ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCES FOR THE APPELLANT: Michael J. Gardner, Esq.
Dawn L. Serafine, Esq.
G. Brent Connor, Esq.
Troutman Sanders, LLP
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
Navy Litigation Office
Catherine M. Kellington, Esq.
Associate Counsel
Naval Surface Warfare Center
Carderock Division

OPINION BY ADMINISTRATIVE JUDGE JAMES

These appeals arise from the contracting officer's (CO) 21 February 2006 final decisions denying appellant's claims under Contract Nos. N65540-96-D-0007 ("contract 96-7," subject of ASBCA No. 55385) and N65540-01-D-0001 ("contract 01-1," subject of ASBCA No. 55386) for amounts the CO declined to fund for lack of timely notice of cost overruns incurred under these cost reimbursement type contracts. The Board has jurisdiction of the appeals under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a two-day hearing, the parties submitted post-hearing and reply briefs. The Board is to decide entitlement only (tr. 1/12).

FINDINGS OF FACT

1. The Naval Surface Warfare Center, Carderock Division (NSWCCD) awarded contract 96-7 on 15 March 1996 to the U.S. Small Business Administration (SBA) under SBA's § 8(a) program. SBA subcontracted performance of contract 96-7 to George G. Sharp, Inc. (Sharp). Contract 96-7 was an indefinite delivery, indefinite quantity

(IDIQ), cost plus fixed fee type contract that provided for issuance of delivery orders (DOs). As extended by DOs 177 and 193, the contract performance period ended 30 September 2001. (ASBCA No. 55385, R4, tab 1 at 1, 4, 33, 50-53, tab 47 at 12-13)

2. Contract 96-7 incorporated by reference the following FAR clauses, *inter alia*:

(a) 52.216-7 ALLOWABLE COST AND PAYMENT (JUL 1991), whose ¶ (d) prescribed procedures to establish and apply indirect cost rates for overhead (O/H) and general and administrative (G&A) costs and ¶ (e) provided for reimbursement of indirect costs at interim billing rates, subject to adjustment upon determination of final indirect rates;

(b) 52.232-20 LIMITATION OF COST (APR 1984) (LOC) clause, which provided in pertinent part:

> (a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule.… The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost.…
>
> (b) The Contractor shall notify the [CO] in writing whenever it has reason to believe that—
>
> (1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or
>
> (2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.
>
> (c) As part of the notification, the Contractor shall provide the [CO] a revised estimate of the total cost of performing this contract.
>
> (d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

> (1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule…and
>
> (2) The Contractor is not obligated to continue performance under this contract…or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the [CO] (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract.…
>
> (e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the [CO], shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost….

(c) 52.232-22 LIMITATION OF FUNDS (APR 1984) (LOF) clause, which provided in pertinent part:

> (a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule.… The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost.…
>
> (b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered…and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the [CO] in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government.… The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the [CO] in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

….

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract…or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government…until the [CO] notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

….

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the [CO], shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess

> of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

(d) 52.216-18 ORDERING (APR 1984) clause, which provided that all DOs are subject to the terms and conditions of the contract. (ASBCA No. 55385, R4, tab 1 at 38, 40, 50)

3. Under contract 96-7, NSWCCD issued 192 DOs, 166 fully funded and 26 incrementally funded, each of which stated an estimated cost and all of which were performed by 30 September 2001 (ASBCA No. 55385, R4, tab 47).

4. On 27 December 2000 NSWCCD CO Anita Nocton, who also was the CO for contract 96-7, awarded contract 01-1 to Sharp on an IDIQ, cost plus fixed fee basis providing for issuance of DOs for 48 months (ASBCA No. 55386, R4, tab 1 at 1-2, 42; tr. 1/171-72).

5. Contract 01-1 incorporated by reference the pertinent clauses identified in finding 2 for contract 96-7, except that contract 01-1 incorporated the FAR 52.216-7 ALLOWABLE COST AND PAYMENT (MAR 2000) clause, it did not incorporate the FAR 52.232-20 LOC clause and it included the following clause ("NSWCCD clause"):

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

(ASBCA No. 55386, R4, tab 1 at 36-38, 41)

6. Under contract 01-1, NSWCCD issued 121 DOs, 75 fully funded at issuance and 46 incrementally funded. All DOs stated an estimated cost and all were completed by 30 June 2004. (ASBCA No. 55386, R4, tab 39)

7. Sharp's fiscal year is the calendar year (tr. 1/72; ex. A-1 at 4). Sharp allocated its O/H costs based on direct labor dollars, including bid and proposal labor dollars, and allocated its G&A costs based on total incurred costs, less G&A expenses, independent research and development costs and bid and proposal costs (app. supp. R4, tab 3 at 2-4).

8. From 1999 through September 2001 Sharp experienced delays and problems implementing a new "Deltek CostPoint" accounting system, due to which Sharp could not generate payroll information and overhead and G&A costs were unavailable in 2000 (ASBCA No. 55385, R4, tabs 30, 33 at 8; ASBCA No. 55386, R4, tab 10 at 1; tr. 1/71).

9. Sharp learned in the end of 2000 or beginning of 2001 of a $530,000 workers compensation cost increase and by the first or second quarter of 2001 of a $491,000 cost for three major medical insurance claims and a $206,000 workers compensation rate classification from Liberty Mutual, all applicable to year 2000 (tr. 1/64-71). Sharp learned on 28 November 2001 of an estimated $900,000 additional premium due to a workers compensation code reclassification by AIG, applicable to year 2001 (app. supp. R4, tab 2).

10. In August 2001 Sharp orally told Edward Collins, Administrative Contracting Officer (ACO) for Sharp's contracts, about a $1 million overrun due to increased medical insurance and workers compensation costs, but did not identify which of its 17 cost contracts was or were overrun. (Tr. 1/118-19, 138-39; app. supp. R4, tab 3, attach. 4)

11. From the commencement of performance of contract 96-7 on 15 March 1996, changed work scopes and timing of DOs made it difficult for Sharp to keep a steady number of employees, causing it to supplement its direct labor work force with contract labor, which was not included in Sharp's O/H base and which caused part of the cost overruns (ASBCA No. 55385, R4, tab 30 at 1, tab 47; ex. A-1 at 3-4). In 2001 Sharp's management received interim cost reports every two weeks (tr. 1/141). Sharp did not allege or prove any further causes of contract or DO overruns that occurred after 2001.

12. When Sharp had nearly completed reprogramming its cost programs, the 11 September 2001 terrorist attack on the World Trade Center damaged Sharp's New York City office building just two blocks away, destroyed some of its cost and financial records and caused it to evacuate immediately and to relocate for eight months in Summit, NJ (tr. 1/75-91, 161; ASBCA No. 55385, app. supp. R4, photos A-D). Sharp

retrieved its computer server data from its New York office, but was delayed approximately eight months while reconstructing many of its cost and financial records, restoring computer servers and receiving U.S. mail, including vendor invoices under contracts 96-7 and 01-1 (ASBCA No. 55385, R4, tab 16 at 3; ex. A-1 at 3, 8; tr. 1/77-80, 85-90, 154-57).

13. Sharp submitted its final O/H and G&A costs and proposed rates to DCAA for 1998 on 11 July 2000, for 1999 on 2 July 2002, for 2000 on 2 October 2002 and for 2001 on 17 October 2002 (supp. R4, tabs 102-05; tr. 2/21).

14. On 13 March 2003 Sharp's Ted Metzing told Lorraine Reilly, assistant to ACO Collins, that Sharp had incurred a $1 million overrun on several unidentified contracts due to overhead and G&A adjustments. On 14 March 2003 Sharp's Albert Seneca called Mr. Collins and said "that there are extenuating circumstances i.e. 9/11" (terrorist attack) for that overrun. (ASBCA No. 55386, R4, tab 5; supp. R4, tab 114 at 7, 19-20, 28-32; tr. 1/102-05).

15. Sharp's 4 August 2003 letter notified NSWCCD contract specialist Annemarie Bartholomeo, supervised by CO Nocton, that Sharp had reached the 75% expenditure level of funds allotted for DO 97 under contract 01-1, and those allotted funds were expected to be sufficient (ASBCA No. 55386, R4, tab 6; tr. 1/136-37, 172, 175-77). Sharp's later lists of DOs overrun under contract 01-1 did not include DO 97 (ASBCA No. 55386, R4, tab 26 at 5, tab 37 at 2-4).

16. On 21 January 2004 DCAA approved Sharp's indirect cost rates for calendar years 1998, 1999, 2000 and 2001 (app. supp. R4, tab 3). DCAA minimally changed Sharps' proposed rates for those years (tr. 2/23).

17. Sharp's 8 June 2004 letter to ACO Collins submitted "Final Vouchers" for 15 DOs, and requested him to obtain necessary funds to cover Sharp's costs on DO Nos. 135, 150, 153, 154, 155, 159 and 164 overrun under contract 96-7 and DO Nos. 1 and 20-22 overrun under contract 01-1. Sharp did not identify the causes or amount of overrun by each of the foregoing 11 DOs. (ASBCA No. 55385, R4, tab 18 at 2-9)

18. Sharp's 24 June 2004 letter to CO Nocton requested funding of estimated overruns of $340,000 on contract 96-7 and $700,000 on contract 01-1 for year 2001, stated that there were lesser cost overruns for years 1998-2000 and did not identify which DOs were overrun under each contract and their causes (ASBCA No. 55386, R4, tab 10).

19. Sharp's 16 July 2004 letter to ACO Collins submitted 26 "Final Vouchers" for 26 DOs under contract 96-7 and requested him to obtain necessary funds to cover Sharp's costs on 15 overrun DOs (Nos. 140-41, 144-45, 147-48, 167, 169-71, 173, 187, 189, 192-93). Sharp stated "an additional claimed amount of $119,952.43," but did not

identify the amounts or causes of the overruns with respect to each of those 15 DOs. (ASBCA No. 55385, R4, tab 19)

20. Sharp's 3 August 2004 letter to CO Nocton requested additional funding of $940,779.13 for 72 DOs under contract 96-7 performed from November 1996 through September 2001, requested $525,412.51 for 36 DOs under contract 01-1 performed from December 2000 through September 2002, of which 18 DOs were fully funded (including $26,907.93 overrun on DO 17) and 18 DOs were incrementally funded, and for the first time identified the specific amount of each DO overrun, but did not identify the cause(s) of each overrun (ASBCA No. 55385, R4, tabs 21, 47; ASBCA No. 55386, tab 39).

21. Sharp's 2 November 2004 letter to ACO Collins requested additional funding of $523,402 for the 36 overrun DOs under contract 01-1, including $24,897.42 for DO 17, alleged the effects of the 9/11 terrorist attack on Sharp and did not identify the causes of the overrun (ASBCA No. 55386, R4, tab 22 at 1, 4).

22. CO Nocton's 14 December 2005 letters to Sharp denied its additional funding requests for contracts 96-7 and 01-1 due to untimely overrun notifications, stated that Sharp could have foreseen the overruns and did not note Sharp's failure to cite all overrun causes and their costs (ASBCA No. 55385, R4, tab 42; ASBCA No. 55386, R4, tab 34).

23. Sharp's 15 February 2005 letter to Mr. Collins requested $940,779.13 in additional funding for 72 DOs under contract 96-7, due to its cost accounting system, added contract labor and the 9/11 terrorist attack, but did not mention increased workers compensation and medical benefits costs (ASBCA No. 55385, R4, tab 30).

24. ACO Collins' 5 and 6 April 2005 letters to CO Nocton recommended that she grant Sharp's requests for additional funding for contracts 96-7 and 01-1, respectively, and sent her copies of DCAA's 4 and 6 April 2005 audit reports on those requests (ASBCA No. 55385, R4, tab 33; ASBCA No. 55386, R4, tab 25).

25. On 8 September 2005 ACO Collins sent CO Nocton a 7 September 2005 DCAA memorandum noting a $2,011 increase from the $24,897 Sharp sought and the $26,908 DCAA reconciled for DO 17 under contract 01-1, and a net $41,144 increase on four DOs under contract 96-7 (ASBCA No. 55385, R4, tabs 37, 38).

26. Sharp's 22 December 2005 letter to CO Nocton submitted certified claims for payment of overruns of $981,923 on contract 96-7 and $525,413 on contract 01-1, requested her final decision thereon, and did not mention increased workers compensation and medical benefits costs (ASBCA No. 55385, R4, tab 43).

27. CO Nocton's 21 February 2006 decisions, misaddressed and retransmitted by facsimile on 7 March 2006, denied Sharp's cost overrun claims on contracts 96-7 and 01-1 (ASBCA No. 55385, R4, tab 45; ASBCA No. 55386, R4, tab 37). Sharp timely appealed from those decisions on 15 March 2006.

28. Of the 72 DOs on which Sharp claimed for cost overruns under contract 96-7, Sharp completed performing 44 of such DOs by or before 31 December 1999, *viz*., Nos. 18, 35, 44, 50-52, 54, 57, 60-61, 64, 66, 70-71, 78-80, 88, 94-96, 103, 109-14, 116-18, 126-27, 133, 135-37, 140-41, 144-45, 147 and 149-50 (ASBCA 55385, R4, tab 33 at 6, tab 37 at 5-7, tab 47). On 3 October 2007 the Board granted respondent partial summary judgment on the aforesaid DOs, 07-2 BCA at 166,797. The 28 DOs still in issue are Nos. 130-32, 138-39, 148, 153-55, 159-62, 164-67, 169-71, 173, 177, 179, 185, 187, 189 and 192-93. Of those 28 DOs, Sharp completed performance of 20 DOs by 31 October 2000 (Nos. 130-32, 138-39, 148, 153-55, 159-60, 162, 165-67, 169-71, 173 and 179) and the 8 remaining DOs between 28 February and 30 September 2001 (Nos. 161, 164, 177, 185, 187, 189 and 192-93) (ASBCA No. 55385, R4, tab 47).

29. Of the 36 DOs on which Sharp incurred overruns under contract 01-1, Sharp completed performance of: (a) 28 DOs between 25 January 2001 and 11 May 2002 (Nos. 1-2, 4, 6-8, 12-15, 17-22, 24-29, 31-32, 35-37 and 51); and (b) 8 DOs between 11 May and 30 September 2002 (Nos. 3, 39-41, 44-45, and 48-49). Respondent issued the last 13 overrun DOs (Nos. 31-32, 35-37, 39-41, 44-45, 48-49, 51) in September-December 2001. (ASBCA No. 55386, R4, tab 39)

30. Mr. Edward J. Amorosso is a certified public accountant with 25 years of experience in government contract cost accounting and provides services regarding cost accounting systems, review and analysis of overhead and G&A cost calculations, incurred cost submissions and forward pricing rate negotiations with DCAA (ex. A-47). Appellant offered, and the Board accepted, Mr. Amorosso as an expert in government contract cost type contract accounting (tr. 1/40-41).

31. Mr. Amorosso reviewed the pleadings and Rule 4 files for ASBCA Nos. 55385 and 55386, the depositions and exhibits of Sharp and government personnel, and formed the following conclusions: (a) Sharp incurred overruns due to unexpected increases in workers compensation and medical costs and its increased use of contract labor due to the government's unpredictable and sporadic work ordering. (b) Problems encountered in converting to the Deltek Costpoint accounting system and the 11 September 2001 terrorist attack masked Sharp's ability to recognize the impact of those increased costs. (c) Sharp had no knowledge of "the cost overrun" until months and in some cases years after the DO was completed. (d) Small overruns, 2% of the value of contract 96-7 and 1.2% of the value of contract 01-1, "would not give Sharp reason to believe that it would in fact incur overruns on the contracts." (Exs. A-1 at 4, A-2)

32. We assign little probative weight to Mr. Amorosso's conclusions (b) and (c) because they are vague with respect to the specific DOs affected by the alleged causes and the durations of such affects. With respect to Mr. Amorosso's conclusion (d), we find that Sharp has not established that it did not have reason to foresee any overruns on the contracts as a whole other than those DO overruns which we sustain, as analyzed and decided below.

DECISION

In our application of established legal principles, we are guided by two themes gleaned from our findings of fact. (1) Certain events, not themselves causes of cost overruns, "masked" Sharp's capability to quantify cost overruns. First was Sharp's 1999 decision to change its accounting system, which impeded its calculation of overhead and G&A rates until 2001 (finding 8). This event did not render the cost overruns unforeseeable and excuse failure to notify the CO. 07-2 BCA ¶ 33,696 at 166,796. Second was the terrorist attack on NYC's World Trade Center on 11 September 2001, which damaged Sharp's office and its cost accounting records and computer data and required its temporary relocation for eight months to reconstruct the records and to return to Sharp's NYC office (finding 12). This event excused Sharp's failure to notify the CO of overruns during those eight months since it rendered the overruns unforeseeable. *Id*. at 166,796-97. (2) The causes of Sharp's increased costs sometimes were present year-to-year, making them foreseeable. The changing proportions of Sharp's direct and contract labor affected contract 96-7's overhead and G&A rates for several years. The increases due to workers compensation costs, three major medical insurance claims and Liberty Mutual workers compensation rate classification affected Sharp's indirect costs only in 2000. The AIG code reclassification increased Sharp's indirect costs only in 2001. (Finding 9)

I. Contract 96-7, ASBCA No. 55385

Appellant argues that because of unexpected increases in workers compensation and major medical insurance costs unknown until the end of 2000 or later and increased use of contract labor from November 1996 to 30 September 2001, it could not reasonably foresee cost overruns during the time of its performance; the 11 September 2001 terrorist attack on the World Trade Center delayed its ability to track costs and to report overruns; and respondent was not prejudiced by failure to receive advance notice of such overruns since it is unlikely that the CO would have directed Sharp to stop work on contract 96-7 and indeed issued further DOs and funding to Sharp (app. br. at 14-20).

Respondent argues that Sharp did not provide timely written notice of impending overruns and the amount of additional funds needed to continue performance required by the contract's LOC or LOF clause, its dysfunctional accounting system did not excuse it

from providing such notice, it failed to prove that its cost overruns were not foreseeable before 11 September 2001; and it first alleged that increased workers compensation and medical cost increases overran DO funding limits in its 20 April 2006 pleadings, the CO's final decision did not address such allegations and its failure to raise such allegations during performance are fatal to recovery of overrun costs (gov't br. at 17-29).

These appeals present the chief issues of whether appellant timely notified the CO of its contract and DO cost overruns in compliance with the LOC and LOF clause requirements, and whether appellant was excused from providing the CO prior notice of such overruns because it had no reason to believe they would occur during the relevant contract and DO performance periods.

It is inaccurate to say that, before filing its complaint, Sharp failed to notify the CO of an overrun due to increased medical insurance and workers compensation costs. In August 2001 Sharp orally notified the ACO of a $1 million overrun due to such causes, albeit without saying which contract or contracts were overrun (finding 10). No single communication, among the several between Sharp and the government alleging overruns from August 2001 through submission of its certified claims on 22 December 2005, identified all the alleged causes of overruns and specified the amount of each such overrun (findings 10, 14, 17-21, 23). Since 3 August 2004 the $940,779 and $525,412 total overrun amounts on contracts 96-7 and 01-1, respectively, have remained essentially constant (findings 20-21, 23, 26).

General Electric Co. v. United States, 440 F.2d 420, 425 (Ct. Cl. 1971), stated the criteria for funding overruns pursuant to the LOC clause:

> [A] contracting officer abuses his discretion under paragraph (b) [of the ASPR 7-402.2 LOC clause, corresponding to ¶ (d) of the FAR 52.232-20 clause] if he refuses to fund a cost overrun where the contractor, through no fault or inadequacy on its part, has no reason to believe, during performance, that a cost overrun will occur and the sole ground for the contracting officer's refusal is the contractor's failure to give proper notice of the overrun.

Those criteria apply to overruns under the LOF clause in incrementally funded contracts as well. *See Optical E.T.C., Inc.*, ASBCA No. 53350, 04-1 BCA ¶ 32,608 at 161,383 (cited *General Electric* for excuses to LOF clause duty to notify CO of overruns); *Arbiter Systems, Inc.*, ASBCA Nos. 47403, 47404, 97-2 BCA ¶ 29,183 at 145,123 (cited *General Electric* regarding LOF clause). A contractor has the burden of proving that it had no reason to foresee or believe during contract performance that a cost overrun would occur. *RMI, Inc. v. United States*, 800 F.2d 246, 248 (Fed. Cir. 1986).

With respect to compliance with the LOC clause on the contract as a whole, we need not address or decide whether Sharp gave timely notice when it had reason to believe it would incur costs in excess of 75% and 100% of the total estimated cost because Sharp has not established that it did not have reason to foresee any overruns on the contract as a whole, other than those DO overruns which we sustain, as analyzed and decided below (finding 32).

With respect to compliance with the LOC clause on the individual delivery orders, Sharp's oral notice to ACO Collins in August 2001 and to Lorraine Reilly, Mr. Collins' assistant, on 13 March 2003, of a $1 million overrun, without identifying the overrun contract and the overrun DO or DOs, and without estimating the amount of additional funds needed to continue performance (findings 10, 14) plainly did not comply with the notice requirements of the contract's LOC and LOF clauses. *See Falcon Research & Development Co.*, ASBCA No. 26853, 87-1 BCA ¶ 19,458 at 98,336-37, *aff'd,* 831 F.2d 1056 (Fed. Cir. 1987) (LOF notices without cost estimates to complete were noncompliant); *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997) (LOC notices without cost estimates to complete were noncompliant). Notices Sharp sent to the CO and ACO in June and July 2004 did not identify which DOs were overrun or the amount of each DO overrun, and the estimated cost to complete performance (findings 18-19). Sharp first notified the CO of the specific amount for each of the 72 DOs overrun under contract 96-7 on 3 August 2004 (finding 20). Sharp's 2004 notices were sent long after 30 September 2001, when all contract 96-7 DOs had been performed (finding 3).

DO overruns under contract 96-7 that Sharp could not identify and report timely to the CO because it could not obtain cost information from its Deltek accounting system from 1999 through September 2001 (finding 8), resulted from appellant's fault or inadequacy, and hence do not come within the *General Electric* rule regarding cost overruns that a contractor had no reason to believe would occur. *See Advanced Materials*, 108 F.3d at 311 (rejecting argument that contractor's changed accounting system did not enable it to calculate when it had reason to believe it would exceed the estimated cost, holding that its "burden of proof regarding foreseeability carries with it an 'attendant duty to maintain an accounting and financial reporting system to secure timely knowledge of probable overruns…'").

The 11 September 2001 terrorist attack which curtailed Sharp's ability to recognize cost overruns during the last 20 days of performance in September 2001 (finding 12) does not affect our foregoing conclusion. From the beginning of performance of contract 96-7 Sharp knew of increased contract labor costs arising from its difficulty to keep a steady direct labor force due to the changes in work scope and timing of DOs, and in 2001 Sharp's management received bi-weekly cost reports (finding 11).

As an exception to our foregoing conclusions, Sharp learned in the end of 2000 or beginning of 2001 of a $530,000 workers compensation cost increase and by the first or second quarter of 2001 of a $491,000 cost for three major medical insurance claims and a $206,000 workers compensation rate classification from Liberty Mutual, all applicable to year 2000, and did not learn of the estimated $900,000 AIG reclassification cost increase until 28 November 2001, applicable to year 2001, after all contract 96-7 DOs had been performed (finding 9). Thus, in 2000 Sharp could not have foreseen that the foregoing cost increases would cause overruns of the 20 DOs that Sharp completed by 31 October 2000, *viz.*, Nos. 130-32, 138-39, 148, 153-55, 159-60, 162, 165-67, 169-71, 173 and 179 finding 28). Sharp completed performance of the remaining 8 overrun DOs in issue, Nos. 161, 164, 177, 185, 187, 189 and 192-93, between 28 February and 30 September 2001 (finding 28), during which period Sharp did not know of the AIG reclassification cost increase, of which it did not learn until 28 November 2001 (finding 9). Accordingly, Sharp is entitled to recover its cost overruns on those 8 DOs, to the extent indicated below.

In ASBCA No. 55385, we sustain the appeal with respect to 28 DOs, Nos. 130-32, 138-39, 148, 153-55, 159-62, 164-67, 169-71, 173, 177, 179, 185, 187, 189 and 192-93, to the extent that cost increases due to workers compensation, the three major medical insurance claims, the Liberty Mutual workers compensation rate classification (applicable to year 2000) and the AIG rate reclassification cost increase (applicable to year 2001), in fact caused increased overhead and G&A costs in 2000 and 2001. We remand this appeal to the parties to resolve quantum with respect to those 28 DOs in accordance with the foregoing holding. We deny the appeal with respect to the above-enumerated 28 DOs insofar as their costs were increased by the contract labor cost overrun or causes other than those identified in this paragraph (see finding 11).

II. Contract 01-1, ASBCA No. 55386

Appellant argues that since contract 01-1 had no LOC clause, Sharp had no duty to notify the CO of overruns on fully funded DOs or on incrementally funded DOs that were fully funded before the overrun occurred; it is meaningless and anomalous to notify the CO under the LOF clause of overruns of contract 01-1 as a whole; Sharp could not have reasonably foreseen, tracked and reported overruns during contract performance for the same reasons advanced with respect to contract 96-7; respondent is estopped from relying on the LOF clause because after Sharp's 13 March 2003 notice respondent continued ordering work, and at no time instructed Sharp not to continue performance, under contract 01-1; and respondent was not prejudiced by failure to receive advance notice of overruns since it is unlikely that the CO would have directed Sharp to stop work on contract 01-1 (app. br. at 34-47).

Respondent's contract 96-7 arguments apply to contact 01-1 as well. Respondent also contends that Sharp gave notice of expending 75% of the funds allotted for DO

No. 97 under contract 01-1, showing that it was aware of the notice duty and procedure, yet all the overrun DOs were performed before Sharp gave the CO notice of those overruns (gov't br. at 19, 21).

With respect to compliance with the LOF clause on the contract as a whole, we need not address or decide whether Sharp gave timely notice when it had reason to believe it would incur costs in excess of 75% of the total amount allotted to the contract, because Sharp has not established that it did not have reason to foresee any overruns on the contract as a whole other than those DO overruns which we sustain, as analyzed and decided below (finding 32).

Contract 01-1 had no LOC clause (finding 5). Sharp, nonetheless, had a duty under contract 01-1's LOF clause to notify the CO of overruns on DOs that were fully funded during their performance. *See Moshman Associates, Inc.*, ASBCA No. 52868, 02-1 BCA ¶ 31,852 at 157,410 (LOF clause applied to incrementally funded contract that became fully funded); *Defense Systems Concepts, Inc.*, ASBCA No. 45920, 94-2 BCA ¶ 26,721 at 132,9211-22, *aff'd*, 41 F.3d 1520 (Fed. Cir. 1994)(table) (same).

Of the 36 overrun DOs under contract 01-1, Sharp completed performance of 28 DOs between 25 January 2001 and 11 May 2002, before it received notice of the AIG rate reclassification cost increase and encompassing the eight-month period after the 11 September 2001 terrorist attack, namely DO Nos. 1-2, 4, 6-8, 12-15, 17-22, 24-29, 31-32, 35-37 and 51 (findings 9, 12, 29(a)). Sharp is entitled to recover the amounts it overran on those 28 DOs to the extent indicated below.

Sharp completed performance of the remaining 8 overrun DOs (Nos. 3, 39-41, 44-45, and 48-49) between 11 May and 30 September 2002 (finding 29(b)), but provided no notice of cost overruns on those DOs until 3 August 2004 (finding 20). Therefore, Sharp is not entitled to recover the amounts it overran on those eight DOs.

We turn to appellant's estoppel argument. Four elements must be present to establish an estoppel: (1) the party to be estopped must know the true facts, *i.e.*, the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, *i.e.*, that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment. *American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1112 (Fed. Cir. 1985). In addition, when estoppel is invoked against the government, the party must show affirmative government misconduct. *See United Pacific Insurance Co. v. Roche*, 401 F.3d 1362, 1366 (Fed. Cir. 2005) ("if equitable estoppel is available at all against the government some form of affirmative

misconduct must be shown in addition to the traditional requirements of estoppel"); *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000).

The record contains no evidence whatever that respondent, after *proper* notice of an overrun on any one of the 72 DOs overrun on contract 96-7, or on any one of the 36 DOs overrun on contract 01-1, induced Sharp to continue performing any DO that Sharp overran. The first notice Sharp gave respondent that identified the 72 overrun DOs on contract 96-7 and the 36 overrun DOs on contract 01-1, and the amount of each such overrun, was 3 August 2004 (finding 20). By that date all 192 DOs under contract 96-7, including the 72 overrun DOs, had been completed (finding 3), and all 121 DOs under contract 01-1, including the 36 overrun DOs, had been completed (finding 6). Respondent issued the last 13 overrun DOs under contract 01-1 to Sharp in September-December 2001 (finding 29), after Sharp had first advised ACO Collins of a $1,000,000 overrun in August 2001 (finding 10). But such notice did not identify the contract or contracts and the DOs under which the overrun(s) were incurred (*id*.), and hence did not satisfy the first element of estoppel in *American Electronic*.

After ACO Collins received Sharp's notices of overruns and requests for additional funding in 2004 (findings 17, 19, 21), he had no authority, and did not promise, to obtain such additional funding. His April 2005 recommendations to CO Nocton to fund the overruns of DOs that had been completed on contracts 96-7 and 01-1 (finding 24) did not and could not induce continued performance of such DOs. *See COLSA, Inc.*, ASBCA No. 45505, 94-1 BCA ¶ 26,309 at 130,865 (no inducement to perform after work performed and cost overrun incurred). Therefore, those ACO recommendations did not satisfy the second element of estoppel in *American Electronic*. Furthermore, a CO has no duty to direct a contractor to stop performance of a contract (or DO) impending overrun. *See Mater Manufacturing, Inc.*, ASBCA No. 37499, 90-2 BCA ¶ 22,777 at 114,401 (CO "is not obligated to invade appellant's plant and force it to cease operations," citing *Hughes Aircraft Corp*., ASBCA No. 24601, 83-1 BCA ¶ 16,396 at 81,520 "It is the contractor that must decide whether or not it will stop or reduce the scope of the work.") Finally, the record is bereft of any evidence of affirmative misconduct of the government with respect to the overrun DOs. Sharp's reliance on the estoppel theory is untenable.

In conclusion, of the 36 overrun DOs under contract 01-1, we sustain the appeal with respect to 28 DOs (Nos. 1-2, 4, 6-8, 12-15, 17-22, 24-29, 31-32, 35-37 and 51) to the extent that the 2001 AIG rate reclassification cost increase in fact caused increased overhead and G&A costs in 2001. We remand this appeal to the parties to resolve quantum with respect to those 28 DOs in accordance with the foregoing holding. We deny the balance of the appeal in ASBCA No. 55386 with respect to the 8 DOs (Nos. 3, 39-41, 44-45, and 48-49) completed between 11 May and 30 September 2002 (finding 29(b)), during which time there was no new cause of increased DO costs (finding 11).

Dated: 9 April 2009

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

I concur

I concur

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

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

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

Dated:

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