Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: April 28, 2006

GSBCA 15509-ST

RAY COMMUNICATIONS, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Marc Lamer of Kostos and Lamer, P.C., Philadelphia, PA, counsel for Appellant.

John C. Sawyer, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **NEILL**, **HYATT**, and **DeGRAFF**.

HYATT, Board Judge.

This appeal is from a contracting officer's decision denying a claim arising under an indefinite delivery, indefinite quantity (IDIQ) fixed-price level-of-effort contract for the provision of acquisition support services. Appellant, Ray Communications, Inc. (Ray), has asserted that respondent, the Department of State, owes it some $578,187.25, plus interest, for billings for work performed under the contract at the Government's request. The State Department denied Ray's claim for the monies on the ground that the billings exceeded

contract funding limitations and it did not order any work in excess of applicable contract or delivery order ceilings.

In its appeal, Ray contends that the State Department's actions in administering the contract, through its contracting officer and her designated representative, nullified any ceilings that might otherwise have existed. For the reasons stated below, we deny the appeal.

Findings of Fact

1. At the time of contract award, Ray, a communications services provider, was headquartered in Bala Cynwyd, Pennsylvania, with a satellite office in Reston, Virginia. It had been in business since 1984, and in 1986 became a participant in the Small Business Administration's (SBA's) section 8(a) program. Transcript at 39-41. From 1986 through 1993, Ray performed a number of United States Government contracts, awarded both competitively and through the section 8(a) program. *Id.* at 40-42.

2. The subject contract, number S-OPRAQ-94-D-0547, was awarded by the State Department to Ray in September 1994 pursuant to the SBA's section 8(a) program. Under the contract, Ray was to provide acquisition support services to the Department's Major Acquisitions Program Office (MAPO), which was subsequently renamed the Office of Major FIP [Federal Information Processing] Acquisitions (MFA). The support services provided by Ray consisted mainly of assisting in the evaluation of technical and cost proposals submitted in major acquisitions conducted by MAPO. Appeal File, Exhibit 23.

3. The means by which the services to be provided by the contractor would be acquired were specified as follows in Section B of the contract:

> This contract is a fixed-price, indefinite delivery - indefinite quantity type of contract. Services shall be obtained from the Contractor by issuance of delivery orders, which shall be fixed price, level of effort [See Section G.5(b)]. The guaranteed minimum for each year of the contract is $30,000. Note that Tasks 1 and 2 are included in this contract document (See Attachments 1 and 2) and are funded herein.

Appeal File, Exhibit 23.

4. Section G.5 of the contract set forth the process for the placement of delivery orders. It stated that an order for services under the contract could be issued only by the administrative contracting officer (ACO) and was to include the following information: (1) basic contract number and respective delivery order number; (2) services to be provided, by

labor category and number of hours; (3) a due date for completion of tasks; (4) the Government point of contact; and (5) confirmation of sufficient funds and respective appropriation data. Section G.5(b) provided that:

> For each task, the contractor will be asked to submit a delivery order proposal, stating its approach to satisfying the requirement, proposing numbers of hours for each appropriate labor category, and using the hourly rates set forth in Section C [of the contract]. The Contract Administrator will negotiate or agree to a firm, fixed price, level-of-effort, and will issue a delivery order in accordance with this section and Sections I.8 and I.9 of this contract.[1]

Appeal File, Exhibit 23.

5. Section G.3 of the contract stated:

> The Administrative Contracting Officer (ACO) is the only person authorized to approve changes in any of the requirements of this contract. In the event the Contractor effects any change at the direction of any person other than the ACO, the changes will be considered to have been made without authority and no adjustment will be made in the delivery order price to cover any increase in costs incurred as a result thereof.

Appeal File, Exhibit 23.

6. The purpose of this procurement was explained in section C.1 of the contract. At the time of contract award, MAPO was a "small 'central select' office" within the State Department's Information Management (IM) function. At that time, MAPO consisted of four full-time government employees, one part-time government employee, and three full-time contractor employees, and was responsible for federal information processing contracts assigned to it by the Procurement Executive or the Deputy Assistant Secretary of IM. MAPO was charged with performing a wide range of activities, including management of all pre-solicitation studies and surveys, and otherwise conducting acquisitions and awarding

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[1] Section I.8 of the contract sets forth the text of Federal Acquisition Regulation (FAR) clause 52.216-18 (Ordering) and Section I.9 of the contract sets forth the text of FAR clause 52.216-19 (Delivery Order Limitations). Both clauses are the versions in effect as of April 1984. Appeal File, Exhibit 23.

contracts. Under its charter, MAPO was generally charged with conducting FIP acquisitions exceeding $50 million or as otherwise assigned. When this contract was awarded, MAPO was conducting the Department of State's Telephone Equipment Contract (DOSTEC) acquisition. This large procurement was for the purchase of telephone equipment, systems engineering, installation, and training for overseas employees and embassies. The Ray contract was needed to permit the Department to obtain contractor support when needed to supplement the efforts of its limited in-house staff in processing the DOSTEC procurement and to assist with other acquisition work as well. Appeal File, Exhibit 23.

7. Section C's Scope of Work described the contractor's role in pertinent part:

> (a) The contractor shall act as an advisor to MAPO and shall provide fully-supported recommendations in the areas of: Determination of user requirements; design of presolicitation studies, and conduct of those studies; assistance in developing a Request for Proposals (RFP), including the technical evaluation and source selection plans; evaluation of cost/price proposals; assistance in responding to vendor questions prior to submission of proposals; evaluation of best-and-final offers (BAFOs); assistance in developing cost/technical trade-off analyses; [and] support in protests lodged during the acquisition. . . .
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> (b) Contractor support will be in terms of deliverable reports, analyses and/or other types of documents (to be specified in each delivery order, along with specific completion times).
>
> (c) The Contractor shall provide a Project Manager, as a single point of contact for the Government. The Contracting Officer's Representative (COR) . . . shall be the Government's project leader. However, the Contractor shall only perform work authorized in writing by the Contracting Officer (CO).

Appeal File, Exhibit 23.

8. The total estimated value of the contract by year was as follows:

Base Year:	$470,966.40
Option Year 1:	$489,808.65
Option Year 2:	$509,406.15
Total:	$ 1,470,181.20

The estimated dollar value of the contract was determined by multiplying the total estimated annual hours per work category by the hourly rate for that category. Appeal File, Exhibit 23.

9. Section H of the contract set forth special contract provisions and requirements. Section H.4(a) listed four key personnel to be provided by Ray to perform work under the contract. Section H.6 provided that:

> The Government shall not exercise any supervision or control over the Contractor's employees performing services under this contract. Such employees shall not be accountable to the Government but solely to the Contractor, who in turn is responsible to the Government.

Appeal File, Exhibit 23.

10. The contracting officer's representative (COR) was MAPO's Director, who was also the contracting officer's supervisor. Transcript at 393; Hearing Exhibit A-16; Hearing Exhibit R-18.[2] Under the contract, the COR was responsible for ensuring adequate records of inspection were kept for purposes of accepting the contractor's work. In addition, the COR was responsible for ensuring that deliverables conformed to contract requirements and could be accepted. Appeal File, Exhibit 23.

11. As delineated in the contracting officer's memorandum designating the COR, the COR was also responsible for monitoring the contract and performing various contract administration duties associated with it. These duties included monitoring performance of technical requirements, monitoring financial management controls, reviewing contractor invoices, and maintaining a working contract file, as well as ensuring that the administrative contracting officer (ACO) received copies of all correspondence and that the ACO signed all correspondence addressed to the contractor. Hearing Exhibit A-16. This memorandum also expressly excluded from the COR's authority the responsibility to modify the contract

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[2] Appellant's hearing exhibits are preceded by an "A." Respondent's hearing exhibits are preceded by an "R."

terms, approve items of cost not specifically authorized under the contract, or obligate, in any way, the payment of money by the Government. *Id.*

12. The COR testified that Ray's invoices were sometimes delivered to him and sometimes to the contracting officer. Ultimately, invoices were always forwarded to another State Department employee within MAPO who was solely responsible for managing the office's finances and who kept track of contract funding. This person would place a financial tracking strip at the bottom of the page to show she had reviewed the invoice. Transcript at 411-12. When the COR approved invoices in writing it was solely to denote that he had reviewed the hours charged and determined them to be reasonable. He did not track contractor hours or review Ray's invoices to attempt to determine Ray's position with respect to funding. *Id.* at 389, 413-14.

13. The COR also testified that he met from time to time with the individuals performing the work under Ray's contract, primarily to obtain informal progress reports. He stated that he did not, in performing his duties as COR, ever encourage any of the Ray employees or subcontractors to exceed the level of effort funded for specific work. Transcript at 387-89.

14. The COR was responsible for seeking additional funding from the Deputy Assistant Secretary of IM when needed for performance of additional work under the contract. If funds were available he would communicate that information to the contracting officer. The COR did testify that during the period from October through December 1995, during the early months of fiscal year 1996, when the Government was faced with possible shutdowns, he may have reported that Ray could be assigned work after he had received assurances from the Deputy Assistant Secretary that funds should be available when the budget was finally approved. The COR explained that these assurances formed the basis for his expectation that the funds would ultimately be available to pay Ray for authorized work. Transcript at 424-25, 429-30.

Task Orders Under the Contract

15. Task orders 1 and 2, both of which were issued simultaneously with the award of the contract, each stated that the task order was to be a fixed-price, level-of-effort endeavor.[3] The tasks were authorized to commence in fiscal year 1994 and continue into the

[3] A total of ten task orders were awarded under the contract. Of those, five task orders -- numbers 1, 2, 3, 5, and 8 -- are at issue in this appeal. Two task orders, numbers 4 and 9, were for services provided to a different office in the Department and are not in dispute. Two other task orders, numbers 6 and 7, are also not involved in this appeal. Task

next fiscal year. Task order 1 (Task 1) set forth a ceiling amount of $11,076.30 and task order 2 (Task 2) set forth a ceiling amount of $18,923.70. Both task orders stated that "the Contractor shall work through the date shown above [October 14 and December 30, 1994, respectively] or until funds have been expended, which ever [sic] comes first." Appeal File, Exhibit 23. The contracting officer testified that she understood this language to mean that the contractor should work until the completion date or its incurred costs reached the ceiling for available funds. Transcript at 440-44.

16. The combined value of the two task orders equaled the basic year's guaranteed minimum of $30,000. The contracting officer explained that this was done for the express purpose of satisfying the minimum order requirement, and that the Government knew the initial hours assigned would not suffice to complete the full tasks. Transcript at 445-46.

Task Order 1

17. Task 1 was for the provision of contractor assistance and services in the performance of the technical evaluation of proposals received in response to the DOSTEC solicitation. The scope of work provided that the contractor would assist in ensuring that the proposals met the minimum mandatory requirements in the solicitation. The contractor was to recommend a ranking for each offeror, based upon the evaluation criteria, to assist the Department in making a "best value" award. The contractor's effort was to include generating requests for additional information, requests for clarification, and deficiency reports. These requests/reports would be transmitted to the appropriate vendor(s) by the contracting officer. Responses submitted by the offerors would then be reviewed and evaluated by the contractor, and the contractor was ultimately to make recommendations as to (1) whether or not each offeror was compliant with the minimum mandatories and (2) rankings of the proposals. Appeal File, Exhibit 23, Attachment 1.

18. In addition, Section 8 of Task 1 specifically stated that:

> This order shall be fixed-price, level-of-effort. The work to be performed is non-severable, i.e., it would not be in the Government's best interest to have a September 30th, 1994 completion date. The work is continuous; the work started in fiscal year 1994 shall continue through October 14, 1994, in accordance with Section 9, below.

Appeal File, Exhibit 23, Attachment 1.

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order 10 was a continuation of task order 8. Appeal File, Exhibit 7 at 1.

19. Section 9 of Task 1 provided that:

> The Contractor shall perform the required task during normal business hours, Monday through Friday. The Senior Systems Analyst (SSA) shall work approximately 25 hours per week. The Project Manager (PM) shall work approximately 2 hours per week. As this task must continue till complete, the Contractor shall work through the date shown above or until funds have been expended, whichever comes first.

Appeal File, Exhibit 23, Attachment 1.

Task Order 2

20. Task 2 was for the preparation of a briefing book to be used by MAPO to sell its services as a "matrix acquisition shop." MAPO was organized in part to function as a clearinghouse for FIP resources and wanted to be able to approach various organizations within the State Department and describe its capabilities so that MAPO could get their contract work. Transcript at 442-43; Appeal File, Exhibit 23. To this end, Task 2 provided for the contractor to rewrite and update the MAPO notebook to reflect MAPO's expanded role. In addition to revising the notebook, the contractor was to develop one-day training courses addressing agency procurement practices such as preparation of the agency procurement request (APR), development of performance-oriented statements of work, and the like. Appeal File, Exhibit 23, Attachment 2.

21. This task, which was handled by contractor and subcontractor personnel who were also assigned to other tasks, was generally treated by State and Ray as a lower priority item, with performance being postponed if more pressing needs, such as proposal evaluation efforts under other task orders, needed to be addressed. Appeal File, Exhibit 17; Transcript at 454

22. Like Task 1, Task 2 was a fixed-price, level-of-effort undertaking, with work initially planned to continue until December 30, 1994. It was anticipated that the contractor would perform required tasks during normal business hours. Appeal File, Exhibit 23, Attachment 2.

Ray's Performance of the First Two Task Orders

23. Promptly after contract award, Ray hired the new employees it needed to perform this contract and engaged the subcontractors who would be assigned to work on the task orders as well. Ray's executive vice president explained in testimony that he undertook

these financial commitments notwithstanding the nominal amounts initially authorized under the first two task orders because the estimated dollar value of the work expected to be needed during the base year plus two option years came to about $1.4 million. Ray expected that work under those task orders would considerably exceed $30,000 and that additional funding would be added as it became available after award. This expectation was based on the fact that when it placed the initial order for $30,000, State was seeking estimates for additional work anticipated to be ordered under these task orders and others likely to be issued under the contract. In addition, certain of the contracting officer's pre-award communications, seeking estimates for work on Tasks 1 and 2, stated that money would be added to the ceiling after award as funding became available. Transcript at 70-75; Supplemental Appeal File, Exhibit 45. In a memorandum to the file dated September 16, 1994, the contracting officer explained that both she and the COR were aware that $30,000 would be insufficient to complete Tasks 1 and 2, but at the time had thought that no additional funds would be available in fiscal year 1994. Appeal File, Exhibit 22 at 3.

24. On September 16, 1994, the Department issued modification number 1 to the contract, for the purpose of adding "not-to-exceed" funding in the amount of $49,996.13. This funding was earmarked in its entirety for Task 1. This brought total funding for the contract to $79,996.14. Appeal File, Exhibit 22.

25. In her file memorandum of September 16, 1994, written in support of modification 1, the contracting officer noted that MAPO had unexpectedly received additional fiscal year funds which it wanted to obligate to Task 1. In addition, the Department and Ray had begun discussions about adding resources to the contract to perform technical evaluations. Individuals identified to perform technical evaluations would be required to work at the State Department's offices. Under the contract, the Ray employees were proposed to work out of Ray's facility and overhead was included in their labor rates. The contracting officer noted that to the extent contractor personnel worked at State's facilities, rates would not be burdened with overhead. Appeal File, Exhibit 22.

26. On September 21, 1994, the contracting officer sent a letter to Ray advising that:

> This letter constitutes a notice to proceed with the work involved in the above-referenced task [order 1]. We have concluded negotiations on this date and have agreed upon the following: Two new labor categories and their associated hourly rates will be added to the contract by Modification No. 2.

> As you know, the above referenced modification must be signed both by your firm and by the Small Business Administration. Because it is imperative that the individuals proposed by your firm begin work immediately, and because we are down to the last two weeks of FY 94, it is impracticable to wait until the modification is formally executed. Note that funds are available for the required work, and these funds will be added to the contract for Task 1, by modification. It is expected that the funding modification will be executed not later than the end of this week.

Appeal File, Exhibit 21 at 28.

27. Modification number 2 to the contract was issued by the contracting officer on September 23, 1994. This modification had no impact on existing funding for the contract, but added two new categories of labor: Renowned Expert (RE) and Senior Telecommunications Specialist (STS), both to be used in performing Task 1. The contracting officer wrote a memorandum to the file, explaining that this modification, as well as modification number 1, adding just under $50,000 to the Task 1 funding ceiling, was for the purpose of speeding up the evaluation process to accord with the expectation of State's upper management that the DOSTEC contract be awarded by the end of November 1994. The contracting officer stated that the only way to speed up the process was to bring in additional evaluators with the special knowledge and skills needed by the Department. The memorandum further stated that the contractor had arranged to subcontract this portion of the effort to Anderson Consulting because of that company's special expertise in this area. Appeal File, Exhibit 21.

28. Modification number 2 also increased the estimated work under the contract as follows:

Base Year	Increased by $333,907.95 to $804,874.35
Option Year 1	Increased by $337,751.19 to $827,559.84
Option Year 2	Increased by $351,276.35 to $860,682.50

The total estimated purchases under the contract for the base plus two option years was thus increased to $2,493,116.70. Appeal File, Exhibit 21.

29. Modification 3, also applicable to Task 1, was issued on September 27, 1994, and adjusted the not-to-exceed ceiling price for the contract by the additional amount of $129,529.92, bringing the total contract funding to $209,526.05. The following purpose was stated for the amendment:

> (a) In Task 1, Attachment 1 to the contract, the following change is made: The Senior Systems Analyst (SSA) hours are hereby increased to allow for an additional 107 workdays. This will further fund the two (formerly 3) additional people required to compress the processing time for the technical evaluation phase of the Department of State Telephone Equipment Contract (DOSTEC). Funding for this labor category, previously set at $49,996.13, is hereby increased as follows:
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> SSA: 1712 hours (16 hours/day x 107 days) x $75.66 = $129,529.92.
>
> This brings the total amount for this category to $189,740.15.

Appeal File, Exhibit 20.

30. Modification 4 to the contract, dated January 6, 1995, revised the contract terms to permit Ray to invoice State twice monthly. In an accompanying file memorandum, the contracting officer stated that this was done in order to accommodate Ray's subcontractor, since State deemed the continued availability of the subcontractor's services to be critical to the success of the project. Appeal File, Exhibit 19.

31. Modification 5, dated March 1, 1995, extended completion dates for the work, extending Task 1 until May 31, 1995, and extending Task 2 through June 30, 1995. This modification expressly did not add funding, noting that "sufficient funding exists to complete the work." Appeal File, Exhibit 18.

32. In a memorandum to the file, also dated March 1, 1995, the contracting officer documented the purpose of modification number 5. She noted that while Task 2 had expired on December 31, 1994, the COR had not informed her of that at the time. Only two of the four deliverables under Task 2 had been completed for several reasons, one of which being that individuals designated to perform Task 2 had also been working on Task 1, which took precedence over Task 2. In addition, the contracting officer noted the extension of Task 1 to May 31 was expected to extend the task through date of award. She further noted that should a protest be filed, additional time and money could be required for completion of Task 1. Appeal File, Exhibit 18 at 2.

33. Modification 6 was issued on July 28, 1995. Its stated purpose was to further fund Tasks 1 and 2 in the amounts of $25,000 and $47,000, respectively. The modification explained that while Task 1 was now complete, it was necessary to add funds to the contract, although the contractor had been properly authorized to complete the work. Task 2's

completion date was extended to September 29, 1995. Delays in obtaining funding were stated to be the fault of the Government. Appeal File, Exhibit 17.

34. In the contracting officer's memorandum to the file, she explained the reason for issuing modification 6, noting that Task 1's provision of support services for the DOSTEC acquisition had been completed as of July 13, 1995. Task 2 had expired on June 30, 1995, but was not complete because the parties had recognized that Task 1 took priority. The contracting officer further stated that "Task 1 was completed upon authorization of the undersigned. Funds were timely requested to complete the work but an internal error was made."[4] The internal error required some time to be resolved, and the contracting officer authorized Ray to complete the work despite the temporary absence of funding. After funds were approved, she contacted Ray's project manager to see how much money would be required to process final invoices for Task 1. Appeal File, Exhibit 17.

35. Modification 7 to the contract was issued by State on August 16, 1995, addressing a variety of administrative matters under the contract. Of relevance to Tasks 1 and 2, the modification provided that:

> In order to cover an additional invoice for Task 1, now complete, funds are hereby transferred from Task 2 to Task 1 as follows: Task 2 is reduced from $65,923.70 by $2,099.02 to $63,824.68. Task 1 is hereby increased from $234,526.05 by $2,099.02 to $236,625.07.

Appeal File, Exhibit 16.

36. On September 25, 1995, the Government issued modification 9, extending the date for completion of Task 2 from September 29 to December 31, 1995. The modification noted that because the individuals needed to complete this task had been performing other tasks under the contract, it was necessary to extend the completion date but that sufficient funds had already been obligated to complete the task. Appeal File, Exhibit 14. In a cover letter sending the modification to the SBA for its signature, the contracting officer noted that the availability of sufficient funds to complete Task 2 had been discussed in a project status meeting with Ray's project manager on September 22, 1995. *Id.*

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[4] The contracting officer explained that while MAPO had the money to order the work, the internal funding document erroneously cited multiple task orders. As a result she had to ask for a new requisition. Transcript at 454.

Task Order 3

37. Task Order 3 (Task 3) was for contractor-provided assistance with the pricing analyses needed for the DOSTEC procurement. The task was to be completed in three phases. Phase I contemplated that the contractor would compare, in detail, each offeror's price proposal against the Government's cost models to ensure that all contract line items were properly addressed. Phase II provided for review of corrected submissions to ensure any items raised in discussions were properly addressed by the offerors and for performance of a comparison of each offeror's pricing to market and GSA schedule prices. A written report was to be submitted to the contracting officer to support negotiations with offerors. Phase III called for review of best and final offers and the provision of a report to the contracting officer with recommendations as to the fairness and reasonableness of proposed prices. Appeal File, Exhibit 11 at 49-50. The statement of work further provided that the delivery order for Task 3 would be fixed-price, level-of-effort for each of the three phases. *Id.* at 52.

38. On September 28, 1994, Ray submitted its proposal for Phase I of Task 3. It agreed to perform the various subtasks associated with Phase I and proposed a price of $14,870.10 to review five offers. This proposal was based on receiving reasonably compliant offers. Appeal File, Exhibit 11, at 26-31.

39. On September 30, 1994, after discussing the proposed price with Ray, the contracting officer sent Ray a letter issuing a notice to proceed with Phase I of Task 3, confirming that the letter would be followed by issuance of a delivery order, and summarizing the negotiations concluded as of that date as follows:

> The resultant delivery order will be fixed-price, level of effort, with a ceiling amount of $10,650. The schedule proposed by your firm has been determined by the undersigned to be acceptable; the report to be delivered is due by October 14, 1994.

The letter further stated that the delivery order to be issued would be funded out of the State Department's fiscal year 1995 appropriation and would be subject to the availability of fiscal year 1995 funds. Finally the contracting officer noted that Ray should take steps to begin work immediately and that State expected that funds would be available for the required work. Appeal File, Exhibit 11 at 58; Transcript at 578.

40. On November 22, 1994, the State Department determined that an additional $30,000 should be allocated to Task 3 for off-site contracting assistance in validating prices proposed in response to the DOSTEC solicitation. The additional amount was for the

purpose of continuing the price validation process under Phases II and III of Task 3. The memorandum justifying the request for funding stated that the period of performance for this effort would be November 7 through December 31, 1994. Appeal File, Exhibit 11 at 46.

41. On November 25, 1994, the contracting officer issued the first delivery order for Task 3 in the amount of $10,650. The delivery order stated:

> The Contractor shall perform the tasks described in the attached Statement of Work. Upon completion and acceptance of the reports to be generated in each of the phases, the contractor shall be paid the firm, fixed price amounts negotiated for each phase. Funds in the amount of not-to-exceed $10,650.00 are obligated hereby for Phase I of the task. Funding for Phases II and III will be negotiated prior to their initiation.

Appeal File, Exhibit 11 at 49. The statement of work attached to the task order was modified to add descriptions for Phases II and III and to change the period of performance from "date of award through October 14, 1994" to "from October 3, 1994 through January 16, 1995." *Id.* at 50-52.

42. The statement of work for this task order further provided that it was to be a fixed-price, level-of-effort endeavor for each of the three phases and that the contractor would be expected to perform during normal business hours from Monday through Friday. With respect to the price ceiling, it was provided that:

> Each Phase shall have a fixed-price ceiling negotiated prior to initiation of that phase. Upon completion of any Phase and acceptance by the Contracting Officer of the deliverable the Contractor may submit an invoice for the completed task. Funds in the amount of $10,650.00 are hereby obligated to cover Phase I, which was completed on October 14, 1994.

Appeal File, Exhibit 11 at 52.

43. Amendment 1 to the delivery order for Task 3 was issued on December 12, 1994, for the purpose of funding Phase II of the DOSTEC price evaluation tasks. The amendment stated that:

> The Delivery Order type is firm, fixed-price level of effort. Funding for Phase II is provided in the fixed-price amount of

> $30,000. The term of this order is from the date of award through 12/16/94.

Appeal File, Exhibit 11 at 44.

44. Amendment 2 to the Task 3 delivery order, issued on April 18, 1995, further funded Phase II in the amount of $50,000. The amendment stated:

> The Delivery Order type is firm-fixed price, level of effort. Additional funding is provided hereby for Phase II in the fixed-price amount of $50,000.00. This brings the total amount of funding under Task 3 to $90,650.00. The term of this order is from the date of award through April 28, 1995.

Appeal File, Exhibit 11 at 42.

45. On July 25, 1995, the contracting officer authored a file memorandum documenting the issuance of amendment 3 to the delivery order for Task 3. The memorandum states that the purpose of amendment 3 was to fund Phase III, which included analysis of DOSTEC best and final offers (BAFOs) for correctness, price realism, and price reasonableness. In particular:

> DOSTEC BAFOs were received on June 23, 1995, and on June 26th, I gave Ray verbal authorization to begin analyzing the BAFO submissions. The request for additional funding for this task had long ago been submitted, but had gotten held up in the front office. Once it was approved the requisition was mistakenly combined with additional funds for Task 1 and Task 2 (which were awarded as part of the contract). So I had to have that requisition killed, and two new ones issued so that I could properly amend this delivery order.
>
> Ray Communications completed their analysis on June 30th, within the time period set forth in the delivery order for this phase. The proper requisition was only received by the undersigned on July 24th. This is not a ratification, however, as the contractor was properly authorized to perform.

Amendment 3, issued on July 24, 1995, added $30,000 to Task 3, for Phase III, bringing the total amount obligated under the Task 3 delivery order to $120,650. In issuing this

amendment it was acknowledged that the work had already been completed. The amendment stated that:

> This brings the total for this delivery order (Task 3) to $120,650.00. (Firm-fixed price amount added: $30,000).

Appeal File, Exhibit 11 at 36, 56-57.

46. Although the contracting officer agreed that the order for Phase I of Task 3 was fixed-price, level-of-effort in nature, she also testified that it was her understanding that the funds subsequently added by the amendments for Phases II and III, in the amounts of $30,000, $50,000, and, finally, another $30,000, were for fixed-price efforts, under which the contractor was required to produce the deliverables for the negotiated amounts. She testified that for these phases, the "work that we had to do was very clear and definable" and thus susceptible to a fixed-price arrangement. If the contractor did not agree with the amount negotiated or the contract delivery type, it could have taken an exception, but did not. Transcript at 464-66.

47. Ray submitted invoices for the work under Task 3 at various intervals. The invoice for Phase I was submitted for the period from October 1 to 31, 1994, and approved for payment by the contracting officer on December 19, 1994. Appeal File, Exhibit 11 at 8.

48. The next invoice submitted was dated December 16, 1994, in the amount of $39,330.16, for services provided on Task 3 in November 1994. The contracting officer approved payment of this invoice on January 4, 1995, with a notation that since funding allocated to Task 3 totaled only $30,000, only that amount could be paid. Appeal File, Exhibit 11 at 37-39; Transcript at 582.[5]

49. On February 21, 1995, Ray invoiced for services provided in support of Task 3 during the month of January 1995. That invoice totaled $50,729.54 and referenced cumulative costs through January 31, 1995, of $126,885.64. Appeal File, Exhibit 11 at 3, 104-06. It is not clear from the record whether this invoice was ever approved for payment.

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[5] Appellant adds that a second invoice for services performed on Task 3 in December 1994 was submitted by Ray on January 10, 1995, in the amount of $26,177.45. According to Ray, this invoice, a copy of which is provided in Appellant's Supplemental Appeal File, Exhibit 40, at 295-97, was never approved for payment.

50. An invoice submitted on March 21, 1995, for the amount of $12,694.52, showed costs, based on the hours worked, for the current period (February 1 to 28, 1995). The same invoice also listed cumulative costs expended to date as $139,580.16. The COR certified that the amount actually billed, $12,694.52, was for services rendered. Two invoices were submitted on April 17, 1995, one for the amount of $28,489.88, representing work done in the first half of March 1995, and a second invoice in the amount of $8814.36, representing work done in the second half of March 1995. On July 12, 1995, another invoice was submitted for the amount of $25,784.57. Again, these invoices reflected cumulative costs incurred in varying amounts but billed only for the current period amount. Appeal File, Exhibit 11 at 5-17.

51. In a memorandum to the file dated August 1, 1995, the contracting officer acknowledged that invoices submitted for Task 3 showed expenditures by Ray Communications of over $300,000. The memorandum stated that Ray had been paid the full amount of $120,650 for which the tasks had been funded. She also commented that "[t]he Contractor incurred a significant cost overrun, but due to the fixed-price nature of the delivery order, could not bill us for more than what was obligated." Appeal File, Exhibit 11 at 2-17.

Task Order 5

52. In December 1994, the contracting officer wrote a letter to Ray's project manager asking for a proposal to perform the attached statement of work for task order 5 (Task 5). This task order was for the review of existing procedures applicable to small dollar FIP purchases within the Department and, ultimately, the preparation of guidelines for completing smaller dollar purchases, and guidelines for managers making such purchases to self-certify procurements of FIP resources. Supplemental Appeal File, Exhibit 46. Ray responded with a proposal to perform this work for the fixed price of $54,541.83. *Id.*, Exhibit 47. There are no documents in the record to show that this work was ever ordered or authorized.

53. By letter dated April 28, 1995, the contracting officer requested that Ray submit a brief technical and price proposal for the performance of a different statement of work designated as Task 5. This attached statement of work explained that the purpose of this task was to be able to assign to the contractor miscellaneous projects within the scope of MFA's mission, particularly projects with a short turn-around time, such as a few days or a week. The intent was to have in place a funded delivery order under which "short-term, quick-response-type task orders can be issued." Appeal File, Exhibit 10 at 45.

54. The attached statement of work for Task 5 provided very specifically how work was intended to be initiated under this task. The COR would contact Ray's project manager

and describe the quick response requirement at hand. The project manager would then give State a fixed price to perform the task, based upon the number of hours and labor categories required. The COR would then summarize the required services, completion date, and agreed-upon fixed price in a letter, with a signature space for Ray to sign indicating its agreement. Funds in the amount of $50,000 were obligated for this delivery order. Each individual task order issued would draw funds down from that overall amount. Appeal File, Exhibit 10.

55. In response, by letter dated May 11, 1995, Ray's project manager provided a brief technical proposal for quick response tasks. Her letter stated that:

> We understand that the types of work requested under this delivery order will be those that require immediate response and very-quick turn-around. Upon receipt of notification . . . that a requirement exists, Ray Communications will determine the level of effort we believe to be necessary to accomplish the task, and within 24 hours will prepare and transmit to MFA a fixed-price quote, stating the personnel, number of hours, and labor categories proposed. All fixed price quotes will be derived from the labor rates as provided in the subject contract.

This letter further acknowledged that the ceiling amount of the Task 5 delivery order would be $50,000 and that funds would be drawn down from that amount as individual task orders were issued, that the performance period would be from time of award through September 30, 1995, and that invoicing would be in accordance with the subject contract. Appeal File, Exhibit 10 at 31-32.

56. In early September 1995, the COR identified an immediate need for contractor support services with respect to the preparation of a white paper to serve as a vehicle to provide recommendations for the procurement of personal computers and associated support equipment that would be compatible with the Department's planned worldwide messaging system. On September 5, 1995, the contracting officer sent Ray's program manager the statement of work for this project, described as "Task No. 5, Quick Response Task, sub-task A," and asked her to call so that they could fix a price. The cover sheet to the statement of work, which was provided by telefacsimile, states that the Department would provide $5000 for this task, which was to be awarded essentially so that a specific subcontractor could edit the white paper. The statement of work called for funding to be obligated in the fixed-price amount agreed upon by the Government and the contractor. Appeal File, Exhibit 10 at 2; Supplemental Appeal File, Exhibit 28.

57. On September 7, 1995, the contracting officer and Ray's project manager negotiated by telephone and agreed that the work would be done for the fixed amount of $5000. They estimated that the task would require about five hours of project management time and about fifty-five hours of a senior systems analyst's time. Appeal File, Exhibit 10 at 2.

58. By letter dated September 7, 1995, the COR confirmed the agreement reached between the contracting officer and Ray to be that a subcontractor would perform this task for the fixed-price amount of $5000, with the white paper to be completed by September 15, 1995. Ray's program manager indicated her concurrence by signing the letter and returning it to the COR. Appeal File, Exhibit 10 at 16; Supplemental Appeal File, Exhibit 29; Exhibit R-3.

59. The delivery order funding this task, however, was issued by the contracting officer on June 30, 1995, for the period from date of award until September 30, 1995, in the not-to-exceed amount of $5000. Appeal File, Exhibit 10 at 3.

60. A six-page white paper dated September 15, 1995, the deliverable called for under Task 5, is included in the record. Appeal File, Exhibit 10 at 9-14.

61. On October 10, 1995, Ray submitted an invoice in the amount of $5000 for professional services rendered with respect to Task 5 during the period from September 1 to 30, 1995. The COR signed off that the services had been rendered. Appeal File, Exhibit 10 at 6.

62. Ray produced copies of several invoices for Task 5. One invoice is dated September 12, 1995, for the amount of $31,599.86, for services provided during the two-week period from August 16 to August 31, 1995. Hearing Exhibit A-5. Another invoice, also dated September 12, 1995, reflected services rendered on Task 5 for the period from September 1 to 15, 1995, in the amount of $23,492.94. Hearing Exhibit A-6. An invoice dated October 10, 1995, reflected billings charged to Task 5 for the period from September 16 to 30, 1995, in the amount of $15,254.87, and, as of that date, cumulative charges to Task 5 of $70,347.67. Hearing Exhibit A-7. These invoices showed substantial hours logged by the project manager, the project leader, several systems analysts, and a cost-price analyst, but did not describe the nature of the work done or identify a delivery order other than Task 5 generally. Nor is there a description in the invoices of any deliverable provided to the State Department. Hearing Exhibits A-5 to A-7. The State Department's appeal file

documentation for Task 5 did not reflect that State received or processed for payment copies of these invoices at the time they were generated.[6] Appeal File, Exhibit 10.

Exercise of First Option Year

63. Prior to the exercise of the first option year, in a memorandum dated September 5, 1995, the COR memorialized a meeting held with Ray's project manager on September 1, 1995. In that memorandum, the COR noted various "areas of agreement" between Ray and State, including the following:

> The Department will no longer issue fixed-price delivery orders under the Ray Communications contract. All future delivery orders will be fixed price - level of effort.
>
> Whenever it appears that estimated hours will be insufficient to produce deliverables as originally defined, Ray Communications will notify the contracting officer at the earliest possible opportunity to give [the Department] an opportunity to adjust the original deliverable and/or schedule.
>
> Ray Communications will receive status reports from its employees and subcontractors at least twice a week. These reports may be oral. If it appears that any individual is working beyond the scope of his/her delivery order, the contracting officer will be notified immediately.

Supplemental Appeal File, Exhibit 27.

64. On September 13, 1995, the Government issued modification 8, exercising option period 1 under the contract, to begin on October 2, 1995, and end on September 30, 1996. The modification additionally provided that once funding for fiscal year 1996 became available, the Government would obligate the minimum $30,000, either by contract modification or issuance of a delivery order. Appeal File, Exhibit 15.

Task Order 8

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[6] It is not clear when these invoices were actually provided to State, but it may be that they were produced for the first time in November 1996, when Ray's executive vice president submitted a package of unpaid invoices to the contracting officer seeking payment at that point. *See* Finding 86.

65. In a letter dated September 5, 1995, the contracting officer requested that Ray submit a brief technical and price proposal to perform task order 8 (Task 8), for State Information Infrastructure (SII) Support Phase I. This letter explained that work under this task would be "done on a phase-by-phase basis" and that funds would be "provided incrementally as work continues." Appeal File, Exhibit 9 at 93. The statement of work for Task 8 called for the provision of support services needed to assist the Department to develop and define its requirements for deployment of a modernized global messaging system. The contractor's services would include, but not be limited to, drafting solicitation documents, reviewing proposals, and assisting with the procurement process in general. The work was to be performed in phases, with Phase I to involve only the work necessary for preparation of a draft solicitation and evaluation of comments received from the industry in response to that draft. The work on following phases was expected to be predicated on the completion of Phase I. *Id.* at 94-95.

66. Task 8's statement of work further provided that deliverables under this task order would consist of analyses, reports, and other documents. The period of performance was to be from the date of award through September 30, 1996. As of the date of award, State acknowledged that funds would cover only performance through November 15, 1995. It was anticipated that additional funding would be added incrementally to move through the various stages of work. The statement of work again confirmed that this would be a fixed-price, level-of-effort delivery order. Section 9 of Task 8's statement of work also stated that the contractor should invoice the Government not more than twice monthly and that, as the ceiling amount for this level-of-effort order was approached, "the Contractor shall notify the Government and shall not exceed said ceiling without prior written authorization from the Contracting Officer." Appeal File, Exhibit 9 at 98.

67. Ray's initial proposal for Task 8 estimated that a total of 5650 hours of work performed by its employees and subcontractors would be needed at a total labor cost of $447,066.50. Appeal File, Exhibit 9 at 28. In a letter dated September 19, 1995, State advised that it had decided to conduct two of the SII procurements concurrently, the one for personal computers (SII-PC) and, in addition, one for the local area network (SII-LAN). *Id.* at 61. Ray promptly, by letter dated September 21, 1995, submitted its revised technical proposal but did not immediately modify its price proposal, proposing instead to meet with the subcontractor who headed the technical team to obtain his input. Ray added that after this meeting had been accomplished, it would submit a revised price proposal, if necessary. *Id.* at 41.

68. Task 8 was awarded to Ray on September 26, 1995. The delivery order issued on that date set forth a not-to-exceed amount of $60,000. The delivery order stated that:

> The contractor shall provide the personnel required to perform the services described in the attached statement of work. Issuance of this Order shall initiate Phase I of this effort, which includes preparation of specifications for SII-PC and SII-LAN, issuance of a draft RFP (or select sections), and review of comments received from vendors. The funds provided for this effort are significantly less than the total requirement described in the statement of work, but shall be sufficient to authorize the Contractor to begin work. This is a fixed-price, level-of-effort delivery order. The Contractor is reminded of the notification requirements in Section 9.

Appeal File, Exhibit 9 at 30.[7]

69. To satisfy an administrative requirement that funding be tracked separately under Task 8, successive funding documents were labeled 8A and 8B. Appeal File, Exhibit 9 at 123; Transcript at 503. Task 8A, set forth in a delivery order issued on November 8, 1995, amended Task 8 and provided additional funding for Phase I in the not-to-exceed amount of $94,000. At that time, funding issues with respect to this contract were complicated by the existence of a budget impasse between Congress and the White House with respect to appropriations bills. One of the agencies affected by the impasse was the State Department, which was operating under a continuing resolution. In view of this situation, the task order amendment cautioned that while the delivery date was November 24, 1995, as of November 8, funds were only available through November 13. Once a budget or additional continuing resolution was passed, funds would be released for the appropriate period. Appeal File, Exhibit 9 at 29.

70. A continuing resolution was passed and on November 21, 1995, State issued another delivery order for Task 8B, further funding Task 8 in the not-to-exceed amount of $35,000 and bringing the total authorized funding for Task 8 to $189,000. The newly authorized funds would be available only through midnight of December 15, 1995. If additional funds were needed during the period from November 21 through December 15, the delivery order provided that another amendment would be issued. Appeal File, Exhibit 9 at 128.

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[7] In a letter to the SBA enclosing a copy of the delivery order for Task 8, the contracting officer stated that "the funds provided are sufficient to kick off the initial tasks," which had been identified in an attachment to the delivery order, and that "additional funds will be provided as needed/available." Appeal File, Exhibit 9 at 32, 39.

71. Another delivery order was issued on December 8, 1995. This order was denominated Task 8B, Amendment 1, and was issued for the purpose of further funding efforts under this task in the not-to exceed amount of $85,160.88. Work under the task order was to proceed until funds had been consumed or until December 15, when the continuing resolution was due to expire. This delivery order followed a notice to proceed with work which had been identified on December 6, 1995. Appeal File, Exhibit 9 at 129.

72. After December 15, 1995, the State Department shut down for approximately three weeks in the absence of a budget or continuing resolution. Transcript at 505; Exhibit R-15. During that three-week period Ray's project manager called the contracting officer and asked if Ray could continue to work during the shut-down since funding was available. The contracting officer said that it could. On January 5, 1996, the project manager called the contracting officer and stated that Ray was close to exhausting existing funding. The contracting officer instructed Ray to stop work. No work on Task 8 was performed for the period from January 6 until February 2, 1996. Hearing Exhibit R-15; Appeal File, Exhibit 7 at 23; Transcript at 632.

73. On February 23, 1996, the contracting officer issued a delivery order for Task 8B, Amendment 2, and added the not-to-exceed amount of $157,620 to this task order. This money funded the contractor's proposal of February 7, 1996, at the full fixed-price level-of-effort requested. The amendment followed a notice to proceed issued on February 2, 1996, and the period of performance was from February 2 until March 15, 1996. Appeal File, Exhibit 9 at 130.

74. In a memorandum to the file, also dated February 23, 1996, the contracting officer explained that the funds added in Amendment 2 to Task 8B covered the current continuing resolution, which was to expire on March 15, 1996. The contractor was given two lists of tasks -- one list for technical tasks and another for cost model tasks -- to be completed by March 15. The memorandum added that funds had been approved for this phase of the project in early February and that a notice to proceed with the work had been issued but that it had taken until this time to get a requisition. Finally, the memorandum noted that "[a]ll together, funds in the amount of $277,781 [had] been obligated on Task 8B." Appeal File, Exhibit 9 at 127.

75. On March 29, 1996, a third task order amendment was issued for further funding of Task 8B in the amount of $49,978.92. Two lists of tasks -- one technical and one cost-related -- were attached to this amendment. The amendment stated that the services to be provided for the funds so added were the first fourteen items on the technical list and the first four items on the cost list. A notice to proceed had been issued on March 27, and the period of performance was to be March 28 through April 15, 1996. Finally, this amendment also stated that this was a "fixed-price, level-of-effort order." Appeal File, Exhibit 9 at 131.

76. On April 15, 1996, the contracting officer issued another task order amendment to Task 8B, adding funding in the amount of $58,817.08 for the period from April 16 to May 3, 1996. This amendment, number 4, noted that the contractor would perform the last three tasks on the first page of the attached list of subtasks for Task 8B and all of the cost tasks on page 3 of the attachment, and added that some tasks in prior sections on the list may need updating or refining during this period as well. This amendment also expressly stated that it was a "fixed-price, level-of-effort order." Appeal File, Exhibit 9 at 135.

77. Also on April 15, 1996, Ray's project manager asked to meet with the contracting officer for the purpose of hand-delivering an envelope of invoices for work done under Tasks 8, 8A, and 8B for the contracting officer's review. The contracting officer reviewed the invoices and sent a written memorandum to the project manager regarding the disposition of each invoice. Hearing Exhibit R-14. On May 3, 1996, the contracting officer prepared a "memorandum for the record," detailing her observations with respect to the invoices. She stated:

> For Task 8, we had obligated $60,000, and had been billed for $59,900. I received two additional invoices for this task which exceeded what was available and had to be rejected. For Task 8A, we had obligated about $94,000, and had paid (i.e., approved invoices) for about $82,000. The invoices that came in exceeded the maximum, so I rejected them and asked for a $12,000 invoice to be submitted. On Task 8B, things really get murky. . . . Essentially, up through Amendment 2 of Task 8B, we had obligated about $277,000, and with the invoices I received last week, the total amount billed for exceeded that by some $78,000.
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> Part of the problem occurred during our 3-week furlough. [The project manager] had called me early in January to see if they should continue to work, since they were funded, and I said yes. . . . [The project manager] called me on/about January 5, 1996, and said they were nearly out of money; I directed her to stop work, and no work was done between Jan. 6th and February 2, 1996. This was the only time the project manager contacted me to say they were approaching the ceiling.

Hearing Exhibit R-15. The contracting officer went on to state that based on her review of the invoices it appeared that Ray Communications had overspent on this task by about $127,800. *Id.*

78. Amendment 4 was the last modification adding funding to Task 8B. After that, following discussions held between Ray's project manager and State's contracting officer, concerning difficulties Ray was experiencing with its comptroller and resulting financial problems, the parties agreed to start fresh with Task 10 to continue work beginning May 6, 1996. Hearing Exhibit R-15. Task 10, then, was simply a continuation of Task 8, with a new number assigned for administrative purposes.[8] Transcript at 301-03.

79. In a letter to Ray, dated April 29, 1996, the contracting officer stated that her office had been informed that morning, by Ray's executive vice president, that the consultants providing services under this task would not be reporting to work because the COR had told them not to come in. She further stated that the consultants had told her that they were not reporting to work because they had not been paid by Ray for services provided in the preceding six weeks. The letter then cautioned Ray that "failure to provide the services ordered and funded puts your firm in a default status. This shall serve as official notification of that status." Finally, the contracting officer stated that:

> Pursuant to FAR 49.402-3(c), this letter shall serve as notice of a new date for resumption of ordered services, which shall be Tuesday, April 30, 1996. Failure to provide requisite services on that date may be cause for Termination for Default. Should contractor personnel resume work as specified herein, then the term for Amendment 4 to Task Order 8B shall be extended from May 3 to May 6, 1996.

Appeal File, Exhibit 9 at 252.

80. The contracting officer testified to her intent and understanding that each separate amendment reflected additional funding for specific agreed-upon tasks and subtasks and an agreed-upon level-of-effort. The contracting officer also testified that with respect to Task 8 and the individually funded and itemized tasks to be performed under that overall Task, the Government accepted Ray's estimates of the time required to complete the itemized tasks and did not attempt to negotiate a lower price or level-of-effort. Transcript at 523.

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[8] Notably, in performing the Task 10 continuation of the Task 8 SII-PC and SII-LAN work, which was managed by a new project leader, Ray began to generate regular reports advising the Department as to the status of funding to perform subtasks. *See* Appellant's Hearing Exhibits A-17, A-18. Ray does not allege that any overruns occurred in completing work under Task 10.

81. Ray's testimony as to its understanding of the incremental funding process was consistent with that of the contracting officer. Also with reference to Task 8, Ray's project leader, who eventually became the project manager for the contract, testified that under the incremental funding process, Ray would submit a proposal stating what tasks or subtasks it would work on during the specified time frame and providing its estimate of the cost based on the number of hours needed to accomplish the tasks. In essence, Ray was required to "define week-by-week" "what [it would] do and how much it would cost." Transcript at 293-94.

82. The Task 8 project leader also testified that for a period when he worked on Task 8 as part of the technical team at State, he was in a large room with the subcontractors performing technical review work.[9] One of the subcontractors headed up the technical review effort. It was the project leader's observation that there was frequent interaction between the COR, contracting officer, and subcontractors, and instructions were provided by the contracting officer and COR at various times. Transcript at 284-90.

Second Option Year

83. In August 1996, the Government issued modification 11, exercising option year 2 of the contract for the period to begin on October 1, 1996, and end on September 30, 1997. The modification stated that the minimum guaranteed amount of $30,000 would be obligated through the issuance of a delivery order. Appeal File, Exhibit 12.

Additional Information and Testimony

84. The contracting officer testified generally to her understanding of the estimated work requirements. She stated that the Government's intent was to order the work but to let the contractor know that while "we really didn't have enough money to complete the work with this task order by itself as funded," the Government's intent was to get additional funds if needed. At the same time, she testified, MAPO "didn't order work in the absence of funds." Transcript at 442-44. She understood the contract terms to mean that the contractor was not authorized to work beyond the specified ceiling price in the absence of any direction from the contracting officer. *Id.* at 496.

85. Although the Government expected that Ray would provide formal notice as it was approaching the contract ceiling amount under individual task and subtask orders, the

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[9] The project leader also testified that he had previously been in charge of the cost team, which consisted of Ray employees located at Ray's facility in Reston, Virginia. Transcript at 284.

first time such notification was provided was under Task 10. Transcript at 497; *see* Hearing Exhibits A-17, A-18.

86. In negotiating task order prices, the contracting officer recalled that her practice was to ask Ray to propose how many hours were needed and a price to accomplish the task. State generally accepted the contractor's estimate. It was rare to negotiate the hours expected to be needed to complete a task order. Transcript at 498. With respect to certain task orders for which no contractor proposals were in the appeal file, she testified that the files appeared to be incomplete. *Id.* at 594.

87. In response to Ray's point that State appeared to have a practice of approving invoices for work performed by the technical team, which was performed primarily by Ray's subcontractors, rather than invoices for the cost team, which was composed of Ray employees, the contracting officer testified that State had no idea that they were paying only for the technical team when invoices came in or that Ray would invoice the work of the two teams separately. The funding and the task orders did not require separate billing of cost and technical work. Transcript at 635-36.

Ray's Claim

88. In a letter to the contracting officer dated November 12, 1996, Ray's executive vice president submitted an original and two copies of sets of invoices for payment under Tasks 1, 2, 3, 5, and 8 under the subject contract. In this letter he stated that many of the invoices for which payment was requested had previously been submitted but not paid. He notes that some of the invoices had been rejected as exceeding funding limitations, others had been held by Ray pending notification that increased funding had been added to ceiling levels, and some were for services rendered but not previously billed to the State Department. He stated his position that whether or not the services had been previously billed to the Government, "Ray is entitled to be paid for all services rendered inasmuch as the company continued to perform above task order ceiling levels based on [the Department's] repeated verbal representations that there would be plenty of money on the contract." Appeal File, Exhibit 8.

89. By letter dated November 29, 1996, the contracting officer responded, generally disputing the billings as to the work performed, disagreeing that any claimed overruns had been authorized either explicitly or tacitly, and informing Ray that out of unpaid billings in the amount of $680,114.82, the Department agreed that it owed approximately $87,500 and disputed the remainder. In this letter the contracting officer addressed several issues that are central to this appeal:

> During the performance of Task 8, the Government was furloughed twice. During the second furlough, the Program Manager called me at home. She explained that there was still money available on her task order, and she asked whether or not she should have her staff continue to work. My direction was to work until the money ran out. As previously stated, there was no question about whether or not additional funds would be forthcoming; we clearly conveyed to the Program Manager that the money we placed on each order or amendment to an order was all the money that was available. The Program Manager later told me she thought she could submit an invoice later and that we would pay it. I told her we would not pay any invoices so submitted; funds were simply not available.
>
> Last April the Program Manager delivered an envelope full of invoices, most of which I had never seen before. In reviewing these new invoices, and going back over some of the invoices we had paid, I discovered that the existing invoices only seemed to cover technical evaluation work, and the new invoices were for price validation work. I do not know where the originals of those invoices are, but despite [Ray's] assertion that we lost them, we had never seen them before. I believe that only [the program manager] can explain that mystery.

Appeal File, Exhibit 7 at 5. In further responding to the claimed overruns, the contracting officer noted again that with the exception of the single incident that occurred during the furlough, "proper notification that we were approaching our ceiling was not provided by Ray." *Id.* She concluded with the statement that the Department would pay additional amounts claimed by Ray under Tasks 1, 2, and 8B, up to the amount of the established ceilings, upon the submission by Ray of properly supported invoices. *Id.* at 5-6.

90. After the contracting officer refused to compensate Ray for amounts in excess of the task order ceilings, for several years, Ray focused on pursuing a quantum meruit claim within the State Department. A formal quantum meruit claim, seeking relief under the State Department's claims settlement authority under 31 U.S.C. § 3702, was submitted on August 18, 1998. Appeal File, Exhibits 4-6.[10] Eventually, by letter dated June 7, 2000, the State

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[10] At around the same time, the State Department's Office of Inspector General conducted an investigation of Ray's allegations with respect to the Government's conduct in administering the subject contract and individual delivery orders. With respect to funding

Department, through a successor contracting officer,[11] responded to the quantum meruit claim by informing Ray that it should first present a certified claim to the contracting officer for decision under the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-13 (2000)). *Id.*, Exhibit 3. On July 17, 2000, Ray filed a certified claim in the amount of $563,266.25. *Id.*, Exhibit 2. The contracting officer denied Ray's claim by letter dated November 15, 2000. *Id.*, Exhibit 1.

92. Ray then filed an appeal of the contracting officer's decision denying its claim. Ray seeks the following amounts on the task orders in dispute:

Task 1	$ 9, 330.73
Task 2	$ 17,812.58
Task 3	$312,955.79
Task 5	$ 70,347.67
Task 8	$167,740.48
TOTAL	$578,187.25

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limitations, the Inspector General's report stated that no evidence was found "to substantiate the allegation that the Department induced Ray to exceed funding limitations set in individual task orders." There was no evidence found that Ray received "repeated verbal assurances that funding would be forthcoming" nor was it found that Ray was "encouraged to continue performance in the absence of funding." The Inspector General did not find any documentary support for the existence of such assurances; to the contrary, the documentation "supported the Department's position that it reminded Ray of the obligation to inform the contracting officer when maximum funding levels were being reached and that the Department warned Ray of the risks involved in working past the authorized funding levels. With respect to Ray's allegation that the contracting officer had "designed a complex web of task orders" to ensure that subcontractors would be paid at Ray's expense, the report concluded that the procedures used to assign tasks and subtasks under this contract were "customary to the administration of Government contracts and had no correlation with making payments to subcontractors." Finally, the report acknowledged that the contracting officer's actions in suggesting suitable subcontractors to Ray, rather than simply approving subcontractors that Ray proposed on its own, although she did not intend to require the use of those subcontractors, may have given rise to an appearance of promoting the use of particular subcontractors, although the report also found that no contracting laws had been violated. Supplemental Appeal File, Exhibit 33.

[11] The contracting officer who awarded and administered Ray's contract during the period relevant to this appeal was no longer handling the contract at that point. Transcript at 644.

Appeal File, Exhibit 4.[12]

Discussion

Ray claims that it is entitled to be compensated for the cost overruns it incurred in the performance of Tasks 1, 2, 3, 5, and 8 under the subject contract for acquisition support services. The issue to be resolved in this appeal is whether the Government had any obligation to fund and pay for the labor hours that Ray dedicated to performing these task orders above and beyond the levels of effort that were authorized and incrementally funded by the State Department.

Ray's principal theme is that a careful examination of the Government's actions in administering these task orders proves its point that the Government was not free to rely on the cost limitation provisions of the contract and individual delivery orders to avoid paying Ray for the additional costs it incurred. In particular, Ray cites to what it regards as the confusing, and sometimes retroactive, incremental funding process used by the agency, in which insufficient funds to complete a task were authorized initially, or funds were obligated to tasks after the Government had formally or informally authorized work and, in some instances, after work had already been completed and costs incurred in excess of the funding authorized. Ray contends that this process was tantamount to the provision of assurances that all work performed would be paid for and caused it to expect that funds would be available and subsequently obligated to pay for all of the work it performed. Ray says that it incurred these costs in reliance on this understanding. Additionally, Ray points out, the Government wanted and accepted the deliverables under the task orders, and thus benefitted from Ray's efforts. The Government should, therefore, in Ray's view, reimburse it for the extra labor hours that were devoted to performing these tasks.

The State Department's response to these arguments is simple: appellant routinely exceeded funding limitations without properly notifying the Government and stopping work as it was required to do under the terms of its contract and the individual delivery orders issued thereunder. As such, the Government has no obligation to absorb Ray's overruns.

Overview

[12] In the contracting officer's decision, the Government agreed that the amounts of $14,921 on Tasks 1 and 2 were within the authorized ceilings and could be paid, although Ray had not, in the State Department's view, submitted a proper invoice against this amount. Ray added this amount back into its claim, since it has not been paid to date.

This was a fixed-price contract in that the labor rates to be charged by the contractor for specified categories of labor were negotiated and set out in the contract; the contractor's performance obligation, however, was similar to that under a cost-reimbursement type of contract. That is, under a fixed-price level-of-effort contract, the authorized level of effort represents the contractor's considered estimate of the number of labor hours that will be needed to achieve the contract objective. If the contract objective cannot be met for the number of hours funded, the contractor is only obligated to continue performance if the Government increases funding. On the other hand, if the contractor is able to complete performance with less labor than was expected, the contractor is paid only for the number of hours actually provided, and is not automatically entitled to the full ceiling amount authorized.[13] *See Halifax Engineering, Inc.*, ASBCA 37335, 91-1 BCA ¶ 23,492.

As such, we look to the body of law developed with respect to limitation of cost and limitation of funding clauses under cost-reimbursement contracts for guidance in evaluating whether Ray has met its burden to show that State was obligated to fund the overruns despite

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[13] The Federal Acquisition Regulation (FAR) defines a firm-fixed-price, level-of-effort contract as follows:

> A firm-fixed-price, level-of-effort term contract requires (a) the contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms and (b) the Government to pay the contractor a fixed dollar amount.

48 CFR 16.207-1 (1994). The FAR further states that:

> A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.

Id., 16.207-2.

Ray's executive vice president, who had overall responsibility for this contract, testified that he understood this to mean that "the Government was going to set . . . a not-to-exceed number and we were going to put as many hours into it as possible with the correct labor categories until we reached that ceiling." Transcript at 84.

Ray's failure to provide advance notice that funds were insufficient to complete individual task orders. Although the contract terms and delivery order terms, with the exception of Task 8, *see* Findings 66, 68, do not expressly require the contractor to advise the Government when the authorized ceiling is likely to be exceeded, both parties have recognized that inherently the contractor must notify the Government that authorized costs have been or are about to be exceeded and stop performing before funds are exhausted. Thus, the precedent developed with respect to the notice clauses under cost-reimbursement contracts and exceptions to application of the preclusive effect of the limitation provisions is instructive, and both parties have relied on it in arguing their respective positions.

As appellant points out, the Board has recognized that cost limitation provisions in Government contracts are strictly construed and enforced. *See, e.g.*, *Michael Weller, Inc. v. Office of Navaho and Hopi Indian Relocation*, GSBCA 10627-NHI, et al., 94-2 BCA ¶ 26,849, at 133,613 (time and materials contract); *Naomi Gray Associates, Inc.*, GSBCA 9390-ED, 90-1 BCA ¶ 22,297, at 111,977 (1989) (cost-plus fixed fee contract); *Automated Management Systems*, GSBCA 7394-COM, 85-1 BCA ¶ 17,891, at 89,600 (time and materials contract); *accord TDC Management Corp.*, DOTCAB 1802, 89-3 BCA ¶ 22,040, at 110,876 (cost-reimbursement no-fee contract). This is in recognition of the fundamental nature of the undertaking, in which the Government seeks to limit the amount it will spend, and the contractor's only obligation is to perform the work up to the ceiling amount authorized. In these circumstances, the contractor is protected from a default termination should it stop performing as costs incurred approach the ceiling and additional funding is not authorized. At the same time, the Government is able to ensure that the contract does not become "a blank check drawn on the Treasury." *Wind Ship Development Corp.*, DOTCAB 1215, 83-1 BCA ¶ 16,135, at 80,158 (1982).

These considerations apply not only to cost-reimbursement type contracts, but also to fixed-price type contracts such as the one in issue in this appeal where the contractor has agreed to strive to achieve the desired result using labor at agreed-upon hourly rates for a fixed level-of-effort, within the constraint of a specified funding ceiling. In all of these cases the Government accepts the risk that it might not receive the end result it wants if the contract deliverables cannot be produced for the agreed-to labor mix and available funding, but does not accept the risk that the contractor will perform at a cost in excess of the funded ceiling without authorization. Because of this, the Government is generally under no obligation to fund an overrun, although the contracting officer may always exercise his or her discretion to do so. *See, e.g., General Electric Co. v. United States*, 412 F.2d 1215, 1220 (Ct. Cl. 1969); *JJM Systems, Inc.*, ASBCA 51152, et al., 03-1 BCA ¶ 32,192;[14] *PB*

[14] As pointed out in *JJM Systems*, the board in *North American Rockwell*, ASBCA 14329, 72-1 BCA ¶ 9207, at 42,722, aptly stated: "[a] contractor cannot create an

Farradyne, Inc., DOTCAB 4063, 00-1 BCA ¶ 30,683 (1999); *Arbiter Systems, Inc.*, ASBCA 47403, et al., 97-2 BCA ¶ 29,183, *aff'd*, 178 F.3d 1311 (Fed. Cir. 1998) (table), *cert. denied*, 527 U.S. 1003 (1999). At the same time, "a heavy burden of self-protection against cost overruns" is placed upon the contractor and cost limitation clauses may be invoked to bar recovery of overruns against a contractor that fails to protect itself either by providing the requisite notice of overrun or by stopping work when funds run out.[15] *Falcon Research & Development Co.*, ASBCA 26853, 87-1 BCA ¶ 19,458, *aff'd mem.*, 831 F.2d 1056 (1987).

In short, a contractor that performs work in excess of the applicable cost ceiling without obtaining express authorization from the contracting officer does so at its own risk, unless it can demonstrate the applicability of an exception to the rule, or that the contracting officer has abused the discretion not to fund the overrun. These exceptions include the following: (1) a change in the contract work; (2) the contractor had no reason to know of and could not have known of, an imminent overrun, or (3) some conduct on the part of the Government entitles the contractor to recover the overruns. *See OAO Corp.*, DOTCAB 1280, 83-1 BCA ¶ 16,379, at 81,440-41. In this case, Ray does not contend that the contract work changed. Rather, it maintains that the Government's conduct in the course of contract administration amounted either to a waiver of the cost limitation provision's requirement to provide notice of an impending overrun or, alternatively, that the Government should be estopped by its conduct from asserting the cost limitation clauses to bar the contractor's recovery. *See American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985) (estoppel); *Wind Ship Development Corp.*, 83-1 BCA at 80,159-60 (waiver).

In particular, Ray relies on *American Electronic Laboratories, Inc.*, a decision in which the Court of Appeals for the Federal Circuit concluded that the Government should be estopped from relying on the limitation of funds clause included in a cost-reimbursement contract to develop and produce electronic countermeasure test simulators. In that case, the contractor notified the Government early in the performance process that it anticipated an overrun of about $1.124 million and requested the Government to allocate additional funds if it wanted the contract work to be completed. The Government, in seeking continued performance, assured the contractor that it had an additional $900,000 easily available to allocate to the procurement. The Court found that the contractor reasonably relied on this

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obligation on the part of the Government to reimburse it for a cost overrun by voluntarily continuing performance and incurring costs after the cost limit has been reached."

[15] It goes without saying that contractors are obligated to maintain reasonably accurate records and to expend reasonable efforts to monitor contract performance, so as to be able to predict or ascertain when a contract ceiling will be reached. *See, e.g.*, *OAO Corp.*, DOTCAB 1280, 83-1 BCA ¶ 16,379, at 81,441.

representation and was induced by it to continue performance into an overrun position in excess of one million dollars. As such, the Court held that by reason of its conduct the Government was equitably estopped from asserting the cost limitation provision of the contract. In so ruling the Court set forth four elements that must be present to establish estoppel:

> (1) the party to be estopped must know the facts, i.e. the government must know of the overrun; (2) the government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the facts, i.e. that no implied funding of the overrun was intended; and (4) the contractor must rely on the government's conduct to its detriment.

774 F.2d at 1113 (citations omitted). The Government's liability to the contractor was, however, limited to the $900,000 in funding that it had represented would be allocated to the contract. *Id.* at 1116.

Looking at the evidence adduced as a whole, we are not convinced overall that the requisite showings for estoppel or waiver have been made as to any of the overruns. Certainly, the first two elements of estoppel have not been established by appellant as to all or any of the task order overruns it experienced. Although appellant has made a valiant effort to suggest that the State Department should have known and therefore very likely did know of the overrun situations existing with these five task orders, the record as a whole does not bear this out. Certainly, the level of actual government knowledge of overruns, and deliberate action to encourage continued performance that is present in cases in which equitable estoppel has been held to apply, have not been shown here. Other than some invoices purporting to show negative cumulative balances on certain tasks, there are no written communications from Ray establishing that clear notice was provided to State as funding was exhausted on various tasks. Nor did Ray produce any internal documents memorializing conversations that its project manager or other executives might have had with the State Department concerning notification of imminent overruns. Further, no Ray witness testified that Ray routinely and unequivocally notified the Government that the effort provided by Ray would exceed available funds prior to completion of the work needed to be done under a particular task order. Neither the evidence of record nor the testimony of witnesses supports a finding by the Board that the Government actually realized that Ray was in an overrun position prior to the company's incurrence of the unfunded costs or that it, with this knowledge, intentionally induced Ray to continue to work by holding out a promise that overruns would be fully funded.

Ray asks us to infer that had the COR carefully reviewed Ray's invoices, he could have figured out that the level of effort put in by Ray was putting the company into an overrun position. This constructive "knowledge" should then, according to Ray, be imputed to the contracting officer, who was the COR's subordinate within the office. The COR testified, however, that he reviewed the invoices for the specific amounts billed to verify the services rendered and did not attempt to track the hours used by the contractor. Finding 12. As such, he did not focus on the potential for overruns. These invoices were not the type of affirmative advance notice of an overrun that was contemplated. *See JJM Systems, Inc.*, 03-1 BCA at 159,112-13.

Moreover, in this situation, where the contractor was concurrently performing numerous individual tasks and subtasks for several delivery orders, it was not realistic to expect the Government to anticipate the contractor's overrun situation. The reason the contract language and the law place the burden of direct notification on the contractor is that in most cases the contractor is in the best position to ascertain that this is the case prior to actually incurring overruns. That was certainly the case here, since Ray was in receipt of the time sheets of both its employees and the subcontractors. Thus, Ray has not shown that the Government had the requisite knowledge of its overrun positions.

Ray's position is similarly unpersuasive with respect to the second element of estoppel – that the Government intended that its conduct would induce the contractor to continue to perform or that the contractor had a right to believe the conduct in question was intended to induce continued performance. In support of this contention, Ray points to those instances in which the Government authorized proceeding with the work before the money was actually available to MAPO, issued confirming orders after work had started, and in some cases funded work retroactively. We are not persuaded that these circumstances amounted to the requisite inducement to incur an overrun on the part of knowledgeable Government officials. With respect to the task orders in question, the Government had ascertained that money would be available to perform the work it wanted and was clear about how much would be obligated. It appears from the record that the promised funds were in fact, in all instances, obligated to the contract as expected. The paperwork obligating the funds may not have been completed prior to authorizing work, but the COR testified that he was not in the habit of advising the contracting officer to add to the work before he had verified that funds would be available. Finding 14.

Under the circumstances, while some confusion with the funding process may have been understandable, the pattern that most readily emerges is not that Ray was told or encouraged to work when funds had not been authorized, but that it was permitted to work prior to the issuance of a formal written directive so long as the COR had ascertained that funds were available and would be obligated for the tasks and subtasks in question. This ordering pattern was not tantamount to encouragement to keep performing after available

funds had been exhausted and additional funds had not been promised. Without more compelling evidence than what Ray regards as a confusing pattern of task orders, delivery orders, and amendments adding funds on an incremental basis, coupled with occasional contractor invoices showing cumulative cost expenditures, many of which apparently were not submitted for payment as costs were accrued, we are unable to conclude that the Government (1) had full knowledge of the overruns and (2) either knowingly induced Ray to continue to perform work or should have known that its conduct was inducing Ray to incur overruns with the expectation of being paid. This is simply not the type of circumstance in which the waiver and estoppel exceptions to strict application of cost limitation provisions are found to apply. *See TEM Associates, Inc.*, DOT BCA 2556, 93-2 BCA ¶ 25,759, at 128,181-82 (when the contracting officer knew of no prior cost overrun, funding of future work did not waive the cost limitation clause retroactively); *Decision Science Consortium, Inc.*, IBCA 1651-2-83, 85-3 BCA ¶ 18,350, at 92,015 (when the contracting officer knew of no cost overrun and neither encouraged nor directed the contractor to continue work after exhaustion of contract funding, the cost limitation clause was not waived).[16]

Nor does it help Ray's argument to refer to cases in which the contractor is excused from notifying the Government of a pending overrun because it had no reason to believe an overrun would occur. These cases typically involved cost reimbursement contracts in which the overages were attributable to unforeseeable changes to estimated costs such as increased indirect labor rates, overhead rates, and general and administrative rates resulting from fluctuating business. These changes were not capable of being discovered by the contractor in time to avoid an overrun by notifying the Government. This line of precedent has thus held that to the extent the costs were genuinely unforeseeable and could not have been discovered in time to provide notice of an overrun, and the contracting officer's sole reason for refusing to fund the overrun is failure to provide notice, the Government may not invoke the cost limitation clause to bar recovery. *See Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 310 (Fed. Cir. 1997); *RMI, Inc. v. United States*, 800 F.2d 246, 248 (Fed. Cir. 1986); *General Electric Co.*, 412 F.2d at 1217. It is the contractor's burden to prove that the overruns were not reasonably foreseeable. *RMI, Inc.*; *Johnson Controls World Services, Inc. v. United States*, 48 Fed. Cl. 479, 487 (2001). This requires the contractor to show, in effect, that it was "impossible" to know the status of its costs. *Johnson Controls*, 48 Fed. Cl. at 487 (citing *Planar Corp.*, ASBCA 21060, 77-1 BCA ¶ 12,269, at 59,065).

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[16] Since we have not found that first two factors enunciated in *American Electronic Laboratories*, estoppel is not applicable and we need not address the third and fourth factors that must be demonstrated to invoke estoppel against the Government.

These cases, and the exception established in them, simply do not apply here. In Ray's situation, its labor rates were fixed, and determining the existence of an overrun should have been simply a matter of tracking the hours spent by Ray's employees and consultants. To the extent Ray alleges that the Government was controlling the subcontractor consultants, who were located at State's offices, the subcontractor consultants nonetheless had to submit timesheets in order to be paid through Ray, and Ray does not establish that the consultants logged hours of which it was unaware and thus unable to determine the potential for an overrun. We are not persuaded that this exception applies to excuse Ray's total failure to raise the overruns with the Government more promptly than it did.

The Government documented its activities under the contract, and there is no indication in the many documents generated in connection with this contract that the Government was aware or even inclined to suspect that overruns were occurring at a point when the contractor could have been told to stop work. Nor is there any evidence that the Government promised payment for work exceeding the authorized levels-of-effort under the incrementally funded task orders. Contemporaneous documents are inherently more reliable than witness recollections recounted many years after the fact. *Program and Construction Management Group, Inc. v. General Services Administration*, GSBCA 14178, et al., 00-1 BCA ¶ 30,641 (1999), *aff'd*, 246 F.3d 1363 (Fed. Cir. 2001). And, in this case, appellant's witnesses have not actually testified that this is what occurred. Rather, appellant, relying on gaps in the record, effectively asks us to infer that this must have happened and surmise that Ray would not have incurred these overruns had it not been induced to do so by the Government.

Ray's interpretation of the incremental funding process, as a blanket authorization to incur as many hours as it needed to produce the deliverables under the task orders without regard to the specific levels of effort actually funded, was simply unreasonable. In essence, by continuing to incur costs significantly above the levels of effort that it could determine were actually funded by the Government, Ray turned the underlying premise of this contract vehicle on its head. Ray's interpretation of the Government's funding process to mean that the Government wanted the relevant deliverables without regard to funding limitations was unreasonable. It was not the contractor's prerogative to perform the work anyway and submit a bill, long after the fact, for costs that are far in excess of the ceiling.

In effect, Ray's position amounts to an effort to shift the burden of communication in a cost overrun situation. In the cases it relies on, notably *American Electronics Laboratories*, the contractor had clearly informed Government officials that it was in an overrun position and, after so informing the officials of this fact, had been induced to continue to perform by the promise that specific additional funding was or would be available. Here, the proof falls short of demonstrating that the Government was firmly

advised of the overruns by Ray before they occurred and that, with this knowledge, the Government acted to induce Ray to continue to perform. In essence, Ray urges that the Board should infer that the Government, by carefully monitoring Ray's performance and invoices, should have been able to deduce for itself that Ray was in an overrun situation and have either ordered Ray to stop work or funded the overruns. This is not required by either the contract or the case law. The contract terms squarely placed the burden of determining the existence of an overrun situation on the contractor and further required that the contractor clearly communicate that fact to the Government so that the Government could make a decision whether to fund all or some part of the remaining work or, alternatively, to settle for what it had received up to that point. The preponderance of the evidence of record suggests that, with respect to the overruns in issue here, this step was never taken by Ray. The original project manager, who worked with the State Department personnel assigned to the contract on a regular basis, and who would have been both the most likely person to inform the agency of an overrun situation, as well as the most likely person to have been the recipient of the Government's alleged inducements to perform in spite of an overrun situation, did not testify at the hearing. The record reflects only two instances in which she undertook to notify the agency of an impending overrun position, both arising in connection with Task 8. There is no evidence beyond these two instances that Ray otherwise attempted to comply with its duty to inform the Government of overruns under the task orders in issue.

Although some cases have held that the Government's actions in continuing to ask for work after becoming aware of overruns effectively waive the requirement to notify the Government in advance of incurring further overruns, *see, e.g.*, *Flight Dynamics Research Corp.*, ASBCA 35248, et al., 88-3 BCA ¶ 20, 861 at 105,499-500, the evidence does not establish that that happened here. Ray has suggested that the State Department's pattern of authorizing funding on a piecemeal basis, and modifying the contract to add hours and funding to the task orders, even occasionally after having told the contractor verbally to proceed, effectively waived the Government's entitlement to expect the contractor to keep it informed if costs over and above these amounts were to be incurred. This is tantamount to a suggestion that an incremental funding process automatically vitiates the fundamental nature of this contract. State fully expected that the hours performed by Ray would match what it promised to fund. In fact, State did fund all the work it actually ordered and came very close to ordering the work level that had been estimated at contract award. Whether this approach was the ideal way to handle these task orders or not, it was still incumbent on Ray to recognize the risk of working in excess of the hours approved and funded, whether verbally or in writing.

To summarize, this is not a case like *American Electronic Laboratories* in which the Government, aware of the contractor's overrun position, affirmatively promised that additional funding would be available and then declined to authorize it after the contractor, relying on that promise, continued to perform without the requisite written authorizations.

There simply is no solid evidence that the State Department was aware of the overruns and, with this knowledge, actively encouraged Ray to continue to perform.

As the foregoing discussion shows, we are unpersuaded overall that Ray has made its case with respect to the overruns experienced under these task orders. Since the rationales offered by Ray as justification for payment of the overruns vary somewhat depending upon the particular overrun and task order in issue, and the facts relied upon by the contractor differ for each task order in which overruns were experienced, we address them individually, as well.

Task 1

Task 1 was for the provision of assistance in evaluating the offers received by State for the DOSTEC procurement. The statement of work clearly specified a fixed-price level-of-effort was intended for this order. Although the initial award, in September 1994, had a ceiling of $11,076.30, this simply reflected State's understanding that this was the extent of funds available in fiscal year 1994, and the intent was to increase the ceiling as 1995 fiscal year funds became available. Shortly after award, the Department added first $30,000 and then $50,000 to the task. By the end of September, the Department had added another $129,529.92, bringing the total funding on Task 1 to $209,526.05. As of May 1995, when the Government extended the completion date of this task in modification 5, the amendment stated that "sufficient funding exists to complete the work." Finding 36. Notably, the record does not reflect any response from Ray suggesting that this was not the case.

In July and August, the Government added more funds to the contract to close out the work. Nothing in the written record suggests that the Government had any idea that Ray had incurred costs over and above the amounts authorized and paid. Nor is there any notation that Ray was regularly submitting invoices that exceeded the amount of the ceiling. Although Ray has submitted copies of invoices covering this period, it is not clear from the record that these invoices were provided to the Government prior to November 12, 1996, when Ray submitted its first formal letter seeking a resolution of the overruns. Finding 88.

Task 2

Task 2, for the preparation of a briefing book, was initially funded in the amount of $18,923.70 with work to commence in September 1994. This task was also clearly defined in its statement of work as a a fixed-price level-of-effort undertaking. Because the personnel working on this task were also working on Task 1, this task remained on the back burner. Its completion date was extended by modification 5 to June 30, 1995, with no additional funds provided because the existing level was deemed sufficient. In modification 6, funds in the amount of $47,000 were added to Task 2, and its completion date was extended to

September 29, 1995. In another modification of the contract, the contracting officer again extended the completion date for this task to December but also stated that sufficient funds were already obligated for completion of the task. Finding 31. Nothing in the record suggests that Ray demurred from this assertion.

Again, this was a specific task, for which the Government allocated a specific amount of money. After extending the completion date for some three months, the Government expressly stated its understanding that sufficient funds existed to complete the task. There is no evidence in the record that Ray ever approached the contracting officer for more money between September 1995 and December 1995, when the work was supposed to be completed. Unlike the other tasks, for which Ray can point to a pattern of ongoing incremental funding and requests to proceed before the funding documentation was complete, this argument is not available for Task 2.

Task 3

Task 3 consisted of support work needed for validation of offerors' prices under the DOSTEC procurement. The statement of work set forth specific tasks to be performed in three phases. The evidence of record clearly establishes that Ray proposed the amount of $14,870.10 to perform Phase I of Task 3 and, after negotiations, the parties agreed to the amount of $10,650 on a fixed-price, level-of-effort basis. Findings 38-39, 41. Although some parts of the documentation refer to Phases II and III as simply firm fixed price efforts, and the contracting officer testified to her understanding that these phases were fixed price endeavors, Finding 46, other documents suggest that the usual fixed-price level-of-effort endeavor was contemplated. Findings 42-44.

Admittedly, the record does not reflect any negotiation process that may have occurred with respect to Phases II and III of Task 3, although amounts were obligated to fund this work. Findings 42-44. The contracting officer testified that she believed the records were incomplete and she also testified to her recollection that negotiations had occurred prior to the obligation of monies. Ray contends, through counsel, that the absence of documentation showing a proposal from Ray proves that no proposals were submitted and no agreements on price or level of effort were reached for the performance of these two phases. Ray thus argues that this supports its position that State either was obligated to pay for all the work necessary to produce deliverables or that State improperly induced it to incur overruns to perform this work.

Again, we disagree. We are at a loss to explain how the funding amounts placed on the various phases in Task 3 were derived, but this is not the controlling consideration. If the contracting officer was correct and the amounts were mutually intended to be fixed price obligations, Ray is clearly not entitled to additional money. Despite her testimony to this

effect, we suspect that the contracting officer's recollection, after all this time, may have been mistaken, especially since at least some of the written documents adding funding to Phases II and III on this task state that they are fixed-price level-of-effort.[17] Findings 42-44. But again, the fixed-price level-of-effort rubric confirms that in performing these phases, as with all portions of the orders under this contract, Ray was expected to notify State when funding levels were close to being exceeded prior to actually incurring an overrun. If not sooner, then certainly by January 1995, when State noted that it would pay only $30,000 of a $39,000 invoice because of the ceiling for Phase II, Ray should have been alerted that it needed to raise the potential of overruns with the Government before incurring them.

On balance, we are inclined to find that the overall tenor of these documents supports the conclusion that these were fixed-price level-of-effort undertakings. Regardless, for the reasons stated in the general discussion above, we cannot accept Ray's contention that because there is no documentary evidence that a price ceiling had been negotiated with the contractor prior to its being authorized to incur costs no ceiling should apply and Ray should be awarded all of its overrun costs with respect to this task order.

Task 5

Ray's argument that it is entitled to some $70,000 in addition to the $5000 paid for this work is premised on its assertion that this was yet another "confusing" task order. State initially broached the matter with Ray in December 1994, seeking a proposal for a ten-week effort to assist the Department in preparing procedures for reviewing purchase requests on a world-wide basis, and receiving from Ray a proposal for a fixed price of $54,541.83. Some four months later, the contracting officer sent a different statement of work for Task 5, this time seeking to establish a "quick-response mechanism" with work to be added by issuance of sub-task orders. The ceiling was to be $50,000. On June 30, 1995, Task 5 was issued in the not-to-exceed amount of $5000. This task order document itself did not order any work but provided that individual task orders would be issued thereunder to draw down funds from the $5000 so obligated. No individual task order was actually issued until

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[17] In some respects, although appellant makes much of the fact that the contracting officer, in testimony, refer to certain phases of Task 3 as "fixed-price," these references are not altogether erroneous. This was indeed a fixed-price, as opposed to cost-reimbursement, type contract. None of this changed the fact that by this time Ray should have understood the need to track incurred costs and seek authorization for work in excess of costs expressly funded. If Ray was improperly pressured to perform for less than its full costs because the contracting officials were operating on the premise that these phases were actually fixed-price and not fixed-price level-of-effort, again, we would expect to see some contemporaneous documentation of this issue generated by Ray.

September, when the Department ordered services for editing the white paper in the amount of $5000.

Nonetheless, although there is no paper trail showing that the Government ordered any services pursuant to Task 5 beyond the editing of the white paper, which it paid for in full, Ray submitted invoices totaling an additional $70,347.67 in services provided in August through September 1995 on Task 5. Ray maintains that because of the confusing nature of the two statements of work for this task order, and the fact that it actually provided the administrative services with the people it said would perform the work in its initial proposal, the State Department should be required to pay Ray for this work.

Of all the assertions made by Ray in connection with the subject contract and delivery orders, its position under Task 5 is the most tenuous. The mere fact that Ray proposed to perform work for approximately $50,000 in response to the first draft statement of work did not obligate the Government to order these services and accept and pay for them. The documentary record on this task order is quite clear. Regardless of what State may have initially suggested might be the scope of the work, by April 1995, it had modified Task 5 to consist of possible small projects for which quick responses would be necessary. No promises were made as to the quantity of tasks that might be ordered. Ultimately, the amount that was obligated was $5000 and the only written order drawing down on Task 5 was the order for the white paper in the amount of $5000. As respondent points out, the record is devoid of any evidence that work over and above the single task contracted for in September 1995 was ever ordered. There is neither documentation nor testimony to support an inference that State ordered additional services under Task 5. The fact that appellant never invoiced State for any additional amounts under Task 5 until November 1996 further vitiates the credibility of appellant's position with respect to this task. If there were any verbal requests for quick response services, accompanied by assurances that funds were or would be available, appellant has provided no evidence that they were made and appellant has not made any showing that estoppel, waiver, or other exception to the rule that overruns will not be funded should apply so as to warrant sustaining its claim in connection with Task 5.

Task 8

Task 8 was for the provision of support services needed for the development of a solicitation for the deployment of a modernized global messaging system and eventually to provide assistance in reviewing proposals and otherwise supporting the procurement process for the SSI-PC and the SSI-LAN. The work was to be done in three phases. The statement of work for Task 8 again provided that this was to be a fixed-price, level-of-effort delivery order, with the concomitant requirement that the contractor notify the Government as the ceiling amount for the effort was approached. Task 8 was, like the other delivery orders

issued under this contract, incrementally funded, and the task orders issued under this delivery order specified which individual tasks listed in the statement of work were to be accomplished with the amounts obligated. In particular, in issuing this delivery order, the Government expressly reminded Ray of its duty to provide advance notice of potential overruns.

The performance of Task 8 was admittedly complicated by the Government-wide shutdowns that affected the early months of fiscal year 1996. The requirement to operate under continuing resolutions, lack of certainty with the budget, and need to obligate expiring funds, contributed to an even more piecemeal ordering process than had previously been experienced in conjunction with this contract. Ray's assertion that the task order and funding process became so confusing as to render it impossible to give notice of potential overruns, however, is not persuasive. Regardless of whether funding was being provided prospectively or retroactively because of the need to operate under continuing resolutions, it should have been possible to track the hours spent with the funding available. The project manager seemingly was able to do that in January 1996.

Even while the ordering activities may appear confusing, however, we cannot conclude that the Government's actions in regard to this task justify Ray's argument that it was induced to incur overruns and that it would have been futile to notify the Government of funding overruns. It was in the course of performance of Task 8 that the contractor finally formally notified the Government of an overrun situation. The first notification occurred in January 1995, while the agency was furloughed; the contracting officer in fact told the contractor to stop work until the funding status could be evaluated.

The second incident occurred in late April 1996, when the Government responded that Ray could not appropriately stop work at that juncture. We do not agree, however, that the Government's action in notifying Ray of its default status under Task 8B confirms that the Government was improperly requiring Ray to incur overruns. The Government's reasoning for asserting that Ray would be in default if it stopped work at that juncture appears to have been predicated on its understanding that the fact that funding for the specific work assigned under amendment 4 to the Task 8 delivery order had not yet been exhausted,[18] even if Ray had experienced unreported overruns on prior tasks and subtasks. Thus, the Government believed Ray was still obligated to perform new, ongoing funded work.

In any event, it is notable that this "threat" to place Ray in default status came at the conclusion of the incurrence of overruns. The task was converted to Task 10 within a few days of this incident and no further overruns were complained of by Ray. This letter, then,

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[18] Amendment 4 extended the funding through May 3, 1996.

cannot be said to justify Ray's incurrence of such extensive overruns prior to this point and does little to advance Ray's case.

The nature of this contractual endeavor, unlike the cost reimbursable contract cases relied upon by Ray, involved individually negotiated tasks for specific levels-of-effort which were authorized incrementally with respect to specific activities that the contractor was to accomplish. The funding for each task order stood on its own. Thus, if previous work had resulted in an overrun, this would not justify the contractor in stopping work on subsequently funded subtasks. The contracting officer's understanding was that the funds and levels-of-effort for the tasks which the Government had authorized the contractor to perform during that period of time had not been exhausted and thus the contractor had an obligation to continue to perform those tasks. If the contractor was in an overrun situation as to that particular task order amendment, it should have informed the Government of that fact. The record suggests, however, that the overruns relied upon by Ray when it announced its intention to stop work were with respect to earlier orders for which funds had been exceeded and no notice provided.

Conclusion

The record we have is insufficient to justify an inference on our part that the Government actively and knowingly induced Ray to accumulate the large amounts of overruns that it did under the disputed tasks with repeated promises that funding would be available. The Government's contemporaneous documentation with respect to these disputed tasks, coupled with the testimony of the contracting officer and COR, suggests that it did not intend to induce or fund cost overruns. The tasks and sub-tasks were incrementally funded, and generally in those instances when the Government authorized work to proceed in advance of the issuance of a written task order or amendment, it was under specific, documented and explained circumstances. As far as we can determine, for the most part the contractor prepared proposals indicating the level of effort it expected would be required to accomplish a given task or set of tasks. Both the COR and the contracting officer testified that they did not intend to induce overruns and did not believe their conduct contributed to the situation. On the other hand, there is no contemporaneous documentation whatever provided by Ray to establish that its overruns were incurred by reason of repeated verbal pressure exerted by the COR or other Government official to work beyond contract ceiling levels with assurances that funds to pay for overruns would be available. Nor is there testimony from Ray's former project manager, who was coordinating the work under this contract and the subject task orders through virtually the entire period in which the overruns

were incurred.[19] Thus, we have no first-hand evidence, either testimonial or documentary, from the person who would presumably have been on the receiving end of any pressure that might possibly have been exerted to continue to work in the absence of funding.

On balance, this is a contractor claim, and the contractor bears the burden of proving entitlement by a preponderance of the evidence. The contemporaneous documents and the testimony of the contracting officer and the COR strongly support the State Department's position that Ray's overruns were neither explicitly nor implicitly authorized or encouraged by the Government. Ray's argument, largely based on the absence of copies of its proposals for various phases of the task orders, and its claim that it construed the incremental funding process to be tantamount to an order to perform the work regardless of the availability of sufficient funding does not override the affirmative evidence in the record. In a situation such as this, where a dispute is litigated long after the events testified about have occurred, as is the case here, the balance falls in favor of the position supported by the available contemporaneous documentation. *Cf. Program and Construction Management Group, Inc. v. General Services Administration*, GSBCA 14178, et al., 00-1 BCA ¶ 30,641 (1999), *aff'd*, 246 F.3d 1363 (Fed. Cir. 2001) (citing *Program and Construction Management Group, Inc. v. General Services Administration*, GSBCA 14149, 99-2 BCA ¶ 30,579, *aff'd*, 13 Fed. Appx. 929 (Fed Cir. 2001) (table)) (contemporaneous documentation trumps conflicting testimony). Ray has not shown that the Government engaged in any conduct that requires it to pay the overruns.

Decision

The appeal is **DENIED**.

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CATHERINE B. HYATT
Board Judge

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[19] Ray did call the successor project manager to testify. He had been employed as the project leader prior to assuming the project manager position upon the departure of his predecessor from Ray's employ. He assumed the project manager position in the middle of the performance of Task 8B and confirmed the incremental funding process that was used in acquiring services under that task order. He also continued with this task when it became Task 10. Finding 82.

We concur:

_____	_____
EDWIN B. NEILL	MARTHA H. DeGRAFF
Board Judge	Board Judge