ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Parsons-UXB Joint Venture	)	ASBCA No. 56481
	)	
Under Contract No. N62742-95-D-1369	)	

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

Appellant appeals from the deemed denial of its claim dated 27 November 2007 for reimbursement of increased state general excise taxes (GET) in the amount of $6,773,742. The government has moved for summary judgment upon the basis that recovery is barred by the Limitation of Cost and Limitation of Funds clauses. It argues that appellant's allegation in its claim that it gave notice of a cost overrun in June 2003 "inherently admits" that appellant had reason to foresee an overrun as of that date, when funding was still available, and that appellant had a contractual duty to protect itself by stopping work (gov't mot. at 8). Appellant opposes the motion, arguing that there was no cost overrun because the Limitation of Cost and Limitation of Funds clauses only limit costs exclusive of fee, that it had no reason to foresee an overrun as of June 2003, and that various other exceptions to the clauses such as consent and waiver are available to it. We decide the threshold issue of whether there was a cost overrun in favor of the government. We deny the motion because appellant has raised triable issues of fact as to

whether it had reason to foresee an overrun prior to completion of the contract. We do not reach the merits of appellant's other exceptions.[1]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

Background and Contract Provisions

1. Appellant is a joint venture (JV) of Parsons Infrastructure and Technology Group Inc. (Parsons) and UXB International, Inc. (UXB) (compl. and answer ¶ 1). Appellant seeks reimbursement of increased GET assessed against the JV and each of the partners.

2. On 29 July 1997, the Navy awarded appellant Contract No. N62742-95-D-1369, a cost plus award fee, indefinite-delivery, indefinite-quantity contract for the Unexploded Ordnance Clearance Project (the project) at Kaho'olawe Island Reserve, Hawaii. The contract provided for a base year from 29 July 1997 through 28 July 1998 and seven one year options, ending with a seventh option year from 29 July 2004 through 28 July 2005. The Navy exercised all of the options. Appellant completed performance on 1 October 2004 except for close-out tasks. (R4, tab 1 at 1, 4, 14, 82, 88, 136, tab 50 at 908, tab 291 at 7118; app. resp. at 4; gov't reply at 1 n.1)

3. The contract included Federal Acquisition Regulation (FAR) 52.216-7, ALLOWABLE COST AND PAYMENT (AUG 1996); FAR 52.232-20, LIMITATION OF COST (APR 1984) (the LOC clause); and FAR 52.232-22, LIMITATION OF FUNDS (APR 1984) (the LOF clause). The LOF clause provides:

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[1] The parties' filings on the motion which are cited in this decision are as follows, and abbreviated as indicated: Navy Motion for Summary Judgment (gov't mot.); Appellant's Opposition to Navy Motion for Summary Judgment (app. opp'n); Appellant's Response to the Navy's Proposed Findings of Fact in Support of the Navy Motion for Summary Judgment (app. resp.); Navy Reply in Support of Motion for Summary Judgment (gov't reply); Appellant's Surreply to Navy's Reply in Support of Navy's Motion for Summary Judgment (app. surreply); Appellant Response to Request for Clarification (app. resp. to Bd. request); Navy Response to Board's Letter of 17 December 2009 Regarding Navy Motion for Summary Judgment (gov't resp. to Bd. request); Appellant Reply to Navy Response to the Board's Request for Clarification (app. reply to gov't resp.); Appellant Supplemental Opposition to the Navy's Motion for Summary Judgment Based upon Newly Discovered Facts (app. supp. opp'n). We round all numbers to the nearest dollar.

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule....

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

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

....

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

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

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the

> Government...until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

(R4, tab 1 at 127, 129)

4. The contract provided that work was to be ordered by task orders. Clause G5 of the contract provided that the LOC and LOF clauses were "applicable to each task order individually." It continued that "'Task Order' is substituted for 'Schedule' wherever that word appears in the clauses." (R4, tab 1 at 88, 91)

5. At time of award, the total estimated cost plus award fee for the base year and seven option years was $280,000,000. The Schedule, Section B, identified the Contract Line Item Numbers (CLINs) and subCLINs applicable to each year. They included subCLINs for various costs and for two categories of award fee, designated as program management and technical services award fee. At time of award, the Schedule did not allocate the estimated cost plus award fee among the various subCLINs. (R4, tab 1 at 4-12)

6. A number of bilateral modifications revised Section B. Modification No. P00043 (Mod. P43) dated 29 October 2003 evidently was the last such modification. Mod. P43 increased the total estimated cost plus award fee to $355,000,000 and increased estimated cost plus award fee for the sixth and seventh option years to $69,168,000 and $10,000,000 respectively. Mod. P43 allocated those amounts as follows. For the sixth option year, the estimated cost was $62,251,200, the program management/technical award fee was $5,533,440, and the overall management award fee was $1,383,360, totaling $69,168,000. For the seventh option year, the estimated cost was $9,000,000, the program management/technical award fee was $800,000, and the overall management award fee was $200,000, totaling $10,000,000. (R4, tab 44; app. resp. to Bd. request, ex. A)

7. The contract did not include accounting and appropriation (funding) data. Rather, it stated that funding data would be indicated on each task order. The actual total estimated cost and funding for the contract, therefore, were aggregates of the estimated cost and funding for the individual task orders. (R4, tab 1 at 1; *see, e.g.*, gov't mot., ex. 1)

8. The Navy issued task orders numbered from 0001 through 0075 with certain skipped numbers (gov't resp. to Bd. request, ex. 3). Those task orders as definitized

provided for an express allocation of fund allotment between costs and fees. For example, the Navy issued Task Order No. 0001 (TO 1) as an undefinitized task order in a not to exceed amount of $30,000. (R4, tab 61 at 1288-89) Bilateral Modification No. 1 (Mod. 1) to the task order dated 19 September 1997 stated the total estimated cost and award fee for the task order was as follows:

0001	Program Management Office		
0001AA	Est. Recurring PMO Cost		
0001AB	Est. Recurring PMO Non-Fee Bearing Travel cost		
0001AC	Est. PMO Other Non-Fee Bearing Cost		$ 38,547.00
0001AD	Est. Non-Recurring PMO Cost		$ 74,650.00
0001AE	Est. Non-Recurring PMO Non-Fee Bearing Relocation Cost		
0001AF	Maximum Award Fee Pool		$ 4,651.00
	Program Management/Services	$4,119.00	
	Overall Management	$ 532.00	
	TOTAL COST-PLUS-AWARD-FEE		$117,848.00

Mod. 1 allocated the funding in accordance with the total estimated cost and award fee:

> The total funded amount for this task order is based on the negotiated amount less $30,000.00 in costs awarded under Task Order No. 0001:
>
> | | |
> |---|---|
> | Estimated Costs | $113,197.00 |
> | Maximum Award Fee | $ 4,651.00 |
> | TOTAL COST-PLUS-AWARD-FEE | $117,848.00 |
> | LESS FUNDS OBLIGATED UNDER [TO 1] | $ 30,000.00 |
> | TOTAL FUNDED COST-PLUS-AWARD FEE | $ 87,848.00 |

(*Id.* at 1293-95) The subsequent modifications to TO 1 were consistent with Mod. 1 in expressly allocating funds between costs and fees. Bilateral Modification No. 2 dated 26 September 2000 deobligated unearned award fee of $297. Bilateral Modification No. 3 dated 23 July 2004 deobligated excess funds, resulting in "Estimated Cost w/GET" of $106,377, program management office/technical award fee of $3,839 and overall management award fee of $491. (*Id.* at 1300, 1302)

Imposition of Additional GET by the State of Hawaii and Claim

9. The State of Hawaii ("the State") imposes GET on all gross revenues derived from business activity in Hawaii. The GET allows for certain deductions and exceptions, including deductions for qualifying subcontractors. (R4, tab 291 at 7099)

10. According to appellant, the dispute which led to additional tax payments concerned two fundamental issues: (1) the JV's GET liability relating to reductions in revenues subject to GET for amounts paid to subcontractors during performance; and (2) Parsons' and UXB's liability relating to whether they were considered subcontractors and subject to GET and whether UXB had liability for work not performed in Hawaii (R4, tab 291 at 7099). The first issue arose in 1998 (*id.*). The second issue, which was more significant financially, arose in May 2003 (SOF ¶ 17).

11. Following contract award, appellant worked with the state tax department to determine how GET on the contract revenues was to be calculated. By date of 22 April 1998, a state tax auditor confirmed in writing to appellant's Mr. Gregory Ahlstrom that the JV was required to file its own GET return. On 4 May 1998, the auditor also confirmed that the partners could exclude reporting the gross receipts derived from the JV from each of their respective GET returns since the JV should file its own return. (R4, tabs 138, 139) Mr. Ahlstrom was appellant's finance manager at the time. During close-out of the contract he served as program manager (*see, e.g.*, R4, tab 49).

12. In November 1998, the State assessed the JV for additional GET of $24,394 for July 1998 because certain subcontractor effort allegedly did not qualify for a construction exemption (SOF ¶ 10, issue 1) (R4, tabs 142, 143 at 6291).

13. As recognized by the Navy, the resolution of whether appellant was liable for additional GET potentially affected other cost-type contracts being performed for the Navy in Hawaii (R4, tab 142).

14. On 14 June 2000, after consultation with the Navy, appellant filed suit in the Tax Appeal Court of the State of Hawaii contesting the November 1998 assessment (R4, tab 143; *see also* compl. ¶ 20).

15. A Navy memorandum for the file dated 11 August 2000 noted that the contracting officer had decided to approve additional payments for GET on several other contracts and that, if appellant's appeal was successful, those contractors might be advised to file amended state returns seeking refunds (R4, tab 148 at 6301).

16. On 15 January 2002, the contracting officer and other Navy representatives met with Mr. Ahlstrom to review the status of the GET appeal. According to the meeting minutes, "[t]he Navy Program Manager has been aware of the potential additional tax liability, and has programmed contingency funds accordingly.... To date the total amount of funds left on contract...as a tax reserve is approximately $500,000." (R4, tab 152 at 6321)

17. On 9 May 2003, Mr. Ahlstrom reported to the contracting officer that "contrary to written direction from the Department itself" (presumably the 4 May 1998 auditor's letter cited above, SOF ¶ 11), the State had assessed partner UXB with GET on its share of the JV distributions, and partner Parsons had been advised of an audit (SOF ¶ 10, issue 2) (R4, tab 160).

18. On 13 June 2003, Mr. Ahlstrom forwarded to the contracting officer a copy of a proposed settlement of the tax issues with the State. The offer outlined a methodology for resolving the tax issues and did not quantify the amount of the settlement. Mr. Ahlstrom estimated in his forwarding letter that, based upon total estimated revenue of $320,000,000, GET liability if the State accepted the offer would be approximately $8,400,000. GET liability if the JV lost in the courts on the subcontractor exemption issue would be approximately $10,900,000. GET liability if it lost on both that issue and the issue of whether the partners were liable for taxes on JV distributions would be approximately $15,900,000. All of these amount would be reduced by approximately $7,900,000, which was the amount of GET that the Navy had paid the JV through April 2003. (R4, tab 162 at 6356)

19. On 20 June 2003, the contracting officer approved submission of the proposed settlement to the State. The contracting officer required appellant to seek and receive approval from him prior to finalization of any settlement with the State. On that same day, appellant forwarded the proposed settlement to the State. (R4, tabs 163, 164)

20. On 19 August 2003, the contracting officer asked appellant for information about the possible cost impact to the contract of the GET dispute. He stated that he understood that, depending on different scenarios, there were potential impacts of $8,400,000, $10,900,000 and $15,900,000. On 25 August 2003, appellant replied that the stated impacts were "still good estimates. However, there are countless combinations of outcomes based on final settlement. These three bracket the possible outcomes." (R4, tabs 168, 170 at 6393)

21. On 29 October 2003, appellant quantified its June 2003 settlement offer to the State at $922,051 through 31 December 2002 (this amount was to be added to GET

amounts which had already been paid) (R4, tab 177). As appellant told the contracting officer, "[o]bviously, this proposal is the best case" (R4, tab 179).

22. On 12 January 2004, a Navy briefing on funding to Admiral McCullough, who had Command responsibility for the project, indicated that:

> • Estimated funds remaining w/final contract pricing: $7 - $10 MIL
>
> *Note:
> - General Excise Tax cost impact: Issue still pending
> - Budgeted $9 MIL
> - Worst case $16.5 MIL

(App. supp. opp'n, ex. A at 168723)

23. In February 2004, the State rejected the 29 October 2003 settlement offer and countered with an offer of $3,165,305 through 31 December 2002 (R4, tab 184).

24. On 17 May 2004, appellant offered to settle all of the GET disputes for $1,400,000 through completion of the contract, which would have resulted in a total payment of GET of $9,564,252. This amount apparently was within contract funding as of that date. The State turned down this offer at the end of May and countered with an offer of $5,223,488. The State's offer would not have settled the issue of the partners' liability for GET. (R4, tabs 196, 200 (GET billings), 201 at 6498, 202; app. surreply at 3)

25. On 7 June 2004, Admiral McCullough wrote the governor of Hawaii concerning the GET on appellant's contract:

> Because the Navy utilized a cost plus type contract, the expenses borne by the contractor, including properly assessed taxes, are in actuality paid by the Navy. The contractor has proposed a total State general excise tax payment of more than $9.5M, which appears to be fair and equitable, yet the Department of Taxation appears to be seeking more than twice that ($19.1M), not including penalties and interest. I find this to be troubling as I hope you will, and respectfully seek your intervention in the matter.

(App. supp. opp'n, ex. B at 2184) The governor replied that the State would "work towards a solution that is equitable for all involved" (*id.*, ex. C).

26. Between July 2004 and August 31, 2007, the parties closed out approximately 54 of the contract's 67 task orders. During the interim closeout process, the Navy deobligated "unused" funds from each closed out task order. (App. resp. to Bd. request at 5 and ex. B)

27. On 6 November 2004, after performance of the contract was complete, appellant's tax counsel recommended to appellant that it accept a settlement offer from the State of $6,700,003 in additional GET. The contracting officer wrote Mr. Ahlstrom on 12 November 2004 that the Navy would support a GET settlement within the funds available, but that the offer of $6,700,003 exceeded funds remaining available for the project. (R4, tab 220 at 6624, tab 223 at 6631) Appellant did not accept the State's offer.

28. On 9 May 2007, the JV and the State settled the State's claims against the JV for additional GET for the amount of $1,700,000. On 13 July 2007, partner Parsons and the State settled the State's claims against Parsons for additional GET for the amount of $2,014,800. On 9 April 2007, the State assessed partner UXB for additional GET of $3,632,980. (R4, tab 275 at 6898, tab 279 at 6926, tab 285 at 7054-73)

29. As of 31 May 2007, according to appellant's program manager, there was $9,900,000 available in the contract budget for GET. The JV's total GET liability as a result of the settlement was $10,200,000, meaning that according to appellant there was a shortfall of $300,000 in the budget. In addition, the contract budget apparently did not include any monies for amounts to be paid by partners Parsons and UXB separately. (R4, tab 276)

30. On 31 August 2007, appellant submitted revised Voucher No. 107R (invoice 107R), seeking payment of $6,594,214 in additional GET costs (R4, tab 285).

31. On 7 September 2007, the contracting officer rejected invoice 107R because appellant was "invoicing for added contract costs not currently in place on the contract" (R4, tab 286 at 7092).

32. On 27 November 2007 appellant submitted its certified claim in the amount of $6,773,742. The claim consists of $6,594,214 as previously invoiced plus additional costs. (R4, tab 291 at 7103)

33. By letter dated 21 July 2008, appellant appealed from the deemed denial of the claim. The appeal was docketed as ASBCA No. 56481.

Status of Cost and Funding

34. Beginning in April 2000 appellant provided detailed monthly Contract Management Status Reports (CMSRs). The CMSRs included Contract Cost Summaries (CCSs) that informed the Navy of the contract cost and funding status and identified the month when individual task orders were expected to reach or had reached 75% of the funding for the task order. The CCSs included a column for estimated cost at completion (EAC). Two other columns, "Percent Complete Financial (EAC)" and "Budget Variance Dollars," depend upon the EAC. Insofar as the record reflects, prior to the submission of Invoice 107R, appellant did not adjust the EAC to include the costs at issue in this appeal. (Gov't mot. at 4, ¶ 5 and ex. 1; app. resp. at 4)

35. The table below sets forth extracts from the CCS for 27 June 2003 (Report No. 74), included in exhibit 1 to the motion. We have omitted columns which described the subject matter of the task order, the number of the most recent modification, and the percentage of physical completion (and corresponding legend notes), and we have not listed all of the task orders. This CCS did not include entries for award fee funded or billed. The table shows the total "Negotiated Budget (LOC)" was $304,211,739, the total funding, "COST ONLY," was $276,693,705, appellant had invoiced $267,398,024 in costs, and the EAC was $304,170,797.

Contract Cost Summary
Report No. 74
June 27, 2003

Contract Task Order	Negotiated Budget (LOC)	Total Funding (LOF) COST ONLY	Project Invoiced To Date (ACWP)	Percent Complete Financial (Funded)	Percent Complete Financial (EAC)	Estimate At Completion (EAC)	Budget Variance Dollars	Budget Variance Percent	Month Exceed 75%
0001	$113,197	$113,197	$106,240	93.9%	93.9%	$113,197	$0	0.00%	Inactive
0002	$5,092,622	$5,092,622	$5,003,288	98.2%	98.2%	$5,092,622	$0	0.00%	Inactive
....	....	....	....	....	....	....	...	....	....
0068***	$4,668,001	$4,576,861	$3,927,041	85.8%	84.1%	$4,668,001	$0	0.00%	May 03
0069***	$17,932,688	$9,827,843	$9,815,407	99.9%	54.7%	$17,932,688	$0	0.00%	May 03
Total	$304,211,739	$276,693,705	$267,398,024	96.6%	87.9%	$304,170,797	-$40,942	-0.01%	

*** These task orders are incrementally funded. These task orders have reached the 75% Limitation of Funds. These task orders require additional incremental funding.

Legends: Excludes Award Fee[:] Negotiated Budget (LOC) = Negotiated Budget + Funded Trends + Approved C.P.

Total Funding (LOF) = Funded Amount of Costs, Does not include Award Fee

Project Invoiced T.D. (ACWP [Actual Cost of Work Performed]) = Cumm. Invoiced Amount thru Period Ending

Percent Complete: Financial = Invoiced T.D. divided by Total Funding (LOF) and by EAC

Estimate at Complete = Negotiated Budget + Pending Change Proposals

Budget Variance: Dollars = EAC Minus Negotiated Budget

Budget Variance: Percent = Budget Variance $ divided by Funded Amount (LOF)

Month Exceed 75% = Month that exceeds 75% of Funded Amount (LOF)

36. The CCS for 30 April 2004 (Report No. 85) includes, in addition to the columns in the CCS extracted above in SOF ¶ 35, columns for "Award Fee Funded" and "Award Fee Billed." As of that report, the total "Negotiated Budget (LOC)" had increased to $331,184,509, total funding, "COST ONLY," was $324,010,843, award fee funded was $12,493,109, appellant had invoiced $321,126,043 in costs, award fee billed was $9,563,407, and the EAC was $334,757,175. (App. supp. R4, tab 419 at 7157)

37. The CCS for 25 June 2004 (Report No. 88) shows the total "Negotiated Budget (LOC)" had increased to $333,608,281, total funding (LOF), "COST ONLY," was $331,275,084, appellant had invoiced $328,120,895, and the EAC was $334,322,228. These amounts excluded award fee. (App. supp. R4, tab 425 at 7575)

38. The Board requested that the parties identify the estimated cost specified in the Schedule as of 31 August 2007, when appellant submitted invoice 107R. According to the government, based on the aggregate of the TOs, estimated cost was $333,569,287 and cost funding was $331,518,861 (gov't resp. to Bd. request, ex. 2, second page). Appellant replied that Mod. P43 established a Cost Plus Award Fee ceiling of $355,000,000 and that the entire ceiling applied to costs (*see* SOF ¶ 6). It also stated that, as of 31 August 2007, "the Navy had allotted, in the aggregate to all TOs: (a) costs totaling approximately $331.6 million; and (b) fee totaling approximately $12.1 million." These amounts total approximately $343.7 million. (App. resp. to Bd. request at 3)

39. Prior to submission of invoice 107R on 31 August 2007, appellant had invoiced $330,867,605 in contract costs. Adding the amount of invoice 107R ($6,594,214), appellant had invoiced $337,461,819 in contract costs as of that date. (App. opp'n at 8; *cf.* R4, tab 285 at 7035, indicating a total of $337,995,213)

40. We conclude from the foregoing SOFs (¶¶ 38, 39), that invoice 107R dated 31 August 2007 when added to prior invoices on the one hand exceeded the funding allotted to costs in the aggregate for all TOs (approximately $331.6 million using appellant's number) and on the other hand was less than the funding allotted for costs and fee on the same basis (approximately $343.7 million) (*see* app. resp. to Bd. request at 3-4; gov't resp. to Bd. request at 4).[2]

[2] Appellant maintains that the funding allotted to costs should be increased by amounts which were deobligated during close-out of some of the task orders (app. reply to gov't resp. at 2). It also maintains that "the Navy increased the contract's cost ceiling by consenting to any alleged overrun" (*id.* at 2-3). We do not decide those questions in this opinion.

Allegations Relating to Notice of the Overrun

41. The government states as an undisputed fact that:

> Appellant claims that it provided the Contracting Officer with all required notices regarding the claimed GET costs for both the JV and the partners by June 2003.... [C]laim p. 3: "As with the JV [tax] liability issue, the JV kept the Navy apprised at every stage of the dispute and negotiations with the State concerning the Partners potential GET liability...offered the Navy the opportunity to acknowledge responsibility for reimbursement...The Navy refused..."; also....: "JV met its LOC notice requirement of informing the CO in writing of pending overruns"....

(Gov't mot. at 3) Appellant responds:

> The JV does not dispute that it alleges that it provided notice to the Navy of the State of Hawaii's assessment of GET against the JV and then against the JV Partners. Compl. ¶¶ 20, 24, 26. The JV does not dispute that it alleges that it provided notice to the Navy that whatever costs resulted from the State's GET assessments would be allowable contract costs. Compl. ¶ 27. The outcome of the GET dispute, however, was indeterminate prior to its 2007 resolution. *See, e.g.*, R4, Tab 170 (JV informed the Navy that the GET dispute could result in "countless combinations of outcomes based on final settlement" [SOF ¶ 20]).

(App. resp. at 3)

DECISION

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A material fact is one which may affect the outcome of the case. A tribunal must take care in each instance "to draw all reasonable inferences against the party whose motion is under consideration." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As we view the motion, there are two principal issues to be decided. First, has the government established, drawing all reasonable inferences against it as the movant, that

there was a cost overrun on the contract? Second, if so, has appellant established that there are triable issues of fact on whether it had reason to foresee as of June 2003 or thereafter that there would be a cost overrun? We analyze these issues under the LOF clause rather than the LOC clause because funding appears to have been less than the total estimated cost (SOF ¶ 38).

1. Was there a cost overrun?

In its motion, the government asserted that invoice 107R presented costs in excess of the contract funding and budget (gov't mot. at 5, ¶ 10). In its opposition, appellant argued:

> [T]he Navy's Motion fails to establish the absence of any genuine dispute of material fact. The Navy's Motion is based entirely upon the existence of a cost overrun, but the Navy has not established an undisputed cost overrun. Indeed, the record shows that the JV's contract costs do not exceed the contract cost ceiling on which the Navy relies to justify its refusal to pay Revised Invoice No. 107.

(App. opp'n at 3) Appellant pointed out that the government had referred to a ceiling of $343.7 million in its motion and that its costs were less than $343.7 million. In its reply, the government explained that of $343.7 million in total funding, $12.5 million was allocated to award fees (as of 30 April 2004) and was not available to fund costs (gov't reply at 5-6, *see* SOF ¶ 36). Appellant continues to maintain, however, that the total funding including that for award fee is available to fund its costs (*see, e.g.,* app. surreply at 2).

We concluded above that invoice 107R dated 31 August 2007 when added to prior invoices exceeded the funding allotted to costs in the aggregate for all task orders at that time. On the other hand, the invoice when added to prior invoices totaled an amount less than the funding allotted for costs and award fee in the aggregate for all task orders. (SOF ¶ 40) Accordingly, we must decide whether the relevant number for comparison under the LOF clause is the funding for costs or the funding for costs plus award fee.

The LOF clause provides:

> (b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered,...and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds

> incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(SOF ¶ 3)

Textron Defense Systems v. Widnall, 143 F.3d 1465 (Fed. Cir. 1998), is the controlling authority on the interpretation of this language. In *Textron*, the Court construed DAR 7-402.2(c), LIMITATION OF FUNDS (1966 OCT), a predecessor to the current LOF clause. The pertinent language was essentially identical. On the relevant date, total funding was $113,479,301 including award fee. Each award fee allotment was made by a contract modification which stated that it was issued pursuant to the Award Fee clause of the contract. All other allotments had been made pursuant to the LOF clause or the Changes clause. The contractor argued, as does appellant here, that it was entitled to recover costs under the LOF clause up to the total amount allotted to the contract including award fee. 143 F.3d at 1466-68.

The Court rejected the contractor's argument. After quoting the LOF clause, the Court stated:

> The dispositive question then is what is the "total amount actually allotted to the contract." That answer is found within the four corners of the LOF clause: "It is contemplated that from time to time the additional funds will be allotted to this contract up to the *full estimated cost set forth in the schedule, exclusive of any fee.*" (Emphasis added.) We think it clear that the "total amount actually allotted to the contract" does not include "any fee," because the main purpose of the LOF clause is to prevent the contractors "costs" from exceeding the "amount allotted to the contract." In this case, the payment schedule specifically provided for an express allocation of fund allotment between costs and fees. Given this express allocation, Textron's argument that the money allocated for payment of fees should be available to pay costs is simply wrong.

Textron, 143 F.3d at 1469.

Similarly here, appellant's argument is "simply wrong." Funding for the contract was provided by task order. The actual total funding for the contract was that for the task orders in the aggregate. The task orders provided for an express allocation of fund allotment between costs and fees. Thus, for example, TO 1 allotted funding between estimated cost and two categories of award fee. When funding was deobligated, the remaining funds continued to be allotted between estimated cost and two categories of award fee. Consistent with this allocation, appellant's CCS for 30 April 2004, for example, included separate columns for award fee funded and award fee billed. (SOF ¶¶ 7, 8, 36)

Appellant attempts to distinguish *Textron*. It states that *Textron* "confirms that when an LOC/LOF clause applies and specifies a cost ceiling and a separate fee ceiling, amounts relating to fee may not be used to fund costs." It continues that "[h]ere, the JV, in responding to the Navy's assertion that JV costs exceed a $343.7 million Contract cost ceiling, established that the JV's costs, exclusive of fee, do not exceed the $343.7 million LOC/LOF ceiling upon which the Navy's Motion relies." (App. resp. to Bd. request at 6-7) In its reply to appellant's opposition to the motion, however, the government explained that of $343.7 million in total funding, $12.5 million was allocated to award fees (as of 30 April 2004) and was not available to fund costs (gov't reply at 5-6; SOF ¶ 36).

Appellant also argues, citing Mod. P43, that "the Contract Schedule provides for a limitation of $355 million without differentiating between cost and fee," and that:

> [W]here a contractual limitation does not differentiate between cost and fee, the entire amount specified in the contract schedule is available to reimburse contract costs. The Navy fails, however, to establish that the Contract cost limitation is other than the $355 million set forth in the Contract Schedule, and the Navy's Motion must, therefore, be denied.

(App. reply to gov't resp. at 4) Mod. P43 does, however, differentiate between cost and fee. It increased the estimated cost plus award fee for the sixth and seventh option years to $69,168,000 and $10,000,000 respectively resulting in a new total for the contract of $355,000,000. Mod. P43 differentiated between cost and fee by allocating the increased amounts among cost and two types of award fee. For option year six, the estimated cost was $62,251,200, the program management/technical award fee was $5,533,440, and the overall management award fee was $1,383,360, totaling $69,168,000. For option year seven, the estimated cost was $9,000,000, the program management/technical award fee was $800,000, and the overall management award fee was $200,000, totaling $10,000,000. (SOF ¶ 6) While Mod. P43 does not address the allocation of funding for

the base or prior option years, presumably that is because the funding for those periods had already been allocated in accordance with previously-issued task orders.

Appellant also cites *Allied-Signal Aerospace Co.*, ASBCA No. 46890, 95-1 BCA ¶ 27,462. In that case the Board concluded that under the LOF clause the allotted funds covered only cost and not fee. In *Textron*, the Court distinguished *Allied-Signal* upon the ground that in *Textron* "the payment schedule...provided for an express allocation of fund allotment between costs and fees." *Textron*, 143 F.3d at 1469. We have similarly concluded that the task orders here, which, in the aggregate, allotted the funding for the contract, also provided for an express allocation of fund allotment between costs and fees (SOF ¶¶ 7, 8).

We conclude, therefore, that as of 31 August 2007 when appellant submitted invoice 107R for additional GET cost, there was a cost overrun on the contract. That invoice when added to prior invoices exceeded the total funding actually allotted for costs as of that date.

2. Did appellant have reason to foresee the overrun?

The government argues that to be paid for a cost overrun, a contractor must prove that it had no reason to foresee or believe during contract performance that a cost overrun would occur. It continues that:

> The allegation that the JV gave notice of the overrun in June 2003 inherently admits that the JV had reason to foresee the overrun. About $9 million of funding remained available in June 2003 when appellant allegedly notified the contracting officer of the overrun, an amount greater [than] the $6.6 million overrun invoiced four years later. Moreover over $65 million of additional funding was added to the contract after June 2003. Rather than overrun the cost ceiling, appellant had a contractual duty to protect itself by stopping work.

(Gov't mot. at 8-9) (citations to the government's statement of facts omitted) The government assumes for purposes of its motion that appellant gave proper notice of a possible overrun and that the contract terms required the cost ceilings to be managed in the aggregate instead of by task order (gov't mot. at 3, ¶¶ 3, 4).

Appellant responds that there are triable issues of fact as to whether it had reason to foresee an overrun of additional GET as of June 2003 or thereafter. It points out that the JV notified the Navy of costs reaching the 75% level as part of the CMSRs, but not of an overrun in connection with GET. According to appellant, "[t]his notice [through the

CMSRs] demonstrates compliance with the LOC, but does not support the Navy's assertion that the overrun [relating to GET] was foreseeable." (App. opp'n at 13)

Appellant also argues:

> The GET costs at issue were the subject of litigation between the JV and the State of Hawaii until 2007, nearly three years after contract performance had ended in October 2004. An overrun that results from litigation is unforeseeable. Certainly, when litigation runs beyond the end of contract performance, the results are unforeseeable.
>
> ....
>
> The record demonstrates that had the JV prevailed in its dispute with Hawaii, no cost overrun would have occurred. In fact, the JV repeatedly proposed settlement with Hawaii for amounts within contract funding [SOF ¶¶ 18, 19, 21, 24]. Accordingly, the foreseeability of the alleged overrun is a material fact in genuine dispute, precluding summary judgment.

(App. surreply at 3) (citations omitted)

Moshman Associates, Inc., ASBCA No. 52868, 02-1 BCA ¶ 31,852 at 157,410, sets forth the applicable principles:

> The issue in such [foreseeability] cases, where there is a limitation of costs or LOF clause,...is whether the overrun was reasonably foreseeable. The burden of proving that a cost overrun was not reasonably foreseeable rests on appellant. "However, in carrying its burden of proof, the contractor must only prove that it could not have reasonably foreseen the cost overrun during the time of performance of the contract." *RMI, Inc. v. United States*, 800 F.2d 246, 248 (Fed. Cir. 1986).... The essential test is whether the contractor "knew or should have known," prior to the end of contract performance that there would be a total cost overrun....

We do not find the government's argument that appellant has "inherently" admitted that it had reason to foresee an overrun as of June 2003, persuasive. The

undisputed facts show that appellant submitted monthly CMSRs. The government has attached the CMSR for the period ending June 2003 to its motion as exhibit 1. The CMSRs included CSSs which provided cost and funding information by task order and in the aggregate. For example, they included total "Negotiated Budget (LOC)," "Total Funding (LOF) (COST ONLY)," and "Estimated At Completion (EAC)." Insofar as the record reflects, however, they did not include an amount for the additional GET sought by the State, which is the subject of this appeal. In other words, the CMSRs themselves, and in particular exhibit 1 to the government's motion, do not establish as an undisputed fact that appellant foresaw that it would someday incur those costs in amounts that would exceed funding limits. (SOF ¶¶ 34, 35)

In evaluating whether appellant has raised a triable issue of fact on foreseeability, we note that in June 2003, Mr. Ahlstrom provided the contracting officer with an estimate of GET liability ranging from $8,400,000 to $15,900,000 depending upon different scenarios. All of these amounts needed to be reduced by approximately $7,900,000, which was the amount of GET that the Navy had paid appellant through April 2003, and assumed project revenues of $320,000,000. (SOF ¶ 18) In August 2003, appellant confirmed that these estimates were "still good estimates. However, there are countless combinations of outcomes based on final settlement. These three bracket the possible outcomes." (SOF ¶ 20)

While the record does not make clear what the contract budget for GET was as of June 2003, a May 2004 settlement offer to the State which would have resulted in a total payment of GET of $9,564,252 apparently was within funding (SOF ¶ 24). Presumably the high end of the estimated liability as of June 2003 ($15,900,000) was not within funding. Considering that the State had reversed the earlier position of the auditor on partner liability in or around May 2003, however, we think appellant has raised a triable issue of fact as to whether it had reason to foresee prior to completion of the contract that the GET cost to be incurred on the contract would be increased by an amount which was outside funding. A trial is required to determine if and/or when appellant had reason to foresee it would be liable for GET beyond the existing funding, as well as to address appellant's other contentions such as the availability to it of various other exceptions to the LOC and LOF clauses including consent and waiver.

CONCLUSION

The government's motion for summary judgment is denied.

Dated: 1 February 2011

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

I concur

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

I concur

JACK DELMAN
Administrative Judge
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. 56481, Appeal of Parsons-UXB Joint Venture, rendered in conformance with the Board's Charter.

Dated:

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