).

ICIA argues that final payment on the 1988 VAAP GOCO Contract was made when the parties agreed on 16 March 2000 in bilateral Modification No. P00101 to set the "CURRENT ESTIMATED CONTRACT AMOUNT" at the amount submitted on ICIA's final billing voucher, and that final payment bars a CAS 413 segment closing adjustment claim (app. reply br. at 27). We do not consider that an agreement on the "CURRENT ESTIMATED CONTRACT AMOUNT" is an agreement on the final total contract price. Moreover, final payment alone does not bar a government claim under a specific contract provision with no express time limit, provided that the claim is presented in a reasonable time. *American Western, supra*, 730 F.2d at 1488-89; *Coral Petroleum, supra*, 86-1 BCA at 93,111-12.

Considering the government's repeated efforts on and after 29 September 1998 to obtain the segment closing data necessary for computing the amount of the claim, ICIA cannot reasonably contend that it was surprised by the assertion of the formal claim in the contracting officer's final decision of September 2004 (*see* findings 22, 24-27, 31). Moreover, under CAS 413.50(c)(12), it was ICIA and not the government that had the obligation upon the VAAP segment closing to "determine the difference between the actuarial liability for the segment and the market value of the assets allocated to the segment." CAS 413.50(c)(12) further provided that if the date of a segment closing could not be readily determined, "the contracting parties shall agree on an appropriate date" (s*ee* finding 23). ICIA contends that it "attempted in 1994 to satisfy" its obligation to "determine the difference" etc. when it submitted its 8 August 1994 PROPOSAL FOR AN ADVANCE AGREEMENT REGARDING TREATMENT OR [SIC] PENSIONS UNDER THE COST ACCOUNTING STANDARDS AND FEDERAL ACQUISITION REGULATIONS (app. reply br. at 1). That proposed agreement was rejected by the government in a detailed 14 page, paragraph-by-paragraph critique, to which ICIA made no substantive response in a revised proposal or otherwise. (*See* findings 19, 20).

If the formal assertion of the segment closing claim by the government was unreasonably delayed, it was due to ICIA's repeated insistence that none of its current contracts at INAAP or VAAP were subject to CAS 413, and its refusal to provide the segment closing adjustment data requested by the government that had not been provided in the 8 August 1994 proposal for advance agreement (*see* findings 22, 24-27). Since the 1988 VAAP GOCO Contract was a flexibly priced contract subject to CAS 413 under the CASB regulations and open during the accounting period when the VAAP segment closing occurred, the government was entitled to a VAAP segment closing adjustment under that contract.

The appeal in ASBCA No. 54877 is sustained as to the government claim for a CAS 413 segment closing adjustment under the INAAP contracts. It is denied as to the government claim for a CAS 413 segment closing adjustment under the 1988 VAAP GOCO Contract.

C. ASBCA No. 55078

The contracting officer's 22 April 2005 claim was for an alleged "constructive reversion" of the surplus assets in the INAAP and VAAP pension plans when "ICIA exercised control" over the assets of those plans by merging them with other ICIA corporate affiliate pension plans.[19] The contracting officer based this claim on the FAR 31.201-5, "Credits" (and predecessor ASPR provision) and FAR 31.205-6(j)(4), "Termination of defined benefit pension plans" cost principles that were incorporated by reference in ICIA's cost reimbursement contracts. (S*ee* finding 34)

The first sentence of the FAR 31.201-5, "Credits" cost principle states: "The applicable portion of any income, rebate, allowance or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund." To "receive" means to "take possession or delivery of." To accrue in this context means "to come into existence as an enforceable claim." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 12 at 1894

[19] The government post-hearing brief offers "ability to control" the government's assets as its "desired definition" of constructive reversion in place of the "exercises control" definition in the contracting officer's final decision. The government argues that the contractor's ability to control begins when there are no longer any open contracts imposing CAS and FAR Part 31 accounting controls on the contractor (gov't br. at 129-34). Government loss of its contractual basis for accounting control over a contractor's pension funds does not necessarily by itself confer any present tangible economic benefit on the contractor. The most it does is create conditions where some future tangible benefit might be received undetected. We interpret constructive reversion or constructive receipt as requiring something more than a merely potential future benefit.

(1971). The precursor of the FAR 31.201-5 credits cost principle (ASPR/DAR 15-201.5) allowed government recovery of the surplus assets of a terminated defined benefits pension plan that were actually received by the contractor and were allocable to costs reimbursed by the government. *See NI Industries, Inc*., ASBCA No. 34943, 92-1 BCA ¶ 24,631 at 122,914-15. The ICIA INAAP and VAAP pension plan actuarial surpluses at issue here, however, remain in a master trust to which the contractor has no enforceable right to possession (*see* finding 29). Therefore the first sentence of the credits cost principle is not applicable and provides no basis for government recovery of those surpluses. The second sentence of the credits cost principle, effective 20 September 1989, consists of a cross reference to FAR 31.205-6(j)(4) and does not provide a separate basis for recovery (54 Fed. Reg. 34,755 (Aug. 21, 1989)).

The FAR 31.205-6(j)(4) "Termination of defined benefit pension plans" cost principle was promulgated effective 20 September 1989. It was not applicable to any of the INAAP or VAAP GOCO Contracts, all of which were awarded prior to the effective date, nor was it applicable to either the 1993 INAAP Facilities Use Contract or the 1994 VAAP Facilities Use Contract, neither of which had any work performed at government expense.[20] (*See* findings 7, 17) FAR 31.205-6(j)(4), as modified 23 September 1991, was applicable to the 1993 INAAP CTR Contract and stated:[21]

> (4) *Termination of defined benefit pension plans*. When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn. The Government's equitable share shall reflect the Government's participation in pension costs through those contracts for which certified (see 15.804) cost or pricing data were submitted or which are subject to [FAR] Subpart 31.2. [Emphasis added]

The FAR does not define "constructively received" as that term is used in FAR 31.205-6(j)(4). But it does provide a specific example of such receipt in the immediately preceding subsection, FAR 31.205-6(j)(3)(v), effective 23 September 1991, as follows:

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[20] The FAR cost principles were incorporated by reference in the Facilities Use Contracts but were applicable only to such work as might be ordered by the government to be performed at government expense (*see* findings 7, 17).

[21] The 1993 INAAP CTR Contract also included the FAR 52.215-27 Termination of Defined Benefit Pension Plans (Sept 1989) clause which was in substantially the same terms as the FAR 31.205-6(j)(4) cost principle (*see* findings 9, 10).

> (v) Increased pension costs resulting from the withdrawal of assets from a pension fund and transfer to another employee benefit plan fund are unallowable except to the extent authorized by an advance agreement. The advance agreement shall:
>
> (A) State the amount of the Government's equitable share in the gross amount withdrawn; and
>
> (B) Provide that the Government receive a credit equal to the amount of the Government's equitable share of the gross withdrawal. If a transfer is made without such an agreement, paragraph (j)(4) of this subsection will apply to the transfer as a constructive withdrawal and receipt of the funds by the contractor. [Emphasis added]

The costs of the INAAP pension plans were reimbursed by the government for the pensions of the ICIA workers employed on the INAAP contracts (s*ee* finding 5). The mergers of the two INAAP plans in other ICIA corporate affiliate plans made the actuarial surpluses in those plans available to pay ICIA's pension obligations to beneficiaries other than those employed on its INAAP contracts with the government (s*ee* findings 28, 29).

For purposes of defining "constructively received" and "amount withdrawn" in FAR 31.205-6(j)(4), we see no substantial difference between ICIA merging the assets and liabilities of its INAAP plans with its other corporate and affiliated pension plans and the transfer of pension plan assets to other employee benefit plans discussed in FAR 31.205-6(j)(3)(v). In both cases, the result is that while the plan assets remain in trust, they became available for purposes other than those for which the costs of procuring those assets were reimbursed by the government.

Moreover, it is clear that the government has an equitable claim on any surpluses in the INAAP plans when those plans are terminated. It is also clear that ICIA has no equitable claim to such surpluses. *See ITT Federal Support Services, Inc. v. United States*, 531 F.2d 522, 523-26 (Ct. Cl. 1976). However, by commingling for actuarial purposes the assets and liabilities of the INAAP plans with other pension plans, ICIA has foreclosed the government's ability to track in the future any surpluses that might have existed had the plans not been merged. When the merged plans are terminated, all surplus assets will "likely" revert to ICIA for lack of government ability to prove the portion allocable to the pension costs it reimbursed. (*See* findings 28, 29, 30)

The definitions of "constructive receipt of income" for federal income tax purposes are neither controlling nor relevant. The policies and equities relevant to raising revenue from the general income of taxpayers are substantially different from the policies and equities relevant to recovery of surplus pension plan assets that were funded entirely by the government under cost reimbursement contracts. *See Marquardt Co. v. United States*, 822 F.2d 1573, 1579-80 (Fed. Cir. 1987); *Ametek Aerospace Products Inc.*, ASBCA No. 45307, 00-2 BCA ¶ 31,080 at 153,451; *Eaton Corp.*, ASBCA No. 34355, 93-2 BCA ¶ 25,743 at 128,097.

ICIA argues that: "The Government's Constructive Receipt Theory Is Directly Contrary to the Federal Circuit's *Teledyne* Decision And All Other Decisions That Construe CAS 413," and that the government's interpretation of the FAR constructive receipt provisions "impermissibly conflict[s] with the provisions of CAS 413" (app. reply br. at 36, 59). We do not agree and note that the Court in *Teledyne* stated that: "The FAR termination provision is a separate provision written to address pension terminations, not segment closings." *See Teledyne, Inc.*, *supra*, 50 Fed. Cl. at 178 n.28. CAS 413 and the FAR termination provisions address two different issues that may involve, as in the INAAP case here, different times of calculation with resulting different amounts. CAS 413 addresses the actuarial surpluses (and deficits) in pension plans at the time of a segment closing. The FAR constructive receipt provisions address the actuarial surpluses in pension plans when constructively received by the contractor. In INAAP's case the CAS 413 segment closing was December 1993 (*see* finding 36). The FAR constructive receipt did not occur until 31 December 2001 (*see* finding 28).

ICIA contends that it is unnecessary to address the constructive receipt claim "because none of the contracts under which pension costs were reimbursed would permit the Government to recover for any 'constructive receipt' that might have occurred" (app. reply br. at 46). We agree that the 1972, 1978, and 1986 INAAP GOCO Contracts under which the INAAP pension costs were reimbursed do not provide for government recovery of "constructively received" pension plan surpluses. But the parties contracted in the subsequent 1993 INAAP CTR Contract for such recovery by the government of any future constructive receipts by ICIA from its government-funded INAAP pension plans. (*See* finding 10) The constructive receipt provisions of the 1993 INAAP CTR Contract did not constitute "an impermissible retroactive application" of those provisions to the earlier contracts as alleged by ICIA (app. reply br. at 43). They imposed a recovery of surplus pension plan assets funded by the government under the earlier contracts only if subsequent to the 1993 INAAP CTR Contract ICIA constructively received those surplus assets by putting them to some use other than that for which they had been funded by the government. ICIA's mergers of its INAAP plans with other ICIA affiliated plans, all of which occurred after the 1993 INAAP CTR Contract was entered into, are the basis for the constructive receipt claim under that contract and not the over-funding of those plans in the reimbursements under the earlier contracts.

ICIA argues that the Advance Agreement (Attachment 2 to the 1993 INAAP Facilities Use Contract) provided that the Termination of Defined Benefit Pension Plans clause would be applicable only if the pension plans were terminated (app. reply br. at 46-49). This argument is without merit. The Advance Agreement did not use the word "only" (s*ee* finding 8). Moreover, the Termination of Defined Benefit Pension Plans clause itself stated that it was applicable if pension fund assets were constructively received "under a termination or otherwise" (emphasis added), and the clause itself was mandated for the 1993 INAAP CTR Contract by FAR 15.804-8(e).[22] ICIA's interpretation of the Advance Agreement amounts to a deviation from the requirements of FAR 15.804-8(e) and FAR 52.215-27, and there is no evidence that any such deviation was approved by the government as required by FAR 1.403 or FAR 31.101.

ICIA argues that the merger of the INAAP plans with the other ICIA plans did not "withdraw" any assets from the INAAP plans because those assets remained in the same pension master trust (app. reply br. at 49-50). We disagree. While the assets remained in the same master trust, they were withdrawn from their exclusive dedication to the INAAP plan beneficiaries and were commingled for actuarial purposes with the plans for other ICIA business segments and corporate affiliates.

ICIA argues that the surplus assets of the INAAP plans when merged into the other ICIA defined benefit pension plans could not be used by ICIA for any purpose other than satisfying its obligations to "plan beneficiaries" (app. reply br. at 57). This is true, but the "plan beneficiaries" of the merged plans included ICIA and corporate affiliate employees who had not performed any work on the INAAP contracts. The government reimbursed ICIA's contributions to the INAAP pension plans solely to support pensions for ICIA employees working on the INAAP contracts and not to support the pension plans of other ICIA and corporate affiliate employees. (*See* findings 27, 28)

ICIA contends that there is no support in the FAR pension plan termination provisions for finding constructive receipt in events occurring "after the end of the parties' contracting relationship" (app. reply br. at 58). We do not agree. The parties' "contracting relationship" under the 1993 INAAP CTR Contract included ICIA's obligation under the FAR 52.215-27, TERMINATION OF DEFINED BENEFIT PENSION PLANS (SEPT 1989) clause to make a refund or give a credit to the government for its equitable share if "pension fund assets . . . are constructively received by it under a termination or otherwise" (*see* finding 9). The clause puts no time limit on the

[22] FAR 15.804-8(e) stated: "*Termination of Defined Benefit Pension Plans*. The contracting officer shall insert the clause at 52.215-27, Termination of Defined Benefit Pension Plans, in all solicitations and contracts for which it is anticipated that certified cost or pricing data will be required and for which any preaward or post-award cost determinations will be subject to subpart 31.2."

contractor's obligation thereunder. Performance of that obligation with respect to the INAAP pension plan surpluses was triggered by the 31 December 2001 merger of those plans with other ICIA corporate affiliate plans. At that time there was, and since that time there has been, no close-out agreement by the parties for the 1993 INAAP CTR Contract. (*See* findings 10, 28)

While we have found a contractual basis in the 1993 INAAP CTR Contract for government recovery of the actuarial surpluses in the INAAP pension funds when they were merged with other ICIA corporate affiliate pension funds, we find no basis in the VAAP contracts at issue for a similar recovery with respect to the *de facto* merger of the VAAP component with other components of the ICI Americas Pension Plan when separate actuarial accounting ceased after 1997 (*see* finding 29). The VAAP GOCO contract awards all preceded the September 1989 effective dates of the FAR 31.205-6(j)(4) cost principle and the related FAR 52.215-27 contract clause. The 1994 VAAP Facilities Use Contract did not include the FAR 52.215-27 clause, and although the FAR 31.205(j)(4) cost principle was incorporated by reference, it was inapplicable as discussed above. Both the cost principle and clause were incorporated in the VAAP BOA and the cost reimbursement orders issued thereunder, but the contracting officer's decision did not assert any claim under the BOA or its delivery orders (*see* finding 35).

The appeal in ASBCA No. 55078 is denied as to the government claim under the 1993 INAAP CTR Contract for constructive receipt of surplus INAAP pension fund assets. The appeal is sustained as to the government claim under the VAAP contracts for constructive receipt of surplus VAAP pension fund assets.

D. Summary Conclusion

The appeals are sustained in part and denied in part as indicated above. In summary, the government is entitled to a CAS 413 segment closing adjustment under the 1988 VAAP GOCO contract, but not under any of the INAAP contracts (ASBCA No. 54877). The government is entitled to a FAR 31.205-6(j)(4) constructive receipt recovery under the 1993 INAAP CTR Contract, but not under any of the VAAP contracts at issue in these appeals (ASBCA No. 55078).

Dated: 23 May 2007

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 54877, 55078, Appeals of ICI Americas, Inc., rendered in conformance with the Board's Charter.

Dated:

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