ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
BearingPoint, Inc.	)	ASBCA Nos. 55354, 55555
	)	
Under Contract No. RAN-C-00-03-00043-00	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

Appellant BearingPoint, Inc. (BearingPoint) was awarded a cost-type contract by the U.S. Agency for International Development (AID or government) for economic recovery, reform and sustained growth in Iraq. In these cases, BearingPoint challenges cost disallowances under the contract. In ASBCA No. 55354, AID seeks to recover costs paid to BearingPoint, and subsequently disallowed, for personal security and support services in Iraq from August 2003 to mid-February 2004. The contracting officer disallowed these costs chiefly on the ground of allocability. In ASBCA No. 55555, BearingPoint challenges AID's disallowances of costs for post differential and danger pay, two premium pay elements for which the contract authorized reimbursement under specified conditions. The contracting officer disallowed these costs on the ground of allowability. The parties tried ASBCA No. 55354 and submitted ASBCA No. 55555 on the record under our Rule 11. We sustain ASBCA No. 55354 in part and deny ASBCA No. 55555.

FINDINGS OF FACT: ASBCA No. 55354

A. *The Contract*

1. Effective 18 July 2003, BearingPoint and AID entered into Contract No. RAN-C-00-03-00043-00 for "Technical Assistance for Economic Recovery, Reform and Sustained Growth in Iraq," a cost-plus-fixed-fee, level-of-effort type contract for which BearingPoint was the winning bidder. The contract contained a base period, commencing on 18 July 2003 and ending on 17 July 2004, and two one-year option periods. The total estimated cost plus fixed fee for the base period was $79,583,885. (ASBCA No. 55354 (55354), R4, tab 1 at 1-2 of 120, tab 2; tr. 1/25) The record reflects that the contract was financed with "funds [that] were appropriated by the U.S. Congress," not with funds from any other source (decl. of Raymond Lewman at 2).

2. The contract contained section C, DESCRIPTION/SPECIFICATION/STATEMENT OF WORK. Section C.1, STATEMENT OF WORK, set forth the objective of contract performance. That was "to create and develop growing, integrated and sustainable economic activity in Iraq" through transactional activities that were to "create a competitive private sector," and through economic governance activities that were to include "support to those public and private institutions that shape and implement economic and financial policy, regulatory, and legal reforms, including the Central Bank and Ministry of Finance." The statement of work called upon BearingPoint to perform in multiple locations, instructing that:

> A highly interactive and participatory work style with national institutions will be required throughout the operation for sharing and educating. This is an important requirement given the primordial objective for generating local interest, commitment, and ownership. The contractor will be expected to partner with respected local institutions (e.g., developing country local, national, or regional institutions). Under USAID guidance, the Contractor will employ extensive efforts to interact with government officials and leading authorities....

(55354, R4, tab 1 at 5, 13 of 120)

3. Section C.1 also contained SPECIAL INSTRUCTIONS. Special Instruction 1 provided that "[t]he advisors working on site...shall report on a daily basis to the counterpart specified by USAID and to the USAID CTO [Cognizant Technical Officer] and one other person to be designated by the CTO on an ongoing basis." (55354, R4, tab 1 at 11 of 120)

4. The contract included section G, CONTRACT ADMINISTRATION DATA. Clause G.1 included U.S. Agency for International Development Acquisition Regulation [AIDAR] 752.7003, DOCUMENTATION FOR PAYMENT (NOV 1998), 48 C.F.R. § 752.7003 (2002). (55354, R4, tab 1 at 21-22)

5. The contract contained section H, SPECIAL CONTRACT REQUIREMENTS. Clause H.7, LOGISTIC SUPPORT, provided that "[t]he Contractor shall be responsible for furnishing all logistic support in the United States and overseas." (55354, R4, tab 1 at 29 of 120) We find that, in practice, the parties interpreted this provision to mean that BearingPoint was required to obtain the personal security and support services that it needed for contract performance.

6. The contract also contained section I, CONTRACT CLAUSES, which incorporated various other standard clauses by reference. Among them were: FAR 52.215-2, AUDIT AND RECORDS – NEGOTIATION (JUN 1999), which contained a flow down requirement in paragraph (g), requiring BearingPoint to include the clause in "all subcontracts that exceed the simplified acquisition threshold" and that satisfy other requirements; FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002); FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.243-2 CHANGES – COST REIMBURSEMENT ALTERNATE I (APR 1984); and FAR 52.244-2, SUBCONTRACTS, ALTERNATE II (AUG 1998). (55354, R4, tab 1 at 34-36 of 120)

B. *Letter of Authorization to Custer Battles*

7. In view of clause H.7 (*see* finding 5), BearingPoint "determined there would be a need to have a firm responsible for security operations" in Iraq. BearingPoint thereupon sought and obtained proposals from four firms. From the firms that submitted proposals, BearingPoint selected Custer Battles, LLC (Custer Battles). We find that BearingPoint selected Custer Battles because: (a) its rates were competitive and reasonable; (b) it was already in Baghdad "and had firsthand experience with what it was like to work there;" and (c) it understood BearingPoint's goals of being able to travel as freely as possible to work with Iraqi counterparts, as contemplated by the "important requirement" in section C.1 that it engage in a "highly interactive and participatory work style" (finding 2). (55354, R4, tab 7; tr. 1/26-27, 28-29, 2/60) Significantly, at the time of its selection, Custer Battles was a recently formed, veteran-owned small business without well established accounting procedures (tr. 2/17).

8. In accordance with the Subcontracts clause incorporated in the contract (*see* finding 6), BearingPoint sought AID's consent to award multiple subcontracts, including the one to Custer Battles, by letter to the contracting officer dated 29 July 2003. In its letter, BearingPoint stated that the proposed subcontracts would "include all mandated FAR/AIDAR flowdown clauses." (55354, R4, tab 11 at 4) Three days later, the

contracting officer gave the requested consent by letter dated 1 August 2003 (55354, R4, tab 11 at 5; tr. 1/41).

9. By date of 1 August 2003, Carol L. Swan, BearingPoint's then-director of international operations, sent a letter of authorization to Custer Battles "to begin work…[as of that date as a subcontractor] under the...Prime Contract" between BearingPoint and AID. In its letter of authorization, BearingPoint stated that: (a) it "intend[ed] to issue an indefinite quantity subcontract to definitize this letter of authorization;" (b) the funds obligated and available aggregated $85,000; and (c) allowable costs under the letter and any ensuing subcontract were limited to those "reasonable, allocable and necessary" under the Allowable Cost and Payment clause (*see* finding 6), and under FAR 52.232-7, PAYMENTS UNDER TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS (DEC 2002), which was not incorporated in the prime contract, as well as applicable AID regulations, "consistent with what would be allowable if the [envisioned] formal subcontract were in place." (55354, R4, tab 11 at 6-7; tr. 1/20-21) The letter of authorization did not expressly include the Audit and Records – Negotiation clause (*see* finding 6).

10. In the scope of work under the letter of authorization, BearingPoint required Custer Battles to:

> Provide security, operations and logistics support for BearingPoint's initial mobilization trip to Baghdad, Iraq beginning with arrival of some BearingPoint team members in Amman, Jordan on August 4, 2003. Costs for this activity shall be based on the unit costs contained in your detailed estimate dated August 1, 2003. BearingPoint's estimate based on these unit costs is attached.

(55354, R4, tab 11 at 7)

11. Custer Battles was to be paid on a time and materials basis (tr. 1/41-42), and the letter of authorization contained both invoicing instructions and a table of the rates which BearingPoint would use to reimburse Custer Battles (55354, R4, tab 92 at 344-45). Ms. Swan testified that BearingPoint initially determined that the rates were reasonable based upon: (a) the four bids that it had received before issuance of the letter of authorization (*see* finding 7); and (b) "maybe three or four competitions" that she conducted in Iraq in January and February of 2004 among 15 to 20 different security firms (tr. 1/42-43).

12. Significantly, Ms. Swan testified, and we find, that the letter of authorization "anticipated a much lower level of security support [than was later provided] because [the

letter] was written in early August 2003...[and] circumstances were [then] very different" than those that later developed (tr. 1/109).

C. *Custer Battles' Performance*

13. We find that, under the letter of authorization, Custer Battles performed multiple services for BearingPoint "from meeting us, picking us up at the airport, transporting us to our living accommodations, to meetings, to taking care of our living -- setting up our living accommodations, securing our living accommodations, security while we moved around town" (tr. 1/178). In particular, Custer Battles' services during the relevant period, as reflected on the invoices in dispute fell into five broad categories, which we outline in greater detail below: (a) logistical support in Amman, Jordan; (b) logistical support in Baghdad, including vehicles and drivers; (c) leasing of quarters for the BearingPoint party; (d) personal security details (PSDs) for staff trips outside the International, or Green Zone in Baghdad; and (e) static guards at BearingPoint living quarters.

1. *Logistical Support in Amman*

14. The initial BearingPoint party of seven individuals arrived in Amman at the very beginning of August 2003, where Custer Battles had obtained hotel rooms for them (tr. 1/35, 53-54). Custer Battles arranged a convoy to transport the party from Amman to Baghdad, and they departed within a few days.

2. *Logistical Support in Baghdad*

15. On 5 or 6 August 2003, the initial BearingPoint party of seven employees arrived in Baghdad (tr. 1/31-32, 35). The party consisted primarily of economists and bankers who had experience with economic development and reform projects and who could provide assistance in reestablishing a banking system or a tax collection authority (tr. 1/33). The party later grew to over 50 BearingPoint employees by mid-December 2003 (tr. 1/247). In August, however, the small initial party stayed at the Burj al-Hayat hotel in Baghdad, along with the Custer Battles team (tr. 1/56).

16. During the relevant period, BearingPoint maintained offices in Baghdad at both the Burj al-Hayat and in the Green Zone, as well as in Erbil, the capital of Iraq's Kurdish Autonomous Region (tr. 1/57, 122, 154).

17. During the relevant period, the Iraqi economy was a cash economy, with no functioning banking system, and BearingPoint initially had difficulty obtaining cash in Baghdad (tr. 1/54, 262). Because of the lack of a banking system, all purchases for the BearingPoint party – "everything from buying bread out in the market to actually renting houses" – required the transportation of cash, which Custer Battles safeguarded

(tr. 1/262). At times, the amounts of cash required were substantial. The record reflects that, on one day, a BearingPoint manager withdrew $650,000 to rent five safe houses for the BearingPoint party (*see* finding 20; tr. 1/262).

18. Custer Battles typically transported BearingPoint personnel in a fleet of Chevrolet Suburbans, together with one Mitsubishi Pajero (tr. 1/179, 208).

3. *Leasing of Quarters for the BearingPoint Party*

19. In August 2003, two significant events regarding the security situation in Iraq occurred in close proximity to each other and affected the BearingPoint party. On 7 August 2003, the Jordanian Embassy in Baghdad was bombed. Twelve days later, on 19 August 2003, the United Nations headquarters in Baghdad was destroyed by a suicide bombing. Ms. Swan testified, and we find, that the Jordanian Embassy bombing was "sort of the beginning of the end in terms [of] the permissive society – permissive environment," and that the subsequent destruction of the United Nations headquarters "was even more of a wake up call and certainly signaled a change in approach" (tr. 1/36). By the fall of 2003, the BearingPoint party was working in a "war zone," and Ms. Swan testified that, "as the situation changed we looked for more security" (tr. 1/89, 159; 55345, R4, tab 62).

20. There were threats against BearingPoint personnel in the Burj al-Hayat and BearingPoint sought to move them to a safer environment (tr. 1/164). A 6 November 2003 BearingPoint internal security report noted that "[t]he security situation is [sic] Iraq is dynamic and there are signs that it is becoming more dangerous for contractors such as BearingPoint" (55354, R4, tab 57 at 1). Some BearingPoint personnel remained in the Burj al-Hayat through December 2003, when the hotel sustained a direct hit from mortar fire and a rocket propelled grenade. In the interest of security, BearingPoint sought to spread out its party and to relocate them to separate venues, where they would have a lower profile (tr. 1/166, 262). As a result, Custer Battles rented five houses in Baghdad -- named, respectively, the Purple, White, Park, Ladies and Ivy houses -- and moved the BearingPoint party into them (tr. 1/79-80; 55354, app. supp. R4, tab 129 at 1).

4. *Personal Security Details*

21. During the relevant period, Custer Battles provided personal security details to BearingPoint. These details consisted of three groups: (a) American and other non-British Western expatriates; (b) Gurkha support guards; and (c) Peshmergas, who were Kurdish fighters who worked as static guards protecting the BearingPoint party's living quarters (tr. 1/178-79, 220, 247-48).

22. Consistent with the "highly interactive and participatory work style" requirement of the statement of work (*see* finding 2), BearingPoint had Custer Battles mobile security details transport BearingPoint personnel from the Burj al-Hayat, and, later, the five houses in Baghdad:

> To and from the Green Zone [Coalition Provisional Authority] Headquarters. We transported usually daily to the Ministry of Oil, Ministry of Electricity, Ministry of Finance. Two location[s] for the Ministry of Finance. To the Central Bank. Those... were almost every day dedicated runs.
>
> Occasionally, we would go out to the power stations within the region. We also had some – several runs that went up to Erbil....

Mobile security details also transported BearingPoint personnel to and from Baghdad International Airport approximately five times per week. (Tr. 1/264-65; *see also* tr. 1/126-27)

5. *Static Guards At Living Quarters*

23. After BearingPoint personnel moved into the rented houses in Baghdad, Custer Battles employed the Peshmergas to secure the houses and the immediate surrounding areas (tr. 1/178-79). Custer Battles paid these static guards $200 per day. Significantly, the individual guards generally were not identified by name on Custer Battles' invoices to BearingPoint. Instead, Custer Battles typically billed for their services by number of guards provided per day. (55354, app. supp. R4, tab 104 at 434, tab 105 at 462, tab 106 at 469)

D. *Dispute Regarding Custer Battles Costs*

24. In late September 2003, BearingPoint received Custer Battles' first invoice, covering the month of August. Instead of itemization, the invoice comprised a single line "that said August 2003 services and a number." BearingPoint rejected it as unacceptable. (Tr. 1/46-47)

25. The deficiencies in this first invoice led to a protracted process that continued until December, in which Ms. Swan and other BearingPoint employees were "trying to get the invoice in a format that we could pay" (tr. 1/62). Under BearingPoint's procedure, subcontractors sent their invoices to BearingPoint's headquarters in McLean, Virginia, which in turn sent them to its staff in the field -- in this case, in Baghdad -- for review by employees with first-hand knowledge of the goods or services for which payment was sought (tr. 1/50). To facilitate this review, BearingPoint developed a spreadsheet for Custer Battles to utilize for meaningful accumulation (tr. 1/53-54). The

process continued into early December, after Custer Battles had submitted its September and October invoices, with Ms. Swan and other BearingPoint employees concluding that the invoices contained unreimburseable costs and pressing for more detail and verification regarding amounts claimed for transportation, food, hotel rates and labor (55354, R4, tab 78; tr. 1/50, 64-65). In this process, Ms. Swan requested Custer Battles' chief financial officer to provide a certification complying with that prescribed in the Documentation for Payment clause (*see* finding 4) (55354, R4, tab 51 at 1, tabs 66, 69; tr. 1/61).

26. BearingPoint did not pay Custer Battles while the two were attempting to develop a compliant invoice. Accordingly, by letter to BearingPoint dated 29 December 2003, Custer Battles stated that, unless the parties could reach an agreement regarding BearingPoint's approximately $4.8 million outstanding balance for services and expenses, Custer Battles would "end its services...and remove all personnel and assets currently being used by BearingPoint in Iraq" (55354, R4, tab 77). Ms. Swan testified, and we find, that, had Custer Battles done so, the BearingPoint party "would not have been able to move from the place we were living to the offices that we had in the Green Zone, [nor] would we have been able to visit the client sites and the government of Iraq ministries" (tr. 1/68). Consequently, the parties agreed to meet in early January, 2004 to discuss outstanding issues, and Custer Battles did not walk off the job (tr. 1/85).

27. In the event, BearingPoint never signed a subcontract with Custer Battles (tr. 1/66). By date of 7 January 2004, Custer Battles sent BearingPoint a letter agreement setting forth terms of payment for Custer Battles's past performance and establishing a statement of work for the future. BearingPoint signed the letter. In pertinent part, the letter expressed the parties' intention "to enter into a binding written Transition of Services Agreement" providing that Custer Battles would furnish personal security details to BearingPoint employees working in Iraq, protect houses that BearingPoint was renting there, furnish certain support services and assign certain leases to BearingPoint. The letter also specified that Custer Battles would provide its services "through the close of business on February 15, 2004, unless this Agreement [were] terminated before" that date. (55354, R4, tab 11 at 6-7)

28. The letter agreement also "incorporate[d] by reference and include[d] Attachment B, Transition of Services Agreement Terms and Conditions, which appl[ied] to this Letter Agreement and will apply to the Transition of Services Agreement." Attachment B contained paragraph 3, Incorporation of Applicable Clauses of Prime Contract, which made various clauses of the prime contract part of the agreement. (55354, R4, tab 11 at 8-10)

29. The letter agreement was not terminated before 15 February 2004, and that date marked the end of Custer Battles' provided services to BearingPoint on the matters at issue in this appeal (55354, R4, tab 208, encl. 8, ¶ 5).

30. During the period relevant to this appeal, Custer Battles was performing other activities concurrently in Iraq (tr. 2/52). One such activity involved multiple contracts between Custer Battles and the Coalition Provisional Authority (CPA) to provide life support services, such as furnishing food and equipment for a security team, to assist the CPA at three hubs for the distribution of a new Iraqi national currency (the currency exchange contracts) (55354, R4, tab 80 at 1-2; tr. 1/252, 267-68). The distribution hubs were in Basra, at the Baghdad International Airport, and near Mosul (tr. 1/266), and were physically apart from the venues and the personnel working on this contract in Baghdad. BearingPoint provided program management services for the currency exchange efforts (tr. 1/254). While BearingPoint personnel concluded that Custer Battles' billings for the currency exchange contracts reflected irregularities, and so reported to the CPA and relevant investigatory agencies (55354, R4, tab 80; tr. 1/254-55), we find that the currency exchange activities were "totally separate" from the activities in dispute (tr. 1/265-68) and did not affect the integrity of the Custer Battles invoices for which BearingPoint seeks reimbursement in this appeal (tr. 1/257-58).

31. During contract performance, Custer Battles submitted invoices to Bearing Point for the months of August through December 2003 and January and February 2004. Three individuals at BearingPoint reviewed these invoices:

(a) Ms. Swan, who was in Iraq from August until mid-September 2003, and again for a two-week period in November 2003, and oversaw payments to Custer Battles from BearingPoint headquarters at other relevant times;

(b) David Bourne, a senior management analyst who had a financial and managerial background and who arrived in Iraq in mid-September 2003, coordinating travel, living accommodations and the movement of BearingPoint personnel in Iraq under the contract on a daily basis until early December 2003; and

(c) John Dulle, a BearingPoint managing director who oversaw all transportation, security and logistics for BearingPoint personnel in Iraq under this and other contracts. (Tr. 1/51, 173-74, 183, 203-04, 237, 242, 246, 249-51)

32. The record contains extensive documentary and testimonial evidence that BearingPoint personnel, after reviewing the Custer Battles invoices for the following months in detail, questioned claimed costs that could not be substantiated from either BearingPoint's records or the knowledge of its employees in the field, as follows: 55354, R4, tabs 53, 61, 66, 68; tr. 1/59-61 (August); tabs 78, 102 (September); tab 79 (August and September disallowances); tabs 103, 120 at 710 (October); tab 122 (November); tabs 105, 124, 125 (December); tab 106 (January); tab 107 (February).

33. We find that BearingPoint questioned $325,279.73 of costs on Custer Battles invoices and disallowed $203,211.24, as follows:

Month	Amount Disallowed
August 2003	$ 10,741.53
September 2003	$ 33,840.00
October 2003	$ 41,478.00
November 2003	$ 35,691.03
December 2003	$ 5,604.89
January 2004	$ 53,700.00
February 2004	$ -0-
Houses	$ 9,940.00
Camp Extension	$ 12,215.79
Total	$203,211.24

(55354, R4, tab 134 at 132, tab 135; tr. 1/76-77) While BearingPoint proposes that we find that its disallowances from Custer Battles invoices aggregate $313,063.94 (Post-Hearing Brief for Appellant (app. br.) at 29), we do not find support for such a figure. BearingPoint is not seeking reimbursement for any amounts that it disallowed from Custer Battles invoices (tr. 1/82).

34. By letter dated 22 November 2004, Ms. Swan requested Custer Battles to furnish copies of "all staff timesheets and expense reports associated with the invoices submitted to BearingPoint" because of a pending DCAA audit (55354, R4, tab 90) (underlining in original). Ms. Swan testified that, in a subsequent conversation, a Custer Battles officer advised her that:

> The records were in Baghdad and that one day when [Custer Battles] transitioned off the [Baghdad International A]irport security detail a new contractor came in and their materials, their files were destroyed or lost. And so [the] Custer Battles [office] in Rhode Island did not have the time sheets that had been available in Baghdad.

(Tr. 1/96-98) This testimony withstood cross examination (tr. 1/117-19) and the record contains no controverting evidence.

E. *Audits*

35. By date of 24 August 2004, DCAA issued an audit report regarding costs billed by Custer Battles to BearingPoint for the period August 2003 through March 2004. In its report, DCAA questioned $4,520,704 of the $5,285,028, which was said to represent the difference between billed and allowable amounts, because Custer Battles

"was unable to provide sufficient supporting data and/or we were unable to apply sufficient audit procedures to allow us to adequately verify the costs claimed." (55354, R4, tab 6 at 5 n.3) DCAA concluded that "Custer Battles does not have an adequate accounting system to support the billed costs," and hence the records produced could not be relied upon. DCAA opined that, because of the accounting system deficiencies, "only a 100% of [sic] review of the supporting data for the billed costs would be sufficient to support an opinion on the costs billed by Custer Battles." (55354, R4, tab 6 at 3-4) Before she was privy to DCAA's findings, Ms. Swan transmitted to the contracting officer an internal 10 July 2004 "white paper" outlining BearingPoint's process for reviewing the Custer Battles invoices (55354, R4, tab 8). We find that this "white paper" is merely cumulative of other evidence adduced at trial (*e.g.*, findings 7-9, 14-19, 25).

36. After further communication between AID and DCAA, those two agencies reduced the amount of the Custer Battles questioned costs from $4,575,240 to $3,851,864. This amount "represent[ed] the difference between the total amount that USAID/Iraq was charged or will be charged by BearingPoint for the services of Custer Battles ($5,962,601) and the total amount DCAA found to be allowable ($2,110,737)." (55354, R4, tab 98 at 3, ¶ c; tr. 2/28)

37. The parties were deadlocked regarding payment for DCAA's recommended "100 % review" of the data supporting the Custer Battles costs (*see* finding 35; tr. 2/34-37). In an effort to break the deadlock, Ms. Swan furnished Karin Kolstrom, then the contracting officer, with BearingPoint's invoices from Custer Battles, as well as related documentation. Ms. Kolstrom concluded, however, that she "could not determine allocability. [Although she had] all these invoices showing all of these people, really there's no proof that these people really existed and worked on the BearingPoint project, nothing." (Tr. 2/42) After further conversation, the parties agreed to a complete audit of the Custer Battles costs conducted by one Frances Outland, a certified public accountant employed by AID in Washington, DC (tr. 2/43-44).

38. To substantiate BearingPoint's claimed costs, Ms. Swan transmitted a detailed analysis to AID by letter dated 11 March 2005 that was designed to show that BearingPoint in fact had less security than was necessary during contract performance. BearingPoint examined "the volume of security support services that would be called for based on the number of our own staff that were working in Iraq on any given day [of performance]. We then compared this amount to the level of effort that Custer Battles actually invoiced us." (55354, app. supp. R4, tab 132 at 2-3) While the parties make conflicting arguments regarding this analysis in their briefs, we find the analysis unpersuasive on the issue of allocability.

39. By memorandum dated 11 August 2005, Ms. Outland set forth her assessment of the disputed cost items. She questioned $2,018,977 of the Custer Battles costs that

BearingPoint had paid (55354, R4, tab 18 at 1). With respect to the largest item – labor costs – Ms. Outland concluded that they were "not supported at all. The days and hours are not supported by timesheets." (55354, R4, tab 18 at 4) In addition, while the Custer Battles labor rates had been the product of competition (tr. 2/58-60; *see also* finding 7), she questioned their reasonableness. The other categories of costs that she questioned included those for the houses in which the BearingPoint party had resided (*see* finding 20), for transportation, and for food (55354, R4, tab 18 at 5-6).

F. *Final Decisions*

40. By date of 14 November 2005, Ms. Kolstrom rendered her final decision allowing in part and denying in part the Custer Battles costs claimed by BearingPoint (55354, R4, tab 24). Ms. Kolstrom disallowed $1,785,925, together with applicable overhead and G & A, "because of a lack of sufficient supporting documentation" (*id*. at 3). The largest components of these disallowed amounts were as follows:

(a) labor, for which she disallowed $1,348,968, consisting of: (1) $1,220,315 for "Custer Battles employees who did not appear on the Custer Battles monthly rosters for the...subcontract;" and (2) $128,663 for amounts "in excess of six days per week per individual;"

(b) ground transportation, for which she disallowed $367,153 for the rental of Chevrolet Suburbans (*see* finding 18) for lack of documentation;

(c) housing, for which she disallowed $42,962 related to the five houses (*see* finding 20), treating $15,000 in lease costs as unreasonable, and concluding that $8,381 in refurbishing costs and $19,581 in labor costs for local personnel were unsubstantiated;

(d) miscellaneous, for which she disallowed $25,255.90 for items such as radio rental, telephone cards, equipment, coffee, services and supplies as unsupported by documentation.

Ms. Kolstrom demanded payment from BearingPoint for the disallowed costs in (a) through (d), as well as for other disallowed costs not in issue here. (55354, R4, tab 24 at 3-7) By date of 9 February 2006, BearingPoint timely appealed this decision to the Board.

41. While the above amounts were in dispute as this case went to trial, they changed after trial. With its opening brief, AID submitted to the Board a 6 October 2008 amendment to Ms. Kolstrom's final decision for both this appeal and for ASBCA No. 55555. This amendment was signed by Sonila Hysi, a new contracting officer. While this amended decision was submitted after the record was closed and without leave

of the Board, we have included it in the record as Rule 4, tab 211. With respect to that part of the amendment that relates to ASBCA No. 55354, Ms. Hysi withdrew Ms. Kolstrom's disallowance regarding six day workweek costs (*see* finding 40(a)(2)) and "allow[ed] reimbursement of the entire $128,663 incurred for the seventh day costs." Ms. Hysi also "allow[ed] $277,163 of the previously disallowed $367,153 for ground transportation," leaving $89,990 in dispute. Ms. Hysi demanded payment of the disallowed costs. (55354, R4, tab 211 at 1-2, 4; *see also* finding 40(b))

G. *Trial Testimony and Post-Trial Concessions*

1. *General*

42. Ms. Kolstrom testified, and we find, that she did not disallow any of BearingPoint's claimed Custer Battles costs as unreasonable (tr. 2/144-45; *see also* 55354, R4, tab 202; tr. 2/156-57).

43. With respect to proof of allocability, Ms. Kolstrom testified, and we find, that she did not consider Mr. Bourne's and Mr. Dulle's review of vouchers, but instead paid claimed costs "because we had documentation to support them" (tr. 2/93).

44. Alluding to Custer Battles' weak accounting system (*see* finding 7), Ms. Kolstrom testified that her overall problem with the Custer Battles costs was that:

> [T]hey did have paper records but it was a mess. That's what DCA[A] said. Was that the paper records ideally they should tie in, they should have nice neat little files with labels and just something showing the paper backs up what they log into the electronic system so it can all be tracked to a certain project. I mean that's basically in general how things should work.
>
> And so they didn't have -- their systems didn't support what they billed BearingPoint basically and that's a big problem.

(Tr. 2/19)

45. While DCAA had audited the Custer Battles costs (findings 35-36), no DCAA auditor testified at trial. Ms. Kolstrom was AID's sole witness. Inexplicably, although Ms. Outland had conducted the review upon which Ms. Kolstrom heavily relied, she did not testify. The record reflects that Ms. Outland was not unavailable at the time of trial (tr. 2/120-21). The record also reflects that Ms. Outland could have filled in gaps that Ms. Kolstrom could not (tr. 2/97-99, 121-44). Ms. Hysi, whose final decision was rendered after trial (*see* finding 41), also did not testify.

2. *Labor Costs*

a. *Custer Battles Employees*

46. With respect to the $1,220,315 in labor costs that Ms. Kolstrom disallowed for "Custer Battles employees who did not appear on the Custer Battles monthly rosters" (*see* finding 40(a)), BearingPoint adduced the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle (*see* finding 31). We find that, with respect to labor costs, BearingPoint followed the process of review by employees at BearingPoint headquarters, followed by review by employees in the field with first-hand knowledge of the services invoiced (*see* finding 25). Ms. Swan testified that "[t]he invoice review team in Baghdad consisted of the staff members we had there actually interacting, working with Custer Battles on the scheduling of resources that they were providing. So, it was David Bourne and then later John Dulle." (Tr. 1/51, 52) Those items that were deemed acceptable by Mr. Bourne and Mr. Dulle were paid by BearingPoint headquarters, and those that were questioned were not (tr. 1/188). With respect to more detailed documentation of labor charges on the Custer Battles invoices, Ms. Swan testified that, while she had highlighted for Custer Battles the need for a time keeping system, she did not demand that Custer Battles furnish time cards because:

> I've never made such a demand from a subcontractor in the years before. And we were on the ground with them. The people that [we] were going to be invoiced for were living in the hotels [and, later the houses] with us. We were working with them every day in actions with them three to four, five different times during the day. So, I didn't believe it was necessary.

(Tr. 1/48-49) We find Ms. Swan's testimony credible. In their testimony, Mr. Bourne and Mr. Dulle explained their review process and the relationship between close living and working relationships and verification of Custer Battles labor charges.

47. Mr. Bourne reviewed the Custer Battles invoices for August, September, October and December, 2003 (tr. 1/185-86, 192-93, 195-96, 198-99; 55354, R4, tabs 101-03, 105). He testified that, in his role in coordinating subcontractors, he interacted with Custer Battles:

> Several times a day for a period [I was] the primary person that dealt with our people moving around. Getting to the office in the morning, getting to their meetings throughout the day. So, usually for each event or movement, I would be talking with some member of Custer Battles personnel.

(Tr. 1/181-82) In reviewing the Custer Battles invoices, he "look[ed] at each line and verif[ied] each item based on personal experience or [sic] using their services,...but also in coordinating the activity" (tr. 1/184). Utilizing his professional background (*see* finding 31(b)), Mr. Bourne identified problems with "nearly every one" of the Custer Battles invoices that he reviewed (tr. 1/187). He testified that he examined labor charges on the invoices "line by line":

> Based on personal experience of being on the ground, not only using their services but also being the one that coordinated their services when they would move around with our personnel. How many people were there.
>
> Additionally, because we were there for a long period of time working seven days a week, I got to know these people. So, I'd have dinners with them...and just had a familiarity with who they were and how long they were there.

(Tr. 1/191-92) Mr. Bourne applied this "line by line" examination process to the labor charges appearing on the Custer Battles invoices for August (55354, R4, tab 101 at 424; tr. 1/191-92), September (55354, R4, tab 102 at 99; tr. 1/194-95), October (55354, R4, tab 103 at 108; tr. 1/197-98), and December 2003 (55354, R4, tab 105 at 461-62; tr. 1/200-02). Mr. Bourne's testimony regarding his review of the four Custer Battles invoices was not challenged on cross examination (tr. 1/203-28), and is consistent with his May 2006 declaration (55354, app. supp. R4, tab 133i, ¶¶ 5-6). We find Mr. Bourne's testimony credible.

48. Mr. Dulle reviewed the Custer Battles invoices for November and December 2003, as well as January 2004, and the final invoice for February 2004 (tr. 1/242-43, 246, 249-51; 55354, R4, tabs 104-07). Like Mr. Bourne, he testified that, in the review process, he "would go through line by line the invoice and just match it up to what we knew that we had received as part of the services" (tr. 1/241). He verified the labor charges on the invoices because "we lived with all the PSDs. So, we knew the Custer Battles people by site [sic] and by name because we lived and worked with them on a daily basis." (Tr. 1/245-46) This was true of the three groups of PSDs – the expatriates, the Gurkhas and the static house guards (1/247-48). Mr. Dulle applied this "line by line" examination process to the labor charges appearing on the invoices for November (55354, R4, tab 104 at 434; tr. 1/242-43), December (55354, R4, tab 105 at 461; tr. 1/247-49), January (55354, R4, tab 106 at 469; tr. 1/250), and February (55354, R4, tab 107 at 474; tr. 1/251). Mr. Dulle's testimony regarding his review of the four Custer Battles invoices was not challenged during his cursory cross examination (tr. 1/260-78), and is consistent with his May 2006 declaration (55354, app. supp. R4, tab 133h, ¶¶ 4-5). Contemporaneous documentation in the record also corroborates his testimony regarding scrutiny of labor charges (55354, R4, tab 122 at 710 (e-mail noting various individuals on November invoice "[n]ot our person"); tab 124 at 714 (Mr. Dulle's e-mail stating "I have

reviewed the Custer Battles invoice and have attached a sheet with the required adjustments" for December PSDs); tab 130 at 582 (Mr. Dulle's e-mail "I have reviewed this [last PSD invoice] and it looks correct"). We find Mr. Dulle's testimony credible.

49. With respect to her disallowances for "Custer Battles employees who did not appear on the Custer Battles monthly rosters" (*see* finding 40(a)), Ms. Kolstrom testified that she regarded the costs as unallocable because Ms. Outland "checked the payroll records. So [Ms. Outland] said yes, this guy was paid, he existed and he was on the employee roster" of Custer Battles for a given month (tr. 2/75). Drawing on Ms. Outland's review (55354, R4, tab 19), Ms. Kolstrom compiled a list, which she set out in her final decision, of 68 such employees whom Ms. Outland was said to have found on the Custer Battles roster (55354, R4, tab 24 at 4-5). Ms. Kolstrom disallowed costs for all claimed Custer Battles employees other than these 68 individuals. The rationale that she proffered at trial was that others were "ghosts" (tr. 2/125). While she testified that she had no reason to distrust BearingPoint (tr. 1/101), she defined a "ghost" as "somebody who didn't really exist, or somebody who -- yes, I mean somebody who was either a fake employee or something that just was billed but who wasn't real" (tr. 2/153; *see also* 2/126). Ms. Kolstrom herself never saw the Custer Battles payroll records (tr. 2/131). Ms. Kolstrom offered confused testimony regarding where or how Ms. Outland had said or concluded that certain Custer Battles employees were ghost employees (tr. 2/133-43; 55354, R4, tab 18 at 7), but nonetheless fell back on her conviction that "Frances Outland the CPA [looked at the documentation] and that's good enough for me" (tr. 2/143). Ms. Kolstrom also testified that she didn't "know exactly what [Ms. Outland] was talking about" (tr. 2/99) when Ms. Outland dismissed BearingPoint's analysis comparing its employees in Iraq to the level of security support required from Custer Battles employees (*see* finding 38). While she had stated in her final decision that DCAA "questioned the entire amount of labor costs billed by Custer Battles due to the lack of timesheets and an inadequate accounting system" (55354, R4, tab 24 at 4), Ms. Kolstrom testified that clause G.1 (*see* finding 4) said nothing about time cards (tr. 2/116-17) and that she had never in 20 years disallowed costs because subcontractor time cards had not been presented (tr. 2/148-49).

50. Considering Ms. Kolstrom's heavy reliance on Ms. Outland's work, the rigor of which was never tested through cross examination (finding 45), as well as Ms. Kolstrom's confused explanation of "ghost" employees, for which we find no evidence, and her unpersuasive and inconsistent responses on cross examination, we do not find her testimony regarding the disallowance of labor costs credible.

b. *Six Day Workweek*

51. With respect to the $128,663 that she disallowed on six-day workweek grounds (*see* finding 40(a)(2)), Ms. Kolstrom had asserted in her final decision that the prime contract "only authorized a six day workweek, and [Ms. Outland] discovered that

Custer Battles had billed [the disallowed amount] in excess of six days per week per individual" and hence she disallowed claimed costs for the seventh day (55354, R4, tab 24 at 4; tr. 2/105-08). At trial, Ms. Kolstrom testified that this disallowance "would be an allowability issue" (tr. 2/97) that turned on clause H.9(g)(2) of the prime contract (*see* finding 59).

3. *Ground Transportation Costs*

52. At trial, BearingPoint adduced the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle regarding ground transportation costs. Ms. Swan testified to her efforts in pressing Custer Battles for substantiation regarding the costs shown on the invoices for the Pajero and the Suburbans (*see* finding 18), an effort well-documented principally in contemporaneous e-mails in the record (tr. 1/53, 60-61, 68-70, 71-72, 84, 87, 147-49; 55354, R4, tab 51 at 1, tabs 61, 62 at 1-2, tab 66 at 1, 71, tab 78 at 1, tab 81 at 2, tabs 84, 104, 135). Mr. Bourne testified with respect to the September 2003 Custer Battles invoice that he had reviewed it as part of his coordination role under the contract and that he found the number of Suburbans charged on the invoice (55354, R4, tab 102 at 97) to be accurate because "[t]ypically I knew exactly how many vehicles we had on the ground – that we were using and I knew how many people we had on the ground that would make use of the vehicles. So, I had a good familiarity with this activity" (tr. 1/193-94). He offered comparable testimony regarding the Suburbans shown on the Custer Battles invoices for the months of October (55354, R4, tab 103 at 103; tr. 1/195-97), and December (55354, R4, tab 105 at 451; tr. 1/198-200). Mr. Dulle also testified regarding the Suburbans listed on the Custer Battles invoices for December (55354, R4, tab 105 at 451; tr. 1/246-47), and for January 2004 (55354, R4, tab 106 at 468), which he substantiated from "the volume [of BearingPoint employees] and the daily usage that I observed" (tr. 1/250) and February (55354, R4, tab 107 at 473; tr. 1/250-51). A string of internal BearingPoint e-mails from January 2004 memorializes Mr. Dulle's review of Custer Battles' November invoice and his ultimate conclusion, in conjunction with the headquarters staff in Virginia, that BearingPoint should pay for only 10 of the 17 Suburbans billed for that particular month, as BearingPoint later did (55354, R4, tab 122 at 1; tr. 1/75-78).

53. With respect to her disallowances for the rental of Suburbans (*see* finding 40(b)), Ms. Kolstrom defended her decision at trial, testifying that "[t]here was no documentation" (tr. 2/89). However, she conceded on cross examination, and we find, that, after hearing the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle, she believed that Suburbans in fact were used (tr. 2/145) and that, as a common sense matter, given the number of BearingPoint employees in Iraq, the cost would be significant (tr. 2/147; *see also* findings 13, 15, 18, 22, 52).

54. By contrast to Ms. Kolstrom's blanket disallowance of all claimed ground transportation costs, Ms. Hysi undertook to analyze allocability in her amended final

decision. In allowing $277,163 of those costs, thereby reducing the disallowance from $367,153 to $89,990 (*see* finding 41), she made calculations based upon the January 2004 e-mail string in which BearingPoint concluded that it had used 10 Suburbans per day in November 2003 (*see* finding 52) and the materials accompanying BearingPoint's 11 March 2005 analysis comparing the number of BearingPoint employees in Iraq to the level of Custer Battles support (*see* finding 38) and concluded that BearingPoint had used 9.5 vehicles per deployment day (55354, R4, tab 211 at 2). After multiplying this figure by the $150 per vehicle daily rental rate and arriving at a $1,421 approximate cost for vehicle usage per day, she in turn multiplied the result by 195 deployment days to reach $277,163 as the amount of the previously disallowed $367,153 in ground transportation costs (55354, R4, tab 211 at 2). This post-trial analysis by a contracting officer, who did not testify and was not subject to cross examination, was offered after the Board had closed the record (*see* findings 41, 57) and was unaccompanied by any showing of compelling necessity.

4. *Housing Costs*

55. With respect to the $42,962 that Ms. Kolstrom disallowed for the five houses (*see* finding 40(c)), it is not evident that these costs remain in dispute (s*ee* tr. 2/95-97 (summarizing disputed costs)). Nonetheless, while the record contains February 2004 e-mail exchanges in which Ms. Swan requested Mr. Dulle to perform "[d]ue diligence on the [Custer Battles] housing invoices," and Mr. Dulle's response that he "found a discrepancy in one area" relating to satellite and internet service (55354, R4, tab 127 at 720), we do not find the e-mails and the slender testimonial evidence about it (tr. 1/249) persuasive.

5. *Miscellaneous Costs*

56. With respect to the $25,255.90 that Ms. Kolstrom disallowed for miscellaneous costs (*see* finding 40(d)), it is not evident that these costs remain in dispute (*see* tr. 2/95-97 (summarizing disputed costs)). We find no evidence to support the costs claimed.

H. *Closing the Record*

57. At the conclusion of the trial, the Board issued a bench ruling closing the record in this appeal pursuant to our Rule 13 (tr. 2/169).

DECISION: ASBCA No. 55354

1. *Contentions of the Parties*

While AID's counsel asserted at trial that "this case has all the trappings of a good novel" (tr. 2/5), the issues before us in this appeal relate chiefly to allocability of costs. We previously denied summary judgment in this appeal after concluding that the record presented triable issues regarding both reasonableness and allocability. *BearingPoint, Inc.*, ASBCA No. 55354, 08-2 BCA ¶ 33,890 at 167,733. Now, following trial, we do not understand that any issue regarding reasonableness remains before us in this appeal (finding 42). The issues in this appeal – as distinguished from ASBCA No. 55555 – are confined to allocability and, in particular, to the type of proof required to establish allocability.

Under the final decisions of both Ms. Kolstrom and Ms. Hysi, AID demanded payment from BearingPoint of amounts that BearingPoint already had paid to Custer Battles during the course of performance (findings 40-41). The two principal categories of disputed costs are labor, chiefly representing claimed costs of the personal security details that guarded the BearingPoint party in Iraq, and ground transportation, representing claimed costs for moving BearingPoint personnel among many venues in Baghdad and elsewhere.

The parties' positions regarding the evidence of the allocability of these claimed costs differ sharply. The nub of BearingPoint's position is that, with respect to both the claimed labor and ground transportation costs, the contract did not specify any particular documentation to support the invoices that it submitted to AID. BearingPoint faults Ms. Kolstrom for "demand[ing] hard-copy records ('evidential matter')," or paper, which demand went beyond contract requirements. (App. br. at 40-41) BearingPoint insists that it adduced credible evidence of allocability of the disputed labor and ground transportation costs, chiefly in the form of the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle (*see* finding 31), as well as some documentary evidence (app. br. at 43).

For its part, AID counters that BearingPoint was required "to maintain records or other sufficient evidence of costs" to obtain reimbursement (Government's Post Hearing Brief Corrected Version (gov't br.) at 67). AID urges that the disputed labor and ground transportation costs are not allocable to the contract because they do not meet the contractual standard looking to contemporaneous documents or other supporting evidence, and, on multiple factual grounds, are simply unreliable (gov't br. at 68-95). In advancing these arguments, AID gives no weight to the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle (gov't br. at 87-89, 91-95).

2. *Labor Costs*

a. *Custer Battles Employees*

In contending that its Custer Battles labor costs are allocable, BearingPoint maintains that Ms. Kolstrom's disallowances reflected a "fundamental misunderstanding"

of the contract requirements for support and documentation of invoices (app. br. at 40). BearingPoint relies upon our decisions in *Analytical Assessments Corp.*, ASBCA Nos. 52393, 52394, 01-2 BCA ¶ 31,483 and *Environmental Safety Consultants, Inc.*, ASBCA No. 53485, 05-1 BCA ¶ 32,903, *modified and aff'd on recon.*, 05-2 BCA ¶ 33,073, to argue that neither the FAR Audit and Records – Negotiation clause (*see* finding 6), nor the AIDAR Documentation for Payment clause (*see* finding 4) calls for cost records in the form of the "nice neat little files" (*see* finding 44) that Ms. Kolstrom demanded. BearingPoint instead maintains that it adduced relevant and probative evidence of allocability through the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle, as well as through the Custer Battles invoices and related documentation. (App. br. at 40-47) In contrast, AID tells us that "BearingPoint asserts that the disallowed [labor] costs ...were incurred specifically for this contract but has not substantiated this assertion for any of the disputed costs" (gov't br. at 69). While its lengthy argument is largely factual, AID relies chiefly upon *JANA, Inc. v. United States*, 936 F.2d 1265 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 12030 (1992), as well as our decisions in *Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563, and *Analytical Assessments Corp.*, ASBCA Nos. 52393, 52394, 01-2 BCA ¶ 31,483, to argue that allocability determinations hinge upon contemporaneous documentation establishing a nexus between contract work and costs (gov't br. at 69, 89-91).

After considering the testimony and exhibits, as well as the briefs of the parties, we conclude that BearingPoint has met its burden of proof regarding labor allocability.

The tests for allocability are well established. "[T]he concept of allocability is addressed to the question whether a sufficient 'nexus' exists between the cost and a government contract." *Boeing North American, Inc. v. Roche*, 298 F.3d 1274, 1281 (Fed. Cir. 2002). That is,

> Allocability is an accounting concept involving the relationship between incurred costs and the activities or cost objectives (*e.g.*, contracts) to which those costs are charged. Proper allocation of costs by a contractor is important because it may be necessary for the contractor to allocate costs among several government contracts or between government contracts and non-government activities.

Id. at 1280; *see also* FAR 31.201-4. "[A]s a general matter, a contractor bears the burden of proof on the issue of allocability. We have so held for many years." *Lockheed-Georgia Co., A Div. Of Lockheed Corp.*, ASBCA No. 27660, 90-3 BCA ¶ 22,957 at 115,278.

We reject AID's central argument that the disputed labor charges are unallocable for insufficient documentation. The contract clauses do not impose the stringent

requirements of either "nice neat little files" that Ms. Kolstrom sought (finding 44) or the contemporaneous records for which AID appears to be arguing. Thus, the Allowable Cost and Payment clause, which was incorporated in the contract (finding 6), imposed no requirement that BearingPoint substantiate labor costs with time sheets, as Ms. Kolstrom insisted (finding 49). The Audit and Records clause, which was also part of the contract (finding 6), looks to "all records and other evidence sufficient to reflect properly all costs claimed to have been incurred...in performance of this contract." FAR 52.215-2(b). The clause prescribes no form that the "records" or the "other evidence" must take, and in fact we have read the clause more liberally than AID's position suggests. *E.g*., *Lockheed-California Co*., ASBCA Nos. 28618, 31314, 96-1 BCA ¶ 27,979 at 139,747-48 (concluding that prior testimony and other documentation were sufficient to establish allocable share of interest on borrowings). And AID's Documentation for Payment clause, which was incorporated (finding 4), contemplates cost reporting "prepared from the books and records of the Contractor," without describing the requisite level of detail. These clauses are consistent with FAR 31.201-2(d), which speaks broadly of a contractor's responsibility to maintain documentation "adequate to demonstrate that costs claimed...are allocable to the contract."

The case law also does not impose the requirements for which AID argues. Thus, *JANA* involved a discrepancy in which the contractor's invoices showed more hours of work than did some of the underlying employee time records. The "real issue" was "*how long* JANA was required to maintain the records that supported the labor charges it invoiced." *JANA*, 936 F.2d at 1268 (emphasis in original). The decision does not address the issue here, which relates to the sufficiency of testimonial evidence, and contemporaneous documentation, to support labor charges in the absence of time cards that were lost or destroyed.

We also derive little guidance here from our own decisions in *Fiber Materials* and *Analytical Assessments*. In *Fiber Materials*, we were confronted with a failure of proof regarding disputed commission costs. The contracting officer there had disallowed the costs for which no payees were identified and the contractor simply "had not presented any evidence concerning those costs," *Fiber Materials*, 07-1 BCA ¶ 33,563 at 166,257, which is very different from the record here. Similarly, in *Analytical Assessments*, we decided the case under our Rule 11 and noted the severe failure of proof, which included "no affidavits...from any employee of either [the subcontractor] or [the contractor] involved in the performance of the contract/subcontract that might lend credence to [the contractor's] contentions" regarding the claimed costs. *Analytical Assessments*, 01-2 BCA ¶ 31,483 at 155,426. This failure of proof contrasts with the record before us here, which includes declarations – comparable to the affidavits that we said were missing in *Analytical Assessments* – as well as testimony from contractor employees, as well as corroborating documentation.

While we thus do not accept AID's legal argument regarding the extent of proof required, we also reject AID's contentions regarding the evidence supporting the claimed costs here. At the outset, we stress that the record presents no evidence of malfeasance. Ms. Kolstrom's frequent conclusions regarding "ghost" employees (finding 49) indicates corrupt conduct. *See United States v. Cornier-Ortiz*, 361 F.3d 29, 31, 37-39 (1st Cir. 2004) (affirming conviction under 18 U.S.C. §§ 371 and 666 for money laundering schemes that, *inter alia*, "involved...ghost employees"); *United States v. Suba*, 132 F.3d 662, 667-68 (11th Cir. 1998) (affirming conviction under 18 U.S.C. § 371 for conspiracy to submit cost reports that "fraudulently sought reimbursement...for the wages of...ghost employees"). The record contains no evidence of such malfeasance (finding 50).

Apart from ghost employees, the nub of the matter for us is the extraordinary imbalance in the cases presented by the parties. For its part, BearingPoint, as the party with the burden of proof on allocability, presented a robust *prima facie* case. Thus, BearingPoint presented credible testimony from Ms. Swan, Mr. Bourne and Mr. Dulle, supported by documents.

With respect to Ms. Swan's testimony, while the record reflects that Ms. Kolstrom's problem with allocability was that Custer Battles "did have paper records but it was a mess" (finding 44), Ms. Swan explained the loss of the Custer Battles time records at the Baghdad International Airport (finding 34). Her testimony on this point withstood cross examination, is otherwise uncontroverted (*id*.), and is consistent with evidence that contract performance occurred in what had become a "war zone" (finding 19). Hence, there is no obstacle to resorting to other credible evidence of the Custer Battles labor costs. *See, e.g., International Equipment Services, Inc*., ASBCA Nos. 21104, 23170, 83-2 BCA ¶ 16,675 at 82,924, *aff'd on recon.*, 84-1 BCA ¶ 17,025 (recognizing that "[i]f accounting records are unavailable, due to no fault of the contractor," estimates may be used); *Cavalier Clothes, Inc. v. United States*, 51 Fed. Cl. 399 at 419-20 (2001) (noting that "factors that have been held to excuse the failure to produce reasonably accurate cost records are those beyond the control of the contractor, such as...the conduct of...some third party"). Ms. Swan also testified regarding the review process that BearingPoint developed for Custer Battles invoices, and to BearingPoint's efforts to mentor Custer Battles in developing an invoice that was the product of meaningful cost accumulation and that would satisfy government requirements (findings 24-26).

In their testimony, Mr. Bourne and Mr. Dulle explained their "line by line" review of each of the Custer Battles labor charges based, as Mr. Bourne put it, on their "personal experience of being on the ground, not only using [Custer Battles'] services but also being the one that coordinated their services" (finding 47; *see also* finding 48). The record reflects that, as a result of this review process, BearingPoint made substantial disallowances from Custer Battles' claimed costs (findings 32-33). Like the testimony of

Ms. Swan (findings 25, 34, 46), the testimony of Mr. Bourne and Mr. Dulle is supported by contemporaneous documentation, as well as their 2006 declarations (findings 47-48).

Cumulatively, the testimony of these three BearingPoint witnesses contrasts with the record in *Analytical Assessments*, where the subcontractor invoices "merely summarize[d] conclusory totals for the cost categories billed without shedding light on how those totals were derived." *Analytical Assessments*, 01-2 BCA ¶ 31,483 at 155,426. It also contrasts with *International Equipment*, where we denied claims in part because the contractor had not "offered evidence from corporate personnel who worked at the plants and had first hand knowledge to substantiate its claims." *International Equipment*, 83-2 BCA ¶ 16, 675 at 82,924. We have found the testimony of BearingPoint's three witnesses credible (findings 46-48), and reject AID's dismissive characterizations of it (gov't br. at 91-95; finding 43).

In the face of BearingPoint's strong case, we are unable to repose confidence in AID's evidence. Although other possible government witnesses could have shed light on the labor disallowances at issue, only Ms. Kolstrom testified (finding 45). She offered confused testimony that we have not found credible (findings 49-50), and it reasonably cannot be said that AID overcame BearingPoint's strong *prima facie* showing.

We are not dissuaded from the foregoing conclusions by various other arguments that AID advances. Thus, while AID belabors Custer Battles' problems with the Iraqi currency exchange contracts (gov't br. at 21-24, 77-79), they were "totally separate" endeavors at different venues (finding 30) and are irrelevant. Similarly, although AID assails BearingPoint's July 2004 "white paper" and 2005 analysis of the volume of required security services (gov't br. at 39-40, 478-53, 97-102), we have found the "white paper" cumulative and the analysis unpersuasive (findings 35, 38). Finally, despite AID's argument that the flow down requirement in the Audit and Records – Negotiation clause (*see* finding 6), which was not included in the letter of authorization (finding 9), applies (gov't br. at 68), we do not agree. Even if the letter is treated as a subcontract, the $85,000 value does not meet the simplified acquisition threshold specified in FAR 2.101 and hence was not called for by either the terms of the clause itself or the original exchange between BearingPoint and the contracting officer regarding subcontract award (*see* findings 8-9).

We accordingly sustain the appeal regarding disallowed Custer Battles labor costs.

b. *Six Day Workweek Costs*

We treat Ms. Hysi's withdrawal of Ms. Kolstrom's disallowance of $128,663 in six day workweek costs (finding 41) as a post-trial concession on this issue. These costs are no longer in dispute.

We accordingly sustain the appeal regarding the $128,663 in disallowed six day workweek costs.

3. Ground Transportation Costs

The parties' arguments regarding ground transportation costs are similar to those advanced regarding labor costs, with a difference. That difference relates to Ms. Hysi's amended decision reducing the amount of AID's ground transportation claim from $367,153 to $89,990 (*see* finding 54). Like the parties, we treat the amended decision as a post-trial concession and conclude that only $89,990 in ground transportation costs now remains in dispute.

With respect to this reduced amount, BearingPoint contends that it has met its burden of proof on allocability, pointing again to the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle as establishing that "they evaluated [Custer Battles'] invoiced costs in the same way each month, and applied the same level of scrutiny" to ground transportation as to labor, and hence it is entitled to recover all of the ground transportation costs (Reply to Respondent's Post-Hearing Brief (app. reply br.) at 12). In contrast, AID maintains that, without trip reports or records of vehicle usage, "there is no way to be sure that the costs Custer Battles submitted on its vouchers were not for purposes besides supporting BearingPoint staff under the contract" (gov't br. at 74). AID then urges us to adopt Ms. Hysi's analysis, and tells us that, for the remaining $89,990, BearingPoint "has not met its burden to provide evidence that each of the vehicles was leased and used exclusively for service...under the contract" (gov't br. at 75).

We conclude that BearingPoint has met its burden of proof regarding the allocability of ground transportation costs.

At trial, the record regarding ground transportation costs was similar to that regarding labor costs. That is, BearingPoint made a strong evidentiary showing with the testimony of Ms. Swan, Mr. Bourne and Mr. Dulle, supported by contemporaneous e-mails reflecting their scrutiny, based upon personal knowledge, of the ground transportation charges on the September 2003 through February 2004 Custer Battles invoices (finding 52). This is credible evidence, tested on cross examination, which we can accept with a high degree of confidence. By contrast, we cannot say the same regarding AID's evidence. Ms. Kolstrom was AID's only witness (finding 45), and her testimony to justify the denial of all ground transportation charges was both counterfactual and counterintuitive, given both the contract requirement of a "highly interactive and participatory work style with national institutions" (finding 2) and the evidence of constant trips to Iraqi ministries and to the Green Zone (finding 22).

We decline AID's invitation to accord evidentiary weight to Ms. Hysi's analysis of ground transportation costs, and do not adopt it. As we have found, the analysis was

submitted with AID's brief in disregard of the bench ruling closing the record, and hence was never subject to cross examination (finding 54). It was also unaccompanied by a showing of "compelling necessity," and was based upon an e-mail string and BearingPoint's analysis of needed security support services, both of which were in the Rule 4 file and available at trial (*id*.).

We accordingly sustain the appeal regarding both the $277,163 conceded in Ms. Hysi's amended decision, and the remaining $89,990 in disallowed ground transportation costs.

4. *Housing and Miscellaneous Costs*

As we have found, it is not apparent from the evidence adduced at trial that either the housing costs or the miscellaneous costs that Ms. Kolstrom disallowed remain in dispute (findings 55, 56). It is likewise not evident from the parties' post-trial submissions. Nonetheless, we have found such evidence as there is regarding the housing costs unpersuasive (finding 55), and no evidence to support the miscellaneous costs (finding 56).

We accordingly deny the appeal as to both housing and miscellaneous costs.

ASBCA No. 55555

FINDINGS OF FACT: ASBCA No. 55555

58. Section C.1 of the contract (*see* finding 3) also contained Special Instruction 3, which provided that "[e]xpatriate advisors are authorized to work up to six days per week without premium pay" (55354, R4, tab 1 at 12 of 120).

59. Clause H.9, PERSONNEL COMPENSATION, provided in part:

> (a) Limitations:
>
> (1) Salaries and wages may not exceed the Contractor's established policy and practice, including the Contractor's established pay scale for equivalent classifications of employees, which shall be certified to by the Contractor....
>
> (2) In addition, there is a ceiling on the reimbursable base salary or wage paid to personnel under the contract equivalent to the maximum annual salary rate of the USAID "ES-6" (or the equivalent to the maximum ES-6 salary, if

compensation is not calculated on an annual basis), as amended from time to time, unless the Contracting Officer approves a higher amount in accordance with the Agency policy and procedures in ADS 302 "USAID Direct Contracting."

....

(g) Overseas Employees[s]

....

(2) The work week for the Contractor's overseas employees shall be not less than 40 hours and shall be scheduled to coincide with the work week for those employees of the USAID Mission and the Cooperation Country associated with the work of this contract.

....

(h) Definitions

As used in this contract, the terms "salaries" and "wages" mean the periodic remuneration received for professional or technical personal services rendered. Unless the contract states otherwise, these terms do not include any other elements of personal compensation described in the cost principle in FAR 31.205-6 "Compensation for Personal Services," such as (but not limited to) the differentials or allowances defined in the clause of this contract entitled "Differentials and Allowances" (AIDAR 752.7028) [*see* finding 60]. The term "compensation" is defined in FAR 31.205-6(a) and includes fees and honoraria related to the personal services provided under this contract, but excludes earnings from sources other than the individual's professional or technical work, overhead, or other charges.

(55354, R4, tab 1 at 29-31 of 120)

60. Section I of the contract (*see* finding 6) also incorporated by reference AIDAR 752.7028, DIFFERENTIALS AND ALLOWANCES (JULY 1996), 48 C.F.R. § 752.7028 (2002) (55354, R4, tab 1 at 36). Paragraph (a) of the clause provided for the reimbursement of post differential, in areas where it was paid to AID employees, "not to

exceed the percentage of salary as is provided such USAID employees in accordance with the [Department of State] Standardized Regulations [DSSR]...Chapter 500...Tables—Chapter 900," and paragraph (j)(1) of the clause for reimbursement of danger pay "not to exceed that paid USAID employees in the cooperating country" in accordance with DSSR Chapter 650.

61. The DSSR included Chapter 40, DEFINITIONS. It contained subparagraph k, which provided:

> "Basic compensation" means the rate of compensation fixed:
>
> (1) by statute for the position held by an employee;
>
> (2) by administrative action pursuant to law; or
>
> (3) administratively in conformity with rates paid by the Government for work of a comparable level of difficulty and responsibility in the continental United States, before any deduction is made and without taking into consideration any additional compensation such as overtime pay, night pay differential, hazard differential, extra pay for work on holidays, post differential, and allowances....

Chapter 40 also included subparagraph l, which provided that "'[s]alary' means the basic compensation of an employee...." (ASBCA No. 55555 (55555), R4, tab 61) (underlining in original)

62. The DSSR also included Chapter 500, POST DIFFERENTIAL. It contained DSSR 511, DEFINITIONS, which stated that "'Post differential' means the additional compensation of [up to] 25 percent over basic compensation...." Chapter 500 also included DSSR 552, CEILING ON PAYMENTS. It provided in part:

> Notwithstanding the rate of differential prescribed for the differential post, the per annum post differential rate at which payment is made shall be reduced, if necessary, so that the combined per annum post differential and basic compensation...or post differential and salary...authorized for the employee does not exceed the per annum salary authorized at Executive Schedule Level II.

DSSR Chapter 900, POST CLASSIFICATIONS AND PAYMENT TABLES, included an OMNIBUS EXHIBIT explaining that "[p]ost differential is paid only for hours for which basic compensation is paid." (55555, R4, tab 61) (underlining in original)

63. The DSSR also included Chapter 650, DANGER PAY ALLOWANCE. It contained DSSR 652(e), which provided that "[t]he amount of danger pay cannot exceed 25 percent of basic compensation." Chapter 650 also contained DSSR 656.2, NO CEILING ON PAYMENTS, which provided that the danger pay allowance "is not subject to any ceiling which would provide a payment less than the full percentage rate prescribed for the post." In addition, DSSR 655 included a note stating that "Danger Pay is paid only for hours for which basic compensation is paid." (55555, R4, tab 61)

64. By letter dated 1 August 2003, the contracting officer notified Ms. Swan that the "initial salaries for all staff that require approval under Section H of the contract [*see* finding 59] are hereby approved." The contracting officer also "provide[d] approval for all actions specified as needing Contracting Officer approval under Clause H.9 Personnel Compensation provided that the Contractor's Personnel Policies are followed and the amounts are within the ES-6 salary maximum." (55354, R4, tab 37)

65. We find that, during the relevant period in Iraq, the percentage of both danger pay and post differential were set at 25 percent of basic compensation (55555, R4, tab 60, table 3).

66. We find that the USAID ES-6 salary ceiling during the relevant period was $134,000 per year (55555, R4, tab 65 at 2). We further find no evidence that the contracting officer approved salaries or wages for BearingPoint or subcontractor personnel in excess of the maximum annual salary rate of the USAID ES-6 pay scale.

67. We find no evidence that, during performance, the parties treated workweek calculations differently for post differential and danger pay.

68. By date of 17 July 2004, the parties entered into bilateral Modification No. 06, extending the expiration date of the contract to 30 September 2004 (55555, R4, tab 6 at 1).

69. By date of 27 August 2004, DCAA issued its audit report regarding costs incurred and billed under the contract from 1 December 2003 through 31 March 2004. Among the costs that DCAA questioned were: (a) $34,002 in danger pay applied to uncapped salary, which DCAA asserted had "exceeded 25 percent of basic compensation established for the post;" (b) $113,113 in 25 percent danger pay applied to excess of 40 hour workweek, which DCAA asserted "exceeded 25 percent of basic compensation;" and (c) $89,783 in post differential, which DCAA asserted exceeded 25 percent of basic compensation. (55354, R4, tab 4 at 6-7)

70. By date of 19 February 2005, the USAID/Iraq Office of Acquisition & Assistance "Mission" Notice No. 05-003 gave guidance to contracting officers in awarding and administering cost reimbursement contracts in Iraq. It provided in part:

> 2. **Responsibilities and Requirements**: USAID contracting officers awarding and administering cost reimbursement contracts that include performance in Iraq are to calculate post differential and danger pay under AIDAR clause 752.7028 [*see* finding 60] by applying the percentages established by the Department of State for U.S. Government employees for each allowance to a maximum 40 hour workweek, regardless of whether the contractor has been authorized a workweek in excess of 40 hours. If the contracting officer has authorized a workweek in excess of 40 hours, then additional non-premium pay salary and related fringe benefits may be paid for hours worked, but payments for post differential and danger pay are limited to the percentage rates applied to a maximum of 40 hours. "Non-premium pay" means an hourly rate of pay that is no more than the regular hourly rate at pay for a maximum 40 hour workweek.
>
> NOTE: The "Ceiling on Payment" in Section 552 of the DSSRs does not apply to contractor employees, in accordance with the parenthetical phrase in 752.7028(a) ["(except the limitation contained in Section 552, "Ceiling on Payment")].
>
> 3. ...This Notice is effective February 3, 2005....

(Rule 11 Brief for Appellant (app. br.), Annex at 1) (boldface in original)

71. By decision dated 7 January 2006, the contracting officer disallowed and demanded payment from BearingPoint of $13,373,840 in prime and subcontractor costs for the period 1 April 2004 through 30 September 2004. Of this amount, he disallowed $90,850 for danger pay and $90,910 for hardship differential pay. (55555, R4, tab 35 at 1-2) Thereafter, by date of 17 February 2006, BearingPoint and the contracting officer agreed "that a withdrawal of the subject Final Decision is in the Parties' best interest" (55555, R4, tab 44 at 1).

72. Subsequently, by final decision dated 10 July 2006, a different contracting officer issued a new final decision disallowing various claimed prime and subcontractor costs. Included among them were $181,760 for danger pay and post differential, or hardship pay, including the G&A provisional rate. (55555, R4, tab 50 at 2-3) By date of

24 August 2006, BearingPoint timely appealed this decision to the Board. In its answer in this appeal, AID admitted that the $181,760 amount is erroneous because the G&A rate employed was too high (compl. and answer ¶¶ 9).

73. Ms. Hysi's 6 October 2008 amendment of Ms. Kolstrom's final decision in ASBCA No. 55354 (*see* finding 41) also applied to the 10 July 2006 decision in this appeal. In her amendment, Ms. Hysi corrected the mathematical error in the calculation of G&A, allowing $64,304, as well as simple interest of $7,746, based upon the applicable G&A rate. (55354, R4, tab 211 at 4)

74. We find no evidence that, before bidding on the contract, BearingPoint made any inquiry regarding whether either post differential or danger pay were to be computed on the basis of a 40-hour or 48-hour workweek. We further find no evidence that, at the time that it submitted its bid, BearingPoint relied upon its current interpretation regarding the length of the workweek for which reimbursement would be allowed under the contract.

DECISION: ASBCA No. 55555

AID's pay disallowances in ASBCA No. 55555 focus on allowability. By contrast to ASBCA No. 55354, the disallowances in this appeal do not relate to Custer Battles employees. The parties join issue over the application of two different types of pay for the period 1 December 2003 through 30 September 2004. Each of these two pay elements was provided in the contract to afford incentives to both contractor and subcontractor employees to work under hardship conditions in a war zone.

The first issue relates to the application of post differential to an extended workweek. By contrast to the workweek issue in ASBCA No. 55354 (*see* findings 40(a)(2), 51), the post differential dispute in this appeal relates to the application of a 25 percent premium. It was applied to salary for assignment to hardship stations. It is undisputed that BearingPoint paid its employees based upon an extended 48-hour workweek. The issue is whether the contract permitted BearingPoint to apply the 25 percent post differential premium to this workweek, or to the shorter 40-hour workweek that AID asserts was required. The second issue relates to danger pay. It, too, was a 25 percent premium, and the issue is whether it could be applied to hours in excess of a 40-hour workweek. The parties' respective positions on danger pay are analogous to their positions regarding post differential. The third issue relates to danger pay on an uncapped salary, which BearingPoint insists, contrary to AID, that it was entitled to compute for each employee based on the employee's actual compensation, regardless of whether that compensation exceeded the annual pay for AID employees at Executive Schedule, Level 6 (ES-6), or $134,000, for the period in dispute. (App. br. at 6-10)

By contrast to the allocability issues in ASBCA No. 55354, AID bears the burden of proof in this appeal. We have frequently held that it is the government's burden to

establish the unallowability of claimed costs. *E.g.*, *Johnson Controls World Services, Inc.*, ASBCA Nos. 46674, 47296, 96-2 BCA ¶ 28,464 at 142,166 (holding that, where allowability is in issue, "the Government bears the burden of proving that the costs are of the type made specifically unallowable by regulation or contract provision"); *Lockheed-Georgia*, 90-3 BCA ¶ 22,957 at 115,276 (same).

1. *Post Differential on Extended Workweek*

Paragraph (a) of the Differentials and Allowances clause defines post differential as "an additional compensation for service at places in foreign areas where conditions of environment differ substantially from [such] conditions...in the continental United States and warrant additional compensation as a recruitment and retention incentive." 48 C.F.R. § 752.7028 (2002). The dispute is not whether tenure in Iraq qualified under this standard, but over whether the contract required AID to reimburse BearingPoint for post differential applied to an extended 48-hour workweek.

Post differential was expressed as an additional percentage applied to pay. To meet its burden of establishing that BearingPoint applied the percentage to an unallowably high base, AID focuses first upon the limitation in paragraph (a) of the Differentials and Allowances clause. That paragraph permits reimbursement for post differential "not to exceed the percentage of salary as is provided such USAID employees in accordance with the [DSSR]...Chapter 500...Tables-Chapter 900," which AID reads in conjunction with the DSSR to equal a 25 percent premium applied to the employee's basic compensation determined upon the basis of a 40-hour workweek, not 48 hours or some longer period actually worked. (Gov't. br. at 52-57) In contrast, BearingPoint contends that the contract "does not limit the amount of post differential that [AID] will reimburse," and hence the contractor properly paid 25 percent of employees' salaries computed using a six-day workweek (app. br. at 44). BearingPoint proffers three principal arguments: (a) the restriction of post differential in paragraph (a) of the Differentials and Allowances clause (*see* finding 60) to "the time such employees actually spend overseas" does not place any constraints on the workweek, but instead looks to its actual length; (b) the limitation in the clause that post differential is "not to exceed the percentage of salary" paid to AID employees relates only to the 25 percent rate specified in DSSR Chapter 500; and (c) the limitation in DSSR 552 only applies "to the total compensation package for each employee," and does not impose a ceiling. (App. br. at 41-44)

We conclude that post differential was limited to 25 percent of salary based on a 40-hour workweek, not an extended 48-hour workweek, and hence BearingPoint is not entitled to reimbursement on the 48-hour basis.

By its terms, paragraph (a) of the Differentials and Allowances clause looks to the "salary...provided...USAID employees" as its touchstone. The clause also requires

computation of post differential "in accordance with the [DSSR]." (Finding 60) *See generally Boston v. United States*, 43 Fed. Cl. 220, 226 n.9 (1999) (dismissing action for lack of jurisdiction over alleged violations of DSSR and other regulations regarding civilian Army employee's overseas assignment). In the DSSR itself, Chapter 40, subparagraph l, equates basic compensation and salary (finding 61). In Chapter 500, which deals with post differential, DSSR 511 provides that the pay element constitutes "additional compensation...over basic compensation" (finding 62). Consistent with this formula, DSSR Chapter 40, subparagraph k, defines basic compensation as the rate "without taking into consideration any additional compensation such as...post differential" (finding 61).

BearingPoint tells us that AID's insistence upon calculating post differential on a 40-hour workweek was the product of an "unpublished (and therefore 'secret') policy" (app. reply at 10). Yet it is no secret that, under paragraph (a) of the Differentials and Allowances clause (*see* finding 60), the concept is rooted in statutes governing the "salary...provided...USAID employees." The applicable provision of the Federal Employees Pay Act of 1945, 5 U.S.C. § 5542(a), provides that "hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or...in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for...at" overtime, or premium, rates. While the overtime requirement "applies only to employees in Grade 15 or below," *Doe v. United States*, 372 F.3d 1347, 1351 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 904 (2005), the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*., has broad application to Federal employees, 29 U.S.C. § 203(e)(2)(A)(ii). *See Agner v. United States*, 8 Cl. Ct. 635 (1985), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986) (table) (recognizing dual coverage of many Federal employees by both statutes for overtime work in excess of 40 hours per week). The Fair Labor Standards Act sets forth the longstanding prohibition of a "workweek longer than forty hours" without compensation of at least "one and one-half times the regular rate." 29 U.S.C. § 207(a)(1).

Paragraph (a) of the Differentials and Allowances clause cannot be read without reference to these well-established standards. Given the formula in the clause that post differential was "not to exceed the percentage of salary as is provided...USAID employees," and the statutory definition of the standard Federal workweek as 40 hours, as well as the equation of basic compensation with salary and the exclusion of overtime pay from basic compensation (finding 61), we conclude that BearingPoint was not entitled to reimbursement for post differential computed on a workweek longer than 40 hours.

We are not dissuaded from this conclusion by BearingPoint's arguments. Thus, contrary to BearingPoint, we read the reference in paragraph (a) of the Differentials and Allowances clause to "the time...employees actually spend overseas" to refer only to amounts earned during in-country posting, not to workweek length. In addition, the reference in paragraph (a) of the clause to post differential "not to exceed the percentage

of salary provided" to AID employees cannot reasonably be translated into the fiscal freefall of letting each contractor define an extended workweek to its liking and then apply a 25 percent post differential to that workweek. Otherwise, paragraph (a)(2) of clause H.9 (finding 59) and the contracting officer's 1 August 2003 letter (finding 64) are meaningless. With respect to BearingPoint's third principal argument, we agree that the offset provision in DSSR 552 (finding 62) applies to "the total compensation package for each employee" (app. br. at 43), and is not relevant to workweek length.

The most that BearingPoint's arguments lead to is ambiguity. Whether the arguments relate to the undefined nature of the workweek to which basic compensation applies or otherwise, ambiguity cannot yield recovery on this record. If the ambiguity were deemed patent, then BearingPoint must establish that it raised the issue before bidding. *E.g., Conner Bros. Construction Co*., ASBCA No. 54109, 07-2 BCA ¶ 33,703 at 166,880, *aff'd*, 550 F.3d 1368 (Fed. Cir. 2008). We have found no evidence that BearingPoint did so. (Finding 74) Alternatively, if the ambiguity were deemed latent, then BearingPoint must establish that it relied upon its current interpretation in bidding. *E.g., Servicios Professionales de Mantenimiento, S.A.*, ASBCA No. 52631, 03-2 BCA ¶ 32,276 at 159,680-81. We have likewise found no evidence that it did so. (Finding 74)

We are also not impressed with BearingPoint's reliance upon either Mission Notice 05-003 (*see* finding 70), or AID's subsequent rulemaking to clarify agency policy. *See* 71 Fed. Reg. 62,229 (Oct. 24, 2006) (to be codified at 48 C.F.R. § 752.7028). Both the Mission Notice and the proposed rule were issued in 2005 and thereafter, well after the performance in dispute (finding 68). BearingPoint tells us that that the Mission Notice was designed "to close a perceived 'loophole,'" and that the rulemaking establishes that "no...authority existed at the times relevant to these appeals" to require calculation of post differential on a 40-hour workweek basis. (App. br. at 45, 47) Regardless, "[i]t is well settled that subsequent contractual or policy modifications by the Government may not be offered to prove that earlier contracts or policies were ambiguous or inadequate." *American Transport Line, Ltd*., ASBCA No. 44510, 93-3 BCA ¶ 26,156 at 130,034.

2. *Danger Pay on Extended Workweek*

The parties' positions regarding the application of danger pay to an extended workweek parallel their positions regarding post differential. As we have found, there is no evidence that the parties treated workweek calculations differently for post differential and danger pay (finding 67).

Like post differential, danger pay was expressed as a percentage applied to pay. As with post differential, the dispute regarding danger pay relates to whether the contract

required AID to reimburse BearingPoint for danger pay applied to an extended workweek of 48 hours.

To meet its burden to establish that the contract precludes reimbursement of danger pay for hours in excess of a 40-hour workweek, AID first points to paragraph (j)(1) of the Differentials and Allowances clause (*see* finding 60). That paragraph provides for danger pay "not to exceed that paid USAID employees in the cooperating country," in accordance with DSSR 650 (see finding 63). The clause also defines danger pay, in paragraph (j)(2) as "an allowance that provides additional compensation above basic compensation to an employee in a foreign area where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well being of the employee." 48 C.F.R. § 752.7028 (2002). Drawing on the clause, AID maintains that neither the definition of danger pay in paragraph (j)(2) as "an allowance that provides additional compensation above basic compensation," nor the applicable provisions of DSSR Chapter 650 (*see* finding 63), will support reimbursement of BearingPoint or its subcontractors "for danger pay allowances in excess of that paid USAID employees in Iraq." (Gov't br. at 45) For its part, BearingPoint incorporates its arguments regarding post differential, which it says "apply with equal force to the analogous issue relative to danger pay"
(app. br. at 48).

We conclude that BearingPoint is not entitled to reimbursement for the danger pay that it paid based upon a 48-hour workweek. The parity requirement in the Differentials and Allowances clause is stronger regarding danger pay than it is for post differential. Under the clause, only danger pay "not to exceed that paid USAID employees in the cooperating country" is reimbursable. For AID employees, as Federal employees, that meant that their salary – basic compensation under DSSR Chapter 40l (finding 61) – paid on the basis of a 40-hour week. Consistently with DSSR 655, danger pay could be paid "only for hours for which basic compensation is paid" (finding 63). Basic compensation could not include any "additional compensation such as overtime pay" for periods beyond the 40-hour workweek (finding 61).

3. *Danger Pay on Uncapped Salary*

By contrast to the danger pay issue addressed in the previous section, which dealt with danger pay as a percentage of a 48-hour workweek, the arguments addressed in this section relate to a different aspect of danger pay. They relate to the application of danger pay to higher salaries, irrespective of the length of the workweek. AID contends that the danger pay that BearingPoint paid to its own and its subcontractors' employees was based upon salaries that were uncapped. That is, AID maintains that the salaries against which BearingPoint applied the 25 percent danger pay premium exceeded the salary ceiling stated in clause H.9(a)(2) (finding 59), which was the maximum annual pay of the USAID ES-6 position. This salary was $134,000 per annum during the relevant period

(finding 66). AID insists that a straightforward reading of the clause means that this figure is the highest multiplicand to which the 25 percent premium amount may be applied. Hence, under AID's theory, the highest danger pay figure would be $134,000 x 25 percent, or $33,500, and the $134,000 base compensation figure could not be increased, regardless of the actual salary that BearingPoint or a particular subcontractor paid. (Gov't br. at 66-70) By contrast, BearingPoint argues that AID misreads the contract and accordingly limits reimbursable danger pay "by shaving employees' 'basic compensation' down to [the] ES-6 level" (Rule 11 Reply Brief for Appellant (app. reply br.) at 16). BearingPoint tells us that it cannot be required to cap the basic compensation at $134,000 because DSSR 652(e) and 656.2 (*see* finding 63) both "establish that the only permissible limitation on danger pay is that it cannot exceed 25% of basic compensation" (app. br. at 49).

We conclude that the contract did not permit the application of danger pay to uncapped salary. By its terms, clause H.9(a)(2) imposed "a ceiling on the reimbursable base salary or wage paid to personnel under the contract equivalent to the maximum...ES-6 salary,...unless the Contracting Officer approves a higher amount..." (finding 59). This unequivocal prescription contains no express qualifying language regarding the DSSR, and is not qualified by any other provision, incorporated by reference or otherwise, to which we have been directed. In addition, on this record, there is no evidence that the contracting officer raised the ceiling for BearingPoint or its subcontractors. (Finding 66) Instead, the evidence reflects that, shortly after award, the contracting officer reiterated that compensation be "within the ES-6 salary maximum" (finding 64).

Even if DSSR 652(3) and 656.2 were read to mean that the danger pay percentage could be applied to uncapped salaries, that would create a patent ambiguity in light of the limitation in paragraph (j)(1) of the Differentials and Allowances clause providing for reimbursement of danger pay "not to exceed that paid USAID employees in the cooperating country." Such AID employees had capped salaries of $134,000 (finding 66), and could not receive danger pay of more that 25 percent of that amount (*see* finding 65). There is no evidence that BearingPoint ever raised this patent ambiguity before bidding (finding 74). In these circumstances, BearingPoint cannot not benefit from raising the ambiguity now. *E.g.*, *Conner Bros. Constr.*, 07-2 BCA ¶ 33,703 at 166,880.

CONCLUSION

ASBCA No. 55354 is sustained in part to the extent indicated. ASBCA No. 55555 is denied except to the extent conceded by the government after trial.

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Dated: 16 October 2009

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. ASBCA Nos. 55354 and 55555, Appeals of BearingPoint, Inc., rendered in conformance with the Board's Charter.

Dated:

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