ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
General Dynamics C4 Systems, Inc.	)	ASBCA No. 54988
	)	
Under Contract No. N00039-98-D-0029	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

General Dynamics C4 Systems, Inc. has appealed from the contracting officer's (CO) final decision denying its claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, for costs pertaining to its performance of certain e-mailed delivery orders (DOs) that it contends were not issued in accordance with the terms of its indefinite delivery, indefinite quantity (IDIQ) contract to supply digital modular radios (DMRs) to the Navy's Space and Naval Warfare Systems Command (SPAWAR). The DOs at issue are Nos. 0018-0020 and 0022-0029. The parties cross-moved for summary judgment on entitlement. We granted the Navy's motion with respect to appellant's contentions that the Navy had violated Federal Acquisition Regulation (FAR) provisions concerning options and we otherwise denied the motions. *General Dynamics C4 Systems, Inc.*, ASBCA No. 54988, 08-1 BCA ¶ 33,779 (*GDC4S I*). In December 2008 the Board held a hearing on entitlement and quantum. For the reasons stated below, we sustain the appeal.

FINDINGS OF FACT

Contract and Background

1. On 4 September 1998 SPAWAR awarded the subject firm fixed-price (FFP) IDIQ contract for the production of DMRs and associated items (the contract) to Motorola, Inc., Systems Solutions Group (Motorola). CO David Bodner executed the contract on behalf of the government. (R4, tab 5 at 1; tr. 1/45) By novation agreement

entered into as of 28 September 2001, which the government recognized by modification effective 1 February 2002, applicable to the contract and others, General Dynamics Decision Systems, Inc. (GDDS) assumed the contract. Effective 1 January 2005, it changed its name to General Dynamics C4 Systems, Inc. (GDC4S). (App. supp. R4, tab 105; tr. 1/50-53; compl., answer ¶ 3; *see also* R4, tab 2 at 1-2) For convenience, we refer to the contractor throughout as "GDC4S," unless we specify otherwise.

2. A DMR is a "software-defined" radio in which software duplicates the functionality of various radios. It is composed of four physical channels, each of which can emulate different radios. It differs from "legacy" radios it was replacing, which typically can perform only one function. A "waveform" is a complete software description necessary to permit the DMR to function as a particular type of radio. The contract was for acquisition of production quantities of the DMR and provided that the government could exercise various options for ordering periods and for additional radio capabilities, such as additional waveforms. (Tr. 1/31-33, 37-38; compl., answer ¶¶ 9-11; *see* app. supp. R4, tab 144 at 26-27 of 29 (re legacy radios))

3. Before Motorola began the DMR program it did a "proof of concept" with the Air Force, which demonstrated that the technology was viable to emulate a host of different waveforms. Motorola decided to develop several products for targeted markets, including the tactical radio market within the Department of Defense (DoD) and the public safety market. The commercial market ultimately did not materialize due to price factors. (Tr. 1/39, 53)

4. At the time, the development of a software-defined radio "had never really been done," "never been really reduced to practice," and Motorola had to initiate "three major inventions" to develop the DMR: (1) producing the "RF" or digital components necessary for the spectrum of functions the radio would provide; (2) placing cryptographic algorithms in a software-based engine, "which had never been done before;" and (3) developing the software architecture for the radio platform (tr. 1/41, *see also* tr. 1/32).

5. The contract at award included contract line item number (CLIN) 0001 for three to six each "Surface Ship UHF SATCOM/LOS/SINCGARS four channel Transmit/Receive Radio" at the unit price of $648,000. It also included options for 5 and 10-year warranties and data and 5 option periods. CLIN 0101 covered the DMRs for the Option I period. (R4, tab 5 at B-1; tr. 1/75)

6. In addition to DMRs, warranties and other items, Options I through V at contract award called for software capabilities, including, among others: CLINs 0105, 0209, 0309, 0409, 0509, UHF LOS [Line of Sight] Transmit/Receive Capability ($5,700 per channel); 0106, 0210, 0310, 0410, 0510, UHF SATCOM Transmit/Receive Capability ($6,800 per channel); 0107, 0211, 0311, 0411, 0511, VHF SINCGARS/SIP

Transmit/Receive Capability ($5,080 per channel); 0110, 0216, 0316, 0416, 0516, HF [High Frequency] Transmit/Receive Capability ($8,320 per channel); 0213, 0313, 0413, 0513, VHF LOS ATC [Air Traffic Control] Transmit/Receive Capability ($1,700 per channel). The contract specifications described the various software capabilities required. (R4, tab 5 at B-2 to B-4, B-11 to B-13, B-21 to B-22, B-30 to B-32, B-40 to B-42, C-3, *et seq*. and as amended at Mod. No. P00008, effective 12/17/99 at 3-4)

7. Section H, SPECIAL PROVISIONS, of the contract, provided in part at § H-5, "EXERCISE OF OPTIONS":

> (a) The Government may exercise options in whole or in part anytime during the option periods set forth herein to require the Contractor to produce and deliver hardware items or provide services specified in the contract.... These options shall be exercised if at all by written notice signed by the [CO], transmitted to the contractor at anytime during the option exercise period set forth below:….

(R4, tab 5 at H-2) The clause listed groups of CLINs with option exercise periods extending through 30 September of each option period. Option V, pursuant to which DO Nos. 0018-0020 and 0022-0029 were issued, had an exercise period of 1 October 2002 through 30 September 2003. The DMR unit prices, as of contract award, decreased considerably with each option. (R4, tab 5 at B-1, -8, -18, -28, -38, -47, -50, H-2)

8. Section H-24, "PARALLEL DEVELOPMENT OF TECHNOLOGY," noted, *inter alia*, that, as of the date of contract award, Motorola had ongoing development projects funded entirely at private expense to evolve new waveforms for its software programmable radio, which the parties anticipated would result in commercially available waveforms. The clause concluded:

> b. Motorola and the Government agree that hardware, software, and waveform development is not specified as an element of performance of this contract. Motorola may continue to pursue these and other development projects at private expense. Nothing in this contract precludes Motorola from charging these and other development projects as independent research and development [IRAD] provided such costs otherwise meet the requirements of FAR 31.205-18.

(R4, tab 5 at H-17)

9. GDC4S charges its IRAD costs as general and administrative (G&A) costs (tr. 2/115-16).[1]

10. Section H-25, SOFTWARE LICENSE AGREEMENT, stated that the software delivered under the contract was considered to be commercial item software in accordance with Defense FAR Supplement (DFARS) 227.7202 (R4, tab 5 at H-18). Section H-25 also provided that two incorporated Software License Agreements applied to all software delivered under the contract. Both were non-exclusive licenses to use the software and documentation on a single DMR system at a time. One was for single channel use and the other allowed use on one to four channels simultaneously. The CLIN purchased was to determine which license applied. Both license agreements stated that the contractor was not selling, and retained ownership of, its software. Thus, the government's payments for the software capabilities were, in effect, software license fees and we sometimes so refer to them hereafter. (R4, tab 5 at H-18 to H-19)

11. At "SECTION I - CONTRACT CLAUSES," the contract incorporated by reference the FAR 52.216-22, INDEFINITE QUANTITY (OCT 1995) clause (R4, tab 5 at I-1), which provides in part:

> (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
>
> (b) *Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause.* [Emphasis added]

12. Section I included the following version of the FAR 52.216-18, ORDERING (OCT 1995) clause:

> (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of [DOs] or task orders by the individuals or activities designated in the Schedule. Such orders may be issued from [CLINs 0001-0127, from contract award through 365 days thereafter; 0201-0238, from option exercise date through 365 days thereafter; 0301-0338, from option exercise date through 365 days thereafter;

[1] In a separate dispute, the government challenged whether GDC4S had properly accounted for its IRAD costs in its fiscal year (FY) 2001 final incurred cost submission. The parties settled the matter in May 2008. (App. supp. R4, tab 172)

> 0401-0438, from option exercise date through 365 days thereafter; 0501-0539, from option exercise date through 365 days thereafter].
>
> However, no order for CLINs 0501-0539 shall be placed after 30 September 2003.
>
> (b) *All* [*DOs*] *or task orders are subject to the terms and conditions of this contract. In the event of conflict between a* [*DO*] *or task order and this contract, the contract shall control*.
>
> (c) If mailed, a [DO] or task order is considered "issued" when the Government deposits the order in the mail. *Orders may be issued orally, by facsimile, or by electronic commerce methods only if authorized in the Schedule*. [Emphasis added]

(R4, tab 5 at I-5)

13. Bilateral modifications, *inter alia*, modified the Ordering clause to revise the dates that certain DOs, not in question, could be issued. Each modification stated that "[e]xcept as provided herein, all terms and conditions of the [contract], as heretofore changed, remains [sic] unchanged and in full force and effect." (R4, tab 6, P00007 at 1, 5, P00018 at 1, 7, tab 7, P00021) The Ordering clause's provisions concerning who had authority to order, the manner in which orders were to be issued, and the final date for placing orders under Option V CLINs were not modified. The parties never discussed modification of the clause's limitation that DOs could be issued by electronic commerce methods only if authorized in the contract Schedule. (*See* R4, tabs 6-8; tr. 1/97, 2/21)

14. As of contract award in 1998, FAR Subpart 16.5—INDEFINITE-DELIVERY CONTRACTS, § 16.505(a)(5), Ordering, stated: "Orders may be placed by facsimile or by electronic commerce methods, *if provided for in the contract*" (emphasis added). However, the contract's Schedule did not authorize issuance of DOs orally, by facsimile, or by electronic commerce methods such as e-mail (R4, tab 5; compl., answer ¶ 16).

15. Contract Section I incorporated by reference the FAR 52.233-1, DISPUTES (OCT 1995) clause, which provides in part:

> (i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the [CO].

(R4, tab 5 at I-2) The section also incorporated by reference the FAR 52.243-1, CHANGES--FIXED-PRICE (AUG 1987) and FAR 52.243-3, CHANGES-TIME-AND-MATERIALS OR LABOR-HOURS (AUG 1987) clauses, which provide, at ¶¶ (e) and (d), respectively, that failure to agree to an adjustment is a dispute under the Disputes clause but the contractor is not excused from proceeding with the work as changed. (R4, tab 5 at I-2)

16. "SECTION I - CONTRACT CLAUSES" was included in each DO issued under the contract and provided that the clauses were: "As specified in the basic contract" (*e.g.*, R4, tab 9, DO No. 0018 at 3 of 3).

Delivery Orders, Modifications, Option Exercises

17. There were 28 DOs under the contract, Nos. 0001-0020, and 0022-0029 (R4, tab 9). CO Bodner issued DO No. 0001 on 8 September 1998 for four DMRs and eight power amplifiers (PAs), in the total amount of $2,854,200. It is uncontested that DO No. 0001 satisfied the contract's required minimum quantity. It is also uncontested that CO Bodner issued the DO via United States mail. (R4, tab 4 (transmittal ltr. at 1); R4, tab 9, DO No. 0001 at 1-2; tr. 2/121; compl., answer, ¶ 17; gov't br. at 6, proposed finding 3; *see also* tr. 2/48)

18. At the time of contract award to Motorola, the government had also awarded a contract to Raytheon. Both contracts required that DMR prototypes be built and submitted to the government, which would test them and perform a "down-select" to the radio of choice. Bilateral Modification No. P00007 to the subject contract, effective 19 November 1999, incorporated the down-select evaluation criteria and stated that the government anticipated that, after ordering the initial minimum contract quantity, it would exercise options under only one awardee's contract. The modification included the government's DMR price evaluation quantities: (Option 1), 100, under CLINs 0101-0127, FY 1999; (Option II), 142, under CLINs 0201-0238, FY 2000; (Option III), 80, under CLINs 0301-0338, FY 2001; (Option IV), 211, under CLINs 0401-0438, FY 2002; and (Option V), 228, under CLINs 0501-0539, FY 2003. The modification also extended the option exercise periods for Options I through IV in consideration for a decrease in DMR requirements. The Option I exercise period was extended to 31 January 2000. The Option V exercise period was not extended. (R4, tab 6, P00007 at 1-4, 6; tr. 1/57-62)

19. On 20 January 1999, CO Bodner issued DO No. 0002 for data requirements and repair parts. On 7 April 1999, he issued DO No. 0003 for a technical manual. He did not recall the method by which he issued any of his DOs. (R4, tab 9; tr. 2/119-21)

20. On 30 November 1999, successor CO Mark D. Lopez issued DO No. 0004 for technical manual items via e-mail. He issued the DO by e-mail because it was a standard SPAWAR command process, which he recalled had been employed previously under the

contract. He also issued all subsequent DOs under the contract by e-mail. He signed them and a Navy support contractor then distributed copies via e-mail to contractor and Navy personnel. CO Lopez never discussed the method of issuing DOs with GDC4S. During the contract's ordering period, GDC4S never challenged or raised any question about the fact that he issued DOs by e-mail. (R4, tab 9; supp. R4, tab 14; tr. 1/105-06, 2/109-10, 125-27)

21. Through bilateral Modification No. P00009, effective 26 January 2000, the parties further extended the Option I exercise period to 29 February 2000 (R4, tab 6).

22. Motorola prevailed in the down-select process. As part of its proposal, it reduced its prices from those in its basic contract. Bilateral Modification No. P00010, effective 1 February 2000, contained reduced DMR unit prices, for quantities of 1-151: $338,400 for Option I; $244,400 for Option II; $220,000 for Option III; $190,000 for Option IV; and, $170,000 for Option V. For more quantities, prices were less. The software license fees referred to above remained the same. Option Year I prices for the DMRs added both subCLIN 0101AA, 5-Year Warranty, beginning at $18,000 each for quantities 1 through 25, and subCLIN 0101AB, 10-Year Warranty, beginning at $36,000 each for those quantities. At the time, the Navy had not selected the type of warranty it wanted for the DMRs. It ultimately selected a 10-year warranty for hardware and a 5-year warranty for software. Motorola had used the information the government had supplied in Modification No. P00007 in arriving at its reduced "stair step" pricing (tr. 1/67), expecting that, as it built more units, it would become more efficient, allowing it to offer lower prices with each successive option year. (R4, tab 6, P00010 at attach. P; tr. 1/62-67)

23. By unilateral Modification No. P00011, effective 1 February 2000, SPAWAR exercised Option I (R4, tab 6).

24. On 3 February 2000, two days after the down-select modification, CO Lopez issued DO No. 0005, known as LRIP (Low Rate Initial Production)-1, for 95 DMRs, 10-year radio warranties, and software copies, at the reduced prices in bilateral Modification No. P00010. The DO also included 18 UHF LOS software licenses and 18 VHF SINCGARS/SIP software licenses, at the original contract prices of $5,700 and $5,080 per channel, respectively. (R4, tab 9, DO No. 0005 at 1-4, *et seq.*; tr. 1/70-72, 2/86)

25. Through bilateral Modification No. P00012, effective 28 March 2000, the Navy exercised Option II and, *inter alia*, the parties incorporated 10-year warranty prices for hardware and 5-year warranty prices for software. Software license fee prices were modified to "Buy 3 Get 4" prices as follows: UHF LOS, $6,270 per channel; UHF SATCOM, $7,480; VHF SINCGARS/SIP, $5,588; HF, $9,152; and VHF LOS ATC, $1,870. (R4, tab 6 at 1-15, 18; tr. 1/123)

26. GDC4S negotiated with the Navy to extend the Option Year I prices, rather than implement the lower Option Year II prices, in exchange for consideration. It had been losing money due to software development expenses that it was not recovering under the FFP contract and sought additional revenue to apply towards that development. The resulting bilateral Modification No. P00018, effective 28 March 2001, among other things, extended the ordering period for Option I CLINs 0101-0128 and 0601 to 30 April 2001. It established terms for SPAWAR's conditional acceptance of up to 53 more units under DO No. 0005's DMR CLIN 0101 and its withholding of $114,048 per unit until milestones were met. It extended Option I pricing for CLIN 0101 only, waived certain specification requirements, and provided that the contractor would supply additional functions, assemblies, technical support and testing at no additional cost to the government. (R4, tab 6, P00018 at 1, 5-7 of 7; tr. 1/72-76) The modification deleted the UHF SATCOM software license CLINs 0210, 0310, 0410 and 0510, for option periods two through five, and provided that the software was included with each DMR delivered (R4, tab 6, P00018 at 2 of 7; *see also* app. supp. R4, tab 144 at 28-29 of 29 (CO Lopez notes government received SATCOM software licenses "essentially … for $0 as part of a consideration package the government obtained in return for spec and schedule relief sought by the contractor;" *see* finding 68)). The modification also incorporated H-34, MOTOROLA, INC. DMR ALL CHANNEL LICENSE AGREEMENT, which replaced the license agreement contained at H-25 for the "licensed software" identified in H-34. That "licensed software" was identified as the SATCOM, SINCGARS, UHF LOS and VHF LOS waveform software. The government was granted a non-exclusive, perpetual license, to use the licensed software on any channel of any designated DMR delivered under DO Nos. 0005 and 0008. As with H-25, the H-34 license agreement provided that it was not a sale of the licensed software and that the contractor retained ownership. (R4, tab 6, P00018 at 3-4, 7 of 7)

27. On 30 March 2001, two days after Modification No. P00018 was effective, SPAWAR issued DO No. 0008, known as LRIP-2, whereby, among other things, it ordered 86 DMRs (R4, tab 9, DO No. 0008 at 1-3; tr. 1/76-77, 2/85).

28. Michael Schumacher was GDC4S' Division Manager of Contracts at the time of the hearing and, prior thereto, was GDC4S' Area Contract Manager. He was not working on the contract at the time of award in 1998 but subsequently became GDC4S' counterpart to CO Lopez. Stephen A. Polowski, who, at the time of the hearing, was GDC4S' "Contract Manager Staff," was not assigned to the DMR program at the outset. When he was assigned in 2000 or 2001, he worked for Mr. Schumacher. Mr. Polowski eventually assumed more project responsibility when Mr. Schumacher engaged in other activities, but he continued to report to him. As of September 2003, when SPAWAR issued the DOs at issue, Mr. Polowski was the DMR program's day-to-day contract manager. All DOs during his tenure were issued by e-mail. (Tr. 1/48-50, 79, 141, 2/8-9, 20, 28)

29. Mr. Schumacher received the LRIP-2 DO No. 0008 by e-mail. At the time he did not realize that the contract had any requirement about the manner in which DOs were to be issued. To his recollection, no one at GDC4S had suggested to him that the government was not to issue DOs by e-mail. GDC4S did not intend in any case to attempt to reject the DO because it was still trying to build a business and to work with the Navy to make the DMR the "next generation" radio. (Tr. 1/78) The DMR had not been built before and was state-of-the-art (tr. 1/108).

30. Effective 6 September 2001, by unilateral Modification No. P00023, SPAWAR exercised Option III (R4, tab 7).

31. Commencing in about August 2002, the parties negotiated to extend Option I DMR prices into Option Year III, in exchange for consideration to the Navy (app. supp. R4, tab 107; tr. 1/79-83). Mr. Schumacher expressed that a further extension would give GDC4S "more of a fighting chance to divert some of those monies back to the software development" (tr. 1/79).

32. Effective 27 September 2002, SPAWAR exercised Option IV through bilateral Modification No. P00026, which also addressed other matters (R4, tab 7).

33. The negotiations to extend Option I pricing into Option Year III continued into January 2003, at which point GDC4S believed an agreement had been reached. On 22 January 2003, the Navy sent draft Modification No. P00032 to GDC4S which, among other things, extended the ordering period for certain Option I CLINs to 31 January 2003, extended the other option exercise dates, and listed the consideration the Navy was to receive if it issued a DO under the Option I CLIN 0101 for LRIP-3 DMRs. (App. supp. R4, tab 115; tr. 1/80, 84-85, 135-36, 2/13) One of the negotiated items was the HF waveform, priced at $9,152 each, including 5-year warranty, that SPAWAR could order from Option Year I through Option Year V (R4, tab 5 at B-3, -4, -12, 13, -22, -32, -41, -42; tr. 1/85). GDC4S sought deletion of the waveform because it had not been developed and the contractor expected it to cost millions of dollars to deliver. The draft modification included waveform deletion. (App. supp. R4, tab 115 at first page of mod., tab 117 at 1; tr. 1/85-88, 92, 96) Per CO Lopez the Navy "did tentatively agree to" deletion of the HF waveform (tr. 2/9).

34. It was Mr. Schumacher's understanding that the Navy planned to obtain the HF waveform through a DoD Joint Tactical Radio Systems (JTRS) program or through a proposal it had asked GDC4S to submit for the separate development and delivery of the waveform. On 30 May 2003 GDC4S submitted an estimated price for DMR HF upgrade tasks involving the HF waveform, said to be consistent with an HF Waveform requirements agreement dated 20 May 2003 between the Navy, GDC4S, and another company. The estimated price, including award fee, was $11,639,168. GDC4S noted

that the estimate did not include an unlimited all channel license fee of $5,653,446, to be negotiated. (Tr. 1/88-90; ex. A-12; *see* tr. 1/40, 42 (re JTRS))

35. Through DO No. 0015, dated 4 June 2003, the Navy ordered 30 DMRs and some PAs (R4, tab 9).

36. Thereafter, GDC4S was "a little shocked" when, on 8 July 2003 SPAWAR issued DO No. 0016 for, among other things, 12 HF waveforms (R4, tab 9 at 1-2; tr. 1/93). By letter dated 23 July 2003 to CO Lopez, GDC4S requested that SPAWAR delete the waveform portion of the DO on the ground that "SPAWAR has waived, both expressly and by its actions, any right to order HF under the HF CLINs in the DMR Contract" (R4, tab 4, attach. 8; *see* tr. 1/95). At the time, GDC4S did not object that the DO had been issued by e-mail. It did so in its claim (finding 54).

37. The CO responded by letter of 28 July 2003 that SPAWAR's alleged representations and actions related to negotiations for a contract modification, but the parties failed to achieve a mutually acceptable one and, "[t]herefore, the contract, as written, remains in full force and effect" (app. supp. R4, tab 125). The parties have not explained why the contemplated HF modification was not executed.

38. Bilateral amendment No. 03, dated 19 August 2003, to the LRIP-1 DO No. 5 extended the delivery schedule for certain items and increased the software order to 28 UHF LOS licensed waveforms and 20 VHF SINCGARS/SIP licensed waveforms, at unit prices of $4,702.50 and $4,191 per channel, respectively (R4, tab 9, DO No. 5 at amend. No. 03 at 1-2).

39. As of 27 August 2003, Mr. Schumacher transferred to other work and had little involvement with the DMR program. Mr. Polowski managed its day-to-day work. (Tr. 1/99-101, 104)

40. SPAWAR exercised Option V by unilateral Modification No. P00034, effective 10 September 2003, 20 days before the ordering period expired. The prices were the lowest of the 5-year contract period. Mr. Polowski described GDC4S as "surprised and disappointed" that the Navy had exercised the option because, in past practice, the Navy had negotiated with the contractor before options were exercised, which did not happen in this case and was, in his view, "a major change in Navy behavior." (R4, tab 7; tr. 2/10[2])

[2] Mr. Polowski mentioned negotiations before "delivery orders were exercised" but, in context, he was referring on this occasion to option exercise.

41. On 19 September 2003, about a week before the Option IV ordering period expired, SPAWAR's support contractor e-mailed DO No. 0017 to GDC4S for repair parts under that option (R4, tab 9, DO No. 0017 at 1-2 of 2).

42. Between Friday, 26 September 2003, and Tuesday, 30 September 2003, SPAWAR's support contractor e-mailed DO Nos. 0018-0020 and 0022-0029, under Option V, for DMRs, PAs, software, spare parts, and associated items, to GDC4S. GDC4S received the e-mails between 27 and 30 September 2003. (R4, tab 9; compl., answer ¶¶ 20, 21; app. mot., ex. A, Polowski decl., ¶¶ 3, 7, and attach. A; gov't resp., ex. B (app. resp. to interrogs. Nos. 4, 5))

43. Under DO No. 0018 the Navy ordered 120 each UHF LOS, VHF SINCGARS/SIP, and VHF LOS ATC licensed waveforms, at "Buy 3 Get 4" unit prices of $4,702.50, $4,191 and $1,402.50 per channel, respectively. Under DO No. 0019, known as LRIP-4, it ordered 79 DMRs. Under DO No. 0020 the Navy ordered 180 HF waveforms at "Buy 3 Get 4" unit prices of $6,864 per channel. Under DO No. 0023 it ordered 16 each UHF LOS, VHF SINCGAR/SIP, VHF LOS ATC and HF waveforms at the aforementioned prices. Under DO No. 0027 the Navy ordered 312 each UHF LOS, VHF SINCGAR/SIP and VHF LOS ATC waveforms at those prices. Under DO No. 0028 it ordered 4 each UHF LOS, VHF SINCGAR/SIP and VHF LOS ATC waveforms at those prices. (R4, tab 9)

44. Upon Mr. Polowski's receipt of DOs under the contract, including those at issue, he prepared a standard "Contract Distribution" memorandum giving the contract and DO number, the effective date stated on the DO, GDC4S' Program Initiation and Authorization (PIA) number, the customer (SPAWAR), and a brief statement of purpose and amount. He or an assistant distributed the memorandum internally at GDC4S and faxed a copy to Jim Anderson, Mr. Polowski's counterpart at the administrative CO's office, to ensure that their data matched. For example, on 30 September 2003, Mr. Polowski faxed to Mr. Anderson a copy of his standard memorandum, dated 30 September 2003, pertaining to DO No. 0026. SPAWAR's support contractor had e-mailed that DO to Mr. Polowski at 6 PM on 29 September 2003. He had received it on 30 September 2003. (Supp. R4, tab 45 at GD001225-1226, tab 46; tr. 2/51-60)

45. Although he executed certain bilateral modifications (*e.g.*, R4, tab 7 at Mod. No. P00022 and others), and GDC4S granted him specific authority in connection with certain negotiations, Mr. Polowski had no contractual authority at GDC4S to accept or reject a DO (tr. 2/56-57).

46. By e-mail on the afternoon of 30 September 2003, Mr. Polowski inquired of CO Lopez whether GDC4S would be receiving DO No. 0021. The CO responded by e-mail that afternoon that he had skipped that DO. The parties agree that SPAWAR did

not issue it. (Supp. R4, tab 62; compl., answer ¶ 21)[3] Thereafter on 30 September 2003, the CO e-mailed Mr. Polowski that "[e]verything in the que [sic] has gone out. 0029 is the last order under the current DMR contract." Mr. Polowski replied by e-mail in the late afternoon on 30 September 2003, thanking the CO for providing the DOs' status. Mr. Polowski did not mention the method of DO delivery. (Supp. R4, tab 62; tr. 2/47)

47. GDC4S did not want to accept the DOs at Option V prices. According to its finance manager, Scott Johs, they would be "extremely expensive" to perform and it would incur a significant loss (tr. 1/176-77, 2/28). About the time of GDC4S' receipt of the DOs, although the exact date is not clear, Mr. Johs discussed the financial difficulties with Mr. Schumacher (tr. 1/103, 176-77, 2/16). Mr. Johs mentioned that there was something "in the back of [his] mind" about how DOs had to be ordered (tr. 1/177, 179). Mr. Schumacher and other of GDC4S' personnel had read the contract, or its Ordering clause, in connection with modifications to the clause or otherwise, prior to his discussion with Mr. Johs, but Mr. Schumacher was not familiar with the ordering requirements. He suggested inquiring of Mr. Polowski. Although memories differ immaterially, the weight of the evidence is that, on a date not clear, but after Mr. Johs' conversation with Mr. Schumacher, Mr. Johs asked Mr. Polowski about the contract's terms and reviewed the Ordering clause with him. Mr. Johs asked whether Mr. Polowski had received mailed copies of DOs and Mr. Polowski informed him that he had not. Mr. Polowski had read the contract when he assumed his responsibilities for the DMR program, but the first time he focused upon the restrictions against issuing DOs by e-mail was during his conversation with Mr. Johs. (Tr. 1/101, 106, 142-43, 177-78, 2/16-17, 21-22)

48. On 2 October 2003, two days after GDC4S' receipt of the last of the DOs and two days after the end of the Option V ordering period, Mr. Polowski spoke by telephone with CO Lopez. Mr. Polowski asked if the Navy would be issuing hard copies of the DOs by mail, stating that GDC4S' financial office was requesting hard copies. He did not mention the Ordering clause or contend that the issuance of DOs by e-mail was contrary to contract requirements. The CO stated that the Navy was no longer sending hard copies of DOs by mail, it did not intend to do so, and it was SPAWAR's command policy to go "paperless" as much as possible. Mr. Polowski reported his conversation in a 2 October 2003 e-mail sent to CO Lopez, Mr. Johs, and other contractor personnel, to which the CO did not respond. (R4, tab 4, attach. 3; tr. 2/23-24, 129-30)

49. John Cole, vice president and general manager of GDC4S's Information Assurance Division at the time of the hearing, was vice president and general manager of GDDS' Information Securities Systems and Products Division in 2003 and had oversight responsibility for the DMR contract, among 50 to 100 other programs (tr. 1/151-52). The DMR contract was likely the largest "and certainly the most challenging" of the contracts in his division at the time, due to its technical requirements, schedule and "budget

[3] References hereafter to DO Nos. 0018-0029 exclude DO No. 0021.

position" (tr. 1/152-53). The contract environment had been one of "constant negotiation" (tr. 1/155). Program management and financial personnel brought to his attention in "late September or early October" that the DOs at issue were not ordered in accordance with the contract's terms (tr. 1/153-56). Prior DOs had been negotiated either by unit price, the compliance matrix, or the specification associated with units to be delivered. After review of the matter with his support organization, Mr. Cole determined to reject the DOs. He discussed his decision with his boss, Mark Fried, GDC4S' president, who concurred. The date of Mr. Cole's decision to reject the DOs, and of Mr. Fried's concurrence, is not clear. (Tr. 1/155-56; *see* R4, tab 4, transmittal ltr. at 4 (claim certification))

50. The Navy alleges that circumstantial evidence establishes that GDC4S decided before the ordering period had ended that it would reject the DOs and that it deliberately waited until after that period had expired to communicate with the CO about the method of DO delivery (gov't br. at 39, 42, 44, 45; gov't reply br. at 14). GDC4S counters that "the unrebutted series of events described by the witnesses suggest [sic] the decision likely was not made until after the ordering period had expired" (app. reply br. at 29). We find that, even if GDC4S had any duty to communicate with the Navy about its method of e-mail issuance, which the Navy has not established, Mr. Cole testified credibly that he had no knowledge of any deliberate delay, as did Mr. Schumacher, with whom Mr. Johs initiated his Ordering clause inquiry, as did Mr. Polowski (tr. 1/107, 157, 2/22). Mr. Polowski's 30 September 2003 e-mails to CO Lopez, on the last day of the Option V ordering period, pertained to his inquiry about the status of DO No. 0021, which GDC4S had not received with the other series of DOs (finding 46). Those e-mails, and Mr. Polowski's standard 30 September 2003 contract distribution memorandum (finding 44), do not suggest that he was concealing any prospect that GDC4S might reject the DOs. We infer from his 2 October 2003 inquiry of the CO about whether SPAWAR was providing hard copies of the DOs that, by this time, GDC4S was considering the fact that the contract did not allow issuance of DOs by e-mail (finding 48). However, by this time, the ordering period had ended and the fact that Mr. Polowski did not mention the e-mail issue had no effect upon whether the Navy had properly issued the disputed DOs.

51. By letter to CO Lopez dated 6 October 2003, referring to DO Nos. 0017-20 and 0022-29, Mr. Polowski stated:

> The Schedule in the Contract does not permit orders by electronic commerce methods such as e-mail. Additionally, the Ordering clause states ".... [N]o order for CLINS 0501-0539 shall be placed after 30 September 2003." Therefore, the Government can no longer lawfully place a binding order with General Dynamics under the Contract.

> General Dynamics, as you no doubt appreciate, is not in a position to voluntarily accept orders under the DMR contract at option year 5 prices. Therefore, we reject your orders under the Contract.
>
> The orders you submitted are rated orders under the Defense Priorities and Allocation System. General Dynamics is willing to submit cost and technical proposals to meet your requirement, or, alternatively, to proceed under a letter contract, or, alternatively to proceed under the Changes clause. We await your direction.

(R4, tab 4, attach. 4)

52. The CO responded by letter of 8 October 2003 that the Navy considered the orders to be validly issued in accordance with the parties' previous course of performance under the contract. Although the Navy now acknowledges that the first DO was issued by mail, the CO then asserted that DO Nos. 001 through 0016 had been issued by electronic distribution and GDC4S had always accepted that method. He stated that the Navy considered DO Nos. 0017-20 and 0022-29 to be validly issued and, in light of GDC4S' statement that it was rejecting them, he requested reasonable assurances by 15 October 2003 that it would perform the orders. (R4, tab 4, attach. 5)

53. GDC4S replied by letter to the CO dated 10 October 2003 that, while it did not agree with the Navy, it viewed the CO's assertion of DO validity and his request for assurances as a direction to proceed under the Changes clause. GDC4S stated that it would do so and would submit a request for equitable adjustment. (R4, tab 4, attach. 6)

Claim, CO's Decision, Product Delivery

54. By letter dated 4 February 2004 GDC4S submitted a certified CDA claim to the CO in the amount of $89,954,040, plus CDA interest. GDC4S sought an equitable contract price adjustment of $78,220,345 for labor, material and warranty costs of DO Nos. 0018-0029, which included a $51,412,757 price adjustment, with 15 percent profit, plus $26,807,588 for software licenses. It alleged that the DOs were not validly exercised during the contract's ordering period because they were sent by e-mail and were at unconscionable prices in light of 2003 circumstances. GDC4S also claimed $11,733,695 on the basis that DO No. 0016 was invalid because, although the contractor had not appreciated it at the time, the Navy's e-mail method of issuance was not authorized under the contract. Also, in addition to the unconscionable price argument raised with respect to the other disputed DOs, GDC4S alleged that the Navy had waived its right to order the waveform and was estopped from doing so. GDC4S likened its claim to a constructive change claim based upon the improper exercise of an option and

stated that its equitable adjustment amount was calculated accordingly. It sought the difference between the contract price paid and its actual performance costs, plus profit. It noted that its claimed amount was based upon actual and estimated future costs. GDC4S did not expect to lose money under the repair parts DO No. 0017 and did not include it in the claim. (R4, tab 4, transmittal ltr. at 1, 3, 4, § 1.0 at 4, 5A, tab 9; tr. 2/12-13, 34-37, 64; *see also* R4, tab 3 at 1, 3; app. supp. R4, tab 174 at 11)

55. Bilateral Modification No. P00039, effective 19 April 2004, extended the H-34 All Channel License Agreement to cover the DMRs issued under DO Nos. 0015 and 0019 (and certain others purchased by another contractor to support a separate Navy contract), at no cost to the government (R4, tab 7).

56. Bilateral Modification No. P00045, effective 10 December 2004, incorporated a superseding DMR specification; obtained consideration for the government in exchange for the modification's specification relief; modified certain DMR conditional acceptance milestones and incorporated certain others; and released certain withheld payment amounts. The modification contained a general release covering various matters that excluded the claim at issue. (R4, tab 8, P00045 at 2-3)

57. By final decision dated 26 January 2005 the CO denied GDC4S' claim. The date the CO received the claim is not clear but his decision states that it was submitted on 4 February 2004 and we accept that as the date of receipt. (R4, tab 2 at 1) On 14 April 2005 GDC4S timely appealed from the denial of the portion of its claim based upon DO Nos. 0018-0029. It did not appeal from the denial of the portion based upon the HF waveform DO No. 0016.[4]

58. It is uncontested that GDC4S did not receive the Option V DO Nos. 0018-0029 at issue through the U.S. mail or by hand-delivery prior to expiration of the Option V ordering period, or at any time, and that they were transmitted to GDC4S as electronic portable document format attachments to e-mails from the Navy's support contractor. The attachments contain electronic images of the DOs, including the CO's signature. They do not contain his digital signature. (*GDC4S I*, 08-1 BCA ¶ 33,779 at 167,187; gov't br. at 22, proposed finding No. 39)

59. GDC4S has delivered the hardware and software for the disputed DOs and the government has accepted the radios, with warranty obligations ongoing (tr. 2/32).

[4] The Navy stated in its summary judgment motion that the HF claim was resolved by bilateral modification in December 2004 (gov't mot. at 7, n.3), but the parties have not elaborated upon this matter.

SPAWAR's E-mail Practice

60. CO Lopez acknowledged that he had been sending DOs by e-mail ever since he had become a CO at SPAWAR in 1998, under the subject contract and others, stating that it was "a common practice" and SPAWAR's "command practice" (tr. 2/98-99). He and SPAWAR did so under other contracts that had the same Ordering clause as the subject contract and when the contract schedules did not authorize transmittal of DOs by e-mail. CO Lopez admitted that GDC4S had nothing to do with his or SPAWAR's decisions to send DOs by e-mail. (App. supp. R4, tab 154 (gov't resp. to App.'s First Set of Requests for Admission); tr. 2/98-99, 104-08)

61. SPAWAR as a command continued to issue DOs by e-mail when contracts did not authorize it even after GDC4S raised the issue under the subject contract, although CO Lopez inserted language in subsequent IDIQ contracts for which he was responsible that authorized the issuance of DOs electronically (app. supp. R4, tab 154; tr. 2/101, 106-08).

62. Prior to 2 October 2003, when GDC4S inquired about the matter, CO Lopez had never discussed the method of issuing DOs with it, and GDC4S had not protested e-mail delivery. The CO acknowledged that GDC4S had protested every DO issued after his 28 July 2003 letter concerning HF waveforms, in which he had asserted that the contract, as written, remained in full force and effect. (Tr. 2/99-100, 109-10, 127)

Initial Audit

63. The Defense Contract Audit Agency (DCAA) issued a 15 September 2004 audit report on GDC4S' 4 February 2004 claim for $78,220,345. DCAA concluded, with currently immaterial qualifications, that GDC4S had submitted adequate cost or pricing data and that the claim had been prepared in accordance with applicable Cost Accounting Standards (CAS), the FAR and the DFARS. The auditors questioned $4,098,232 of the claimed amount, much of which was based upon estimated costs. (R4, tab 3 at 1, 3 *et seq.*; app. supp. R4, tab 174 at 1; tr. 2/64) With regard to the claimed software license fees, DCAA stated that, as with personal computers, each DMR unit came with a license that allowed the government to use the software that controls the unit, but that no data was offered in support of the license fees other than the prices contained in the contract and in GDC4S' follow-on DMR proposals. DCAA concluded that it had no basis upon which to review the license fees but opined they did not qualify as commercial items. GDC4S responded to the auditors that it would update its claim and otherwise reserved comment. (R4, tab 3 at 4, 8, 15)

Claim's License Fee Calculation

64. Mr. Polowski was involved in preparing the software licenses element of GDC4S' claim. He prepared a chart dated December 2003 which summarized the results of GDC4S' pricing analysis. It did not have data concerning the value of licenses for any similar products so it examined the costs for each of its major DMR waveforms at what it referred to as "Price," "Total Cost," and "Prime Cost" levels. In each case, GDC4S used the actual number of DMRs sold based upon DOs issued under LRIPs 1 through 4 and estimated numbers for LRIPs 5 through 7, with 4 channels each, resulting in 1772 total estimated channels sold. The cost per license was calculated as GDC4S' total estimated investment divided by the total estimated channels sold. For its claim, GDC4S used the "Price" level estimate, the highest of the three methods, which appears to have added 15% profit, unlike the other two. GDC4S claimed $33,083 per channel for SATCOM licenses; $16,720 per channel for UHF LOS licenses; and $19,460 per channel for VHF SINCGARS/SIP licenses, which it combined with VHF LOS ATC licenses. Under the "Total Cost" method, the respective amounts were $28,767, $14,539, and $16,922 per channel and, under the "Prime Cost" method, they were $22,375, $11,308, and $13,161 per channel. GDC4S did not claim actual costs for its software because they were in the hundreds of millions of dollars and would have had to have been allocated over various licenses purchased by the Navy or others. Rather, it attempted to arrive at a reasonable price on a per unit basis. (R4, tab 4, § 1 at 5A; app. supp. R4, tab 177; tr. 2/33-37) GDC4S did not explain the differences among the three license fee calculation methods or justify its selection of the "Price" method over the other two methods.

65. When GDC4S' engineers worked on a software design, they charged special risk PIA internal charge accounts which were not billed to a customer but written off against profit. GDC4S' calculation of its total investment costs in connection with the license fee portion of its claim was for its software development work only. It tracked the software development costs through PIAs that were separate from the PIAs for hardware and services. (Tr. 1/55, 2/40-42)

2005 LRIP-5 Contract; Loss Position on Subject Contract

66. About two years after SPAWAR issued the September 2003 DOs in question, GDC4S and the government entered into a sole-source follow-on FFP contract, referred to as the LRIP-5 contract. That contract, covering the period July 2005 through July 2007, was for 81 DMRs of the same configuration as in the subject contract, PAs, software licenses and a 1-year warranty. This was the government's first DMR purchase after the disputed DOs. GDC4S submitted certified cost and pricing data in support of the LRIP-5 contract negotiations. CO Lopez and GDC4S negotiated an 11.7% profit rate. (App. supp. R4, tab 144 at 1-3, 5, 26, attach. 7; tr. 1/110, 113-14, 116, 2/141)

67. The software license fee under the LRIP-5 contract was $60,000 per channel for the SATCOM license only. There were 100 such licenses, for a total of $6 million in license fees. GDC4S did not charge for the other licenses. (App. supp. R4, tab 144 at 2, 27 of 29) CO Lopez justified the $60,000 license fee in his "ACQUISITION DECISION" as follows in part:

> The contractor does have opportunities to sell small quantities of DMR…but these are in quantities too small {4 to 12} to recover the contractor's IRAD investment to develop DMR software waveforms. At the present time the Navy is the only customer…. Moreover, the current [DoD] acquisition strategy for software waveforms calls for the development of JTRS SCA complaint [sic] waveforms which will then be provided as GFM…. Therefore, the contractor investment in DMR waveform software is highly risky. *For the contractor to recover their investment in DMR software development the Navy would pay nearly $2M dollars per license…on this follow on contract….*
>
> ....
>
> …DMR "system" costs are either lower or cost competitive then [sic] the system costs of the legacy systems DMR is replacing. [Emphasis added.]

(App. supp. R4, tab 144 at 27 of 29)

68. The CO also noted that DMR prices under the subject contract decreased over its 5-year period because GDC4S had expected that a commercial market would emerge that would "subsidize" those prices, but it never materialized, and GDC4S had lost nearly $200M through the third quarter of 2004 with an estimated additional loss of $50M by contract completion. The CO noted that the Navy essentially had received the software licenses under the subject contract for $0 as part of its consideration for specification and schedule relief sought by GDC4S. He determined that a price comparison with the contract's Option Year I prices was appropriate and that the $60,000 license fee for the LRIP-5 contract compared favorably. (App. supp. R4, tab 144 at 28-29 of 29)

69. With respect to GDC4S' losses on the contract, Mr. Cole testified, without rebuttal, that, as of September 2001, when GDC4S was acquiring Motorola's defense business, Motorola had recognized a loss of $86.5 million on the contract. From the date of sale through one year thereafter GDC4S had estimated an additional loss of $116.9 million, which was recognized in the purchase transaction accounting. Thereafter, GDC4S lost an additional $49.3 million, not recognized in the sales transaction. Total

Motorola and GDC4S program losses were $252.7 million, which does not include the costs of additional IRAD work and software development related to the DMR program. (Tr. 1/158-59; *see* R4, tab 144, attach. 8) The Navy has not presented any evidence that GDC4S has not properly accounted for its losses under the contract.

Claim Updates and DCAA Supplemental Audit

70. On about 30 April or 1 May 2008, GDC4S updated its claim to reflect its actual costs where available after completion of the work at issue and payments made by the government. The claim contained actual costs for the portion related to hardware and a cost estimate to complete on GDC4S' warranty obligations. The updated claim continued to seek $26,807,588 for software licenses, but reduced the amount claimed for hardware, labor, overhead and profit to $49,882,331, for a subtotal of $76,689,919, less $33,197,953 in payments received, for a total claimed amount of $43,491,966, plus CDA interest. Actual costs had been segregated by the PIA work breakdown system under each disputed DO. GDC4S continued to seek 15% profit. (App. supp. R4, tabs 169, 179; tr. 2/64-69)

71. DCAA's 23 July 2008 supplemental audit report on the updated claim replaced its original report. DCAA again found that, except for qualifications related to the establishment of final indirect expense rates for calendar years 2003 through 2007, GDC4S had submitted adequate cost or pricing data and had prepared the claim in accordance with the CAS, FAR and DFARS. DCAA did not question any of GDC4S' claimed direct costs, G&A or cost of money (COM) and determined that they were actual costs incurred and recorded by DO against PIAs and task numbers. With regard to profit, DCAA determined that GDC4S had properly classified the costs in its claim to permit application of DoD's Weighted Guidelines but had not included a rationale for its proposed 15% rate, which it had applied to its total proposed costs, including COM. DCAA questioned $766,838 of the claim concerning warranty costs, principally because GDC4S had used average 2006 and 2007 warranty costs to estimate the costs for a 10-year period when other actual costs were available. The auditors again did not include the $26,807,588 software license fees in their scope of audit. (App. supp. R4, tab 174 at cover page, 1-2, 6-10, 32; tr. 2/70)

72. Based upon DCAA's review, GDC4S updated its claim in November 2008. It revised its warranty calculation to use additional actual costs, including costs from 2005 through 2007 and nine months of 2008; it added warranty support costs, previously omitted; it corrected its claim error of including profit on COM; and it included the most recent government payments. The software license portion of the claim did not change. The updated claim was $76,132,483 less $33,212,706 in payments received from the government, for a net of $42,919,777. (Tr. 2/70-78, 80; ex. A-16)

73. During the December 2008 hearing, GDC4S corrected its claim to apply the contract's 5-year warranty period for software rather than the 10-year hardware warranty inadvertently used for both hardware and software in earlier updates. The resulting revised claim was $73,155,135, less $33,212,706 in government payments, for a net of $39,942,429. (Tr. 2/78-83; ex. A-18)

Quantum Elements

74. GDC4S submitted uncontroverted evidence of its incurrence of its claimed costs and that they were calculated consistently with its disclosed and approved government cost accounting practices and its approved systems and procedures. The Navy also has not rebutted its contention that it used appropriate indirect rates and factors. (App. supp. R4, tabs 178-94; exs. A-5, -15, -16 (incurred cost summaries and authorization documents); app. supp. R4, tabs 136, 137, 141, 149, 150, 159-68, 170, 176 (indirect rate approvals and support/forward pricing agreements), tabs 131, 145, 147, 156, 158 (interim billing rate documentation), tabs 126, 128, 135 (purchasing system reviews/approvals/CPSR (Contractor Purchasing System CAP Validation Review)), tabs 111, 112, 122, 123, 130, 132-34, 138-40 (CAS disclosure statements), tabs 148, 173 (MMAS procedures (Material Management and Accounting System)), tabs 127, 129 (business processes documentation)

75. The government, including DCAA as set forth above, and the Navy at the hearing, did not present any evidence controverting GDC4S' claimed labor and material incurred costs or payments received and, based upon GDC4S' warranty cost revision, the Navy does not contest the reasonableness of those claimed costs (tr. 2/7).

76. The Navy alleges that items delivered under the DOs at issue were "nonconforming" (*e.g.*, gov't br. at 49), but it has not submitted evidence that they did not conform to contract requirements as modified or evidence that established any effect of the modifications upon GDC4S' claimed amount.

77. CO Lopez adopted DCAA's position that the claimed software license fees were not supported by cost data and concluded that he could not determine whether the amounts sought were fair and reasonable (tr. 2/149-50). As established, the subject contract included license fees for the software associated with the DMRs (findings 10, 25, 26, 43). We find that GDC4S' "Prime Cost" method of calculating its license fees, which did not include profit, and resulted in prices of $22,375, $11,308, and $13,161 per channel is adequately and reasonably supported and compares favorably with the $60,000 SATCOM license fee negotiated under the LRIP-5 contract. It is undisputed that the underlying development costs far exceeded these license fee amounts. (*See* app. supp. R4, tab 144 at 27 of 29; findings 64, 67)

78. With regard to the claimed 15% profit, GDC4S cited the LRIP-5 contract, where the CO negotiated an 11.7% profit rate. Mr. Schumacher's testimony in support of the 15% rate considered risk and other factors as of September 2003 when the disputed DOs issued, rather than as of the updated claim. It was unclear as to whether he had ever negotiated a contract with a profit rate as high as 15%. In any case, he could not recall a specific one. (Tr. 107-09)

79. CO Lopez disagreed that 15% profit was justified. He performed a Weighted Guidelines analysis concerning the two highest cost DOs at issue, for DMRs and PAs, and arrived at 5-6.6% profit under the subject contract. In the CO's view, there was much more risk under the LRIP-5 contract than under the subject contract as of the time of the final updated claim. The CO noted that the claim reflected incurred costs, whereas in negotiating the LRIP-5, the parties were estimating costs. (Tr. 2/134-40, 142; ex. A-9) The Navy asserts in briefing that the use of a higher than normal profit rate to price contract changes after they have been performed is not reasonable; the only risk GDC4S faced as of the updated claim was litigation risk; and, under the Weighted Guidelines, a reasonable profit would not exceed 6.6% (gov't br. at 29, proposed finding 55, at 53-54).

80. We conclude that a 6.6% profit rate is appropriate under the circumstances.

DISCUSSION

The Parties' Contentions

In addition to arguments that we have considered but are not necessary to our decision, appellant alleges that DOs issued under an IDIQ contract represent the government's acceptance of the contractor's offer embodied in the contract and must adhere strictly to all of the contract's terms, as with the government's exercise of a contract option. Appellant contends that the e-mailed DO Nos. 0018-0029 did not comply with the contract, which did not allow their issuance by e-mail. Thus, appellant was free to reject the DO's, which were in the nature of a counteroffer by the Navy. When it rejected the DOs, but complied with the CO's demand for performance, as it was required to do under the Disputes clause, it became entitled to its costs of performance and profit, which it has proved.

In addition to certain arguments that we rejected in *GDC4S I*, or that we do not find persuasive, the Navy asserts that appellant has failed in its burden to prove entitlement under the Changes clause. The Navy contends that the contract did not require that DOs be issued in a particular manner and it should be interpreted consistently with the parties' pre-dispute conduct, which evidences that the issuing method was not of the essence of the contract, and that the CO had no reason to foresee that issuance by e-mail would injure appellant, which it did not. The Navy alleges that appellant waived any right to reject e-mailed DOs and that its claim is barred by estoppel. With regard to

quantum, the Navy contends that appellant has presented an improper total cost claim which would result in an impermissible windfall recovery under the contract, which appellant had been performing at a loss.

DOs Not Issued in Accordance with Contract Terms
are Like Invalid Option Exercises

In *Dynamics Corp. of America v. United States*, 389 F.2d 424, 430-33 (Ct. Cl. 1968), the Court of Claims established that the government's issuance of orders under an indefinite quantity contract is like its exercise of options and must be accomplished in strict accordance with the contract's terms. The court found that the orders in question were not issued within the time period specified in the contract and granted summary judgment to the contractor for the reasonable value of goods it had delivered under protest when the government required it to perform. Indeed, it is settled that, "[f]or an option order to be effective, the Government must exercise the option in exact accord with the terms of the contract." *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000). We recognize that the ordering term violation could be viewed as merely technical, but we believe that established option law controls the result in this appeal. When the government fails to exercise an option in strict compliance with the contract's terms, but requires the contractor to perform, the government has effected a constructive contract change entitling the contractor to an equitable adjustment. *Chemical Technology, Inc*., ASBCA No. 21863, 80-2 BCA ¶ 14,728 at 72,641. In this special circumstance, the contractor has the right to recover the costs it incurred in performing the work, plus a reasonable profit. *Lockheed Martin Corp*., ASBCA No. 45719, 00-2 BCA ¶ 31,025 at 153,225.

CO Bodner issued the first DO via the United States mail. He does not recall how he issued the next two, but CO Lopez issued the remaining 25 DOs, including DO Nos. 0018-0029 at issue, only by e-mail, through a support contractor. (Findings 17, 19, 20, 58) We do not accept the Navy's contentions that the contract did not require a particular manner of DO issuance and that we should interpret it in light of the parties' conduct prior to the instant dispute. The contract's Indefinite Quantity clause provided that delivery or performance was to be made "*only* as authorized by orders issued in accordance with the Ordering clause (finding 11) (emphasis added). The Ordering clause provided that orders could be issued by electronic commerce methods "*only* if authorized in the Schedule" (finding 12) (emphasis added). The contract Schedule did not authorize issuance of DOs by e-mail (finding 14). When the contract is clear, there is no ambiguity, and it is not necessary to examine the course of performance. *Optic-Electronic Corp*., ASBCA No. 24962, 84-3 BCA ¶ 17,565 at 87,532.

Waiver and Estoppel Do Not Apply

The Navy bears the burden to prove its affirmative defenses of waiver, *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005); *Kearfott Guidance & Navigation Corp*., ASBCA Nos. 49271 *et al.*, 04-2 BCA ¶ 32,757 at 162,020; and estoppel, *Foote Mineral Co. v. United States*, 654 F.2d 81, 86 (Ct. Cl. 1981); *United Technologies Corp., Pratt & Whitney*, ASBCA Nos. 47416 *et al*., 06-1 BCA ¶ 33,289 at 165,049-50. Appellant contends that these affirmative defenses are flawed legally as well as factually because, even if, contrary to the facts of this case, it had accepted some e-mailed DOs with full cognizance that e-mail delivery was not authorized under the contract, this would not have precluded it from rejecting later DOs, which were each a separate counteroffer creating an independent right of acceptance or rejection.

The Navy has not directed us to any case in which waiver or estoppel has been applied in the event of improper option exercise or improper issuance of a DO under an IDIQ contract that the contractor protested prior to performance. Regardless of whether waiver or estoppel could ever apply under those circumstances, the Navy has failed to meet its burden to prove that they apply here. Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Alvarez & Associates Construction Co*., ASBCA No. 49341, 98-1 BCA ¶ 29,559 at 146,536. "An intent to waive a contractual right must be manifest in a party's failure to object." *United Technologies Corp*., *Pratt & Whitney Group*, ASBCA No. 46880 *et al*., 95-1 BCA ¶ 27,592 at 137,482 (citations omitted). A party's silence about an irregularity in a transaction does not waive its right to object to the same irregularity in a subsequent transaction. *Hooe & Herbert v. United States*, 41 Ct. Cl. 378, 382-83 (1906). In *Hooe & Herbert*, counsel raised no objection to irregularities in the manner in which four depositions were taken but objected to the same irregularities in subsequent depositions, although there was no question about the integrity of the depositions. The court held that there had been no waiver of the right to object, stating:

> Waiver is always a question of fact, determinable from all the facts and circumstances surrounding the transaction in hand. To estop the assertion of one's rights *it must distinctly appear that the same were waived with full knowledge of what they were and with intent to waive the same. Mere silence does not constitute waiver* except in that class of cases where the law will presume waiver from silence irrespective of the party's actual intent or knowledge. The rule is predicated upon the legal maxim, *consensus tollit errorum*. Its operation, however, is not without limitation. *It cannot be extended so as to include future irregularities and preclude a party from challenging future invasions of his rights under the law*. As to the particular transaction where waiver may be

> successfully invoked, it is effective as to it and all consequences which legitimately flow therefrom. [Emphasis added.]

Hooe & Herbert, 41 Ct. Cl. at 382-83.

Although appellant did not protest the issuance of any DOs by e-mail until after it had received the DOs at issue (findings 20, 36), it did not intend to waive its right to decline DOs that were not issued in accordance with the contract's Indefinite Quantity and Ordering clauses. Except for DO No. 0016, no longer at issue (finding 57), which followed failed negotiations, and appellant initially protested on other grounds, then also protested because it was issued by e-mail (finding 36), all major DOs after the first one (*i.e.*, other than for data requirements, repair parts, and manuals, *see* findings 19, 20, 41), until the DOs in question, were issued after extensive negotiations yielding bilateral contract modifications of benefit to appellant. Appellant wanted to continue to work with the Navy to make the state-of-the-art DMR and had no desire to reject those DOs. (Findings 22, 24, 26, 27, 29; *see also* findings 33, 35) Indeed, appellant was surprised when SPAWAR exercised Option V and issued the disputed DOs because they were not preceded by contract negotiations (finding 40, *see also* finding 49). This lack of negotiations prior to electronic ordering is material in distinguishing the DOs at issue from the DOs pointed to by the government as evidence of the parties' past conduct in this regard.

Ultimately, appellant protested every DO issued after negotiations were unsuccessful with respect to draft Modification No. P00032 and CO Lopez issued his 28 July 2003 letter that the contract as written remained in full force and effect (findings 33, 37, 62). Appellant's personnel had read the contract and/or the Ordering clause at some point. However, they did not realize until after Mr. Johs raised the question with Mr. Schumacher, which was upon or shortly after appellant's receipt of the set of DOs at issue, and Mr. Johs thereafter reviewed the clause with Mr. Polowski, that SPAWAR had violated the contract's restriction that DOs were not to be issued by e-mail. (Findings 29, 47, 49; *see also* finding 54) Contrary to the Navy's suggestion, Mr. Polowski's preparation of his standard memoranda upon receipt of the disputed DOs, which merely reflect their terms and the effective dates stated on the DOs, does not indicate that appellant accepted the DOs and waived its right to reject them. He had no authority to do so in any case. (Findings 44, 45)

Thus, appellant's failure to object earlier during the course of the contract to the issuance of DOs by e-mail alone did not manifest any intent to waive the contract's DO delivery restrictions.

To prove that appellant is estopped from recovery, the Navy must satisfy each of the following four elements of proof: (1) appellant knew the facts; (2) it intended that its

conduct be acted upon or acted such that the Navy had a right to believe it was so intended; (3) the Navy was ignorant of the true facts; and (4) the Navy relied upon appellant's conduct to its injury. *Rel-Reeves, Inc. v. United States*, 534 F.2d 274, 296-97 (Ct. Cl. 1976); *United Technologies Corp.*, 95-1 BCA ¶ 27,592 at 137,481.

The Navy cannot satisfy estoppel element No. 1. As set forth above, appellant did not "know the facts." It did not appreciate the contract's restrictions against the issuance of DOs by e-mail until it had occasion to examine the matter when the DOs at issue were issued without prior negotiations. Moreover, with respect to element No. 3, the Navy was not ignorant of the "true facts." CO Lopez is also charged with reading the contract. He issued DOs by e-mail under the contract regardless of its strictures against that method and he admitted that appellant had nothing to do with his or SPAWAR's decisions to send DOs by e-mail (finding 60). Because of the Navy's failure to satisfy these factors, we need not address the other requisite elements of estoppel.

Quantum

Appellant has not presented an unsupported total cost claim as the Navy alleges. Appellant has submitted uncontroverted evidence of its claimed actual costs incurred in performing the disputed DOs. The government did not present any evidence challenging its claimed labor and material costs or payments received and it does not contest the reasonableness of appellant's claimed warranty costs as revised at the hearing. (Findings 74, 75) The Navy alleges that items delivered under the DOs were "nonconforming," but it has not submitted evidence that they did not conform to contract requirements as modified or evidence that established any effect upon appellant's claimed amount (finding 76). Under the circumstances, the government has failed to undermine appellant's claimed costs. *See Lockheed Martin Corp.*, 00-2 BCA ¶ 31,025 at 153,222.

With regard to software license fees, the Navy alleges in briefing that development costs were not allowable under the contract except as part of G&A to the extent they qualified as IRAD costs (reply br. at 21-22). However, this interpretation fails to give meaning to all parts of the contract, which included license fees for the software associated with the DMRs (*e.g.*, findings 2, 6, 10, 24-26, 38, 43). The Navy did not offer evidence that appellant's claimed software license fees are not fair and reasonable. We found that GDC4S' "Prime Cost" method of calculating its license fees, which did not include profit, and resulted in prices of $22,375, $11,308, and $13,161 per channel, was adequately and reasonably supported and compared favorably with the $60,000 SATCOM license fee negotiated under the LRIP-5 contract. It is undisputed that the underlying development costs far exceeded these license fee amounts. (Finding 77) Moreover, because the DOs issued under Option 5 were invalid, resulting in a constructive contract change entitling appellant to its actual costs of performance plus reasonable profit, Modification No. P00018's deletion of the SATCOM software license fee from the Option 5 CLIN 0510 (finding 26) does not apply.

With regard to profit, the Navy alleges that appellant did not properly account for its loss position under the contract and that it must have considered, at the time it acquired Motorola's business, that it would incur some losses in performing the Option V DOs. Mr. Cole's unrebutted testimony was that, as of September 2001, when appellant was acquiring Motorola's defense business, Motorola had recognized a loss of $86.5 million on the contract and, from the date of sale through one year thereafter, appellant had estimated an additional loss of $116.9 million, which was recognized in the purchase transaction accounting. Thereafter, appellant lost an additional $49.3 million, not recognized in the sales transaction. (Finding 69) Regardless, as established, when the government requires performance after the improper issuance of a DO, as after the improper exercise of an option, the contractor is entitled to its actual costs plus a reasonable profit. Any losses prior thereto are not relevant. We concluded that a 6.6% profit rate was appropriate under the circumstances here (finding 80).

DECISION

We sustain the appeal to the extent stated. The record does not permit the Board to calculate the precise amount due to appellant. Therefore, the matter is remanded to the parties with the following instructions. The government shall pay appellant its claimed incurred costs as revised (finding 73), plus 6.6% profit, plus license fees calculated in accordance with appellant's Prime Cost method, less payments made by the government, plus CDA interest calculated as of the CO's receipt of appellant's claim on 4 February 2004 (finding 57; 41 U.S.C. § 611).

Dated: 8 May 2009

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. 54988, Appeal of General Dynamics C4 Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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