UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATE OF AMERICA *ex rel.* RICHARD D. BAGLEY, Plaintiff, v. TRW, INC. Defendant.	CASE NO. CV 95-4153 AHM (AJWx) ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ODYSSEY CLAIM; DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE RELATOR'S ODYSSEY CLAIM

INTRODUCTION

This matter comes before the Court on Defendant TRW's Motion for Summary Judgment on the Relator's Odyssey Claim ("TRW's Motion") and the United States of America and *Qui Tam* Relator's[1] Motion for Partial Summary Judgment on the Odyssey Claim ("Plaintiffs' Motion"). TRW argues that because its treatment of the Odyssey proposal as a "bid and proposal" cost was permitted by 48 C.F.R. § 31.205-18(e), it is entitled to partial summary judgment to the extent Plaintiffs premise this action on the "falsity" of Odyssey bid and proposal costs submitted to the government. The government counters that it is entitled to partial summary judgment on the issue of "falsity" because 48 C.F.R. § 31.205-18 does not allow TRW to charge the Odyssey proposal costs as "bid and proposal" costs.

[1] For convenience, the Court will refer to the relator and the United States collectively as the "United States," "the Government" or "Plaintiffs."

The Court GRANTS Plaintiffs' Motion and DENIES TRW's Motion because to the extent TRW recorded the costs of preparing its Odyssey proposal as "B&P" or "bid and proposal" costs, that violated 48 C.F.R. § 31.205-18.

Before turning to the facts and analysis, the Court is compelled to note that in excellent briefs and oral argument, all the parties recognized that the outcome of these motions requires the Court to construe regulations, legislative history and administrative pronouncements that are far from clear, consistent or coherent. The Court agrees. Both sides also pointed out that the other side's analysis and interpretations would make sense only if portions of those regulations, legislative history and pronouncements are deemed superfluous. That, too, is true. When is a contract not a contract but a memorialization of a "cooperative agreement"? Does "sponsored" mean the same as "required"? Do both mean "paid"? When an apparent change in a regulation makes costs allowable that arguably were not previously recoverable, but does so only "to the extent they . . . are not otherwise unallowable" has there really been a change? That a decision as potentially consequential as this requires the Court to delve into such a linguistic morass is regrettable. But as the parties presented the issues, there is no choice.

FACTS[2]

This is an action for damages brought by the United States and *qui tam* relator Richard D. Bagley against defendant TRW, Inc. ('defendant' and 'TRW') for violation of the federal False Claims Act (["FCA" or] 31 U.S.C. § 3729 *et seq*.)." TRW's Statement of Uncontroverted Facts and Conclusions of Law in Support of TRW's Motion for Summary Judgment on the Relator's Odyssey Claim (hereinafter, "TRW's UF") ¶ 1. "TRW is a diversified manufacturing and technology firm. Its businesses include manufacturing automotive components and developing advanced space and defense products and systems." *Id.* "TRW, during the time relevant to this case, had a substantial contracting relationship with the United States government." *Id.*

"Richard Bagley, the relator in this case, is a former employee of TRW." TRW's UF ¶ 2.

[2] The facts are undisputed unless otherwise noted. "Everyone agrees there are no meaningful factual disputes on TRW's motion for summary judgment on the Odyssey claim." TRW's Reply at 1; *see also* Relator and United States of America's Statement of Genuine Issues ("Plaintiffs' SGI").

"One of [Plaintiffs'] claims in this case concerns the proposed Odyssey communications system."[3] *Id.* ¶3. "Developed by TRW and envisioned as a network of 12 medium-earth-orbit satellites and several ground stations located around the globe, Odyssey would allow telephone communications using special portable handsets from anywhere in the world, including regions without land-line or cellular telephone service." *Id.*

". . . TRW looked for another company to help finance and commercialize its Odyssey technology. Eventually, TRW linked up with Teleglobe Inc., a Canadian telecommunications concern . . ." *Id.* ¶ 12. "On November 8, 1994, TRW and Teleglobe signed a Memorandum of Agreement ("MOA") outlining how they would cooperate to try to make Odyssey a reality." *Id.* ¶ 13. "The MOA foresaw the companies eventually entering into a joint venture relationship in the form of a 'Limited Partnership.'" *Id.* "The Limited Partnership would be a separate legal entity in which companies other than TRW and Teleglobe would be invited to invest." *Id.*

The MOA is a "contract." TRW's Mem. P. & A. in Supp. of TRW's Mot. for Summ. J. on the Relator's Odyssey Claim (hereinafter, "TRW's Opening Br.") at 14:15.[4] Paragraph 10.1 of the MOA expressly provided that the obligations in paragraph 3.2 would be "legally binding." Ruhlin Decl., Exh. 1.

"On February 7, 1995, as contemplated by the MOA, TRW and Teleglobe created the Limited Partnership, which was called Odyssey Worldwide Services Limited Partnership ('OWS')." *Id.* ¶ 23.

"Paragraph 3.2 of the MOA allocated to TRW the task of preparing a firm, fixed-price proposal to build and sell the Odyssey system hardware to the Limited Partnership. ('TRW undertakes to take those actions which, in the reasonable opinion of TRW, are necessary to submit to the Limited Partnership a firm fixed price proposal for the System on or before May 1, 1995, and the value of such

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[3] The Odyssey proposal costs account for just one of several claims and one of several pending summary judgment motions in this case.

[4] In its initial submission on these motions TRW advocated that the MOA required TRW to prepare the Odyssey proposal. In its Reply, TRW asserted that the MOA was merely a step toward a "potential cooperative arrangement" with other investors. TRW's Reply at 11.

work shall be included in the Limited Partnership's definitive commercial agreement with TRW for the procurement of the System.')" Plaintiffs' UF ¶ 15. The costs at issue on these motions are the costs TRW incurred in preparing this submission for the limited partnership.

The MOA was amended and re-executed on February 28, 1995, at a time when OWS existed. Ruhlin Decl. Ex. 2. TRW points out, however, that although "[t]he Limited Partnership received TRW's fixed-price proposal for construction of the satellite system on May 1, 1995 [] TRW and OWS never entered into the 'definitive commercial agreement' foreseen by § 3.2 of the MOA." TRW's UF ¶ 23. In fact, TRW asserts that "TRW never received any compensation under the MOA for its proposal work." *Id.* ¶ 16. The Government thus far has failed to rebut this contention. After TRW shopped the Odyssey proposal around for additional investors, there was still insufficient interest to go forward with the project. *Id.* ¶ 26.

The plaintiffs allege that TRW falsely characterized, as government-reimbursable "Bid and Proposal" ("B&P") costs, certain of the costs TRW incurred in preparing the 1995 proposal to build the Odyssey system ("Odyssey proposal"). *Id.* ¶ 3. TRW disagrees and claims that it recorded these costs properly and in compliance with the applicable regulations.[5] TRW's UF ¶ 17.

DISCUSSION

I. LEGAL STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

[5] Though not relevant to these motions, the Government disputes that *all* the costs were recorded as B&P and whether such recordation was "consistent with TRW approved accounting practices" as described in TRW's Controller's Manual. Plaintiffs' SGI ¶ 17.

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transportation Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Management Sys. Corp.*, __ U.S. __, 119 S.Ct. 1597, 1603, 143 L.Ed.2d 966 (1999) (*citing Celotex*, 477 U.S. at 322).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." F. R. Civ. P. 56(e). Summary judgment will be entered against the non-moving party if that party does not present such specific facts. *Id*. Only admissible evidence may be considered in deciding a motion for summary judgment. *Id*.; *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir.1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie*, __ U.S.__ , 119 S.Ct. 1545, 1551-52, 143 L.Ed.2d 731 (1999) (*citing Anderson*, 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson*, 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

Here, whether TRW can be held liable under the FCA depends upon whether TRW violated applicable cost accounting regulations. "Their meaning is ultimately the subject of judicial interpretation,

and it is [TRW's] compliance with these regulations, as interpreted by this court, that determines whether its accounting practices resulted in the submission of a 'false claim' under the Act." *United States ex rel. Oliver v. The Parsons Company*, 195 F.3d 457, 463 (9th Cir. 1999) (reversing district court's grant of summary judgment to the defendant because the defendant's reasonable interpretation of a regulation does not necessarily preclude finding a claim was "false").

II. THE APPLICABLE REGULATIONS PRECLUDE TRW FROM RECOVERING ODYSSEY COSTS AS "B&P"

A. The Regulations

The parties concede that no real factual disputes prevent resolution of these cross-motions. The only issue that must be resolved is whether the relevant provisions in the Federal Acquisition Regulations ("FAR") permitted TRW to record as B&P any costs it incurred in preparing the Odyssey proposal.[6] *See id.* In particular, the resolution of these motions depends on the meaning of 48 C.F.R. § 31.205-18. There are two subsections central to the parties' dispute: 48 C.F.R. § 31.205-18(a) ("18(a)") and 48 C.F.R. § 31.205-18(e)(3) ("(e)(3)").

The logical starting point in the analysis is to define B&P. At all times relevant here, the Code of Federal Regulations defined B&P in 18(a) as it is defined today:

> *Bid and proposal (B&P) costs*, as used in this subsection, means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. The term does not include the costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract.

"B&P costs are normally allocable to an indirect account." *Boeing Co. v. United States*, 862 F.2d 290, 293 (Fed. Cir. 1989). However, "B&P costs arising from a specific requirement in an existing contract may be reallocated from the indirect cost account to the direct cost account." *Id.* The FAR define "indirect costs" in part as follows:

> An indirect cost is any cost not directly identified with a single, final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. It is

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[6] B&P costs may, at least in part, be passed on to the government without regard to whether they were incurred in pursuit of a potential government or non-government, *i.e.*, commercial, contract. *See* Joint Submission in Response to the Court's October 23, 2000 Status Conference Order ("Jt. Submn. of 11/20/00") at 14-15, 25, 32.

> not subject to treatment as a direct cost. After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to the several cost objectives.

48 C.F.R. § 31.203(a). The FAR define "direct costs" in relevant part as follows:

> A direct cost is any cost that can be identified specifically with a particular final cost objective. . . . Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

48 C.F.R. § 31.202(a). In 1995, 48 C.F.R. § 31.205-18(e) provided:

> *Cooperative arrangements.* IR&D effort may be performed by contractors working jointly with one or more non-Federal entities pursuant to a cooperative arrangement (for example, joint ventures, limited partnerships, teaming arrangements, and collaboration and consortium arrangements). IR&D effort may also be performed by contractors pursuant to cooperative research and development agreements, or similar arrangements, entered into under (1) section 12 of the Stevenson-Wydler Technology Transfer Act of 1980 (15 U.S.C. 3710(a)); (2) sections 203(c) (5) and (6)) of the National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(c) (5) and (6)), when there is no transfer of Federal appropriated funds; (3) 10 U.S.C. 2371 for the Defense Advanced Research Projects Agency; or (4) other equivalent authority. IR&D costs incurred by a contractor pursuant to these types of cooperative arrangements should be considered as allowable IR&D costs if the work performed would have been allowed as contractor IR&D had there been no cooperative arrangement.

A 1997 amendment added subsection (3) to 18(e). It provides:

> Costs incurred in preparing, submitting, and supporting offers on potential cooperative arrangements are allowable to the extent they are allocable, reasonable, and not otherwise unallowable.[7]

At oral argument TRW asserted for the first time that the FAR definition of "contract" informs the analysis. At all times relevant here, the FAR defined "contract" as it is defined today:

> As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.
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> . . .
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> *Contract* means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition

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[7] Subsections (1) and (2) to 18(e) deal explicitly with IR&D costs. That new subsection (3) is not explicitly confined to IR&D costs is a factor that TRW relies on to argue it encompasses B&P costs.

> to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq. For discussion of various types of contracts, see Part 16.

48 C.F.R. § 2.101.

B. The Government's Position

The Government's argument is simple: "The plain language of 48 C.F.R. § 31.205-18 . . . governs this Court's determination of whether TRW properly charged its Odyssey proposal costs to 'B&P.' [Therefore, b]ecause the Odyssey proposal costs were 'costs of effort . . . required in the performance of a contract,' they are excluded from the definition of 'B&P' under FAR 31.205-18(a)" and cannot be recorded as B&P costs. Plaintiffs' UF at 5-6. The Government also contends that the 1997 amendment adding (e)(3) is irrelevant because it was added after the costs were incurred and because it is inapplicable in any event.

C. TRW's Position

As TRW's lawyer commendably acknowledged at the hearing on these motions, TRW's position has been evolving. The Court traces TRW's arguments below.

1. Opening Brief

TRW initially argued that the 1997 amendment adding subsection (3) to 48 C.F.R. § 31.205-18(e) is relevant because it implements the *prior* intent of Congress. TRW's Opening Br. at 18 n.5. TRW asserted that (e)(3) expressly allowed it to charge the Odyssey proposal costs as B&P and this was consistent with the purpose of 48 C.F.R. § 31.205-18 to prevent a contractor from being paid twice for the same work.

2. Reply Brief

In its Reply, TRW argued that the MOA was a cooperative agreement and for the first time raised the "Spector Memorandum" (described below) to support a contention that the Department of Defense interpreted 18(a) to allow the recovery of IR&D costs incurred pursuant to cooperative agreements and that because Congress intended that B&P costs be treated the same as IR&D costs, the Odyssey proposal costs incurred pursuant to the MOA cooperative agreement were properly

charged to B&P.

3. At the Hearing

At the hearing on these motions, TRW claimed for the first time that the definition of "contract" in 48 C.F.R. § 2.101 requires that the buyer be obligated to pay and that the term "sponsored" also means "paid for." Therefore, TRW argued, the phrase "required in the performance of a contract" in 18(a) really means "sponsored by a contract," which, in turn, means "actually paid for by a contract in which the buyer was required to pay." Under this strained analysis, the B&P costs incurred on the Odyssey proposal would be reimbursable because TRW was not paid for those costs.

4. Policy

In addition to the foregoing arguments, TRW relies on policy considerations. TRW points out (and the Government acknowledges) that the Odyssey proposal costs would have been recoverable if TRW had undertaken that work independently and apart from any arrangements with any other entity, instead of pursuant to the MOA. The MOA was executed in a changing political and regulatory environment in which the government itself had encouraged major defense contractors to develop proposals and relationships that would provide economic incentives for the private sector to invest capital in projects of potential interest to the government. Thus, TRW argues, it is anomalous to penalize it for having entered into a commercial venture, *i.e.*, a cooperative agreements, that had the potential for having a third party (the Limited Partnership) pay for these B&P costs.

TRW understandably asks: what possible policy is served by construing the regulations in a manner that has this effect? This Court may not have a logical or persuasive answer, but the Court does not make federal fiscal or regulatory policy.[8]

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[8] At the hearing the Government offered three justifications for what TRW perceives to be such an absurd result: (1) 18(a) is a prophylactic rule preventing double-recovery in that the costs incurred pursuant to contract performance are more likely to be reimbursed under that contract, thereby making recovery on an "indirect" basis unnecessary; (2) 18(a) encourages the orderly classification of costs for accounting purposes; and (3) 18(a) prevents the government from becoming a surety for uncollectible commercial debts that arise from the risk of nonpayment inherent in any bargained-for exchange. The supposed anomaly therefore is not the kind of "absurd result" that can override the plain meaning of a regulation. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987).

D. Why TRW's Arguments Are Unpersuasive

All of TRW's arguments result from and are meant to support its fundamental contention that the plain language in 18(a) does not apply.

The Court disagrees and basically concurs with the Government that:

> Juxtaposition of the language of the regulation with the language of TRW's MOA with Teleglobe clearly[9] demonstrates that the law forbade TRW from charging its Odyssey proposal costs as "B&P." First, TRW concedes that the MOA is a "contract." TRW's Opening Br. at 14:15. Second, that contract clearly "requires" TRW to incur those costs necessary to create the Odyssey proposal:
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> > 3.2 In addition to the work identified in Schedule 3.1(a), TRW undertakes to take those actions which, in the reasonable opinion of TRW, are necessary to submit to the Limited Partnership a firm fixed price proposal for the [Odyssey] System on or before May 1, 1995 . . . .
> >
> > . . .
> >
> > 10.1 This Memorandum will constitute a legally binding obligation of each of the parties hereto with respect to those matters set forth in Section[] 3 . . . .
>
> Because the Odyssey proposal costs were "costs of effort . . . required in the performance of a contract," they are excluded from the definition of "B&P" under FAR 31.205-18(a).

Plaintiffs' UF at 6.

The Court therefore concludes that TRW violated FAR 31.205-18 to the extent it charged Odyssey proposal costs to the federal government as B&P costs. Moreover, as the following analysis demonstrates, TRW's arguments are flawed.

1. Does 48 C.F.R. § 31.205-18(e)(3) Expressly Allow TRW's Actions?

First, TRW contends that (e)(3) "makes clear that B&P includes the cost of proposals prepared in connection with 'cooperative arrangements' [and t]hat provision covers the Odyssey proposal costs." TRW's Opening Br. at 15. TRW reads (e)(3) too broadly. It provides that:

> Costs incurred in preparing, submitting, and supporting offers on ***potential*** cooperative arrangements are allowable to the extent they are allocable, reasonable, and not otherwise unallowable.

48 C.F.R. § 31.205-18(e)(3) (emphasis added). Even if (e)(3) were clearly applicable to this case, which would require that it be given retroactive effect because it was added to the regulation in 1997,

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[9] "Clearly" overstates the degree of persuasiveness or lucidity.

the Odyssey proposal would not fit within the definition of (e)(3).[10]

To characterize the Odyssey proposal, as TRW does, as an "offer[] on [a] potential cooperative arrangement[]" is disingenuous. The Odyssey proposal clearly was not prepared to support a "*potential* cooperative arrangement." Indeed, TRW has conceded that it and Teleglobe were involved in an *actual* cooperative arrangement via the MOA and the Limited Partnership. ("[A]s contemplated by the MOA, TRW and Teleglobe created the Limited Partnership, which was called Odyssey Worldwide Services Limited Partnership ('OWS')"). TRW's UF ¶¶ 13, 23. The drafters of (e)(3) did not write it to include costs incurred pursuant to an *actual* cooperative arrangement and they expressly preserved the exclusions in 18(a) with the qualifier "to the extent they are . . . not otherwise unallowable." There is no indication (e)(3) was intended to change the definition of B&P in 18(a).

That the drafters did not intend to change existing law is clear from their response to the public comments on the proposed amended version of 18(e). Section 18(e) states that "IR&D costs incurred by a contractor *pursuant* to . . . cooperative arrangements should be considered as allowable IR&D costs . . ." (Emphasis added.) The American Bar Association Public Contract Law Section suggested that the proposed rule should clarify that "costs incurred 'in pursuit of cooperative arrangements' are B&P costs."[11] Ruhlin Decl. Ex. 14.C at 255.[12] The Cost Principles Committee of the FAR Council declined to add "or B&P" after "IR&D." It believed that such an addition "could mistakenly imply that B&P costs incurred pursuant to a requirement of a cooperative agreement should be charged indirect instead of direct . . ." *Id.* (emphasis in original.) That confirms that when a cooperative agreement requires a contractor to incur B&P costs, such as the Odyssey proposal costs at issue here, those costs

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[10] TRW argues that there is no retroactivity problem because (e)(3) merely clarified existing law. The Court agrees, but rather than supporting TRW's position, that conclusion provides an additional reason why (e)(3) cannot be read in the way TRW wants it read, because that would directly conflict with the plain language of 18(a), which also refers to "potential" contracts.

[11] This evidence contradicts TRW's assertion at the hearing that even before the addition of (e)(3) there was *no doubt* that B&P costs incurred prior to entering into cooperative agreements were reimbursable.

[12] Memorandum dated March 26, 1997 for the Director of the Defense Acquisition Regulations Council from the Chairman of the Cost Principles Committee.

should be charged directly to that cooperative agreement rather than recorded as indirect B&P costs.[13] This is consistent with *Boeing*, 862 F.2d at 293 (costs arising from a specific requirement of an existing contract are properly deemed direct costs).

In short, the only way --- certainly the best way --- to harmonize 18(a) and 18(e) is to give effect to the plain language of the entire regulation.[14]

2. History of the Regulation: Administering Agency's Interpretation & Congressional Intent

a. Administrative Interpretation

In its reply memorandum TRW invokes for the first time and relies heavily on the "Spector Memorandum" for the proposition that "the MOA was not the type of 'contract' that implicated the 'required in the performance of a contract' clause . . ." in 18(a) but was instead a "cooperative agreement." TRW's Reply at 7. It characterizes the MOA that way because the Spector Memorandum states that "R&D costs incurred by a defense contractor pursuant to a *cooperative agreement* may be considered as allowable IR&D costs."

The Spector Memorandum is a memorandum dated December 10, 1991 regarding "Research and Development Performed Under Cooperative Agreement" from the Director of Defense Procurement, Eleanor R. Spector, to the Assistant Secretary of the Army, Assistant Secretary of the Navy, Assistant Secretary of the Air Force, Director of Defense Logistics Agency, and Director of

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[13] That the same memorandum states in the next paragraph that "the proposed rule . . . makes it clear that proposal costs related to all types of funding instruments . . . are allowable . . ." does not change this conclusion. "Related to" is ambiguous in this context and would be consistent with the language in (e)(3) only if it means "related to *potential* . . . funding" or "*in pursuit of* funding."

[14] The Court's construction of (e)(3) does not eviscerate it, as TRW contends. *See* TRW's Reply at 17. The amendment clarified that costs incurred in the pursuit of potential cooperative arrangements are allowable, whereas previously it was unclear whether cooperative arrangements were the type of non-government contract the pursuit of which could result in allowable B&P costs. *See* TRW's Reply at 6 (noting the prior confusion over whether cooperative arrangements were "contracts").

Defense Contract Audit Agency.[15] *See* Supp. Bedell Decl. Ex. A. Spector wrote that:

> A number of questions have arisen concerning the allowability of R&D efforts performed under ***cooperative agreements***. While the terms and conditions of the agreements may suggest they are contracts, they are not the type of ***contract*** contemplated under Federal Acquisition Regulation (FAR) 31. 205-18(a) that would preclude the recovery of independent research and development (IR&D) costs.
>
> Accordingly, R&D costs incurred by a defense contractor pursuant to a ***cooperative agreement*** may be considered as allowable ***IR&D*** costs if the work performed would have been allowed as contractor ***IR&D*** had there been no ***cooperative agreement***. (Emphasis added.)

This memorandum, in substance, added the category of costs incurred pursuant to "cooperative agreements" to those costs that might be indirectly chargeable to the government as IR&D.

First, the Spector Memorandum states on its face that it applies to IR&D. Had Spector intended her interpretation to apply to *both* IR&D and B&P, she likely would have explicitly included the term B&P, given that she also referred to 18(a), which defines both such terms (as well as others).

It is more than just the plain language of the Spector Memorandum that persuades the Court that Spector dealt only with IR&D and not B&P. If B&P were encompassed in her analysis, that would have run afoul of the express language of 18(a) that defines IR&D differently than B&P.

As noted above, B&P was defined in 1991 as follows:

> *Bid and proposal (B&P) costs,* as used in this subdivision, means the costs incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential Government or non-Government contracts. *The term* ***does not include*** *the costs of* ***effort sponsored*** *by a grant or* ***cooperative agreement***[16] ***or required in contract performance***.

18(a) (emphasis added). In 1991, in the same section 18(a) IR&D was defined as follows:

> *Independent research and development (IR&D)* means a contractor's IR&D cost that is ***not sponsored by, or required in performance of, a contract or grant*** and that consists of projects falling within the four following areas: (1) basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies. IR&D effort shall not include technical effort expended in developing and preparing technical data specifically to support submitting a bid or proposal.

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[15] The Spector Memorandum apparently was not sent to TRW, though TRW claims that it was widely known in the government contracting community and the Court accepts that assertion. However, TRW does not present the Court with any evidence that it, or anyone else, relied upon the Spector Memorandum in charging the challenged Odyssey costs as B&P.

[16] This same language appeared in the regulation at all relevant times as it still does.

18(a) (emphasis added).

The key difference is that the B&P definition specifically states that B&P "does not include the costs of effort sponsored by a . . . ***cooperative agreement***." The term "cooperative agreement" does not appear in the definition of IR&D. Spector merely opined that certain costs incurred under cooperative agreements could be classified as recoverable IR&D. She could not extend that analysis to B&P because 18(a) excluded from B&P "effort sponsored by a . . . ***cooperative agreement***." Moreover, nothing in the Spector Memorandum suggests that the author intended to or was in fact changing existing law.

Under 18(a) the definition of B&P clearly encompasses the Odyssey proposal costs --- regardless whether the MOA was a contract or merely a cooperative agreement. On the other hand, 18(a) does not specifically preclude charging IR&D costs incurred pursuant to a cooperative agreement, as the Spector Memorandum allows.

For both of the above reasons, the Court finds the Spector Memorandum unpersuasive and inapplicable to B&P.

b. Congressional Intent

In essence, TRW argues that from at least 1991 and continuing thereafter, Congress intended 18(a) to encompass the Odyssey proposal B&P costs. "[O]ur approach to statutory interpretation is to look to legislative history only where we conclude the statutory language does not resolve an interpretive issue. . . . [T]his Circuit also recognizes the principle that legislative history--no matter how clear--can't override statutory text. Where the statute's language can be construed in a consistent and workable fashion [this Court] must put aside contrary legislative history." *Northwest Forest*, 82 F.3d at 834-35 (internal citations and quotation marks omitted). "We accord a high degree of deference to an agency's interpretation of the statutory provisions and regulations it is charged with administering. . . . Nonetheless, the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . To ascertain the intent of Congress, we first must determine whether Congress has directly spoken to the precise question at issue." *Forest Guardians v. Dombeck*, 131 F.3d 1309, 1311 (9th Cir. 1997) (internal citations and quotation marks omitted).

There is no indication in the record that "Congress has directly spoken to the precise question at issue" here by enacting a relevant statute or otherwise, although much of the language in the FAR is the result of broadly delegated congressional authority.

The legislative history cited by TRW at best parallels the Spector Memorandum, but uses language that is even murkier.

> The House bill contained a provision (sec. 231) that would eliminate the requirements for advance agreements and technical reviews from the process of Defense Department reimbursement of contractor independent research and development and bid and proposal (IR&D/B&P) costs beginning in fiscal year 1993. The House provision also would make such costs allowable without the current administratively imposed cost ceilings, subject to the standard tests for reimbursement applicable to other indirect costs, to the extent that the funds were used for projects of potential interest to the Department of Defense.
>
> The Senate amendment contained no similar provision.
>
> The Senate recedes with an amendment. The conference agreement would eliminate both the advance agreement and formal technical review processes. All independent research and development and bid and proposal costs would be reimbursed to the extent that they are reasonable, allocable, and not otherwise made unallowable by law or regulation.
>
> *The conferees note that in the past, questions have arisen as to whether such costs, when incurred by a contractor through participation in consortia or cooperative agreement, would be reimbursable. The conferees agree that such costs should be reimbursed. Under the conference agreement, such costs would be fully reimbursable to the extent that they are reasonable, allocable, and not otherwise disallowed under applicable laws or regulations.*

H.R. Conf. Rep. No. 102-311, at 567-68 (1991) (emphasis added) (history of National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, tit. VIII, part A, sec. 802, 10 U.S.C. § 2372, 105 Stat. 1290, 1412 (1991)). This passage does appear to refer to both B&P and IR&D as "costs" that are reimbursable "when incurred . . . through participation in consortia or cooperative agreement[s]." However, because of the qualifier in the last clause of the last sentence it appears that Congress had no intention of changing the then-current state of the law, which (under 18(a)) precluded recovery of B&P "costs of effort sponsored by a grant or cooperative agreement, or required in the performance of a contract." Moreover, the Spector Memorandum, which dealt only with IR&D costs, was written after the conference report. If the report had any impact on her, that would support the Government's position that not even a high-ranking administrator of FAR believed Congress intended to allow recovery for costs incurred in cooperative agreements for *both* B&P and IR&D.

Because the legislative history is at best ambiguous the Court accords it little weight and defers to the FAR as worded by the agencies. *See Northwest Forest*, 82 F.3d at 835.

3. The Purpose of Preventing Double-Recovery Is Not Implicated Here

TRW also argues that the purpose of 48 C.F.R. § 31.205-18(a) is to prevent a contractor from being paid twice for B&P work, once under a contract and again through indirect charges to the government. TRW is indisputably correct that the regulation serves that purpose --- but not necessarily only that purpose. TRW imports these arguments from a case in which the Armed Services Board of Contract Appeals ("ASBCA") was persuaded in part by the same argument because it could not otherwise discern a compelling interpretation of a similarly ambiguous regulation. *General Dynamics Corp.*, ASBCA No. 10254, 66-1 BCA ¶ 5680, at 26,501-03, 166 ASBCA LEXIS 338 (1966), *see* Pl.'s App. of Authorities Ex. 17. That case criticized the ambiguity in Armed Services Procurement Regulation ("ASPR") 15-205.35(c), which defined IR&D as "that research and development which is not sponsored by a contract, grant, or other arrangement." The government sought to prevent the categorization of certain costs as IR&D because General Dynamics received partial funding for those research costs from private sources. Positing that the word "sponsored" could have several different meanings --- including (1) funded entirely by, (2) funded in part by, (3) for the benefit of or (4) controlled by --- the ASBCA resorted to policy and course of dealing arguments because the ambiguous language in the regulation did not "compel any specific result." *Id.* In allowing the costs to be charged as IR&D, the ASBCA expressly limited its decision to the facts of the case before it. *Id.* at 26,503.

Far from holding that "sponsored" necessarily means "paid for" (as urged by TRW), in *General Dynamics* the ASBCA posited several different meanings of "sponsored" and refrained from resting its decision on any one of them. Even when viewed in light of the definition of "contract" in 48 C.F.R. § 2.101 ("binding legal relationship obligating the seller to furnish . . . and the buyer to pay . . ."), the Court cannot make the inferential leap that TRW urges, namely: in 18(a) "sponsored" means "paid for" and "sponsored" means the same as "required." Under such a construction, the Court would be injecting the ambiguous verb "sponsored" (previously criticized in *General Dynamics*) back into 18(a). TRW's construction would read the phrase "required in the performance of" out of the

regulation so that 18(a) read: B&P "does not include the costs of effort sponsored by a grant or cooperative agreement, or *sponsored by* [instead of '*required* in the performance of'] a contract."

This Court will not stretch the plain words to accommodate TRW's view that *General Dynamics* requires such a construction. instead of "*sponsored* by a contract." As with the Spector Memorandum, *General Dynamics* analyzes only IR&D costs. Moreover, in *General Dynamics* the ASBCA in effect "punted" rather than attempting to definitively interpret ambiguous language. In so doing, the ASBCA relied on course of dealing and policy because it found no plain meaning, clear administrative interpretation or legislative history upon which it could rely. In contrast, this Court has found that the plain meaning of 18(a) precluded TRW from charging Odyssey proposal costs as B&P and that TRW has failed to present any *clear* administrative interpretation or legislative history to *rebut* the plain meaning of 18(a).

Moreover, it does not follow that because TRW was not actually paid even once, much less twice, it cannot be liable under the FCA. Nothing in 18(a) conditions whether costs may be allocated to B&P or instead must be allocated directly to a contract on whether the contractor was actually paid. If non-payment by a third-party commercial contractor obligated the government to pay, there might be an incentive for contractors to default.

CONCLUSION

For all the foregoing reasons, the United States' Motion is GRANTED and TRW's Motion is DENIED.

IT IS SO ORDERED.

DATE: December 12, 2000

A. Howard Matz
United States District Judge