ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Todd Pacific Shipyards Corporation	)	ASBCA No. 55126
	)	
Under Contract No. N00024-01-C-4115	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Appellant Todd Pacific Shipyards Corporation (Todd) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO's) denial of its claim under its contract with the United States Navy for advance planning for repair and alteration of Auxiliary Oiler Explosive (AOE) class ships, which included options for their repair and alteration. Todd seeks costs pertaining to its Dry Dock No. 3, also referred to, like we do hereafter, as the "Emerald Sea" dry dock. In *Todd Pacific Corp*., ASBCA No. 55126, 06-2 BCA ¶ 33,421 (*Todd I*), we denied the Navy's motion to dismiss portions of the appeal for alleged lack of jurisdiction.

The parties have engaged in discovery. The Navy moves for summary judgment, relying upon the pleadings and the record, including three sworn declarations of Douglas J. Throckmorton, Chief of the Contracting Office (CCO) with the Puget Sound Naval Shipyard & Intermediate Maintenance Facility (PSNS & IMF). At award and during contract performance, he was CCO at the Supervisor of Shipbuilding, Conversion and Repair (SUPSHIP), Puget Sound, which was subsequently absorbed by PSNS & IMF.

He served as CO under the contract. (R4, tab 1 at GOV99, tab 39; gov't mot., ex. 7, Throckmorton decl. ¶¶ 1, 2) The Navy also relies upon the declaration of William G. Riplinger, also a CO at PSNS & IMF, who served as the CO under a predecessor contract (gov't rebut., ex. 2, Riplinger decl. ¶¶ 1, 2, 4).

Todd opposes the Navy's motion, relying upon the pleadings and the record, including certain deposition testimony and the sworn declarations of Stephen G. Welch, Todd's Chief Executive Officer (CEO) since 1997 and, prior thereto, its Chief Financial Officer (CFO); of Scott Wiscomb, who was Todd's CFO during the periods at issue; and of Patrick A. McGeehin, a certified public accountant (CPA) with a government contracts specialty, engaged by Todd to present expert evidence at hearing. (App. supp. br., exs. 2, 5; app. opp'n, ex. A, Welch decl. ¶ 1, ex. B, Wiscomb decl. ¶ 1, ex. D, McGeehin decl. ¶¶ 1, 2) For the reasons set forth below, we grant the motion in part and otherwise deny it.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

For purposes of the Navy's motion, the following facts, including contract provisions and regulations, are undisputed or have not been controverted. They are derived from the record and those of the Navy's proposed facts with which Todd agrees and from Todd's proposed facts in its opposition submissions, all of which the Navy has accepted, *arguendo*, even if it does not agree with some of them. We have included only those portions of the undisputed proposed facts that are relevant, or helpful as background, and that do not contain legal conclusions or argument.

Background

Todd is the only private contractor in the Puget Sound area with the facilities to dry dock the Navy's AOE class ships. They are very large ships that can be repaired and altered only in a very large dry dock, such as Todd's Emerald Sea, which it used for AOE repairs and alterations under predecessor contracts with the Navy. Its continued availability was essential to the Navy's awarding the subject contract to Todd. (App. opp'n at 4, proposed fact (PF) 1, ex. C at 1-2 of 4, ex. A, Welch decl. ¶ 2)

In order that the Emerald Sea could be used to repair AOE vessels, Todd was required to maintain it to Navy standards set forth in MIL-STD-1625C, Safety Certification Program for Dry Docking Facilities and Shipbuilding Ways for U.S. Navy Ships (below) (app. opp'n at 4, PF 2, ex. A, Welch decl. ¶ 3).

Prior to the subject contract, three predecessor contracts between Todd and the government involved AOE class ships. Contract No. N00024-85-C-8518, awarded in 1985, and Contract No. N00024-91-C-8503, awarded in 1991, each included the USS

SACRAMENTO and the USS CAMDEN, and Contract No. N00024-96-C-8500 (Contract No. 8500), awarded in 1996, included those AOEs plus the USS BRIDGE and the USS RAINIER. These were each cost-type multi-ship/multi-option contracts not covered by the Cost Accounting Standards (CAS). Certain options included dry docking, and the dry dock had to meet the Naval Sea Systems Command's (NAVSEA) certification requirements. Along with dry dock certification, the predecessor contracts required the same kind of advance planning, repair and maintenance work for AOE vessels as the subject contract. (Gov't mot. at 5-6, ex. 7, Throckmorton decl. ¶ 4; app. opp'n at 17, re: gov't proposed undisputed facts (UFs) 3-4; R4, tab 1 at GOV75; gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶¶ 2-4, attachs. 1-3)

SUPSHIP's "DESIGNATION OF CONTRACTING OFFICERS" memorandum dated 14 September 1999 to contractors, including Todd, named Nick H. Peak and Mr. Throckmorton as authorized to exercise full and complete CO authority on behalf of the United States; four individuals as having limited delegated CO authority of $500,000 or less; and one, of $100,000 or less. There is no allegation, and we have not been directed to evidence, that any of the latter five individuals were involved in matters covered by this appeal. The memorandum emphasized that persons, other than those named, did not have CO authority; any actions by contractors in advance of or outside a properly executed contract or modification were at their own risk; and they were not authorized to proceed with a change until the contract had been modified in writing by a duly authorized CO acting within the scope of his or her authority. (Gov't rebut., ex. 18, Throckmorton supp. decl., 9/14/99 memo.)

Under Todd's predecessor contracts, in accordance with its standard accounting procedures, it allocated dry dock costs as indirect costs based upon dock usage, with a factor for vessel weight, and, in the case of AOEs, a special "multiplier" (gov't mot. at 6, ex. 7, Throckmorton decl. ¶ 5; app. opp'n at 17, UF 5). For at least 12 years prior to its current claim, this had been Todd's consistent practice in allocating its general costs for the Emerald Sea dry dock to individual contracts, both government and commercial (gov't mot. at 4-5, ex. 7, Throckmorton decl. ¶ 5; app. opp'n at 17, UF 1, ex. B, Wiscomb decl. ¶ 3; R4, tab 60 at GOV514-15; compl. ¶ 21). Todd's treatment of its dry dock costs as indirect costs was reflected in its certified incurred cost submissions to the government (gov't mot. at 5; app. opp'n at 17, UF 2; R4, tabs 17, 26, 53).

During the periods in question, the contractor's fiscal year (CFY or FY) started on or about 1 April. Todd performed dry dock work on the USS CAMDEN from 24 May through 29 May 2001 under Contract No. 8500, during its CFY 2002, two weeks prior to award of the subject contract. Todd's claim at issue included costs of that work. (Gov't mot. at 6, ex. 7, Throckmorton decl. ¶ 6; app. opp'n at 17-18, UF 6) However, the Navy alleged that, in bilateral Modification No. A01185 to Contract No. 8500, Todd released any claims arising under that CAMDEN dry docking (gov't mot. at 6 n.4, ex. 2, Riplinger

decl. ¶¶ 5, 6; *see also* gov't rebut., ex. 2). Todd now acknowledges that "it did release any claims arising out of the FY 02 USS Camden docking" (app. reply at 21).

When the current contract was under discussion, it was clear to both parties that the Emerald Sea dry dock would need substantial work to render it usable for the contract. Todd completed building the Emerald Sea in 1970. In 1982 it was cut into sections and relocated to Todd's Seattle shipyard. It was reassembled and the Navy certified it. Thereafter, the Navy conducted periodic surveys of the dry dock's condition and prescribed specific repairs required to maintain certification. Each year, Todd made needed repairs, including hole patching and replacement of corroded structure, and maintained operating systems. (App. opp'n at 5, PF 4, ex. A, Welch decl. ¶ 8)

During the period 1994 through 2000 repairs were minimal, dealing only with the steel work considered to be unsatisfactory in the Navy's bi-annual survey. In 2001 the Emerald Sea dry dock was about 30 years old and had questionable future utility without substantial, extraordinary expenditures. The expenditures to upgrade, alter, repair and maintain the dry dock in order to service AOEs under the subject contract were not the type of routine costs incurred in the past. They were extraordinary and became necessary due to the dry dock's age and deteriorating condition. (App. opp'n at 4-5, PFs 3, 5, ex. A, Welch decl. ¶¶ 7, 8)

SUPSHIP's "DESIGNATION OF CONTRACTING OFFICERS" memorandum dated 19 March 2001 to contractors, including Todd, provided a current list of designated COs and stated that it was to apply to all current and future contracts administered by SUPSHIP until canceled or superseded. It named Mr. Throckmorton and Ernesto Perez as authorized to exercise full and complete CO authority on behalf of the United States; two individuals as having limited delegated CO authority of $1,000,000 or less; and four, including Mr. Riplinger, of $500,000 or less. There is no allegation, and we have not been directed to evidence, that any of the individuals with limited authority, other than Mr. Riplinger, were involved in matters covered by this appeal. The memorandum contained the same cautions as its predecessor. A similar memorandum dated 24 July 2001 added another person, not mentioned in this appeal, to those with limited authority – in her case, $100,000 or less. (Gov't rebut., ex. 18, Throckmorton supp. decl., 3/19/01 and 7/24/01 memos.)

In anticipation of the subject contract, Todd discussed with the Navy the need for substantial repairs to the Emerald Sea dry dock and their high cost. Beginning in about March 2001, Todd engaged in discussions with the Navy regarding a change to the methodology for reimbursing the costs of repairing and maintaining the Emerald Sea. At CEO Welch's direction, Todd's CFO, Mr. Wiscomb, discussed the matter with Daniel Orcutt, a Navy employee who worked under the CO. Mr. Orcutt, who died in 2003, was not a CO and had no authority at any time to bind the government. (App. opp'n at 7, PF

10, ex. B, Wiscomb decl. ¶ 6; gov't rebut., ex. 18, Throckmorton supp. decl. ¶¶ 1-2; gov't surreply, ex. 10, Throckmorton 2nd supp. decl. ¶ 13)

According to Mr. Wiscomb, Mr. Orcutt indicated that he was prepared to negotiate and resolve with Todd a new method for reimbursing costs of the Emerald Sea dry dock under the anticipated contract and that he, too, wanted to change the method. Mr. Wiscomb states that he and Mr. Orcutt undertook to develop and implement a cost reimbursement method involving more than just the Emerald Sea, but that the "genesis of, and driving force behind," their efforts were the anticipated expenditures to maintain the dry dock and have it available under the contract (app. opp'n, ex. B, Wiscomb decl. ¶ 6). According to Messrs. Welch and Wiscomb, Todd understood that the CO had authorized Mr. Orcutt to enter into agreements, and to develop and implement a new method to reimburse Todd's costs of upgrading, altering, repairing and maintaining the dry dock. Mr. Orcutt had just completed negotiations with Mr. Wiscomb regarding the Navy's reimbursement of Todd's environmental insurance costs. In that case, the CO had designated Mr. Orcutt to negotiate a resolution with Todd. Mr. Orcutt had agreed to terms that, as Todd understood it, bound the Navy. On another occasion, Mr. Orcutt had negotiated with Mr. Wiscomb to reimburse Todd for workers' compensation insurance. (App. opp'n at 7, PF 10, ex. A, Welch decl. ¶ 21, ex. B, Wiscomb decl. ¶¶ 6-9)

CO Throckmorton reports that:

> I have reviewed our files on Advance Agreements with Todd for Workers' Compensation Settlement Costs and for Environmental Risk Transfer Insurance Cost. It is well documented in both files that we requested and received permission from [NAVSEA] Code SEA02 to pursue entering into those agreements with Todd. Both files also contain pre-negotiation business clearances wherein the negotiator, Mr. Orcutt, laid out the Government's going in position/objective and sought the permission of the Review Board to initiate negotiations in line with that position/objective. Review Boards (chaired by Mr. Nick Peak in the case of the Advance Agreement for Workers' Compensation Settlement Costs and me in the case of the Advance Agreement for Environmental Risk Transfer Insurance Cost) were held to review those business clearances and established the parameters within which Mr. Orcutt could negotiate. Any deviation from the established negotiation parameters had to be specifically approved by the Review Board before Mr. Orcutt could proceed. Review Boards were also held to obtain approval of post-negotiation business

> clearances prepared by Mr. Orcutt for both of those Agreements.
>
> In the case of the Environmental Risk Transfer Insurance Cost issue, I received letter and e-mail requests from Todd's [CFO], Mr. Wiscomb, to meet with them to discuss their "proposal" and I, along with Mr. Orcutt, [counsel] and several representatives from the Defense Contract Audit Agency [DCAA] met with them, as requested. Throughout the ensuing months, Mr. Orcutt, in several of his e-mails to Mr. Wiscomb on this subject indicated that he was not able to enter into any discussions without specific approval from NAVSEA Headquarters and the [CO].

(Gov't rebut., ex. 18, Throckmorton supp. decl. ¶¶ 3, 4; *see also* gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶ 8, attach, 4, re: Contract Review Board procedures) Mr. Orcutt did not sign any of the final implementing documents binding the government contractually to the advance agreements (Throckmorton 2nd supp. decl. ¶ 32(a)).

Federal Acquisition Regulation (FAR) 31.109, Advance agreements, provides:

> (a) . . . To avoid possible subsequent disallowance or dispute based on unreasonableness, unallocability, or unallowability under the specific cost principles at [various Subparts, including 31.2], [COs] and contractors should seek advance agreement on the treatment of special or unusual costs. However, an advance agreement is not an absolute requirement. . . .
>
> (b) Advance agreements may be negotiated either before or during a contract but should be negotiated before incurrence of the costs involved. The agreements must be in writing, executed by both contracting parties, and incorporated into applicable current and future contracts.

Mr. Wiscomb expressed Todd's concern to Mr. Orcutt that it would be incurring substantial costs to upgrade and maintain the Emerald Sea dry dock for the sole purpose of performing AOE work and the costs would be incurred substantially before any scheduled AOE dry dockings. Mr. Wiscomb opined that allocation of Emerald Sea costs on the historical basis of dock usage would be inappropriate. (App. opp'n at 7, PF 11, ex. B, Wiscomb decl. ¶ 11)

According to Todd, Mr. Wiscomb and Mr. Orcutt agreed that the current reimbursement method needed to be replaced; the new method, to be timely developed and implemented, would reimburse Todd over the period of the contract to "smooth" the Navy's funding burden and eliminate incentives for Todd to delay dry dock repair and maintenance until shortly prior to "scheduled availabilities" (defined below); and, in recognition of the need to incur costs in advance of scheduled and "non-scheduled availabilities," the Navy would reimburse Todd for Emerald Sea dry dock maintenance in the period the costs were incurred, separate and apart from any subsequent dry docking. (App. opp'n at 8, PF 12, ex. A, Welch decl. ¶¶ 17, 22, ex. B, Wiscomb decl. ¶ 13) Mr. Wiscomb reports that "[p]ending the establishment of an equitable method to charge the costs in question to the Government as they were being incurred, the costs for repairing and maintaining Todd's dry docks were provisionally allocated based on dry dock usage" (Wiscomb decl. ¶ 13).

CO Throckmorton denies knowledge of any discussions between Mr. Orcutt and Mr. Wiscomb, beginning in March 2001, regarding the methodology for reimbursing Todd's Emerald Sea dry dock costs. The CO states that Mr. Orcutt would have obtained his prior approval. (Gov't rebut., ex. 18, Throckmorton supp. decl. ¶ 6) However, the Navy has accepted Todd's allegations for purposes of summary judgment.

According to Todd, throughout its dealings with the Navy, the premise was that the Navy would reimburse Todd for its Emerald Sea dry dock costs. The issue was how best to do so. (App. opp'n at 8, PF 14, ex. A, Welch decl. ¶ 15, ex. B, Wiscomb decl. ¶ 18)

In anticipation of the subject contract, Todd undertook an analysis to determine the expenditures that would be necessary to maintain the Emerald Sea to be ready and able to perform under the contract. Todd's 29 May 2001 report noted that:

> In recent years we have not been able to meet straight NAVSEA guidelines for correction of deficient steel. The small amount of repairs undertaken in the past have left us with a situation that the great majority of the steelwork in the dock is approaching unsatisfactory status in a very few years. With the support of the Navy we developed an alternative process to focus repairs to the most critical areas. We have made our case with the help of special Engineering studies called Finite Element Analysis (FEA). These in depth reports have shown that the straight NAVSEA guidelines may be conservative in some areas but also point out areas where we are vulnerable to very high stress due to gross amounts of extremely deteriorated structure.

. . . .

> Our repair strategy has been to address the most severe and critical structural members until available funds were expended each year. The backlog of needed repairs has increased, as corrosion accelerates, and as new ships impose higher loading. The diverging trend between capacity and demand is expected to accelerate, unless an increased rate of repairs is applied to narrow this gap.

(R4, tab 10 at GOV177-78) The report concluded that, from FY 2002 through FY 2006, the anticipated contract period, expenditures "to maintain NAVSEA certification suitable to lift the two classes of AOEs based in Puget Sound" would total approximately $16.2 million (*id.* at GOV176, *see also* at GOV180; app. opp'n at 5-6, PFs 6, 7, ex. A, Welch decl. ¶ 9, ex. B, Wiscomb decl. ¶ 4)

These costs were necessary solely to prepare the Emerald Sea dry dock for AOE availabilities, not to perform commercial work. Todd would have accommodated its commercial work in other dry docks, through other means, or not at all. After the contract was executed and the Emerald Sea had been sufficiently repaired, including during the period covered by Todd's claim, it performed commercial work there when the dock was not being used on the Navy's behalf. (R4, tab 68; app. opp'n at 6, PF 8, ex. A, Welch decl. ¶¶ 12, 13, ex. B, Wiscomb decl. ¶ 5) Todd alleges that it thereby mitigated, by "several million dollars," the alleged costs for which it holds the Navy responsible (app. reply at 5).

Beginning in May 2001, prior to contract award, and continuing after award through at least 20 May 2003, the Navy tracked the certification status of the Emerald Sea dry dock, specifying work that needed to be done (app. opp'n at 13, PF 29, ex. F).

The Base Contract

On 14 June 2001, NAVSEA awarded the subject multi-ship/multi-option cost-reimbursement contract to Todd. CO William C. Randolph signed the contract. CO Throckmorton was named as the Contract Administration Office Representative. The contract covered various tasks associated with repairs and alterations to AOE class ships. Under the contract, Todd was required to maintain the Emerald Sea dry dock in certified status and to have it ready and available for both scheduled repairs and alterations ("scheduled availabilities") and non-scheduled repairs and alterations ("non-scheduled availabilities"), also referred to as emergent work. Like the predecessor contracts, the contract is not covered by the CAS and does not contain any CAS provisions. (R4, tab 1

at GOV6, -7, -53, -59, -99; gov't mot. at 6-7, ex. 7, Throckmorton decl. ¶ 4; app. opp'n at 18, UF No. 7, at 9, PFs 15, 16, ex. A, Welch decl. ¶ 3)

Contract SECTION C – DESCRIPTION/SPECIFICATION/WORK STATEMENT, provides in part at paragraph I:

> **[T]he Place of Performance is the Puget Sound Homeport area [near] NAVSTA Bremerton, WA.** The Contractor, under the direction of [SUPSHIP] . . . shall furnish the material, services, and facilities . . . necessary for the accomplishment of the following work: . . . .

(R4, tab 1 at GOV53) The "following work" includes base and option contract line items (CLINs). The base work consists of five CLINs (*id*. at GOV7). CLIN 0001 pertains to base work to be accomplished in FY 2001, described in section 1.01, SCOPE, as follows:

> The Contractor is required to accomplish the FY 01 Advance Planning functions for USS SACRAMENTO FY 02 PMA in accordance with the schedule of TABLE C-1, including the design review of Government alteration drawings, shipchecks to validate work specifications and drawings, and other work necessary to prepare for the alteration and repair of USS SACRAMENTO.

(R4, tab 1 at GOV53)

Section 1.01 refers to the contractor's required use of a technical standard pertaining to a safety certification program for dry docking facilities, providing in part:

> p. The following documents or their subsequent revisions in effect at time of contract award and/or option exercise, as well as applicable current instructions, general specifications, type plans, naval ship technical manuals and directives from [NAVSEA] shall be used in the technical requirements of work under the Contract:
>
> . . . .
>
> MIL-STD-1625C Safety Certification Program for Drydocking Facilities and Shipbuilding Ways for U.S. Navy Ships

(R4, tab 1 at GOV57)

The contract's DRYDOCK CERTIFICATION (NAVSEA) (MAY 1993) clause refers to the dry docking safety certification program as follows:

> The drydocking of all vessels on or after 1 January 1980 shall be accomplished in dry docks certified in accordance with MIL-STD-1625C(SH) dated 25 August 1987 as invoked by NAVSEA Standard Item 009-01.

(R4, tab 1 at GOV75)

CLIN 0002 pertains to the accomplishment of non-scheduled, emergent, repair and alteration requirements between scheduled availabilities; CLINs 0003, 0004, and 0005 pertain to provisioned item orders, the furnishing of data, and technical documentation for the base period CLINs 0001 and 0002 and for option CLINs, "IF OPTION(S) ARE EXERCISED" (R4, tab 1 at GOV59, -61, -65).

The contract incorporates by reference the FAR 52.216-7, ALLOWABLE COST AND PAYMENT (MAR 2000); FAR 52.243-2, CHANGES--COST-REIMBURSEMENT (AUG 1987); and FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996) clauses (R4, tab 1 at GOV113, -117, -118; gov't mot. at 7-10; app. opp'n at 18, UFs 9-11).

The Allowable Cost and Payment clause provides in part, at FAR 52.216-7(a), that the "Government shall make payments to the Contractor when requested as work progresses . . . in amounts determined to be allowable by the [CO] in accordance with Subpart 31.2 of the [FAR]."

FAR 31.201-1, Composition of total cost, provides in part:

> (a) The total cost of a contract is the sum of the direct and indirect costs allocable to the contract . . . . In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used . . . .
>
> (b) . . .The allowable costs to the Government are limited to those allocable costs which are allowable pursuant to part 31 and applicable agency supplements.

FAR 31.201-2, Determining allowability, provides in part:

(a) The factors to be considered in determining whether a cost is allowable include the following:

(1) Reasonableness.

(2) Allocability.

(3) Standards promulgated by the CAS Board, if applicable; otherwise, generally accepted accounting principles [GAAP] and practices appropriate to the particular circumstances.

(4) Terms of the contract.

(5) Any limitations set forth in this subpart.

. . . .

(c) When contractor accounting practices are inconsistent with this Subpart 31.2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from using practices consistent with this subpart.

FAR 31.201-4, Determining allocability, provides in part:

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business . . . .

FAR 31.202, Direct costs, provides in part:

(a) A direct cost is any cost that can be identified specifically with a particular final cost objective. No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

FAR 31.203, Indirect costs, provides in part:

(a) An indirect cost is any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. It is not subject to treatment as a direct cost. . . .

. . . .

(d) The contractor's method of allocating indirect costs shall be in accordance with standards promulgated by the CAS Board, if applicable to the contract; otherwise, the method shall be in accordance with [GAAP] which are consistently applied. The method may require examination when—

(1) Substantial differences occur between the cost patterns of work under the contract and the contractor's other work;

(2) Significant changes occur in the nature of the business, . . . fixed-asset improvement programs, . . . or other relevant circumstances . . . .

FAR 31.001, Definitions, defines "Cost objective" as:

[A] function, organizational subdivision, *contract*, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of

> processes, products, jobs, capitalized projects, etc. [Emphasis added]

It defines "Final cost objective," as "a cost objective that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points." "Indirect cost pools" are "groupings of incurred costs identified with two or more cost objectives but not identified specifically with any final cost objective."

Contract Options

The contract contains the FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000) (NAVSEA VARIATION) (MAR 2000) clause, providing in part:

> (a) The Government may extend the term of this contract by written notice(s) to the Contractor within the periods specified below. If more than one option exists, each option is independent of any other option, and the Government has the right to unilaterally exercise any such option whether or not it has exercised other options.

(R4, tab 1 at GOV126; *see also* gov't mot. at 15; app. opp'n at 19, UF 25) The clause lists 24 option CLINs, associated AOEs, and option exercise dates (*id*.). The AOEs are the USS SACRAMENTO (AOE 1), USS RAINIER (AOE 7), USS BRIDGE (AOE 10), and USS CAMDEN (AOE 2). Eleven of the options are for advance planning for future accomplishment of ship repair and alteration work. Thirteen are for actual ship repair and alteration work. The work under each option CLIN falls under a specified fiscal year, from FY 2002 through FY 2007. The options are unpriced and subject to procedures for undefinitized orders in the event of option exercise. (R4, tab 1 at GOV7 to -31, -61 to -62; gov't mot. at 14, ex. 7, Throckmorton decl. ¶¶ 4, 8; app. opp'n at 19, UFs 22-24, 26)

Four of the options in the contract at award are for ship repair and alteration work that includes dry docking (dry dock options), indicated by the designation "DPMA" ("Docking Phased Maintenance Availability") (gov't mot., ex. 7, Throckmorton decl. ¶ 7). The dry dock options are CLINs 0017 (USS SACRAMENTO, FY 2004 DPMA), 0020 (USS BRIDGE, FY 2005 DPMA), 0021 (USS CAMDEN, FY 2005 DPMA), and 0025 (USS RAINIER, FY 2006 DPMA). If the government exercised those options, it was to deliver the vessels to Todd's plant on or about 21 January 2004, 6 October 2004, 6 April 2005 and 5 October 2005, respectively, and Todd was to redeliver them no later than 24 March 2004, 8 December 2004, 8 June 2005 and 7 December 2005, respectively. (R4, tab 1 at GOV17, -20, -21, -25, -96; gov't mot. at 17-18, ex. 7, Throckmorton decl. ¶ 7; app. opp'n at 19, UFs 27, 28, 31)

The dry dock options provide that the contractor is to accomplish the repair and alteration of the covered vessels in accordance with the statement of work description for option CLIN 0018, "including drydocking requirements" (R4, tab 1 at GOV69-71). That description includes the following at section 1.08:

> k. Applicable to designated Drydocking Availabilities, the Contractor shall make certified drydocking facilities available for accomplishment of work items below the ship's waterline.

(R4, tab 1 at GOV67)

In or about June 2003 the parties bilaterally added dry docking to Option CLIN 0013 for the USS CAMDEN, which originally had not included dry dock work. The government exercised the option and it was definitized. Todd performed this dry docking from 2 through 18 August 2003, during CFY 2004. This was the only dry docking Todd performed under the subject contract. (Gov't mot. at 23, ex. 7, Throckmorton decl. ¶ 7, ex. 13 (bilateral Modification No. A00315, effective 12 June 2003 at 8), ex. 14 (bilateral Modification No. A00351, effective 12 August 2003); app. opp'n at 22, UF 43)

On 22 September 2003, the Navy certified the Emerald Sea dry dock for a capacity of 31,200 long tons (R4, tab 27; app. opp'n at 13, PF 30).

The Navy provisionally exercised dry dock option CLIN 0017, covering the USS SACRAMENTO, at not-to-exceed amounts subject to final price definitization, as recorded in bilateral contract modifications, including Modification No. A00398, effective 4 December 2003. Fifteen days later, on 19 December 2003, the Navy notified Todd that it had decided to cancel that dry docking. (R4, tab 31; gov't mot. at 20; app. opp'n at 21, UFs 35, 36)

Bilateral Modification No. A00427, effective 27 February 2004, changed dry dock option CLIN 0017 from a DPMA dry docking category to a Phased Maintenance Restricted Availability (PRAV) category, which did not entail dry docking. The change was effective on 12 February 2004. (R4, tab 34; gov't mot. at 20, ex. 7, Throckmorton decl. ¶ 7; app. opp'n at 21, UF 36) The modification contains the following clause:

> 7. The change in delivery date, estimated cost, base fee, and award fee pool described above is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims arising out of this modification and any other modifications or change orders

> indicated above, including all claims for delays and disruption resulting from, caused by, or incident to such modifications or change orders.

(R4, tab 34 at GOV278) The modification does not contain any reservation of claims.

Bilateral Modification No. A00434, effective 30 March 2004, reflects the parties' bilaterally negotiated definitized price for former dry dock CLIN 0017 and the change of the CLIN from a DPMA to a PRAV (R4, tab 37; gov't mot. at 21; app. opp'n at 21, UF 39). The modification provides in part:

> 1. The purpose of this modification is to definitize the provisional exercise of Contract Option CLIN 0017;
>
> 2. WHEREAS, [Modifications including Nos. A00398, A00427 and several others] provisionally exercised Option CLIN 0017 sub-CLINs . . . of USS SACRAMENTO(AOE-1) FY04 [DPMA] with total estimated cost plus all fees of $6,395,447.00 pending definitive execution of CLIN 0017 and;
>
> 3. WHEREAS, the parties have now finalized negotiation to definitize CLIN 0017 and its provisional modifications set forth at paragraph 2 and;
>
> 4. NOW THEREFORE, CLIN 0017 "Accomplish Repair and Alteration of USS SACRAMENTO (AOE-1) FY04 DPMA" is hereby fully exercised and changed to the FY04 PRAV . . . .

(R4, tab 37 at GOV286-87) The modification contains a "SECTION B CLIN 0017 Summary" showing total costs and fees, including sub-CLINs, of $4,516,315 (*id*. at GOV290). The modification includes the following clause:

> 14. The change in delivery date and the change to Section B estimated cost, base fee, and award fee pool is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims arising out of this modification and any other modifications or change orders indicated above, including all claims for delays and disruption resulting

> from, caused by, or incident to such modifications or change orders.

(R4, tab 37 at GOV288) The modification does not contain any reservation of claims.

Todd performed the work in the revised option CLIN 0017 without placing the USS SACRAMENTO in dry dock (gov't mot. at 21; app. opp'n at 21, UF 38).

In 2003 the government transferred the USS RAINIER to the Military Sealift Command (MSC). In 2004 it transferred the USS BRIDGE to MSC and decommissioned the USS SACRAMENTO. On 1 October 2005 the government decommissioned the USS CAMDEN. With the transfer and decommissioning of the four AOEs, the government no longer needed any of the work specified in the unexercised options—including the three remaining unexercised original dry dock option CLINs 0020, 0021 and 0025, and it did not exercise any more options. (Gov't mot. at 23-24, ex. 7, Throckmorton decl. ¶ 10; app. opp'n at 22, UFs 44, 45)

Because the parties had bilaterally deleted dry docking from the only original dry dock option the government had exercised (option CLIN 0017), and the government did not exercise any of the other original dry dock options, Todd did not perform any dry dock work under any of the four original dry dock options (gov't mot. at 22-23, ex. 7, Throckmorton decl. ¶ 9; app. opp'n at 22, UF 42).

Other Actions During Course of Contract Pertaining to Emerald Sea Dry Dock

After contract award, Todd repeatedly sought to engage Mr. Orcutt and other Navy personnel to complete the development and implementation of new cost reimbursement procedures. The Navy did not express to Todd a lack of desire to do so. Todd characterizes the project as suffering from competing demands and priorities within the Navy. Mr. Orcutt's attention was diverted to other matters and he ultimately left his position. CO Throckmorton had a few conversations with Todd about a new cost reimbursement method but did not implement one. Budget considerations influenced the Navy in considering a cost reimbursement process that would have resulted in earlier payments to Todd. (App. opp'n at 12, PFs 26, 27, ex. A, Welch decl. ¶ 29, ex. B, Wiscomb decl. ¶¶ 14, 15)

In letters from 22 June 2001 through 13 November 2001, Todd provided the Navy with projections of its Emerald Sea dry dock costs for FY 2002. DCAA audited the projections and, in its 12 September 2001 audit report to the Navy, took no exceptions to them for either FY 2002 or 2003. On 31 October 2001 Todd and the Navy executed a Forward Pricing Rate Agreement covering CFYs 2002 and 2003, which incorporated the projections. Todd updated its projections on 13 December 2001. DCAA audited them

and, in its 27 December 2001 audit report took no exception to Todd's Emerald Sea cost projections. On 28 December 2001 Todd and the Navy executed a new Forward Pricing Rate Agreement covering CFYs 2002 and 2003, which incorporated the Emerald Sea cost projections. In letters from 18 July 2001 through 13 December 2002, Todd provided the government with charts and data showing the actual expenses incurred for the Emerald Sea dry dock in FY 2002. (*See* R4, tab 19; app. opp'n at 13-14, PFs 32, 33, ex. H at 23-24) We have not located in the record or been directed to the Forward Pricing Rate Agreements, DCAA's audit reports, and most of the referenced letters.

Todd submitted a Proposal to Eliminate Dry Dock Multiplier Discussion Outline to the Navy on 21 March 2002 (R4, tab 14; app. opp'n at 12, PF 28). CO Throckmorton states that: this was the first time he had received any indication from Todd that it wished to discuss a different methodology of allocating Emerald Sea dry dock costs; the "dry dock multiplier" issue was raised in connection with all of Todd's dry docks, not just the Emerald Sea; and Todd did not allege in its proposal, or in related discussions, that it had reached an oral agreement with Mr. Orcutt (gov't rebut., ex. 18, Throckmorton supp. decl. ¶ 6; gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶ 12).

On 12 November 2002 Joseph Fallica of SUPSHIP e-mailed Yuji Kamada of SUPSHIP inquiring about the classification for accounting purposes of Todd's improvements to the Emerald Sea dry dock (app. opp'n, ex. E). Mr. Fallica was under CO Throckmorton's supervision and was not authorized to bind the government (gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶¶ 18, 20). The parties have not identified Mr. Kamada's position with the Navy. The e-mail states in part:

> As you may be aware, Todd is planning to perform some major work on their [Emerald Sea dry dock] for about $16.0 M over the next three years, to include replacement of the wing walls. Moreover, it is Todd's position that this work represents normal maintenance and not capital improvements for accounting purposes. Todd asserts that replacement of wing walls does not increase the life of the drydock nor efficiency. Accordingly, Todd does not want to depreciate the cost but rather charge the full amount to the government as it is incurred.

(App. opp'n at 12-13, PF 28, ex. E)

Mr. Welch acknowledges that: "*On the face of the Contract, it was clear* that the AOE availabilities may or may not come to pass depending upon the Navy's exercise of the options for Scheduled Availabilities, or its decisions regarding Non-Scheduled Availabilities" (app. opp'n, ex. A, Welch decl. ¶ 32) (emphasis added). The contract

contains a schedule of expected AOE dockings and, during the course of the contract, the Navy provided additional information regarding expected dockings (*id*. ¶ 33). The Navy conveyed some information to the effect that one or more AOEs might be transferred to MSC and would not be delivered to Todd for alterations or repairs (*id*. ¶ 34, ex. B, Wiscomb decl. ¶ 20). However, according to Mr. Welch:

> [T]he scheduling information provided to Todd by the Navy (especially pertaining to timing) proved *woefully unreliable – perhaps even misleading*.
>
> . . . *Recognizing that one or more changes in the expected dockings was always a possibility*, Todd did not have the level of information and insight that the Navy had with respect to the future of the AOE vessels to exercise independent judgment on the likelihood that the scheduled dockings would or would not occur. *If the Navy had knowledge or reason to believe* that the scheduled dockings might not occur because of accelerated decommissioning or transfer to other Navy activities, the Navy never shared that information with Todd until too late to affect Todd's expenditures for the Emerald Sea Dry Dock. [Emphasis added]

(App. opp'n, ex. A, Welsh decl. ¶¶ 34-35)

None of the information Mr. Wiscomb had seen conveyed that decommissionings and cancelations were imminent. Todd was "very surprised" by the Navy's announcement of the decommissioning of AOEs and cancellation of availabilities (app. opp'n, ex. B, Wiscomb decl. ¶ 20). It was "shocked" when it received the news that the USS SACRAMENTO was being decommissioned and would not be delivered for its scheduled availabilities (*id.*, ex. A, Welch decl. ¶ 36). In a SUPSHIP Puget Sound "Corporate Day" meeting held on 15 February 2002, which was eight months after contract award, the Navy's Vice Admiral Peter Nanos had advised Mr. Welch of his belief that the AOE 1 class (the SACRAMENTO was AOE 1) would be active for an additional 10 to 15 years (*id*., *see also* app. opp'n at 10-11, PFs 20-22).

After the Navy decided not to exercise the options for dry dockings (except for the USS CAMDEN), this left only the possibility of non-scheduled availabilities under the contract. However, the Navy declined, despite Todd's repeated requests, to relieve it of its obligation under the contract to repair and maintain the Emerald Sea dry dock to Navy standards. (App. opp'n at 11, PF 23, ex. A, Welch decl. ¶ 25)

Initially, the fact that the Navy had not formalized a new cost reimbursement method was a "nuisance" and caused Todd cash flow difficulties that were not critical. The problem became much greater when the Navy began canceling ship availabilities and, under the old reimbursement procedures, there was no process for Todd to be reimbursed for its repair and maintenance of the Emerald Sea dry dock. Prior to the AOE decommissioning and cancellation of availabilities, there was no suggestion that those actions were coming in a time frame that might leave Todd without a mechanism to obtain Navy reimbursement of its prior Emerald Sea expenditures. There was never any suggestion by the Navy that Todd's advance Emerald Sea repair and alteration work would be uncompensated if the Navy chose not to exercise options and deliver AOEs to Todd for repairs. Todd made its dry dock expenditures in accordance with the agreed "smoothing" approach, with the knowledge of Navy officials. (App. opp'n at 14-15, PFs 34-36, ex. A, Welch decl. ¶¶ 30, 32, ex. B, Wiscomb decl. ¶ 21)

As time passed, a number of Navy personnel became involved in seeking ways for the Navy to reimburse Todd's Emerald Sea dry dock costs. This led to the Navy's suggesting various changes to the cost reimbursement method that would justify reimbursement of some or all of the amounts in question. During this process, Navy programming and contracting personnel repeatedly provided guidance to Todd about methods, amounts and accounting justifications that might be used to support the Navy's reimbursement to Todd. (App. opp'n at 15, PFs 37, 38, ex. B, Wiscomb decl. ¶¶ 22, 23) Mr. Wiscomb states that: "The only issue was how to achieve agreement on a justification, inasmuch as a new, appropriate cost reimbursement method was not developed and implemented" (app. opp'n, ex. B, Wiscomb decl. ¶ 23).

Todd's Claim

On 5 March 2004, Todd submitted an $8.9 million "Drydock # 3 Settlement Proposal" to CO Throckmorton seeking settlement, such as by an advance agreement, of all outstanding issues related to the Emerald Sea dry dock, including reimbursement to Todd for unrealized usage costs and unrecovered maintenance and operating costs (R4, tab 35). Todd stated that, upon concluding contract negotiations in June, 2001, it had undertaken a five-year repair and maintenance project, estimated to cost $16 million, to ensure that the Emerald Sea would remain certified and ready to support all scheduled and potential emergent dry dockings covered by the contract. Todd alleged that it was clearly understood that the Navy would pay for the dry dock costs through direct charges or as unrecovered costs included in overhead. It alleged that, since nearly all of its non-Navy customers could be accommodated on a mid-sized dry dock, its continuing need for a dry dock as large as the Emerald Sea was driven by its contractual requirements under the AOE contract and the Navy's representations and commitments as to the future work. Todd alleged that it would not have committed to the $16 million project without $8.9 million in dry dock-related financial support it expected from the Navy but that, after

signing the contract, the Navy decided to transfer the USS BRIDGE and the USS RAINIER to MSC and to decommission the USS SACRAMENTO early, and the USS CAMDEN's fate was unknown. Todd alleged that it had been discussing the need to change its the Emerald Sea cost recovery methodology with SUPSHIP for three years, and that its expenditures were on the Navy's behalf, pursuant to the clear understanding that the Navy would pay for the dry dock costs.

In its proposal, Todd stated that "anticipated payments from the Navy for drydocking AOE vessels in Todd's drydock #3 over the course of the five year period CFY 2002-2006 totaled $3,791,572" (R4, tab 35 at GOV281).

An e-mail dated 21 April 2004 from CO Throckmorton to Harold V. Hanson and William S. Herrell of NAVSEA's central contracting office, and other Navy personnel, reports that, on 20 April 2004 CO Throckmorton, Mr. Fallica, and DCAA representatives met with Todd's CFO and an accounting manager regarding Todd's 5 March 2004 proposal (app. supp. br., ex. 4). Mr. Hanson was then NAVSEA's executive director for contracts, the head civilian position for contracts (app. supp. br., ex. 2 (Hanson 8/29/07 dep. excerpts) at 3 (p. 6)). The record reflects that Mr. Herrell worked under and advised Mr. Hanson (*see* app. supp. br., ex. 5 (Herrell 7/12/07 dep. excerpt) at 41 (p. 160); *see also* app. supp. br., ex. 2 at 41 (p. 158 referring to Mr. Hanson's subordinate "Mr. Harold" (sic)). In his e-mail, the CO stated that certain legal review was required and that "[o]ur combined approach has been and will continue to be to find ways in which the Navy can participate in these costs consistent with applicable regulations and the law" (app. supp. br., ex. 4).

On 10 May 2004, after DCAA had reviewed Todd's proposal, the CO requested additional information from Todd and a certified proposal (R4, tab 39). Todd, SUPSHIP and DCAA met on 24 May 2004 to discuss the proposal (R4, tab 42 at GOV304, tab 43 at GOV315, reference (1)).

On 18 June 2004, Todd submitted a certified "Drydock No. 3 Settlement Proposal (Revised)" in the amount of $9,318,462 (R4, tab 43 at GOV315). It addressed items the CO had identified as deficiencies in Todd's prior proposal and took into account informal guidance provided to Todd by other Navy personnel (app. opp'n at 16, PF 40, ex. B, Wiscomb decl. ¶ 25). Todd stated that its rationale was the same as in its earlier proposal, with added recovery theories, including that the costs were reimbursable under the FAR Allowable Cost and Payment clause, and were allowable as maintenance and repair costs under FAR 31.205-24, and as pre-contract costs under FAR 31.205-32 where applicable. Todd alleged, alternatively, that: the Navy had constructively changed the contract when it directed that the Emerald Sea dry dock be kept in a certified and ready condition and had concurred in Todd's expenditure of $16 million to comply; the Navy's transfer of two vessels and early decommissioning of another constituted a partial

termination of the contract for convenience; the Navy had entered into a contract implied-in-fact to reimburse Todd for its unrecovered Emerald Sea dry dock costs; or Todd was entitled to recover pursuant to Pub. L. No. 85-804 and FAR Part 50.

Todd and the Navy met over several months to discuss Todd's 18 June 2004 claim. The government participants included, among others, CO Throckmorton, Paul Noel of his office, said to be a NAVSEA Naval Architect and Docking Observer, and DCAA (*see* R4, tab 60 at GOV512, -515; gov't mot. at 24, ex. 7, Throckmorton decl. ¶ 11; app. opp'n at 23, UF 48, first and second sentences).

At some point(s) in 2004 Mr. Hanson participated in a discussion(s) in Seattle with at least Mr. Welch, CO Throckmorton, and DCAA (*see* app. supp. br., ex. 2 at 21 (pp. 78-81), ex. 3). Mr. Hanson testified in his deposition that:

> And the reason I went out there was to make sure that we were doing what we were supposed to do and doing what we could. You know, a lot of times you have to get three standard deviations out before things are black or white. And so if you wanted to pay somebody, well, could you do it? You know, maybe you could. Do you not want to pay them? Well, things aren't necessarily black and white all the time. So I guess my job was to go out there to see what are the issues. Are we taking a reasonable position and to ensure that, if possible, we reached an agreement and to demonstrate to Mr. Welch that we took his issues seriously.

(*Id*., ex. 2 at 22 (p. 82))

A 19 January 2005 internal "POINT PAPER" prepared by Mr. Fallica addressed discussions with Todd about Emerald Sea dry dock compensation (app. opp'n, ex. G at 1, 8). The paper stated that, for three years, Todd had unsuccessfully raised the issue of unrecovered costs (*id*. at 1) and that:

> During January 2005 a breakthrough occurred. Todd had previously proposed one simple accounting resolution approach after another, which were all reviewed and rejected by the Government. Finally, Todd with the help of the Government, and as a result of informative debriefings, separated their dry dock issues into four distinct categories (i.e., Navy dry dock certification costs, unabsorbed overhead, dry dock cost allocation methodology, and correction of prior billing errors). This approach allowed for meaningful

> discussions, and development of a workable framework, in order to reach a likely mutually acceptable resolution.

(*Id*. at 2)

Concerning certification costs, estimated at $4.2 million, the paper stated:

> After in-depth technical discussions about usage of the dry dock by other vessels, and level of certification capacity (which could be debated to be in excess of AOE minimum requirement), Todd's underlining [sic] premise was accepted by the Government. That is to say, the AOE program directly benefited from costs incurred from compliance with Navy dry dock certification requirements. Government dry dock engineers concurred with Todd's fundamental position that Navy dry dock certification requirements were up and beyond commercial practices.
>
> . . . Most of the identified inspection effort could clearly be linked to compliance with Navy dry dock certification requirements. However, repair and replacement activities represented a more difficult task, since work effort related to equipment . . . and structural components . . . would have likely been performed to some extent, regardless of compliance with Navy dry dock certification requirements.
>
> To expedite resolution, the Government and Todd collaborated and formed a technical evaluation team . . . . At this time, the process is still ongoing.

(*Id*. at 2-3)

Regarding unabsorbed overhead costs, estimated at $600,000, the paper stated that Todd had released the Navy from any further claims or equitable price adjustments connected with the cancellation of the USS SACRAMENTO dry dock work. The paper added that Todd had developed an acceptable cost impact proposal for unabsorbed Emerald Sea dry dock costs, but asserted that "no explicit or implicit commitment or understanding was made, as to whether the Government would consider reimbursement for unabsorbed overhead." (*Id*. at 3)

With respect to "DRY DOCK COST ALLOCATION METHODOLOGY" and a change to a "two rate" allocation method, at an estimated cost of $480,000, the paper

stated that during CFYs 2002, 2003, and 2004, Todd had embarked upon a necessary and long term capital dry dock improvement program which predominantly benefited large vessels but had not changed its established cost accounting practice of using a single rate to charge for dry dock usage (*id*. at 4). The paper stated:

> In retrospect this was an accounting oversight, a better and fairer approach would have been to develop and implement a two rate system. That is to say, a basic rate for operation and maintenance costs, to be applied to all vessels; and a special rate for capital improvement costs, to be applied to only large vessels. PSNS & IMF Code 440 and DCAA . . . have taken no exception, provided that it is a one-time adjustment, i.e., only applicable to historical CFYs 2002, 2003, and 2004, and no impact to CFYs 05 and beyond. Todd has implicitly accepted such a limitation, and indicated that no future dry dock capital improvements are planned, and it is likely that the Emerald Sea dry dock will be sold soon, after the arrival of the RESOLUTE dry dock . . . .

(*Id*.)

Concerning "CORRECTION OF PRIOR BILLING ERRORS," estimated to cost $80,000, the paper stated:

> As a result of recent scrutiny of incurred Emerald Sea dry dock costs and billings, it was discovered that Todd has under billed dry dock usage for the AOE program. Apparently this may have been going on for decades. However, at this time only CFY 2002 and forward, are technically open for accounting adjustments.
>
> It is Todd's established accounting practice to charge dry dock usage based upon the mathematical product of vessel tonnage times number of lift and lay days. However, for commercial vessels, Todd used gross displacement tons whereas for Navy vessels Todd used long tons. This represents an inconsistent application of accounting practices. Furthermore, due to the circumstance that displacement (volume) tons of a vessel is generally greater than long tons (weight measurement), the AOE program was more than likely under charged for Emerald Sea dry dock usage during CFYs 2002 and 2004.

(*Id*. at 4)

The paper stated:

> The Government with the audit assistance of DCAA, has found a clear and defensible basis for additional compensation for availability and usage of the Emerald Sea dry dock, in the performance of the [subject contract]. *This should not be interpreted as an overall finding of contractual entitlement. The only cost category with a sound basis for entitlement, is the correction of prior billing errors related to application of long tons instead of gross displacement tonnage*. In regard to Navy dry dock certification costs, and dry dock cost allocation methodology, these represent retroactive accounting system changes. As such, there is no explicit entitlement. Moreover, since these are not required accounting changes, the Government is under no patent obligation to provide any additional reimbursement to Todd. Nonetheless, the Government has the discretion, to declare these changes as desired accounting system changes, and compensate Todd from zero dollars to full cost impact of the retroactive accounting system changes. In regard to unabsorbed overhead, this matter is technically closed, due to Todd [sic] expressed contractual release from any subsequent claims and equitable price adjustments. [Emphasis added]

(*Id*. at 4-5)

The paper recommended an advance agreement with Todd concerning dry dock certification costs, with the proviso, to avoid a "windfall profit" to Todd, for the government's cost recovery if the dry dock were sold, or if it were not disposed of after Todd's planned acquisition of the RESOLUTE dry dock (*id*. at 7-8). The paper concluded that Todd had demonstrated a "sound basis for an equitable price adjustment of approximately $5.4 million" (*id*. at 8), noting that "it is the Government's position that there may be no contractual requirement for the Government to reimburse Todd for the subject equitable price adjustment, except for costs related to the correction of prior billing errors," but that "based upon the principles of equity, some level of additional compensation should be made to Todd to make them 'whole'" (*id*.).

As referenced in the point paper, the Navy had sent representatives to Todd to determine which Emerald Sea dry dock costs were directly attributable to the requirement to meet the Navy's unique repair and maintenance standards, primarily those in MIL-STD-1625C. As reported by Mr. Wiscomb, who had worked with the Navy, Todd had understood that the CO had agreed that the Navy would pay at least those costs; a Navy representative(s), whom Mr. Wiscomb does not identify, reported the resulting amount to the CO; but the CO declined to pay it. (App. opp'n at 16, PF 42, ex. B, Wiscomb decl. ¶ 29, ex. G at 2-3)

On 19 January 2005 CO Throckmorton e-mailed a copy of the point paper to Mr. Hanson for review prior to discussion. The CO copied Mr. Herrell and several other government personnel. (App. supp. br., ex. 1) The CO stated that the point paper documented the results of discussions with Todd, "our proposed settlement methodology," and associated funding issues. He continued:

> Todd has recently submitted detailed "certification costs" in the amount of $4.2M which are still in the process of being verified by DCAA. This is a much larger number than we had originally anticipated. The good news is that there are available funds on the current AOE MS/MO contract in the amount of $5M that we anticipate being able to use for this purpose. We're still reviewing the use of these funds for this purpose from a legal prospective [sic]. Costs associated with the other aspects of the proposed settlement methodology amount to $1.2M which would require current year funds.

(*Id*.)

By e-mail dated 20 January 2005 to Mr. Hanson, CO Throckmorton noted that he would be on medical leave through 11 February and that Mr. Fallica would follow up with Mr. Hanson. The CO concluded:

> My personal view is that we should pursue only the "certification cost" part of the proposed settlement methodology and not consider any of the other aspects of that methodology. Once we have your concurrence on a settlement approach, [Mr. Fallica] can finalize negotiations with Todd, and Ernesto Perez, who is acting Code 440 in my absence, can authorize the resultant action.

(App. supp. br., ex. 1)

Mr. Herrell testified in his deposition that he thought that his view concerning Todd's entitlement to compensation, as presented in the 19 January 2005 point paper, was relevant from the "standpoint that unless I thought it made sense, Mr. Hanson wasn't going to agree with it" (app. supp. br., ex. 5 at 41 (p. 160; *see also* pp. 158, 159)). Mr. Herrell also testified that "I don't think that Todd was due any compensation" and that he communicated his view to CO Throckmorton and Mr. Fallica (*id*. at 161).

On 26 January 2005 Mr. Fallica met with Mr. Wiscomb and a DCAA representative. Mr. Fallica sent his meeting notes to them for review for accuracy. (R4, tab 54 at GOV475-76) The notes report that Todd was now estimating its total costs at issue at $6,000,000 and that no significant change to "the estimated settlement amount of $6.0 million" was expected (*id*. at GOV476). The notes state:

> SUPSHIP reiterated that while the Government has provided conceptual guidance and explained the ground rules (i.e., FAR, CAS and GAAP principles), this should not be interpreted as an advanced approval of Todd's resulting methodology and computations. Moreover, discussions to date between Todd and SUPSHIP, should not be interpreted as a commitment to reimburse Todd for any additional costs related to the availability and usage of the Emerald Sea dry dock.

(*Id*.) The notes refer to a planned video teleconference (VTC) with NAVSEA to discuss settlement issues raised by Todd and state that SUPSHIP asked Todd to submit a formal proposal clearly explaining its approach.

By e-mail of 3 February 2005 to Mr. Herrell, Mr. Hanson, CO Throckmorton, and other government personnel, Mr. Fallica appended the 19 January 2005 point paper, reissued with the annotation "ATTORNEY WORK PRODUCT." He noted that it represented a preliminary assessment subject to change. (App. supp. br., ex. 6)[1] Also on 3 February 2005, a VTC among NAVSEA, DCAA, and SUPSHIP personnel occurred during which information submitted by Todd was discussed (R4, tab 56).

By e-mail dated 15 March 2005 to Mr. Hanson, copied to Mr. Herrell, CO Throckmorton stated in part:

> I need to speak with you about Todd's Emerald Sea Settlement proposal. There appears to be a deep

[1] The Navy has referred to the point paper in briefing and has not claimed that it is subject to the attorney work product doctrine.

> misunderstanding on Todd's part with regard to where we are in the settlement process. Steve Welch has called the Shipyard Commander, CAPT Orzalli, indicating that we are reneging on our $6M settlement agreement.

(App. supp. br., ex. 7) Mr. Herrell replied by e-mail of 16 March 2005 that "this was my concern in our last VTC, that we may have left them the impression that we were in agreement with the $6m figure" (*id*.). The CO responded on 16 March 2005 by e-mail to Mr. Herrell and Mr. Hanson, copied to other government personnel, referring to the 26 January 2005 meeting with Todd and the meeting notes, as follows in part:

> Please note that Scott Wiscomb (Todd CFO) was provided with a draft copy of the notes for his review and identification of omissions/corrections before it was finalized. He provided no comment. The notes clearly indicate that there was no agreement on entitlement. It also documents Todd's intent to submit a detailed cost proposal.

(*Id*.)

By letter to the CO dated 28 March 2005, which referred to Todd's 18 June 2004 claim and to numerous meetings with SUPSHIP and DCAA, Todd submitted its certified "Drydock # 3 Settlement Proposal (Revision 2)" in the amount of $5,990,000, covering CFYs 2002-2005 (R4, tab 60 at GOV512, 519-20; app. opp'n at 16, PF 41). Todd stated that the claim had been substantially revised to reflect the Navy's and DCAA's guidance and that it now included: (1) $4,502,000 in NAVSEA certification-related costs; (2) $620,000 for a revised, two-rate, AOE dry dock allocation; (3) $267,000 to correct billing errors in CFYs 2002 and 2004; and (4) $600,000 in unabsorbed dry dock costs during the planned SACRAMENTO availability period (R4, tab 60 at GOV513-15).

Under claim item (1), Todd alleged that, to maintain the Emerald Sea dry dock to NAVSEA standards to support the AOEs' scheduled and emergent dry docking requirements, it had to spend substantial sums in excess of those it would have incurred to maintain the dry dock to commercial standards and it should be allowed to charge the costs, which included allocable G&A, as direct costs under the subject contract (R4, tab 60 at GOV513).

Todd described explained claim item (2) in part as follows:

> This cost allocation component represents a desired change to Todd's traditional approach to allocating overhead costs on its drydock # 3. Historically, Todd has allocated drydock # 3

> overhead costs to jobs that used the drydock based on the ships' weight and number of lift and lay days used. The proposed new approach is based on the belief that the capital investments that Todd has made in the drydock have almost exclusively been structural in nature and therefore primarily benefit the larger and heavier vessels. Accordingly, the drydock's capital costs should be allocated to only those larger and heavier ships that benefited from the capital improvements, while routine operating and maintenance costs should be allocated to all vessels. Therefore, Todd is proposing a two rate method of allocating drydock # 3 overhead costs, and that this method be applied retroactively to CFY2002 and CFY 2004, the two years in which AOE dockings occurred.

(R4, tab 60 at GOV514)

Concerning claim item (3), Todd contended in part:

> While researching our historical drydock cost allocations for drydock # 3, we discovered that Todd had been allocating these costs to the AOE's based on their displacement weight . . . ., while allocating drydock # 3 costs to all other vessels that used the dock based on their gross weight. This practice is at least 12 years old and I believe stems from the fact that only commercial vessels' gross weight is typically known, while only the AOEs' displacement weight is known. The effect of this historical approach is to under-allocate drydock costs to the AOE's because a vessel's gross weight exceeds its displacement weight.
>
> We discussed this situation with Paul Noel (NAVSEA Naval Architect and Docking Observer) who agreed that this past practice did not fairly allocate costs to the AOE's. . . . [W]e agreed to use and Paul agreed to accept an estimate of the gross weight of the AOE's prepared by Dave Bergey (Todd Naval Architect). . . . I used this estimated gross weight to re-calculate the costs that should have been allocated to the CFY2002 and CFY2004 Camden drydockings.

(R4, tab 60 at GOV515)

The Navy represents, without contradiction, that Mr. Noel was not a CO and did not have contracting authority (gov't mot. at 24, proposed finding 48; *see also* gov't rebut., ex. 18, Throckmorton supp. decl. at attachs. (CO designations)). Todd states that it "agrees with the Navy that Mr. Noel's concurrence in the reasonableness of the correction of the billing errors does not itself bind the Navy to the correction" (app. opp'n at 50).

For claim item (4), Todd alleged in part that: from at least early September 2003 the Navy had planned to dry dock the USS SACRAMENTO at the Emerald Sea for nine weeks, from 28 February 2004 through 1 May 2004; Todd declined work or scheduled other work accordingly; the Navy notified Todd on 19 December 2003 that the SACRAMENTO dry docking was cancelled; Todd could not fill any of the dry dock time remaining in CFY 2004 (28 February 2004 through 28 March 2004) with other customers; none of the $472,000 in costs for that period were absorbed by other vessels; during the remainder of the formerly scheduled SACRAMENTO dry docking period, from 29 March 2004 through 1 May 2004, in CFY 2005, four commercial vessels docked at the Emerald Sea, which absorbed about $174,000 in costs; the SACRAMENTO would have absorbed $302,000; and, therefore, the unabsorbed costs for this period were $128,000. Todd claimed total unabsorbed costs during the entire planned SACRAMENTO dry docking period of $600,000 ($472,000 + $128,000). (R4, tab 60 at GOV515-16) Todd asserted that application of the *Eichleay* formula (*see Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894) was not necessary to its recovery of its unabsorbed overhead (R4, tab 60 at GOV518).

As in its 18 June 2004 claim, Todd alleged that its claimed costs were recoverable under the contract directly or under the Changes clause; the lack of AOE work amounted to the Navy's partial termination of its contract for convenience; and there was an implied-in-fact contract that the Navy would pay the claimed costs (R4, tab 60 at GOV516). Todd also alleged two more bases for recovery: (1) the CAS and the FAR provided for equitable adjustment based upon "desirable change" to cost accounting practices, and (2) Todd was entitled to an equitable adjustment for its unabsorbed overhead due to the Navy's delay or suspension of its work (R4, tab 60 at GOV516-18).

Todd alleged that:

> The core of the issue is that Todd was required to incur costs to maintain drydock #3 in accord with the Navy's contract requirements, and is entitled to payment of those costs by the Navy. The Navy's transfer of the AOEs to the maritime fleet, and consequent reduction of AOE repair work at Todd, has made it impossible for Todd to recover these costs through

> charges on AOE repair work. However, the Navy's elimination of AOE work does not mean Todd is no longer entitled to recover these costs it incurred to maintain drydock #3 under the contract. Rather, the lack of AOE work merely means that it is necessary to provide for Todd's recovery of these costs in some other way.

(R4, tab 60 at GOV516) Todd concluded that its claim followed concepts discussed in meetings over a four-month period, believed to be acceptable to SUPSHIP and DCAA (*id.* at GOV518).

CO Throckmorton declares that: after March 2002, through Todd's 28 March 2005 claim, Todd engaged in discussions or communications with the government about its wish for an accounting change in its treatment of its Emerald Sea dry dock costs; the CO was involved in many of the discussions and was the government's lead spokesperson in discussing Todd's submittals relating to a possible new Emerald Sea cost allocation methodology; in these discussions and submissions Todd never alleged to the CO that Mr. Orcutt had entered into an oral agreement concerning the Emerald Sea costs; and Mr. Throckmorton never entered into any oral agreement with Todd concerning the Emerald Sea (gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶¶ 5, 13-17, 27).

By final decision dated 31 May 2005, the CO denied Todd's claim (R4, tab 66, ex. A at GOV573 *et seq*.; gov't mot. at 28; app. opp'n at 24, UF 52). He determined, among other things, that Todd's proposed cost allocation methodology did not comply with the FAR or CAS, and that its constructive contract change, partial termination for convenience, and implied-in-fact arguments all related to the "underlining [sic] issue of the non-exercise of un-priced contract options" which the Navy was not required to exercise. This timely appeal ensued.

In denying Todd's claim, the CO rejected various grounds that Navy personnel had suggested as a justification for recovery, such as "desirable change" to a cost accounting practice and "unabsorbed overhead" (app. opp'n at 17, PF 44, ex. B, Wiscomb decl. ¶ 28).

Ratification Authority

Under FAR 1.602-1, Authority, COs "may bind the Government only to the extent of the authority delegated to them." FAR 1.602-3, Ratification of unauthorized commitments, at paragraph (a), defines "[r]atification" as "the act of approving an unauthorized commitment by an official who has the authority to do so." "Unauthorized commitment" means "an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of

the Government." Subject to numerous limitations, the head of the contracting activity (HCA), unless a higher level official is designated by an agency, may ratify an unauthorized commitment. FAR 1.602-3(b)(2), (c).

By memorandum dated 30 August 1996 from NAVSEA's Deputy Commander for Contracts to the NAVSEA CCOs, NAVSEA delegated HCA responsibilities to all NAVSEA CCOs, including CO Throckmorton, without power of redelegation and subject to listed restrictions and to all other applicable regulations and guidance (gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶ 29(a), attach. 5 at first and second pages). Concerning ratification, the memorandum stated:

> Ratification of Unauthorized Commitments up to $50,000 – NAPS 5201.602-3 – Delegated to activities with legal counsel and restricted as follows:
>
> $25,000 procurement authority may ratify up to $10,000,
> $100,000 procurement authority may ratify up to $25,000,
> $500,000 procurement authority may ratify up to $50,000.

(*Id*., attach. 5 at third page)

CO Throckmorton has authority to ratify up to $50,000 in otherwise unauthorized commitments by Navy personnel, subject to satisfaction of procedural requirements, including written reports to NAVSEA headquarters with detailed justification. He can also recommend to NAVSEA ratification of unauthorized commitments exceeding his $50,000 limit. (*Id*. ¶¶ 27, 32(d))

The CO denies ratifying any alleged oral commitment to Todd, including any alleged oral agreement of his own or any oral implied-in-fact agreement allegedly entered into by Mr. Orcutt, said by Todd to be for several million dollars. The CO asserts that he lacks authority for any such ratification and that his warrant is subject to FAR limitations. (Gov't surreply, ex. 19, Throckmorton 2nd supp. decl. ¶¶ 28, 29)

Complaint

Todd alleged in its complaint that: (1) its unrecovered costs to upgrade, alter, repair and maintain the Emerald Sea dry dock are due it under the contract's Allowable Cost and Payment clause and other contract provisions; (2) the Navy had agreed with Todd to develop and implement a new methodology for reimbursing dry dock costs under the contract; Todd would be reimbursed for its Emerald Sea dry dock costs in an equitable and timely manner not dependent upon performance of repairs and alterations in the dry dock; the Navy and Todd would reduce this "advance agreement" to writing; the Navy did not keep its promise of a written agreement and breached the parties'

agreement; Todd had justifiably relied upon the Navy's representations; and the agreement should be given full effect and, if necessary, should be deemed to be implied-in-fact; (3) alternatively, the FAR allows pre-contract costs under certain conditions and the same principles apply to pre-option costs (but Todd agrees with the Navy that the contract does not address such costs and it does not allege that its claimed implied-in-fact agreement covered pre-contract costs (gov't mot. at 19; app. opp'n at 21, UF 34)); (4) Todd's claim based upon its revised two-rate AOE dry dock allocation method is a desirable change to its cost accounting practices for which it is entitled to an equitable adjustment; (5) the Navy constructively terminated the contract for convenience to the extent that it failed to deliver AOE vessels for alterations and repairs at the Emerald Sea dry dock; (6) alternatively, the Navy had superior knowledge concerning the timing of its transfer of AOE vessels to MSC, its decommissioning of other AOEs, and its failure to deliver them to Todd for alterations and repairs, entitling Todd to recover its claimed dry dock certification costs [2] and (7) the Navy has been unjustly enriched and is equitably estopped from failing to reimburse Todd for its claimed dry dock certification costs.

Expert Evidence

In his sworn declaration, Todd's proffered expert, CPA McGeehin, opines, among other things, that it is appropriate and in accordance with the contract and applicable cost accounting rules for the Navy to reimburse Todd directly under the contract for its unrecovered costs of upgrading, altering, repairing and maintaining the Emerald Sea dry dock. He asserts that the costs were incurred specifically for the subject contract and are identifiable only with that final cost objective, thus satisfying FAR 31.202(a)'s definition of direct costs and FAR 31.201-4(a)'s allocability requirements. He adds that consistency principles do not require that the costs be treated as indirect costs, noting that, under FAR 31.203(d), an allocation method in use may require examination when substantial differences occur between the cost patterns of work under the contract and the contractor's other work, or significant changes occur in the nature of the business, or other relevant circumstances. Mr. McGeehin opines that consistency principles are not so rigid as to ignore the extraordinary nature of the costs incurred for the deteriorating Emerald Sea dry dock and that there is no requirement that once an allocation approach is

[2] In *Todd I* the Board examined, *sua sponte*, whether it had jurisdiction to entertain the superior knowledge aspect of Todd's claim. The Navy had not raised that issue in its motion to dismiss for lack of jurisdiction. We concluded that Todd had alleged sufficient facts in its claim and related submissions to constitute an allegation that the Navy had failed to disclose superior knowledge. Untimely, in a footnote to its rebuttal brief, the Navy asked the Board to reconsider that portion of its decision (gov't rebut. at 34 n.22). However, in its surreply, the Navy withdrew that request (gov't surreply at 91 n.49).

selected it can never be changed; rather, a justified change is allowable. (App. opp'n, ex. D, McGeehin decl. ¶¶ 20, 22) Mr. McGeehin does not separately address Todd's indirect cost claims in his analysis or the Navy's contention that accounting changes sought would be impermissible retroactive changes.

For purposes of its motion, the Navy has not challenged Mr. McGeehin's qualifications as an accounting expert, but it alleges, as we discuss below, that the Board cannot consider his opinion. In the alternative, the Navy alleges that Mr. McGeehin's opinion is incorrect. The Navy has not submitted any expert evidence of its own.

DISCUSSION

The parties have submitted extensive briefs. We have considered all of their arguments, whether or not we mention or discuss them. For purposes of summary judgment, the Navy alleges that, even accepting all of appellant's factual allegations *arguendo*, the Navy is entitled to judgment on all aspects of appellant's claim as a matter of law. Principally, appellant contends in briefing that: (1) it is entitled to its unrecovered Emerald Sea dry dock certification costs under the terms of the base contract as direct charges to the contract; (2) alternatively, it had a contract implied-in fact with the Navy that the Navy would pay those costs; (3) alternatively, the Navy is liable for those costs due to its superior knowledge; (4) and the "two-rate," "billing error," and "unabsorbed overhead" claims are valid separate indirect cost claims. In defending against summary judgment, appellant has not pursued its constructive partial termination for convenience, equitable estoppel, pre-option cost, desirable change, and certain other arguments it has made previously, but it states that it has not abandoned them in the event of subsequent proceedings.

I. McGeehin Declaration

In support of its assertion that the Board cannot consider Mr. McGeehin's declaration, the Navy contends that the court held in *Rumsfeld v. United Technologies Corp*., 315 F.3d 1361, 1369 (Fed. Cir.), *cert. denied*, *United Technologies Corp., Pratt & Whitney v. Rumsfeld*, 540 U.S. 1012 (2003), that the views of an accounting expert concerning contract interpretation, accounting statutes and regulations are legally irrelevant and that the Board could not receive them. However, the Navy overstates the court's holding. For example, the court expressly stated that the Board could properly consider expert testimony concerning GAAP requirements, 315 F.3d at 1369 n.6. Therefore, except to the extent that Mr. McGeehin expresses his views on the correct interpretation of the contract, or upon an alleged agreement between the parties, which are matters of law not within his province, we have considered his declaration.

II. Summary Judgment Standards

Summary judgment is a salutary method to resolve an appeal when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Sweats Fashions, Inc. v. Pannill Knitting Co*., 833 F.2d 1560, 1562-63 (Fed. Cir. 1987). In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact. Even when there is a factual dispute, a disputed fact is only material if it might make a difference in the appeal's outcome. There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Any significant doubt over factual issues, and all reasonable inferences,

must be resolved and drawn in favor of the party opposing summary judgment. However, the opposing party must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. *Sweats Fashions, supra,* 833 F.2d at 1562-63; *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390-91 (Fed. Cir. 1987).

III. Appellant's Claims For Dry Dock Certification Costs As Direct Costs

A. Claim Under Base Contract

The Navy contends, among other things, that appellant's claim under the base contract for dry dock certification costs fails because, regardless of how appellant characterizes its claim, its genesis is the Navy's decision not to exercise dry dock options, which was fully within its discretion. Additionally, appellant's predecessor AOE contracts contained the same language in their Statements of Work as in the subject contract requiring appellant to provide the facilities necessary for the work, including a certified dry dock. Appellant repeatedly charged its dry dock costs as indirect costs, but now seeks an inconsistent, impermissible, retroactive change that would allocate them as direct costs to this contract, which is contrary to the parties' prior course of dealing. A contractor must maintain consistency in its accounting procedures and cannot increase its reimbursable costs under a cost-type contract by changing accounting practices after contract award. Appellant's inconsistency is highlighted by the fact that it now seeks to charge dry dock certification costs directly, while its "two-rate," "billing errors," and "unabsorbed overhead" claims continue to treat dry dock costs as indirect costs. The Navy further asserts that the change claimed would be inequitable because the $4,502,000 appellant seeks in unrecovered certification costs would result in a greater payment to it than if the Navy had exercised all of its dry dock options and used the dry dock accordingly, which appellant had anticipated would yield $3,791,572 in Navy payments.

Appellant responds that this appeal does not concern option exercise, but rather the Navy's promise under the base contract to reimburse it for its costs of preparing and maintaining the Emerald Sea dry dock to a state of readiness to perform the Navy's dry docking repairs. Appellant contends that the agreement is derived from the parties' written contract, interpreted in light of their understanding when they entered into it. It asserts that it sought the accounting change at issue prior to entering into the contract, and that, pending the establishment of an equitable method to charge the dry dock costs to the Navy as they were incurred, they were merely provisionally allocated based upon dry dock usage. Appellant alleges that the agreement to implement a new cost reimbursement method thus was not a retroactive change and did not create an accounting inconsistency, but instead recognized the difference in usage between the Emerald Sea dry dock and appellant's other dry docks and the extraordinary level of

repairs required to qualify the Emerald Sea for AOE work. It alleges that the Emerald Sea costs had only a single cost objective—the subject contract—and thus were properly chargeable as direct costs.

Appellant also states:

> To be clear, Todd's position is that the Contract obligated the Navy to reimburse Todd's Emerald Sea Dry Dock costs without regard to whether any or all of the options were exercised. The Contract does not specify the methodology by which those dry dock costs will be reimbursed. In previous contracts, where dry dockings had taken place, that reimbursement was through an indirect cost methodology, and it sufficed because Todd was ultimately reimbursed for its dry dock costs. In this instance, because of the extraordinary nature and cost of the dry dock repairs, a different methodology was appropriate and became necessary when the projected dry dockings did not occur.

(App. reply at 8-9) Appellant acknowledges that it performed repairs on commercial vessels in the Emerald Sea dry dock during the period covered by its claim, but asserts that it did so to mitigate its damages.

With respect to the alleged inconsistent treatment of its claimed "two-rate," "billing errors," and "unabsorbed overhead" costs as indirect costs, Todd states:

> The Navy also notes that one or more of the smaller claims in Todd's March 28, 2005 claim submittal treats certain costs as indirect – claiming that this is an inconsistency. The short answer to this assertion is that these claims were formulated at the suggestion of the Navy and removed from Todd's direct cost calculation because the Navy had indicated that, as so formulated, they could be the basis for the Navy's payment. Todd does not seek a duplicate recovery but rather seeks recovery of these costs only as an alternative to a direct cost recovery.

(App. opp'n at 33)

Under appellant's predecessor AOE contracts, pursuant to its standard accounting procedures, it had allocated dry dock costs as indirect costs based upon dry dock usage, with adjustments for vessel weight and AOEs. This had been its consistent practice in

allocating its general costs for the Emerald Sea dry dock to individual government and commercial contracts, for at least 12 years prior to its current claim.

The contract at award contained 24 option CLINs, 13 of which were for AOE ship repair and alteration work. Of those 13 options, 4 included dry docking. Dry dock work was later added to option CLIN 0013, covering the USS CAMDEN. The Navy exercised and the parties definitized that option. However, it developed that the CAMDEN work was the only dry docking work appellant performed under the contract. The Navy had provisionally exercised one other dry docking option, CLIN 0017, pertaining to the USS SACRAMENTO, but 15 days later it notified appellant that it had decided to cancel that dry docking. Thereafter, by bilateral contract modifications, CLIN 0017 was changed to a category that did not entail dry docking.

The Option to Extend the Term of the Contract clause provides that the government "may" extend the contract term (R4, tab 1 at GOV126). It specifies options and states that the government has the right unilaterally to exercise any one of them "whether or not" it exercises others (*id*.). The contract also uses the conditional phrase, "IF OPTION(S) ARE EXERCISED," further acknowledging that they might not be (R4, tab 1 at GOV61, -65). Thus, nothing in the contract binds the Navy to exercise its options, or limits its discretion whether to do so. *See Government Systems Advisors, Inc. v. United States*, 847 F.2d 811 (Fed. Cir. 1988); *Plum Run, Inc*. ASBCA No. 46091 *et al*., 97-2 BCA ¶ 29,193.

Although appellant does not allege that the Navy improperly failed to exercise options, its description in its claim of the "core of the issue" (R4, tab 60 at GOV516), and some of its current arguments link the Emerald Sea dry dock certification costs it seeks with the Navy's decisions not to exercise certain dry dock options and the consequent reduction of the AOE repair work against which appellant had traditionally charged its dry dock costs. The claim asserts that the lack of such AOE work required appellant's recovery of those costs in "some other way" (*id*.).

The first alleged "other way" is under the base contract. The contract does not mention recovery of Emerald Sea dry dock certification costs in particular or evidence any intent by the parties that they were to be charged to the contract as direct costs.

However, the contract's Allowable Cost and Payment clause incorporates the cost principles in FAR Subpart 31.2. Under FAR 31.201-1(a), any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used. FAR 31.202(a) defines a direct cost as one that can be "identified specifically with a particular final cost objective," in this case a contract (*see* FAR 31.001). It prohibits allocation of any cost to a contract as a direct cost if other costs incurred for the same purpose "in like circumstances" have been included in any indirect cost pool allocated to

that contract. Under FAR 31.203(a), an indirect cost is one "not directly identified with a single, final cost objective," but with two or more of them, and it is not subject to treatment as a direct cost. Under FAR 31.203(d), when, as here, CAS standards do not apply, a contractor is to allocate its indirect costs in accordance with GAAP in a consistent manner. The allocation method may require examination in the event of substantial differences in cost patterns under a contract and the contractor's other work or if significant changes occur in the nature of the contractor's business, fixed asset improvement programs or other relevant circumstances. FAR 31.201-4 makes a cost allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received. Subject to that prerequisite, under FAR 31.201-4(a) and (b), a cost is allocable to a government contract if it is incurred specifically for the contract or if it benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received.

For summary judgment purposes, the Navy has accepted that: appellant's expenditures to upgrade, alter, repair and maintain the Emerald Sea dry dock in order to service AOE vessels were extraordinary due to the age and deteriorating condition of the dry dock and were necessary solely to prepare it for AOE availabilities, not to perform commercial work. We have an expert opinion before us that, under these circumstances, an accounting change was appropriate and that the Emerald Sea dry dock certification costs were properly chargeable to the subject contract as direct costs. We have no conflicting expert opinion.

Moreover, for summary judgment purposes, the Navy has also accepted that, in anticipation of the subject contract, appellant discussed with it the need for substantial repairs to the Emerald Sea dry dock and their high cost, and that, beginning in about March 2001, which was prior to contract award, appellant engaged in discussions with the Navy regarding a change to the methodology for reimbursing the costs of repairing and maintaining the Emerald Sea. We have not located in the record, or been directed to, the parties' forward pricing rate agreements or direct documentation concerning whether the contract years in question were closed when appellant sought to change its accounting methodology.

Thus, the record to date is insufficient for us to determine whether the accounting change appellant sought was warranted, prospective, allowable, and unreasonably denied, as it asserts, or was unjustified and impermissibly inconsistent and retroactive, as the Navy contends. *See, e.g., Celesco Industries, Inc.*, ASBCA No. 20569, 77-1 BCA ¶12,445 at 60,287, *clarified on recons.*, 77-2 BCA ¶12,585 (denying retroactive change in bid and proposal cost allocation, noting contractor had been aware of changing business situation prior to requested change and that contracting party should not be permitted to benefit from retroactive accounting changes). *See also Blue Cross and Blue Shield Assoc.*, ASBCA No. 26529, 86-2 BCA ¶ 18,751 at 94,4127 (denying retroactive

change under which state insurance assessment, previously allocated only to appellant's private subscription business, but which had increased substantially over time, would be allocated in part to appellant's contract with government to administer Medicare payments; Board noted change would violate requirements for accounting consistency and, absent "peculiar" circumstance, neither contracting party could retroactively change accounting treatment of cost item to the prejudice of the other), *aff'd Blue Cross and Blue Shield Assoc. v. United States*, 13 Cl. Ct. 710 (1987), *aff'd* 852 F.2d 1294 (Fed. Cir. 1988) (unpub.); *cert. denied*, 488 U.S. 933 (1988), *rehr'g denied*, 488 U.S. 1051 (1989).

Due to the need for more development of the material facts, the Navy is not entitled to summary judgment on appellant's direct cost claim under the base contract.

B. Claim Based Upon Contract Implied-in-Fact

The Navy contends that appellant's alternative argument that the parties entered into an implied-in-fact contract under which the Navy would pay appellant's unrecovered Emerald Sea dry dock certification costs is unfounded for several reasons: Messrs. Orcutt, Noel, and Fallica lacked contracting authority; there cannot be an implied agreement when a written contract controls the same subject matter; the alleged implied agreement lacked consideration because it pertained to appellant's pre-existing contractual duty to supply a certified dry dock; negotiations towards an agreement do not constitute an agreement, particularly when the parties intend a written one; and any agreement was, at best, an agreement to attempt to reach an agreement. The Navy also denies that there was any ratification of any oral agreement and adds that, even accepting *arguendo* all of Todd's alleged facts concerning ratification, they would not satisfy the legal prerequisites for ratification.

Appellant counters that it has established an implied-in-fact contract. It asserts that, prior to entering into the subject contract, the CO (whom appellant does not name) had designated Mr. Orcutt to reach an agreement on behalf of the Navy on a new cost reimbursement method; Mr. Orcutt agreed that a method would be finalized to pay for dry dock certification costs as they were incurred, regardless of any option exercise and any dry dock use; he had the necessary authority to bind the Navy; and a "successor [CO]," said to be Mr. Throckmorton (app. opp'n at 37), had ratified the agreement that appellant would be reimbursed for its dry dock certification costs, both during several months of negotiations and by accepting the benefits of appellant's expenditures, knowing that it expected to be reimbursed. Appellant first describes the agreement as follows:

> Todd and the Navy reached an implied-in-fact agreement that Todd would be compensated for its dry dock costs by a method that would not be dependent on eventual scheduled or

> emergent dry dockings. The parties did not finalize the specifics of the new cost reimbursement method, but that method was to be determined by future, good-faith negotiation and was not necessary to the agreement itself.

(*Id*. at 43) Appellant alleges that the implied-in-fact contract was negotiated on a separate but complementary path with the express agreement and that the consideration for the implied-in-fact agreement was "Todd's provision of a dry dock suitable for AOE vessels that no other contractor in the area could provide" (*id*. at 44).

In further briefing, appellant explains that it is not claiming that Mr. Orcutt had apparent contracting authority but that he had implied actual authority based upon the duties assigned to him and the authority he had been given to take action. Appellant also alleges that the parties agreed on all material terms regarding compensation for its dry dock costs; they left the details of the compensation mechanism for later determination; but they did not leave any material terms to a later written memorialization.

Appellant also alleges that depositions revealed a second basis for finding that the CO ratified its alleged implied in fact agreement:

> [N]amely, that Mr. Throckmorton acknowledged in a Point Paper that Todd "had a sound basis for an equitable price adjustment of approximately $5.4 million" and authorized payment, subject only to approval by NAVSEA headquarters. Mr. Throckmorton reached this conclusion despite an erroneous belief – borne of the incorrect advice of his accountants and counsel – that legal entitlement did not exist absent retroactive changes to Todd's accounting system. The Point Paper thus recommended that the retroactive accounting changes be carried out through "an advance agreement." None of this was, in fact, required . . . . For purposes of ratification, however, the salient fact is that only because Mr. Throckmorton was misled into believing that approval by NAVSEA headquarters would be denied, was Todd not paid. The Point Paper thus constitutes Mr. Throckmorton's ratification of Mr. Orcutt's promise.

(App. supp. br. at 1-2)

To establish an implied-in-fact contract with the government, appellant must show mutuality of intent to contract, consideration, lack of ambiguity in offer and acceptance, and that the government representative whose conduct is relied upon had actual authority

to bind the government in contract. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). "Extensive negotiations in which the parties demonstrate hope and intent to reach an agreement are not sufficient in themselves to establish a contract implied-in-fact. Moreover, in negotiations where the parties contemplate that their contractual relationship would arise by means of a written agreement, no contract can be implied." *Pacific Gas & Electric Co. v. United States*, 3 Cl. Ct. 329, 339 (1983) (citations omitted), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984) (unpub.). Finally, an "express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract." *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990).

Even accepting all of appellant's allegations of fact as true for purposes of the government's motion, there is simply no foundation for a contract implied-in-fact. First, the alleged implied contract is not "entirely unrelated to" the parties' express contract, under which the dry dock certification requirement arises. Although the contract does not mention certification costs in particular, they are part of its overall cost recovery scheme under the Allowable Cost and Payment clause. Even if the payment of the Emerald Sea dry dock certification costs were deemed to be a separate, unrelated, matter, the most appellant has established is that the parties were attempting to reach an agreement pertaining to some payment by the Navy for such costs.

Preliminarily, appellant's discussion of the point paper drafted by Mr. Fallica of CO Throckmorton's office is largely legal argument and characterization, not fact, and is not supported by the document itself. The paper, an internal Navy document, recommended an advance agreement with Todd concerning dry dock certification costs, subject to conditions. It concluded that Todd had demonstrated a sound basis for a $5.4 million equitable price adjustment, but noted that it was the government's position that there might be no contractual requirement to make an adjustment except for costs related to billing errors. In contemporaneous e-mails, CO Throckmorton described the point paper to Mr. Herrell of NAVSEA's central contracting office and other government personnel as reflecting "proposed settlement methodology" (app. supp. br., ex. 1). In an e-mail to Mr. Hanson, Mr. Herrell's superior at NAVSEA's central contracting office, CO Throckmorton favored pursuing only the certification cost portion of the proposed settlement methodology and concluded: "Once we have your concurrence on a settlement approach, [Mr. Fallica] can finalize negotiations with Todd, and Ernesto Perez . . . can authorize the resultant action" (*id*.).

In the end, there was no Navy concurrence on a settlement approach and no resulting final negotiations. There was never any implied-in-fact agreement by the Navy to pay appellant's claimed Emerald Sea dry dock certification costs. Appellant has not established that, drawing all reasonable inferences in its favor, there was any

consideration for such an implied agreement, since it was already bound under the express contract to supply the certified dry dock, or even if there were consideration, that any Navy official with actual authority, or with "implied actual authority," entered into any such agreement. Among other things, to establish implied actual authority in a government employee who allegedly created an obligation requires a showing that the authority claimed is an integral part of the duties assigned to that employee. *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989); *Catel, Inc.*, ASBCA No. 54627, 05-1 BCA ¶ 32,966 at 163,298-99; *MTD Transcribing Service*, ASBCA No. 53104, 01-1 BCA ¶ 31,304 at 154,540. While Mr. Orcutt, to whom appellant points, had participated in negotiating advance agreements in the past, he was not among the persons with actual contracting authority named in the Navy's written designations to appellant. Moreover, circumstances belie that he had any implied actual authority. Those advance agreements were subject to approval by Navy review boards, which included COs, and Mr. Orcutt did not sign any of the final implementing documents binding the government to the advance agreements.

Even if there had been some sort of unauthorized agreement by Mr. Orcutt or any other Navy employee, it is apparent that there was no ratification of it. CO Throckmorton's ratification authority was limited to $50,000, subject to requirements, including written reports to NAVSEA headquarters with detailed justification. This is far below the amount appellant claims in certification costs. The CO could also recommend ratification of unauthorized commitments exceeding his $50,000 limit. He denies any ratification and there is no evidence of any. In any case, even if the CO had recommended ratification, his final decision denying appellant's claim evidences that there was none.

It is abundantly clear that the agreement appellant and the Navy were contemplating was to be memorialized in writing; that the Navy ultimately did not agree to pay unrecovered Emerald Sea dry dock certification costs; and there was no ratification of any unauthorized agreement. Under the undisputed facts, appellant cannot meet its burden to prove its claimed contract implied-in-fact.

The Navy is entitled to summary judgment on appellant's direct cost claim under an alleged contract implied-in-fact.

C. Claim Based Upon Superior Knowledge

While continuing to accept appellant's allegations *arguendo*, the Navy alleges that appellant has not established the elements necessary to recover its claimed dry dock certification costs based upon the superior knowledge doctrine. Appellant responds that "there is reason to believe that the Navy had superior knowledge regarding the planned transfer and decommissioning of the AOE vessels at the time the Contract was executed

or not long thereafter" (app. opp'n at 45) (emphasis added) and that there is a "likelihood" that the Navy had superior knowledge that it failed to share with appellant (*id*. at 46). Appellant further describes its superior knowledge claim as "premised on the combined facts that the Navy had reason to know that the Navy would not be exercising the Contract options for the ship repairs and that if those options were not exercised, it did not intend to reimburse Todd's dry dock costs" (app. reply at 17-18). Appellant alleges that the Navy's withholding of this "vital knowledge" led appellant to sign the contract without insisting that the Emerald Sea dry dock cost methodology first be finalized, thus affecting appellant's performance costs (*id*. at 18).

The superior knowledge doctrine "imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000). Application of the doctrine can, "in limited circumstances," result in a determination of contract breach, but a contractor claiming breach due to the government's non-disclosure of superior knowledge must produce "specific evidence." *GAF Corp. v. United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992). The specific evidence must show that: (1) the contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration (sometimes stated as "direction"); (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor, or did not put it on notice to inquire; and (4) the government failed to provide the relevant information. *Id*.; *American Ship Building Co. v. United States*, 654 F.2d 75, 79 (Ct. Cl. 1981). The superior knowledge doctrine refers "only to the time the contract was made." *J. A. Jones Construction Co*., ASBCA No. 43344, 96-2 BCA ¶ 28,517 at 142,419.

Appellant presents the alleged facts in support of its contentions through the declarations of Messrs. Welch and Wiscomb. Mr. Welch states that, during the course of the contract, the Navy conveyed some information to the effect that one or more AOEs might be transferred to MSC and would not be delivered to appellant for alterations or repairs, but that the scheduling information the Navy provided, especially pertaining to timing, was "woefully unreliable – *perhaps* even misleading" (app. opp'n, ex. A, Welch decl. ¶ 34)(emphasis added). He continues that "[*i*]*f the Navy had knowledge or reason to believe* that the scheduled dockings might not occur because of accelerated decommissioning or transfer to other Navy activities, the Navy never shared that information" with appellant until too late to affect its expenditures for the Emerald Sea Dry Dock (*id*. ¶ 35) (emphasis added).

According to Mr. Wiscomb, none of the information he had seen conveyed that decommissionings and cancelations were imminent. He and Mr. Welch declare that appellant was surprised and shocked by the Navy's decommissioning of AOEs and

cancellation of availabilities, including the USS SACRAMENTO. Mr. Welch states that, in February 2002, a Navy Vice Admiral had advised him of his "belief" that the AOE 1 Class would be active for 10 to 15 years (app. opp'n, ex. A, Welch decl. ¶ 36).

Accepting Mr. Welch's hearsay report as accurate, it would appear to undermine, rather than enforce, the allegation that the Navy had superior knowledge about the AOEs' future. In any case, the admiral's statement of his belief was made after contract award and could not have influenced appellant's decision to enter into the contract. Moreover, Mr. Welch acknowledged that it was clear on the face of the contract that the AOE availabilities might not occur depending upon the Navy's option exercise or its decisions regarding unscheduled availabilities, and that appellant recognized that changes in expected dockings were "always a possibility" (*id.*. ¶¶ 34-35).

Thus, appellant fails at the outset to satisfy element (3) of the superior knowledge doctrine. The contract did not mislead appellant as to the likelihood of the Navy's exercising its options or fail to put it on notice to inquire. *See Solar Turbines, Inc. v. United States*, 26 Cl. Ct. 1249, 1271-72 (1992), *aff'd,* 114 F.3d 1206 (Fed. Cir. 1997) (unpub.), where the court noted that the government's failure to disclose superior knowledge can result in a contract breach in "certain narrowly defined circumstances" (*id*. at 1271), but stated:

> [T]he duty to disclose superior knowledge as defined in case law would not seem to encompass the type of knowledge plaintiff alleges the Navy failed to disclose here. . . .
>
> . . . .
>
> Here, plaintiff has failed to establish [the superior knowledge] prerequisites with respect to the information it alleges the Navy withheld. . . . [T]he contract specifications certainly did not mislead plaintiff as to the likelihood of the Navy entering such future contracts or fail to put plaintiff on notice to inquire . . . . The contract simply provided the Navy with an unpriced option to have plaintiff design and manufacture two additional units and left the determination of whether to exercise that option and purchase those units completely up to the Navy.

(*Id*. at 1272) (citations omitted)

In any event, appellant's alleged facts and conclusory contentions are couched in indefinite and speculative terms and concede that the Navy might not even have had the

alleged superior knowledge at the time of contract award. The parties have engaged in discovery and, under the terms of the contract and undisputed facts of this appeal, we do not envision any possibility that a hearing would yield material evidence leading to any recovery by appellant based upon the superior knowledge doctrine. Speculation and conjecture are insufficient to defeat an otherwise proper motion for summary judgment. *The American Aerospace Technology Corp*., ASBCA No. 36049, 90-1 BCA ¶ 22,354 at 112,316 (*aff'd on recon*. *The American Aerospace Technology Corp*., ASBCA No. 36049, 89-3 BCA ¶ 22,100).

The Navy is entitled to summary judgment on appellant's direct cost claim under the doctrine of superior knowledge.

IV. Appellant's Indirect Cost Claims

Appellant alleges that its indirect cost claims "were broken out and formulated based on the Navy's own direction that the claims would be favorably received" (app. reply at 19). The record does reflect that appellant formulated the claims after some Navy involvement and guidance. However, as set forth above and below, appellant has not established any agreement by the Navy to pay any of appellant's claim items.

A. Two-Rate Claim

Under appellant's two-rate claim, it would continue to allocate its dry dock costs as indirect costs to commercial and government contracts and to allocate routine operation and maintenance costs to all vessels, but would alter its past practice by allocating its dry dock capital improvement costs only to those larger and heavier vessels that benefited from the improvements, including AOEs. The Navy alleges that this aspect of appellant's claim is based upon conclusory allegations that an accounting change would be reasonable and proper and is an impermissible retroactive change. The Navy notes, additionally, that the dry dock costs at issue would be allocated only to the two USS CAMDEN dry dockings, the first of which was under predecessor Contract No. 8500, during CFY 2002. Appellant now acknowledges that it released any claims arising out of that dry docking in bilateral Modification No. A01185 to that contract. The Navy adds that, even if it had proposed the changes alleged by appellant in this and its other claims, under FED R. EVID. 408, a party's statements made in compromise negotiations may not be used by the other party as an admission of liability.

Appellant has acknowledged release of the stated portion of its two-rate claim (app. reply at 21), and the Navy is entitled to summary judgment on that portion of appellant's claim. However, appellant denies that the Navy is entitled to judgment on the remaining portion. As with its direct cost claim, appellant asserts that it is entitled to change its previous dry dock cost allocation method due to the special circumstances of

the extraordinary repairs and upgrades made to the Emerald Sea dry dock. Citing the Navy's point paper, appellant also contends that the Navy agreed that the two-rate method of allocating its indirect costs is appropriate.

Appellant has failed to establish any agreement by the Navy to a change in appellant's established accounting method of allocating its dry dock costs as indirect costs to its commercial and government contracts and the Navy is entitled to summary judgment on that issue.

Nonetheless, our discussion above of FAR 31.203(d)'s provision for reevaluation of an existing cost allocation method under certain circumstances, and concerning the current record's inadequacy to establish whether the accounting change appellant sought was warranted, prospective, allowable, and unreasonably denied, as it asserts, or was unjustified and impermissibly inconsistent and retroactive, as the Navy contends, applies here. Thus, the Navy is not entitled to summary judgment on this aspect of appellant's two-rate indirect cost claim.

B. Billing Errors Claim

Appellant's billing errors indirect cost claim seeks to change its established accounting procedure of basing dry dock usage charges for commercial vessels upon their gross weight and usage charges for AOEs upon their displacement weight. The Navy asserts that the claim's description is a misnomer because there were no "billing errors" to be corrected. Rather, appellant belatedly realized that its established accounting practice was not as advantageous to it as would be the different, impermissible, retroactive change it now advocates. The Navy further alleges that the claim as filed was based solely upon Mr. Noel's alleged agreement that appellant's past accounting practice did not fairly allocate costs to the AOEs and that, even if Mr. Noel had had contracting authority, which he did not, a statement about fairness, unsupported by consideration, is not a binding commitment.

The Navy also notes, and appellant agrees (app. reply at 22), that, as with its two-rate claim, appellant released its alleged billing error costs applicable to the CFY 2002 USS CAMDEN dry docking. Thus, the Navy is entitled to summary judgment on that portion of appellant's billing errors claim.

While appellant also "agrees with the Navy that Mr. Noel's concurrence in the reasonableness of the correction of the billing errors does not itself bind the Navy to the correction," it adds that the claim item was formulated based upon the Navy's recommendation, and that the prior method of cost allocation was unreasonable and should be corrected (app. opp'n at 50). Appellant alleges that the Navy's point paper acknowledged the billing errors and the equity of correcting them and appellant asserts

that it has demonstrated both special circumstances and the need for an accounting change to produce equitable results.

Again, appellant has failed to establish any agreement by the Navy to a change in appellant's established accounting method of allocating its dry dock costs as indirect costs to its commercial and government contracts, and the Navy is entitled to summary judgment on that issue.

However, again, our discussion of FAR 31.203(d)'s provision for reevaluation of an existing cost allocation method under certain circumstances, and concerning the current record's inadequacy to establish whether the accounting change appellant sought was warranted, prospective, allowable, and unreasonably denied, as it asserts, or was unjustified and impermissibly inconsistent and retroactive, as the Navy contends, applies here. Thus, the Navy is not entitled to summary judgment on this aspect of appellant's billing errors claim.

C. Unabsorbed Overhead Claim

Appellant seeks alleged unabsorbed overhead due to the deletion of the USS SACRAMENTO dry docking from option CLIN 0017. Appellant contends that due to a "short" two-month cancellation notice it was only able to fill a portion of the nine-week planned dry docking period involved with other work (R4, tab 60 at GOV515).

The Navy asserts that appellant's claim is barred by its unqualified, binding, releases in bilateral Modifications Nos. A00427 and A00434 and, in any case, appellant has neither alleged nor proved the legal elements necessary to support a claim for recovery of unabsorbed overhead expenses. Among other infirmities, appellant admitted in its claim that it did not apply the *Eichleay* formula, which is the exclusive means by which a contractor can establish unabsorbed overhead.

Appellant alleges that the modifications at issue pertained to work on the USS SACRAMENTO performed pier side, not at the Emerald Sea dry dock, and that its unabsorbed overhead claim is for its inability to use that dry dock during the period in which the USS SACRAMENTO dry docking was to have occurred. It also contends that its unabsorbed overhead claim is akin to an equipment standby claim and meets the "spirit of" *Eichleay* delay cases (app opp'n at 52).

On 19 December 2003, the Navy notified Todd that it had decided to cancel the planned dry docking of the USS SACRAMENTO under dry dock option CLIN 0017. Bilateral Modification No. A00427, effective on 27 February 2004, changed CLIN 0017 from the dry docking DPMA category to a PRAV category, which did not entail dry docking. The modification contains the following unqualified release:

> 7. The change in delivery date, estimated cost, base fee, and award fee pool described above is considered to be fair and reasonable and has been mutually agreed upon in full and final settlement of all claims arising out of this modification and any other modifications or change orders indicated above, including all claims for delays and disruption resulting from, caused by, or incident to such modifications or change orders.

(R4, tab 34 at GOV278) The modification does not contain any reservation of claims. The release is not limited in its coverage to matters affecting pier side work. Bilateral Modification No. A00434, effective 30 March 2004, reflects the parties' bilaterally negotiated definitized price, and the change of the CLIN from a DPMA to a PRAV. It contains a similar unqualified release without any claim reservation. Again, the release is not limited to pier side work. Further, apart from any other consideration pertinent to Modification No. A00427, the price definitization in Modification No. A00434 was consideration for appellant's execution of the release. (R4, tab 37) *See Inland Empire Builders, Inc. v. United States*, 424 F.2d 1370, 1376 (Ct. Cl. 1970).

Appellant's unabsorbed overhead claim, regardless of whether it is characterized an equipment standby claim, is based upon its inability to perform dry docking work on the USS SACRAMENTO as it had planned and its inability to make full use of the Emerald Sea dry dock during a portion of the period previously scheduled for the SACRAMENTO. The triggering event was the cancellation of the SACRAMENTO dry docking, which occurred prior to appellant's execution of the releases. In considering substantially similar release language in a bilateral modification executed without any claim reservation, we noted that "[i]t is well settled that a contractor who executes an unconditional release is barred from any additional compensation under the contract based upon events occurring prior to the execution of the release." *Northwest Marine, Inc.*, ASBCA No. 40505, 94-3 BCA ¶ 27,036 at 134,742 (citations omitted). *See also Pacific Ship Repair & Fabrication, Inc.*, ASBCA No. 49288, 99-1 BCA ¶ 30,222 (similar release clause bars contractor's claims). Thus, appellant's unconditional releases are binding and bar its claim for unabsorbed overhead.

Moreover, even if the releases were not binding, the Navy is correct that appellant has not satisfied the prerequisites for recovery of its claimed unabsorbed overhead. First, while appellant eschews the *Eichleay* formula and has not attempted to show that it applies, it is the exclusive means of calculating unabsorbed overhead when the government has delayed a contract and caused the contractor to be on standby. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577-80 (Fed. Cir. 1994). Moreover, to prove entitlement to *Eichleay* damages, the contractor must show that: a government-caused

delay was substantial and of indefinite duration; during that delay the contractor was required to be ready to resume full work on the contract immediately; and there was an effective suspension of much, if not all, of the work on the contract. *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370-71 (Fed. Cir. 2003). Here, the dry docking work at the Emerald Sea was deleted from the contract in a bilateral modification and was not to be resumed. There was no pertinent Navy-caused suspension or delay and the Navy did not place appellant on standby.

The Navy is entitled to summary judgment on appellant's unabsorbed overhead claim.

DECISION

We grant the government's motion for summary judgment as to sections III.B, III.C, and IV.C above. We grant the motion to the extent stated as to sections IV.A and IV.B, and otherwise deny it.

Dated: 19 June 2008

CHERYL L. SCOTT
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 No. 55126, Appeal of Todd Pacific Shipyards Corporation, rendered in conformance with the Board's Charter.

Dated:

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