ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Northrop Grumman Systems Corporation Space Systems Division	)	ASBCA No. 54774
	)	
	)	
Under Contract No. DAAE30-97-C-1005	)	

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MAJ Eugene Y. Kim, JA
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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAGE

Northrop Grumman's predecessor on the contract at issue, GenCorp Aerojet (Aerojet),[1] entered into Contract No. DAAE30-97-C-1005, SADARM Low Rate Production II (LRP-2) in February 1997 with the Department of the Army for the production of projectiles. Aerojet seeks a total of $12,773,388 comprised primarily of the $12,000,000 appellant contends is due as the balance of an oral, binding settlement agreement (or at least an "agreement to agree") allegedly entered into by the parties at a 17 September 1999 meeting. According to appellant, the Army's Picatinny SADARM program office (Picatinny SPO) assented to the contractor's offer obligating "inseparable" FY 1998 and FY 1999 funds to perform certain work for $20,000,000 and to finalize previously undefinitized contract Modification No. P00017 for $29,300,000. Next, Aerojet seeks $651,515 in unreimbursed costs the contractor attributes to a "constructive change" supposedly made by the government with respect to Aerojet's closeout activities associated with its former subcontractor Alliant Techsystems, Inc. (Alliant or ATK). Finally, appellant requests $121,873 in costs to prepare its request for equitable adjustment. The government denies that the parties reached an enforceable agreement on Aerojet's terms at the 17 September 1999 meeting, and rejects other assertions by the

[1] The division of GenCorp Aerojet performing this contract was acquired by Northrop Grumman (finding 170). We refer to the contractor as Aerojet for ease of reference.

contractor. A hearing was conducted, and the parties extensively briefed the issues; entitlement only is before the Board. We address both jurisdiction and the merits of the appeal.

FINDINGS OF FACT

Events Prior to the 17 September 1999 Meeting

The Contracts and the Parties

1. There is considerable history to the effort that culminated in the subject contract; work on a Sense and Destroy Armament (SADARM) projectile, an antiarmor weapon, began in the late 1970s and evolved in scope following difficulties in achieving the desired results, changes in the government's contracting approach, and problems in obtaining program funding (R4, tab 55 at 666-69[2]). The SADARM missile is a 155mm howitzer projectile armed with an indirect fire, "smart munition," intended to be remotely fired from a fixed position over a battlefield area for the purpose of seeking and destroying a specific enemy target such as a tank. There were two submunitions in each projectile. At the appropriate range it deploys submunitions, which descend by a form of parachute and employ several types of sensors to "seek" out the target then fire the submunition to "destroy" the target. (R4, tab 67 at 1387, tab 186 at 2197; tr. 2/46, 3/38-42)

2. The Army initially awarded separate contracts to both Aerojet, whose facilities were in Azusa, CA and Alliant located in Edina, MN for the SADARM engineering and manufacturing development (EMD) phase in the late 1980s. However, government budget reductions in 1990 led to the selection of Aerojet as the single contractor to complete the EMD effort and produce projectiles through a series of contracts. Alliant remained involved in the program by entering into a teaming agreement with Aerojet to serve as a subcontractor on SADARM projects. Alliant was responsible for providing radar subsystems, the warhead, fuse, safe and arm device, projectile body and load assemble and pack. Alliant's subcontract with Aerojet was initially a cost reimbursement contract, but at some point there was a "settlement" that converted it to a fixed-price contract. (Tr. 2/45-48, 3/9-11; R4, tab 52 at 619-21)

3. Among the SADARM-related contracts awarded to Aerojet was cost-plus-fixed-fee Contract No. DAAA21-86-C-0309, a low rate initial production contract, for the design and development of the SADARM 155mm projectile. This was followed in 1995 by the government's award to Aerojet of low rate SADARM production

[2] All Rule 4 documents are referred to by the Bates-stamped numbers that were added by the parties.

(LRP) Contract No. DAAE30-95-C-0080 (LRP-1) for production of 260 projectiles. Due to shortcomings of the projectiles, the government began a SADARM product improvement (PI) program in 1997 and awarded a product improvement contract to Aerojet, Contract No. DAAE30-97-C-1017. (R4, tab 55 at 666-69; tr. 2/43-48) The purpose of the PI contract was to correct reliability problems encountered with the basic SADARM round (tr. 3/241).

4. In February 1997, Aerojet and the Army, through the Picatinny SPO, entered into the instant contract, No. DAAE30-97-C-1005 (LRP-2), a second low rate production contract for SADARM projectiles, which was negotiated in the firm fixed-price of $81,631,048. Among other requirements, Aerojet was to deliver 600 155mm M898 projectiles. The model number "M898" designated the "basic" SADARM production round called for in the contract; the later improved rounds were referred to as "M898-E1" to differentiate between the basic contract round and one that reflected additional engineering changes after necessary approvals to the contract's technical data package (TDP) were obtained from the government's Configuration Control Board (CCB). Section F of the contract stated that the final lot of basic contract projectiles was to be delivered by December 1998. (R4, tab 1 at 2, 7, 15, 26, 27, tab 66, subtab 22 at 1011-22)

5. The government's SADARM program office was lodged at Picatinny Arsenal, NJ. The Picatinny SPO was part of the Department of the Army's Tank – Automotive and Armaments Command, Armament Research, Development and Engineering Center (ARDEC), which also provided contracting support to SADARM activities (tr. 3/7-8, 236-39; R4, tab 65). Funding for the Picatinny SPO came through requests made to and decided upon by the following escalating hierarchy: the Department of the Army, the Department of Defense, and the Office of the Secretary of Defense (OSD), which sought funding from Congress through the President's budget for approved programs and purposes (tr. 3/33-37, 6/66-68, 147-52, 7/6-7). We periodically interrupt the narrative of contract events to include information about contemporaneous and directly relevant funding actions by these higher echelons.

6. Colonel (COL) Bernard E. Ellis served as the Picatinny SPO project manager from 1997-2001, and was responsible for overseeing cost, schedule, performance, and delivery of the product to the user. Employees within the Picatinny SPO reporting to COL Ellis included Mr. Patrick Serao, deputy SADARM program manager during three of COL Ellis's four-year tenure; Ms. Faith Harder, a procurement analyst; Mr. Joseph Gormley, a business manager; Ms. Ann Kahn, a program analyst; and Mr. Timothy Joens, a pricing and cost analyst. Mr. Rene Kiebler was the Chief of the Production Division for the Picatinny SPO from 1998 to 2000. Despite their programmatic oversight of the contract, neither COL Ellis nor any of these individuals employed in the Picatinny SPO had contracting officer authority. (Tr. 3/237, 4/110, 5/8, 122-23, 202, 6/6, 48, 148, 171, 7/5) Contracting office support, including assistance from

contracting officer (CO) Steven Trauger and CO Marion Doyle, was provided to the Picatinny SPO by the ARDEC command at Picatinny Arsenal (tr. 3/235-39). Mr. David Banashefski was the government's contracting officer when the contract at issue was signed; he was succeeded by April 1999 by CO Trauger. CO Doyle, who worked for CO Trauger, was the contracting officer who handled the SADARM contract much of the time. (Tr. 5/5-8) Mr. Hoot Albaugh, a budget analyst in the Office of the Under Secretary of Defense Comptroller (OSD), became responsible for monitoring the SADARM program in 1996. Mr. Albaugh reviewed budget submissions and made recommendations regarding programs within his purview, including whether OSD should grant or withhold money. (Tr. 7/5-8)

7. Mr. Richard Bregard was brought in by the contractor at a time when Aerojet was endeavoring to assuage the government's "concern about submunition reliability" (R4, tab 13 at 180-81). He became Aerojet's director of SADARM programs beginning in 1998. Mr. Bregard was responsible for all of the programs associated with the SADARM project including the product improvement contracts, the advanced sensor contracts, and the basic production contracts. He testified that his functional counterpart in the government was COL Ellis. (Tr. 3/5-10)

8. Mr. Bregard had retired from the Army as colonel in 1997, was experienced in program execution and procurement, and had held increasingly senior and responsible positions, particularly in the armaments area. Mr. Bregard had been assigned to Picatinny Arsenal in the program executive office from 1992 to 1996. For the first year, he was the deputy program executive officer and then for the remaining period assumed command of the program management office for tank main armaments. (Tr. 3/5-10)

9. Mr. Michael Marshall, who reported to Mr. Bregard at Aerojet, was the contractor's SADARM program manager from 1998 to 2002 (tr. 2/157-59). Mr. Gerald Newman was a director or manager of contracts for Aerojet, who became responsible for the SADARM program in late 1997 or early 1998. Initially, Messrs. Frank Chechitelli and Tony Piunno worked for Mr. Newman on SADARM, although Ms. Patricia Burnes later replaced Mr. Chechitelli. (Tr. 1/52, 4/8-10) Ms. Burnes, who initially became involved in the SADARM program in 1991, became Aerojet's SADARM contract administrator in November 1998. Authority to bind Aerojet by contract flowed from the company's vice president of contracts to Mr. Newman and, through him, to Ms. Burnes. (Tr. 1/48-50)

10. Mr. Blake Larson, an Executive Vice President for Alliant's Mission Systems Group, began working on the SADARM program as Alliant's program manager in 1993. Although Alliant technically had become a subcontractor to Aerojet by the time of the instant contract, it continued to play a significant role in production of the SADARM

projectile and the companies had entered into a collaborative teaming agreement to reflect that close relationship. (Tr. 2/47-49)

11. The subject LRP-2 contract included an option for 520 projectiles at a unit price of $129,154. The contract provided the following regarding exercise of the option:

> The Government may require the delivery of the 520 each 155mm SADARM projectiles for a negotiated Firm Fixed Price not to exceed the Unit Price as delineated above. The Contracting Officer may exercise the option by written notice to the Contractor at any time after reaching a negotiated FFP amount for the option requirement, provided the contractor is given written notice at least 12 months prior to completion of the basic delivery schedule. Delivery of added items shall be in accordance with the delivery schedule listed in Section F of the contract.

(R4, tab 1 at 2) Section F stated that the final lot of option projectiles was to be delivered by October 1999 (*id*. at 27-28).

12. The contract contained clause section E – Inspection and Acceptance, "E.9 FIRST ARTICLE TEST (CONTRACTOR TESTING)," which provides in relevant part:

> a. The first article shall be comprised of the items listed in the requirement specifications and [source] control drawings called out in the SADARM Specification tree, which shall be examined and tested in accordance with contract requirements, the requirement specification(s), and drawings listed in the Technical Data Package.
>
> b. The first article shall be representative of items to be manufactured using the same processes and procedures and the same facility as contract production. All parts and materials, including packaging and packing, shall be obtained from the same source of supply as will be used during regular production. All components, subassemblies, and assemblies in the first article sample shall have been produced by the Contractor (including subcontractors) using the technical data package provided by the Government.

(R4, tab 1 at 23-24)

13. Among other standard clauses, the contract incorporated by reference FAR 52.233-1, DISPUTES (OCT 1995) and FAR 52.243-1, CHANGES – FIXED-PRICE (AUG 1987) (R4, tab 1 at 48).

14. As described by both Picatinny and OSD personnel, the Picatinny SPO does not have unilateral discretion over either the amount of funding it receives or the purposes for which monies granted may be spent (findings 1, 5). The Picatinny SPO in February 1998 submitted a budget request for fiscal year (FY) 1999 funding to the Department of the Army for review and approval; once the Army concurred, it forwarded the document to OSD for the next level of review and approval. The "Exhibit P-40, Budget Item Justification Sheet" (P-40) sought $56.5 million for 550 SADARM rounds for FY 1999. If approved by all higher headquarters, the Picatinny SPO request ultimately would be included in the President's proposed budget that would be sent to Congress. (R4, tab 67 at 1387; tr. 6/150-52, 157) Mr. Albaugh explained that the P-40 "is one of the basic budget exhibits that goes in the final justification book" that comprises the budget request (tr. 7/9).

Performance and Reliability Problems

15. By June 1998, there were serious problems with production of the SADARM projectiles and significant cost overruns (tr. 3/240-51). In acknowledgment of these concerns, the parties entered into no-cost Modification No. P00016 on 24 June 1998 aimed at improving munition reliability (R4, tab 4). The modification expressed a specific goal for testing results in that "The parties agree that a key SADARM program goal is to reach a .8 projectile reliability." It was also agreed that "Any change to the SADARM TDP, whether or not it is related to reliability improvement...will be discussed and approved under the standard configuration control board process for SADARM." (*Id*. at 86) The parties replaced the delivery schedule for basic contract requirements. The modification also changed the delivery date for the final lot of basic contract projectiles from December 1998 to June 1999 (*id.* at 91-92), and stated that the total price of the contract shall remain constant at $81,641,392 (*id.* at 87).[3]

16. Shortly thereafter, on 6 July 1998, COL Cornell J. Hazelton, chief of the Picatinny ARDEC contracting office, authorized the government to issue an undefinitized contract action (UCA) for the procurement of 300 projectiles under the LRP-2 contract. COL Hazelton supported this decision with the following findings: "[D]ue to a recent significant overrun" on the LRP-1 contract in the amount of $15.8M and a restructuring of the LRP-2 contract, only 300 projectiles, not 520 as planned, could be purchased under the option provision of the LRP-2 contract. The total estimated price of the 300

[3] There is an unexplained discrepancy between this amount and the total contract price of $81,631,048 stated in the initial contract (finding 4).

projectiles was $29.3 million. In order to prevent a break in the production schedule and to make sure that required projectiles were timely delivered, Aerojet had to purchase long lead-time materials for the option projectiles by 13 July 1998. A change action using normal contracting procedures would delay placing the option quantity in the contract, which would create a corresponding production gap between the basic and option deliverables. That, in turn, would increase SADARM costs, delay the "FUE" [first unit equipped] date of July 1999, and could result in a loss of key prime contractor and subcontractor personnel. COL Hazelton specifically limited expenditures until modification definitization: "However, it should be noted that the Government has determined that it will not expend more than $10M, (which represents the anticipated costs associated with procurement of the long lead materials delineated below), prior to definitization." (R4, tab 5)

17. As authorized by COL Hazelton (R4, tab 5), the parties on 3 August 1998 entered into bilateral Modification No. P00017 (R4, tab 6), which "implement[ed] an Undefinitized Contractual Action (UCA) change order in accordance with FAR 52.243-1 'Changes-Fixed price'" (*id.* at 100). The modification reduced the original option requirement of 520 projectiles in the LRP-2 contract to 200 projectiles. The reduction of procurement quantity was justified by the necessity of diverting the limited amount of available money to fund cost growth in the LRP-1 contract (*id.*). The modification incorporated Engineering Change Notices (ECNs) 4426 (Operational VRP Dimensional Acceptance with Wind Tunnel), 4432 (SV6A VECP – Iteration 6A Liner into Forebody Assemblies), and 4413 ((SECP 417R2) SADARM Base and Body FAT B1 Short Round Design Update) into the contract (*id.* at 100). The parties agreed to a fixed-price ceiling of $29,300,000, and that a subsequent definitized modification (*i.e.*, one containing final terms of the modification including price) resulting from this UCA would not exceed $29,300,000. Until that was accomplished, the contractor was not authorized to make expenditures or incur obligations exceeding $10,000,000. The total price of the contract was increased by $10,000,000, from $81,641,392 to $91,641,392. A schedule for definitization of the modification was included and provided as follows:

SCHEDULE	**DATE**
Issue Change Order	31 Jul 98
Receive Qualifying Proposal	30 Aug 98
Evaluations Complete	11 Sep 98
Negotiations Complete	15 Sep 98
Definitization Modification Issued	23 Sep 98

The modification stated that the final lot of option projectiles was to be delivered by September 1999. (*Id.* at 100-01) (Emphasis in original)

18. In Modification No. P00017, the parties acknowledged that the projectile configuration in the LRP-1 contract required design improvements in order to demonstrate an acceptable reliability rate (R4, tabs 5, 6). Carrying out these improvements would increase projectile costs within a tightly constrained budget and certain missile components had to be ordered well in advance to avoid subsequent delays. To accommodate for funding, design, and scheduling problems yet continue with production, the parties adopted the expedient approach of incrementally exercising the contract option for additional rounds by executing a series of modifications that sequentially provided essential terms definitizing the agreement as further information and funding became available. For example, changes to the TDP were verified by first testing the reconfigured round, and then subjecting the proposed improvements to the government's CCB for approval before the contract could be modified. (*See, e.g.*, R4, tab 66, subtab 22 at 1011-12)

19. Important operational tests of the SADARM projectiles took place in August 1998 at Ft. Greeley, Alaska (tr. 3/11, 22, 25, 149-50). The projectiles performed poorly with "a demonstrated reliability of 0.625" for Reliability Growth Test A (Rel A) and an even worse reliability rate of 0.35 demonstrated in Reliability Growth Test B (Rel B) (R4, tab 13 at 192).

20. The government notified the contractor immediately of its concern over the projectiles' poor performance. On 18 August 1998, CO Doyle sent Aerojet a letter stating that unsatisfactory first article test (FAT) results in the SADARM Reliability Growth A and B projectile testing phase that had just taken place constituted the contractor's failure to meet the criteria set out in both the LRP-1 and LRP-2 contracts. CO Doyle advised that, as agreed by the parties "during the LRP I restructure negotiations, the FAT at the projectile level will be considered to have been satisfied when a reliability [rate] equal to or greater than 70% is demonstrated in the Reliability Growth rounds A, B, or C projectile firings using the criteria in paragraph E.16 of contract DAAE30-95-C-0080." The next SADARM projectile test, Reliability Growth C (Rel C), scheduled for October 1998, would be considered a retest of the projectile level FAT. (R4, tab 7)

21. The contractor's failure to evidence strong projectile reliability in Rel A and Rel B occurred during the same period in which Aerojet and the government were attempting to definitize Modification No. P00017. The parties had to contend with limited funding, rising costs, and increasing government reservations over the efficacy of the projectiles' configuration. (Findings 7, 15-20) On 24 August 1998, Mr. Marshall conducted a "Level 2 Review" briefing for Mr. Carl B. Fischer, vice president of Aerojet, at Azusa, CA (R4, tab 80; tr. 2/253-55). The purpose of the briefing, which outlined the status of the subject contract and difficulties encountered, was to secure approval for Aerojet to submit to the government a $34.8 million UCA definitization proposal for Modification No. P00017 (R4, tab 80 at 1540, 1543, 1555-56; tr. 2/253). Mr. Fischer

approved release of the proposal (tr. 2/254). On 1 September 1998, the same briefing was presented as a "Level 1 Review" to Mr. Robert Wolfe, president of Aerojet, who also approved giving the proposal to the Army (R4, tab 81; tr. 2/254).

22. On 14 September 1998, Aerojet submitted Proposal No. C9770-10-01B to the government. Pursuant to the LRP-2 contract and Modification No. P00017, appellant offered to provide an additional 200 projectiles for a firm fixed-price of $33.7 million. Despite the amount of the offer, Aerojet acknowledged that it understood "that the negotiated price in any resultant definitized contract modification shall not exceed the fixed ceiling amount of $29,300,000.00 specified in P00017 of [the LRP-2 contract]." (R4, tab 8; *see also* tab 9) Mr. Marshall testified that "$34 million" was a fair and reasonable price for the rounds, but that he was authorized to settle at "[$]29.3." The parties did not enter into negotiations on the proposal. (Tr. 2/166-67)

23. CO Banashefski sent Aerojet a cure notice dated 8 October 1998, referencing CO Doyle's 18 August 1998 letter that advised Aerojet of the failure of its proffered projectiles to pass the first article test. The cure notice expressed the government's concern regarding Aerojet's ability to perform the LRP-2 contract in accordance with the terms, specifications, delivery schedule, and demonstrating necessary projectile reliability. CO Banashefski told the contractor that:

> The failures experienced with the Reliability Growth A and B tests as delineated in the referenced attachment have created a concern on the part of the Government that Aerojet will be unable to perform the SADARM LRP II contract effort in accordance with the terms and conditions of the contract and will be unable to deliver SADARM projectiles on schedule and in accordance with the specification and TDP. In addition, these failures give rise to a concern that Reliability Growth C test hardware will not be delivered in accordance with the contract and will not demonstrate the required reliability. Finally, failure to successfully complete reliability growth testing will constitute failure of projectile level FAT.

Aerojet was advised that its problems were, in the government's view, endangering performance of the contract, given ten days to submit a comprehensive plan to cure the reliability problems, and warned that the contract might be terminated for default. (R4, tab 10)

24. By letter hand-dated 9 October 1998 to General (GEN) Dennis J. Reimer, Chief of Staff of the United States Army, Lieutenant General (LTG) Paul J. Kern,

Military Deputy to the Assistant Secretary of the Army (Research, Development and Acquisition), furnished an information paper explaining the underlying rationale for the cure notice that had been issued to Aerojet. LTG Kern advised GEN Reimer that:

> SADARM is entering its third year of low rate production deliveries in support of test requirements and the contractor has yet to meet the 80 percent reliability requirement for fielding. Recent high zone testing has shown system reliability to be 44%. The contractor has acknowledged that the current hardware probably cannot meet the 80 percent requirement.
>
> The Government is unwilling to accept projectiles for stockpile which do not meet the reliability requirements.

LTG Kern concluded that subsequent to receiving Aerojet's comprehensive plan responding to the cure notice, the SADARM project manager would "brief program status and alternatives to the Army staff prior to briefing the Under Secretary of Defense (Acquisition and Technology) on 6 November 1998." Also handwritten on LTG Kern's letter was a short note saying that LTG Kern and Army Major General (MG) John F. Michitsch had met with Aerojet's vice president and project manager on that date to discuss the cure notice and action required. (R4, tab 82; tr. 3/11, 34)

25. Aerojet's interim response of 12 October 1998 to the government's cure notice requested additional time in which to fully respond, stated the contractor's position that neither the Reliability Growth tests nor the FAT were requirements of the LRP-2 contract, and sought information regarding specific contract requirements the government thought appellant would be unable to meet. The contractor assured the government that it too was "also concerned about the performance of SADARM," and had been "working diligently...to improve system performance." (R4, tab 11)

26. The government responded on 16 October 1998 to Aerojet's request for further information and additional time to respond to the 8 October 1998 cure notice (R4, tab 12). CO Banashefski cited the poor results of the Rel A and Rel B testing as the basis for the government's concern that Aerojet would be unable to meet a success rate of 80% for the LRP 2 contract:

> The following information is being provided, as requested per Aerojet's referenced a) letter, to further clarify the reasons for the Government's issuance of a cure notice under the LRP II contract.

> As an attachment to the referenced Cure Notice, Aerojet was provided the results of the Reliability Growth A and B tests. To reiterate, the Rel Growth A test results under the LRP I contract reflected a reliability of 63%, while the Rel Growth B test results under the LRP II contract reflected a 35% reliability. These poor test results have created a Government concern that the contractor will be unable to perform the LRP II contract effort in accordance with the terms and conditions of the subject contract.
>
> This concern is justified when the aforementioned poor reliability test results are coupled with the fact that the mutually agreed upon LAT [Lot Acceptance Test] criteria in the LRP II contract is predicated on a high confidence of LAT success using a submunition reliability of 80%. Therefore, it is reasonable to assume, based on the latest achieved submunition reliability, that the success of the upcoming LRP II contract lot acceptance tests are questionable at best.

(*Id.* at 176-77)

27. Aerojet was advised of several specific issues which:

> [E]xacerbate[d] the Government's concern that the contractor will be unable to successfully pass the LAT specification requirements of the contract:
>
> 1) To date, no apparent corrective actions have been developed nor implemented for the problems experienced during the REL Growth A, B, and OT tests (High Altitude Fires, Low EBC Fires, AFT Band Cutter Failures, and Low Electronic Component Survivability).
>
> 2) Past submunition problems (i.e. Sensor Drift, and IR Deployment Failures) thought to have been corrected reappeared during the REL Growth A & B tests.
>
> 3) The LAT criteria in the LRP II contract includes additional scoring criteria above and beyond the REL Growth test criteria, (i.e. Hits, Submunition Spacing, and High Altitude firing).

4) The current sensor drift problems may degrade performance such that hit criteria is not satisfied.

5) The 28% decrease in reliability from the Rel Growth A test to the Rel Growth B test indicates to the Government that Aerojet does not have the resources or an expedient failure diagnosis/corrective action process required to assure ongoing future production of high reliability hardware.

(R4, tab 12 at 177)

28. CO Banashefski responded to several points raised by Aerojet's 12 October 1998 letter, and emphasized that although the government was willing to cooperate, the responsibility for complying with the contract was Aerojet's:

> [A]lthough the government was well aware of the technical shortcomings associated with the Rel Growth A & B tests, this does not diminish in any way Aerojet's responsibility and/or culpability to assure quality hardware is delivered under the subject contract. In addition, although the Government is participating with Aerojet in the spirit of teaming to improve system performance, Aeojet's [sic] cure notice plan to resolve the aforementioned reliability problems affecting the contract is ultimately and solely Aerojet's responsibility. Lastly, Aerojet's comment that work being performed under the PI program will solve the reliability issues mentioned in the Army's cure notice is untrue. The PI contract covers performance enhancement and cost reduction improvements to the SADARM projectile which are not expected to be realized until FY02.

(*Id.*)

29. The contracting officer stressed that Aerojet should "fully understand[] the Government's position in preparing its "go forward plan in response to the cure notice":

1) The government will not accept any rounds for inventory if LAT requirements are not met.
2) The government will not entertain increasing the first lot quantity beyond what is currently required in the contract (73 rounds)

3) Aerojet must accept the risk of maintaining production of low reliability hardware in light of its jeopardy to a successful LAT
4) Government may exercise its right to conduct LAT in Non Yuma environment for both performance and reliability reasons.
5) The government will accept on a no cost basis a temporary delay of the Rel Growth C delivery until the review of Aerojet's go forward plan.

(R4, tab 12 at 177-78)

30. On 30 October 1998, Aerojet submitted a further response to the cure notice, rejected the government's concern over the contractor's ability to complete the contract, and provided assurances regarding Aerojet's commitment to the SADARM program (R4, tab 13). In an overview of events, Aerojet stated that the government's cure notice had failed to identify any material requirement of the LRP-2 contract which Aerojet was not meeting at present, or was not capable of meeting in the future. Aerojet advised that it understood the Army's concern about submunition reliability, noted that the current SADARM round was being manufactured in accordance with the TDP, and advised that it was capable of passing the Lot Acceptance Test under the LRP-2 contract. (*Id.* at 180) Appellant concluded that the cure notice was unwarranted because Aerojet was in compliance with the LRP-2 contract, and gave assurances that Aerojet and Alliant were performing effectively and could meet future contract requirements. Aerojet attached its "comprehensive plan...to address the reliability problems affecting the SADARM projectile" entitled "Low Risk Path to 80% Reliability." (*Id.* at 187-88, attach. 1 at 189-97)

31. On 16 November 1998, Aerojet submitted to the government a proposal that dealt, in part, with concerns raised by the government's cure notice but went beyond those issues to call for contract commitments that exceeded any to date (R4, tab 83). The contractor offered a *quid pro quo*: because it "was everyone's basic assumption that the Army [only] had funding for around 200 rounds," but "needed at least 300 rounds for programmatic and political reasons," Aerojet offered to provide "an additional 100 rounds within the available FY98 funding." The contractor advised that this proposition had been briefed by its Mr. Fischer to MG Michitsch on 1 April 1998, and was discussed with COL Ellis beforehand. (*Id*. at 1574-75)

32. Aerojet's 16 November 1998 proposal named specific terms for its offer, which was predicated on "the basic assumption that there would be an ongoing funded SADARM production Program into the foreseeable future to allow Aerojet and Alliant the opportunity to recoup their investment" and increase the likelihood of a "long term business arrangement on SADARM." The contractor would (1) "agree to cap the Army's

liability for [the] LRP-1 contract by agreeing to convert from cost reimbursable to FFP"; (2) "provide [an] aggressive unit cost curve for future production of SADARM to assure the Army of the benefits of competition"; and (3) "agree [along with Alliant] to invest substantive discretionary funding...[to] improve sensor performance and submunition reliability." (R4, tab 83 at 1574-75) But in return, Aerojet demanded a "firm and enforceable commitment from the Army" for the following:

> (4) The Army would agree that it would not compete SADARM requirements in the future if Aerojet met the predetermined cost curves and the technical requirements of its contracts. This commitment includes all future SADARM requirements for production, Product Improvement, COTS and VECPs;
>
> (5) In order to promote programmatic stability and improve cost performance, the Army would award Aerojet a sole source contract for FY 99 and multi-year contracts for future SADARM production starting in FY 2000;
>
> (6) The Army and Aerojet would agree on funded positive incentives for SADARM reliability and performance for FY99 contract and beyond;
>
> (7) The Army and Aerojet would strive to increase the SADARM base through international sales and other applications....

(*Id.*)

33. Aerojet repeatedly made clear that the government's commitment to a long term and exclusive contracting arrangement "must be in a form that is firm and enforceable. Beyond that basic ground rule, we are open to your proposals as to how [the government] can commit to your portion of the arrangement." (R4, tab 83 at 1575) Although the contractor "appreciate[d] that it may be contractually challenging for the Army to fulfill its part of the proposed arrangement," and said that it did "not want to set down hard rules in this letter on the form of the Army's commitment to this proposed arrangement," it advised the Army to take the following actions:

> First, you need to accept the go-forward plan and provide a written assurance that you intend to move forward with the Aerojet-Alliant team and award the FY99 production and PI/COTS requirements to Aerojet on a sole source basis.

> Second, you need to negotiate positive future performance incentives with us. Third, you need to propose an appropriate form of agreement for the award of future SADARM requirements to Aerojet on a sole source basis provided that Aerojet meets the pre-agreed cost and performance goals.

(*Id.* at 1576)

34. On 25 November 1998, the government replied to Aerojet's 30 October 1998 response to the cure notice. The contracting officer began by telling Aerojet that the "Government disagrees with many of the comments and statements" presented in the contractor's "response to the Cure Notice." He reaffirmed the government's "position that based on the contractor's performance under the contract, a cure notice was warranted at the time of issuance." CO Banashefski advised that, based on the "potential merits" of the go-forward plan submitted by Aerojet "in the spirit of cooperation," it was the government's intention to jointly pursue a plan with Aerojet and Alliant for continuation of the SADARM program. (R4, tab 14)

35. However, CO Banashefski cautioned the contractor that the plan was still being "worked," and had yet to be officially approved; that approval would be provided by him as soon as practical. He reminded Aerojet that several open issues remained, including reliability thresholds for the Reliability C & D tests and completion of the schedule for the "97-99 procurement of the total 1000 each projectiles" that included the 100 NSP (not separately priced) rounds. The contracting officer advised Aerojet that the terms and conditions for the incorporation of the latter rounds required further discussion. CO Banashefski cautioned Aerojet that, "For the record, it should be understood that any corporate investment by Aerojet/ATK in support of this program is solely of your own accord and *at your own risk*." (*Id*.) (Emphasis added)

36. Following the exchange of correspondence regarding the cure notice, COL Ellis on 4 December 1998 first briefed LTG Kern on "The SADARM Program: Path Forward" (R4, tab 66, subtab 65), then gave the same presentation to the Army Acquisition Executive (*id*. at 1333). Slides from that presentation noted that the go-forward plan would be defined, and limited M898 (basic round) production would take place in accordance with "Congress Desire [sic]" (*id*. at 1315).

37. COL Ellis's briefing noted that "Reliability Is The Issue!" and clarified the basis for reliability scoring:

> Reliability Scoring:
> If the submunition had a target in the foot print and shot and hit (near miss) it was scored reliable. Submunitions with a

> target in the foot print that did not shoot (or far miss) were scored unreliable.

(*Id*. at 1320)

38. The briefing provided a graph depicting historical reliability of the SADARM projectile; the final scoring of the testing ranged from a low 15% success rate in 1992, 31% in 1993, a high of 52% in 1997, and a combined score of 44% for the August 1998 Rel A and Rel B tests. A projected goal of 70% was shown for the upcoming Rel C tests. (R4, tab 66, subtab 65 at 1324)

39. In December 1998 following further communications concerning the government's cure notice and briefing of Army headquarters, the contract was not terminated and the determination was made to pursue increased projectile reliability to support a continued SADARM program (s*ee, e.g.*, R4, tab 30, "Aerojet/ARDEC ECP Discussion 12/9/99"). The government, Aerojet, and Alliant began what was referred to as the collaborative "Alpha Team process" in an effort to improve SADARM projectile reliability within available monies (tr. 2/50, 172-73, 5/126). The Alpha team was comprised of government representatives from ARDEC and the Picatinny SPO and the Defense Contract Audit Agency (DCAA) in addition to Aerojet and Alliant contractor personnel (R4, tab 88). The purpose of the meetings was to develop a proposal to further the SADARM program, including a budget and schedule that were acceptable to both the government and the contractor (tr. 5/126, 1/78-79, 2/172). Mr. Marshall, Aerojet's SADARM program manager, chaired the Alpha team and coordinated meetings, dates, agendas, distribution of minutes, and the management of action items (tr. 2/172-73, 179-80).

40. A chronology of Alpha team meetings, prepared by Ms. Burnes, indicates that the group met periodically for several months from December 1998 into 1999 (R4, tab 60 at 732, tab 66, subtab 25, tabs 211, 214, 213, 218, 222). Contractor and government witnesses testified that Aerojet and Alliant provided some cost and pricing data to support a plan for improved SADARM projectiles to the government during these meetings (tr. 2/182, 193-96, 3/47-48, 5/178, 6/193-94).

41. As noted by Alpha team minutes from the 12-13 January 1999 meeting attended by representatives from the government, Aerojet and Alliant, the parties discussed the lack of available funding due to the inability of the SADARM projectiles to demonstrate acceptable reliability (R4, tab 66, subtab 13 at 944; tr. 2/124-28, 190, 262). The minutes state that, "In accordance with the ALPHA team build schedule," acquisition of long lead material would not begin until FY 1999, because "the government does not intend to release funds to the contractors until 80% reliability has been demonstrated."

For planning purposes, this was estimated to be accomplished in November 1998. (R4, tab 66, subtab 13 at 944)

42. The 12-13 January 1999 minutes also show that the parties considered the undefinitized contract action, Modification No. P00017:

> Full procurement was authorized on Aug 3 with receipt of the UCA. The UCA ordered 200 projectiles, therefore the DCAA audit against the contract should not penalize the contractors for providing 100 donated rounds. It was also noted that the contractors proposed costs for the UCA effort is in excess of $33M.

(*Id*.)

43. By letter dated 13 January 1999, CO Banashefski wrote to Aerojet in response to Mr. Newman's 16 November 1998 letter and the 1 April 1998 briefing made by Mr. Fischer to MG Michitsch; both communications emphasized the contractor's strong desire for the government to commit to awarding further SADARM contracts to Aerojet on a sole-source basis (R4, tab 89). CO Banashefski provided Aerojet with notice of the government's intent "to pursue a go forward plan to accomplish the definitization/negotiation of 400 rounds using the available FY98 and FY99 production requirement funding" (*id*. at 1621). He took strong exception to Aerojet's proposed arrangement, and advised the contractor that while a sole-source SADARM contract was under consideration for FY 1999, "it should be clearly understood that the Government **never** 'promised to continue to award to Aerojet on a sole-source basis through multi-year contracts;' nor [could the government do so] from either a legal or contractual perspective" (emphasis in original). The contracting officer clarified that the government wanted to "maintain a viable SADARM program," but that "To date, Aerojet has not accomplished all of their ground rule commitments." CO Banashefski told Aerojet that the Picatinny SPO had fulfilled its commitment by requesting funding for FY 2000-02 SADARM production requirements, and that these requests were "currently at OSD awaiting approval." He stated that when the government "agreed as part of the overall commitment to maintain a viable SADARM program, to pursue a sole-source acquisition for the FY99 SADARM production requirement and a multi-year procurement for the SADARM FY00-02 production requirements," this "agreement was predicated on Aerojet meeting its commitments to the Program as delineated in the referenced b) 1 April 98 briefing charts." (*Id.* at 1619)

44. The contracting officer addressed specific assertions that were made in Aerojet's 16 November 1998 letter (R4, tab 83) that insisted upon the government's making a firm and enforceable commitment to giving Aerojet multiple-year, sole source

and exclusive contracts for the SADARM program (R4, tab 89). He criticized Aerojet's proffered cost curve in "that the 'competitive' part of the cost curve does NOT exist, especially for the near future" (*id.* at 1620) (emphasis in original). CO Banashefski cautioned that the increased costs from Aerojet's current contract would result in the SADARM program "reporting a Total Procurement Cost Breach when the President's Budget is submitted to Congress" and reiterated that "the Army cannot legally or contractually commit to awarding any out-year production buys/efforts to Aerojet at this time" (*id.* at 1620-21).

45. CO Banashefski again reminded the contractor that any investment by Aerojet and Alliant of "discretionary funding" toward submunition reliability efforts outside of the contract were taken "at your own risk without any commitment on the part" of the government. He noted that "a large portion of the contractor efforts associated with these areas were once originally part of the LRP 1 contract" and not the instant LRP-2 contract. (*Id*. at 1620)

46. The contracting officer contested a central point of Aerojet's 16 November 1998 letter that predicated the go-forward plan upon the government's entering into a legally binding agreement not to compete future SADARM work:

> 4) As delineated above, the Government never agreed that it would not compete "SADARM requirements" in the future if Aerojet met the predetermined cost curves and the technical requirements of the contract. Rather, the Government indicated it would pursue a sole source acquisition strategy for out-year production buys to include the PI and COTS efforts cost curves and the technical requirements of the contract.

(*Id*. at 1620) He emphasized that, while the government's "current acquisition strategy is to endeavor to obtain multi-year approval for Aerojet for production buys FY00-02," the government could not "legally or contractually commit to awarding any out-year production buys/efforts to Aerojet at this time" (*id.* at 1621).

47. The government issued unilateral Modification No. P00024 to the LRP-2 contract in January 1999 (R4, tab 16) The purpose of the modification was to add $2.5 million in interim FY 1998 funding, thereby increasing the amount of the contract from $91,641,392 to $94,141,392 (*id.* at 203). In February 1999, the government issued unilateral Modification No. P00025 (R4, tab 17), which added another $2.5 million in interim FY 1998 funding, thus increasing the amount of the contract to $96,641,392 (*id.* at 212).

48. In February 1999, the Picatinny SPO submitted a P-40 budget request to higher headquarters that sought to change the FY 1999 SADARM request to $31.5 million for the acquisition of 100 projectiles (R4, tab 68 at 1395; tr. 6/157-58). Congress appropriated $31,542,000 in FY 1999 funds for SADARM; of that amount, OSD released $1,542,000 to the SADARM program in November 1998 with the restriction that the monies could not be used to acquire rounds, and $30 million was withheld (R4, tab 68 at 1404; tr. 7/11). According to a 2 April 1999 memorandum by Mr. Albaugh, OSD withheld $30,000,000 from the appropriation "for cause" pending "resolution of test problems" (R4, tab 68 at 1404, 1406, 1409), which he testified were associated with the lack of demonstrated reliability of the projectiles (tr. 7/11-13). Continued funding for the SADARM program remained in serious jeopardy due to mounting concerns on the part of Congress, OSD, and the Army over the contractor's ability to produce acceptable projectiles within contract and budget constraints. OSD specifically limited expenditures to continued program management and support to prior year contracts (R4, tab 68 at 1409), and continued to restrict funds thereafter (*id.* at 1414, 1419; tr. 7/9-30). OSD did not allow any of the FY 1999 monies released to the Picatinny SPO to be spent to acquire more rounds (R4, tab 68 at 1420; tr. 7/22-24).

49. In a memorandum describing the 16-18 March 1999 Alpha team meeting, Mr. Marshall stated that Aerojet's revised estimated price for 400 rounds, excluding Alliant's costs for the 100 "free" rounds, was $76.9 million (R4, tab 222 at 10177, attach. 8 at 10191). The meeting was attended by representatives of the government, Aerojet, and Alliant (*id.* at 10181). The minutes of that meeting show that Mr. William DeMassi of the Picatinny SPO cautioned the contractor that OSD was not going to release SADARM funds "for award" until the projectiles demonstrated reliability results of 80% (R4, tab 96 at 1679).

50. Among matters discussed in March of 1999 by the government, Aerojet and Alliant was OSD's concern over the viability of the SADARM program due to the poor results shown in projectile reliability testing, and OSD's refusal to consider granting FY 1999 funds for the purchase of SADARM rounds unless considerable improvement was shown (R4, tab 222; tr. 2/123-25, 3/159-62). According to an internal Aerojet memorandum commenting upon the March 1999 Alpha team meeting, the parties focused on resolution of projectile difficulties in the face of budget constraints (R4, tab 98; tr. 3/162). The Aerojet memorandum cited several "hot buttons" that had to be dealt with. This included that: the government would "not pay for program [costs], restated again and again"; a "lot of activity [costs were] moved into ECPs"; the "ECP budget in 98 is zero and is $1M in FY 99"; the "gap in FY98/99 comes about from program funding and we (Government and Aerojet) have notified Congress that this funding level" would cause an eight-month delay; and the government's perspective that Aerojet should conduct and shoulder the cost of more frequent testing to prove the worth of proposed engineering changes. (R4, tab 98)

51. On 2 April 1999, Mr. Marshall presented a level 2 briefing to Mr. Fischer regarding the "SADARM LRP-II Restructure Program," and sought approval to present proposal C9770-10-01B (Revised) to the government (R4, tab 100; tr. 2/262). As indicated on the slides used in the briefing, the contract manager was Ms. Burnes (R4, tab 100). The contractor assumed that "$22M to $24M" would be available in FY 1999 funding (*id.* at 1723). The slide entitled "Noteworthy Contract Requirements" stated the contractor's understanding that FY 1999 government funds were at risk due to the unsatisfactory projectile test results:

> **FY99 Spend Prohibition** – Government will not release GFY99 funds till Rel Growth >80% is demonstrated (cost estimating assumes 11/99).

(*Id.* at 1730) (emphasis in original) Mr. Fischer approved release of Aerojet's proposal to the government (tr. 2/268), as did Mr. Wolfe after receiving essentially the same briefing from Mr. Bregard and Mr. Marshall (R4, tab 102 at 1761, 1767; tr. 2/268).

52. OSD released $5,023,000 in FY 1999 SADARM funds on 5 April 1999, but restricted use of that money to "continued program management and support to prior year contracts." OSD continued to withhold $24,977,000 that was appropriated by Congress pending resolution of projectile test problems and increased munition reliability. Of this $5,023,000 only $5,000,000, still limited in application, was transferred by OSD to the Picatinny SADARM program on 8 April 1999. (R4, tab 68 at 1409-12)

53. On 20 April 1999, Aerojet submitted firm fixed-price Proposal No. C9770-10-01B (Revised) in the amount of $76,490,173 (R4, tab 66, subtab 22). Among other things, Aerojet offered to: provide up to 200 additional rounds in FY 1998, plus up to 100 additional FY 1998 rounds at no additional cost; furnish up to 100 additional FY 1999 rounds; incorporate certain listed ECNs; and, amend certain parts of the LRP-2 contract (*id.* at 1009). The cover letter stated that the contractor's September 1998 Proposal No. C9770-10-01B had expired and was withdrawn, and held the revised proposal open for 90 days (R4, tab 104). The cover letter explained that the revised proposal was made in response to CO Banashefski's 13 January 1999 letter which advised of restrictions on the government's ability to award a multi-year sole source contract, and said that it "reflect[ed] the cooperative efforts" of the Alpha team process. Aerojet made the revised proposal contingent on a number of "assumptions and conditions," including the following: (1) the ceiling price in Modification No. P00017 of $29.3 million for the FY 1998 quantity of 200 rounds was no longer valid due to technical and schedule changes that had arisen since the modification was made; (2) the pricing of the revised proposal was the result of Alpha team negotiations "which established mutually acceptable labor and material pricing methodologies" for the "LRP II restructure

proposal"; and (3) appellant had assumed that "in the [forthcoming] definitization of this modification [No. P00017], no significant exceptions [would] be taken to labor and material rate estimates for agreed-upon work scope." The revised proposal said that the configuration of the increased quantity of rounds would include all specification deviations, waivers, and ECNs currently approved by the government for the basic quantity of 600 projectiles. (*Id.*) The 600 "basic" rounds were designated as model number M898 (R4, tab 1 at 7-8).

54. In addition to the revised proposal, Aerojet submitted a separate volume providing detailed cost information (R4, tab 66, subtab 22). The cost volume noted that technical improvements would have to be validated by reliability testing and then submitted to the government's CCB before the TDP could be amended to reflect the changes:

> The basis of this estimate is the current Configuration Control Board (CCB) approved and government controlled Technical Data Package (TDP), reference Contract DAAE30-95-C-0080 CDRL item 15.... Changes to this SADARM TDP will be discussed and approved under the standard CCB process for SADARM. The ALPHA team agreed that contractor costs for class 1 changes would be negotiated and funded separately in accordance with the CCB process.
>
> Aerojet expects that the successful culmination of the Reliability Growth Program will result in a number of contractor-proposed changes to the TDP.... These changes will be incorporated via deviation into the Reliability Growth C and/or D test events. Upon qualification, in either the "C" or "D" tests, these changes will be submitted to the SADARM CCB for consideration.

(*Id.* at 1011-12) Appellant reserved the right to withdraw its offer to provide 100 free rounds if FY 1999 funding was not released by November 1999, and if FY 2000 funding was not budgeted and obligated to the contract by December 1999 (*id.* at 1013). The revised proposal price of $76.4 million was comprised of $48.2 million in FY 1999 monies and $28.2 million in FY 2000 funding (*id.* at 1033). Appellant again updated its proposal in May and June 1999, and adjusted its proposed total price to $75.8 million (R4, tab 237); expiration of the proposal eventually was extended to 24 September 1999 (R4, tab 257).

55. Congress and Picatinny SPO's higher headquarters were increasingly concerned about the large cost and questionable reliability of the SADARM munition

(*see, e.g.*, findings 43, 48-52, 91-94). On 5 May 1999, COL Ellis gave a briefing on the SADARM program to Ms. Trish Ryan, Professional Staff Member of the United States House of Representatives Appropriations Committee. COL Ellis testified that Ms. Ryan was responsible for making "recommendations to the Congress and [writing] the congressional language that went into the bill" (tr. 3/248). At the time of the briefing, OSD was still withholding the majority of FY 1999 funds from the SADARM program because the projectiles still had not demonstrated the acceptable reliability rate of 80% (tr. 3/250). COL Ellis advised Ms. Ryan that there would be no contract award using FY 1999 funds until projectile reliability was successfully demonstrated (R4, tab 105 at 1800, 1813-14; tr. 3/249). COL Ellis's objective was to assure Ms. Ryan that the SADARM program was following Congressional guidance to resolve technical difficulties before acquiring more rounds using FY 1999 funds. COL Ellis recounted that the government had already made a substantial investment in the SADARM projectile that would be lost if the program was discontinued before engineering solutions were found. He explained: "by this time the army had spent about a billion dollars and they still didn't have anything in the field so, you know, our senior army OSD and Congress were digging in their heels about showing performance." (Tr. 3/249-51) In May 1999, COL Ellis also gave a briefing to Dr. George Schneiter, Director, Strategic and Tactical Systems–OSD, and the Overarching Integrated Product Team in a further effort to obtain the release of FY 1999 funds (R4, tab 107; tr. 2/251).

56. An "ARMY INFORMATION PAPER" about the "M898 Sense and Destroy Armor (SADARM)" projectile that was the subject of the instant contract was prepared 12 May 1999 (R4, tab 106 at 1817-18). The purpose of the paper was "To provide information on zeroing of POM Procurement funding of SADARM (FY 01-04)" (*id.* at 1817). It was noted that the Army through FY 1999 had already invested $1.3 billion in SADARM, which was then in low rate production and that there was a concurrent Product Improvement program intended to enhance effectiveness and reduce costs. The paper examined "two scenarios: One which assumes the FY 99 procurement program and the FY 00 procurement budget request remain intact; and the other more probable scenario which assumes the POM reduction will cause loss of FY 99 and FY 00 procurements." (*Id.*)

57. Aerojet reviewed the paper with the assistance of a consultant. Mr. Bill Yerkes noted to Mr. Bregard that although the paper made no explicit assumptions regarding the budget cuts "effectively terminating the SADARM production program," he opined that "the army's FY01-04 procurement cut effectively makes the army's current production program unexecutable [sic]." He forecasted that "there'd be a more severe impact of the Army's cut than what the paper covers." (R4, tab 106 at 1815) Mr. Bregard testified that he understood that "if [the budget reduction discussed in the paper] happens we're effectively out of business" (tr. 3/172).

58. According to Mr. Marshall's minutes from the Alpha team meeting held on 26 May 1999, the government took exception to several statements in Aerojet's revised proposal (R4, tab 109). The government disputed that the proposal complied with the government's go forward plan or reflected the efforts of the Alpha team process. The government did not agree that the ceiling price of $29.3M stated in Modification No. P00017 for 200 FY 1998 rounds was no longer valid, or that the Alpha team had discussed that matter; Mr. Marshall records that the government's reaction was that "This is new!" (*Id.* at 1823) Mr. Marshall wrote that, in response to the contractor's assertion that it would withdraw the 100 NSP rounds if FY 1999 funding was not released by November 1999 and FY 2000 funding was not budgeted and obligated by December 1999, the government said that the "Alpha team acknowledged that once the RG [reliability growth] requirement was met, OSD would release the FY99 (option) funding which would immediately be put on [the] contract" (*id.* at 1824). The minutes show that the Alpha team agreed to follow the "process in place (CCB)" and submit proposed changes to the CCB for approval once reliability testing had taken place to establish the efficacy of these changes (*id.* at 1823). Mr. Marshall's notes stated that the government was willing to include the following language, not previously negotiated by the Alpha team, that "The Government will only require delivery of the NSP CLIN [contract line item] projectiles when the FY99 Option is exercised. The FY99 option will be exercised no later than three months after successful completion of Reliability Growth C or D testing." (*Id*. at 1824) The cover page to the minutes indicated that a number of issues including "Ceiling Price," "GFY98/99 Re-Opener/100 NSP Projectiles," and "Final Quantities/Ceiling Price" were "escalated for [higher] management resolution" (*id.* at 1821). The list of meeting attendees did not include COL Ellis or any government contracting officer (*id.* at 1822).

59. In response to proposed budget cuts that could end projectile production, on 9 June 1999, Mr. Wolfe, President of Aerojet, and Mr. Michael Brown, CEO of Litton[4], wrote to Secretary of the Army Louis Caldera to "express our deep concern about the current status of funding" for the SADARM program (R4, tab 112). The letter primarily addressed the Army's anticipated reduction or elimination of SADARM funding for FY 2000 through FY 2004, and sought instead to persuade Secretary Caldera to bolster that effort. (*Id*. at 1841-42) The authors acknowledged "that the Army is reviewing this matter" and planned to take corrective action before the Budget Estimate Submission in August, but "fear[ed] that irreversible damage will already have been done, as a skeptical

[4] Litton is mentioned in the claim as one of the companies for which a "long lead funding commitment" was necessary, hence the parties entered into Modification No. P00017 exercising the contract option for more projectiles before all of the necessary terms were agreed upon (R4, tab 55 at 673).

Congress reacts by severely cutting or eliminating the FY00 SADARM budget" (*id*. at 1842). They warned that "canceling SADARM effectively loses the $1.3B Army Investment" (*id*. at 1841).

60. Also on 9 June 1999, Mr. Bregard and Mr. Larson exchanged e-mails regarding the adverse impact on the contractors from the Army's intended reduction of SADARM monies, and the meeting planned for 23 June 1999 to discuss that matter. Mr. Bregard told Mr. Larson that he had spoken with COL Ellis regarding restructuring the LRP-2 contract, and had advised of the contractor's concern over the production gap cost, the UCA Modification No. P00017 ceiling of $29.3 million, and the 100 contractor-contributed rounds. Mr. Bregard also stated that Aerojet and Alliant would have to explain to the government why the $29.3 million price was no longer valid. Mr. Bregard said that COL Ellis "plans on leaving the 23rd with a handshake." (R4, tab 111) In later testimony, Mr. Bregard testified that he understood COL Ellis's use of the term "handshake" to mean "An agreement." When queried by Aerojet's counsel as to "what kind of agreement," Mr. Bregard replied that "If we're into dialogue it could have been, you know, this is it, this is the contract go forward plan." Mr. Bregard said that he had reached similar agreements with COL Ellis before, but did not provide any additional details, such as the substance of these agreements or when these allegedly occurred. (Tr. 3/57-58)

61. Mr. Bregard's e-mail exchanges of 18 and 21 June 1999 with Ms. Harder emphasized that it was necessary to definitize Modification No. P00017 as soon as possible, as the failure to do so would "put the available $$ at risk" (R4, tab 239).

62. By letter dated 15 July 1999, Mr. Fischer wrote to LTG Kern as a follow-up to their 29 June 1999 meeting and in response to LTG Kern's request to be notified "of any more concerns about the lack of Army support for SADARM" (R4, tab 117). Mr. Fischer declared that it "disheartens me to report that major misperceptions continue to exist, both in Congress and among our potential international clients" about the continued viability of the SADARM program. Mr. Fischer continued that he had been advised that "the House Appropriations Defense Subcommittee will zero the SADARM FY00 procurement request ($54.5M)." He attributed the concerns of "Congressional personnel" about the SADARM program to "a wide spread belief that the Army does not want to procure 'Basic' SADARM [projectiles] and thus has no need for the production funds." Mr. Fischer worried that Congress might misunderstand the relationship between basic and product improvement SADARM efforts in both cutting and restricting the use of funds, and emphasized that "[t]hese false perceptions must be corrected." (*Id*. at 1855) Noting that Congressional leadership wanted to act quickly on the budget request before the upcoming August break (*id.*), Mr. Fischer affirmed that the contractor remained committed to the program. He cautioned LTG Kern that it was necessary for the Army to:

> (1) obtain release of the FY99 procurement funds, (2) obtain a "recoloring" of FY00 funds by transferring $24.5M for procurement into RDT&E, and (3) restore the FY01-04 POM procurements funds, at the minimum sustaining rate level, of $216M.

(*Id.* at 1855-56) Mr. Bregard forwarded a copy of Mr. Fischer's letter expressing concern over diminished Congressional funding and OSD support for the SADARM program to, among others, Mr. Larson and Ms. Burnes (*id*. at 1854).

63. The parties met on 20-21 July 1999; participants included COL Ellis, Mr. Bregard, Mr. Marshall, Mr. Larson, Ms. Burnes, and Ms. Harder. Mr. Larson's notes from 20 July 1999 indicate, among other things, that available funds were $29.3 million in FY 1998 and $31.5 million in FY 1999, with an estimated $21-26 million of the latter figure available to the contractor. (R4, tab 66, subtab 29 at 1128) Other notes on the meeting show that the 100 NSP rounds were now "off the table" (R4, tab 120). Following a meeting of the parties at Picatinny Arsenal on 27 July 1999, Mr. Larson sent an e-mail to Aerojet and government personnel stating that it was his understanding that the parties were ready to discuss these "5 facts": (1) FY 1998 money required for 200 rounds; (2) FY 1999 money required for 100 rounds; (3) gap costs; (4) "orphans," which were mostly ECP (engineering change proposal) costs; and (5) a delivery schedule "that ties to bridging the program to the planned (maybe risky) GFY00 budget" (R4, tab 122).

64. Mr. Bregard sent an e-mail to COL Ellis, Mr. Serao, and Mr. Larson on 2 August 1999 following a video teleconference amongst representatives of the Picatinny SPO, Aerojet, and Alliant (R4, tab 126). Mr. Bregard stated that "[a]s ugly as the numbers are, I believe we answered the 5 questions" from the 20-21 July 1999 meeting. He said that the parties needed to get together in a small group to devise options which "we [are] willing to take forward for approval," and that the meeting "would not be billed as a negotiating session, [but] more of a go-forward strategy meeting." (R4, tab 126) COL Ellis responded to Mr. Bregard and Mr. Larson in an e-mail. Among other things, COL Ellis stated: "Where I'm coming from...FY98 is $29.3M for 200 rounds...FY99 is negotiable.... I personally don't think a unilateral UCA is the way to go, but given the situation and past track record, I may have no alternative." (*Id*. at 1872)

65. COL Ellis later testified that FY 1999 monies were not available for the acquisition of rounds at the time of his remarks in August 1999, and that he was frustrated by the parties' inability to resolve the technical and budgetary problems confronting the SADARM program. COL Ellis was disappointed that the parties had not reached agreement on a "path forward" that could be used as a strategy to help convince Congress to appropriate more money and persuade higher echelons at OSD and Army headquarters to release additional funding to the program. COL Ellis explained that if the parties could

not reach agreement and obligate existing FY 1998 monies, then the government would have to issue a unilateral modification to definitize Modification No. P00017 or risk having OSD or Army headquarters pull back those funds for use elsewhere. (Tr. 3/254-57)

66. Following a 6 August 1999 teleconference among Mr. Bregard, Mr. Larson, and COL Ellis, Mr. Bregard sent an e-mail to Aerojet employees Mr. Newman, Ms. Burnes, and Mr. Marshall. The e-mail stated that "[w]e have been adamant that [COL Ellis] can not get 200 rounds for $29.3M." Mr. Bregard had sent COL Ellis a copy of a PowerPoint slide indicating that the government could only buy 165 rounds for $29.3 million in FY 1998 money and the government could only purchase 70 rounds for $12.4 million in FY 1999 money. Mr. Bregard concluded that "we finally got [COL Ellis] off 200 rounds or die." (R4, tab 127) At the hearing, COL Ellis testified that although he was willing to relay this contractor-supplied information to his superiors, he still believed that the $29.3 million price for 200 rounds stated in UCA Modification No. P00017 was a good number (tr. 4/188-90).

67. Ms. Burnes prepared summarized minutes from the 11 August 1999 "Continuation of Follow-up Contract Negotiations" held at Picatinny Arsenal (R4, tab 129). Her notes indicate that COL Ellis started the meeting by saying: "There's $29.3 for 200 rounds in '98. Then pay bills in '99 plus 100 rounds (100 rounds are negotiable). Get '98 on Contract before end of September." Contractor representatives expressed concern about whether FY 1999 money would be used to pay FY 1998 bills, and Mr. Bregard observed that there would be a "hard Problem for '99." (*Id.* at 1877, 1879) Mr. Larson testified that there was no discussion at that time of problems anticipated in obtaining the requested FY 1999 funds (tr. 2/78).

68. On 18 August 1999, CO Doyle sent Mr. Marshall an e-mail with comments from the government's Alpha team members regarding Aerojet's most recent proposal under the LRP-2 contract (R4, tab 130). Aerojet was requested to review the government's comments, "make any adjustments and provide the Government with the assurance of 200 rounds for $29.3M in accordance with the ceiling price of the UCA [Modification No. P00017]" (*id.* at 1881).

69. In an internal Aerojet 19 August 1999 e-mail, Mr. Bregard said that he agreed that a meeting with Mr. Fischer was a good idea, expressed concern that "we're skating on thin ice" and worried about "heading off a unilateral mod for $29.3M for 200 rounds" (R4, tab 131). Mr. Marshall responded to CO Doyle regarding the government's 18 August 1999 comments. Among other things, Aerojet stated its understanding "that the Government intends to replace Reliability Growth D with Reliability Demonstration Assessment Program (RDAP)," and that "Testing has not been eliminated." (R4, tab 133 at 1893)

70. Mr. Bregard sent a subsequent e-mail to others at Aerojet and to Alliant's Blake Larson on 27 August 1999 following a telephone conference with COL Ellis, whom Mr. Bregard indicated was "willing to settle (??!!?)." Mr. Bregard and COL Ellis planned to have the parties meet the week of 13 September 1999, because COL Ellis was leaving the country on 18 September and afterward would have to brief the Army and OSD on the status of the SADARM program. At the end of the e-mail, Mr. Bregard stated that COL Ellis had again said that the government would use a unilateral modification if the parties had not reached resolution before he started higher level briefings at the end of September. (R4, tab 134) Mr. Larson testified that he thought the parties had reached a point where they "needed to come to that meeting with the authority to settle" (tr. 2/79-80). In late August 1999, Aerojet and Alliant extended the deadline for their "LRP-2 Option GFY98/99 Production Years" to 24 September 1999 (R4, tabs 257, 258).

71. The government conducted Reliability Growth C (Rel C) testing of the SADARM projectiles at the Yuma Proving Grounds from 30 August-1 September 1999 (R4, tab 260 at 10301). The Reliability Determination and Assessment Program – 1 (RDAP-1) round configuration was used for rounds in the Rel C tests (tr. 2/88-89), even though that configuration was not made part of the contract TDP until approval of the changes by the CCB and the execution of Modification No. P00047 on 21 March 2000 (R4, tab 66, subtab 48). Aerojet was testing that configuration to ensure that the engineering changes made to the original projectile requirements were effective (tr. 2/88-89). The testing of the projectiles was carried out at a distance of 15 kilometers (zone 7R) and 21 kilometers (zone 8S). The combined results of the zones 8S/7R reliability testing showed an overall 78% success rate; this reflected an 86% projectile reliability rate at target zone 8S, and a 74% reliability rate at zone 7R. There were 25 target hits from 22 projectiles; this average of more than one hit per projectile was possible since each missile carried two submunitions. (R4, tab 260; finding 1) COL Ellis sent an e-mail to government and contractor personnel saying "Well Done to the entire team!" (R4, tab 262). At the hearing, Mr. Bregard agreed that he presumed that once information regarding the improved test results got to OSD, FY 1999 money would be released for contract purposes (tr. 3/158-59), although he acknowledged that the firing of 22 projectiles did not provide a "huge data sample" (tr. 3/92).

72. COL Ellis testified that although the improved results of the Yuma testing were "encouraging" and "close," the 80% reliability rate was not quite reached. He said that although an 80% success rate was referred to as a "goal," it was a "*de facto*" requirement for the projectiles' performance in that OSD, Congress, and senior Army leadership expected this level of achievement. COL Ellis testified that he had been told by Army headquarters that if the demonstrated reliability of the rounds did not reach 80%, the SADARM program would not get more money. (Tr. 4/198-99)

73. On 2 September 1999, DCAA provided the Picatinny SPO with audit report No. 4901-99H22000023. The audit examined Aerojet's 20 April 1999 proposal as revised 17 May 1999 and 11 June 1999. (R4, tab 261) The $75,871,859 proposal was made in response to the government's request to definitize UCA Modification No. P00017. The proposal called for an additional 300 projectiles for $47,681,629 for FY 1998, with 100 projectiles to be provided by Aerojet at no additional cost to the government, and another 100 projectiles in the amount of $28,190,229 for FY 1999. The audit specified that Modification No. P00017 had set the fixed ceiling of $29,300,000 for FY 1998, and limited authorization for contractor spending and obligation to $10,000,000. (*Id.* at 10303) DCAA questioned contractor-asserted costs of $8.7 million, and determined that a little over $1 million in costs were unsupported. The report stated that the proposal was "acceptable as a basis for negotiation of a fair and reasonable price." (*Id.* at 10303, 10305) Mr. Timothy Joens, Picatinny SPO cost and pricing analyst, testified that he read the DCAA report but did not remember coming up with a position on the contractor's April 1999 proposal based on the audit. In October 1999, Mr. Joens prepared a spreadsheet from which he concluded that the government's goal "of definitizing the UCA for a not to exceed 29.3 million was still achievable." (Tr. 6/184-86) CO Trauger did not recall seeing the audit report, and testified that although he thought that he knew about it, he did not believe the government used the audit as the basis for discussions at the 17 September 1999 meeting (tr. 5/13). CO Trauger testified that he believed that $29.3 million proposed in draft Modification No. P00032 was a reasonable ceiling price for the UCA. CO Trauger had reviewed the spreadsheet prepared by Mr. Joens which buttressed the government's position that $29.3 million was "still a good number." (Tr. 5/10-12, 6/184-86; R4, tab 156)

74. In preparation for the 17 September 1999 meeting and to obtain authority to negotiate, Mr. Bregard and others briefed higher Aerojet management including Mr. Fischer (R4, tabs 138-39; tr. 2/228-230, 285-88, 3/190-92). Among other things, the slides used for the briefing showed that the government's available FY 1998 funding was $29.3M (R4, tab 138 at 1929). Mr. Bregard testified that he had authority to negotiate for Aerojet, and that Mr. Newman and Ms. Burnes had contract authority to sign a modification (tr. 3/98). Mr. Larson testified that he received authority to "settle" on behalf of Alliant (tr. 2/92).

75. On 10 September 1999, CO Doyle asked COL Ellis to confirm whether a meeting with Aerojet had been scheduled for the next week. COL Ellis responded that Mr. Marshall, Ms. Burnes, and Mr. Newman would be at Picatinny Arsenal on the following Wednesday to meet with government personnel and that Mr. Bregard would be there on Thursday. COL Ellis stated that his "position remains unchanged for FY98...[to acquire] 200 rounds for $29.3M. Any tasks/costs that can be moved should be moved to FY99 and we'll pay for it with FY99 dollars." (R4, tab 142)

76. In a 10 September 1999 e-mail to Aerojet and Alliant personnel, Alliant's Mr. Larson summarized his thoughts "just to make sure" that he was on track regarding certain "items." He queried whether, "even though these items are titled GFY98 proposal, the govt is still committing to GFY98 and GFY99 funds simultaneously and contractually when we close this deal next week." (R4, tab 267)

77. The Picatinny SPO sent proposed bilateral contract Modification No. P00032 to appellant on or about 13 September 1999 for signature. The purpose of the modification was to definitize UCA Modification No. P00017 at a not to exceed (NTE) price of $29.3 million. On 16 September 1999, Ms. Burnes, on behalf of Aerojet, responded to the proposed government modification (R4, tab 19). She stated that the premise that draft Modification No. P00032 would definitize the UCA at "an amount not to exceed $29.3 million" was "incorrect" (*id.* at 275). Ms. Burnes objected to Aerojet being required to furnish SADARM projectiles in a "revised contractual baseline" that would meet reliability requirements (*id.* at 276). She noted that the technical baseline for rounds designated in Modification No. P00017 "was the TDP existing" prior to that modification, which included "ECNs 4426, 4432, 4413, and the ECNs for the EM Housing and the One-Piece Housing" (*id.* at 275). Ms. Burnes stated that this TDP had to be revised, as a result of the poor reliability test results and the government's cure notice, which threatened contract termination unless SADARM performance improved (*id.* at 276). She advised that Aerojet had "pursue[d] this improvement in performance largely on its own money because the Army cut off funding." Ms. Burnes said that Aerojet had refrained from any "formal contractual dispute" over these issues, as "Such an action would very likely have precipitated the termination of the entire program due to skepticism in Congress as to the utility of the SADARM system" (*id.*). Instead, Aerojet came up with a "'go forward' strategy" to convince senior Army staff and OSD to continue the contract (*id.* at 277). Ms. Burnes pointed out that it was a reconfigured round, not one made to the basic configuration of the TDP, that demonstrated improvement in the recent testing at Yuma. Referring to round configuration, she advised that "if the Government's [sic] needs an orange instead of an apple," then the government "cannot, under the Changes clause of the SADARM contract, force the contractor to provide an orange for the price of an apple." (*Id.* at 276)

78. Ms. Burnes gave the following reasons for the contractor's refusal to sign the proposed modification:

> In summary, the two basic issues that generally drive contract price – the specifications and the delivery schedule – have changed substantially since August 1998 through the reliability improvement program and the efforts of the Alpha Team. Both changes have materially impacted the cost of performing the program. The Army now wants a new product

> and a new delivery schedule, but insists on the old price. The Army has threatened to issue a unilateral contract modification if Aerojet now rejects the Army's counter-offer. If that were to occur, Aerojet would have no choice financially or legally but to appeal any such unilateral determination under the Changes clause of the LRP II contract.
>
> Aerojet is willing to work with the Army to reach a resolution that is agreeable to both sides, but the Army must also participate in good faith in this process. It is important for the Army to recognize that it does not hold a contractually enforceable NTE, nor does it have a viable defense if Aerojet files a claim in response to a unilateral contractual change order. If the Army accepts the basic fact that it never requested nor received an NTE for the current FY98 program as outlined by the Alpha Team, and reflected in the current technical baseline and production schedule for SADARM, then the parties can move forward to a mutual solution.

(R4, tab 19 at 278)

79. Ms. Burnes was examined at the hearing about her objection to the draft Modification No. P00032 to definitize UCA Modification No. P00017 (tr. 1/170-75). She acknowledged that any changes to the TDP would have to be based upon Engineering Change Notices that were approved by the government's CCB (*id.* at 170-71). Ms. Burnes could not identify any changes to the TDP at the time of the 17 September 1999 meeting that showed that the configuration tested at Yuma had been approved by the CCB (*id.* at 170-73). The Picatinny SPO could not enter into any contract modification incorporating changes to the TDP that had been shown useful at Yuma because the CCB had not granted permission to do so at the time of the 17 September 1999 meeting (findings 4, 71).

80. On 14 September 1999, Mr. Larson sent an e-mail to Mr. Bregard, conveying his thoughts on a "Recommended Approach" for the 17 September 1999 meeting. Among the points made by Mr. Larson were:

> -Define path to provide government 200 rounds for 29.3 mil in 98 when settled simultaneously with bills paid in 99
> - Try for no REAs.
> - Zero rounds in GFY99 (probably)
> - All work completed in Dec. '00..

- Bundle and treat as one contract (which it is) to minimize anti-deficiency concerns

....

Why is this a good deal for the Government?

• Get 200 rounds
  - PM Commitment?
  - Congressional visiblity

• Avoids REA/Claims Process
  - Financial impact
  - Team/relationship
  - Program health/political impact

• Avoids costly production break

(R4, tab 270) Mr. Larson testified that, by this e-mail, he was trying to "get the framework" for the 17 September 1999 meeting (tr. 2/87).

The 17 September 1999 Meeting

81. Mr. Newman testified that he and Mr. Bregard attended the 17 September 1999 meeting at Picatinny Arsenal because the parties had been unable to definitize Modification No. P00017 and Aerojet intended to reach a resolution that day (tr. 4/37-28). Mr. Newman and Ms. Burnes had authority to sign contracts for Aerojet (tr. 1/50, 208, 4/39-40), which Mr. Bregard distinguished from his "program authority" to negotiate on behalf of the contractor (tr. 3/98). The only persons at the meeting with authority to bind the government were CO Trauger, who had unlimited execution rights and a maximum of $50 million in contract approval, and CO Doyle, whom he supervised (tr. 1/208, 3/260, 5/14). COL Ellis did not have a contracting officer's warrant (tr. 3/260).

82. CO Trauger first assumed supervisory contracting officer duties for the Picatinny SPO around April 1999 (tr. 5/8-9). He took over contracting officer authority from CO Banashefski when the program was transferred to CO Trauger's group (tr. 5/6). CO Trauger testified that he attended the 17 September 1999 meeting because "we really didn't expect to have a bilateral agreement come out of this. We expected a unilateral decision and nobody else, I don't think, was willing to sign the unilateral modification." (Tr. 5/14) CO Trauger said that he did not believe that anyone had ever "unilaterally definitized the UCA" (tr. 5/64-65). When asked why he was willing to unilaterally issue Modification No. P00032 to definitize Modification No. P00017, CO Trauger said

"[m]aybe out of stupidity." In response to questioning at the hearing about whether he was joking, he said that he was and explained that no one else would sign the modification and doing nothing was not an option. (Tr. 5/114-15)

83. The parties met on 17 September 1999 at Picatinny Arsenal, with senior contractor and government SADARM program representatives participating. Ms. Burnes took notes during the meeting that were later transcribed. (R4, tabs 22, 145, 147; tr. 1/110-14) Government personnel at the meeting included COL Ellis, Mr. Serao, CO Trauger, CO Doyle, Ms. Harder, Mr. Kiebler, and Mr. Joens. In addition to Ms. Burnes, Aerojet personnel included Mr. Bregard, Mr. Marshall, and Mr. Newman. Mr. Larson attended for Alliant. (R4, tab 22 at 297)

84. The parties' expectations differed with respect to the government's ability at that time to enter into an agreement which would obligate FY 1999 funds. In addition to definitizing Modification No. P00017 (R4, tabs 33-34; tr. 4/75, 125), it was the contractor's intent to secure an inseparable agreement encompassing both FY 1998 and FY 1999 funds and work (R4, tab 22 at 297; tr. 2/94). Mr. Bregard testified that he wanted a "Done. Deal. Finished" on 17 September 1999, but understood that time was "actually short" for the government to sign a modification "by the end of their fiscal year" (tr. 3/101). Mr. Larson agreed that the contractor did not actually expect to have a signed modification that day (tr. 2/90).

85. The government was concerned that existing FY 1998 monies had to then be obligated or that those funds would be at risk (tr. 4/164). The Picatinny SPO wanted to "develop a path forward, which was to definitize the '98 program...as well as what do we do with the '99 withhold money" (tr. 4/125). COL Ellis wanted to develop a "path forward" to take up to the Army and OSD, hoping the strategy would satisfy their requirements and persuade these to release additional FY 1999 funds. He expected, upon obtaining permission from higher headquarters, to next enter into a "contractually binding settlement." (Tr. 4/189-90)

86. The Picatinny SPO on 17 September 1999 was constrained from entering into an agreement due to the lack of FY 1999 funds (tr. 4/208-09, 5/15, 134-35) following OSD's determination that continuation of the SADARM program was in jeopardy (tr. 7/11-13). At the time of the 17 September 1999 meeting, OSD continued to withhold $24,877,000 in FY 1999 money from the SADARM program pending resolution of test problems. On 8 April 1999, OSD had transferred just $5,000,000 to the Picatinny SPO (finding 52), which was insufficient to meet the contractor's most recent cost proposal (finding 53).

Aerojet's Proposed "Path Forward"

87. According to Ms. Burnes's transcribed meeting notes (R4, tab 22), the meeting began with a PowerPoint slide presentation by Mr. Bregard entitled "FY98/FY99 Funding Resolution Go Forward Plan" (R4, tab 66, subtab 33). Ms. Burnes added captions to her notes to track the sequence of events and referenced certain slides from the presentation. Mr. Bregard began by explaining the contractor's recommended "Path Forward" and a "Cost Breakdown," followed by a discussion of "Reduction Thoughts" (R4, tab 22 at 297-98). The parties next caucused, then came back together to explore various options (*id.* at 298-301).

88. The second page of Mr. Bregard's presentation listed the following under a proposed "Path Forward":

· 200 Rounds Delivered
· Fits within total available GFY98/GFY99 funding
· No program break
  – all work completed by Dec 00
· Incorporates RDAP-I baseline
· Maintains production program to support Product Improvement Program
· Mutually agreeable path forward
· Gives soldier near term capability

(R4, tab 66, subtab 33 at 1144) A cost breakdown on the next slide indicated 200 rounds at "29.3" under the column headed FY 1998. Under the columns captioned "Funded w/FY99 $," the slide showed "11.8" for "Post RDAP-1 ECPs," "7.1" for "ATK Stretch," "4.7" for "AJ Stretch," "0.3" for "Orphans," "3.7" for "Task Deferrals" and "0.5" for "AJ PM deferral." The total amount shown to be funded using FY 1999 monies was "28.1." (*Id.* at 1145) Mr. Larson responded to the question from Mr. Kiebler, "Can the program run without '99 money?" by saying "No. It must include the last three items." (R4, tab 22 at 297)

89. According to Ms. Burnes's transcribed notes, Mr. Larson said at the beginning of discussion on this slide that there had to be a "simultaneous modification covering the '98 and '99 monies" (R4, tab 22 at 297). He later testified that he did not think there could be a solution without a simultaneous modification guaranteeing the contractor work for both years and obligating both FY 1998 and FY 1999 monies (tr. 2/94). Mr. Newman concurred that if all the government had available was $29.3 million in FY 1998 and it needed 200 rounds, then FY 1998 and FY 1999 work and funds had to be tied together to get a solution (tr. 4/41). Mr. Bregard's testimony was in agreement that a "simultaneous modification" incorporating funds for both fiscal years was "fundamental to the deal"

from Aerojet's perspective (tr. 3/104-05). He explained that "This was not a '98 deal and a '99 deal," but a "package [that] had to be together" (tr. 3/198). According to the slide labeled "Process," appellant anticipated that the parties would "Agree to [a] deal" on 17 September 1999; draft and coordinate contractor review of the modification definitizing UCA Modification No. P00017 on 21-22 September 1999; and that the government would sign the modification on 28 September 1999 before the fiscal year ended on 30 September 1999 (R4, tab 66, subtab 33 at 1147; tr. 3/101).

90. According to Ms. Burnes's abbreviated notes, Mr. Serao said, "Sign a modification in $50M range – 200 rounds.... But it can't be signed without '99 funds" (R4, tab 22 at 298). He testified at the hearing that OSD was still withholding FY 1999 money at the time of the meeting (tr. 4/125). Mr. Serao said that it was unknown on 17 September 1999 how much FY 1999 money would be released and so it was difficult to know what work could be done for that fiscal year. The parties were endeavoring to develop a strategy to get "from '98 to '99 [low rate] production" to full production which "we were anticipating starting in 2000 at the time." (Tr. 4/131)

91. Mr. Bregard testified that he regarded Mr. Larson's assertion that "There must be a simultaneous modification covering the '98 and '99 monies" as an "important prerequisite" to a 17 September 1999 agreement. He stated that this was "fundamental to the deal," and agreed that the contractors never backed down from this requirement. (Tr. 3/104-05) His cross-examination testimony confirms that Aerojet was aware at the meeting that the government did not then have sufficient FY 1999 funding available (tr. 5/194-95).

92. According to the PowerPoint slide labeled "Process," appellant anticipated that the parties would "Agree to [a] deal" on 17 September 1999; draft and coordinate contractor review of the modification definitizing UCA Modification No. P00017 on 21-22 September 1999; and that the government would sign the modification on 28 September 1999 before the fiscal year ended on 30 September 1999 (R4, tab 66, subtab 33 at 1147; tr. 3/101).

93. We note that the contractor's insistence that the government commit multiple-fiscal year funding is consistent with Aerojet's demand on 16 November 1998 that it do so, which was rejected by CO Banashefski on 13 January 1999 (see finding 43).

94. The government's lack of FY 1999 funds was again raised by several government representatives on 17 September 1999, in response to the contractor's requirement that the parties enter into an agreement to definitize Modification No. P00017 that included those monies. CO Trauger testified that he did not issue a simultaneous modification obligating monies for both fiscal years 1998 and 1999 on 17 September 1999 because the Picatinny SPO did not then have FY 1999 money

(tr. 5/16). COL Ellis confirmed that the government could not have issued such a modification because it "did not have FY '99 dollars released to execute the time frame," nor did he remember any government representative giving the contractor assurances that FY 1999 money would be available (tr. 3/260).

95. Mr. Bregard's cross-examination testimony shows that Aerojet was aware at the meeting that the government did not have FY 1999 monies, and that there were limitations on what the government was authorized to do and when. He distinguished between making a "contract" and a "deal":

> Q All right. We're at Tab 22 and you'll see that the first entry, Mr. Larson, the very first thing he says is there must be a simultaneous modification covering the '98 and '99 monies, correct? Do you see that?
>
> A Yes.
>
> Q Now you knew because they didn't have the '99 money that that couldn't occur on 17 September, correct?
>
> A I don't mean to put words in [Mr. Larson's] mouth is [sic] that they could do that by the end of the month, that was our premise. It didn't happen as you point out. But the idea of the package had to be together, it was '98 and '99 together. This was not a '98 deal and a '99 deal.
>
> Q Okay. But you knew on 17 September that they couldn't do that on that day?
>
> A No, I didn't know that. There's no reason why they couldn't do that deal. They can't sign a contract document because the PCO on the 11th of September of 17th of September didn't have the money in his hand, you're correct in that regard.
>
> ....
>
> Q All right. And then on page 2, 298, the money issue is brought up by Mr. Sorayo, [sic] you were asked about this but can't sign with '99 funds. Do you have any recollection of him saying that?

A I don't recall. I knew he was there and there was dialogue. I don't recall. But I would accept that statement.

Q Okay. I mean there really is no debate about the fact that the government didn't have the '99 funds on 17 September, correct?

A There's no debate that the PCO [Picatinny Contracting Office] didn't have the government money.

Q Okay. I stand corrected. The Department of Defense had the money?

A The Department of Defense had the money.

(Tr. 3/198-99)

96. After Mr. Larson asked whether "certain language" could be inserted in the contract to permit an inseparable commitment of FY 1998 and FY 1999 funds, an Aerojet employee, Mr. Ted Ostlund, asked how much money was available in FY 1999. Ms. Burnes's notes indicate that Ms. Harder, Mr. Kiebler, and Mr. Serao responded "A lot has happened – don't know how much." (R4, tab 22 at 298) Aerojet's Mr. Marshall testified that everyone at the meeting knew that the government did not at the time have enough FY 1999 money to fund the contractor's desired modification (tr. 2/289).

The Parties Caucus and Confer

97. Following a government caucus, COL Ellis returned to the contractor with two alternative approaches for discussion, each of which dealt only with the available FY 1998 funds. The first was "$29.3M – including Task Deferrals, Task Deferrals + NTE for ECP – No Gap. How many rounds?" The second alternative was "$29.3M – $3.7M Task Deferrals in '99. Expect 200 rounds, expect NTE for ECP." (R4, tab 22 at 298) COL Ellis testified that he did not present anything relating to FY 1999 expenditures because the government did not have FY 1999 funds available (tr. 3/262). Representatives from Aerojet and Alliant then conferred; afterward, Mr. Bregard refused the second alternative offered by COL Ellis. Various numbers, dollar figures, and delivery schedules were then written on a large white board in the conference room, and the parties began discussing that information. (R4, tab 22 at 299)

98. Ms. Burnes's notes indicate that, after more discussion, COL Ellis suggested definitizing UCA Modification No. P00017 as follows: the government would agree to purchase 200 rounds for $29.3 million using FY 1998 money, and the modification would

include an option for 30 additional rounds to be bought for $12 million using FY 1999 funds[5] as well as a second option for a price not to exceed $8 million (subject to a downward adjustment) to pay for the engineering change proposals necessary to bring the rounds to an acceptable configuration (R4, tab 22 at 300). COL Ellis testified that the government could have executed this agreement on 17 September 1999 within available FY 1998 funds, and then at its discretion exercised the optional items if and when FY 1999 monies became available for those purposes (tr. 4/217-18).

99. CO Trauger agreed that he could have entered into a modification consistent with COL Ellis's proposal that obligated only FY 1998 funds (tr. 5/77). He emphasized that the government "had no choice" but to use an option to contract for work necessitating FY 1999 funds, as these were not then available. CO Trauger testified that he could only exercise his contracting officer authority after other reviews had first taken place, and that he had received permission to issue Modification No. P00032. (Tr. 5/114-21)

100. The contractor disagreed with allowing the government to use a contract option to control the commitment of FY 1999 funds (R4, tab 22 at 299-300). As testified by Mr. Bregard, Aerojet felt that the government "wanted to option out at their discretion '99 and that was not where we were heading" (tr. 3/116). Appellant also rejected the suggested downward-only negotiation of the NTE $8 million price for ECPs. Ms. Harder asked about obtaining 200 rounds in 1998, and using an option for 30 rounds plus ECPs. Appellant again rejected the use of an option, and Mr. Larson and Mr. Newman said that such an agreement would be dependent upon the use of "re-opener" language. The government would not accept this condition, which Ms. Harder said was not merely a matter of "paperwork." (R4, tab 22 at 300)

101. Mr. Bregard indicated that if there was no FY 1999 money, then there would be "no ECPs. If '99 split two ways, Production & ECP." Mr. Larson asked whether the "business group" would agree to "$49.3 for 230 rounds." (R4, tab 22 at 300) He testified that the parties were "driving hopefully to closer [sic] and settlement"; he said that he wanted to be sure the teams did not have any issues that were going to derail the process, and no one dissented (tr. 2/101). Ms. Burnes's notes indicate that, at this point, both Ms. Harder and CO Doyle nodded "in affirmative" to Mr. Larson's inquiry (R4, tab 22 at 300). Mr. Bregard stated that he believed the parties had reached a "deal" upon seeing Ms. Harder and CO Doyle nod (tr. 3/113). Ms. Harder denied such a nod (tr. 5/216), and

[5] The 30 rounds were not priced as part of Aerojet's $49.3 million offer. Rather, these were to be paid for by savings that the contractor hoped to realize if the schedule was accelerated by two months and Aerojet did not have to suffer a break in production (tr. 3/202-10; R4, tab 22 at 300-02).

CO Doyle testified that she did not remember Mr. Larson's question or that she nodded (tr. 6/21).

102. Mr. Bregard proposed the following[6] to the group: "$29.3 for 200" and "$20 for 30." He clarified that additional ECPs were "not to be part of this deal." Government representative Mr. Fayez Malooly noted that the CCB would determine "how much for ECPs." (R4, tab 22 at 300) He observed that ECPs would bring rounds to the RDAP-1 configuration, which Mr. Bregard and COL Ellis agreed was the proven baseline (*id*. at 301).

103. CO Trauger then asserted that the government could not guarantee FY 1999 funds (R4, tab 22 at 301). He testified that he did so because it appeared to him that the parties were moving toward an agreement, and he wanted "to get it on the floor that we didn't have '99 money. We couldn't make an agreement that involved '99 money because we didn't have it." (Tr. 5/22) Mr. Larson and Mr. Newman responded that, if that was the case, "Then the agreement will be subject to re-negotiation" (R4, tab 22 at 301). Ms. Burnes recorded that Mr. Newman asked when FY 1999 money would be available. Ms. Harder allegedly replied, "October" (R4, tab 22 at 301), although Ms. Harder testified that she did not recall this exchange (tr. 5/215).

104. Mr. Newman asked whether the parties could write a modification which the government would hold until FY 1999 funds were released (R4, tab 22 at 301). CO Trauger said that he could not sign a modification without correct fiscal year funds, and then hold on to it until the government received FY 1999 money (tr. 5/23-24).

105. CO Trauger, CO Doyle, and Ms. Harder left the room to make a telephone call (R4, tab 22 at 301). CO Trauger recalled that they had inquired regarding the availability of additional FY 1999 money, but at hearing did not remember that they had obtained any information (tr. 5/24). When they returned, CO Trauger said the government's offer was $29.3 million for 200 rounds with an option of $20 million for 30 rounds plus ECPs. Mr. Newman responded that "Then it is $49.3M for one whole modification instead of a Re-opener. Then hold until funding is available." COL Ellis objected to "one whole modification" in the amount of $49.3 million unless "subject to availability [of funds] wording" was included. Mr. Larson again suggested a "re-opener clause," but government representatives including CO Trauger made clear that this was not acceptable. (R4, tab 22 at 301; tr. 5/23)

106. Mr. Newman said that "The Gov. won't sign until money is available," to which COL Ellis replied that it was "The Contractor's risk that the Government will walk

[6] Ms. Burnes's notes also attribute this suggestion to COL Ellis (R4, tab 22 at 301).

away" (R4, tab 22 at 301). Mr. Newman responded "If you don't get money, then we're where we are today" (*id.* at 302).

107. Aerojet's Mr. Bregard next wrote the following on the white board:

FY98	FY99	
$29.3M	$20.0M	$49.3M
200 Rds	30 Rds	230 Rds
	Rel C, ECPs	

Mr. Larson then added the phrase "Not Separable" between the "FY98" and "FY99" columns, and both Mr. Bregard and Mr. Larson signed the white board. (R4, tab 22 at 302; tr. 3/119) Mr. Bregard offered the pen to anybody who would sign, but no one else would do so. Mr. Bregard testified that Ms. Harder said she wanted a copy of the white board and that she was going to hold the contractor to it. Ms. Burnes testified that COL Ellis shook hands "and said we have an agreement." (Tr. 1/127, 3/119-20, 209-10) A copy of the white board writing was printed out and distributed to meeting attendees (tr. 5/229).

108. COL Ellis disagreed that the parties reached an agreement on the contractor's white board terms because the government "did not have the FY '99 dollars to execute that portion, so we were at an impasse in terms of coming to resolution with Aerojet because they did not want an option" (tr. 3/267). He denied assuring the contractor's representatives that FY 1999 money would be forthcoming, including telling them how much, for what purpose or when (tr. 3/260). COL Ellis testified that the parties had "come to a common point of reference that said there was an ECP that was not to exceed $8 million dollars." He said that this position had been taken by Aerojet as a "fixed number," but that the government needed to have that figure "analyzed and supported by certified cost and pricing data" before the government could agree. (Tr. 3/264) COL Ellis said that he did not sign the white board because "that would be sending the signal that we had a binding agreement, contractual agreement" and that the parties had not done so (tr. 3/267).

109. COL Ellis testified that although he did not recall shaking hands with Mr. Bregard and Mr. Larson, he often did so at meetings. COL Ellis said that if he had shaken hands, it was because he believed that the parties had come up with a path forward "that said if we got the money this is how we would spend it." (Tr. 3/267) We find that COL Ellis's handshake signified nothing more than a courteous gesture concluding this portion of the meeting.

Modification No. P00032 Definitizing Modification No. P00017

110. This exchange did not end the 17 September 1999 meeting (R4, tab 22 at 302). CO Trauger, the government's senior contracting officer, refused to enter into any agreement that committed inseparable FY 1998 and FY 1999 funds, and advised all present that the government could not do so because it lacked adequate latter year money (findings 97, 99, 103-05; tr. 5/101). He had taken both bilateral and unilateral versions of a modification to definitize Modification No. P00017 to the 17 September 1999 meeting, as it was the government's intention to definitize the UCA "one way or the other" (tr. 5/15) so that remaining SADARM FY 1998 funds expiring on 30 September 1999 would not be lost. The version of Modification No. P00032 handed out by CO Trauger was the same draft modification that had been provided earlier to Aerojet for signature but was rejected (R4, tab 19). According to CO Trauger, his introduction of this modification (now No. P00032) "superseded everything that happened" to that point (tr. 5/101).

111. Except for the new delivery schedule, the language in CO Trauger's proposed definitizing modification was the same as that in Modification No. P00017. Both documents specified the "basic" SADARM configuration at a quantity of 200 rounds at a price not to exceed $29.3 million. (*Compare* R4, tab 6 at 32, tab 21 at 286) Although the parties understood that the TDP had to be revised to eliminate flaws that resulted in Rel A and Rel B testing failures, neither modification included the ECPs needed to improve the SADARM projectiles to the RDAP-1 configuration that was subjected to Reliability Growth C testing at Yuma on 30 August-1 September 1999 (*see* R4, tab 18 at 227, 242; tr. 5/101-05). This approach of modifying the contract to add "old rounds" (tr. 4/247) and later updating the TDP is consistent with Aerojet's April 1999 proposal, which was based on "the [then] current Configuration Control Board (CCB) approved and government controlled Technical Data Package." Aerojet had anticipated that "the successful culmination of the Reliability Growth program" at Yuma would result in engineering changes to the TDP. Proposed changes were "incorporated via deviation" in the rounds subject to testing. If these rounds proved successful, the changes would subsequently "be submitted to the SADARM CCB for consideration." (R4, tab 18 at 226-27)

112. Unilateral Modification No. P00032, dated 17 September 1999, stated that it definitized Modification No. P00017, the UCA change order of 3 August 1998, at the ceiling price of $29.3 million for 200 rounds and based these terms upon Alpha team discussions. The total price of the contract was increased by $14.3 million from $97,184,023 to $111,484,023. The list of changes to the contract were the same as those stated in Modification No. P00017, including the same ECNs, although the unilateral modification extended the delivery schedules for SubCLINs 0005AA through 0005AD to October and December 2000. (R4, tab 21 at 286-87) Modification No. P00032 did not incorporate the ECPs that made up the RDAP-1 baseline (*id.*; tr. 4/245-47, 5/28, 62, 67,

69-70). The final numbered paragraph of Modification No. P00032 stated that all "other terms and conditions remain unchanged" from the UCA (R4, tab 21 at 287).

113. CO Trauger recalled that he first offered the bilateral version of definitization Modification No. P00032 to Mr. Newman, who refused to sign it (tr. 5/55, 4/54-56). Ms. Harder said that CO Trauger then gave Mr. Newman the unilateral version (tr. 5/217-18; R4, tab 21). Contractor representatives were upset by the government's issuance of the unilateral modification (tr. 4/89-90, 3/121), and Mr. Marshall recalled that "All hell broke loose" (tr. 2/297-98). Mr. Bregard agreed with this characterization, and testified:

> That's a true statement. We were very unpleased with how that came about because it was rather obvious that the unilateral was prepared before we walked in that room. And so it was a take back to us that no matter what happened, the government was going to drop that unilateral on us of $29.3 [million for 200 rounds].

(Tr. 3/121)

114. Ms. Burnes said that the unilateral modification was not consistent with what the contractor had proposed on the white board (tr. 1/221). Ms. Burnes's notes indicate that CO Trauger said that the contractor could accept the unilateral modification without claims, and that the measure was necessary because the government needed to obligate FY 1998 money before the end of the fiscal year on 30 September 1999. Mr. Newman replied that Aerojet needed to consult with its lawyers regarding unilateral Modification No. P00032 and would "file a Claim if '99 doesn't show up." (R4, tab 22 at 302)

115. At the end of the meeting, COL Ellis said that the ball was in the government's court to pursue a modification using FY 1999 funds, and in appellant's regarding its response to the unilateral modification (R4, tab 22 at 302). CO Trauger's testimony agreed with this (tr. 5/100-01).

The Disputed Outcome of the 17 September 1999 Meeting

116. It was COL Ellis's perspective at the conclusion of the 17 September 1999 meeting that the parties "were on a path forward to try and get release of the FY '99 funds. And this is how we would spend them" if received and allowed for that purpose (tr. 3/269, 4/226). He did not believe that the government had just entered into a contract for $49.3 million (tr. 3/269, 4/228), nor did other government representatives including COs Trauger (tr. 5/31) and Doyle (tr. 6/43), or SADARM program personnel including Mr. Serao (tr. 4/132) and Ms. Harder (tr. 5/218).

117. Although Mr. Marshall and Mr. Bregard both testified that they did not think that the unilateral modification had changed "the deal," and that it was just an administrative necessity (tr. 2/245-46, 3/122-23), Aerojet's senior contracting representative Gerald Newman testified that unilateral Modification No. P00032 obligating only FY 1998 funds was "inconsistent with what we had talked about because what we had talked about was a joint '98-'99 settlement" (tr. 4/90). Prior to joining Aerojet, Mr. Newman had served as a government contracting officer for the Air Force (tr. 4/7-8). He confirmed that discussions took place at the 17 September 1999 meeting that the government did not have FY 1999 money available. Mr. Newman acknowledged understanding that documents pertaining to a "package deal" could not be signed on that date due to lack of government funds, and that he didn't "believe we said an oral contract was awarded on that date." (Tr. 4/80-81, 83) He testified on cross-examination that he knew at the time that the government could not sign a simultaneous modification on 17 September 1999 that included FY 1999 funds, as it "had to go get the money first" (tr. 4/78, 80).

118. Aerojet employees Ms. Burnes (tr. 2/10-11), Mr. Marshall (tr. 2/242-43), Mr. Bregard (tr. 3/158-59, 196, 208) and Mr. Newman (tr. 4/48) all testified that they were confident at the time of the 17 September 1999 meeting that although the Picatinny SPO did not then have FY 1999 funds, this money would soon become available. Mr. Bregard testified that he believed the government could quickly obtain SADARM funds for the project. He said that: "We'd just passed REL C, we shot the socks off of them at 80 percent, thereabouts, and we passed all the criteria. [COL Ellis] just had to go to OSD and get the release and electronic funds transferred down and within three days the army could have had the authority to move the money." (Tr. 3/196) In response to being asked how the government could enter into "a final agreement with no FY99 money," Ms. Burnes testified that she believed that the government could do so "Because [the government] anticipated getting it." She stated that Aerojet "viewed the fiscal year 99 funding as being available and that we would receive it based upon that agreement." (Tr. 2/10) Mr. Marshall concurred with this perspective (tr. 2/242). Ms. Burnes stated that "At the meeting I did not feel that there was a contingency" to the agreement based upon the government's receipt of FY 1999 funding (tr. 2/13).

119. Ms. Burnes testified that the issue of curtailed FY 1999 funding for the SADARM program "had come up in some of the Alpha meetings" but that "we were assured that it was not going to be a problem" (tr. 1/124). Upon cross-examination regarding the source of the alleged reassurances, Ms. Burnes testified that she thought this information came from Ms. Harder but generally attributed the alleged reassurances to "a lot of discussions and I know that I felt that funds would not be a problem and it would be because of things that were said to me" (tr. 2/6). Ms. Burnes did not provide corroboration for or details regarding these alleged reassurances.

120. Ms. Harder, who had been a government representative at the Alpha team meeting (tr. 5/206), took exception to (among other things) the characterization of certain of her actions as chronicled by Ms. Burnes's notes on the 17 September 1999 meeting. Ms. Harder denied that she had nodded "in the affirmative" to Mr. Larson's question as to whether the government's business group analysis would agree to "$49.3 for 230 rounds" (tr. 5/216; R4, tab 22 at 300). She testified that she did not recall telling the contractor that FY 1999 funds would become available in October (R4, tab 22 at 301; tr. 5/215). Ms. Harder disputed that she would have said that if the Picatinny SPO got the FY 1999 money, then it would rescind Modification No. P00032, as "we would have followed it up with another mod. We don't rescind unilaterals" (tr. 5/216). She confirmed that none of the government's representatives at the meeting said that the government would be automatically liable for the full price of $49.3 million if the government received FY 1999 funds, nor did she think that was the case (*id*.), and she did not feel that any sort of agreement was reached at the meeting (*id*. at 218). Ms. Harder's objections to Ms. Burnes's notes are consistent with the perspective that Ms. Harder had expressed prior to the 17 September 1999 meeting that the contractor did not always accurately represent what had taken place between the parties: "The contractor is continually putting statements in their letters to strengthen their position for these potential future challenges." (R4, tab 151) She testified that Ms. Burnes "tended to document stuff that didn't always happen, and if we didn't challenge it, then we're not putting ourselves in a very good position" (tr. 5/225).

121. CO Doyle testified that she did not remember Mr. Larson's question seeking agreement to 230 rounds for $49.3 million (including both FY 1998 and FY 1999 funds), or that she ever nodded in assent (tr. 6/21).

122. We find that appellant has furnished insufficient and unpersuasive support for the proposition that Aerojet reasonably understood at the time of the 17 September 1999 meeting that FY 1999 funds were or would soon be available for the contract. To the contrary, CO Trauger repeatedly advised the contractor during the 17 September 1999 meeting of the lack of FY 1999 money. The contractor was told that the government did not know how much or if further funds would be received. The perspective that additional SADARM funds were very uncertain at best is consistent with information known prior to the meeting by Aerojet, Alliant and the government that: the munition's poor performance and significant costs had soured Congress on the program; OSD was withholding money from the Picatinny SPO and limiting that office's flexibility to use those funds, particularly regarding the purchase of more rounds; and while the days-old scores from Rel C testing on 30 August – 1 September 1999 were better than the dismal results of Rel A and Rel B, the Yuma testing still fell short of the 80% benchmark set by Congress and acknowledged by the parties in contract Modification No. P00016. (Findings 15, 15-21, 25-30, 41, 48, 52-62) Mr. Bregard's testimony that Aerojet had met

the 80% reliability rate is inaccurate. His observation that funds could be available within three days after a request by COL Ellis for release of the money (finding 118) describes, at best, the mechanics of the electronic transfer of funds. The real impediment was the lack of Congressional and OSD support for the greatly expensive yet insufficiently effective program. Aerojet understood at the time the uncertainty of the future of the SADARM program, as evidenced by (among other things) ongoing efforts by its top corporate levels that were shared with Mr. Bregard, Mr. Larson, and Ms. Burnes among other contractor personnel (*see, e.g.*, finding 63).

123. We find the testimony of the government's witnesses and supporting evidence regarding what transpired at the 17 September 1999 meeting to be far more credible and convincing than that proffered by Aerojet. There is no probative evidence that the government entered into a binding agreement on the contractor's terms or even an "agreement to agree" or contingent agreement that the government thwarted. It is noteworthy that appellant does not assert that either CO Trauger or CO Doyle made a written or verbal commitment to the so-called "white board agreement," as these two were the only officials in attendance with government contracting authority. CO Trauger emphatically told everyone there that the government did not have FY 1999 funds available, nor could it enter into an agreement obligating those funds unless the terms were couched as an option to be exercised at the government's discretion. CO Trauger's actions spoke as loudly as his words, as he then caused "all hell" to break loose amongst contractor representatives when he unilaterally issued Modification No. P00032, which definitized Modification No. P00017, required the expenditure of FY 1998 funds only and was at direct odds with the contractor's white board offer.

124. We find that CO Trauger did not sit idly by during the 17 September 1999 meeting, but manifested his clear rejection of the contractor's terms; his determination to issue Modification No. P00032 was more than an administrative necessity to obligate soon to expire FY 1998 funds, although the modification also achieved that goal. CO Trauger's refusal to accept the contractor's white board offer, followed by his unilateral issuance of Modification No. P00032 retaining the ceiling price of $29.3 million and adding only $14.3M in available FY 1998 funds and no FY 1999 monies as demanded by Aerojet, evidence CO Trauger's rejection of Aerojet's terms requiring the "inseparable" commitment of $49.3 million in both FY 1998 and FY 1999 monies. The disparity between Modification No. P00032 and Aerojet's white board offer extends beyond the type and amount of funds. Modification No. P00032 did not include improvements necessary to bring the rounds to the same configuration used in the Yuma testing as these alterations lacked requisite CCB approval and were not incorporated into the TDP. Aerojet's white board offer included these engineering changes.

Events Following the 17 September 1999 Meeting

125. Mr. Bregard and Ms. Burnes testified that following the 17 September 1999 meeting, appellant continued production of SADARM rounds at the improved configuration (tr. 3/123, 1/145).

126. In a memorandum and in e-mails following the 17 September 1999 meeting, Mr. Larson expressed his view that the meeting resulted in an inseparable "bottom line settlement" between the parties of $49.3 million that included both FY 1998 and FY 1999 funds for either 200 or 230 rounds, depending upon the delivery date (R4, tab 66, subtabs 40, 41, tab 275).

127. On 21 September 1999, CO Doyle sent an e-mail to Ms. Burnes requesting a "top level breakout to support the FY99 dollars for the 30 rounds ($12M) and your proposed ECP's, with a 'Not to Exceed' price of $8M" (R4, tab 25). CO Trauger was aware of CO Doyle's request for cost and pricing data (tr. 5/32). Although COL Ellis was away at the time, he soon learned of CO Doyle's request and was not surprised because it "follows on from the 17 September discussion"; he agreed that the inquiry was necessary to determine the "reasonableness of the proposal" (tr. 3/272, 4/253). Ms. Burnes replied to CO Doyle that she did not understand the request because, in part, the "negotiation was resolved at a FFP [firm fixed-price] of $49.3 million for 230 rounds on the basis of the data already furnished to the Alpha Team along with the data presented and discussed during our negotiation session." Ms. Burnes refused to provide the requested cost information. (R4, tab 149)

128. Ms. Burnes sent a 22 September 1999 letter to CO Trauger to "confirm" the negotiations "concluded between the Army and Aerojet on 17 September 1999." She asserted that an "agreement was reached on all the material terms" even though "not all of the details associated with the settlement modification could be discussed." (R4, tab 26 at 308) Ms. Burnes contended that the parties had "agreed to a 'bottom line' price of $49.3 million for 230 rounds" (*id.*) and that "both the FY98 and FY99 effort will be incorporated into the contract through a single, fully funded modification" (*id.* at 309). Ms. Burnes went on to say that the government issued Modification No. P00032 for the FY 1998 part of the settlement because FY 1999 funding was not available. She said that the government had "issued unilateral Modification No. P00032 for the FY 98 portion of the settlement, with the express intention of superseding that unilateral modification with a bilateral modification covering the entire bottom-line settlement" (*id.* at 310). Ms. Burnes identified the rounds in the alleged 17 September 1999 agreement as "the Reliability Determination and Assessment Program (RDAP) -1configuration as fired in Yuma [on] 31 Aug 1999." She took the position that "The parties agreed that the bottom-line price of $49.3 million includes costs required to implement the ECPs, which are necessary to bring the [projectiles up to that configuration]." (*Id.* at 309) Ms. Burnes

also said that the "release" language needed to be changed "to reflect the actual quantities agreed to by the parties" of $49.3 million for 230 rounds (*id.* at 310). Her letter, which was reviewed and agreed to by Mr. Bregard (tr. 3/131, 220), did not state that the alleged agreement between the parties for $49.3 million was contingent upon the government's receipt of FY 1999 funds.

129. On 23 September 1999, Ms. Harder sent an e-mail to COL Ellis taking exception to Ms. Burnes's letters in which Ms. Burnes purported to confirm the parties' 17 September 1999 meeting as resulting in an inseparable firm fixed-price deal for $49.3 million (R4, tab 151). COL Ellis testified that he thought Ms. Burnes's letter was "a mischaracterization of the outcome of the meetings" (tr. 3/272-73). Mr. Serao's testimony similarly expressed concern that Ms. Burnes's correspondence tended to be "lengthy, convoluted and very self serving" (tr. 4/136).

130. Further exchanges between Aerojet and the government indicate that the contractor persisted in its position that the parties had entered into a binding, firm fixed-price agreement at the 17 September 1999 meeting for $49.3 million while the government remained equally adamant that they did not (*see, e.g.*, R4, tabs 164, 166, 170; tr. 5/154-55). The Picatinny SPO's request for release of FY 1999 funds from OSD to pay for rounds was denied due to the continued questionable reliability of the projectiles (*see, e.g.*, R4, tabs 159-62, 167-69; tr. 6/61-63, 3/276-77). Over the next five months, the Picatinny SPO continued to seek the release of further SADARM funding; e-mail records indicate that the contractor was kept aware of the difficulties encountered (R4, tab 160). Mr. Albaugh advised the Picatinny SPO that the OSD Comptroller was against release of funding and that there was a strong indication from the Army that the SADARM program was going to be terminated. (*See, e.g.*, R4, tabs 160, 292; tr. 7/34-36)

131. According to e-mail messages of 21-22 September 1999, Mr. Gormley and Ms. Kahn of the Picatinny SPO drafted a memorandum for higher Army headquarters to request that OSD release FY 1999 funding for the SADARM program and continued projectile production (R4, tab 150; tr. 6/96-97). Mr. Gormley testified that he was supervised by COL Ellis, and that his duties included planning, budgeting, and overseeing execution of the SADARM program. Preparing memoranda of this type to seek money from higher headquarters was an element of his position. Mr. Gormley's review of contractual activities within the project office did not include authority over the procurement office. (Tr. 6/48-49) Mr. Gormley stated that OSD had by then withheld FY 1999 funds from the SADARM program for at least nine months, and that he previously had been prevented by Army headquarters from contacting OSD to seek release of the monies (tr. 6/97-99). In relevant part, Mr. Gormley's draft memorandum stated:

> The OSD is withholding $25.2M of Army's SADARM PAA funding, SSN 66300, pending the SADARM Overarching Integrated Product Team (OIPT) report submittal to Dr. Gansler's office concerning the recent Reliability Testing conducted at Yuma Proving Ground. The OIPT will not meet on 1 October 1999 as previously planned. Therefore the Army is requesting full release of the FY99 SADARM PAA funding based upon the successful test results from the 31 August – 2 September 1999 SADARM firings.
>
> ....
>
> *The Project Manager's Office has negotiated an agreement with Aerojet to provide 200 projectiles for $29.3M (FY 98 funding) and 30 projectiles for $12M (FY99 funding) to include a production stretch.* This stretch and the 30 projectiles provide for the minimum number of rounds to keep the production line going through the end of October 2000. Additionally, $8M will provide for the Engineering Change Proposals (ECPs) for the FY 1997 through the FY 1999 production builds. These ECPs incorporate the latest high reliability fixes which resulted in successful completion of the recent Reliability Demonstration tests.
>
> The balance of the funding ($5.2M) will be used for production support....
>
> Your expeditious release of funding is needed in order to allow for timely contract execution in support of SADARM.

(R4, tab 150 at 1987-88) (emphasis added)

132. Neither Mr. Gormley nor Ms. Kahn had attended the 17 September 1999 meeting (tr. 6/52, 165). Mr. Gormley testified that he "wasn't really discussing the contract [but] was trying to make a case to get the money" (tr. 6/109). He stated that it was his understanding that "we were going to have a contract for 200 rounds in '98, with an option for 30 in '99" (tr. 6/109-10). Mr. Gormley testified that he probably obtained information about the 17 September meeting for purposes of drafting the memorandum from Ms. Harder, COL Ellis, Mr. Sareo, and Mr. Kiebler (tr. 6/105-06). Copies of the draft memorandum intended for OSD were sent to these and to Mr. Bregard (R4, tabs 150, 276; tr. 6/166-67). Mr. Gormley and Ms. Kahn did not recall getting feedback on the

draft (tr. 6/122, 166-67). Eventually, a somewhat revised memorandum was signed by Army LTG Kern, but was not sent to OSD (R4, tab 283; tr. 6/56). A similar memorandum was signed by Ms. Judith Guenther, the Department of Army's Director of Investment, and sent to OSD on 24 September 1999 (R4, tab 284; tr. 6/58).

133. In a memorandum dated 30 September 1999, Mr. Albaugh on behalf of OSD approved the limited release of $14.5 million in FY 1999 funds for the SADARM program (R4, tab 285). The memorandum noted that "FY 1999 SADARM funding was placed on withhold due to continuing testing problems," but that the restricted monies were being released following a "recent successful test." The constrained SADARM funds were allowed only to "provide for ECPs, target replacement, and partial funding for program management," and OSD continued to withhold funding for additional production pending further review. (*Id.* at 10366) These limited FY 1999 monies were released by OSD on 6 October 1999 (*id.* at 10367), and transferred to the SADARM program on 14 October 1999 (R4, tab 68 at 1417). Among other amounts, $10,477,000 specifically was designated as being "withheld" by OSD and could not be used for purposes of buying additional rounds "pending resolution of test problems" (*id.* at 1394).

134. On 5 October 1999, Aerojet provided the government with "Draft Terms and Conditions for use in the preparation of the 'Definitization Modification'" as "agreed during the 17 September 1999 negotiations and confirmed" by Ms. Burnes's letter of 22 September 1999. These terms would have increased the scope and price of the subject contract to a "'bottom line' price of $49.3 million for 230 rounds to be delivered in the RDAP-1 configuration." (R4, tab 28)

135. By letter dated 6 October 1999, CO Trauger responded to Ms. Burnes's 22 September 1999 letter, stating that it was the government's "understanding that during that [17 September] meeting we reached an agreement in principle on a go forward plan towards a negotiated settlement, but not a final negotiated agreement." He said that although the parties were in agreement with certain aspects of Aerojet's 22 September 1999 letter, there was disagreement with a number of important items and that it was necessary to clarify the government's position. CO Trauger acknowledged there was tentative agreement on a package of $49.3 million, but made clear his view that the parties were still negotiating regarding the FY 1999 portion. CO Trauger specifically refused to confirm, as Ms. Burnes had requested, that there was "no separate agreement or pricing...by fiscal year classification." He noted that there was no "release" language in Modification No. P00032, but said that if the parties were to reach an agreement for both FY 1998 and FY 1999, settlement language should be included in a subsequent modification. CO Trauger advised that the terms should make clear that the FY 1998 requirements in Modification No. P00032 and the "additional FY 1999 requirements" were being definitized and settled in the "final negotiated modification." He emphasized that the government understood, at the end of the 17 September 1999 meeting, that it

would endeavor to come up with a modification reflecting the parties' tentative agreement and that appellant would provide support for the modification including a summary of costs for the FY 1999 work. CO Trauger emphasized he was required to make a finding that the price paid by the government was reasonable before he could obligate appropriated funds to the contract, but that "Inexplicably, Aerojet has met this request [for cost information] with surprise and resistance." (R4, tab 29)

136. Aerojet, through Ms. Burnes, responded to CO Trauger's letter on 19 October 1999 (R4, tab 31). The contractor took the position that there had been an agreement on a "'bottom line' firm fixed price of $49.3M for 230 rounds in the RDAP-1 configuration" in "a total package which is not separable." Aerojet emphasized that "There was no mention that this was a tentative settlement subject to future negotiation. It was a classic handshake deal." (*Id.* at 384) Appellant said that it had been "clearly stated and understood that P[0]0032 was a temporary measure that would be superceded by the contract modification that definitized the negotiated settlement" (*id.* at 387). Mr. Burnes stated that "There was no understanding that Aerojet would supply additional pricing data" (*id.*), and concluded with the contractor's "hopes that the settlement can be finalized in the very near future" (*id.* at 388). Aerojet asserted that the Army had agreed to prepare a "Definitization Modification [to] reflect a fully funded bilateral modification for both the FY98 and FY99 production years contingent upon release of the FY99 dollars from OSD" (*id.* at 386). This is appellant's first characterization of the alleged agreement as "contingent" upon the release of FY 1999 funds. CO Trauger testified that he did not respond to Aerojet's letter because his position had been stated in his 6 October 1999 letter (tr. 5/38-39).

137. A briefing for both contractor and government representatives was held on 10 November 1999 at Aerojet's facilities in Azusa, CA (R4, tab 294). The parties discussed lack of support at OSD for the release of FY 1999 monies to the SADARM program (*id.* at 2589).

138. On 2 December 1999, Mr. Bregard sent an e-mail to COL Ellis asking "Why isn't [sic] the $12M FY99 funds treated like it is already committed, but not obligated?" (R4, tab 166 at 2106). Mr. Gormley furnished information pertaining to this query to COL Ellis, and advised that those funds weren't being "treated as committed but not obligated because we don't have it in hand. The OSD has no intention of releasing the FY 99 money unless [the] Army exhibits an intent to continue production." (*Id.*) By e-mail dated 8 December 1999, Mr. Gormley forwarded to MG Michitsch, COL Ellis, and Mr. Bregard (among others) a draft paper with a "go forward strategy." The draft stated that the Army had "FY 98 (200 rounds) on contract and an unexecuted option for FY 99 (30 rounds)." The draft memorandum made clear that it was unlikely that higher headquarters would permit the Picatinny SPO to use FY 1999 funds for the purchase of additional rounds. (R4, tab 167 at 2109) Mr. Gormley explained that he prepared the

draft paper out of concern that OSD would not release FY 1999 money to buy rounds (tr. 6/75).

139. By repeated requests from December 1999 through February 2000, the Picatinny SPO sought the release of an additional $10.5 million from OSD (R4, tabs 305-07, 310).

140. A 22 February 2000 memorandum drafted by Ms. Maureen Raines, Army Budget Analyst, documents the following: On 8 February 2000, the Army requested OSD to release $10.5 million of FY 1999 PAA funds being withheld (R4, tab 174; tr. 6/80). On 22 February 2000, Ms. Raines met with MAJ Richard Nichols, SARD-SC, Mr. Gormley of OUSD (A&T),[7] and Mr. Donald Brownlee, Director, Tactical Weapons & Systems (Gen Corp/Aerojet), regarding the remaining FY 1999 money being withheld by OSD (R4, tab 174). A memorandum of the meeting contains the following:

> The contractor stated that Aerojet and Gen Corp will be building rounds until September (FY 1998 contract). However, two of their subcontractors (Chamberlain and Alpha) are now idle and waiting for some business. The contractor wants $12.0M in FY 99 funds to build 30 extra rounds. The P-Forms show that the Army does not plan to buy any additional rounds until FY 01 funds are available. Production breaks for the subcontractors will require that they be requalified (delay of 18 months/cost of approximately $140M). Mr. Gormley pointed out that the Army cannot spend any FY 00 funds until 80% reliability has been certified by ATEC. Therefore, the government has to use FY 99 dollars to cover operational costs. In addition, Ron Garant has indicated that OSD will not release any dollars for hardware.

(R4, tab 174) Ms. Raines also indicated in the memo that she had scheduled a meeting with OSD on 23 February 2000 to discuss release of the remaining withheld FY 1999 funds (*id.*).

141. In a 2 March 2000 e-mail, MAJ Nichols notified, among others, the Picatinny SPO and Aerojet that OSD had denied the request for release of the remaining FY 1999 funds being withheld (R4, tab 176).

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[7] At this time Mr. Gormley was on temporary assignment from Picatinny Arsenal to OSD (tr. 6/83).

142. Ms. Kahn distributed notice of OSD's denial of the request by e-mail dated 2 March 2000 (R4, tab 176). COL Ellis explained that even though he had briefed OSD about the path forward his office had developed, OSD refused to release the funds due to lack of support for the overall program from Army headquarters (tr. 3/278-79). Mr. Gormley testified that the Picatinny SPO continued as an advocate for the SADARM program and the release of FY 1999 funds, as "The last thing we wanted was to see money come out of the program" (tr. 6/73).

143. On 21 March 2000, the parties signed bilateral Modification No. P00047, which increased the amount of the contract from $111,952,744 to $119,952,744. The modification incorporated into the contract certain listed ECPs at a cost of $8 million, added other ECPs at no cost, and brought the SADARM projectile design up to the RDAP-1 configuration. (R4, tab 33) Ms. Burnes transmitted a signed copy of the modification to CO Doyle, noting that Aerojet was "pleased that this second increment of funding [was to implement] the previously negotiated $49.3 million settlement" (R4, tab 48 at 1225). CO Trauger testified that he disagreed with Ms. Burnes's characterization of the modification as a furtherance of the alleged settlement, and stated that this and other correspondence from Ms. Burnes generally was met by the government with the feeling that she typically "twist[ed] the truth as to what actually happened" (tr. 5/111-12).

144. Aerojet relies heavily upon its contract manager Ms. Burnes to establish that the contractor reasonably believed that the Picatinny SPO on 17 September 1999 committed to Aerojet's white board offer and would timely receive adequate FY 1999 funding for that purpose. Conversely, government employees worried contemporaneously that Ms. Burnes deliberately distorted correspondence, attempting to bias the record in the contractor's favor. (*See*, *e.g.*, findings 119, 125, 135)

145. We do not find Ms. Burnes to be a credible witness. We are not persuaded by her testimony, demeanor at hearing or project correspondence that Aerojet reasonably believed, among other things, that the government agreed to the 17 September 1999 white board offer or anticipated obtaining adequate FY 1999 funds as demanded by Aerojet. We also find more reliable the testimony of Aerojet employees Mr. Bregard and Mr. Marshall that Alliant's production line was not government furnished equipment but was acquired by Aerojet from Alliant (findings 152-56).

146. Additional FY 1999 SADARM funding of $10,447,000 was released by OSD on 6 April 2000, and provided to the Picatinny SPO shortly thereafter, thereby bringing the FY 1999 funding released to a total of $31,275,000 (R4, tab 68 at 1419-22). Mr. Albaugh's internal memorandum pertaining to this release noted that "FY 2000 SADARM funding is currently on withhold given SADARM technical problems, as well as a congressional limitation that prevents obligating those funds" (R4, tab 319 at 10501).

Mr. Albaugh testified that none of the money released by OSD could have been used for the purchase of SADARM projectiles (tr. 7/22).

147. The parties entered into bilateral Modification No. P00050 on 8 May 2000, which carried an effective date of 19 April 2000. The modification stretched "the existing production schedule by four months to reduce a production gap between the existing deliveries and the pending FY01 funding." Aerojet agreed to slow the production rate and extend delivery of the projectiles from December 2000 to April 2001. The modification provided that, in the four-month stretch period (May 2000 through August 2000), appellant would maintain sufficient staff necessary to meet requirements for hardware delivery compliant with the TDP. Aerojet released the government from any liability under the contract "for future equitable adjustments attributable" to the modification. Contract funding was increased by $6.2 million to a total of $126,259,937. (R4, tab 34)

148. Mr. Bregard, Mr. Marshall, and Ms. Burnes testified that Aerojet delivered 200 SADARM rounds, which Mr. Bregard said were in the RDAP-1 configuration (tr. 1/149, 2/246-47, 3/145) The contracting officer's final decision states that the projectiles were delivered and accepted as of July 2001 (R4, tab 65 at 740).

149. According to the 1 June 2000 H.R. No. 106-644 on the Department of Defense Appropriations Bill for 2001, the House Committee on Appropriations recommended that the Army's request of $14,907,000 be rejected and that funding be discontinued for the SADARM program. The Committee noted that "The SADARM program, which has been in development for almost twenty years and has cost almost two billion dollars to date, has yet to pass an operational test." It reiterated that the Army had been unable to certify that an 80% reliability test rate had been achieved as required, and that the "current Army outyear budget plan does not fund SADARM production [or Product Improvement] after fiscal year 2001." H.R. Rep. No. 106-644, at 99, 106th Cong., 2d Sess. (2000).

150. The "FY 01 Joint Appropriations Conference Bill passed by the House on 19 July 2000, provide[d] no FY 01 funding for SADARM procurement" (R4, tab 184). Aerojet wrote the government on 28 August 2000, expressing concern over the status of the SADARM program and offering to assist in persuading Congress and OSD regarding the efficacy of the program (R4, tab 185).

151. Both government and contractor representatives continued to advocate at higher governmental echelons that the SADARM program be continued. In May 2001, relief was requested from restrictive language in FY 2000 Defense Appropriations Conference Report 106-371, page 171 that prohibited obligation of SADARM FY 2000 procurement funds until an 80% reliability rate for the projectiles was demonstrated

(R4, tab 190 at 2208-09). Mr. Fischer, now Aerojet's president, wrote Mr. Gregory R. Dahlberg, Under Secretary of the Army, about their recent meeting to discuss the "Army's concern about approaching Congress with a FY01 reprogramming action" to accomplish the "SADARM Plus" program, and assured Mr. Dahlberg of the contractor's continued commitment to the program (R4, tab 185).

Closeout Activities

152. On 19 March 2001 following Alliant's decision to withdraw from SADARM work, Aerojet and Alliant entered into a Comprehensive Settlement Agreement (CSA)[8] to dissolve their teaming agreement, and to "compromise and settle all open issues" between these parties (R4, tab 66, subtab 68). Mr. Bregard testified that the government was not made aware of Alliant's withdrawal from the program until the day after the CSA was signed (tr. 3/228-29). He was involved in negotiating the agreement, and testified that the CSA was negotiated without the knowledge or direction of the government (tr. 3/229).

153. The CSA between Aerojet and Alliant provided for Aerojet to purchase and move the subcontractor's production line from Minnesota to California (R4, tab 66, subtab 68). The line and all other residual materials were owned by Alliant, which had a fixed-price contract with Aerojet. Under the agreement, Aerojet paid $5 million from its own funds to take ownership of and move the line to its facility in Azusa and to obtain other residual materials and components from the subcontractor. The production line was moved after all of Alliant's efforts were complete and production was over. (Tr. 2/325-26, 329)

154. Mr. Marshall testified that Aerojet owned the production line after moving it from Alliant; neither the line nor ownership thereof was transferred to the government (tr. 2/327). He "thought the Government's interest and what I was asking them to pay for...was the capturing of the manufacturing processing documentation so that we could resume production when funds were available" (*id*. at 2/330). Mr. Marshall identified the cost of transferring the Alliant production line as part of the Alliant/Aerojet CSA (tr. 2/332).

155. On 20 March 2001, Mr. Bregard informed COL Ellis and other government personnel by e-mail that Alliant and Aerojet had entered on 19 March 2001 into a CSA formally ending those companies' SADARM teaming arrangement. The message stated that the purpose of the CSA was to settle all open issues between Alliant and Aerojet "including the parties' rights, duties and liabilities relating to the Joint Venture Agreement, the Teaming Agreement, the International MOU, and SADARM contracts." Aerojet assured the government that "SADARM deliverables...[would] continue to be of

[8] The CSA was not made part of the appeal record.

the highest quality." (R4, tab 66, subtab 68) Ms. Burnes testified that, at the time, the government and Aerojet were still hopeful that the SADARM program would continue. She said that because Alliant had made a lot of parts for the projectiles, Aerojet was concerned that restarting the production line would be a problem when additional funding came in. The contractor's solution was to move the necessary equipment from Alliant to Aerojet. (Tr. 1/151-52)

156. In August 2001, Aerojet submitted to the government an unsolicited cost proposal for the closeout of the LRP-2 contract (tr. 1/153; R4, tab 66, subtab 55). The projected cost was $2,699,218 and the proposed closeout activities included "Packaging and shipping of Government owned equipment currently residing at various vendors" (R4, tab 66, subtab 55 at 1245, 1249). The proposal advised that Aerojet had "initiated closeout task activities in May 2001" and had "advanced funding for the early start of this effort in anticipation of Government coverage." Aerojet stated that it expected "fair and reasonable cost incurred since May 2001, to be allowed by the Government." (*Id.* at 1253)

157. The government by e-mail dated 3 August 2001 rejected Aerojet's closeout proposal costs arising from Aerojet's CSA with Alliant, including any associated liability therefore:

> We will entertain an unsolicited proposal concerning CLOSEOUT tasks for the production contract, lessons learned and technology transfer that will be of benefit to the Army. This proposal does not adequately address this objective.
>
> *[It] contains numerous tasks which are covered in your Corporate Settlement Agreement (CSA) with Alliant. They are your cost of resolving your contractual relationship with one of your subcontractors, not a government obligation.*
>
> *We will not accept any contingent liability, past or present, by accepting the unsolicited proposal*. This includes, but is not limited to, entering into any contractual relationships with Alliant's former vendors, and costs of developing the scope of work and cost estimates in an Alpha contracting mode.
>
> We do not require any additional obsolescence work, but you may include recommendations for remediation that you have already developed and have been paid for under the PI contract.

(R4, tab 42 at 524) (emphasis added)

158. CO Doyle followed that message with a letter dated 31 August 2001 rejecting for unrelated reasons a value engineering change proposal. Relevant to the closeout portion of Aerojet's claim and the government's alleged continuing need to produce more projectiles, she advised Aerojet that the "Army currently has no future funding or plans of purchasing SADARM." (R4, tab 44)

159. By letter dated 15 October 2001, CO Doyle requested that Aerojet submit for the government's consideration a proposal for an enclosed statement of work (SOW) for SADARM closeout (R4, tab 66, subtab 56). In addition to an "Instrumented Projectile Failure Analysis" and a "LESSONS LEARNED REPORT," the SOW advised Aerojet that the government would provide direction on "the packaging and shipping of the Government owned equipment accountable under" the contract (*id.* at 1261, 1264).

160. On or about 7 December 2001 and in response to CO Doyle's request, appellant submitted Proposal No. C9770-10-01Q, "SADARM LRPII Production Close Out" (R4, tab 66, subtab 59). The total amount of the proposal, which included costs already incurred by Aerojet, was $1,447,371; of that amount, $651,515 was specifically sought for the "ALLIANT TRANSITION" (*id.* at 1282-83).

161. On 30 January 2002, Aerojet's Ms. Burnes received a telephone message from CO Doyle stating that the government's bottom line position was $547,804. The government took exception to paying for anything related to Aerojet's CSA with Alliant, as those costs were regarded as part of the Aerojet and Alliant subcontract. (Tr. 1/162; R4, tab 66, subtab 61)

162. By letter dated 24 April 2002, Ms. Burnes wrote CO Doyle to confirm telephone negotiations of 17 April 2002 during which the government and Aerojet agreed to a fixed-price payment of $668,811 for some of the closeout work identified in appellant's December 2001 proposal. Appellant noted that the government had not accepted some items in Aerojet's proposal, including those tasks and costs relating to the transition of Alliant's production line to Aerojet's facility that remained part of appellant's REA. (R4, tab 49) On 30 May 2002, an agreement was formalized in bilateral Modification No. P00065 (R4, tab 50) which incorporated, among other things, the following closeout tasks: CLIN 0019b for Aerojet GFE/GFM (government furnished equipment) transfer and CLIN 0019c for Chamberlain Manufacturing GFE/GFM transfer (*id*. at 0589). Modification No. P00065 was partially adjusted by Modification P00070 effective 17 June 2003 (R4, tab 66, subtabs 70, 71).

163. Unlike Mr. Bregard, who testified that the CSA was negotiated without the government's knowledge or approval (finding 166), Ms. Burnes testified that the government was aware that Aerojet was closing out Alliant's involvement in the

SADARM project (tr. 1/155). She based this opinion upon the government's "ha[ving] people at Alliant that represented SADARM" and alleged that there were "discussions with a variety of people," although she did cite any documentation and did not identify any participants or particular conversations, much less statements made by anyone with contracting officer authority (*id.*). Ms. Burnes stated that the government should reimburse Aerojet for moving Alliant's production line because the line was government furnished equipment (tr. 1/156, 162, 2/28). Mr. Marshall gave contrary and more credible testimony. He testified that, pursuant to the CSA, Aerojet owned the production line and that it was not GFE (tr. 2/327-38). Mr. Bregard similarly testified that Aerojet acquired Alliant's production line as part of their CSA (tr. 3/228-29).

164. We find that: the Alliant production line was not GFE; Aerojet entered into the CSA with Alliant at its own initiative as part of ending their contractual relationship; the CSA covered Aerojet's acquisition of Alliant's production line, including the cost of moving that asset from Minnesota to Aerojet's facility in California; Aerojet began performance of closeout actions in May 2001 before submitting its unsolicited August 2001 proposal to the government and without its permission; and Aerojet's closeout activities were not done on behalf or for the benefit of the government but were undertaken without the knowledge, approval or direction of the government.

Aerojet's Request for Equitable Adjustment

165. On 7 March 2002, Aerojet submitted a request for equitable adjustment (REA), "demand[ing] immediate payment of the outstanding balance of $12 million due under the definitization of Modification P00017 of the contract" (R4, tab 52 at 616). Appellant sought a total of $12,984,349 consisting of $12 million as "the unpaid balance of the settlement agreement reached" on 17 September 1999, $862,476 in contract closeout activities, and $121,873 in REA preparation costs (*id.* at 618). Aerojet contended that the parties reached a nonseverable "Handshake Agreement" at the 17 September 1999 meeting for the "Bottom-Line Price Of $49.3 Million" (*id.* at 631). Aerojet argued that the agreement was contingent only upon receipt of funds, and that the Army's redirection of funds to other programs "does not affect the enforceability of the settlement agreement" (*id.* at 646). The contractor cautioned that changes to the technical baseline for the projectiles and alteration of the delivery schedule "invalidated the NTE ceiling price established by Modification P00017" (*id.* at 618).

166. The contractor's REA traced the history of the SADARM program and the EMD, LRP-1 and LRP-2 contracts (R4, tab 52 at 618-31). Aerojet noted that although the government had issued a "cure notice to the contractor" due to the failure of the projectiles to pass First Article Testing, the parties had agreed to work together to achieve contract goals (*id.*). Aerojet emphasized that its proposal in response to the UCA was

based upon the "currently approved" configuration and TDP revision was contemplated at a later time (*id.* at 624) (emphasis in original).

167. According to Aerojet in both the REA (R4, tab 52 at 641) and subsequent claim (R4, tab 55 at 698), contract "Deliveries were completed in July 2001, but disputes over the acceptability of the last two lots kept the contract active until November 2001." We conclude from this that the REA was prepared following completion of the work, and appellant does not assert that the request was prepared for purposes of contract administration.

168. Aerojet's Ms. Burnes testified that the REA was prepared by "[a]n outside law firm" (tr. 2/11). Appellant provides no information regarding the authorship or genesis of the document in either the REA itself or the claim, although the latter references an exhibit identified in the Rule 4 file index as "Request for Equitable Adjustment Preparation Costs" (*see* R4, tab 66, subtab 64). This single page exhibit identifies the client as "NORTHROP GRUMMAN" and the "Matter" as the "SADARM LRP-2 CONTRACT REA." The document does not substantiate what work was done, is not identified as an invoice, does not name the law firm, and shows "Unbilled Fees" of $95,518.50 and "Unbilled disb" in the amount of $708.69. (*Id*.) Aerojet provides no legal justification beyond its sparse assertion that it is entitled to recover costs of preparing the REA in the amount of $121,873 (R4, tab 55 at 720; app. br. at 79).

169. The record shows that, by the time Aerojet filed its request for equitable adjustment in March 2002, the parties had for several months been engaged in meaningful discussions regarding costs associated with closeout activities. The government by 30 January 2002 had offered the contractor $547,804 to resolve certain items, although the government remained unwilling to pay for costs associated with moving Alliant's production line from Minnesota to Aerojet's facility in California. We find, and appellant offers neither evidence nor argument to the contrary, that the contractor's filing of the REA neither prompted nor aided the parties' negotiations or eventual partial settlement regarding closeout activities.

170. An administrative modification dated 4 June 2002 was made to the contract to reflect a Novation Agreement dated 30 May 2002. The modification changed the contractor's name from "Aerojet General Corp." to "Northrop Grumman Systems Corporation Space Systems Division." The mailing address for the contractor remained the same. (R4, tab 66, subtab 1) The government had been advised by Aerojet's REA that "Northrop Corporation purchased certain assets of the Aerojet General Corporation effective October 19, 2001." However, until a final novation agreement was finalized and "to allow contract performance to continue uninterrupted," Aerojet had "executed a general power of attorney authorizing Northrop to act in the name of Aerojet for all

contractual actions" including the REA. For ease of reference, the contractor explained that "Aerojet and Northrop are both referred to as 'Aerojet.'" (R4, tab 52 at 618 n.1)

171. By letter dated 24 October 2002, CO Doyle responded to Aerojet's REA, advising that the government had performed an in-depth review of the request (R4, tab 53). CO Doyle advised that Aerojet's submission lacked any of the "detailed and auditable cost information" necessary for the government to perform a complete analysis of the REA (*id.* at 654). The government criticized the contractor's assertions underlying the REA, and emphasized among other things that the parties did not reach a final agreement on Aerojet's terms during the 17 September 1999 meeting (*id.*). CO Doyle stated that appellant's "contention that a binding agreement was formed by CO Trauger's silence during proposed agreement negotiations is shattered by his contemporaneous issuance of [Modification No.] P00032 with such varying terms, especially with regard to price" (*id.* at 655).

Aerojet's Claim

172. Aerojet submitted a certified claim on 12 March 2004 that echoed its 7 March 2002 REA. The claim sought $12,773,388 consisting of $12 million, the unpaid balance of the purported 17 September 1999 agreement, $651,515 for closeout-associated costs, and $121,873 for REA preparation costs. (R4, tab 55) Although the REA had sought $862,476 for contract closeout activities (R4, tab 52 at 619), the parties had settled a portion of that dispute. Aerojet's claim acknowledged this, but asserted that it remained entitled to "$651,515 in actual costs" associated with the "move of the Alliant production line" that were not reimbursed by the government as part of "modifications [Nos.] P00065 and P00070" (R4, tab 55 at 665-66).

173. The claim asserted several legal theories for its demands: for recovery of the alleged unpaid balance of $12 million, Aerojet maintained that the parties entered into a binding modification on 17 September 1999 in the fixed-price amount of $49.3 million, and that appellant was entitled to the balance of this amount as the allegedly unpaid remainder when the government did not comply with purported terms (R4, tab 55). Aerojet asserted that it should recover costs associated with closeout activities, particularly moving the production line from Alliant to Aerojet, because the government constructively changed the contract to require these actions. Appellant advanced the alternative argument that the government was estopped from denying payment because the government was aware of Aerojet and Alliant's closeout efforts, but "did not direct Aerojet to halt its efforts despite reaping the benefits of the added work." (*Id.* at 703)

174. With minor exceptions, the claim and REA were almost verbatim (*compare* R4, tab 52 with R4, tab 55). The claim contained some additional information, primarily updating legal references (R4, tab 55, *passim*) and capturing events that had transpired in

the interim. The claim acknowledges the novation agreement between Aerojet and Northrop Grumman (R4, tab 55 at 664); contends that appellant had been assured by the government that unilateral Modification No. P00032 was issued as an administrative necessity and was not a bad faith rejection of the alleged 17 September 1999 white board agreement (*id*. at 687); acknowledges that Modification No. P00065 reduced the amount sought by appellant for closeout costs to $651,515; and provided some additional information on closeout activities (*id*. at 701, 717).

175. Section III.C of Aerojet's claim, which is captioned "If The Army Chooses To Abrogate Its Settlement Agreement With Aerojet, Then Aerojet Is Entitled To An Equitable Adjustment In Excess of the $49.3 Million Settlement Amount," cautioned the government that, although the contractor was "still willing to settle for the $12 million remaining unpaid" under the alleged 17 September 1999 agreement, Aerojet would seek additional recovery if the government did not abide by the purported agreement. Aerojet did not specify a particular amount that it would seek if this occurred, only that it would be "In Excess Of" the alleged $49.3 million settlement amount. The contractor identified the elements of its potential claim, which we number below for ready reference:

> [1] The actual incurred costs to perform LRP-2, including the $12 million not paid pursuant to the settlement agreement, in the estimated amount of $29.2 million (See Exh. 63.);
> [2] The Cost of Money and Profit on all the costs incurred in performing changed work under LRP-2;
> [3] The cost of closing out the contract funded either under the "Changes" or "Termination for Convenience" clause of the contract;
> [4] The cost of Aerojet's lifetime buyout for obsolete parts required to bridge production from the SADARM basic configuration build until the PI contract configuration changes could be incorporated into the TDP in an amount of approximately $5.5 million that is not currently charged to the LRP-2 contract; and
> [5] The cost of preparing the REA in the amount of $121,873. (See Exh. 64.)

(R4, tab 55 at 720)

176. We focus on items 2 and 4. As discussed below in detail, we find that a sum certain cannot be ascertained for items 2 or 4. Nor are we aided by the caption of

Aerojet's claim § III.C, which seeks an amount "In Excess Of" the alleged $49.3 million settlement amount (*id.*).

177. The second item seeking "the Cost of Money and Profit" does not specify an amount (*id.*). One of Aerojet's post-hearing submissions states that this element "arguably may not have been submitted in a sum certain" (app. opp'n to gov't mot. to dismiss at 7). While we agree with this statement, we reject the complex rubric by which Aerojet suggests that the "amount in dispute can be calculated" (app. resp. to Bd. inquiry at 6-7) and find that the amount could not readily be determined using ratios.

178. By the fourth item, Aerojet seeks to recover "approximately $5.5 million" as the "cost of Aerojet's lifetime buyout for obsolete parts required to bridge production from the SADARM basic configuration build until the PI contract configuration changes could be incorporated into the TDP" (R4, tab 55 at 720). The statement that Aerojet seeks "approximately $5.5 million" does not cite supporting documentation, nor does it reference another portion of the claim to provide a firm amount. We are thus left without a clear amount sought by Aerojet for this particular element.

179. We are unable to ascertain just how much money the contractor seeks in § III.C for this alternative claim for abrogation of the purported "settlement agreement." We understand only, as Aerojet entitles this section of the potential claim, that "If The Army Chooses To Abrogate Its Settlement Agreement With Aerojet, Then Aerojet Is Entitled to An Equitable Adjustment In Excess Of The $49.3 Million Settlement Agreement" (*id.*). This language informs neither the contracting officer nor the Board as to just how much this amount "In Excess" of the purported settlement happens to be.

The Contracting Officer's Review and Final Decision

180. On 19 April 2004, CO Paul Milenkowic advised Aerojet that the government was in the process of reviewing the contractor's 12 March 2004 claim and requested a "breakdown of the actual costs incurred for the 200 projectiles delivered." CO Milenkowic noted that this information previously had been requested on 21 September 1999 and 6 October 1999, and again as part of the government's consideration of appellant's 7 March 2002 REA. (R4, tab 56) By letter dated 23 April 2004 and signed by Ms. Burnes, Aerojet again refused to supply the information, stated that the contractor would not create new data not collected as part of the LRP-2 contract, and maintained that this information was not relevant to its claim. Aerojet asserted that:

> Northrop Grumman's claim is based upon the Company's contention that the parties reached a settlement definitizing the total contract price through the date of the agreement. This settlement was contingent only upon availability of funds

> from OSD. When the funds became available, the settlement became final notwithstanding the Government's subsequent failure to allocate the funds to the contract. This settlement was not merely a pricing exercise to identify the recurring costs for 200 projectiles but was a settlement of the price of the changes to the entire contract through that point in time.

(R4, tab 57)

181. CO Milenkowic on 3 May 2004 reiterated his request for substantiation of Aerojet's costs. He again questioned the contractor's reluctance to furnish this information despite repeated government requests, and noted that Aerojet's failure "to provide the data then or now brings into question whether the parties ever got so far in their discussions as to consider price reasonableness and whether any loss was ever really sustained." (R4, tab 58) Aerojet provided limited cost summaries in late May 2004, and the parties continued through June 2004 to express differing views regarding the utility of cost information provided by appellant (R4, tabs 60-64).

182. CO Milenkowic on 23 July 2004 issued a final decision denying Aerojet's claim (R4, tab 65). CO Milenkowic summarized the claim and his decision as follows:

> The main part of the present claim is not based on any allegation that Aerojet incurred costs in excess of $29.3M to produce the 200 projectiles. Instead, it is based on the assertion that at the 17 September 1999 meeting the Government agreed to pay $49.3M for 200 projectiles for delivery on 30 December 2000 and an additional $12M is now owed. I find that the Government did not make such an agreement and such funds are not owed to the Contractor. I also find that the contractor has been fully compensated for all contractual changes and that the same have been reflected in bilateral modifications to the contract.

(*Id.* at 740)

Aerojet's Appeal

183. Aerojet filed an appeal from the contracting officer's final decision, which was docketed as ASBCA No. 54774. In its complaint, appellant set out three counts. The first contention is that the parties entered into a binding agreement on 17 September 1999, and that the government breached the LRP-2 contract by not paying appellant the full amount of $49.3 million in accordance with the alleged settlement agreement (compl. at

25). The second count asserts that the government constructively changed the contract with regard to the closeout modification for Aerojet to maintain Alliant's production line (*id.* at 26). Aerojet's third contention, also pertaining to alleged closeout costs, is that the government is estopped from denying payment to appellant for moving the production line (*id.* at 27). By ¶ 5 of its complaint, Aerojet seeks $12,773,388, the same amount sought in its claim. The pleading at ¶ 99 concludes with appellant's "Prayer for Relief" requesting that the ASBCA find the contractor is "entitled to be paid $12,773,388 and such other and further relief, including interest, as is appropriate in the circumstances." The Board conducted a hearing on entitlement only, and the parties extensively briefed the issues.

DISCUSSION

Aerojet's post-hearing briefs focus upon its primary assertion that it is due $12,000,000 as the balance of an express oral agreement allegedly reached with the government on 17 September 1999 (*see generally* app. br. at 82-106; app. reply br. at 62-63). The contractor also seeks $651,515 for "closeout activities" associated with moving Alliant's production line to Aerojet's facility, and $121,873 for preparing the Request for Equitable Adjustment (R4, tab 55 at 664, 721).

I. Jurisdictional Matters

The government did not initially question the Board's jurisdiction over this appeal. However, the government's post-hearing reply brief raised jurisdictional challenges to three other arguments advanced by appellant's briefs which the government contended were beyond the bounds of the claim. (Gov't reply br. at 47-56) The controverted arguments are: (1) the parties at least entered into an "agreement to agree" subject to two contingencies that were met, but the government acted without good faith by refusing to fulfill its promises (app. br. at 96-98); (2) the government breached the LRP-2 contract option requirement by improperly procuring the rounds by means of unilateral Modification No. P00032 (*id.* at 99-100); and (3) if the government refuses to pay the settlement amount sought, Aerojet would then be entitled to recover an amount in excess of the $49.3 Million settlement amount (*id.* at 105-06). The last argument is taken from § III.C of the contractor's claim (R4, tab 55 at 720-21).

Aerojet responded by filing a motion on 23 October 2006 to "strike those arguments from Respondent's brief due to their untimely assertion." Appellant contends that it was prejudiced by lack of notice of the objections because the government neither "raise[d] these arguments in its opening statement" nor did it timely furnish the information by failing to comply with the Board's Order requiring the parties to provide a list of legal authorities before the hearing. Aerojet defended its controverted theories as

properly made because these "are simply derivative legal arguments arising from the same underlying facts." (App. mot. at 1)

The government on 25 October 2006 opposed appellant's motion to strike, taking issue with the "notion that the Government is under some obligation to 'reply' to [Aerojet's] pre-hearing arguments in the Government's opening statement and Post-Hearing Brief." The government asserted that appellant's "pre-hearing arguments and Post-Hearing Brief are not substitutes for, or amendments to, the certified claim and the final decision upon which the Board's jurisdiction is based." It chastised appellant for attempting to add, years later, new claims allegedly acknowledged by Aerojet to be separate and apart from the alleged 17 September 1999 agreement, closeout, and REA preparation costs. The Board treated the government's opposition as a motion to dismiss the alternative theories for want of jurisdiction, and ordered further briefing on these issues.

After reviewing the parties' responses, the Board raised *sua sponte* the issue of whether § III.C of Aerojet's claim is stated in a sum certain and, if not, whether it is couched in such terms as to be severable from the remaining claim.

Our review of jurisdictional issues begins with the Contract Disputes Act of 1978 (CDA) which requires that a contractor first submit its claim to the contracting officer for a final decision before the Board is vested with jurisdiction. 41 U.S.C. §§ 605(a), 606. The Federal Circuit has held that: the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. *Arctic Slope Native Ass'n Ltd. v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009), *cert. denied*, ___ U.S. ___, 2010 U.S. LEXIS 5433 (June 28, 2010), citing *England v. Swanson Group*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). *See also Webb Electric Company of Florida, Inc.*, ASBCA No. 54293, 07-2 BCA ¶ 33,717 at 166,938. The content of the claim is crucial, as it establishes the bounds of the appeal:

> The emphasis upon the claim and its supporting documentation comports with the balanced approach taken by the CDA, which was carefully structured to ensure fundamental fairness to both parties. The Government is entitled to learn the basis of the claim asserted by the contractor, ensuring both a lack of prejudice to the Government and judicial economy by establishing a process where claims are resolved at the lowest possible level. 41 U.S.C. § 605(a).

J.S. Alberici Constr. Co. and Martin K. Eby Constr. Co., a joint venture, ENG BCA No 6178, 98-2 BCA ¶ 29,875 at 147,917, *aff'd, Caldera v. Alberici*, 153 F.3d 1381 (Fed. Cir. 1998). While an appeal is limited to the claim's factual foundation, an appellant is not foreclosed from espousing new or different legal theories in support of recovery, provided these arguments are "based on the same claim previously presented to and denied by the contracting officer." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). The standard for distinguishing between an extra-jurisdictional, new claim from an alternative legal basis for an existing claim "does not require ridged [*sic*] adherence to the exact language or structure of the original administrative CDA claim." *Id.* at 1365. Rather, we are to apply a common sense analysis, *Ebasco Environmental*, ASBCA No. 44547, 93-3 BCA ¶ 26,220 at 130,490 citing *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1579 (Fed. Cir. 1992), and base our determination upon whether the controverted matter is based upon common or related operative facts within the claim. *Dawkins General Contractors & Supply, Inc.*, ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844. We rule in this section on jurisdiction and not upon the merits of Aerojet's assertions.

A. Jurisdiction over Aerojet's Argument of an Alleged Contingent Agreement

Aerojet's initial post-hearing brief urges that, "At the very least, the September 17, 1999, meeting resulted in an 'agreement to agree,'" which the government breached when it "did not sign a formal agreement simply because the deal was [later] considered to be less than optimal" (app. br. at 96). Appellant argues that the government's failure to perform the contingent duties is further actionable as a breach of its obligation to act in good faith (app. sur-reply at 1-5). Aerojet's response does not contend that it raised the explicit theory of an "agreement to agree" or a "contingent agreement" in its 12 March 2004 claim. It maintains that "the operative facts supporting Appellant's binding oral agreement are the same as the facts supporting its alternative 'agreement-to-agree' legal theory" which are properly before the Board, even if recovery was premised upon a different legal argument (app. sur-reply at 7).

The government contends that Aerojet's assertions of an "agreement to agree" or a contingent agreement are not found in the "certified claim that supports jurisdiction in this appeal."

Decision

We agree with Aerojet that an "agreement to agree" is an alternative legal theory within our jurisdiction and not the assertion of a new claim or beyond our consideration. Although differently argued in its post-hearing briefs than presented in its claim, appellant alleges that facts found in its claim are sufficient to support both an assertion that a binding agreement resulted from the 17 September 1999 meeting and an agreement

to agree. The later-offered argument is that an agreement was contemplated upon the completion of contingencies including receipt of SADARM funds. It consistently has been Aerojet's position that the government became obliged to the contractor on 17 September 1999 but did not fulfill its commitment. For example, Aerojet's certified claim recounts that although the contractor prepared "draft Terms and Conditions for use in the definitization modification 'to both increase the scope and price of the subject contract as agreed during the 17 September 1999 negotiations,'" the government "never responded to these terms specifically or countered with its own version." (R4, tab 55 at 690) With respect to funding for the alleged settlement, appellant's claim specifically states that even if the parties' 17 September 1999 agreement were to be found separable and subject to the release of FY 1999 funds, "the argument that this condition precedent did not occur must fail" because the money was in fact released by OSD (*id.* at 713). Aerojet alleges that the agreement was thus binding even if OSD later restricted the purpose for which the money could be used (*id.* at 714).

The concept that the parties on 17 September 1999 at least agreed in principle, whether to a legally unenforceable "path forward" as contended by the government, or to an enforceable agreement or "agreement to agree" as urged by Aerojet, is a central theme of the contractor's claim. We hold that the Board properly has jurisdiction over this legal theory, as the events urged in support of it do not differ from the "essential nature or the basic operative facts of the original claim." *Trepte Construction Co.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385; *see also Environmental Safety Consultants, Inc.*, ASBCA No. 54995, 06-1 BCA ¶ 33,230 at 164,666, *recon. denied*, 06-2 BCA ¶ 33,321.

B. Jurisdiction over Alleged Improper Exercise of Option

Aerojet's brief alleges that the government breached the Option clause when it improperly exercised the option for additional SADARM projectiles using unilaterally-issued Modification No. P00032. Appellant contends that, even though Modification No. P00017 calling for more projectiles was entered into bilaterally, further negotiation remained necessary because "the critical element of price was left undefinitized." The contractor criticizes the government for failure to act "in exact accord" with the option clause, which states that parties are to negotiate a price. Aerojet contends that the missing terms of Modification No. P00017 were supplied by the parties' alleged 17 September 1999 agreement and that they thereby exercised the contract option. Aerojet argues that Modification No. P00032 was wrongly issued unilaterally because the contractor's assent was required but not obtained; set a price for and required production of RDAP-1 rounds, a more advanced projectile than the basic contract requirement; and changed the delivery schedule. (App. br. at 99-100)

The government objected on several bases, asserting a lack of jurisdiction attributed to each of "three fatal flaws" in this breach of option clause argument.

The first "flaw" alleged is the government's contention that the Board is without jurisdiction because this particular breach falls outside the claim. The government notes that even "Aerojet admits that its LRP-2 breach claim is a new claim" as appellant's initial brief states that the argument is "separate and apart from the Army's breach of the September 17th Agreement." (Gov't reply br. at 49 citing app. br. at 99) The government alleges as a further "flaw" that Aerojet cannot now raise a breach of option claim, as doing so is time-barred by the six-year statue of limitations (gov't reply br. at 49). Third, the government impugns the very underpinning of this argument, contending that Modification No. P00032 was not an option exercise; rather, it was Modification No. P00017 that "exercised the option" for additional projectiles (*id.*).

Decision

We grant the government's motion to dismiss appellant's argument that the government failed to properly exercise the contract option, as Aerojet's claim neither articulated nor furnished operative facts to support that contention. Nowhere in Aerojet's claim is the assertion that the government failed to follow the requirements of the contract Option clause. To the contrary, appellant's claim and briefs are in agreement that Modification No. P00017 exercised the contract option for additional SADARM rounds. (*See, e.g.*, app. sur-reply at 8-11; R4, tab 55 at 664)

Aerojet's claim specifically states that, "In August 1998, the Army and Aerojet signed an Undefinitized Contractual Action ('UCA') [Modification No. P00017] exercising the production option of the SADARM LRP-2 Contract" (R4, tab 55 at 664), and mentions elsewhere that the option was exercised (*id.*, *passim*). The claim does not contend that the option was not exercised or violated contract requirements, but alleges instead that the option was definitized in accordance with the contractor's white board terms of 17 September 1999 and not by unilaterally imposed Modification No. P00032 as argued by the government. The contractor asserts that "all of the steps listed in Modification P00017 were accomplished and a definitized option exercise was agreed to on September 17, 1999 for $49.3 million." (*Id*. at 707) The claim focuses upon the substantive legitimacy of Aerojet's white board offer to definitize the option, and does not raise a violation of contract procedures. We dismiss Aerojet's argument that the government allegedly breached the contract's Option clause for want of jurisdiction, as this contention was neither made in the claim nor are sufficient facts alleged to regard this assertion as simply an alternate legal theory supported by facts presented.

C. Jurisdiction over Aerojet's Argument of Alleged Abrogation of Settlement Agreement

According to the caption of claim § III.C, "If The Army Chooses To Abrogate Its Settlement Agreement With Aerojet, Then Aerojet Is Entitled To An Equitable Adjustment In Excess Of The $49.3 Million Settlement Agreement" (R4, tab 55 at 720). Appellant

continues this argument in its initial brief, which contends that it "remains willing to abide by the settlement agreement reached during the September 17, 1999 negotiation" and will "settle for the $12 million remaining unpaid under the agreement plus the costs incurred under the contract closeout modification and the costs to prepare [its] proposal" (app. br. at 105). However, appellant cautions, "in the alternative," if the government is not willing to pay this amount, then Aerojet is "entitled to recover all of the additional costs incurred in its performance of the LRP-2 Contract that were subsumed into the settlement agreement" (*id.*). Aerojet quantified some but not all of these costs, and we are unable to calculate just how much it seeks by this provision. (Findings 175-79)

The government initially asserted that this argument "suffer[ed] from the same jurisdictional and statute of limitation problems as its breach of LRP-2 contract claim." It contended that the Board lacks jurisdiction because these "theories are new claims that are not supported by the claim and final decision" (gov't reply br. at 58), and that Aerojet is "time-bar[r]ed from filing these new claims because the claims accrued on 17 September 1999" (*id.* at 59). Subsequently, the government withdrew its objection to this particular "abrogation" claim, noting that the assertion was "included in the certified claim and is within the jurisdiction of the Board" (gov't sur-reply at 9).

Decision

Despite the government's later position that the assertion underlying this alternate theory was stated in the claim, the Board remained concerned over Aerojet's failure to state just how much it seeks for the alleged abrogation of the purported settlement agreement. The parties were ordered to further brief the issues of whether this portion of the claim was stated in a sum certain, and, if it is not, whether § III.C, stated as an "alternate claim," is severable from Aerojet's primary claim for $12,773,388 thus preserving our jurisdiction over the latter. For the following reasons, we hold that § III.C as written does not assert a present demand and is not part of Aerojet's asserted claim for $12,773,338; § III.C is severable from the claim and does not taint the Board's jurisdiction over this appeal.

The CDA grants a limited waiver of sovereign immunity by allowing the federal government to be sued in its capacity as a contracting party. 41 U.S.C. §§ 601-13. A contractor's submission of a cognizable claim to the contracting officer is a prerequisite to the Board's jurisdiction over a subsequent appeal, as the Act and its implementing regulations require that a monetary claim be submitted in a sum certain. 41 U.S.C. § 605(a); FAR 33.201; *Essex Electro Engineers, Inc. v. United States*, 960 F.2d 1576, 1581-82 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953 (1992). A "sum certain" is a "determinable" amount. *Opto Mechanik, Inc.*, ASBCA No. 28190, 84-1 BCA ¶ 17,039 at 84,837 citing *Harnischfeger Corp.*, ASBCA No. 23918, 80-2 BCA ¶ 14,541 at 71,679.

We reject Aerojet's assertion that it is allowed to augment the overall claim for $12,773,388 until any time prior to final judgment to add the unstated breach damages. While it may properly do so upon learning additional facts pertaining to a valid claim, *Tecom, Inc. v. United States*, 732 F.2d 935, 938 (Fed. Cir. 1984), it cannot later furnish a sum certain to "rehabilitate" an invalid one or portion thereof. *Eaton Contract Services, Inc.*, ASBCA No. 52888 *et al.*, 02-2 BCA ¶ 32,023 at 158,266-67. The sufficiency of a claim is determined at the time it is submitted to the contracting officer; if it was improperly made, the Board lacks jurisdiction. *Id*. This is a fact-specific inquiry, and is determined on a case by case basis. Nowhere does appellant quantify exactly how much more than $49.3 million it seeks, nor does it provide specific sums for all of the components of "this alternate claim" (*see* findings 175-79; R4, tab 55 at 720). Aerojet's failure in § III.C to identify an overall amount or a sum for each sub-element from which the total could be calculated, renders that section invalid for failure to state a sum certain.

Although we hold that Aerojet did not state § III.C in a sum certain, we deny the government's motion to dismiss the entire appeal for want of jurisdiction; that section is severable, and does not invalidate the contractor's $12,773,388 claim. We base this determination upon Aerojet's claim, as that document, not subsequent correspondence or argument, is the foundation of jurisdiction. *Eaton*, 02-2 BCA ¶ 32,023 at 158,266-67. The thrust of Aerojet's 12 March 2004 claim is that the government must immediately do two things: first, abide by the parties' alleged 17 September 1999 agreement for additional SADARM projectiles, and second, pay Aerojet the certified amount of $12,773,388, comprised primarily of the balance of the $49.3 million supposedly agreed upon plus certain closeout and REA preparation costs. (R4, tab 55 at 664)

The risk of breach damages "in excess of $49.3 million" looming if the government does not satisfy appellant's $12,773,388 claim, is not an integrated whole of the overall claim nor is it stated by Aerojet as a present demand. The verbiage of this section does not satisfy the requirement that a submission state its demand "as a matter of right" to qualify as a "claim" under the CDA. *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*) citing FAR 33.201, 48 C.F.R. § 33.201. A contractor's failure to submit "a present demand to the contracting officer for a decision on a claim for a sum certain" by expressing an "intent to submit a claim in some amount at some time in the future is not a claim for purposes of the CDA." *National Gypsum Co.*, ASBCA No. 53259, 01-2 BCA ¶ 31,532 at 155,673 citing *Management Resource Associates, Inc*., ASBCA No. 49620, 96-2 BCA ¶ 28,588 at 142,736.

The severable nature of § III.C is reinforced by Aerojet's consistent monetary demand for $12,773,388 within the claim. Appellant states at the outset that "this demand for payment is in the total amount of $12,773,388" (R4, tab 55 at 664); repeats in the body that "this Claim is for a total amount of $12,773,388" (*id*. at 666); and concludes the claim with the statement that "Aerojet is entitled to, and hereby demands payment in

the amount of **$12,773,388**" (*id*. at 721) (emphasis in original). This sum certain does not include the amounts described in § III.C, but is comprised of $12 million for the unpaid balance of the purported 17 September 1999 agreement, $651,515 for Alliant closeout-associated costs, and $121,873 for REA preparation costs (*id.* at 664).

Conclusion Regarding Jurisdiction

In summary, we deny the government's motion to dismiss for want of jurisdiction appellant's argument that the parties at least "agreed to agree" on 17 September 1999. We grant the government's motion to dismiss Aerojet's argument that the government improperly exercised the contract option to obtain additional SADARM projectiles, as this was neither presented in appellant's 12 March 2004 claim nor does the claim furnish operative facts to support this theory. We grant the government's motion to dismiss § III.C of Aerojet's claim because it is not stated in a sum certain as required and the Board lacks jurisdiction over this assertion. We deny the government's motion to dismiss the entire appeal, as § III.C is severable from and does not invalidate the remainder of the claim.

II. The Merits of Aerojet's Claim

Having disposed of the jurisdictional issues, we address the merits of appellant's remaining legal arguments. Aerojet claims that it is entitled to $12,000,000 as the balance due pursuant to the binding and enforceable fixed-price agreement allegedly entered into by the parties on 17 September 1999 (app. br. at 82-94). Aerojet alternatively contends that the parties at the very least had a contingent agreement or had "agreed to agree" to a settlement on 17 September 1999 (*id*. at 94-98). Appellant also seeks $651,515 as unreimbursed costs it incurred as a result of the closeout of Alliant's production line (*id*. at 101-05), and $121,873 for the cost of preparing its request for equitable adjustment (*id.* at 106).

A. Did the Government Accept the Contractor's Terms on 17 September 1999?

1. Positions of the Parties

Aerojet's primary argument is that the parties entered into a binding, enforceable agreement on 17 September 1999 "which was consented to by the contracting officer, for $49.3 million subject only to the release of FY99 funds by the Office of the Secretary of Defense (OSD)." This agreement allegedly comported with the contractor's offer: as written on the white board by Mr. Bregard, Aerojet proposed to furnish for $49.3 million a total of 230 rounds in the same configuration as tested at Yuma; this amount was comprised of $29.3 million in FY 1998 money and $20 million in FY 1999 funds. This "offer" was predicated upon an "inseparable" government commitment of both FY 1998

and FY 1999 funds, and Aerojet being able to produce rounds with minimum interruption. (Findings 88-94, 107) Appellant contends that the government breached this agreement, and is "obligated to pay Aerojet the $12 million balance remaining under the definitization of the production option under the LRP-2 contract, as agreed to during the September 17, 1999 negotiation, and as subsequently confirmed by the Army's memorandum of September 22, 1999, and the contracting officer's letter of October 6, 1999." (App. br. at 82)

Aerojet argues that, although their 17 September 1999 agreement was not formally executed, it was nonetheless enforceable because it met all criteria for a binding contract (app. br. at 82-91 citing, *inter alia*, *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1332 (Fed. Cir. 2000), *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991), and *Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1320 (Fed. Cir. 1997)), for the proposition that a valid agreement is formed where there is both consideration to ensure mutuality of obligation, and sufficiently definite terms to ascertain whether breach occurred and, if so, determine the appropriate remedies. Appellant contends that a legally enforceable agreement arose from the "totality of the factual circumstances" surrounding the meeting (*id*. at 88 citing *Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1991)). The context urged by Aerojet is that: the 17 September 1999 agreement represented the culmination of months of extensive effort by the parties, including the comprehensive work of the Alpha Team (app. br. at 83); the 17 September 1999 agreement "was technically a definitization of the Undefinitized Contract Action (UCA) that exercised the LRP-2 Option. [Modification No. P00017] was a bilateral contract change that exercised the production option of the LRP-2 Contract for 200 projectiles" (*id*.); and this "definitization was memorialized at the meeting, written on the whiteboard, and signed by the principles from both Aerojet and Alliant" (*id*. at 84). Appellant notes that although "some details of the package agreement required final definitization," these "outstanding details [do] not eradicate the agreement" (*id*. at 85).

Aerojet contends that, taken together, the "signed white board, handshake, contemporaneous documents, lengthy preceding negotiations, a pending proposal, [and] Government post-negotiations" correspondence evidence the government's ratification of the alleged 17 September 1999 agreement (app. reply br. at 88). Aerojet asserts that "[CO] participation and silence during a meeting at which direction was given constitutes ratification and binds the government" (app. br. at 85 citing *Dan Rice Constr. Co. v. United States*, 36 Fed. Cl. 1 (1996) and *Gricoski Detective Agency*, GSBCA No. 8901 *et al*., 90-3 BCA ¶ 23,131 at 116,114). Aerojet alleges that "[a]lthough [CO Trauger] did not sign the September 17th 'white board,'" and "[e]ven assuming that the bottom line agreement was not formally approved by [him] on September 17th," CO Trauger did not object to its terms and thus "ratified that agreement through his acquiescence at the meeting" (app. br. at 84).

Aerojet disagrees with the government's contention that CO Trauger's unilateral issuance of Modification No. P00032 at the conclusion of the meeting was inconsistent with appellant's position that the parties had reached a "difficult, total package settlement resolution of $49.3 million" (app. br. at 91). Appellant's brief characterizes that modification as merely an administrative vehicle to enable the government "to obligate the FY 1998 money in a timely manner" (*id*. at 90).

Aerojet argues in the alternative that, even if an enforceable agreement did not result on 17 September 1999, CO Trauger later ratified the alleged agreement "by his actions after the meeting" (*id*. at 84), and focuses upon two government documents. These are a September 1999 document prepared primarily by Mr. Gormley of the Picatinny SPO, seeking the release of funds from higher headquarters, that mentions an "agreement" between the parties (R4, tab 150 at 1987-88), and CO Trauger's 6 October 1999 letter which says the parties "tentatively agree[d]" on 17 September 1999 (R4, tab 29; app. br. at 85).

Conversely, the government denies that there is either legal or factual support for appellant's proposition that the parties on 17 September 1999 entered into a binding contract. The government argues that Aerojet cannot satisfy three of the four requisite elements of proof for contract formation because appellant cannot show there was mutuality of intent, consideration, or an unambiguous offer and acceptance. The government asserts that only the fourth element of proof was met, in that CO Trauger and Mr. Newman, with contracting authority to bind the government and Aerojet respectively, attended the meeting but that this alone does not establish that agreement was reached. (Gov't br. at 4-6, 94-100, 114-17)

The government disagrees that there was any mutuality of intent between the parties to enter into a binding agreement on 17 September 1999 on Aerojet's terms. It asserts that CO Trauger made "crystal clear" that the government could not be bound to an "'inseparable package deal funded by both FY98 and FY99 funds'" as demanded by the contractor, because the Picatinny SPO did not have available FY 1999 money. (*Id*. at 5) The government argues that neither CO Trauger, who served as the government's supervisory contracting representative during that meeting, nor any other government employee in attendance, believed that the government then entered into a binding agreement (*id.*). According to the government, the parties on 17 September 1999 agreed at most to a "path forward," or a plan to be used in hopefully persuading higher headquarters to make additional money available to the Picatinny SPO (*id*. at 4-6, 115-16). It asserts that, at trial, both Mr. Bregard and Mr. Newman, Aerojet's most senior representatives, shared the government's view that an enforceable agreement did not obtain on 17 September 1999 (*id*. at 1-2). Mr. Bregard distinguished between a "deal" and a "contract," and testified that "[w]e still had a deal. I mean you couldn't sign

a contract for the '99 funds but we still had a deal" (*id*. at 1 citing tr. 3/214). Mr. Newman affirmed at trial his deposition testimony that "he did not believe that an 'oral contract' was 'in place' at the 17 September 1999 meeting" (gov't br. at 2, 68, citing tr. 4/95; R4, tab 335).

The government alleges that the parties' communications "after the meeting illustrate the total lack of mutual intent/meeting of the minds" about the formation of a binding agreement on 17 September 1999 (gov't br. at 6). It notes that appellant "makes this very point in its Request for Equitable Adjustment," as Aerojet states there that "the parties did immediately offer differing views regarding the funding allocations and pricing of the various aspects of the settlement" (*id.* citing R4, tab 52 at 634). The government emphasizes that disagreement promptly arose between the parties over whether they had entered into a firm fixed-price agreement on 17 September 1999 in the amount of $49.3 million. It cites CO Doyle's e-mail of 21 September 1999, written to Ms. Burnes on the second business day following the controversial meeting, in which CO Doyle asks Aerojet to provide "cost and pricing data to support the FY99 funded price including a not-to-exceed ("NTE") price." (Gov't br. at 58-60 citing supp. R4, tab 149 at 1984) CO Doyle's request was followed by the parties' immediate exchange of correspondence presenting contrasting versions of the meeting outcome. The government argues that the contractor puts forth nothing other than its own self-serving correspondence to show that the parties entered into an agreement on 17 September 1999 of the nature espoused by appellant. (Gov't br. at 6-7)

Next, the government argues that the requisite element of consideration is absent, because CO Trauger did not commit to Aerojet's proposal, as he knew that the Picatinny SPO could not then enter into a contract using FY 1999 funds because these monies were not available for that purpose. The government contends that CO Trauger and other government employees did not remain silent at the meeting, but repeatedly voiced to Aerojet that there was a funding constraint and that the government could not accept appellant's proposal. The government denies that CO Trauger acquiesced to the contractor's "package deal" offer of a firm fixed-price, $49.3 million agreement for 230 rounds to be paid for using "not separable" FY 1998 and FY 1999 funds to definitize Modification No. P00017. (*Id*. at 115)

Finally, the government asserts that there was never an unambiguous offer by appellant nor an acceptance by the government, and that both are required for a binding agreement. The government relates specific events during the parties' exchange on 17 September 1999 as evidence of their lack of mutual agreement. (Gov't br. at 115-16) While the government agrees that "There was a give and take between the parties that resembles an offer by Aerojet," the government recounts that the contractor insisted on "'an inseparable package deal' funded by both FY 1998 and FY 1999 funds." The government contends that CO Trauger repeatedly emphasized at the 17 September 1999

meeting that he could not and did not accept Aerojet's terms because he did not have FY 1999 money for that purpose. (*Id*. at 5) The government alleges that material terms of appellant's white board offer, including delivery dates, were not made clear and that the parties were not in mutual agreement regarding the type of projectiles involved, including whether basic or improved rounds were contemplated (*id*. at 101-03). The government asserts that the parties reached an impasse during the meeting when the government refused to commit FY 1999 funds, which it did not have, and Aerojet continued to insist that it do so. The government reiterates that CO Trauger "testified that he did not accept [appellant's] 'offer' because of the lack of funding," and instead "issued unilateral Modification [No.] P00032." The government reinforces its position with the testimony of COL Ellis, who stated that the parties agreed to a "path forward" with the understanding that the government could "negotiate a binding modification" only upon receipt of FY 1999 funds for that purpose. (*Id*. at 5) The government cites Mr. Bregard's deposition testimony as consistent with this anticipated approach "when he said...everybody was going to swing in and make it happen'" (*id*. citing tr. 3/212). The government argues that CO Trauger "characterized the agreement as 'tentative' and an 'agreement in principle.'" The government asserts that "If there was an offer, there certainly was no acceptance by [CO] Trauger," who to the contrary "issued the unilateral [Modification No. P00032] instead." (*Id*.)

The government disputes appellant's reliance upon Mr. Gormley's 22 September 1999 memorandum as evidence that the parties reached an enforceable agreement on 17 September 1999 (gov't reply br. at 30-319 citing R4, tab 150). The government contends that Mr. Gormley's memorandum was for the limited purpose of seeking the release of funds for the Picatinny SPO from OSD, which was reluctant to approve further SADARM investment. The government notes that Mr. Gormley did not attend the 17 September 1999 meeting, and wrote the draft memorandum based upon his understanding of information obtained from others. The government asserts that his statement in the memorandum that "The Project Manager's Office has negotiated an agreement" falls short of establishing that the parties had entered into a binding contract. It alleges that Mr. Gormley contemporaneously showed his knowledge that the parties did not have an enforceable contract requiring the expenditure of FY 1999 funds in his 8 December 1999 e-mail, which referred to the parties' "unexecuted option for FY 99 (30 rounds)," a position inconsistent with an enforceable agreement having taken place on 17 September 1999. (Gov't reply br. at 30-31 citing R4, tab 167)

2. Decision

This portion of Aerojet's claim rests upon two principle contentions: first, that the parties entered into a binding agreement on 17 September 1999 meeting under terms written on the white board, and second that the government breached that agreement. As the party alleging the existence of a contract on 17 September 1999, Aerojet "bears the

burden of showing 'a mutual intent to contract.'" *Sinil Co.*, ASBCA Nos. 55819, 55820, 09-2 BCA ¶ 34,213 at 169,131, citing *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998) and *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). To recover, Aerojet must establish that a valid agreement arose on 17 September 1999 between Aerojet and the government; the government had a duty arising from that agreement; the government breached that duty; and Aerojet suffered damages caused by that breach. *San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). "The party alleging a contract must show a mutual intent to contract including an offer, an acceptance, and consideration." *Id*. citing *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990); *see also Thermalon Industries, Ltd.*, 34 Fed. Cl. 411, 414 (1995), and *Fincke v. United States*, 675 F.2d 820, 825 (Ct. Cl. 1982). It is essential that "acceptance of the offer be manifested by conduct that indicates assent to the proposed bargain." *Russell Corp. v. United States*, 537 F.2d 289 (Ct. Cl. 1976). And, "while there is no single best way for an acceptance to be communicated to an offeror, there is no doubt that an acceptance must be communicated." *Emeco Industries, Inc. v. United States*, 485 F.2d 652, 656 (Ct. Cl. 1973).

The issue is whether appellant is correct that parties at the 17 September 1999 meeting came to an enforceable "deal" on Aerojet's terms that combined FY 1998 and FY 1999 monies. Or, as alleged by the government, did they without obligation to this scheme simply devise a "path forward" that the Picatinny SPO hoped would be useful in seeking FY 1999 funds from higher echelons for continued projectile purchase?

Aerojet's offer must be put into context with respect to appellant's expectations for the meeting, and what contractor and government representatives knew or should have known on 17 September 1999 about the ability of the Picatinny SPO to then accept Aerojet's offer. Aerojet was aware of seriously jeopardized support and funding for the SADARM program at Army headquarters, OSD and Congress, but nonetheless remained determined on 17 September 1999 to secure the government's commitment of both FY 1998 and FY 1999 funds by means of a simultaneous modification obligating both years. Months before the 17 September 1999 meeting, Aerojet had been placed on notice that its contract was threatened with termination for default due to severe reliability problems with its projectiles, and that the overall SADARM program was in serious jeopardy of having production eliminated due to diminishing support from Congress and the OSD, the definitive levels for SADARM authorization and funding. (*See, e.g.*, R4, tabs 10-12, 67-68, 82-83, 89, 98, 100) Aerojet knew that, although the Picatinny SPO could execute contracts, that office did not control the level of program support from Army headquarters, OSD, or Congress. Aerojet's recognition of Picatinny's limited authority is evident by pleas from the contractor's highest corporate levels to Congress, OSD and Army headquarters that the SADARM missile program be continued. Aerojet's Mr. Fischer repeatedly met and corresponded with top Army leadership; Mr. Bregard,

Mr. Marshall, and Ms. Burnes were kept apprised of those efforts. Mr. Fischer's letter of 15 July 1999 to LTG Kern cited "major misperceptions" in Congress over the viability of the SADARM program due to the Army's lack of support, and Mr. Fischer's worry that the "House Appropriation Defense Subcommittee" would "zero the SADARM FY00 procurement request." (Finding 75) By letter dated 9 June 1999 to Secretary of the Army Louis Caldera, Robert A. Wolfe, President of Aerojet and Michael Brown, Litton's Chief Executive Officer, jointly conveyed their "deep concern about the current status of funding" for the SADARM program. This letter expressed the executives' worry that "canceling the SADARM effectively loses the $1.3 [billion] Army Investment in gun-hardened smart munitions," and that unless additional support materialized at once, by the time the Army's budget submission was prepared in August 1999, "irreversible damage will already have been done, as a skeptical Congress reacts by severely cutting or eliminating the FY00 SADARM budget." (Finding 72) The 17 September 1999 meeting took place against the backdrop of both parties' sure knowledge of the serious vulnerability of the SADARM program and the continuation of Aerojet's contract, especially with respect to the acquisition of more rounds. (*See, e.g.,* findings 25, 50-52, 55-56, 59, 62)

As appellant makes no assertion that CO Trauger (or any other government employee) signed the white board or gave explicit verbal assent thereto, and it is undisputed that the only signatories to the white board were contractors Mr. Bregard and Mr. Larson (R4, tab 23), it is necessary that Aerojet prove its case by other means. Aerojet alleges three manifestations of nonverbal conduct by government representatives as evidence of assent to or ratification of appellant's offer. These are that: government personnel CO Doyle and Ms. Harder nodded during discussions of Aerojet's offer; COL Ellis shook hands with the contractor; and CO Trauger silently acquiesced during the meeting to and/or ratified appellant's offer. (App. br. at 84-85) Aerojet also places great emphasis upon CO Trauger's failure to object to a September 1999 memorandum prepared by Mr. Gormley, which states that "The Project Manager's Office has negotiated an agreement," as further evidence of both ratification and what the parties "believed happened" at the 17 September 1999 meeting" (*id.* at 80). Aerojet argues that CO Trauger ratified the alleged 17 September 1999 agreement by "acquiescence at the meeting itself, and later, by his actions after the meeting" (*id.* at 84).

We examine these actions in particular, and the parties' conduct as a whole, in determining whether a binding agreement was reached on 17 September 1999 or ratified. "Ratification," as defined by FAR 1.602-3, Ratification of Unauthorized Commitments, at ¶ (a) "means the act of approving an unauthorized commitment by an official who has the authority to do so."

(a) CO Trauger's Alleged Silence During the 17 September 1999 Meeting

The first and most important aspect of nonverbal conduct asserted by Aerojet of at least ratification (if not affirmative approval) of the alleged 17 September 1999 white board agreement is CO Trauger's alleged silence at the time an enforceable agreement supposedly was formed (app. br. at 82-91). We give particular focus to CO Trauger's actions, because he as supervisory contracting officer possessed unique authority at the 17 September 1999 meeting to bind the government to an agreement.

Appellant contends that, "Even assuming that the bottom line agreement was not formally approved by the contracting officer on September 17th, Mr. Trauger ratified that agreement through his acquiescence at the meeting itself" (app. br. at 85). We understand Aerojet to argue that CO Trauger's alleged silence during the meeting, and failure to object to the terms of the contractor's "Not Separable" white board offer that required the government to commit both FY 1998 and FY 1999 funds, were tantamount to either tacit consent to or ratification of the alleged agreement.

We find this argument unpersuasive, both because of CO Trauger's conduct and Aerojet's particular knowledge that the overall SADARM program was in jeopardy and that funding was uncertain. The record is replete with repeated objections voiced by CO Trauger and other government representatives to all present on 17 September 1999 that the Picatinny SPO could not and would not enter into an agreement obligating FY 1999 funds; his concerns are consistent with information then known by both government and contractor personnel. CO Trauger, as well as other government representatives, repeatedly told appellant that the Picatinny SPO did not have FY 1999 funds nor did they did know how much or when Picatinny would receive funds or be allowed to use these for contracting purposes, and that Picatinny could not enter into an agreement committing monies that it did not have. There is no proof CO Trauger silently stood by, or refrained from disclosing this important impediment. We specifically have found that CO Trauger rejected Aerojet's white board offer, both by advising the contractor during the 17 September 1999 meeting that the government could not enter into an agreement requiring the expenditure of FY 1999 funds, and by his unilaterally issuing Modification No. P00032 containing terms inconsistent with the contractor's white board. (*See., e.g.*, findings 14, 22, 45, 48-49, 52, 55-57, 59-60, 62, 94-107, 110-14)

Aerojet has not shown that it was lulled on 17 September 1999 by CO Trauger into believing that the parties had made an enforceable agreement on the contractor's terms. The facts urged by Aerojet do not persuade us that CO Trauger remained silent with respect to his inability to contract using FY 1999 funds or that he allowed his alleged silence to ratify an unauthorized government action at the 17 September 1999 meeting. *Winter v. Cath-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007) citing *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1433-34 (Fed. Cir.

1998) ("Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority.") Nor does the case law relied upon by Aerojet bolster its position. Although the Court in *Dan Rice* observed that the contracting officer's alleged silence during a telephone conference when the contractor was directed by others to perform additional tasks "may well have ratified the directive," that decision did not establish a point of law. The Court held only that the disputed exchange in that case constituted a genuine issue of material fact precluding summary judgment. 36 Fed. Cl. 1, 4.

(b) Alleged Nodding by Government Representatives

The next allegation of nonverbal government approval by appellant is that "the Army business group (including Mr. Trauger, Ms. Doyle, and Ms. Harder) 'nodded' in agreement with the concept of $49.3M for 230 rounds" at the 17 September 1999 meeting. Aerojet maintains that "Ms. Burnes testified specifically that she saw the Army personnel agree to this package concept" (app. br. at 39). We understand Aerojet to contend by these assertions that CO Trauger joined CO Doyle and Ms. Harder in nodding in approval of the contractor's offer, and that the Board should give weight to these nonverbal indications of approval.

However, appellant does not support CO Trauger's alleged nod with any part of the record. According to the evidence, Ms. Burnes's testimony and meeting notes indicate only that she saw CO Doyle and Ms. Harder nod. (Finding 101) We give no weight to Ms. Burnes's testimony, as we have not found her to be a credible witness (finding 145). Mr. Bregard testified that he could not see CO Trauger at that time, but stated that he was looking particularly at CO Doyle and Ms. Harder because they had been vocal in rejecting Aerojet's offer, and that he felt that "when they nodded, we had a deal" (tr. 3/113). Aerojet failed to furnish proof that CO Trauger nodded to indicate his acceptance of Aerojet's offer, and appellant's assertions do not rise to the level of proof necessary to adequately support its claim. We do not find that this alleged conduct occurred; even if we did, assuming *arguendo* that CO Doyle and Ms. Harder had expressed their assent to the white board by nodding, a point the former does not recall and the latter denies (findings 101, 120-21), their nonverbal conduct is insufficient to support a finding that the government accepted Aerojet's offer or to meet the contractor's burden of proof.

(c) COL Ellis's Handshake with Mr. Bregard and Mr. Larson

A "handshake" is the next nonverbal conduct asserted by Aerojet to evidence the government's acceptance of the alleged agreement of 17 September 1999 (app. br. at 26-27, 53-57, 86-88). According to the contractor, "it was a common practice [for the parties] to reach a negotiated settlement (a 'handshake deal') and complete the

administrative paperwork later" (app. br. at 86-87). It is Aerojet's contention that, after considerable discussion amongst the parties regarding the contractor's white board offer, "Mr. Bregard, Mr. Larson, and COL Ellis then shook hands on the deal and COL Ellis stated that they had a deal" (app. br. at 41 citing testimony from Aerojet and Alliant employees, tr. 1/127, 130 (Ms. Burnes); 2/105 (Mr. Larson); 2/242 (Mr. Marshall); 3/120-21 (Mr. Bregard); and 4/53 (Mr. Newman)).

Mr. Bregard testified that he and COL Ellis had reached "handshake" settlements before, although appellant did not furnish any instances where this actually had occurred (app. br. at 27; finding 60). Appellant argues that the parties on 17 September 1999 contemplated again using the same "handshake" approach, as indicated by "the action items generated at the end of the September 17th meeting [which] envisioned exactly that course of action" of subsequently executing contract documents. Aerojet contends that "the fact that no 'writing' was executed at the time of the meeting itself was not unusual, nor does it lessen the legal efficacy of the agreement entered into." (App. br. at 86-87) It argues that the government "cannot be serious" in basing CO Trauger's rejection of the 17 September 1999 agreement upon the contracting officer's unilateral issuance of Modification No. P00032 toward the end of the meeting because he "allowed the parties to reach a difficult, total package settlement resolution of $49.3 million which he facilitated [and then] allowed the parties to shake on the deal" (*id*. at 90-91).

Aerojet's assertion that the government should be bound to the terms of the contractor's white board agreement because COL Ellis may have shaken hands with the contractor fails for want of proof. Aerojet has not overcome the significant obstacle of authority: COL Ellis had no authority to bind the government by contract, and CO Trauger, who did, clearly objected to the white board offer both by voicing his objection to the commitment of FY 1999 funds (which the government did not have) and by rejecting the white board offer by issuing unilateral Modification No. P00032 with terms directly contrary to those of the white board. (Findings 6, 109, 122-24)

Aerojet's assertions that the parties previously had entered into agreements on the basis of a handshake, and on 17 September 1999 intended this informal, courteous gesture to secure a $49.3 million commitment, are unsupported by the record (findings 60, 109).

We reject appellant's argument as lacking both legal and factual support.

(d) Mr. Gormley's Memorandum of September 1999

Aerojet places considerable emphasis upon a September 1999 internal government document to justify its stance that the government contemporaneously recognized and the contracting officer ratified the alleged 17 September 1999 agreement. Appellant contends that "after 7 years of argument, after the submission of 399 documents into the

record, and after 7 days of hearing time, *Appellant's case boils down to this simple document drafted by the Government*." (App. br. at 81) (Emphasis supplied) The contractor relied upon an internal memorandum drafted about 21-22 September 1999 by Mr. Gormley, which he prepared for the purpose of seeking the release of FY 1999 funds from OSD. According to Aerojet, "This single memorandum supports the majority of Appellant's case," including that:

> 1. The September 17th meeting was, in fact, a negotiation, and not merely a business discussion.
> 2 This negotiation resulted in an agreement that included all the essential elements of a contract – a $49.3 million price; a quantity of 200 projectiles; the configuration of the Rounds; and a delivery schedule.
> 3. This agreement was only contingent on the release of already appropriated funds that were being held by OSD for reliability concerns (concerns that had been resolved by the REL-C testing concluded in early September 1999).

(*Id*. at 80-81) According to appellant, Mr. Gormley's memorandum establishes that the parties had a binding agreement for which "the only condition precedent had already been satisfied." It reasons that OSD's subsequent "refus[al] to release the FY99 funds to finalize the agreement leads to the inescapable conclusion that the Government breached this agreement." (*Id*. at 81)

There are several fundamental flaws in Aerojet's reliance upon Mr. Gormley's memorandum to prove its case, and we find this argument without merit. Mr. Gormley prepared the subject memorandum for the sole purpose of seeking funds from OSD; Aerojet offers nothing to establish that Mr. Gormley, who did not attend the 17 September 1999 meeting and obtained his information secondhand, was making or endorsing a previously-unauthorized commitment. There is no proof Mr. Gormley's memorandum was more than an attempt to convince higher headquarters that the Picatinny SPO and the contractor had determined a future course of action (or, as both described, a "path forward"). (Findings 146-47) Importantly, Mr. Gormley was not an authorized procurement official, nor was he shown to be a subordinate of CO Trauger (finding 6). *See California Sand and Gravel, Inc.*, 22 Cl. Ct. at 27 ("For effective ratification, a superior must have authority to ratify [and] knowledge of a subordinate's unauthorized act"). Mr. Gormley's memorandum does not corroborate that the government entered into an enforceable agreement at the 17 September 1999 meeting. Even if the funds sought by this memorandum had materialized, the requirements for a binding contract as of that singular date were not present. Although Aerojet was insistent both during and after that meeting that a competent bargain was then struck, the

government (particularly CO Trauger) did not join in a meeting of minds as to more than a nascent and nonbinding path forward.

B. Did the Parties on 17 September 1999 "Agree to Agree" to a Settlement Subject Only to the Release of Funds by OSD?

Aerojet argues in the alternative that, in the event that the Board does not find that the parties entered into a binding agreement at the 17 September 1999 meeting, then the Board should hold that the parties at the very least "agreed to agree" upon a settlement on the contractor's terms, subject to the release of funds by OSD. Appellant contends that the government subsequently breached its "duty of good faith and fair dealing" to consummate the contingent agreement by "OSD's decision to divert funds" to other purposes than providing funds as stated by Aerojet's 17 September 1999 terms. (App. br. at 96) Aerojet contends that "CO Trauger's letter of October 6, 1999 further delineated" the parties' contingent agreement (*id.* at 97). Aerojet asserts that CO Trauger there "confirm[ed] the definitized option price" by stating that the government "tentatively agree[d] to a package of $49.3M." According to appellant, the "tentative component" referred to by CO Trauger was the release of FY 1999 SADARM funds, and that this contingency was met because those funds had been obligated for a full year at the time of the agreement. Aerojet argues that OSD's "release" of funds was "simply a ministerial act" (app. br. at 96), and that "[t]he Government cannot avoid a contractual obligation by simply failing to allocate existing funds to the program" (*id.* at 94 citing *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980)).

CO Trauger's 6 October 1999 letter responded to the 22 September 1999 position taken by Aerojet's Ms. Burnes that the parties had entered into an agreement on 17 September 1999. She had objected to CO Doyle's request to Aerojet for additional cost data for the missiles, and insisted that "Due to the compressed timeframe of the negotiations, not all of the details associated with the settlement modification could be discussed, although agreement was reached on all the material terms." (R4, tab 26) CO Trauger firmly disagreed, and wrote that it was the government's "understanding that during that meeting we reached an agreement in principle on a go forward plan towards a negotiated settlement, but not a final negotiated agreement" (finding 135). CO Trauger asserted that the parties "did tentatively agree to a package of $49.3M" that "consisted of 200 projectiles in FY98 for the $29.3M," and that "in FY99 the $20M would cover an additional 30 projectiles, contractor gap costs, and an $8M NTE cost for [a] contractor...technical data package [to be] developed by Aerojet" (R4, tab 29). He advised Ms. Burnes that the government was "willing to continue this process in an attempt to reach a mutually satisfactory resolution to the matter," but admonished that it was his duty to "make a finding" that the price being paid using government funds was reasonable and found it inexplicable that Aerojet met the request for data "with surprise and resistance" (finding 135).

Beyond alleging that OSD wrongly withheld funding for the SADARM contract, appellant asserts a further lack of good faith on the part of the government for the alleged failure to complete negotiations in accordance with the so-called white board terms put forth by the contractor in the 17 September 1999 meeting (app. br. at 96-97). Aerojet contends that the duty "to negotiate in good faith prevents" the government from "renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the earlier agreement" (*id*. at 98).

We are unconvinced that the parties on 17 September 1999 committed to even an "agreement to agree," much less a binding agreement. To be sure, there may be a continuum of actions leading up to a binding and enforceable agreement; that is why we have closely examined the circumstances relied upon by appellant to evidence an agreement both singly and as a whole. Subsequent government correspondence characterizes the meeting result as a "path forward" or strategy to be used to convince higher headquarters and Congress to continue the SADARM program, and a plan in the event that the Picatinny SPO received FY 1999 funds and was allowed to obtain additional missiles. This is an approach the parties had undertaken before (*see, e.g.*, findings 33-34, 36, 43, 46, 58, 60, 64-65, 77, 85).

All Aerojet has convinced the Board of is that it wanted to provide the government with 230 missiles for $49.3 million that combined and obligated both FY 1998 and FY 1999 funding; certainly the contractor displayed single-mindedness by doing everything it could both during and after the meeting to bring that about. What Aerojet has not shown is that the government agreed to do so on 17 September 1999 or that it promised to do so later but then acted without good faith or manipulated funding to avoid a commitment.

We find the testimony of the government's witnesses, particularly CO Trauger, to be more credible and persuasive regarding the government's inability and unwillingness on 17 September 1999 to commit FY 1999 funds, which it did not have, than that relied upon by appellant. CO Trauger made clear at the meeting that he lacked authority to bind the government to the terms sought by the contractor that would have combined FY 1998 and FY 1999 monies. His refusal was consistent with FAR 1.602-1, Authority, which requires a contracting officer to comply with all requirements of law, regulation and procedure, and with FAR 43.105, Availability of funds, which at ¶ (a) forbids a contracting officer from executing a contract modification without first obtaining a certification of funds availability, unless the contract is made subject to the availability of funds or contains a limitation of cost of funds. CO Trauger correctly pointed out to Aerojet that he could not, without including a proviso such as "subject to limitation of funds," agree on 17 September 1999 to Aerojet's offer that required combining FY 1998 and FY 1999 monies and then just ratify the transaction later. Procurement regulations

curtail a contracting officer's authority to obligating the government only where monies are available.

CO Trauger's careful adherence to these regulatory restrictions are of two-fold importance here. Not only does it reinforce that the government did not (indeed, could not) enter into an agreement on Aerojet's terms on 17 September 1999, but also that it did not (and could not) enter into an "agreement to agree" on that date, subject only to OSD's subsequent release of funds unless properly stated as an option to the contract. CO Trauger on 17 September 1999 was without authority to commit FY 1999 funds nor did he have authority to retroactively ratify that action if the money was in hand after that date. Contracting officers may subsequently ratify such actions only where "Funds are available and *were available at the time* the unauthorized commitment was made." FAR 1.602-3, Ratification of Unauthorized Commitments, (c)(6) Limitations (emphasis supplied). CO Trauger at most could have and did agree to consider a subsequent agreement if and when sufficient FY 1999 funds became available to Picatinny; however, this willingness to contemplate future work did not bind the government to Aerojet's 17 September 1999 terms. (*See* findings 65, 85-145)

Reiterating our holding that the government did not on 17 September 1999 enter into a binding agreement or even an agreement to agree on appellant's terms, we further firmly reject for want of proof Aerojet's argument that the government (under the purview of OSD) manipulated the availability of FY 1999 funds to avoid meeting its obligations. While the government cannot (without more) avoid contractual promises by pleading insufficient funds where adequate unrestricted monies are otherwise available, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), there is no proof that the government here simply avoided an obligation to Aerojet by refusing to perform the ministerial act of releasing money for that purpose. Simply put, the only agreement (or agreement to agree) made by the government on 17 September 1999 was unilateral Modification No. P00032 to definitize Modification No. P00017 using FY 1998 monies; the government did not then enter into an obligation for the expenditure of FY 1999 funds. Repeated intercession by top contractor leadership, made before the 17 September 1999 meeting, to OSD and Congress to keep the imperiled SADARM program alive, demonstrates wide knowledge that the SADARM effort was in serious jeopardy both with Congress and the upper echelons of the Department of Defense. Aerojet failed to prove that it reasonably anticipated at the meeting that government funds for the purposes advocated by appellant were or would be available. There is no proof that OSD's subsequent reluctance to allocate money as Aerojet would have preferred was an exercise of "buyer's remorse" to avoid an unwise bargain or an attempt to thwart a duty.

We specifically reject Aerojet's contentions that the government acted in bad faith or failed to honor its commitment (*see, e.g.,* app. sur-reply at 1-5). This argument fails for want of proof. To the extent that either party attempted to overreach, that error must

be laid upon appellant by its repeated attempts to construct a record to support its desired (if not achieved) positions. (*See, e.g.,* findings 118-24, 127-29, 135-36, 143-45)

C. Alliant Closeout Claim

Aerojet argues that it is entitled to recover "$651,515 related directly to Alliant Transition costs" that were described in Aerojet's December 2001 proposal to close out the contract as "Packing and Shipping" the production line Aerojet had purchased from Alliant (R4, tab 55 at 717). Aerojet attributes the expense of moving the line from Minnesota to its facility in California to a constructive government change, because the government allegedly benefitted from Aerojet's preservation of SADARM manufacturing capability after Alliant withdrew from the program (*id.* at 1249). Appellant contends that the government wanted this done because the government "thought it would have a future need or work for SADARM." Aerojet points to Modification No. P00050 for the proposition that the government kept stretching the projectile delivery date for the purpose of keeping the line in operation. (App. br. at 76)

Aerojet also asserts that the government is responsible for the expense of moving the line because "These costs were an obligation that Aerojet owed to Alliant for packing up the Government equipment" (*id*. at 78). According to Aerojet, the government issued a statement of work that included this effort, and that appellant provided the requested cost proposal then carried out the work described in the SOW with the government's knowledge and tacit approval. The contractor complains that the government never objected or advised that the contractor acted at its own risk in moving the line, and thus the government constructively changed the contract. The contractor accuses the government of now wrongly refusing to reimburse Aerojet for the effort. *(Id*. at 101-05)

A "constructive change" occurs "when a contractor performs work beyond the contract requirements, without a formal change order under the Changes clause, due either to an informal order from, or through the fault of, the government." *M.A. Mortenson Co.,* ASBCA No. 53229, 05-1 BCA ¶ 32,837 at 162,469-70 citing *Ets-Hokin Corp. v. United States*, 420 F.2d 716, 720 (Ct. Cl. 1970). To prove a constructive change, Aerojet must establish that:

> (1) it was compelled by the government to perform work that was not required by the terms of the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and (4) the additional work was not volunteered, but was directed by a government officer. *Real Estate Technical Advisors, Inc*., ASBCA Nos. 53427, 53501, 03-1 BCA

¶ 32,074; *Monterey Mechanical Co*., ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,953 citing *Len Co. and Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967).

MC II Generator & Electric, ASBCA No. 53389, 04-1 BCA ¶ 32,569 at 161,169.

We hold that Aerojet failed to prove that the government constructively changed the contract with respect to the SADARM production line formerly owned by Alliant, nor has it shown the government is otherwise responsible for Aerojet's disposition of that equipment; we deny this aspect of the claim. The contractor acquired the line from Alliant as part of their Comprehensive Settlement Agreement, which was signed without government knowledge or direction (finding 152). Aerojet was well aware before it entered into the CSA in March 2001 that, despite the Picatinny SPO's repeated requests, future SADARM production was in serious jeopardy (*see, e.g.,* findings 14, 48, 52, 62, 94, 122, 138-41, 149-51) and that projectile production (if not delivery) had ended by the time it purchased the line from Alliant (findings 147-49). Aerojet has not met the threshold requirement for a constructive change, because it has not shown that the government compelled Aerojet to acquire Alliant's line; rather the record demonstrates that Aerojet acted as a volunteer and at its own initiative and not at the government's behest. We reject appellant's contention that the government is estopped from objecting to paying for its closeout work, because the government was aware of the effort and did not object. Aerojet failed to establish that the government bore any duty to intervene in the closeout with Alliant, particularly where Aerojet undertook and carried out the work without the government's specific or implicit direction. (Findings 152-64)

We also reject appellant's assertion that the government bore responsibility because the line was government furnished equipment, and that the government's draft statement of work called for this effort which Aerojet performed with the government's tacit approval. The record does not support Aerojet's contentions, as both Aerojet's proposal (finding 156) and the government's draft Statement of Work (finding 159) are couched in terms of protecting "government furnished equipment." Credible testimony from Aerojet's own witnesses establishes that the line became the contractor's asset and never passed into government ownership or possession (findings 152-56). Aerojet failed to prove that the former Alliant line belonged to the government or was ever GFE, and has not shown that the line fell within the government's statement of work (findings 152-64). Although the government expressed an interest in preserving assets it owned, the government never obligated itself to closing out the production line and had no duty to warn Aerojet to cease from handling contractor-owned equipment.

D. REA Preparation Costs

Aerojet's 7 March 2002 request for equitable adjustment seeks to recover $121,873 in costs associated with preparation of the REA. Appellant provided no justification other than a general assertion of entitlement, and furnished scant documentation of this expense that does not identify the outside legal firm to which these costs are attributed. (Findings 165-68)

Although FAR 31.205-33, PROFESSIONAL AND CONSULTANT SERVICES COSTS provides that specialized business expenses including legal fees are allowable, there are limits on a contractor's ability to recover these expenditures; "allowability and entitlement to recover" are not necessarily the same thing. Legal fees cannot be recovered if these were incurred for the purpose of prosecuting or defending against claims or appeals against the Federal government. FAR 31.205-47, COSTS RELATED TO LEGAL AND OTHER PROCEEDINGS. We determine which of the following distinct categories these costs fall into: performance of a contract, administration of a contract, or prosecution of a CDA claim. *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1549 (Fed. Cir. 1995), *overruled in part on other grounds*, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579 (Fed. Cir. 1995) (*en banc*).

We hold that Aerojet's REA was not prepared to further either contract administration or performance, as the work had been completed by the time the request was submitted (findings 165-71). Further, the very close similarity of the REA to the claim is persuasive that Aerojet "recorded its efforts for the purpose of documenting the claim it intended to submit." *Defense Supply Systems, Inc*., ASBCA No. 54494, 05-2 BCA ¶ 33,031. This reflects that appellant had by the time of its REA then adopted and later maintained a litigation stance. "[C]osts incurred before the filing of a CDA claim are not automatically allowable and any presumption must yield to a consideration of the particular facts and circumstances involved." *Grumman Aerospace Corp. (on behalf of Rohr Corp.)*, ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,674, *aff'd,* 34 Fed. Appx. 710 (Fed. Cir. 2002). Aerojet failed to prove that it is entitled to recover any of the costs alleged for preparation of its request for equitable adjustment, and we deny this portion of the claim.

CONCLUSION

We have considered all arguments advanced by Aerojet, and find no merit to any part of its claim. Aerojet failed to prove that the parties entered into (or that the government otherwise consented to or ratified) an agreement in accordance with the contractor's 17 September 1999 white board terms. The government never attempted to circumvent any obligation under the pretext of inadequate availability of funds. The contractor cannot recover closeout costs for moving the Alliant production line from

Minnesota to Aerojet's facility in California, as this was neither done with the government's knowledge or direction, and Aerojet has not proven that the government constructively changed the contract to require this work. Appellant cannot recover its REA preparation costs, as that request was prepared to establish Aerojet's litigation position. The appeal is denied in its entirety.

Dated: 22 July 2010

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54774, Appeal of Northrop Grumman Systems Corporation Space Systems Division, rendered in conformance with the Board's Charter.

Dated:

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