ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Phoenix Data Solutions LLC	)	ASBCA No. 60207
f/k/a Aetna Government Health Plans	)	
	)	
Under Contract No. H94002-09-C-0008	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS[1]

In July 2009, the TRICARE Management Activity (TMA), now known as the Defense Health Agency (DHA) awarded the TRICARE managed care support contract for the Northeast region to appellant, Phoenix Data Solutions LLC, formerly known as Aetna Government Health Plans (AGHP).[2] A few days later, the incumbent contractor protested the award to the Government Accountability Office (GAO), requiring DHA to issue a stop-work order. In early November 2009, GAO sustained the protest on a number of bases, including the appearance of an organizational conflict of interest because AGHP had hired a former DHA official and allowed him to work on part of AGHP's proposal. In early May 2010, six months after GAO issued its decision, and more than nine months after issuing the stop-work order, DHA terminated AGHP's contract for the convenience of the government. Under the Federal Acquisition

[1] This decision, originally issued on June 21, 2018, subject to protective order, is being reissued simultaneously with the Board's opinion on motions for reconsideration and redaction of portions of this decision. As appellant's requests for corrections and redactions have been granted in part, the changes are incorporated in this reissuance.

[2] For simplicity, this opinion refers to appellant as AGHP and respondent as DHA, regardless of time period.

Regulation (FAR) when a contract is terminated for the convenience of the government, the contracting officer should attempt to negotiate a settlement with the contractor that fairly compensates the contractor for the work performed. Instead, DHA slow-rolled AGHP from May 2010 through July 2015, when AGHP submitted its claim. AGHP now appeals from a deemed denial of that claim, as DHA failed to issue a contracting officer's final decision within the time required by the FAR.

The Board conducted an eight-day hearing in March 2017 at its offices in Falls Church, Virginia. At the hearing, AGHP presented generally unrebutted testimony from its employees and claims consultant serving to establish the reasonableness of the costs claimed in its termination settlement proposal and supporting the claimed amounts through documentary evidence and the testimony of individuals with personal knowledge of the documents and the calculation of the claimed amounts. In opposition, DHA presented speculation as to how, in DHA's opinion, AGHP could have structured its bid and responded to the stop-work order in such a manner that it would have resulted in a lower potential cost to the government. In addition, after knowingly deciding not to place on the hearing record deposition testimony of an unavailable witness regarding the possible organizational conflict of interest, DHA seeks, in post-hearing briefing, to reopen the record to consider such information.

In essence, DHA asks us to convert a termination for convenience of the government to a termination for default. Had DHA believed that the appearance of a conflict of interest was sufficient to justify a termination for default, DHA could have terminated AGHP for default in 2010.[3] Instead, DHA chose to terminate AGHP for the convenience of the government. Having done so, DHA was required by the FAR to pay AGHP for its allowable costs incurred. We find that AGHP is entitled to most of its claimed costs, and make an award in favor of AGHP in the amount of $11,093,549, plus Contract Disputes Act (CDA) interest.

FINDINGS OF FACT

I. TRICARE and Managed Care Support Contracts

TMA was an agency of the Department of Defense. Among other programs, TMA administered the TRICARE Managed Care Support Program. As of 1 October 2013, TMA was reorganized into the DHA, also an agency of the Department of Defense and the successor in interest to TMA (gov't br. at 5). TRICARE is a supplemental health benefit provided to military service members, their family members, military retirees, and their family members. TRICARE also provides care to

[3] We make no findings of fact as to whether a termination for default would have been justified.

certain individuals specifically identified by Congress, as well as the Public Health Service, and uniformed members of the National Oceanic and Atmospheric Administration. TRICARE covers approximately 9.3 million beneficiaries. (Tr. 4/108-09)

DHA issues managed care support contracts to support the TRICARE benefit. The support contractors manage enrollment of beneficiaries, collect enrollment fees, provide clinical support through a network of healthcare providers, and provide clinical management and oversight (tr. 4/109). Managed care support contracts originated with the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Reform Initiative in the early 1990s (tr. 4/110-11). In 1996, DHA issued the first generation of TRICARE contracts, referred to as the "Legacy" contracts. These contracts divided the country into 12 geographic healthcare regions (tr. 4/111). The 12 regions were awarded to 5 different contractors: Sierra Health, Anthem, Humana, Foundation Health (later known as Health Net Federal Services) and TriWest (tr. 4/112).

In 2003, DHA awarded a second generation of TRICARE contracts, referred to "T-Nex." In the T-Nex procurement, DHA consolidated the 12 regions in the Legacy contracts into 3 regions, and made some changes to the structure of TRICARE, including the establishment of TRICARE regional offices. (App. supp. R4, tab 95 at 2669; tr. 4/111) Health Net, Humana and TriWest, were each awarded T-Nex contracts, and each of the contractors was an existing Legacy contractor (tr. 4/112-13). Aetna submitted a proposal in response to the T-Nex solicitation for the North region, but was unsuccessful. While Aetna's proposal was found to be acceptable, and of low risk, its price was too high and the region was awarded to Health Net. (Ex. G-7) Health Net had been performing managed care support contracts for DHA since the original CHAMPUS Initiative in the early 1990s, and consistently throughout that time period (tr. 4/114-15). The third generation of TRICARE contracts, and the procurement at issue in this appeal, was known as "T-3," and the requirements between T-Nex and T-3 did not substantially change (tr. 4/157). The fourth generation of TRICARE contracts, referred to as "T-17," were awarded long after the events at issue in this appeal, and further consolidated the number of regions to two (tr. 6/136).

II. AGHP and Its Bid for the T-3 North Contract

AGHP is a subsidiary of Aetna, Inc. (tr. 1/83). Although Aetna is a major healthcare benefits company, neither Aetna, nor any of its subsidiaries has ever performed a TRICARE managed care support contract. However, Aetna did perform a TRICARE contract prior to the CHAMPUS reforms. (Tr. 1/46, 231) In late 2006, the DHA Director, Major General Elder Granger, invited Aetna's then-Chairman and Chief Executive Officer, Ronald A. Williams, to submit a proposal for one of the T-3 contracts (tr. 1/44). Mr. Williams subsequently asked Susan M. Peters to lead Aetna's

efforts in bidding on the T-3 North region contract (tr. 1/44-46). At the time, AGHP was a dormant entity, without any employees or assets (tr. 1/54). Ms. Peters was named President of AGHP and oversaw AGHP's submission of a proposal for the T-3 North Contract (tr. 1/54).

On 29 May 2007, AGHP entered into a teaming agreement with Wisconsin Physicians Services (WPS) under which WPS agreed to act as the claims processing subcontractor to AGHP in support of the T-3 North contract (app. supp. R4, tab 1). WPS is one of only two companies in the United States that provides claims processing services for the TRICARE managed care support contracts (tr. 6/156, 8/12). WPS had performed claims processing services as a TRICARE subcontractor since the first generation of TRICARE managed care support contracts was awarded (tr. 8/10, 13). At the time of the T-3 solicitation, WPS was the subcontractor for TriWest, the incumbent contractor in the west region (tr. 1/74, 8/17).

DHA issued Request for Proposal (RFP) No. H94002-07-R-0007 on 24 March 2008, for the third generation of TRICARE managed care support contracts in the north, south, and west regions (app. supp. R4, tab 58). This was nearly a year later than AGHP expected the RFP to be issued (tr. 1/55). The RFP permitted offerors to bid on any or all of the three regions, but stated that only one region would be awarded to any one offeror (tr. 4/114). The RFP provided for a base period, contract line item number (CLIN) 0001, "Transition-In," of 10 months from 1 June 2009, the anticipated contract award date, through the healthcare delivery date of 31 March 2010 (tr. 4/115); five 1-year option periods for providing the managed care support services, CLINs 1001-5015; and a "Transition Out" period, CLIN 9001 (app. supp. R4, tab 58 at 189-1902). The RFP required that the contractor provide "[f]ully operational services and systems at the start of healthcare delivery and minimal disruption to beneficiaries and [military treatment facilities]" (*id.* at 1903).

The RFP detailed technical requirements for performance of the T-3 contracts, including provider networks, referral management, medical management, enrollment, customer service, claims processing, and management (app. supp. R4, tab 58 at 1903-14; tr. 1/55-56). The RFP contained requirements for location and qualifications for providers, requiring AGHP to recruit providers in areas not covered by the parent Aetna's commercial provider networks, and negotiate agreements or amendments to existing commercial provider agreements to implement TRICARE terms and conditions (tr. 1/56-60, 87, 206, 3/175-76). The RFP required that the contractor provide beneficiaries with the best healthcare at the most efficient cost, while also maximizing the use of military treatment facilities, such as base hospitals (tr. 1/61-62). AGHP subcontracted this responsibility to Humana Military Services (tr. 1/75-76, 214-15).

The RFP also contained provisions regarding the appropriate level of care that differed in some ways from the parent Aetna's commercial contracts, particularly for injuries such as post-traumatic stress disorder and traumatic brain injuries that were more common in the pool of military beneficiaries than in commercial beneficiaries (tr. 1/62-65). The RFP required that AGHP establish walk-in service centers on certain military bases, something that Aetna did not offer for commercial customers (tr. 1/66-67). AGHP subcontracted with Humana Military Services to set up and operate the walk-in service centers (tr. 1/75-76, 215). The RFP had detailed requirements for claims processing which were much stricter than Aetna's commercial customers would require (tr. 1/67-68). The RFP also required the contractor to manage all its subcontractors, and provide reports specific to DHA's requirements (tr. 1/68-69, 3/165).

Pursuant to the transition-in CLIN 0001, the awardee would be required to accomplish all the requirements described above before the health care delivery date scheduled to begin 10 months after award (app. supp. R4, tab 58 at 1893, 1917; tr. 1/71). In addition, the transition-in CLIN had a number of deliverables (tr. 1/71; app. supp. R4, tab 58 at 1922). The implementation plan was due 10 days after award (app. supp. R4, tab 58 at 1922). In order to have the implementation plan ready on time, AGHP had to fully plan out and build the plan before contract award, because it could not be produced within 10 days (tr. 1/72).

AGHP management determined that 10 months would not provide an adequate amount of time for AGHP to complete all of the required transition-in activities (tr. 1/71, 3/245-46, 5/191-92). All current and prior TRICARE managed care support contracts had been awarded to incumbent contractors, meaning that the awardees had easier transitions (tr. 4/191). DHA determined that the 10 month transition-in period was sufficient based on its analysis of the work required to be done by contractors who were incumbent managed care support providers, and had not evaluated the time that would be necessary for a new contractor (tr. 4/120, 168-69).

Managed care support contractors also had to connect to the government's enrollment system in order to determine whether individuals were eligible for benefits (tr. 1/51-52). This required that AGHP achieve and maintain Defense Information Assurance Certification and Accreditation Process (DIACAP) compliance (tr. 1/52). In addition, the TRICARE T-3 managed care support RFP required the contractor to comply with the Cost Accounting Standards (CAS) and the FAR (app. supp. R4, tab 58 at 1954-1967). AGHP engaged John Sasaki of Huron Consulting to set up AGHP's cost accounting systems to be compliant with the FAR and the CAS (tr. 1/76-77).

As AGHP was a dormant entity with no ongoing operations, it had to recruit skilled personnel who would be able to perform the contract requirements immediately (tr. 1/72, 3/245-46). One of the employees hired by AGHP was DHA's Chief of Staff (tr. 1/101).

Although the former DHA Chief of Staff, was not hired specifically to work on AGHP's proposal, he did participate in parts of the proposal preparation (tr. 1/101-03). The parties dispute the facts regarding the former DHA Chief of Staff's tenure with AGHP. As we do not find the matter relevant to AGHP's claim, we do not make any findings of fact regarding the former DHA Chief of Staff's employment. However, we note that DHA asserts that his retention created the appearance of a conflict of interest while AGHP asserts that the former DHA Chief of Staff's employment was highlighted in its proposal and that he was not involved in the pricing of AGHP's bid (gov't br. at 10, 23; app. reply at 6-7, 16). In addition, the parties dispute the significance of the ethics opinion the former DHA Chief of Staff received prior to leaving DHA (exs. G-47, -48).

On 30 June 2008, AGHP submitted its initial proposal in response to the TRICARE T-3 managed care support RFP (ex. A-8; tr. 1/81). In its proposal, AGHP indicated that it would commence transition-in activities 330 days before the anticipated contract award date of 1 June 2009 (app. supp. R4, tab 2 at 54, tab 59 at 2001-02; tr. 1/118, 3/246). AGHP determined the start date for its transition-in activities by working backwards to analyze the contract requirements and build out the necessary timelines (tr. 1/72-73). AGHP's proposal was $21,352,566 for CLIN 0001, transition-in, which was a firm-fixed-price line item (app. supp. R4, tab 2 at 52, tab 58 at 1893; tr. 4/116). AGHP's proposal indicated that it expected to incur total costs of $88,729,044, including direct labor, fringe benefits, overhead, subcontractor costs, shared services, other direct costs and general and administrative (G&A) expenses, but that AGHP would absorb $67,376,478 of that amount, charging DHA $21,352,566 (app. supp. R4, tab 2 at 52-53; tr. 1/117-18). AGHP indicted in its proposal that it was willing to "absorb" an estimated $67 million in transition-in costs to increase the competitiveness of its proposal, especially in comparison to a potential incumbent offeror, and to let the government know that AGHP was interested in obtaining the contract (app. supp. R4, tab 2 at 67; tr. 1/90).

AGHP's proposal included "Tab 2 Exhibit 2F(b)" of Volume IV of AGHP's initial Price/Cost proposal which was a monthly staffing plan for the transition-in, which identified staff positions that AGHP intended to fill during the period before the anticipated contract award date, as well as during the CLIN 0001 base period and the Option 1 period following the healthcare delivery date (app. supp. R4, tab 61; tr. 1/123-24, 5/97). At the hearing, AGHP presented extensive and essentially unrebutted evidence regarding its determination of the necessary staffing levels for the transition-in. Mr. Sasaki testified that AGHP developed its monthly staffing plan by identifying a function, estimating the level of effort required to perform the function, and determining the number of full-time equivalent employees needed to complete the work per month (app. supp. R4, tab 2 at 50; tr. 5/99-101). AGHP set forth the data underlying these calculations in its initial proposal in a manning summary (ex. A-27), a pricing template for the transition-in CLIN translating the full-time equivalent employees per month to dollars per position (ex. A-28), and a cross-walk between the TRICARE Operations Manual

requirements and the AGHP employees that would be performing those requirements (ex. A-29; tr. 5/108-17).

AGHP's proposal also stated that AGHP would incur costs for the transition-in activities beginning 330 days before the anticipated award date of 1 June 2009, and that AGHP would charge those costs to the transition-in CLIN (tr. 3/248-49). For example, subsection 5.1.1, Direct Labor, within section 5.1, Transition-In (CLIN 0001), of AGHP's price/cost proposal stated in pertinent part:

> Although most of the Transition-In related activities will be performed between the [contract award date] and [health care delivery] (i.e., June 1, 2009, to March 31, 2010), some *Transition-In activities will begin as early as [contract award date] -330 days* and conclude as late as [health care delivery] +90 days. Although a portion of the estimated level-of-effort required will occur outside the Base Period as defined in §F.3 of the T-3 RFP, *AGHP will track these activities and charge it to the Transition-In CLIN*, as these activities are directly identified to the Transition-In final cost objective.

(App. supp. R4, tab 2 at 54 (emphasis added); tr. 1/119-20, 5/94-96) All of the pre-contract award activities were necessary transition-in activities that fell within the scope of CLIN 0001 (tr. 4/139).

The technical volume of AGHP's initial proposal also made clear that AGHP would begin work before award of the contract. The executive summary stated that "AGHP will dedicate resources to transition activities to assure pre-award readiness" (app. supp. R4, tab 59 at 2002). In the executive summary, AGHP set forth a series of bullet points explaining the work that it would do after proposal submission and before contract award (*id.*; tr. 1/86-87). The identified transition-in activities were all necessary to prepare for healthcare delivery and were within the scope of CLIN 0001 (tr. 4/127). The management section of the initial proposal also set forth efforts that AGHP would conduct to ensure "Pre-Award Readiness" and identified tasks that would be performed prior to contract award (app. supp. R4, tab 60 at 2067-68; tr. 1/108-12). AGHP's initial proposal also provided a draft transition plan, showing that AGHP intended to begin work in advance of the anticipated award date of June 2009 (app. supp. R4, tab 60 at 2076-80; tr. 1/113-14).

On or about 30 June 2008, two offerors submitted proposals for the T-3 North Contract: AGHP and the incumbent, Health Net (app. supp. R4, tab 95 at 2669-70; ex. A-8; tr. 1/81, 3/16-17). DHA conducted the procurement on a best value basis in accordance with FAR Part 15 (tr. 4/121).

On 1 August 2008, AGHP began its transition-in activities, about a month after submitting its initial proposal for the T-3 North Contract (tr. 1/124-25, 131; ex. A-9). AGHP's direct labor costs for this period included activities related to claims, transition, human resources/staffing, referral & medical management, communications, enrollment, beneficiary satisfaction, information technology/DIACAP, network and provider services, and training (tr. 3/113-15; app. supp. R4, tab 96 at 2705). AGHP had an average of 22 full-time employees during this period, which included most of the key personnel identified in AGHP's proposal (tr. 6/38; app. supp. R4, tab 96 at 2705).

During the transition-in period, AGHP developed its transition-in project plan; facilitated transition-in project management; developed processing procedures for claims adjudication; coordinated with WPS to develop processing and appeals guidelines; ensured that data processing met DHA protocols; developed a staffing plan and managed recruiting and hiring activities; drafted and published job postings; reviewed resumes and scheduled interviews; negotiated a contract with a temporary employee vendor; developed memoranda of understanding templates for military treatment facilities, DHA Regional Directors and DHA Communications and Customer Service Directorate; determined program and system design work plans and resources for medical management; created policies and procedures for each element of medical management; prepared communications materials for internal and external publication; developed logo and branding standards; developed enrollment policies and procedures; developed work plans for contingency operations and for marketing of beneficiary services; ensured that subcontractor information technology systems were fully integrated; determined the system capabilities required to perform day-to-day business activities; created the provider recruitment list; began credentialing providers in the target network and created a provider directory; and developed and released several employee training courses (app. supp. R4, tabs 3-13, 15-39).

During the transition-in period, AGHP incurred labor costs for its staff, recruiting and relocation of key personnel expenses, and other direct costs such as information technology projects, consulting and other professional services, and travel costs (app. supp. R4, tab 60 at 2019-30; tr. 1/88-89, 104-05, 121, 5/158-59, 6/38, 51, 158-59). During the transition-in period, AGHP implemented a timekeeping system that was FAR and CAS compliant (exs. A-1, -2; tr. 1/126-28, 5/89, 6/76-77). As is common for companies not performing government contracts, prior to the T-3 North Contract, neither AGHP nor Aetna had a timekeeping system (tr. 1/127, 4/42-43, 6/49-50).

DHA's contracting officer and government representative Mr. Scott Lamond conceded on cross-examination that all of the items listed in paragraph 5.1, Transition-In (CLIN 0001) of AGHP's proposal, were necessary transition-in activities and were within the scope of CLIN 0001 (tr. 4/128-29). Mr. Lamond also testified that

the DHA price evaluation team understood that AGHP was proposing to begin work 330 days before the expected contract award date, and that AGHP would charge the costs to the fixed-price, transition-in CLIN (tr. 4/137).

As AGHP was incurring costs that would not be reimbursed if AGHP was not awarded the contract, AGHP made efforts to mitigate costs (app. supp. R4, tab 11 at 244-48; tr. 3/256). AGHP minimized the amount it spent on pre-award information technology activities to only those activities necessary to meet the delivery requirements of the T-3 North Contract (ex. A-10; tr. 1/135-36).

DHA held discussions with offerors, including AGHP, at its office in Aurora, Colorado, on 12 December 2008 (app. supp. R4, tab 64; tr. 1/137-38, 3/18). DHA procuring contracting officer Bruce Mitterer led the discussions on behalf of DHA; however, Mr. Mitterer testified that he did not read AGHP's proposal before (or after) awarding the T-3 North Contract to AGHP (app. supp. R4, tab 64 at 2115; tr. 1/139, 3/17-26). DHA did not raise any concerns with AGHP's transition-in plan in its discussions with AGHP and further, DCAA did not raise any issues in its pre-award audit of AGHP's initial proposal (app. supp. R4, tab 64 at 2279-81; tr. 1/146, 4/145, 7/21).

After the discussions, Ms. Peters (AGHP's leader on the project) relayed to the Chairman & CEO of Aetna, Mr. Williams, that Mr. Mitterer had stated that the "biggest risk with [AGHP] is transition" and that it would be a "large leap of faith" to award the T-3 North Contract to AGHP (ex. A-11; tr. 1/148-49). AGHP understood this guidance from Mr. Mitterer to mean that AGHP "may need to show more pre-transition work to help ease these concerns" (ex. A-11; tr. 1/148-49). On or about 5 January 2009, AGHP submitted its final proposal revision (tr. 1/150). AGHP's final proposal revision continued to state that AGHP would began pre-contract transition-in activities 330 days before the assumed award date of 1 June 2009 and would charge those costs to CLIN 0001 (app. supp. R4, tab 14 at 538; tr. 1/151-52).

III. Contract Award, Protest of Award, and Termination for Convenience

By letter dated 13 July 2009, and preceded by a telephone call to Ms. Peters, Mr. Mitterer informed AGHP that it had been selected for award of the T-3 North Contract (app. supp. R4, tab 66; tr. 1/155). At the same time, DHA exercised Option Period 1 of the contract (app. supp. R4, tab 66). The value of the award for the fixed-price transition-in and Option Period 1 was approximately $2.8 billion, and the total estimated contract price, including option periods, was approximately $16.7 billion (app. supp. R4, tab 66; tr. 3/28). That same day, AGHP notified individuals with contingent offers that AGHP had been awarded the T-3 North Contract (tr. 4/70). Attached to Mr. Mitterer's letter to AGHP was a copy of the T-3 North Contract for AGHP to sign and return, and a list of differences between the TRICARE T-3

Managed Care Support RFP and the T-3 North Contract, including a change to the transition-in period from 1 June 2009 through 31 March 2010, to "Award" (16 July 2009) through 31 March 2010, thereby shortening the period by approximately six weeks (app. supp. R4, tab 66; tr. 1/158-59, 2/73-74, 3/29). The T-3 North Contract incorporated, among other clauses, FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (MAY 2004); and FAR 52.233-3, PROTEST AFTER AWARD (AUG 1996) (R4, tab 1 at 89-90).

Contemporaneous with the award to AGHP, Mr. Mitterer also awarded the T-3 South and T-3 West contracts to other companies (tr. 3/14-15; app. supp. R4, tab 95 at 2669-70). Following award of the T-3 North Contract, Mr. Mitterer assigned the T-3 North Contract for administration to another DHA contracting officer, Jeffrey A. Whittall (tr. 3/18). However, Mr. Mitterer also scheduled, and subsequently conducted, a post-award debriefing of the T-3 North Contract award in Aurora, Colorado, on 22 July 2009 (app. supp. R4, tab 69; tr. 1/161).

Following the award of the T-3 North Contract to AGHP, the incumbent contractor for the North Region, Health Net, filed a bid protest with GAO (app. supp. R4, tab 95 at 2670 n.16). Among other things, Health Net alleged that AGHP's hiring of the former DHA Chief of Staff resulted in a potential organizational conflict of interest (*id.* at 2690). In the afternoon of 21 July 2009, while AGHP and WPS representatives were in or traveling to Aurora, Colorado, for the post-award debriefing, Mr. Whittall emailed a stop-work order, informing AGHP that award of the T-3 North Contract had been protested to GAO (app. supp. R4, tab 68; tr. 1/165, 8/40). The stop-work order stated in pertinent part:

> In accordance with Federal Acquisition Regulation Part 33.104(c)(1) and contract clauses 52.233-3 Protest after Award (Aug 1996) and 52.233-3 Protest after Award (Aug 1996 – alternate 1 (Jun 1985)[)], you are directed to immediately stop all work under this contract, comply with all terms of these referenced clauses, and take all reasonable steps to minimize the incurrence of allocable costs during this work stoppage. You shall notify your subcontractors of this work stoppage and that they also are not authorized to incur additional costs.

(App. supp. R4, tab 68 at 2295)

All three of the T-3 contract awards were protested, and all three protests were subsequently sustained resulting in the termination of all three awards (app. supp. R4, tab 95 at 2670 ("As a result of sustained decisions in all three regions, [DHA] implemented corrective actions to address the recommendations in the post-award bid

protest decisions and announced different awards in all three regions.")). As of the date of the stop-work order on 21 July 2009, AGHP had already been performing the various transition-in requirements for nearly a year and had existing infrastructure and personnel that it could not immediately reduce and had notified the employees who had been given contingent offers that it had been awarded the contract (tr. 1/124-25, 131, 3/113-15, 4/70).

During the stop-work order period, AGHP was on stand-by, awaiting the outcome of the bid protest. Had GAO dismissed or denied the bid protest, AGHP would have been required to immediately resume its performance of the T-3 North Contract requirements. (Tr. 1/167-69, 4/73, 146, 5/120-21; app. supp. R4, tab 96 at 2723) AGHP took steps to mitigate activity and costs, including stopping all additional outside spending, stopping travel and not hiring any new employees (tr. 1/166, 3/261, 6/54-55; app. supp. R4, tab 96 at 2724-26). However, AGHP did not terminate the employment of its existing employees due to its difficulty in recruiting the employees and the possible need to immediately restart performance if the stop-work order were lifted (tr. 1/166-67, 3/265, 5/122-23, 6/93-94). In addition, AGHP did not believe it would be cost-effective to terminate its employees for the expected duration of the stop-work order, because of its obligation to pay severance benefits (tr. 1/166). AGHP attempted to redeploy its staff, but with limited success. AGHP permitted the staff to continue transition-in activities instead of simply paying the employees to do nothing. (Tr. 3/261, 5/145-46)

On 4 November 2009, GAO sustained the bid protest and required DHA to provide notice of its planned corrective action within 60 days. GAO found that DHA had improperly evaluated AGHP's past performance; performed a flawed-price realism evaluation; failed to consider risks associated with AGHP's staffing plan; and, that AGHP had created the appearance of a conflict of interest due to the hiring of a former DHA official. *See* 31 U.S.C. § 3554(b)(3); *Health Net Federal Services, LLC*, B-401652-3, B-401652-5, 2009 CPD ¶ 200, 2009 WL 3843162 (Comp. Gen. Nov. 4, 2009). Due to the 60-day statutory timeframe for deciding corrective action (31 U.S.C. § 3554(b)(3)), AGHP expected that DHA would announce its plans for corrective action no later than 3 January 2010, at which point AGHP could reassess its efforts as necessary (tr. 5/125-26). On 18 December 2009, DHA issued a letter stating that it would not announce its corrective actions within 60 days, and planned, instead, to continue to investigate the issues, and would announce its corrective action at a later date (app. supp. R4, tab 71). AGHP determined that it was better to retain its employees because the duration and outcome of the stop-work order were unknown (tr. 5/125-26; app. supp. R4, tab 96 at 2725-26).

As of the date of the stop-work order, AGHP had 37 employees who were either already active AGHP employees or had accepted formal offers of employment from AGHP (app. supp. R4, tab 96 at 2722, tab 73 at 2342; tr. 6/167-68). AGHP's

ability to mitigate its labor costs was limited because it was difficult to place employees in other parts of Aetna, given that they would need to be recalled if the stop-work order were lifted, and because parent Aetna was then laying-off employees due to the global financial crisis (tr. 3/261-64, 5/124-25, 6/169; app. supp. R4, tabs 70, 96 at 2725). Following DHA's December 2009 letter stating that it would not take corrective action within 60 days, AGHP attempted to re-deploy its workers without any restriction that the workers be available for recall (tr. 5/126-27). Eleven employees remained with AGHP by the end of the stop-work order period (app. supp. R4, tab 96 at 2725). In addition to labor costs, during the stop-work period AGHP also incurred costs for computers, telecommunications equipment, facilities, utilities and other related expenses (app. supp. R4, tab 96 at 2729-33; R4, tab 38 at 11-12; tr. 5/129).

By letter dated 5 May 2010, Mr. Mitterer terminated the T-3 North Contract for the government's convenience pursuant to FAR clauses 52.249-2, Termination for Convenience of the Government (Fixed-Price); and 52.249-6, Termination for Convenience of the Government (Cost-Reimbursement) (R4, tab 43). The notice of termination included a "finding" by the contracting officer that AGHP would have been ineligible for award due to the former DHA Chief of Staff's access to nonpublic information that could provide a competitive advantage (R4, tab 43; tr. 3/79). DHA subsequently awarded the T-3 North Contract to Health Net at a cost of roughly $500 million more than AGHP's bid (tr. 2/156). Upon receipt of the letter, AGHP immediately commenced contract close-out activities, including the termination of subcontractors, termination and cancellation of key suppliers, record retention and archiving, placement of AGHP employees in permanent positions in other parts of Aetna where possible, termination of AGHP employees who could not be reassigned within Aetna, and cleanup and withdrawal from its office space (tr. 3/265-66, 4/75; app. supp. R4, tab 96 at 2734).

AGHP incurred costs for the payment of job elimination benefits to some of its employees (app. supp. R4, tab 96 at 2737, tab 98; tr. 3/264, 6/74, 102-03). The job elimination benefits were paid in accordance with Aetna's company-wide policy (app. supp. R4, tab 98; tr. 3/264), to 6 of the 34 AGHP employees at the time of the termination, and to 9 shared service employees of the parent Aetna (app. supp. R4, tab 96 at 2735-36). Other post-termination expenses included costs from Aetna Shared Services, which is a corporate home office department providing various support services to both the commercial organization and AGHP (tr. 5/157), and settlement activities, including costs for consultants retained to assist in preparing the stop-work order request for equitable adjustment and termination settlement proposals (app. supp. R4, tab 96 at 2738). The settlement activities included conducting interviews and holding meetings with individuals to obtain the necessary information to support the activities and costs (app. supp. R4, tab 96 at 2737-38; tr. 4/78-79, 5/118).

IV. Post-Termination Activities

On 10 September 2010, AGHP submitted a Request for Equitable Adjustment (REA) pursuant to FAR 52.233-3(c), Protest After Award, for costs incurred as a result of the stop-work order issued 21 July 2009 through the termination for convenience letter dated 5 May 2010, a period of 288 days (R4, tab 38). The REA was prepared by obtaining information from AGHP's books and records (including the timekeeping system), conducting interviews of personnel, and Mr. Sasaki's knowledge of the operations (tr. 5/118).

The REA claimed costs for labor, fringe benefits, facilities, unabsorbed overhead, G&A expense, and profit (tr. 5/127-30). The REA excludes labor costs for contingent hires whose drug tests were not performed until after the stop-work order was issued (R4, tab 38 at 9-11; tr. 5/128-29). The facilities costs included office space in Hartford, Connecticut, during the stop-work order period, as well as costs for employees' computers, emails and phones, which are corporate charges allocated on a per-person basis (R4, tab 38 at 11-12; tr. 5/129). The REA also included unabsorbed overhead, because, during the stop-work order period, AGHP had no contract activity that otherwise would have absorbed a pro-rata share of AGHP's fixed costs (R4, tab 38 at 13-14; tr. 5/130). The REA also included profit of 11.33 percent, based on the proposed cost and price of performing the contract, excluding contingent components such as the award fee[4] (R4, tab 38 at 15-16; tr. 5/130). AGHP expected the contract to be profitable, even given the absorption of transition-in costs because the T-3 North Contract was self-insured, meaning that the government bore the risk of reimbursing the actual healthcare costs, known as the underwritten healthcare (tr. 1/122-23, 133-35, 3/250-52, 5/136-37; ex. A-10). However, despite not bearing the risk of healthcare costs, AGHP was entitled to a fixed fee on the underwritten healthcare costs in addition to the fee associated with claims processing (tr. 3/251-52, 5/136-37). AGHP calculated the profit percentage by identifying each of the T-3 North Contract CLINs and accumulating the total profit included in its proposed pricing, not including the award fee, and then dividing the net profit by total estimated cost, including the absorbed transition-in costs (R4, tab 38 at 15-16; tr. 5/134-35). During testimony, Mr. Foster admitted that, "for the course of the contract, they would be in a profit-bearing position" and therefore profit could be justified as part of a termination settlement (tr. 7/137). In addition, the REA included the costs of preparing the REA and an estimate for the costs of supporting a DCAA audit and negotiating the REA with DHA (R4, tab 38 at 14; tr. 5/130).

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[4] An award fee is additional compensation provided to a contractor based upon the government's evaluation of the quality of its performance.

Judy Ross succeeded Mr. Whittall as the administrative contracting officer for the T-3 North Contract in December 2010 and served as the termination contracting officer (tr. 5/6-9). Mr. Whittall requested a technical evaluation by DHA contracting officer's representative Steven P. Hellmann, and an audit by DCAA, that was performed by senior auditor Joan Rheault (tr. 3/267, 5/10, 131). Mr. Hellmann drafted a memorandum, dated 5 July 2011, concluding that it was reasonable for AGHP to retain its staff during the stop-work order period, that AGHP's facility costs, Aetna Information Systems (AIS) user service charges, AIS desktop charges, and AIS telecommunications costs were reasonable (app. supp. R4, tab 73 at 2343-44; tr. 6/163-64, 167-71). However, Mr. Hellmann determined that AGHP's proposed REA preparation and settlement costs were excessive, and re-calculated an amount based on four full-time staff working for six months (app. supp. R4, tab 73 at 2344).

On 7 June 2011, DCAA issued an audit report on the REA questioning the REA in its entirety because AGHP "did not make an adequate attempt to stop work on the contract" (app. supp. R4, tab 72 at 2320). However, Ms. Ross testified that AGHP was required to minimize its costs, not to entirely refrain from incurring any costs, that DCAA's findings were contradicted by the requirements of the stop-work order clause at FAR 52.233-3, and that "AGHP was entitled to adjustment for the stop-work order period" (tr. 5/9-14). Ms. Ross' successor, Patrick Foster, similarly admitted that AGHP was entitled to carrying costs during the stop-work order period (tr. 7/120).

On 29 April 2011, AGHP submitted its initial termination settlement proposal (TSP) pursuant to FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price) (R4, tab 37). AGHP's initial TSP included the unreimbursed costs for transition-in activities from 1 August 2008 through 21 July 2009 and contract close-out and settlement efforts after receipt of the termination notice (R4, tab 37 at 15; tr. 4/79, 5/155).[5]

As AGHP did not have a timekeeping system in place prior to May 2009, AGHP reconstructed the estimated labor costs for each employee on allowable contract efforts (tr. 4/80-82, 5/160-61). AGHP estimated these costs by identifying the personnel employed during that time period and reviewing calendars, meeting invitations, and weekly meeting minutes (tr. 4/80, 5/160-61). AGHP also interviewed the employees and had them review their own notes, calendars, and other documentation (ex. A-19; tr. 4/80-81).

On 19 July 2011, Mr. Hellmann issued a memorandum describing his technical review of AGHP's initial TSP, concluding that the pre-contract costs were unallowable

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[5] Thus, the TSP sought reimbursement for claimed costs for the period before the costs claimed in the REA, and costs for the period after the costs claimed in the REA, but did not claim any of the costs claimed in the REA.

because AGHP was not authorized to perform work prior to contract award (app. supp. R4, tab 74 at 2346; tr. 6/184). Mr. Hellmann testified that he believed that the transition-in period of 10 months was sufficient to prepare for the healthcare delivery date; however, his experience was limited to transition-in activities by incumbent contractors (tr. 6/194-95). Mr. Hellmann's technical evaluation also concluded that, even if pre-contract costs were allowable, the pre-contract costs incurred by AGHP were "out of proportion to the total cost of transitioning this contract," asserting that "AGHP spent 84% of their entire transition-in budget prior to contract award" (app. supp. R4, tab 74 at 2346). However, his calculation was not based on AGHP's total estimated costs for transition-in of $88,729,044, included post-contract award costs, and included WPS costs that were removed before AGHP submitted its certified claim (app. supp. R4, tab 2 at 52; tr. 6/186-87). Mr. Hellmann also indicated that AGHP's severance costs were excessive, but did not determine whether the severance costs actually incurred by AGHP were required by law, employer-employee agreement, or an established policy consistent with FAR 31.205-6(g)(2) (app. supp. R4, tab 74 at 2348; tr. 6/190).

As part of DCAA's audit of Aetna's TSP, the DCAA auditor, Ms. Rheault informed Ms. Kelly J. Shane, Aetna's Director of Contract Administration, by email dated 29 September 2011 that DCAA would not start its audit until after DHA made a determination regarding the allowability of the pre-contract costs included in the initial TSP (app. supp. R4, tab 75). By letter dated 31 October 2011, Ms. Ross informed AGHP that DHA had completed its review of AGHP's initial TSP, and determined that the pre-contract costs included in the initial TSP were unallowable because the RFP and contract provided a 10-month fixed-price transition period that had proven adequate in the past and that none of the phase-in requirements stipulate any contractor activities prior to award of the contract, and there was no advance agreement to allow such costs (R4, tab 32; tr. 3/271-72). Ms. Ross instructed AGHP to remove the pre-contract costs (which accounted for $19,330,449 of the $23,866,580 claimed) from its initial TSP and "re-submit AGHP's termination settlement proposal containing only those costs appropriately incurred after the date of contract award" (R4, tab 32 at 2). The letter concluded by stating: "It is the government's intent, after receipt of audit of AGHP's revised termination settlement proposal, to negotiate the termination settlement and request for equitable adjustment for the related stop-work order together" (*id.* at 2).

On 27 April 2012, AGHP submitted its revised TSP for $21,369,076.85, revising the prior TSP and incorporating and superseding the REA for the stop-work order period (R4, tab 30). AGHP engaged the Kenrich Group, specifically Gregory S. Bingham, to perform a review of the REA and the initial TSP, and assist in preparing the revised TSP (tr. 3/273-74, 4/84-85, 6/13). By letter dated 10 May 2012, Ms. Ross requested that DCAA audit AGHP's revised TSP (app. supp. R4, tab 76; tr. 5/32). Under "Specific Comments," Ms. Ross' letter requested that DCAA "[e]nsure that Aetna incurred costs

fall within the date of award through the date of the Stop Work Order," effectively restricting the audit to the period between 13 July 2009 and 21 July 2009 (app. supp. R4, tab 76; tr. 5/33-34, 54). Ms. Rheault was the DCAA auditor assigned to audit AGHP's revised TSP (tr. 4/6). As part of her initial risk assessment before beginning the audit, Ms. Rheault asked Ms. Ross whether she had "any concerns regarding" AGHP and the termination (app. supp. R4, tab 77 at 2359, tab 78 at 2361). Ms. Ross responded with a list of five concerns, including the pre-contract costs (app. supp. R4, tab 77 at 2358).

In reply to Ms. Rheault's question about whether Ms. Ross had "any documentation to show that Aetna didn't perform the transition in tasks," Ms. Ross stated: "No, I don't think there is any documentation showing that the transition activities never happened. Since, they never happened...there are no documents." (App. supp. R4, tab 77 at 2357) Ms. Ross admitted during testimony that she made these allegations without having undertaken an effort to determine whether AGHP had actually performed the pre-contract transition-in activities listed in the revised TSP, and did not discuss with AGHP whether they had conducted any transition-in activities (tr. 5/36-38). In response to Ms. Ross's concern regarding the pre-contract costs, DCAA's audit work papers state that DCAA "will request [DHA] review the work performed to date by the contractor to determine if it falls within the scope of CLIN 0001 Transition In" (app. supp. R4, tab 78 at 2361). However, there is no evidence in the record that DHA performed a technical evaluation to determine whether AGHP's transition-in activities were within the scope of CLIN 0001 (tr. 4/151).

At DCAA's request, on 26 July 2012, Ms. Ross, then-contract specialist Patrick Foster, Ms. Rheault, two other DCAA auditors, and representatives for AGHP participated in a "Termination Proposal Walk-Through Meeting" at AGHP's facility in Hartford, Connecticut, for AGHP to explain its revised TSP and answer any questions (app. supp. R4, tab 79; tr. 4/6). In advance of the walk-through, Ms. Shane sent all of the participants an agenda, and she sent meeting notes at the conclusion of the walk-through (R4, tabs 26, 29; app. supp. R4, tab 79; tr. 4/7, 86). During the walk-through, AGHP explained its timekeeping system, the estimation of time before the implementation of timekeeping, and cost accumulation (R4, tab 26 at 2; tr. 4/8, 86-87). During the meeting, no one from either DHA or DCAA questioned AGHP's methodology for estimating labor hours prior to May 2009; however, both DCAA and DCMA requested additional supporting information for certain aspects of AGHP's revised TSP, including the basis of estimate for unabsorbed overhead, a cost reasonableness determination for AGHP's consultant costs, and information on Aetna's information technology project accounting system (app. supp. R4, tab 80 at 2368; tr. 4/87, 5/40-41). AGHP provided these items in emails (and attached zip files) transmitted to Ms. Ross and Mr. Foster on 12 August and 21 August 2012 (app. supp. R4, tab 81 at 2397, tab 82; tr. 4/90-91, 5/45-47).

Between 14 and 23 August 2012, Ms. Rheault and Ms. Ross communicated regarding AGHP's use of estimates for labor costs for the period before AGHP's timekeeping system was implemented. Ms. Ross indicated that "she didn't take exception to the method. But she did not approve them either." (App. supp. R4, tabs 83, 84) On 24 August 2012, Ms. Rheault informed AGHP that she needed to review the documentation "used to estimate direct labor costs for the time period of 8/1/08 – 5/17/09" (app. supp. R4, tab 52 at 1862; tr. 4/94). Ms. Rheault requested that the documentation be "organized and put together in binders or some fashion to make it easy to review" and stated that she planned to "sit in a conference room and review [the documentation] alone" at AGHP's facility (app. supp. R4, tab 52 at 1862). AGHP also made other work papers archived on AGHP's SharePoint site electronically available to Ms. Rheault for review, but she never reviewed the electronic documents (app. supp. R4, tab 53 at 1865; tr. 4/100, 5/168).

By letter dated 21 November 2012, DCAA informed Ms. Ross that AGHP had provided inadequate documentation to support its labor costs for the period before the timekeeping system was implemented on 18 May 2009 (app. supp. R4, tab 85). By letter dated 4 January 2013, Ms. Ross "parroted some of the deficiencies" that Ms. Rheault had identified, and asserted that "DCAA requested the [supporting] records and received 'Time Keeping Templates' and supporting meeting notes, but was informed that employee's calendars, email correspondence and work papers were not readily available and that the records may no longer exist" (app. supp. R4, tab 86; tr. 5/48-49). Ms. Ross informed AGHP's financial manager Mark Santos that "[t]he government requires additional information in order to evaluate your [revised] Termination Settlement Proposal" (app. supp. R4, tab 86). AGHP provided supporting data by letters dated 13 February 2013, and 26 February 2013 (app. supp. R4, tabs 87, 89; tr. 4/15-17, 7/154). Ms. Rheault did not find the contemporaneous supporting documentation compelling because it could not be tied to specific labor hours (app. supp. R4, tab 87 at 2416; tr. 4/19, 5/169, 7/59). DCAA supervisory auditor, Mariane Hart, testified that DCAA's problem with the documentation was not that the documents did not support the costs, but, instead, that it would have required too much work to "connect the dots" (tr. 7/59).

On 24 May 2013, DCAA issued its audit report regarding AGHP's revised TSP. DCAA questioned all of the pre-contract costs, including both labor and non-labor costs, on the basis that "[t]he contract does not allow for pre-contract costs therefore they are not allowable" (app. supp. R4, tab 93 at 2613). In addition, DCAA questioned all of the pre-contract labor costs that were incurred before implementation of AGHP's timekeeping system on 18 May 2009 as "not adequately supported" because AGHP used a method of estimating not approved by the contracting officer, and DCAA's "review of the data provided found that a connection could not be made between the support provided and the estimated allocation of labor costs" (*id.* at 2614).

DCAA did not dispute that AGHP incurred the pre-contract costs, noting that the estimated labor hours were "priced out using payroll data for the period the costs were incurred" (*id.* at 2625). Similarly, DCAA questioned all of the G&A costs (*id.* at 2617). DCAA acknowledged in its audit that, although AGHP did not separately accumulate G&A expenses from all other expenses during 2008 and 2009, AGHP "performed an analysis of all non-labor expenses to segregate them between direct, office overhead, offsite overhead and G&A," and "[u]nallowables were identified and removed from the pool" (*id.* at 2618). DCAA applied an adjustment for loss pursuant to FAR 49.203 based on a finding that Aetna would have incurred a loss had the entire contract been completed, and questioned AGHP's proposed profit in its entirety (*id.* at 2620).

Beginning in July 2013, and for the next several months, AGHP attempted to schedule termination settlement negotiations with DHA; however, DHA declined to enter into negotiations ostensibly pending finalization of its pre-negotiation memorandum (R4, tabs 9, 10; tr. 4/21-24, 100, 5/56, 7/117, 169-71). However, contract specialist, and later contracting officer, Mr. Foster, testified that he allowed AGHP's TSP to sit and "collect dust" without doing any work on it for extended periods of time (tr. 7/170-71). On 13 July 2015, more than four years after submitting its initial TSP, and without having had discussions or negotiations with DHA about its TSP, AGHP submitted to the termination contracting officer a certified claim in the amount of $17,066,351 plus CDA interest (R4, tab 4). By the time AGHP submitted its certified claim, Ms. Ross had retired and Mr. Foster had replaced her as the DHA contracting officer responsible for AGHP's revised TSP (tr. 5/7-8, 7/107). Mr. Foster failed to issue a final decision within the time permitted by the CDA, and AGHP appealed to this Board from the deemed denial of its claim (tr. 4/26, 7/171-72).

DECISION

I. Termination for Convenience of the Government

The government terminated AGHP's contract for the convenience of the government. The contract consisted of the fixed-price base period and the flexibly-priced Option Period 1, but all work performed by AGHP was pursuant to the fixed-price transition-in contract line item (tr. 6/32). The termination for convenience of a fixed-price contract or line item has the "general effect of" converting the contract or line item into a cost-reimbursement contract. *See, e.g., New York Shipbuilding Co., A Division of Merritt-Chapman & Scott Corp.*, ASBCA No. 15443, 73-1 BCA ¶ 9852 at 46,019. The terminated contract thus provides for reimbursement of allowable costs incurred in performing the terminated portion of the contract. *Id.* The Board, and the Court of Appeals for the Federal Circuit, have held consistently that the termination for convenience provision, FAR 49.201, requires that the terminated contractor be compensated fairly for the work performed prior to the termination, including, where

appropriate, profit on the work performed. Additionally, the measurement of "fair compensation" is a matter of judgment that may be guided by cost and accounting data, but costs also may be estimated using other data or standards. *See, e.g., Safeco Ins. Co. of Am.*, ASBCA No. 52107, 03-2 BCA ¶ 32,341 at 160,016-17; *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003); FAR 49.201.

Against this well-established body of case law, DHA argues that AGHP's purported responsibility, due to its hiring of a former DHA official and creating the appearance of a conflict of interest, limits AGHP's ability to recover pursuant to the termination for convenience contract provision (gov't br. at 40-42). DHA cites to the holding in *Dynalectron Corp. v. United States*, 518 F.2d 594, 605 (Ct. Cl. 1975), for the proposition that "a contractor's culpability for bringing about the situation that occasioned termination can impact its entitlement to recover" (gov't br. at 40). However, DHA's argument suffers from a fundamental misunderstanding of the FAR's contract termination procedures. *Dynalectron*, and the other cases cited by DHA all involve default terminations that were not sustained. In fact, DHA recognizes this fact in a footnote arguing that the rule should apply to terminations for convenience in the first instance and that "there is no reason to put the Government through the rigmarole of defending a termination of default when it simply wants to part company with a contractor who bears significant responsibility for creating a situation that led to termination" (gov't br. at 40 n.6). However, this is not what the FAR requires.

In *Dynalectron,* the Court of Claims overturned the government's default termination; however, the court also found that the contractor had waived some of its defenses to the default termination. Under the specific termination for default provision that was included in the contract in *Dynalectron*, a default termination could be converted to termination for the convenience of the government if the failure to perform the contract was due to causes "beyond the control and without the fault or negligence of the contractor." *Dynalectron*, 518 F.2d at 604; FAR 49.401(b). Here, the government terminated AGHP for the convenience of the government, not for default. Unlike the FAR's termination for default provision, there is no requirement that the contractor be without fault in the termination for convenience provision (R4, tab 1 at 90 (incorporating FAR 52.249-2 ("The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest."))).

We have previously held that the government cannot convert a termination for convenience into a termination for default. *See Roged Inc.*, ASBCA No. 20702, 76-2 BCA ¶ 12,018. In *Roged* the government terminated a contractor for convenience of the government and subsequently issued what it characterized as a "Notice of Termination Conversion" seeking to convert the termination for convenience to a termination for default. We noted that "the Government was aware

of its right to initiate a default termination and that such a termination seemed to be warranted, yet the [contracting officer] terminated the contract for the convenience of the Government." We sustained the appeal, holding that the government cannot change a convenience termination to one for default. *Roged*, 76-2 BCA ¶ 12,018 at 57,653.

DHA asserts that it is not seeking to convert the termination for convenience to a termination for default, but asserts a right to reduce any award based on contractor fault or negligence, pursuant to an equitable right to apply a jury verdict approach (gov't resp. br. at 13-18). DHA relies upon a number of termination for default cases, as well as the holding of the NASA Board of Contract Appeals in *Chronometrics, Inc.*, NASA BCA Nos. 185-2, 785-9, 90-3 BCA ¶ 22,992. In that appeal, NASA proceeded against the contractor pursuant to the inspection clause, asserting a government claim in the form of a price reduction for defective work. The NASA Board found mutual fault and applied a jury-verdict approach. *Chronometrics*, 90-3 BCA ¶ 22,992 at 115,479. Although factually different from the other cases involving terminations for default that were not sustained, *Chronometrics* still involves a government claim against the contractor. Here, DHA has not asserted a government claim against AGHP, and DHA has not identified a legal basis for this Board to reduce an award to AGHP for its purported fault.

The fact that DHA might have terminated AGHP for default is irrelevant to the resolution of AGHP's appeal regarding its termination settlement proposal. Instead, we review AGHP's termination settlement proposal pursuant to the contract's termination for convenience provision, and not in reference to the termination for default provision that DHA chose not to apply back in 2010.

Although not relevant to our analysis of this issue, we note here that DHA alleges in its brief that we improperly limited its ability to present evidence regarding AGHP's retention of the former DHA Chief of Staff[6] (gov't br. at 36 n.3). DHA asserts that the former DHA Chief of Staff's testimony was "of crucial importance to a central issue" in the appeal and attached to its brief an excerpt from the former DHA Chief of Staff's deposition, along with three other documents (*id.*, ex. D). AGHP, in turn, moves to strike as untimely the exhibits to DHA's brief and the related discussion of the exhibits. We grant AGHP's motion to strike exhibit B, the WPS settlement

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[6] By order dated 6 March 2016, we granted AGHP's renewed motion to quash the trial subpoena issued to the former DHA Chief of Staff, based upon letters from two of the former DHA Chief of Staff's doctors, both indicating that it would be harmful to his health to require him to testify. The order found that the former DHA Chief of Staff was unavailable pursuant to Federal Rule of Evidence 32(a)(4)(C), and indicated that the government could designate portions of his deposition as a hearing exhibit.

agreement, and exhibit D, the excerpts from the deposition of the former DHA Chief of Staff, as DHA provides no explanation as to why it could not have entered these documents as exhibits at the hearing. In fact, at the conclusion of DHA's direct case, the undersigned presiding judge asked DHA counsel if he was designating any portion of the deposition transcript of the former DHA Chief of Staff for the record, and government counsel stated that he was not (tr. 8/45). We deny AGHP's request to strike exhibit A as untimely (GAO opinion in the bid protest action) and references in DHA's brief to the exhibit, as the Board can take judicial notice of the opinion, and we address DHA's arguments regarding the GAO decision in our opinion below. We also deny AGHP's request to strike exhibit C, an exhibit from AGHP's final proposal revision, because several other portions of that same multi-volume document were entered into the record, and the Board would have requested supplementation of the hearing record to include this document.[7]

Given that DHA terminated AGHP for convenience of the government, and not for default, it is unclear how AGHP's decision to retain the former DHA Chief of Staff could be "of crucial importance to a central issue" as DHA asserts. However, we note that even if AGHP's retention of the former Chief of Staff were found to be improper, and we make no such finding, GAO made findings of error on the part of DHA that would also be relevant to an allocation of blame. Notably, GAO found that DHA had improperly evaluated AGHP's past performance; performed a flawed price realism evaluation, and failed to consider risks associated with AGHP's staffing plan. *Health Net Federal Services,* 2009 WL 3843162. Moreover, a Report by the Department of Defense Inspector General found that DHA's acquisition personnel were not adequately trained and that none of DHA's personnel in critical acquisition and key leadership positions met their job qualifications (app. supp. R4, tab 91).

We cite this information simply in response to DHA's allegation that it was prevented from establishing an important element of its case to demonstrate that, even if such an argument were relevant, which it is not, it is not clear that DHA would be able to establish that the AGHP was primarily responsible for the termination. Moreover, even assuming that DHA could establish that a default termination was justified by the appearance of a conflict of interest due to AGHP's retention of the former DHA Chief of Staff, DHA cannot escape the legal implications of its decision in 2010 to terminate AGHP's contract for convenience rather than terminating for default.

II. AGHP's Termination Settlement Proposal

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[7] This document was used to calculate the adjustment for loss. We alternatively attempted to estimate the adjustment using other record documents and computed a slightly larger loss percentage.

AGHP's claim can be divided into four main categories based upon when the costs were incurred: costs incurred prior to award of the contract; costs incurred during performance of the contract (post award, but prior to the stop-work order) costs incurred during the time covered by the stop-work order; and post-termination costs, including contract closeout and termination settlement proposal preparation costs. We address these costs chronologically, starting with the largest category by dollar amount, the costs incurred prior to award of the contract.

A. AGHP's Pre-Award Costs

i. AGHP's Pre-Award Costs Are Allowable

The FAR provides that pre-award costs are allowable under certain circumstances, specifically:

> Precontract costs means costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule. These costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (see 31.109).

FAR 31.205-32. We have held that, to be allowable, pre-contract costs must satisfy the following four-part test:

> (1) the costs must be incurred prior to the effective date of the contract; and
> (2) the costs must be incurred directly pursuant to the negotiations and in anticipation of the contract award; and
> (3) the incurrence of the costs must be necessary to comply with the proposed delivery schedule; and
> (4) the costs must have been allowable if they were incurred after contract award.

Radant Technologies, Inc., ASBCA No. 38324, 91-3 BCA ¶ 24,106 at 120,657. The Court of Federal Claims applied a similar test in *Penberthy Electromelt International, Inc. v. United States*, 11 Cl. Ct. 307, 315 (1986). Applying this test, we find that AGHP's pre-contract costs were allowable.

There is no dispute regarding the first prong of the *Radant* test, that the pre-contract costs were incurred prior to the effective date of the contract. Similarly, we find that the costs were incurred in response to the solicitation and in anticipation

of the contract award, thus satisfying the second prong of the *Radant* test. "The term 'pursuant to negotiations' does not mean that the subject of precontract costs must have been discussed during actual negotiations. Rather, it means that the costs were incurred as a result of the solicitation and award process." *AT&T Techs., Inc.*, DOT BCA No. 2007, 89-3 BCA ¶ 22,104 at 111,151.

One purpose of this prong of the *Radant* test is to exclude otherwise unallowable bid and proposal costs. *R.G. Robins & Co.*, ASBCA No. 27516, 83-1 BCA ¶ 16,420 at 81,692. The other major purpose of this prong of the *Radant* test is to exclude costs expended by a contractor, often on basic research and development, on a product that could possibly become the subject of a future solicitation. *Codex Corporation*, ASBCA No. 17983, 75-2 BCA ¶ 11,554 at 55,150-52, *remanded Codex Corporation v. United States*, 226 Ct. Cl. 693, 698-99 (1981),[8] (disallowing costs incurred more than seven months before agency issued request for proposals). Here, the record is clear that AGHP is seeking reimbursement for costs incurred after it submitted its bid in response to the solicitation, thus the costs "would not have been incurred except in anticipation of performing the contract." *Radant*, 91-3 BCA ¶ 24,106 at 120,657.

The government disputes that the costs were incurred pursuant to negotiations, relying upon *Integrated Logistics Support Systems International, Inc. v. United States*, 47 Fed. Cl. 248, 257 (2000), *aff'd,* 36 F. App'x 650 (Fed. Cir. 2002), for the proposition that "the contractor and contracting authority must reach a shared understanding before the costs are incurred, in order for the contractor to recover the costs" (gov't br. at 47-48). While *Integrated Logistics* does stand for this proposition, we decline to follow that opinion for multiple reasons. First, *Radant Technologies* is an opinion of this Board, and thus is binding authority which we must follow. *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,220. Conversely, the opinion in *Integrated Logistics* is the opinion of a single judge of the Court of Federal Claims and is not binding on us, or the other judges on the Court of Federal Claims.[9] Second, the plain language of the FAR does not support the holding in *Integrated Logistics* to the extent it requires a "shared understanding before the costs are incurred" for the pre-contract costs to be allowable. The FAR simply requires that the costs be incurred "pursuant to the negotiation and in anticipation of the contract award." FAR 31.205-32. Third, *Integrated Logistics* appears to misinterpret the authorities, including *United*

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[8] The appeal was remanded for further review to determine whether the application of the strict rule for allowability of pre-contract costs was modified by the "fairness" principle applicable in termination for convenience cases. *Codex Corporation*, 226 Ct. Cl. at 698-99. There is no reported opinion on remand of the *Codex* appeal.

[9] The Federal Circuit affirmed *Integrated Logistics* in a non-precedential judgment of affirmance without opinion.

Technology Center, ASBCA No. 12007, 68-2 BCA ¶ 7350 at 34,207 and *Codex Corporation*, 75-2 BCA ¶ 11,554 at 55,150-52, upon which it relies for the requirement of a "shared understanding." Those appeals both involved contractors seeking reimbursement for costs incurred before there was even a solicitation. While DHA asserts that the rule allowing pre-contract costs only applies to sole-source procurements, because those are the cases that are reported, it appears that such cases are more frequently reported simply because it is more common for contractors to expend costs in anticipation of sole-source awards, than for a competitive procurement. Here, AGHP was performing pre-contract activities at risk that it would not receive the award in a competitive procurement.

The third prong of the *Radant* test, that the pre-contract costs be necessary to meet the delivery schedule, is also in dispute. AGHP presented credible testimony from its witnesses that they believed it was necessary to incur the pre-contract costs to meet the delivery schedule and be in a position to provide health care to the TRICARE members on the health care delivery date, set in the solicitation to be 10 months after contract award, but subsequently reduced to 8½ months at the time of award. Specifically, AGHP cites to the requirement that the awardee submit a transition-in plan 10 days after contract award (app. supp. R4, tab 58 at 1922). AGHP presented testimony that it was necessary to have a complete transition-in plan prepared in order to provide the contractually-required plan and that it would not be possible to meet this deadline without incurring pre-contract costs (tr. 1/72). Additionally, AGHP presented credible testimony regarding other transition-in milestones for which it was necessary to incur pre-contract costs, including the DIACAP computer security requirements and the need to procure office space and recruit and train call center employees (tr. 1/52, 72, 3/245-46).

DHA asserts that it was not necessary for AGHP to incur pre-contract costs to meet the delivery schedule.[10] As evidence, DHA cites the fact that other TRICARE awardees have been able to meet the contract requirements with a ten-month transition in period. However, on cross-examination, the government witnesses conceded that all of the transitions they had observed were incumbent contractors transitioning-in to a new contract, possibly for a different region. Thus, the government witnesses were unable to identify how long it should take for a new contractor to meet the contract delivery schedule. (Tr. 4/120, 168-69)

We note that our holding in *Radant* provides that the requirement that the pre-contract expenditures be necessary to meet the delivery schedule "does not require

[10] AGHP retained staff to prepare the T-3 North proposal. After AGHP submitted its proposal, and before award of the contract, AGHP may have had salaried staff perform transition-in tasks simply because there was no other work available. However, DHA did not elicit any testimony on this issue.

that the contractor prove, in retrospect, that it was actually necessary to do so. What is required is that the contractor reasonably believed, at the time of the incurrence of the costs, that the pre-contract work was necessary and undertook it in good faith." *Radant*, 91-3 BCA ¶ 24,106 at 120,658 (citing *N. Am. Rockwell Corp.*, ASBCA No. 15863, 72-2 BCA ¶ 9490). AGHP simply needs to establish that it undertook the pre-contract work in good faith and that its interpretation of the delivery schedule was reasonable. AGHP demonstrated such good faith in its proposal where it informed DHA of its intent to begin transition-in activities 330 days before the expected contract award date, and performed at risk of not being paid in the event that it was not awarded the contract. We find that AGHP has satisfied this requirement.

DHA additionally challenges AGHP's transition-in activities as unnecessary because AGHP could have subcontracted a larger portion of the contract's requirements to experienced parties (gov't br. at 48-49). This argument is based upon pure speculation. AGHP submitted a proposal that DHA found to be the best value to the government and awarded the contract to AGHP. Speculation by DHA, that Aetna still would have been awarded the contract if it had structured its proposal differently utterly fails even the most attenuated test of relevance.

Regarding the final prong of the *Radant* test, requiring that the costs would be allowable if they were incurred following award of the contract, there is no dispute between the parties. Contracting officer Lamond, the government's FED. R. CIV. P. 30(b)(6) witness during discovery, testified at the hearing that all of AGHP's pre-contract costs were necessary transition-in activities within the scope of CLIN 0001 (tr. 4/128-29). Accordingly, we find that AGHP has satisfied the *Radant* test and that its pre-contract costs are allowable.

ii. Quantum for Pre-Contract Costs

a. Direct Costs

Next we turn to quantum for pre-contract costs. AGHP asserts entitlement to $8,162,511[11] in pre-contract costs, including $2,789,450 in direct costs (app. br. at 92; R4, tab 2 at 69). AGHP presented unrebutted testimony regarding the calculation of its claimed costs. DHA presents a number of challenges to AGHP's claimed quantum, specifically travel, information technology, and consulting fees. Regarding travel expenses, DHA questions all $102,481 of AGHP's pre-contract travel expenses and asserts that AGHP submitted pages of travel detail "without sufficient specification of the purpose of the travel for the Government or this Board to determine that it is

[11] Certain amounts claimed at the hearing differ from the amounts asserted in AGHP's claim because its subcontractor, WPS, settled its pass-through claim prior to the hearing.

actually allocable to the T-3 North Contract" and that "it is unreasonable to expect the Government or this Board to comb through them to identify the occasional travel cost that is adequately documented" (gov't br. at 67). AGHP presented testimony regarding the necessity of the travel costs (tr. 5/159) and internal review of the travel costs for inclusion in the termination settlement proposal (tr. 6/72-74). Documentation of the travel costs is not in the hearing record. DHA elicited no testimony on this point at the hearing other than testimony from a DCAA auditor that the audit report questioned some travel costs. DHA did not ask any questions regarding the travel costs of AGHP's employees or AGHP's claims consultant. Here, AGHP presented unrebutted hearing testimony from individuals with personal knowledge of AGHP's travel expenses sufficient to establish the allowability of the costs. *See BearingPoint, Inc.,* ASBCA Nos. 55354, 55555, 09-2 BCA ¶ 34,289 at 169,394. DHA's two-sentence summary challenge of the travel expenses in its post-hearing brief is insufficient to overcome AGHP's presentation of direct testimony.

DHA questioned all $608,813 of AGHP's claimed pre-contract information technology costs. DHA asserts that AGHP was not justified in incurring information technology costs for its efforts to meet DIACAP certification requirements because the work required coordination with the government that was not occurring pre-award, and that AGHP improperly comingled the DIACAP expenditures with other information technology expenditures (gov't br. at 51-52). Once again, AGHP presented direct testimony from individuals with personal knowledge of the information technology expenditures (tr. 3/163-67, 4/88-89), along with AGHP's information technology plan and other documentation (app. supp. R4, tabs 22-23). DHA relies on the testimony of Mr. Lamond that DIACAP certification could be achieved without requiring work prior to contract award and that the expenditures would be a wasted effort because of the need for coordination with the government (tr. 4/168-69). While we generally credit Mr. Lamond's testimony, here, his experience was limited to work with incumbent contractors (tr. 4/120, 168-69) and as a contracting officer, rather than in developing computer systems. We find that AGHP established the necessity of the information technology expenditures.

DHA additionally challenges $10,398 in consulting fees pertaining to AGHP's information technology expenses for work performed by AGHP's subcontractor LunarLine (gov't br. at 52, 67). DHA asserts that the invoice from LunarLine was not provided to DCAA. AGHP provided testimony from two individuals with personal knowledge of the LunarLine contract that the subcontractor provided services to AGHP in meeting the DIACAP requirements (tr. 1/129, 6/78) along with copies of the LunarLine agreement (exs. A-4, -6). We find that AGHP has substantiated these costs. In summation, we find that AGHP has demonstrated entitlement to its claimed $2,789,450 in direct costs.

b. *General and Administrative Expenses*

AGHP additionally asserts entitlement to G&A costs for pre-contract expenses in the amount of $4,542,366. DHA challenges AGHP's G&A rate for 2008 of 545.45 percent. The G&A rate for 2009 is 16.02 percent. DHA asserts that AGHP's 2008 G&A is unsupportable because AGHP lacks contemporaneous records, such as timesheets, to support its division of labor between direct and indirect labor. DHA additionally asserts that the G&A rate is unreasonable because it improperly seeks to pass on bid and proposal costs and the costs of standing-up a new entity (gov't br. at 52 (citing *OK's Cascade Co. v. United States*, 97 Fed. Cl. 635 (2011), *aff'd,* 467 F. App'x 888 (Fed. Cir. 2012))). However, in *OK's Cascade*, the court held that the contractor was attempting to recover direct costs for equipment that would not have been recoverable had the contract been performed. *Id.* at 647. Here, Mr. Lamond testified that all the charged costs were necessary for performance of CLIN 0001 (tr. 4/128-29).

DHA suggests that AGHP's G&A rate be reduced to 359.20 percent by reducing the G&A rate applicable to AGHP's non-bid preparation costs to 14.37 percent (gov't br. at 59-61). DHA's argument regarding the allocation of direct versus indirect costs is without merit. As an initial point, we note that the labor in question was expended on the transition-in firm-fixed-price line item which did not require timesheets. The standard for termination settlement proposals recognizes the fact that the settlement may need to be based upon estimates. *See, e.g., Alfair Dev. Co.,* ASBCA Nos. 53119, 53120, 05-2 BCA ¶ 32,990 at 163,513; FAR 49.201(c). We find that AGHP presented testimony establishing the accuracy of its timesheet estimates (tr. 3/197-203, 4/80-82, 5/160-61, 6/41-42). Additionally, because AGHP had only one contract and only one cost objective, the allocation between direct and indirect labor is largely irrelevant. All of the labor costs, direct and indirect, are being charged to the same cost objective and the division between the two "would seem to have no bearing." *Navgas, Inc.*, ASBCA No. 9240, 65-1 BCA ¶ 4533 at 21,760.

DHA's challenge to the reasonableness of the G&A rate fares no better. DHA simply challenges the 2008 G&A rate because it is "too high" and because AGHP is purportedly improperly seeking to have the government fund its stand-up expenses. However, DHA does not cite to any violation of a FAR provision or any court precedent, other than to argue that a termination for convenience settlement only provides for recovery of costs in accordance with "standards of reasonableness, allowability, and regulatory cost principles" (gov't br. at 59 (quoting *DODS, Inc.*, ASBCA No. 59510, 15-1 BCA ¶ 35,918)). To the extent DHA is referring to the price reasonableness provision in FAR 31-201.3(a), AGHP would bear the burden of proof. When a review of the facts "results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." FAR 31.201-3(a). The Federal

Circuit has interpreted this provision as providing the "reviewing officer or court considerable flexibility in assessing the reasonableness of costs." *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013). The Federal Circuit additionally noted that cost reasonableness "is a question of fact." *Id.* at 1360 (citing *Gen. Dynamics Corp. v. United States*, 410 F.2d 404, 409 (Ct. Cl. 1969)). The "standard for assessing reasonableness is flexible, allowing [the Board] to consider many fact-intensive and context-specific factors." *Id.* (citing FAR 31.201-3). Moreover, "the reasonableness of specific costs 'must be examined with particular care' when the costs incurred 'may not be subject to effective competitive constraints.'" *Id.* at 1359 (quoting FAR 31.201-3(a)). Here, to the extent DHA raises the FAR provision, AGHP presented credible testimony regarding the calculation of its G&A rate, and explained that that G&A rate was high as a percentage because the pool of costs was applied to a small base (tr. 6/60-62). Thus, we allow AGHP its claimed G&A expenses of $4,542,366.

c. *Profit and Adjustment for Loss*

Next, we turn to AGHP's claimed profit and DHA's assertion that AGHP would have lost money on performance of the portion of the contract that had been awarded, the base period plus Option Period 1 and, thus, that any recovery should be reduced by an adjustment for loss pursuant to FAR 52.249-2(g)(iii). The FAR provides that "if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision...and shall reduce the settlement to reflect the indicated rate of loss." FAR 52.249-2(g)(iii).

Here, the parties dispute the interpretation of "the entire contract had it been completed" because hearing testimony established that AGHP would have lost money on the base period due to its absorption of pre-contract costs, but that the contract would have turned profitable in the second or third option years. AGHP contends that "the entire contract had it been completed" would include all option years included in the solicitation, that the allowance for loss provision is inapplicable, and asserts entitlement to all of its incurred costs, plus an 11.33 percent profit (app. br. at 106-07). DHA asserts that "the entire contract had it been completed" applies only to the awarded base period and option year one, and then only to the fixed-price line items within the awarded work. According to DHA, because no work was performed on the cost-plus-fixed-fee and requirement line items, AGHP is not entitled to any profit on these line items. Thus, DHA asserts that AGHP's award should be reduced for the loss it would have incurred on the awarded fixed-price line items, which DHA calculates to be 62.35 percent. (Gov't br. at 43-47)

The question of whether the FAR term "entire contract" includes option years appears to be a question of first impression. In interpreting a FAR provision we start

with the plain meaning of the words in their ordinary use. The dictionary definition of "entire" is "with no part left out; whole." NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010). While the parties debate the meaning of "entire" we find the key to interpretation to be the term "contract" because unexercised options are not part of the contract. The drafters of the FAR could have specifically included un-awarded option periods in the adjustment for loss provision as the drafters of the FAR did in other locations. *See* FAR 19.701 ("*Individual contract plan* means a subcontracting plan that covers the entire contract period (including option periods)"); FAR 52.219-9 (same).

Although not directly on point, the Federal Circuit's holding in *Hi-Shear Technology Corp. v. United States*, 356 F.3d 1372 (Fed. Cir. 2004), is instructive. *Hi-Shear* involved a contractor seeking lost profits on negligently estimated quantities of parts and unexercised options. The court noted that a damages award in a breach of contract case should place the non-breaching party in as good of a position as it would have been had the contract been performed, and that the starting point for analysis is "an understanding of the breaching party's obligations under the contract." *Hi-Shear*, 356 F.3d at 1378-79 (quoting *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996)). While the termination for convenience at issue is not a breach of contract, we follow *Hi-Shear* in noting that DHA was obligated under the contract for the transition-in and Option Period 1 but not the unexercised options for periods 2 through 5. Were we to hold otherwise, it would violate the Federal Circuit's guidance that the non-breaching party should not recover more than it would have, had the contract been performed and that it must be definitely established that there would have been a profit. *Hi-Shear*, 356 F.3d at 1379 (quoting *Rumsfeld v. Applied Cos., Inc.*, 325 F.3d 1328, 1339 (Fed. Cir. 2003) and *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001)). This holding is also consistent with the holding in *Vehicle Maintenance Services v. GSA*, GSBCA No. 11663, 94-2 BCA ¶ 26,893 at 133,880 ("VMS assumed any financial risks resulting from its financial planning based on the assumption that it would be awarded all option periods under the contract."); *see also Electro Optical Mechanisms, Inc.*, ASBCA No. 24527, 80-2 BCA ¶ 14,570 at 71,848 ("In the absence of a contractual commitment to purchase on the part of the Government, appellant assumed the risk that claimed costs would not be fully recovered in the event the purchase option was not exercised when it failed to amortize its costs in establishing the amount of rental payments.").

AGHP cites to the Federal Circuit's holding in *Jacobs Engineering Group, Inc. v. United States*, 434 F.3d 1378 (Fed. Cir. 2006) for the proposition that its decision to absorb transition-in costs does not limit its ability to be compensated in its entirety for its transition-in expenses (app. br. at 89-90). However, AGHP's reliance on *Jacobs* is misplaced, as the contractor in *Jacobs* was performing a contract with an explicit cost-sharing agreement. *Jacobs*, 434 F.3d at 1379. A cost-sharing contract is a cost-reimbursement contract where the contractor receives no fee and agrees to absorb a

portion of the costs "in the expectation of substantial compensating benefits." FAR 16.303. Here, AGHP unilaterally proposed to absorb transition-in costs in the hopes of profiting on the option years of the contract. The government awarded the contract to AGHP, but did not enter into an explicit agreement to provide substantial compensating benefits to AGHP. Had AGHP performed the awarded work, and not been awarded additional option years, it would have incurred a loss on the contract. The fact that AGHP would have earned a profit if the option years were exercised is irrelevant to determining whether AGHP is entitled to profit in the termination settlement proposal.

Having determined that AGHP's entitlement to profit should be calculated based on the awarded work, we turn to the calculation of that profit, or the application of the adjustment for loss provision. DHA asserts that there should be a 62.35 percent reduction in AGHP's costs as an adjustment for loss. DHA arrives at this estimate by excluding all estimated profit on requirements, time and materials, and cost-plus-fixed-fee line items because AGHP did not perform any work on the line items, and thus, would not be entitled to any profit. DHA also excluded the award fee pool line items, because contractors cannot recover any award fees in a termination for convenience, a point that AGHP does not dispute. Thus, DHA calculates the adjustment for loss based on two fixed-price line items: the transition-in (CLIN 0001) and the TRICARE service centers (CLIN 1010). (Gov't br. at 45-46) In response to the government's brief, AGHP asserts that the calculations are erroneous because they do not include the "entire contract" including all the option years, but does not propose an alternative calculation for the adjustment for loss for the awarded work (app. resp. br. at 34-36).

We disagree with DHA's proposed calculation of the adjustment for loss because it is not calculated on the entire contract had it been performed. As discussed above, DHA awarded the transition-in and Option Period 1 to AGHP. Had AGHP performed the "entire contract," it would have performed the transition-in and all 15 CLINs included in Option Period 1.

DHA's proposed calculation includes only one of the 15 CLINs for Option Period 1. DHA bases its exclusion of profit on other line items on the principle that no profit is allowed on work not performed. However, DHA misapprehends the calculation of the adjustment for loss. AGHP is not receiving profit on any work not performed. Rather, we are determining the proper profit or loss to be applied to the work performed. The adjustment for loss asks whether AGHP would be in a loss situation for the entire contract (which we interpret as the awarded portion of the contract) had it been performed. Thus, we calculate the adjustment for loss based on AGHP's proposed fixed fees for underwritten health care and disease management and the asserted profit percentage on the administrative CLINs and offset this with the costs absorbed for the transition-in CLIN. This yields a loss of $32,354,859 and a loss

percentage of 16.26 percent.[12] Pursuant to the adjustment for loss provision of the FAR, we find that AGHP is not entitled to profit on its termination settlement proposal and that its costs must be reduced by the loss percentage. We found above that AGHP was entitled to $2,789,450 in direct costs, plus $4,542,366 in G&A for a subtotal of $7,331,816 which must be reduced by the adjustment for loss of 16.26 percent for a net award of $6,139,663.

B. AGHP's Contract Performance Costs

The contract performance period covers the period from contract award on 13 July 2009 through the stop-work order issued on 21 July 2009.[13] The calculation of the termination settlement costs during this period is similar to the calculation of pre-contract costs. AGHP claims $296,569 in direct costs during the performance period, plus G&A at the 2009 rate of 16.02 percent, plus profit. DHA challenges $74,557 of AGHP's information technology costs, along with all $18,984 of claimed travel expenses. As with the information technology costs questioned for the pre-contract period, AGHP presented testimony by individuals with personal knowledge of the expenditures. DHA questions the expenditures in two sentences in its post-hearing brief, concluding that "[t]o the Government's knowledge AGHP has not remedied this shortcoming in its documentation." (Gov't br. at 67) For the reasons stated above with regard to the pre-contract information technology costs, we find that AGHP has established entitlement to the claimed information technology costs. With regard to the travel costs, DHA asserts that the costs are unallowable because the travel vouchers did not provide the date, place or purpose of the trips or the title of the travelers (gov't br. at 67). At the hearing, AGHP presented the testimony of Ms. Peters that the claimed travel costs were for AGHP employees to attend the kick-off meeting with DHA in Aurora, Colorado (tr. 1/165). We find that AGHP has established the claimed travel costs and find that AGHP is entitled to $296,569 in direct costs.

DHA does not challenge AGHP's 2009 G&A rate applicable to these costs. The adjustment for loss arguments discussed above apply to the contract performance period costs. For the reasons above, we find that AGHP is not entitled to profit and that the adjustment for loss applies and reduce AGHP's recovery by 16.26 percent.

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[12] This was calculated based on a loss on CLIN 0001 of $68,129,882, that was offset by an anticipated profit of $35,775,023 on CLINs 1003, 1004, 1006, 1007, 1008, 1009, and 1010 and then dividing by the cost of performance of $198,994,746 (R4, tab 4 at 50; gov't br., ex. C).

[13] DHA contends that the performance period is only six days, relying upon the date the government signed the contract, 16 July 2009, rather than the date the government notified AGHP of the award. As we have found that AGHP's pre-award costs were allowable, the exact award date is irrelevant.

Thus, AGHP is entitled to its $296,569, plus a G&A rate of 16.02 percent less the 16.26 percent adjustment for loss, resulting in a total recovery of $288,132.

C. AGHP's Stop-Work Period Costs

AGHP asserts entitlement to $3,737,064 in direct costs during the stop-work order period, comprised of $2,736,735 in labor costs plus $444,329 in other direct costs, plus unabsorbed home office G&A of $175,681, and profit of $380,319 calculated at 11.33 percent (app. supp. R4, tab 4 at 132). DHA asserts that AGHP failed to take adequate steps to minimize its expenses following the stop-work order and argues that AGHP's recovery should be limited to $292,544—the amount of severance pay AGHP incurred plus $342,515 in other direct costs (gov't resp. br. at 26-31, A-1). DHA questions AGHPs failure to reduce staffing following the stop-work order, its charges for office space and information technology services, and AGHP's payment of severance to employees that could not be placed in other parts of parent Aetna (gov't br. at 65-67; gov't resp. br. at 25-26).

As explained above, AGHP presented undisputed testimony that, upon receipt of the stop-work order, it attempted to limit expenditures by cancelling travel and other avoidable expenses. However, it was more difficult to limit salary expenses and related overhead such as office space, information technology expense, and other items. AGHP presented testimony that it attempted to place individuals in other parts of parent Aetna, but had limited success because of parent Aetna's corporate downsizing due to the global financial crisis, and the requirement that AGHP be able to recall the individuals, if as they believed likely, the protest were denied and the stop-work order lifted (tr. 3/261-64, 5/124-25, 6/169). Pursuant to the contract AGHP would be required to furnish the transition-in plan within 10 days of the stop-work order being lifted, and would not be able to do so if it separated its employees (tr. 1/167-69, 4/73, 146, 5/120-21). In addition, AGHP entered into employment agreements that would require payment of severance to the employees if they were separated (app. supp. R4, tab 98; tr. 3/264). Given these facts, it was not unreasonable for AGHP to retain its staff during the pendency of the bid protest.

AGHP presented additional testimony that, once DHA indicated that it would not take corrective action within the 60-day period, AGHP attempted to reassign its employees within parent Aetna and eventually placed all but six AGHP employees (app. supp. R4, tab 96 at 2735-36; tr. 5/126-27). We find AGHP's actions to be reasonable and award the requested burdened labor costs of $2,736,735. DHA's position, essentially, that AGHP should have immediately separated all employees, is unreasonable under these circumstances. When the stop-work order was issued due to the bid protest at GAO, there was no way for AGHP to know that GAO would sustain the protest. Had AGHP immediately separated all of its employees, it would have been unable to perform the contract had the protest been denied. To the extent DHA

complains that AGHP incurred excessive labor expenses during the stop-work order, DHA ignores its own responsibility in taking six months after the GAO decision to issue the termination for convenience. DHA also ignores the findings of its contracting officer's representative that it was reasonable for AGHP to retain its employees during the stop-work order. (App. supp. R4, tab 73 at 2342-43; tr. 6/164-69)

DHA questions $101,814 of AGHP's claimed $444,329 in other direct costs comprised of computer and telecommunications charges that are tied to the size of AGHP's workforce (gov't resp. br. at 31). As we found that AGHP's efforts to limit its labor costs were reasonable, we find AGHP's related direct costs to be reasonable and award the requested $444,329.

AGHP asserts entitlement to $175,681 in unabsorbed home office overhead costs calculated pursuant to the *Eichleay* formula. DHA asserts that AGHP cannot satisfy the requirements for unabsorbed home office overhead. In order to receive unabsorbed home office overhead:

> First there must have been a government-caused delay of uncertain duration. *Interstate Gen. Gov't Contractors, Inc. v. West*, 12 F.3d 1053, 1056 (Fed. Cir. 1993). The contractor must also show that the delay extended the original time for performance or that, even though the contract was finished within the required time period, the contractor incurred additional costs because he had planned to finish earlier. *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003). Finally, the contractor must have been on standby and unable to take on other work during the delay period. *Interstate Gen.*, 12 F.3d at 1056–57.

Nicon, 331 F.3d at 883.

DHA first asserts that AGHP is not entitled to *Eichleay* damages because AGHP was the cause of the delay rather than the government (gov't br. at 61-62). If the contractor played a role in the delay or the delay was beyond the government's control, the contractor cannot recover unabsorbed overhead. *Nicon*, 331 F.3d at 887 (citing *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1348 (Fed. Cir. 2000)). Here, DHA asserts that AGHP's decision to hire the former DHA Chief of Staff made the delay AGHP's fault and the fact that there is an automatic stay in the event of a bid protest to GAO means that the delay was beyond the fault of the government (gov't br. at 61-63).

We reject the government's argument as the delay was caused by the government. The fact that AGHP hired a former DHA employee did not "cause" the

delay at issue in this appeal. The delay was caused by the government issuing a stop-work order and the multi-month delay after the GAO opinion for the government to terminate the contract for convenience. Only one of the six findings cited by GAO in sustaining the bid protest was AGHP's retention of a former DHA employee. Thus, it is pure speculation to argue that the appearance of a conflict of interest "caused" the suspension of work. It is clear that the delay was of uncertain duration, as DHA did not provide AGHP with a date when the stop-work order would be lifted. In fact, DHA told AGHP that they were not able to comply with the 60-day period for corrective action normally expected following a GAO decision and that they did not know when they would be able to take corrective action (app. supp. R4, tab 71). In the end, it took DHA over six months after the GAO decision to announce the termination for convenience.

Regarding the second prong, it is clear that the stop-work order would have delayed completion of the transition-in line item, had the government not terminated the contract. The stop-work order provided that AGHP would be entitled to an adjustment in the delivery schedule if the stop-work order increased the time required for performance (R4, tab 46; FAR 52.233-3). Contracting officer and government FED. R. CIV. P. 30(b)(6) witness Mr. Lamond testified that AGHP was required to be ready to perform upon lifting of the stop-work order (tr. 4/146). Moreover, DHA's proposed restart of the transition-in period (ex. A-16) would require AGHP to submit its transition-in plan within 10 days of lifting of the stop-work order.

While AGHP was subject to a stop-work order, AGHP was unable to bill to the contract, despite the fact that its employees continued to perform work. As the Federal Circuit has explained,

> [A]pplication of the *Eichleay* formula does not require that the contractor's work force be idle. It simply requires that overhead be unabsorbed because performance of the contract has been suspended or significantly interrupted and that additional contracts are unavailable during the delay when payment for the suspended contract activity would have supported such overhead.
>
> Suspension or delay of contract performance results in interruption or reduction of the contractor's stream of income from direct costs incurred. Home office overhead costs continue to accrue during such periods, however, regardless of direct contract activity. Consequently, this decrease in direct costs necessary to support the continuing overhead creates unabsorbed overhead, unless home office workers are laid off or given additional work during such

> suspension or delay periods. Even then, fixed overhead costs usually remain.

Interstate Gen., 12 F.3d at 1057 (internal citation omitted). Here, AGHP reasonably retained staff during the stop-work order period. These employees were paid their salary and fringe benefits; however, AGHP was not able to charge these costs to the contract. Thus, the *Eichleay* formula allows AGHP to be compensated for the overhead costs during the suspension of work. Accordingly, we find that AGHP has satisfied the requirements of the *Eichleay* formula and is entitled to its claimed $175,681 in unabsorbed overhead.

Thus, we find that AGHP is entitled to $3,356,745 in suspension of work period costs. For the reasons set forth above, these costs must be reduced by 16.26 percent pursuant to the adjustment for loss provision, resulting in an award of $2,810,938.

D. AGHP's Contract Close-Out and Termination Settlement Expenses

AGHP asserts entitlement to $2,049,035 for contract close-out and termination settlement expenses. These costs are comprised of $292,544 in job elimination benefits (severance pay) and $203,118 in direct labor for close-out of the contract, and G&A expenses of $110,220 on these categories, calculated at 7.76 percent. AGHP additionally claims $336,048 in costs for preparing the REA and staffing the DCAA audit. AGHP asserts $1,107,104 in costs for preparing the termination settlement proposal and revised termination settlement proposal. (R4, tab 4 at 65-66) Once again, the government presents general challenges to entitlement, but fails to question specific expenses. The government asserts that AGHP cannot recover its expenses for "meritless proposals that sought plainly unallowable costs and were put forward as part of a litigation strategy" (gov't br. at 68). As we have upheld most of AGHP's claimed expenses, we reject the government's argument that the settlement expenses are unallowable because they were part of meritless proposals and sought unallowable costs.

The government additionally argues that AGHP's claimed contract close-out and termination settlement expenses are not allowable because they were incurred to promote prosecution of AGHP's CDA claim (gov't br. at 69 (citing *Tip Top Constr., Inc. v. Donahoe*, 695 F.3d 1276, 1283-84 (Fed. Cir. 2012))). According to the government, it made clear to AGHP the narrow confines within which it was willing to negotiate a settlement, and, thus, AGHP's expenses incurred in support of settlement proposals beyond the government's proposed confines are litigation expenses (gov't br. at 69-71). The government does not propose any method to allocate AGHP's claimed costs between allowable settlement expenses and unallowable litigation expenses, and instead questions the costs in their entirety.

AGHP asserts that the record demonstrates its good faith in the settlement negotiations (app. resp. br. at 56-58). As AGHP notes, termination settlement proposals are supposed to be negotiated. FAR 49.103. Once the government terminated the contract for convenience, AGHP was required to submit a termination settlement proposal. FAR 49.104(h). Additionally, we note that the government's proposed restriction on recovery of settlement expenses is contrary to the CDA's claims process which encourages the exchange of information between the contracting officer and the contractor. We do not find AGHP's allegations of bad faith persuasive and decline to "scour the record for such evidence." *ESCgov, Inc.*, ASBCA No. 58852, 17-1 BCA ¶ 36,772 at 179,188.

With regard to job elimination expenses, the government asserts that there is no evidence of a legal obligation for AGHP to pay severance, and that the costs are therefore unallowable (gov't resp. br. at 26 (citing *ESCgov*, 17-1 BCA ¶ 36,772)). Additionally, the government asserts that AGHP should not be permitted to recover both stop work period labor and job elimination benefits (gov't resp. br. at A-2 n.16).

The government misstates the requirements for allowability of severance expenses. Pursuant to FAR 31.205-6(g)(2)(iii), severance pay is allowable to the extent it is required by "Established policy that constitutes, in effect, an implied agreement on the contractor's part." FAR 31.205-6(g)(iii). AGHP presented unrebutted testimony that Aetna, the parent corporation, had a job elimination policy requiring severance payments, and that the policy applied to AGHP employees (app. supp. R4, tab 98 at 626; tr. 3/264). This is factually distinguishable from the situation in *ESCgov* where the employee manual "permitted" severance payments. *ESCgov*, 17-1 BCA ¶ 36,772 at 179,187. In addition, we reject the government's argument that severance payments constitute a double recovery. As noted above, we find AGHP's actions during the stop-work period to be reasonable. As AGHP was unable to place some of its employees in other positions during the stop-work period, it was required to pay severance to the remaining employees upon separation and this does not constitute a second recovery. Accordingly, we find that AGHP is entitled to the claimed $292,544 in job elimination benefits.[14]

With regard to AGHP's contract close-out labor costs of $203,118, the government asserts that AGHP failed to provide timesheet data to support the claimed

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[14] We note that AGHP claims job separation benefits paid to "shared service" employees that were employees of the parent Aetna but performing work for AGHP. Given that Aetna was laying-off employees during this period due to the global financial crisis, the causation for the separation of these employees is unclear. In addition, the record is silent regarding the internal pricing of the shared service employees and AGHP's liability to parent Aetna for the separation benefits. DHA presented no testimony on this issue. As AGHP established a *prima facie* case regarding the costs, we allow them.

costs (gov't br. at 67). The government's sole basis for questioning these costs is a sentence in a DCAA audit report (*id.*; app. supp. R4, tab 93 at 2644). However, the government did not elicit any testimony on this issue, with the exception of a supervisory auditor's comment that, in reviewing audit work papers, she "didn't see the evidence of time cards" for some employees during the close-out period (tr. 7/73). However, such testimony is insufficient to counter the direct testimony presented by AGHP's witnesses regarding contract close-out activities and preparation of the termination settlement proposal (tr. 4/75, 78, 5/117-18). Thus, we find that AGHP has demonstrated entitlement to $203,118 in contract close-out labor costs.

AGHP asserts entitlement to a 7.76 percent G&A rate on the severance expenses and contract close-out labor, totaling $110,220. The government asserts that AGHP is not entitled to G&A on its claimed job elimination benefits, and is not entitled to G&A on the expenses of WPS (gov't br. at 66 n.26). The government cites our opinion in *System Development Corp.*, ASBCA No. 16947, 73-1 BCA ¶ 9788, for the proposition that mass severance payments cannot be burdened with G&A expenses. However, the government misreads the holding in *Systems Development* where the issue was whether the severance expenses should be considered a contingent liability as the contractor had accrued reserves for such expenses. We held that the severance payments should be treated as other direct costs, and thus would be burdened with G&A expenses. *Id.* at 45,737. AGHP did not respond to the government's assertion that the WPS subcontract costs should not be subject to G&A burden. As noted above, we granted AGHP's motion to strike the government's attempt to supplement the record with the WPS settlement agreement. As there is no evidence in the record to indicate that such costs were excluded from the settlement agreement with WPS, we only allow G&A on the job elimination benefits and close-out direct labor and allow $38,463 in G&A for a total of $534,125.[15]

The government does not specifically question the costs in AGHP's claim for $336,048 in costs for preparing the REA and supporting the DCAA audit, so we award those costs to AGHP. Similarly, the government does not specifically question any of AGHP's claimed TSP preparation costs, so we award the claimed amount of $1,107,104.

In total, we award AGHP $1,977,277 in contract close-out and termination settlement proposal costs. These costs are not eligible for profit, so are not subject to the adjustment for loss and are not reduced by AGHP's expected loss on performance of the contract.

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[15] AGHP's claim also included G&A on WPS costs for the contract performance period. Our calculation of G&A for the contract performance period excluded the WPS costs.

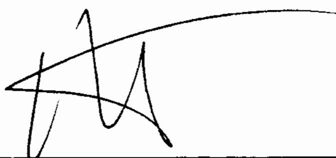
CONCLUSION

For the reasons stated above, we find that AGHP has established entitlement to $6,139,663 in pre-contract costs, $288,132 in contract performance costs, $2,810,938 in stop-work order period costs, and $1,977,278 in contract close-out and termination settlement proposal costs, for a total of $11,216,011, plus CDA interest from the date of the claim, 13 July 2015.

Dated: October 2, 2018

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60207, Appeal of Phoenix Data Solutions LLC f/k/a Aetna Government Health Plans, rendered in conformance with the Board's Charter.

Dated:

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