ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
PHI Applied Physical Sciences, Inc.	)	ASBCA Nos. 56581, 58038
	)	
Under Contract No. W31P4Q-05-C-R188	)	

APPEARANCE FOR THE APPELLANT: Peter C. Holzer, Esq.
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APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These appeals involve invoices for cost overruns totaling $1,276,904 allegedly incurred in performance of the referenced contract. The government contends that appellant failed to give notice of the alleged cost overruns in accordance with the contract's Limitation of Cost clause and that the contractor was never issued the requisite notice by the contracting officer (CO) that the estimated costs of the contract were increased. Briefing of the appeals was concluded on 1 April 2013 with the receipt of appellant's reply brief. We conclude that the appeals are properly within our jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. We sustain ASBCA No. 56581 in part in the amount of $1,546 (the unpaid contract balance) but otherwise deny the appeal. ASBCA No. 58038 is denied.

FINDINGS OF FACT

1. The referenced cost-plus-fixed-fee (CPFF) contract was awarded to PHI Applied Physical Sciences, Inc. (PHI) by the U.S. Army Aviation & Missile Command, Redstone Arsenal, Alabama (Army) on 12 May 2005 to develop a miniature fluorometer for the Defense Research Projects Agency (DARPA) and demonstrate it at the DoD Small Business Innovation Research Program (SBIR) Phase II and Beyond Conference (the "DARPA conference") in San Diego, California, in July 2005. In addition, PHI was to submit to the Army a "Final Technical Report" pursuant to Section H-7 of the contract. The specified period of performance in Section F-5 was six months through 16 November 2005. (R4, tabs 1 at 1, 2, 4, 8, 11)

2. The total estimated cost of the contract was $37,730 with zero fixed fee (R4, tab 1 at 4). The contract incorporated FAR 52.232-20, LIMITATION OF COST (APR 1984) (hereinafter the LOC clause) which states in pertinent part:

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

the Contracting Officer (i) notifies the contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(*Id.* at 20)

3. Section B-2, ESTIMATED COST, FIXED FEE AND PAYMENT, of the contract stated:

In consideration for its undertakings under this Contract, the Government shall pay to the Contractor the cost thereof determined by the Contracting Officer (KO) to be allowable, subject to the Provisions of the clause entitled "Allowable Cost and Payment" (FAR 52.216-7) of the general Provisions of this Contract.

a. It is estimated that the total cost of the work required to be performed under this Contract is $37,730.00 (exclusive of fee).

b. For performance of the work required by this Contract, the Government will pay the Contractor a Fixed Fee in the amount of $0.00....

(R4, tab 1 at 4)

4. Section H-2, IMPORTANT NOTICE—INSTRUCTIONS BY CONTRACTING OFFICER (KO), stated:

> a. The Contractor will not accept any instructions issued by any person other than the Contracting Officer or the Contracting Officer's Representative (COR) when one is appointed. If a COR is appointed, the appointment will be done by letter to the COR with the scope of the COR's authority set forth in the appointment letter. A copy of the appointment letter will be furnished to the Contractor.
>
> b. No information other than that which may by contained in an authorized modification to the purchase instrument, duly issued by the Contracting Officer which may be received from any person employed by the U.S. Government or otherwise, will be considered as grounds for deviation from any stipulation of this purchase instrument or reference drawings and/or specifications.

(R4, tab 1 at 11)

5. Administrative Contracting Officer (ACO) functions for the contract were delegated by the Army to Defense Contract Management Agency (DCMA), Santa Ana, California, and PHI was instructed to send "All correspondence of an administrative nature" to the ACO with a copy to the Army (R4, tab 1 at 1, 10).

6. Section G-5 stated, "It is hereby directed that the Defense Contract Audit Agency (DCAA) review the Contractor's Direct/Indirect Rates and perform an Accounting System Review 30 days after Contract Award" (R4, tab 1 at 10). Hereinafter, Section G-5 of the contract is referred to as the DCAA Review clause.

7. With regard to the Final Technical Report, Section H-7 stated:

> [T]he Contractor agrees, notwithstanding any other Clauses or Provisions of this Contract, to furnish a Final Report as stipulated in the Contract Data Requirements List (CDRLs), identified in Section J to subject Contract, covering the work accomplished. It shall be the Contractor's responsibility to reserve a sufficient level of effort to complete the Final Report. The Contractor shall not be entitled to additional

funds beyond the Contract amount as a result of complying with this Provision.

(R4, tab 1 at 11-12)

8. The contract also incorporated by reference: FAR 52.215-2, AUDIT AND RECORDS-NEGOTIATION (JUN 1999) (Audit clause); FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002) (Allowable Cost clause); and, FAR 52.233-1, DISPUTES (JUL 2002).

9. The Audit clause states in pertinent part:

> (b) Examination of costs. If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.
>
> ....
>
> (f) *Availability.* The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract....

10. The Allowable Cost clause states in pertinent part:

> (a) *Invoicing.* (1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more

> often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) subpart 31.2 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.
>
> ....
>
> In the event that the Government requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the specified due date.
>
> ....
>
> (g) *Audit.* At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be-
>
> (1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or
>
> (2) Adjusted for prior overpayments underpayments.

11. Although the exact timing, methodology, addressees and circumstances of their transmission are unclear, as of 5 August 2005, appellant had submitted and DCAA had "processed" the contractor's Vouchers BVN0001 and BVN0002 [1] (Vouchers 1 and 2). Voucher 1 sought payment in the total amount of $26,077 for preparatory costs associated

[1] There is considerable confusion and inconsistency in the record regarding the numbering/identification and amounts of these vouchers. For consistency within this decision, the eight vouchers involved in this dispute have been designated BVN0001 through BVN0008 (or Vouchers 1 through 8). That numbering appears to be the predominant designation used by the parties for identification of appellant's vouchers considering the record as a whole.

with the DARPA conference, including materials/instrumentation and subcontractor expenses. The conference and demonstration were conducted on 15 July 2005 and Voucher 2 sought reimbursement for conference-related expenses in the total amount of $10,107. (R4, tabs 2, 4, 11)

12. As of 22 September 2005, both Vouchers 1 and 2, in the total amount of $36,184, had been approved for payment and paid by DFAS prior to verification and audit of the costs (R4, tab 2).

13. On 2 September 2005, the Administrative Contract Specialist (ACS) requested that DCAA Western Region, Santa Ana, California perform the post-award accounting system review specified in the DCAA Review clause (R4, tab 3 at 1). Following several email exchanges designed to gather background data, DCAA notified the ACS on 12 September 2005 that it would perform the review (*id.* at 4).

14. As contemplated by, and pursuant to, the Audit, Allowable Cost and DCAA Review clauses, a DCAA auditor made a field visit to appellant's home office on 22 September 2005 (R4, tab 3). Prior to her visit, the auditor advised appellant's Chief Technical Officer (CTO), Dr. Theodore Fay, *inter alia*, that the total amount billed under the contract should not exceed any contract ceiling amount (tr. 1/53, 96-97; app. supp. R4, tab 14 at 3). The auditor summarized the results of her visit in a 23 September 2005 email to the ACS as follows (R4, tab 3 at 7):

> Just need to let you know that PHI does not have [an accounting] system in place. I just met with them yesterday. The company has 3 direct people and 2 indirect people, and no experience with government contracting. They kept time sheets, but made no distinction between direct and indirect labor, had no idea how to set up their accounts, was not familiar with unallowable [cost], accrued labor but had not paid their employees (so there are no payroll records), did not keep track of their contract ceiling cost = 37K and did not segregate indirect expenses into logical groupings, such as Overhead and G&A. I had nothing to report back to you accounting and billing system wise except that they kept their records manually, on excel worksheets and folders. They just purchased peach tree [accounting software] but had not inputted their financial data into the system. There are indicators of financial distress.

> I need to coordinate with you to cancel the assignment. When the system is in place, which I do not know when, I can come back and test it.
>
> In the mean time, they need to get an amendment raising the ceiling of the contract. They claimed they incurred in excess of $300,000 to create this prototype. You may want to send an audit request for incurred costs to date only.
>
> The only thing I can do for you is verify the material and subcontract costs to invoices and payment. Please confirm with me. [Emphasis added]

15. The DCAA auditor sent an email dated 27 September 2005 to PHI advising them, *inter alia,* that she had confirmed with the CO that the government "has no funds set up to reimburse you for your development costs right now, may be another contract" (app. supp. R4, tab 19). The auditor further advised appellant that the CO requested only that the auditor verify PHI's material and subcontract costs and requested that PHI fax the invoices to her (*id.*).

16. On 28 September 2005, after discussion with the ACO, the auditor emailed the ACO as follows (R4, tab 3 at 8):

> As reported to you, the contractor has no accounting system in place. Per your directions, we will cancel the audit of their post award accounting system survey.
>
> Just to let you know that the contractor may not [sic] motivated to support my verification of material and subcontract costs to date, because they have been reimbursed by the government on public voucher 1 and 2 by $36,000. If they know that the government is not obligated to pay them in excess of the $37,000 ceiling cost, they may not provide me the support data or agree to meet with me anymore. Anyway, we have agreed that in case I can have access to their support data, I can provide you the results of my findings through memorandum in lieu of a formal audit report. Please let me know if you have any additional questions.

17. In a 3 October 2005 letter to the ACS and ACO, appellant's Chief Executive Officer (CEO), requested a no-cost extension of the performance period of the contract stating in pertinent part (R4, tab 4 at 1):

> We have successfully completed the exhibit of our product at the DOD Phase II and Beyond Conference in San Diego. There was general agreement at the conference that our prototype did operate successfully as a long-range explosive detector for nitrate explosives and as a medical laboratory instrument to detect biological chemicals.
>
> The purpose of the exhibit was to introduce our hardware prototype to potential industrial and government customers. We require ongoing industrial and government support to certify our product, as requested by the Army and DARPA, at the appropriate government facilities under both laboratory and field conditions. These arrangements are taking more time than expected, but progress toward the next step should be included in our report. An extension of the contract under the current cost allotment would enable us to complete these ongoing positive negotiations and our contract report. Please consider our request for a six month extension of the contract under the current allotment. Please send a copy of this letter to Mr. Marty Soprano at DARPA. [Emphasis added]

18. Also on 3 October 2005 and after receiving notice that DCAA had "verified" the $36,184 in costs set forth in appellant's Invoices 1 and 2, the ACO asked the ACS to draft "an admin mod changing the contract from CPFF to FFP by bilateral modification at agreed to price...of $36,184" (R4, tab 5 at 1).

19. On 13 October 2005, PHI's CTO, Dr. Theodore Fay, emailed the DARPA SBIR Project Manager and the ACS regarding the status of PHI's request for a no-cost extension (R4, tab 4 at 4). The email stated that PHI had "multiple potential licensing offers to reduce production costs. We want to...make sure they are mutually beneficial to all parties, including the original government sponsors, so as to document the intended contract results in our final report" (*id.*).

20. As of 21 October 2005, the DARPA SBIR Project Manager had determined not to endorse appellant's request for a no-cost extension of the contract (R4, tab 6 at 10), and described PHI's "claims that they actually incurred in excess of $300,000 to create the prototype" as "outlandish" (*id.*). As a response, the ACO again notified the ACS that,

"The contract needs to be modified to reflect a firm-fixed-price by bilateral agreement" (*id.*).

21. On 24 October 2005, a Mr. Bill Olson (apparently a government employee "working with PHI to help them commercialize their sensor") (R4, tab 5 at 6), sent an email to the DARPA SBIR Project Manager concerning Mr. Olson's meeting with the "PHI board" stating in part as follows (*id.* at 6-7):

> PHI did not spend an extra single cent on the contract doing technical work. Also, all the funds paid to PHI in the contract went to Talktronics and its suppliers.
>
> The problem has arisen because the DCAA is auditing PHI. Their reason was that the contract was CPFF and it was necessary to determine PHI's rate structure and other financial information pertinent to the contract. I believe that it is the contract type that has caused the problem.
>
> PHI was told that they had to go through with the audit and Ted has been working on it most of his time for the past three months, DCAA auditors have been to their home at least twice, each time for several hours. PHI was also told by the auditors that they had to keep track of all the time spent preparing to answer the auditors. It is a voucher for some of this time spent that was submitted – done as they were told -that has become the $300K issue.
>
> This audit is ongoing but I believe could have been avoided if another contracting vehicle had been used (e.g. FFP?)
>
> Again, PHI (Ted and Ann Fay) did not receive anything for their time on the technical effort.

22. On 25 October 2005, the DARPA SBIR Project Manager queried the DCAA Auditor and ACO regarding the "$300K issue." The DCAA auditor emailed her response stating in part (R4, tab 5 at 5-6):

> 3. We have started a preaward system survey at your request dated September 12, 2005, and upon entrance conference with the contractor on September 22, 2005, we have determined that the accounting system is not in place and

cancelled the audit accordingly. The total time expended for the entrance conference is probably 6 hours.

4. Prior to the entrance conference, I emailed the contractor some questions regarding their accounting system, so that the contractor can support my audit in an efficient manner. I had no idea that they did not have an accounting system.
5. To provide your office with support data for $36,184 claimed via a memorandum dated September 29, 2004, [sic] we coordinated with the contractor for an additional 2-3 hours to gather support data for the conference costs, including subcontract costs.
6. When I found out about the $37,730 contract ceiling, I told the contractor not to expend more time on setting up the accounting system, because the costs may not be reimbursed. The contractor has expressed their intention of setting up Peach Tree accounting during the entrance conference. I informed the contractor that the government is not liable to the contractor for any amount exceeding the contract ceiling, unless the contractor can obtain an amendment increasing the value of the contract.
7. We have limited prior experience with the contractor, except approving their public vouchers.
8. The sample timesheets the contractor provided me were support for the company's procedure to record labor effort, as part of my survey of the accounting system. At that time, I thought those hours were for technical effort incurred to put together their prototype. I told them to keep track of direct technical hours, in case they want to commercialize their product. Because the time sheets did not list the work performed, I did not know if the time was administrative (indirect) or technical (direct). Besides, there is no accounting system to verify the nature of the effort (direct or indirect).

23. The proposed bilateral modification converting the contract to a FFP contract in the total amount of $37,730 was forwarded to appellant on 3 November 2005 (R4, tab 6 at 1-9, 11).

24. On 7 November 2005 (R4, tab 6 at 12), appellant's Dr. Theodore Fay responded to the ACS as follows (*id.* at 13):

We have received your request to modify the PHI contract. Please be advised that Ms. Ann Fay, the company CEO, was released from the hospital on 4 November 2005. She has several ongoing health issues and is still recovering from a serious cardiac procedure that was performed last Monday. Due to her overall medical condition it is not advisable to present this proposal to her in detail, either today or for some time to come. Furthermore, a decision of the magnitude required cannot be made without approval by the company's Board of Directors.

We realize that your organization wishes to resolve this issue to the benefit of all parties; we share that goal. But any proposed solution must take into consideration our nation's security, as well as concepts of fundamental fairness. Please consider a request that you authorize prompt payment of vouchers 3 and 4. We are confident that, in exchange for such a demonstration of good faith by our government, our Board of Directors will agree not to submit additional vouchers for work that was performed under the above-referenced contract.

The DCAA ordered us stop technical work. In fact, such work was not possible for many months because of the oral and written auditing requirements imposed upon us by three government agencies under the terms of the CPFF contract. Such administrative work is normal for such contracts, but we have not been compensated for any of the additional work. All money received to date has been used to pay vendors and subcontractors.

After paying our current obligations, PHI intends to use any residual funds to construct a field-ready Explosives Detector to protect our soldiers from IEDs. We would like to complete our technical work and have our system ready for demonstration to the CENTCOM generals listed in the attached LA Times article. Please let us know when we can have one of our Board representatives meet to arrange a resolution of this dispute that is fair to all parties and also enhances our nation's security.

25. The contract expired on 16 November 2005 (e.g., app. supp. R4, tab 23 at 1). By email to PHI on 24 February 2006, a DARPA Technical Monitor (TM) stated "DARPA would like to know when the Final Report will be submitted. Additionally this report is needed to close out the contract." (App. supp. R4, tab 24 at 2)

26. There is no persuasive evidence that Vouchers 3 and 4 (referenced in the above 7 November 2005 letter from PHI) were received by the government prior to 14 July 2006 (R4, tab 8; app. supp. R4, tab 25). On that date, PHI's Final Report and the attached "final" Vouchers 3 and 4 were received by the DARPA TM who emailed the ACS on 18 July 2006 advising her of their receipt (R4, tab 7 at 5). PHI's 30 June 2006 cover letter was not designated a claim and simply requested DARPA to "Please remit payment." No certification of amounts sought in Vouchers 3 and 4 was provided by appellant. There is no argument by appellant that its 30 June 2006 letter and/or accompanying vouchers constituted a proper CDA claim.[2] (R4, tab 7 at 1)

27. Voucher 3, dated 31 August 2005 sought a total of $36,591.59 for "Overhead on Public Vouchers [1 and 2]" for the period 12 May 2005 (the date of contract award) through 31 August 2005. Although an indecipherable hand-written formula was included on the voucher, the precise details and methodology used by appellant to compute the amount sought is not explained and there is no further supporting data or evidence in the record. (App. supp. R4, tab 29 at 6)

28. Voucher 4, dated 21 September 2005, sought reimbursement in the total amount of $243,443.44 for "PAYROLL" ($121,040) and "OVERHEAD" ($122,403.44) allegedly incurred during the period 12 May 2005 through 21 September 2005. There is no further explanation or supporting data in the record elaborating on the amounts sought. (App. supp. R4, tab 29 at 7)

29. On 18 July 2006, the DARPA TM requested that appellant complete and return the requisite contract close out form (DD250) (app. supp. R4, tab 24 at 1).

30. In a memorandum dated 25 July 2006, the DARPA TM discussed the concurrent submission of the vouchers and Final Report. Noting that PHI had been previously paid $36,184, the memorandum stated in part (R4, tab 8):

> Second, on 22 September 2005, the Defense Contract Audit Agency (DCAA) met with PHI to review their accounting

[2] As noted below, appellant appealed from the deemed denial of its 31 July 2008 letter in September 2008 more than two years later. PHI does not contend that any earlier communication qualified as a CDA claim.

> system. The DCAA spent a total of 10 hours with PHI reviewing documents, billing records and their collection methods only to conclude that no accounting system was in place. The amount invoiced lacks support given the hours spent in conference with PHI and has no merit. Additionally, during the conference PHI expressed their intention of establishing Peach Tree© accounting. Given the dollar value of the contract, DCAA specifically told PHI not to expend any additional time setting up the accounting system because the costs may not be reimbursed. The DCAA emphasized that the Government is not liable to PHI for any expenses that exceed the contact ceiling, unless they could obtain an amendment increasing the value of the contract. No amendment was authorized.
>
> For these reasons, this office cannot recommend reimbursement of the costs claimed by PHI. This office does recommend that PHI claim the $1546.00 remaining on the contract.

31. Under a cover letter from its attorney dated 22 September 2006, appellant returned an executed DD250, along with Vouchers 1 to 5 to the DARPA TM. The cover letter stated that appellant "requests reimbursement for actual costs incurred" and that the DD250 "be given serious consideration." (App. supp. R4, tab 29 at 1)

32. Voucher 5, dated 22 September 2006, sought $40,000 for the "FINAL REPORT" and covered the period from contract award through 7 April 2006. No data or detailed explanation was submitted with the voucher supporting the costs. (App. supp. R4, tab 29 at 8) In addition to listing the amounts sought in Vouchers 3-5 above, the DD250 also listed a fourth item for reimbursement, "FIXED FEE," in the amount of $25,000. Thus, the sum total of the amounts listed in the DD250 was $345,035.03. (App. supp. R4, tab 29 at 2)

33. On 7 October and 6 December 2006, appellant's attorney sent an inquiry to the DARPA TM requesting the status of the government's processing of the DD250 (app. supp. R4, tabs 30, 32).

34. By letter dated 31 January 2007 to PHI's Ms. Ann Fay, the CO informed appellant that Vouchers 3 and 4 were not approved for payment (app. supp. R4, tab 34).

35. Approximately 18 months later on 31 July 2008, appellant faxed Voucher 6 (as well as an additional copy of Voucher 5) to the CO (app. supp. R4, tab 36 at 1).[3] Voucher 6, dated 23 June 2008, requested reimbursement of $47,378 for "OVERHEAD ON FINAL REPORT VOUCHER [5]" (R4, tab 16 at 3). Explanatory details, methodology and supporting data for the "OVERHEAD" computation are not in the record.

36. By letter to PHI dated 28 August 2008 in response to PHI's 31 July 2008 letter, the CO advised appellant that the remaining amount available for payment under the contract was $1,546 and encouraged appellant to submit an appropriate voucher in that amount which would be paid (R4, tab 17; app. supp. R4, tab 36). The record as a whole establishes that appellant incurred at least $1,546 in allowable unpaid costs in performance of the contract (*see* tr. 2/13-14, 100-02). However, the CO advised appellant that any amounts sought in excess of the $37,730 contract price were unallowable and not properly payable because appellant failed to comply with the notice provisions of the LOC clause. The letter was not designated a final decision by the CO. (App. supp. R4, tab 36; R4, tab 17)

37. Appellant filed an appeal from the CO's 28 August 2008 letter to the Board by letter dated 17 September 2008 (R4, tabs 17, 18), received by the Board on 29 September

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[3] The documentary evidence includes a letter from PHI dated 21 January 2008. That letter is ostensibly addressed to the ASBCA with a copy to the Army at Redstone Arsenal, Alabama. An accompanying return receipt indicates that it was received by the Army. However, there is no return receipt or other record that the ASBCA at any time received the letter prior to its inclusion in the Rule 4 file. The letter references two letters that were allegedly written by PHI to the CO on 7 December 2007 and 4 January 2008. The latter two letters are not in the record and there is no independent evidence of their contents. The letter refers to a "demand for payment" without further specificity. The amount sought by that demand is indeterminate, there are no supporting data or vouchers, and there is no evidence that a certification associated with the payment "demand," if necessary, was provided. The letter requests that the ASBCA "consider this letter to be our Notice of Appeal" from the Army's alleged failure to respond to the "claim." (R4, tab 12) There was no discussion of the letter or its possible jurisdictional significance at the hearing or in appellant's post-hearing briefs. Because of the absence of essential evidence regarding whether a proper CDA claim was submitted to the CO prior to the letter and appellant's failure to pursue potential and related jurisdictional issues, we decline to address possible CDA-related implications of the letter further.

2008 with a Notice of Docketing of the appeal as ASBCA No. 56581 issued on 30 September 2008.

38. On 25 November 2008, the government filed a Motion to Dismiss for Lack of Jurisdiction (Motion). The Motion asserted that the two invoices (Vouchers 5 and 6 submitted to the CO in PHI's 31 July 2008 letter) were not in dispute when submitted and, therefore, no CDA claim was submitted to the CO (gov't mot. at 5-7).

39. In its "Opposition" to the Motion dated 3 December 2008 (date-stamped received by the Board on 7 January 2009) appellant treated the government's Motion as equivalent to a Motion to dismiss for failure to state a claim under Federal Rules of Civil Procedure (FRCP) and cited relevant FRCP standards and case law to support rejection of the Motion. Appellant also alleged that there were a number of factual inaccuracies in the Motion, alluded generally to prior disputes with the government in performance of the contract and considered its appeal was properly taken from a deemed denial of its 31 July 2008 letter even if the CO's 28 August 2008 disapproval of the invoices was not properly construable as a final decision.

40. On 4 February 2009, the government filed its "Response" to appellant's "Opposition" again asserting that Vouchers 5 and 6 were not in dispute when submitted and consequently no valid claim was presented to the CO.

41. On 24 March 2009, the Board ordered the government to submit a Rule 4 file and established dates for appellant to file a complaint and any supplemental Rule 4 file.

42. Following receipt of the complaint, answer, and parties' Rule 4 filings, the Board convened a teleconference with the parties on 16 July 2009. After discussing the Motion and associated subsequent filings, the Board reserved ruling on the Motion pending further development of the record. During the teleconference, appellant indicated that it intended to file a "protective" claim with the CO that would satisfy all statutory and jurisdictional requirements, including those pertaining to certification. The government agreed that the CO would expeditiously review the "protective" claim, and appellant indicated it would appeal any denial or deemed denial thereof. Moreover, the Board indicated that upon receipt of a further appeal, it would consolidate the appeals for trial of all issues relating to jurisdiction, entitlement and quantum.

43. For various reasons, appellant did not file its contemplated "protective" claim with the CO until 5 July 2011, almost two years after the teleconference. The 5 July 2011 letter to the CO was designated as PHI's "amended certified claim." It was certified by appellant's CEO Ms. Ann Fay and attached the previously discussed DD250 and Vouchers 1 through 6 and also included two additional Vouchers 7 and 8. Although an amount was

not stated in the body of the claim cover letter, a sum certain amount for the claim is easily determinable by totaling the underlying and attached DD250 and individual voucher amounts. Voucher 7 sought reimbursement for $299,060 for "CONTRACT COMPLIANCE" costs through 5 July 2011 and Voucher 8 sought reimbursement for "OVERHEAD ON [Voucher 7]." Further details and/or supporting data justifying the amounts sought in Vouchers 7 and 8 were not provided. The total amount set forth in the DD250 and invoices is $1,276,914.

44. By letter dated 25 August 2011, the CO declined to take any "further action" on the claim because of the pendency of ASBCA No. 56581. The letter was not designated a final decision nor did it contain any advice concerning appeal rights. During a teleconference with the Board on 19 October 2011, appellant again stated it was appealing the CO's determination not to take further action. As reflected in the Board's memorandum summarizing the teleconference, appellant stated that it was initiating an appeal pursuant to Rule 1(c) from the "deemed denial" of its claim. Appellant also indicated it would formally appeal in accordance with Rule 1(c) in writing. Appellant filed its written Notice of Appeal from the CO's deemed denial of its claim on 20 March 2012. That appeal was docketed by the Board as ASBCA No. 58038. As requested by the parties, the appeals were consolidated by the Board for hearing of all issues pertaining to jurisdiction, entitlement, and quantum.

DECISION

Resolution of these appeals requires us to address issues relating to our jurisdiction, entitlement to recover and quantum. We conclude that we have jurisdiction over both appeals and that appellant failed to comply with the provisions of the LOC clause and has not established entitlement or quantum for recovery of amounts claimed in excess of the contract price.

Jurisdiction

The government initially filed a Motion to Dismiss for Lack of Jurisdiction (Motion) in ASBCA No. 56581 in November 2008. That motion alleged that the two vouchers (Vouchers 5 and 6) involved in that appeal were not in dispute when submitted and consequently needed to be "converted" into a claim to be cognizable and within our CDA jurisdiction. Primarily because of the extensive uncertainty surrounding the facts related to, and timing of, appellant's vouchers and alleged "claim" submissions, the Board reserved its ruling on the motion pending full development of the facts at trial. In addition, appellant expressed an intent on several occasions to file a further "protective" claim and appeal encompassing all vouchers on the contract and appeal any adverse decision which appeal would be consolidated for trial. Consequently, final processing, consolidation and

scheduling of all matters was delayed until appellant eventually filed its "protective" claim in July 2011 and appeal in March 2012 docketed as ASBCA No. 58038. In its post-hearing briefs, the government does not reassert and reargue its original positions set forth in the Motion regarding our jurisdiction to decide ASBCA No. 56581. Nevertheless, that Motion has not been resolved and has not been formally abandoned or withdrawn. Moreover, the perplexing timing, presentment, and facts surrounding the underlying vouchers in dispute warrant addressing the jurisdictional issues originally set forth in the Motion. Addressing the ASBCA No. 56581 jurisdictional issues also serves as a useful introduction to the similar issues presented in ASBCA No. 58038 and further supports our conclusions regarding whether the vouchers in question were disputed. The government continues to argue that appellant failed to file a "claim" with respect to all vouchers (with the exception of Vouchers 5 and 6) in ASBCA No. 58038. As a result of our findings and determinations in these appeals following trial, the Motion is subsumed within and denied consistent with our conclusions detailed in this decision.

The government contended in the Motion that we lack jurisdiction to decide these appeals primarily because the vouchers underlying appellant's alleged claim were routine, not in dispute when submitted, and appellant never converted such invoice submissions into claims. Because the vouchers fail to qualify as claims, no proper CDA claim was submitted to the CO, and the Board is without authority to resolve the appeals, according to the government. The Disputes clause of the contract at FAR 52.233-1(c) defines claim as follows:

> (c) Claim, as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

Applying the above definition, we determine that we have jurisdiction over both appeals. ASBCA No. 56581 involves two vouchers (Vouchers 5 and 6) that were submitted to the CO as attachments to appellant's letter of 31 July 2008 with payment

rejected by the CO on 28 August 2008 (findings 32, 35, 36). Neither voucher exceeded the $100,000 threshold for certification. Nor did they exceed that threshold if the amounts sought in each voucher are totaled and considered in the aggregate for purposes of assessing compliance with certification requirements. The pivotal issue for jurisdictional purposes is whether Vouchers 5 and/or 6 were routine and not in dispute when submitted. Determination of this issue is dependent on the facts of each case. *See Parsons Global Services, Inc. v. McHugh,* 677 F.3d 1166, 1170 (Fed. Cir. 2012). Here, we consider they were in dispute and were nonroutine. As of the date of submission and as detailed in our findings, there was no reasonable doubt that the government would refuse to pay any amount in excess of the contract price as a consequence of appellant's failures to comply with the LOC clause. Therefore, the appellant's 31 July 2008 submission qualified as a claim. The CO's subsequent refusal to pay any claim exceeding the contract price and failure to issue a final decision permitted appellant to appeal from the claim's deemed denial.

We reach the same conclusion with respect to the eight vouchers and DD250 involved in ASBCA No. 58038. Appellant's 5 July 2011 letter to the CO, certifying the amounts sought in the underlying, attached vouchers qualified as a CDA claim. Although the amount sought was not expressly totaled by appellant, a sum certain total is readily calculable by simple arithmetic from the attachments. Adding the amounts reflected in the eight vouchers and DD250, the total amount sought and certified is $1,276,904. *Cf., e.g., United Technologies Corp., Pratt & Whitney Group, Government Engines and Space Propulsion,* ASBCA No. 46880 *et al.,* 96-1 BCA ¶ 28,226 at 140,946 (adding amounts associated with multiple alternate breach claims and theories of liability); *Mulunesh Berhe,* ASBCA No. 49681, 96-2 BCA ¶ 28,339 at 141,520 (simple multiplication of lease rental rate by number of months); *Dillingham Shipyard,* ASBCA No. 27458, 84-1 BCA ¶ 16,984 at 84,612 (sum certain determinable by multiplying hourly rate by claimed hours); *Metric Construction Co., v. United States,* 1 Cl. Ct. 383, 391 (1983). Moreover, the vouchers and DD250 were unquestionably nonroutine and disputed when submitted in 2011. The CO was well apprised of the LOC clause issues involved and his subsequent letter refusing to "take further action" constituted a deemed denial of the claim from which appellant properly appealed.

We now turn to entitlement and the merits.

Noncompliance with the LOC Clause

The LOC clause requires the contractor, *inter alia,* to give the government notice "whenever it has reason to believe" that its cost of performing the contract will be greater than its estimated cost. The notice must be in writing, submitted to the CO, and include a revised estimate of the total cost of performance.

Once proper notice is provided to the CO, the contract relieves the contractor of its obligation to continue performance or incur costs in excess of the contract estimate until the CO notifies the contractor in writing that the total estimated cost has been increased. The LOC clause further emphasizes in subparagraph (e) that, "No notice, communication, or representation in any form" from persons other than the CO can properly be construed as increasing the estimated cost and that absent the requisite written notice from the CO, "the Government is not obligated to reimburse the contractor for any costs in excess of the estimated cost." The LOC clause benefits both the government and the contractor by limiting both the government's obligation to pay and the contractor's obligation to perform to the agreed contractual cost ceiling. *See Advanced Materials, Inc. v. Perry,* 108 F.3d 307, 310 (Fed. Cir. 1997).

Our decision addresses the dual notice requirements established in the LOC clause, concluding that appellant failed to give the requisite notice to the CO and that the CO never notified appellant of an increase in the contract's estimated cost.

Appellant's Failure to Provide Notice

The contentions of the parties in these appeals primarily focus on whether appellant adequately notified the CO of the claimed cost overruns in dispute. The contractor generally bears the responsibility for cost overruns absent such notice. *E.g., Cal-Tron Systems, Inc.,* ASBCA No. 49159, 97-1 BCA ¶ 28,841. Although appellant claims it notified the CO, it fails to point to any specific communication in the record that arguably qualified as a writing satisfying the notice requirements of the LOC clause, much less one addressed to the CO. *Cf. Consulting Services Corp.,* ASBCA No. 20288, 76-2 BCA ¶ 12,124 at 58,249-51 (invoices to project office insufficient to satisfy notice obligation).

Appellant primarily argues it was "impossible" to give the 60-day notice because it had overrun the contract essentially from its inception. It also focuses on the actions and instructions of a government auditor arguing that the auditor impliedly authorized its incurrence of costs (exceeding more than 30 times the estimated cost) of complying with contract requirements.

Regardless of whether it should have given the 60 day notice, PHI was also obliged to provide an overrun notice "whenever it had reason to believe" that its cost of performance would exceed the contract's estimated cost in accordance with ¶ (b)(2) of the LOC clause. *See, e.g., Systems Engineering Associates Corp.,* ASBCA No. 38592 *et al.,* 91-2 BCA ¶ 23,676 at 118,578. Essentially at the time of entering into the contract and certainly no later than September 2005 appellant had such knowledge. The overrun was

not only reasonably foreseeable but actually known by the contractor. During the 22 September site visit, PHI informed the auditor that it had incurred costs greatly in excess of the estimated costs and had recently purchased expensive accounting software to comply with contractual accounting system requirements.[4] These costs were incurred before the auditor set foot in appellant's premises. At that time, appellant had received payments of $36,184 of the contract's estimated cost total of $37,700. Particularly here where the auditor advised appellant before, during and after her audit of LOC clause restrictions, PHI could not have been ignorant of its responsibilities to notify the CO expressly in writing and request an increase in the estimated costs in a specific amount. General mention of financial difficulties to the auditor did not satisfy the notice requirement.

Faced with the clear instructions enunciated by the auditor in late September 2005 (not to mention the clause itself), appellant instead sought a no-cost extension of the contract less than one-week later by letter dated 3 October 2005. The logical import of the letter in context was that appellant had made a business decision to move forward without seeking an increase in the estimated cost of the contract. Potential business opportunities were once more emphasized by appellant in its 13 October 2005 letter again without mention of a need for an increase in the contractual cost ceiling. Regardless of any interactions with the auditor, these letters evince that appellant fully recognized the cost limitations of the contract, was on notice that no increase would be forthcoming, and that further performance was in its then-perceived best interest for business reasons. These business opportunities failed to materialize over the next few years precipitating a belated attempt to recover the costs under this minor contract. Appellant's potential business opportunities were again stressed in its 7 November 2005 letter to the ACS. The request for payment of Vouchers 3 and 4 in that letter also did not serve as adequate notice. The letter, which was not addressed to the CO, was untimely submitted 9 days before expiration of the contract and long after appellant had full knowledge of the overrun. Moreover, there is no evidence that any government official actually received Vouchers 3 and 4 until July 2006. Consequently, the specific amounts sought therein, and the magnitude of any implied request for an increase in the estimated contract costs, were not known.

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[4] The auditor and government were initially under the misimpression that the $300,000 was previously incurred to develop the prototype fluorometer. However, in late October 2005, it was reported that not "an extra single cent" was spent on the prototype. Instead, PHI indicated that the "300K issue" pertained to its accounting system and audit-related preparations, in particular by Dr. Theodore Fay over the preceding three months. (Finding 21)

Absence of Government Notice Authorizing Cost Increase

Regardless of whether the various communications from the contractor to various government representatives are arguably construable as constructive and adequate notice to the government, no increase in the contract's estimated cost was authorized at any time. Merely providing notice did not require the CO to increase the estimated contract cost. *Applied Theory, Inc.*, ASBCA No. 49725, 97-1 BCA ¶ 28,670, *aff'd,* 152 F.3d 944 (Fed. Cir. 1998) (table). Not only did the CO not provide such notice here, the government consistently and unambiguously informed appellant that no further funding would be provided. Appellant fails to identify any communication that could have served as notice of an increase in the cost ceiling or confused it regarding the government's clear refusal to authorize such an increase. The DCAA auditor was not authorized to provide any such assurances and we have found that she repeatedly so informed appellant. *Cf. American Standard, Inc.*, ASBCA No. 15660, 71-2 BCA ¶ 9109 at 42,215; *Aries Corp.*, ASBCA No. 14004, 70-1 BCA ¶ 8249 at 38,348-49. Moreover, the contract expressly and unambiguously so stated (finding 4). Although the contractor submitted its Final Technical Report in July 2006, completion of the report was again done for business reasons and was not required by any authorized government official involved in the administration of the contract. Moreover, appellant was expressly informed by a specific contract provision that it "shall not be entitled to additional funds" for the report (finding 7). There was no order constructive or otherwise, authorizing PHI to continue with contract performance in any event.

Miscellaneous Additional Issues:

Selection of Contract Type

Appellant raises several contentions regarding the propriety of awarding PHI a cost-reimbursement contract with allegedly onerous accounting requirements. These contentions appear to be founded in appellant's belief that the CO abused her discretion in selecting the contract type by failing properly to consider the factors set forth in FAR 16.104. Appellant implies that the government should have reviewed and assessed the adequacy of appellant's accounting system *prior to* awarding the contract. PHI also states that it notified the government that appellant was "ignorant of its responsibilities under a CPFF agreement." (App. br. at 23) Therefore, appellant contends it never should have been awarded the CPFF contract in dispute.

While appellant may have avoided requisite formal audit review had a fixed-price contractual vehicle been selected, it would have assumed the risk of cost increases without the protections afforded by the LOC clause. In essence, in the reverse of the more typical situation where the contractor argues that such risks were not properly

allocated to it by a fixed-price contracting vehicle, appellant here suggests that it was an abuse of discretion not to allocate appellant such risks. *Cf. AT&T v. United States,* 307 F.3d 1374 (Fed. Cir. 2002). Appellant was not prejudiced by selection of the CPFF contractual arrangement. The most obvious point is that appellant would not have received more than the fixed-price of the contract. Equally significant and, as emphasized throughout this opinion, the simple protection and solution for appellant was to provide the overrun notice and await notice from the CO that the estimated costs of the contract were increased before expenditure of the funds in question. Appellant was repeatedly advised of its rights and obligations under the LOC clause and could not have been confused. PHI was aware of these issues almost from the very inception of the contract yet knowingly entered into it. Finally, the preliminary efforts to convert the contract to a firm fixed-price contract were initiated by the government in good faith to accommodate what the government reasonably perceived to be appellant's desires at the time. No abuse of discretion occurred and, in any event, the *AT&T* case establishes that contractors have no judicially enforceable remedy for alleged violation of regulations and internal agency directives guiding the CO's selection of a contract type. *Id.* at 1379-80

Economic Duress

It is unnecessary to discuss in detail well-established criteria for recovery based on economic duress. Perhaps most fundamentally, the doctrine requires that appellant prove that wrongful government conduct caused the financial distress. *Cf. Rumsfeld v. Freedom NY, Inc.,* 329 F.3d 1320, 1329 (Fed. Cir. 2003). PHI identifies no such actionable government conduct. In particular, there was nothing improper in the auditor's actions and instructions for the few hours that she may have visited and communicated with appellant. Any financial distress experienced by appellant was occasioned by its desire to develop, produce and market its product. The failure of its business expectations to materialize was not the fault of the government. At all relevant times it could have availed itself of the protections afforded by the LOC clause and not continued performance pending an authorized increase in the contractual ceiling. *Cf. Hittman Associates, Inc.,* ASBCA No. 14638, 71-1 BCA ¶ 8706. The contractor was not wrongfully coerced, misled, induced, or even encouraged to continue performance by any contracting official.

Quantum

Except to the very minor extent discussed below, appellant has wholly failed to offer any persuasive evidence of quantum. These appeals could be denied for that reason alone. In this regard, it is important to note that as a general rule accounting data and supporting records comparable to that sought by auditors to support and justify payment of invoices and vouchers should be submitted to the Board in establishing and proving

quantum. There is no litigation benefit to contractors for failure to fully comply with reasonable audit requests and instructions.

Nevertheless, the CO and government officials have at various times before and at the hearing of these appeals expressed their willingness to compensate appellant for the amount remaining on the contract of $1,546 (*see* findings 30, 36). We have also found that the record as a whole supports the conclusion appellant in fact incurred unpaid allowable costs in that amount in connection with performance of the contract. Accordingly we award the unpaid $1,546 balance of the contract and to that limited extent sustain ASBCA No. 56581.

CONCLUSION

In conclusion, for reasons detailed above, we sustain ASBCA No. 56581 in the amount of $1,546 plus interest in accordance with the CDA from 31 July 2008, but otherwise deny that appeal and ASBCA No. 58038.

Dated: 30 April 2013

ROBERT T. PEACOCK
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 Nos. 56581, 58038, Appeals of PHI Applied Physical Sciences, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals