ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
George G. Sharp, Inc.	)	ASBCA Nos. 55385, 55386
	)	
Under Contract Nos. N65540-96-D-0007	)	
N65540-01-D-0001	)	

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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

These appeals arise from the contracting officer's (CO) 21 February 2006 final decisions denying appellant's claims under Contract Nos. N65540-96-D-0007 and N65540-01-C-0001 for amounts the CO had declined to fund for lack of timely notice of cost overruns incurred under these cost reimbursement type contracts. On 31 May 2007 respondent moved for summary judgment on the two appeals, on 25 June 2007 appellant responded to the motion and on 6 July 2007 respondent replied to that response.

The Board's 27 July 2007 letter to the parties requested further facts and analyses of whether the cost overruns under the captioned contracts should properly be determined with respect to the estimated costs of the contracts themselves or of the individual delivery orders (DO) issued thereunder. On 23-24 August 2007 the parties submitted additional material facts and analyses, and on 6-7 September 2007 provided replies to their opponent's August submissions, as ordered. Neither party disputed the additional facts submitted by its opponent.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

For purposes of deciding respondent's motion, we set forth below the facts that appellant does not genuinely dispute, with a few corrections and additions.

1. The Naval Surface Warfare Center, Carderock Division (respondent) awarded Contract No. N65540-96-D-0007 (contract 96-7) to the U.S. Small Business Administration (SBA) on 15 March 1996 under SBA's § 8(a) program. SBA subcontracted performance of contract 96-7 to George G. Sharp, Inc. (appellant). Contract 96-7 was an indefinite delivery, indefinite quantity (IDIQ), cost plus fixed fee type contract that provided for issuance of DOs. As amended, the contract performance period ended on 30 September 2001. (Gov't mot. at 2; ASBCA No. 55385, R4, tab 1 at 1, 4, 33, 50-53)

2. Respondent awarded Contract No. N65540-01-D-0001 (contract 01-1) to appellant on 27 December 2000 on an IDIQ, cost plus fixed fee basis that provided for issuance of DOs. Its 48-month performance period ended 26 December 2004. (ASBCA No. 55386, R4, tab 1 at 1, 3, 41-42)

3. Contract 96-7 incorporated by reference the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991) clause, and contract 01-1 incorporated by reference the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (MAR 2000) clause. Paragraph (d) of those clauses prescribed procedures to establish and apply indirect cost rates for overhead (O/H) and general and administrative (G&A) costs. Paragraph (e) provided for reimbursement of indirect costs at interim provisional billing rates, subject to adjustment upon determination of final indirect rates. (ASBCA No. 55385, R4, tab 1 at 38; ASBCA No. 55386, R4, tab 1 at 36)

4. Contract 96-7 incorporated by reference the FAR 52.232-20 LIMITATION OF COST (APR 1984) ("LOC") clause, which provided in pertinent part:

> (b) The Contractor shall notify the [CO] in writing whenever it has reason to believe that—
>
> (1) The costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
>
> (2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

> (c) As part of the notification, the Contractor shall provide the [CO] a revised estimate of the total cost of performing this contract.
>
> (d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—
>
> (1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule . . . . and
>
> (2) The Contractor is not obligated to continue performance under this contract . . . or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the [CO] (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. . . .

and the FAR 52.232-22 LIMITATION OF FUNDS (APR 1984) ("LOF") clause, which provided in pertinent part:

> (c) The Contractor shall notify the [CO] in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government . . . . The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.
>
> (d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the [CO] in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.
>
> . . . .

> (f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—
>
> (1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and
>
> (2) The Contractor is not obligated to continue performance under this contract . . . or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government . . . until the [CO] notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

(ASBCA No. 55385, R4, tab 1 at 40) Contract 96-7 as awarded stated a $20,332,452 "NOT TO EXCEED" amount (ASBCA 55385, R4, tab 1 at 4). That amount was last increased on 25 October 2000 to $47,003,056 by Modification No. P00014 (ASBCA No. 55385, R4, tab 15).

5. Contract 96-7, § B.2, stated (ASBCA No. 55385, R4, tab 1 at 7-8):

> (e) Nothing herein shall be construed to alter or waive any of the rights or obligations of either party pursuant to the clause hereof entitled [LOC] and/or [LOF].
>
> (f) It is understood and agreed that the number of hours and the total dollar amount for each labor category specified in any delivery order issued under this contract are estimates only and shall not limit the use of hours or dollar amounts in any labor category which may be required and provided for under an individual delivery order. Accordingly, in the performance of any delivery order, the contractor shall be allowed to adjust the quantity of labor hours provided for within labor categories specified in the order provided that in so performing the contractor shall not in any event exceed the ceiling price restrictions of any order, including modifications thereof.

6. Contract 01-1 as awarded stated the "TOTAL AMOUNT OF CONTRACT" of $43,570,676 (ASBCA No. 55386, R4, tab 1 at 1). That amount was increased to $43,770,676 by Modification No. P00003 on 1 May 2002 (ASBCA No. 55386, R4, tab 4). Contract 01-1 incorporated by reference only the LOF clause (not the LOC clause) and included the following clause (the NSWCCD clause):

> LIMITATION OF LIABILITY/INCREMENTAL FUNDING (JUN 1996) (NSWCCD)
>
> (a) This contract is incrementally funded and the amount currently available for payment hereunder is limited to (N/A) inclusive of fee. It is estimated that these funds will cover the cost of performance through 48 months. Subject to the provisions of the clause FAR 52.232-22, "Limitation of Funds (Apr 1984)" in Section I of this contract, no legal liability on the part of the Government for payment in excess of (N/A) shall arise unless additional funds are made available and are incorporated as a modification to this contract.
>
> (b) If an individual delivery/task order is to be incrementally funded, the provision will be applicable to such delivery/task order and will be completed with the appropriate amounts and date.
>
> NOTE: THIS CLAUSE APPLIES TO INDIVIDUAL DELIVERY ORDERS ONLY.

(ASBCA No. 55386, R4, tab 1 at 36-38)

7. The 192 DOs issued under contract 96-7 on DD Form 1155, whose Block 16 made the DO subject to the terms and conditions of that contract, each stated an estimated cost. None of the 166 fully funded DOs referred to the LOC clause, 5 incrementally funded DOs (3, 10, 11, 35, 42) referred to the LOF clause and 21 DOs, incrementally funded in whole or in part (55, 65, 69, 74-75, 83-84, 87, 102, 112, 117, 120, 123, 142, 156, 158, 160, 162, 171, 174 and 188), included variants of the NSWCCD clause ¶ (a), completed with amounts and dates. (ASBCA No. 55385, R4, tab 47; gov't resp., attach. 1)

8. The 121 DOs, issued on DD Form 1155 under contract 01-1 each stated an estimated cost. Of these, 46 DOs were incrementally funded, of which 3 referred to the LOF clause, 43 included variants of the NSWCCD clause and appellant incurred

overruns on 18 DOs.[1] (ASBCA No. 55386, R4, tab 39; gov't resp., attach. 2; app. opp'n at 3-4)

9. Starting in November 1999 and continuing through September 2001, appellant experienced delay and problems in implementing a new "Deltek CostPoint" accounting system, which it alleges affected its ability to recognize changes in various items of expense and overruns on contracts 96-7 and 01-1. To fix incompatibility problems of "Oracle" and "CostPoint" software, appellant reprogrammed and added accounting and cross-charging software packages. Its Deltek CostPoint accounting system was operable for payroll in mid-2000 and for accounting in July 2001. (Gov't mot. at 4-5, n.1)

10. Because of the foregoing Deltek problems, appellant could not run progress reports or generate payroll information for nearly a year and did not provide its Workers Compensation insurer the needed 1999-2000 payroll information until 2001, and hence was unable to account for rapid increases in Workers Compensation insurance premiums that occurred from 1999 to 2001 (gov't mot, ex. 3, ASBCA Nos. 55385, 55386, compl. ¶ 12).

11. In early 2001 appellant was notified of an unanticipated "spike" in self-insured medical claims in the fourth quarter 2000, which affected its 2001 O/H and G&A rates (gov't mot., ex. 3, ASBCA Nos. 55385, 55386, compl. ¶ 13).

12. Changes in the work scope and timing of 40 DOs performed under contract 96-7 from 5 November 1996 to 30 September 2001 made it difficult for appellant to maintain a steady number of employees, which caused it to supplement its decreased direct labor work force with "contract employees" that led to an indirect cost overrun on contract 96-7 (gov't mot., ex. 2, ASBCA No. 55385 at 10-11; app. opp'n at 3).

13. The 11 September 2001 terrorist attack on the World Trade Center damaged appellant's nearby building and caused its employees to relocate for eight months in Summit, New Jersey (gov't mot., ex. 3, sub-ex. A). While relocated, appellant retrieved all its computer server data (gov't mot., ex. 4).

14. From 11 July 2000 through 2 October 2003 appellant submitted to DCAA proposed final billing rates for its fiscal years (calendar year) 1998, 1999, 2000 and 2001 (gov't mot., ex. 6, at 1 of each of sub-exs. 1-4). By 11 September 2001 appellant had "closed everything" for 1999 and prior years (gov't mot. at 6, ex. 5).

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[1] Those 18 DOs were performed from December 2000 through September 2002. The remaining 75 DOs under contract 01-1 were fully funded at issue; appellant incurred overruns on 18 of such DOs. (App. opp'n at 4)

15. On 13 March 2003 appellant advised Ms. Lorraine Reilly of the Defense Contract Management Agency that it had incurred about $1 million in excess of the contract ceilings on several unidentified contracts, which advice she passed to Administrative CO Edward Collins (gov't mot. at 7, ex. 7, e-mail 14 March 2003).

16. On 21 January 2004 appellant received DCAA's approved, indirect cost rates for calendar years 1998, 1999, 2000 and 2001 (gov't mot. at 7, ex. 8). DCAA minimally changed appellant's proposed rates for those years (gov't mot. at 7, ex. 9).

17. Appellant's 24 June 2004 letter notified the CO and requested funding of estimated overruns of $340,000 on contract 96-7 and $700,000 on contract 01-1 for 2001. It stated that there were also cost overruns for 1998 through 2000 although they would be less than the 2001 cost. (ASBCA No. 55386, R4, tab 10) On 22 December 2005 appellant submitted certified claims for payment of overruns of $981,923 on contract 96-7 and of $525,413 on contract 01-1, and requested a CO's final decision (ASBCA No. 55385, R4, tab 43).

18. On 7 March 2006 appellant received the CO's 21 February 2006 final decisions denying its overrun claims under contracts 96-7 and 01-1 (ASBCA No. 55385, R4, tab 45; ASBCA No. 55386, R4, tab 37). On 15 March 2006 appellant timely appealed from those final decisions, which the Board docketed as ASBCA Nos. 55385 and 55386.

Appellant asserts that the foregoing undisputed facts are incomplete and the following added facts must be considered. Movant states that, for purposes of summary judgment, it accepts *arguendo* all of appellant's factual allegations set forth at pages 2-10 of its opposition (gov't reply br. at 2), the material allegations of which we set forth below.

19. With respect to SOF ¶¶ 1, 7, appellant adds that of the 193 DOs issued under contract 96-7, it requested additional funding for 73 DOs performed from 5 November 1996 to 30 September 2001 (app. opp'n at 2-3[2]).

20. With respect to SOF ¶¶ 2, 8, appellant adds that of the 121 DOs issued under contract 01-1, it requested additional funding for 36 DOs performed from 27 December 2000 to 30 September 2002 (app. opp'n at 3-4).

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[2] Including 43 DOs performed by 31 December 1999. There were actually 192 DOs rather than 193 because DO No. 0107 was never issued (gov't resp., attach. 1 at 5).

21. With respect to SOF ¶ 4, appellant adds that the FAR 52.216-18 ORDERING (APR 1984) clause in contract 96-7 provided in ¶ (b) (ASBCA No. 55385, R4, tab 1 at 50):

> (b) All delivery orders are subject to the terms and conditions of this contract. . . .

the FAR 52.216-18 ORDERING (OCT 1995) clause in contract 01-1 provided in ¶ (b) (ASBCA No. 55386, R4, tab 1 at 41):

> (b) All delivery orders or task orders are subject to the terms and conditions of this contract.

and FAR 52.232-20 and 52.232-22 provided that "Task Order" or other appropriate designation could be substituted for "Schedule" wherever that word appeared in the LOC and LOF clauses (app. opp'n at 5)[3].

22. With respect to SOF ¶ 7, appellant adds that it only incurred overruns on three of the DOs that referred to the LOF clause (app. supp. br. at 4).

23. With respect to SOF ¶ 9, appellant adds that its ability to foresee overruns in year 2000 O/H and G&A costs was affected not only by problems in implementing the Deltek CostPoint accounting system, but also by unforeseen and unprecedented increases in worker's compensation and medical insurance costs that were not known until 2001; unforeseen increased contract labor that impacted its direct and indirect costs; and the need to abandon its New York City headquarters building damaged by an aircraft engine in the 11 September 2001 terrorist attack, and to relocate in New Jersey for eight months (app. ex. A at 27-28, 33-38, 46-48, ex. B at 27, ex. C ¶ 14, ex. D at 44-51, ex. E at 33).

24. With respect to SOF ¶ 12, appellant adds that it could not have known whether the unpredictable changes in scope and timing of work would cause cost overruns before the O/H and G&A costs were finally determined for its fiscal year, because increased O/H and G&A costs could be offset by decreased direct costs (app. ex. C ¶ 14).

25. With respect to SOF ¶ 13, appellant adds that DCAA's New York City Branch Office would not conduct any audits of appellant while appellant was in New Jersey (app. ex. A at 23-24, ex. F at 18-19) and though appellant recovered its server

[3] Contracts 96-7 and 01-1 did not so substitute.

data, it was significantly delayed due to the 11 September 2001 terrorist attack by the need to retrieve and clean its servers and to recover their raw data, and by the loss of its notes and papers regarding O/H and G&A amounts to be submitted to DCAA (app. ex. E at 30-33).[4]

26. With respect to SOF ¶ 14, appellant adds that: (a) respondent errs in equating the closing of appellant's books for a fiscal year with determining O/H and G&A, since after closing its books, it had to audit them and to submit cost proposals to DCAA, for which DCAA allows six months (app. ex. E at 51, 57-58, ex. G at 6, ex. A at 45-46, sub-ex. A-2), and (b) appellant submitted its 1998 costs in July 2000, its 1999 costs in July 2002, its 2001 costs in October 2002, and its 2000 costs were not finalized and submitted until October 2003 (app. ex. A, sub-exs. A-1 - A-4) and (c) DCAA did not approve appellant's 1998-2001 indirect cost rates until 21 January 2004 (app. ex. A, sub-ex. A-7).

27. With respect to SOF ¶ 15, appellant adds that it did not know of any cost overruns on the 73 DOs under contract 96-7 and on the 36 DOs under contract 01-1 until after their respective, specific periods of performance had ended; when contract 96-7 was closed $171,689.67 in unused funds remained and when contract 01-1 was closed $333,393.79 in unused funds remained (app. opp'n at 9); and ACO Ed Collins told appellant that he could later move, realign and reapply money to overrun DOs from appellant's refunds for overpaid DOs within one contract, as he had done in the past (app. ex. A at 54, 62-64).

PARTIES' CONTENTIONS

Movant contends that: (1) appellant failed to comply with the notice requirements of the LOC and LOF clauses in contracts 96-7 and 01-1 (gov't mot. at 9); (2) all appellant's excuses for avoiding such notice requirements are legally invalid, namely, appellant was responsible for maintaining an adequate accounting system from November 1999 through September 2000 (gov't mot. at 9-11), its failure to recognize increased workers compensation costs was due to the foregoing accounting system problems (gov't mot. at 11-12), it was aware of the "spike" in employee medical costs in the first quarter of 2001, which should have alerted it to a potential indirect cost overrun

[4] DCAA audit reports of 19 September 2002 and 19 July 2004 state that Sharp relocated to New Jersey after 11 September 2001 "without any of the information or documentation" at its NYC office two blocks from "Ground Zero in Manhattan" and "as a result, it has taken the contractor a significant amount of time to organize records and to respond to our [DCAA] requests" (ASBCA No. 55385, R4, tab 16 at 3; ASBCA No. 55386, R4, tab 13 at 3).

(gov't mot. at 12-13), and it should have been aware of a potential cost overrun when it chose to use contract labor (gov't mot. at 13); and (3) appellant had reason to believe it incurred cost increases shortly after the end of each calendar year, and had no legal right to wait for DCAA concurrence in annual indirect cost rates before notifying the CO of its cost overruns (gov't mot. at 13-15). In the alternative, movant seeks a partial summary judgment for those "claims related to the years prior to 2000" under ASBCA No. 55385 (gov't mot. at 15).

Appellant contends that: (1) The LOC and LOF clauses in contracts 96-7 and 01-1 did not require notice of cost overruns under contracts 96-7 and 01-1 because those overruns could not reasonably have been foreseen during the performance of those contracts or of the pertinent DOs, since unexpected workers compensation premiums and medical costs were not known until after those contracts and pertinent DOs had already been performed (app. opp'n at 11-13); (2) increased indirect costs caused by increased workers compensation premiums, medical costs and contract labor did not automatically equate to cost overruns (app. opp'n at 14, 17); (3) movant disregards the effects of the 11 September 2001 terrorist attack that caused appellant's loss of needed accounting documents (app. opp'n at 14); (4) movant failed to identify when appellant should have known of the contract 01-1 cost overruns (app. opp'n at 14); (5) the cumulative effect of such "unprecedented" events as increased workers compensation premiums, medical costs and contract labor, and loss of records due to the 11 September 2001 terrorist attack could not have been anticipated during performance of the contracts and pertinent DOs (app. opp'n at 15-16); (6) closing of appellant's books did not equate with foreseeability of cost overruns (app. opp'n at 17-18); and (7) the foregoing disputed material facts foreclose summary judgment (app. opp'n at 19).

Movant rejoins that: (1) since it accepts all appellant's factual allegations, there are no genuinely disputed material facts (gov't reply br. at 2); (2) appellant misconstrues the LOC and LOF clauses to apply to DOs, whereas "[i]n fact" those clauses "speak of 'performance under the contract'" (gov't reply br. at 2-3); (3) appellant's overruns claimed for 1998-2000 were reasonably known to be probable when it submitted its O/H rates to DCAA for those years (gov't reply br. at 4); (4) appellant was actually aware of its contract 01-1 overruns on 14 March 2003 when it so advised DCMA (gov't reply br. at 5); (5) appellant plainly knew its approved indirect rates on 21 January 2004, but failed to notify the CO until six days before completing contract 01-1 (gov't reply br. at 5-6); (6) appellant alleges no specific and detailed information regarding the dates and causes of the overruns of each DO (gov't reply br. at 6-7); and (7) ACO Collins stated that only the PCO had final approval to fund cost overruns (gov't reply br. at ex. 10).

Regarding the question the Board raised on 27 July 2007, whether the LOC/LOF clauses notice requirements are triggered by costs incurred on the IDIQ contract or on the individual DOs, appellant contends that neither those contracts' not to exceed amounts

nor § B.2(f) in contract 96-7 affect the application of the LOC/LOF clauses; it understood that the LOC/LOF clauses were incorporated into each DO, but even if this were not so, it would not change the results in these disputes (app. 8/23/07 br. at 3-4) and appellant does not dispute that the LOC/LOF clauses require notice of cost overruns on each contract as a whole (app. 9/7/07 br. at 1). Appellant argues that as of January 2004 (when it "could have known of overruns on the 01-1 Contract"), there were millions of dollars funded for delivery orders in the process of being performed (*id.* at 4).[5] Respondent contends that cost overruns incurred under each contract as a whole as well as arguably under each DO individually trigger the LOC/LOF notice requirements (govt. 9/7/07 br. at 6-7).

DECISION

I.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

The rule is well established that a CO abuses his discretion under the LOC clause to refuse to fund an overrun, when the contractor, through no fault or inadequacy on its part (including his accounting procedures), has no reason to believe, during performance, that a cost overrun will occur and the CO's sole ground for refusal is the contractor's failure to give proper notice of the overrun. *See General Electric Co. v. United States*, 440 F.2d 420, 425 (Ct. Cl. 1971). Appellant has the burden of proving that the cost overruns that it incurred were not reasonably foreseeable during the performance of the contracts. *See Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 311 (Fed. Cir. 1997); *RMI, Inc. v. United States*, 800 F.2d 246, 248 (Fed. Cir. 1986).

II. ASBCA No. 55385

On the threshold question of the applicability of the LOC/LOF clause notice requirements to contract 96-7 as a whole or to the individual DOs thereunder, we agree that the LOC/LOF clause applies to the contract as a whole, and also, as appellant understood, to each DO individually, *see Systems Engineering Associates Corp.*, ASBCA Nos. 38592 *et al.*, 91-2 BCA ¶ 23,676 at 118,577 (LOC clause requires notice of overrun of the estimated cost of the contract "and applies also to each delivery order

[5] On 21 January 2004 appellant knew its approved 1998-2001 indirect cost rates (SOF ¶ 16). As of that date, appellant continued performing eight DOs, whose total costs were approximately $7.7 million, completing all DOs by 30 June 2004 (gov't resp., attach. 2 at 4-6; ASBCA No. 55386, R4, tab 39).

individually"); *Analysas Corp*., ASBCA No. 54183, 04-1 BCA ¶ 32,629 at 161,445 (LOC clause notice baseline applied to the total estimated cost of each DO).

Appellant incurred cost overruns on more than 40 DOs under contract 96-7 whose performance was completed by 31 December 1999 (SOF ¶ 19, n.2). Appellant's failure to recognize cost overruns from November 1999 to September 2001 due to Deltek accounting system problems (SOF ¶ 9) does not satisfy the *General Electric* criteria for excusing its failure to notify the CO of foreseeable overruns. *See Advanced Materials, supra,* 108 F.3d at 311 (rejecting argument that contractor's changed accounting system did not enable it to calculate when it had reason to believe it would exceed the estimated cost, holding that its "burden of proof regarding foreseeability carries with it an 'attendant duty to maintain an accounting and financial reporting system to secure timely knowledge of probable overruns before costs are incurred'"). Likewise, appellant's argument that to know its actual indirect costs it had to await the results of the DCAA audit on 21 January 2004 (SOF ¶¶ 24, 26(c)) is untenable. *See Arbiter Systems, supra*, 97-2 BCA at 145,123 ("We reject the suggestion that appellant had to wait for DCAA audits to know its actual indirect costs."); *Systems Engineering*, 91-2 BCA at 118,578 (LOC clause did not require the contractor to give the notices only when it was certain an overrun would occur, but rather when reason exists to believe an overrun will occur).

Appellant also incurred overruns on the 30 remaining contract 96-7 DOs whose performance was completed by 30 September 2001 and on the contract as a whole (SOF ¶¶ 17, 19). There are disputed material facts regarding whether appellant had reason to know of indirect cost overruns in 2000 and 2001 due to increased workers compensation insurance premiums and self-insured medical claims (SOF ¶¶ 10-11, 23). The 11 September 2001 terrorist attack on NYC's World Trade Center, which caused appellant to relocate in New Jersey for eight months with attendant delay in retrieving server data, overhead and G&A papers (SOF ¶¶ 13, 25), clearly satisfies the *General Electric* criteria for excusing its failure to notify the CO of overruns which were unforeseeable as of that date.

We grant respondent's alternative motion for partial summary judgment with respect to those DOs whose performance had been completed by 31 December 1999 under contract 96-7, and deny the balance of respondent's motion in ASBCA No. 55385.

III. ASBCA No. 55386

Appellant performed 36 DOs on which it incurred overruns from 27 December 2000 to 30 September 2002 (SOF ¶ 8 and n.1, SOF ¶ 20). There are disputed material facts regarding the foreseeability of appellant's indirect costs in 2001 (SOF ¶¶ 10-11, 23). Moreover, the 11 September 2001 attack on the World Trade Center, which caused appellant to relocate in New Jersey for eight months and delayed retrieval of server data,

overhead and G&A papers (SOF ¶¶ 13, 25), plainly excuses any duty to notify the CO of overruns which were unforeseeable as of that date until its records were reasonably available. *See GKS, Inc*., ASBCA No. 45913, 94-3 BCA ¶ 27,232 at 135,702 (applying *General Electric* criteria for unforeseeable overruns to cost contract with LOF clause).

As far as contract 01-1 as a whole is concerned, the record indicates that as of 21 January 2004 (when appellant knew its approved indirect cost rates for 1998-2001, but not those of 2002-2004), there were eight DOs, funded at approximately $7.7 million, that appellant was continuing to perform (*see* app. 9/7/07 br. at 4 and n.5, *supra*). We conclude that the present appeal record is insufficient to resolve the question of whether and when, between 21 January and 24 June 2004 (when appellant estimated a $700,000 overrun for year 2001, SOF ¶ 17), or even earlier, appellant knew or had reason to believe that its total costs on contract 01-1 would exceed $43,770,676 (SOF ¶ 6).

Accordingly, we deny respondent's motion for summary judgment on ASBCA No. 55386 regarding contract 01-1.

Dated: 3 October 2007

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 55385 and 55386, Appeals of George G. Sharp, Inc., rendered in conformance with the Board's Charter.

Dated:

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