Annual Review Claims, Disputes, and Terminations Supplementary Materials

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United States Court of Appeals for the Federal Circuit

KIEWIT INFRASTRUCTURE WEST CO.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-2125

Appeal from the United States Court of Federal Claims in No. 1:16-cv-00045-EJD, Senior Judge Edward J. Damich.

Decided: August 26, 2020

JOHN SPENCER STEWART, Stewart Sokol & Gray, LLC, Portland, OR, for plaintiff-appellant. Also represented by TYLER J. STORTI.

SOSUN BAE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant-appellee. Also represented by ETHAN P. DAVIS, ALLISON KIDD-MILLER, ROBERT EDWARD KIRSCHMAN, JR.

Before PROST, *Chief Judge,* MAYER and LOURIE, *Circuit Judges*.

MAYER, *Circuit Judge*.

Kiewit Infrastructure West Co. ("Kiewit") appeals the judgment of the United States Court of Federal Claims granting the government's motion for summary judgment and denying Kiewit's request for an equitable adjustment for the cost of purchasing certain wetland mitigation credits. *See Kiewit Infrastructure West Co. v. United States*, No. 1:16-cv-00045, 2019 WL 2156459 (Fed. Cl. May 15, 2019) ("*Federal Claims Decision*"). For the reasons discussed below, we reverse and remand.

I. BACKGROUND

On June 19, 2012, the Western Federal Lands Highway Division of the Federal Highway Administration ("FHA") issued a solicitation for a road design and reconstruction project (the "Deweyville project"). *See* J.A. 321–30; *see also* J.A. 331–32, 337. The project consisted of realigning and reconstructing approximately twelve miles of road running through the Tongass National Forest, a forest located on Prince of Wales Island in Alaska. *See* J.A. 292–93.

In conjunction with the issuance of the solicitation, the FHA provided offerors with a copy of a Waste Disposal Sites Investigation Report ("Waste Site Report"), which identified sites that a contractor could use to dispose of waste materials generated during road reconstruction. *See* J.A. 369–83. This report, which indicated that many of the potential waste disposal sites were located in existing rock quarries, contained estimates of the volume of waste each location could accommodate. J.A. 372. It also stated that "[t]he criteria for establishing waste disposal sites included identifying locations that would minimize negative impacts

to wetlands, wildlife, fisheries, streams, and karst formations." J.A. 372.[1]

The FHA also provided offerors with access to the "Categorical Exclusion," *see* J.A. 324–25, 341–59, a document that the agency had prepared in connection with its efforts to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321–70.[2] The Categorical Exclusion[3] stated that the FHA had determined that the Deweyville project would "not have a significant effect on the human environment," J.A. 352, and that "[t]he project was designed . . . to minimize the amount of fill placed into wetlands wherever possible," J.A. 350.[4] It further asserted

[1] The Waste Site Report was not created for the Deweyville project, but instead for a previous highway project in the Tongass National Forest. *See* J.A. 369, 372.

[2] "NEPA was passed by Congress to protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005); *see* 42 U.S.C. § 4321. When an agency identifies proposed actions that likely will "not have any significant effect on the environment, the agency may classify those actions as categorical exclusions." *Colo. Wild, Inc. v. U.S. Forest Serv.*, 435 F.3d 1204, 1209 (10th Cir. 2006).

[3] The Categorical Exclusion issued in May 2012 but was amended in both July 2012 and April 2013. *See* J.A. 341, 347, 353.

[4] The solicitation for the Deweyville project stated that the data contained in the Categorical Exclusion was "for the Contractor's information" and that the FHA would "not be responsible for any interpretation of or conclusion drawn from the data . . . by the Contractor." J.A. 324; *see also* J.A. 325.

that approximately forty-three acres of wetlands would be "permanently impacted by the proposed action." J.A. 350. Additionally, the Categorical Exclusion referred to the Waste Site Report and stated that:

> Material and waste sites are expected to be sourced at existing . . . quarries in the area as identified in the [Waste Site Report]. The sites identified in that report will serve as both material sources and waste sites and are included in this analysis of environmental resource impacts. No further analysis of the environmental impacts of using these sites for material and wasting is necessary at the sites identified in the report unless an expansion of a site is proposed.

J.A. 348.

The solicitation for the Deweyville project placed responsibility for "obtaining any necessary licenses and permits" on the contractor. J.A. 325. Specifically, it stated that the contractor was required to obtain "all permits and clearances needed for completion of the project," including permits required by the Clean Water Act, 33 U.S.C. § 1344.[5] J.A. 328. The solicitation further provided that the contractor was "responsible for purchasing [wetland]

[5] An entity or individual who seeks to obtain a section 404 permit under the Clean Water Act can provide compensation for the unavoidable impacts that a project will have on wetlands through an in-lieu fee program, which allows for the purchase of compensatory wetland mitigation credits. *See* 33 C.F.R. §§ 332.1, 332.8; *see also id.* § 320.4(b)(2)(i) (stating that "[w]etlands . . . serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species").

mitigation credits, if necessary." J.A. 337; *see also* J.A. 327.[6]

The solicitation also contained a provision, Revised Standard Specification 105.06 ("RSS 105.06"), which, like the Categorical Exclusion, referred to the Waste Site Report and stated that "[n]o further analysis of the environmental impacts of using [government-designated waste] sites [would be] needed unless an expansion of a site [were] proposed." J.A. 330. RSS 105.06 further stated that the government-designated waste sites had "received NEPA clearance." J.A. 330.

Prior to bid submission, Kiewit employees made a two-day visit to the Deweyville project site. J.A. 396, 425. Kiewit's total bid included approximately $1,000,000 for wetland mitigation fees.[7] *See* J.A. 125, 432, 583–84. The FHA awarded the contract for the Deweyville project to Kiewit on August 2, 2012. J.A. 125.

On March 7, 2013, Kiewit wrote a letter to the Deweyville project manager, Jane Traffalis, requesting an

[6] On July 19, 2012, the agency issued solicitation amendment A004, which clarified that the contractor was responsible for the purchase of wetland mitigation credits and that it would not be reimbursed for the cost of such credits. *See* J.A. 337.

[7] Kiewit asserts that the approximately $1 million it included in its bid for wetland mitigation fees only covered fees related to the roadway corridor and did not include any fees for wetland mitigation at the government-designated waste disposal areas. *See* Br. of Appellant 3 ("In reliance on the Government's representations in the Contract Documents, Kiewit's bid did not include costs associated with encountering any wetlands in the designated waste sites or paying any mitigation 'in-lieu credit' fees for such wetlands.").

equitable adjustment for the cost of purchasing mitigation credits for the wetlands it encountered at government-designated waste sites. *See* J.A. 386–87. Kiewit asserted that although RSS 105.06 stated that "[n]o further analysis of the environmental impacts of using [government-designated waste] sites" would be required unless a contractor expanded the sites, J.A. 330, its engineers had determined that there were approximately nineteen acres of wetlands at the designated sites, *see* J.A. 386. According to Kiewit, the additional cost of purchasing mitigation credits for wetlands at government-designated waste sites was "compensable under the contract changes clause." J.A. 386.

Traffalis responded by stating that Kiewit's claim for an equitable adjustment based on wetlands at the government-designated waste disposal sites was more appropriately evaluated as a differing site condition claim rather than a constructive change claim. *See* J.A. 393. She further asserted that Kiewit was not entitled to an equitable adjustment based upon a differing site condition because its contract with the FHA did not "represent[] anything about the presence or absence of wetlands at the disposal sites identified in the [Waste Site Report] and . . . a reasonable site investigation would have revealed the presence of wetlands." J.A. 395.

On June 3, 2014, Kiewit sent Traffalis another letter, again asserting that the requirement that it perform wetland delineation at the waste disposal areas was a compensable change. J.A. 396–97. Kiewit stated that it had "invested two complete days on a site investigation trip, which [was] unquestionably a reasonable investigation . . . on a competitively bid design build project in a remote location." J.A. 396.

Traffalis again denied Kiewit's request for an equitable adjustment. J.A. 398. She asserted that it was the FHA's conclusion that the presence of wetlands at the government-designated waste areas did "not constitute a change

to the contract, nor [was] it a differing site condition." J.A. 398. Kiewit then filed a certified claim with the contracting officer, stating that the basis of its "request for additional compensation [was] outlined in" its June 2014 letter to Traffalis. J.A. 399.

On January 15, 2015, the contracting officer issued a final decision denying Kiewit's claim for an equitable adjustment. J.A. 400–07. In the contracting officer's view, there had been no constructive change to Kiewit's contract with the FHA because that contract "made no representations that the . . . wetlands process [pursuant to section 404 of the Clean Water Act], including mitigation, was complete for the [government-designated] waste sites." J.A. 405.

Kiewit then appealed to the Court of Federal Claims, seeking an equitable adjustment in the amount of $490,387 and asserting that the presence of wetlands at the government-designated waste disposal sites was both a constructive change to its contract with the FHA and a differing site condition. *See Federal Claims Decision*, 2019 WL 2156459, at *1. Although the government argued that Kiewit's differing site condition claim should be dismissed because it had not been properly presented to the contracting officer, the Court of Federal Claims rejected this argument. According to the court, although Kiewit's differing site condition and constructive change claims relied upon "slightly different legal theories," they could be considered the same for jurisdictional purposes because they arose from the same set of operative facts and sought essentially identical relief. *Id*. at *9.

Turning to the merits, the court granted summary judgment in favor of the government on both Kiewit's differing site condition claim and its constructive change claim. *Id*. at *9–11. The court determined that although both RSS 105.06 and the Categorical Exclusion state that "[n]o further analysis of the environmental impacts of

using [government-designated] waste sites" would be required unless a contractor chose to expand those sites, *see* J.A. 330, 348, the term "environmental impacts" referred only to NEPA environmental impacts, not Clean Water Act environmental impacts. *Federal Claims Decision*, 2019 WL 2156459, at *10–11. According to the court, Kiewit "was justified in not inquiring further concerning environmental impacts of the NEPA type; it was not justified in not inquiring further concerning environmental impacts under the [Clean Water Act]." *Id.* at *11.

Kiewit then filed a timely appeal with this court. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A. Standard of Review

We review a grant of summary judgment by the Court of Federal Claims de novo. *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1244 (Fed. Cir. 2007); *see K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1004 (Fed. Cir. 2015). We likewise review de novo the court's "conclusions of law, such as contract interpretation." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003).

B. Jurisdiction over Differing Claims

The Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101–09, "provides for the resolution of contract disputes arising between the government and contractors." *England v. The Swanson Grp., Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004). One prerequisite for the exercise of CDA jurisdiction by the Court of Federal Claims "is a final decision by a contracting officer on a valid claim." *Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1111–12 (Fed. Cir. 2013) (emphases omitted); *see* 41 U.S.C. § 7103(a). Although "a CDA claim need not be submitted in any particular form or use any particular wording, it must contain a clear and unequivocal statement that gives the contracting

officer adequate notice of the basis and amount of the claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citation and internal quotation marks omitted); *see Hejran Hejrat Co. v. U.S. Army Corps of Eng'rs*, 930 F.3d 1354, 1357–59 (Fed. Cir. 2019).

Here, there is no dispute that Kiewit properly presented its constructive change claim to the contracting officer. *See* J.A. 39, 397–99. Nor is there any dispute that the contracting officer issued a final decision on that claim. *See* J.A. 45. The government contends, however, that the Court of Federal Claims "erred in exercising jurisdiction over Kiewit's differing site condition claim because Kiewit failed to submit a certified claim for a differing site condition to the contracting officer and, consequently, the contracting officer never issued a final decision upon such a claim." Br. of Appellee 24.

As we have previously made clear, two claims may be considered the "same" for CDA jurisdictional purposes if "they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Scott Timber*, 333 F.3d at 1365; *see K-Con*, 778 F.3d at 1006 (explaining that "merely adding factual details or legal argumentation does not create a different claim, but presenting a materially different factual or legal theory . . . does create a different claim"). Here, we need not, and therefore do not, resolve the question of whether Kiewit's differing site condition and constructive change claims should be considered separate claims for CDA jurisdictional purposes. Because Kiewit's request for an equitable adjustment—which turns on the proper interpretation of solicitation provision RSS 105.06—can adequately be assessed under a constructive change rubric, it is unnecessary to consider its alternative theory of recovery based upon an alleged differing site condition. *See, e.g.*, *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1366 (Fed. Cir. 2009) (resolving the parties' "divergent interpretation[s]" of solicitation language and concluding that the

contracting agency's requirement that the contractor perform according to the agency's erroneous interpretation of that language was a constructive change to the contract); *Lockheed Martin IR Imaging Sys., Inc. v. West*, 108 F.3d 319, 322–24 (Fed. Cir. 1997) (accepting a contractor's reasonable interpretation of a solicitation provision and concluding that the contracting agency's contrary interpretation effected a constructive change); *Aydin Corp. v. Widnall*, 61 F.3d 1571, 1577 (Fed. Cir. 1995) ("To identify a constructive change, this court consults the contract language.").

C. Kiewit's Constructive Change Claim

"A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government." *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *see Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1361 (Fed. Cir. 2016) (explaining that "[e]ven absent a formal order under the Changes clause, the contracting officer may still *constructively* change the contract" (citation and internal quotation marks omitted)).[8] In general, where a federal agency "requires a constructive change in a contract, [it] must fairly compensate the contractor for the costs of the change." *Aydin*, 61 F.3d at 1577; *see Int'l Data Prods.*, 492 F.3d at 1325 ("Equitable adjustments are corrective measures that make a contractor whole when the Government modifies a contract.").

Kiewit asserts that it performed work beyond the requirements set out in its contract with the FHA because it

[8] The contract for the Deweyville project incorporated certain standard Federal Acquisition Regulation ("FAR") provisions, such as the FAR changes clause, 48 C.F.R. § 52.243-4. *See* J.A. 119.

was required to purchase mitigation credits not only for wetlands in the Deweyville project's roadway corridor, but also for the wetlands it encountered at the government-designated waste disposal sites. According to Kiewit, because the solicitation affirmatively represented that a contractor would not need to conduct any further environmental impacts analysis of the government-designated waste sites unless it decided to expand those sites, *see* J.A. 330, it reasonably concluded that it would not need to perform any wetlands analysis at those sites.

We agree. Resolution of the dispute between Kiewit and the FHA hinges on the proper interpretation of the term "environmental impacts" in RSS 105.06. *See Federal Claims Decision*, 2019 WL 2156459, at *10. That solicitation provision states:

> Waste and excess material may be disposed at the sites listed in the [Waste Site Report]. The sites have received NEPA clearance. No further analysis of the *environmental impacts* of using these sites is needed unless an expansion of a site is proposed. If expansion is proposed, the requirements of Subsection 105.02(b) will apply. Obtain approval from the U.S. Forest Service before using these sites.

J.A. 330 (emphasis added).

By its plain terms, RSS 105.06 dictates that, unless a contractor decided to expand the government-designated waste sites, "[n]o further analysis of the environmental impacts of using" such sites would be necessary. J.A. 330. The government does not meaningfully dispute that the analysis required to obtain a permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, is an "environmental impacts" analysis. It nonetheless contends that "wetland delineation and payment of wetland mitigation credits" are excluded from the "environmental impacts" covered by RSS 105.06, Br. of Appellee 43, because that

provision "does not refer to section 404 of the Clean Water Act, or to wetlands, but only to NEPA," *id.* at 45; *see also id.* at 44–45 (arguing that because the sentence in RSS 105.06 containing the "environmental impacts" language "is directly preceded by the statement that the '[government-designated waste] sites have received NEPA clearance,' the only reasonable reading of [RSS 105.06] is that no further analysis of environmental impacts was necessary for NEPA clearance purposes" (quoting J.A. 330)).

This argument is unavailing for two reasons. First, contract language matters. *See, e.g.*, *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 826 (Fed. Cir. 2010) ("Our analysis begins with the language of the contracts."); *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993) ("A contract is read in accordance with its express terms and the plain meaning thereof."). RSS 105.06 does not state that no further environmental analysis would be necessary for NEPA clearance purposes if a contractor elected to dispose of waste and excess material at government-designated waste sites. *See* J.A. 330. Instead, it broadly provides that *"[n]o further analysis of the environmental impacts* of using [such] sites" would be required. J.A. 330 (emphasis added).

If the government intended to exclude wetland impacts from the "environmental impacts" covered by RSS 105.06, it should have included contract language to that effect. *See, e.g.*, *States Roofing*, 587 F.3d at 1369 (adopting a contractor's interpretation of a disputed contract provision where the contracting agency "'inadvertently' omitted a [provision] that could have avoided misunderstanding"). Because the government failed to do so, we decline "to rewrite the contract . . . and insert words the parties never agreed to." *George Hyman Const. Co. v. United States*, 832 F.2d 574, 581 (Fed. Cir. 1987); *see also Am. Capital Corp. v. FDIC*, 472 F.3d 859, 865 (Fed. Cir. 2006) (explaining that this court "cannot rewrite a contract or insert words to which a party has never agreed"); *Freightliner Corp. v.*

Caldera, 225 F.3d 1361, 1367 (Fed. Cir. 2000) (rejecting a proffered interpretation of a contract term "because it add[ed] an unnecessary interpretative gloss to the contract language").

Second, there is no merit to the government's argument that because the second sentence of RSS 105.06 states that the government-designated waste sites had "received NEPA clearance," Kiewit should have understood that the term "environmental impacts" in the next sentence excluded impacts to wetlands. There is no dispute that NEPA and the Clean Water Act are separate statutes; there is likewise no dispute that NEPA imposes duties on federal agencies rather than private parties. *See, e.g.*, *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (explaining that "NEPA is a procedural statute that binds only the federal government"). Because NEPA requires federal agencies to "take a hard look at environmental consequences" of a proposed project or action, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citation and internal quotation marks omitted), however, an agency's NEPA assessment will frequently include an analysis of the impact that a proposed project will have on any wetlands in the project's vicinity. *See* Protection of Wetlands, Exec. Order 11,990, 42 Fed. Reg. 26,961 (May 24, 1977), *reprinted as amended in* 42 U.S.C. § 4321 note; *see also Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1271–72 (10th Cir. 2004); *Miss. River Basin All. v. Westphal*, 230 F.3d 170, 173–77 (5th Cir. 2000); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1151–53 (9th Cir. 1997). Indeed, the FHA specifically considered the impact that the Deweyville project would have on wetlands as part of its NEPA analysis.[9] *See* J.A. 350.

[9] As will be discussed more fully below, the Categorical Exclusion, which the FHA prepared as part of its effort to comply with NEPA, identified approximately forty-three

We cannot accept, therefore, the government's argument that because RSS 105.06 states that the government-designated waste sites had "received NEPA clearance," it somehow excludes the analysis of wetlands from the provision's affirmative representation that "[n]o further analysis of the environmental impacts of using [those] sites" would be necessary. J.A. 330. To the contrary, the fact that the FHA, as part of the NEPA process, had already undertaken an evaluation of "the effects of [Deweyville] project activities on wetlands," J.A. 350, bolstered, rather than undercut, Kiewit's reasonable conclusion that it would not need to conduct any further wetlands analysis at the designated waste disposal areas.

D. The Waste Site Report and the Categorical Exclusion

Even assuming that the meaning of the term "environmental impacts" in RSS 105.06 were ambiguous, moreover, the Categorical Exclusion would alleviate any interpretive uncertainty.[10] *See Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1311 (Fed. Cir. 2016) (concluding that a term in a solicitation was ambiguous but that this ambiguity was resolved by reference to communications from the contracting agency); *see also Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1381 (Fed. Cir. 2017) (concluding that both the plain language of the solicitation and the extrinsic evidence supported one interpretation of a disputed contract provision); *Gardiner, Kamya & Assocs., P.C. v. Jackson*, 467 F.3d 1348, 1354 (Fed. Cir. 2006) (explaining that "[w]hen a contract is ambiguous, before resorting to

acres of wetlands in the Deweyville project's roadway corridor but did not identify any wetlands at the waste disposal sites. *See* J.A. 350.

[10] We need not decide whether either the Categorical Exclusion or the Waste Site Report was incorporated into the solicitation because resolution of this issue is unnecessary to our analysis.

the doctrine of contra proferentem, we may appropriately look to extrinsic evidence to aid in our interpretation of the contract" (citation and internal quotation marks omitted)).

The Categorical Exclusion, like RSS 105.06, represents that "[n]o further analysis of the environmental impacts of using" the government-designated waste sites would be necessary "unless an expansion of a site [was] proposed." J.A. 348. Notably, however, in the Categorical Exclusion, unlike in RSS 105.06, the "[n]o further analysis" language is not preceded by any reference to NEPA. *See* J.A. 330, 348. Thus, as the Court of Federal Claims correctly concluded, "[r]eading the Categorical Exclusion[], a reasonably prudent contractor would conclude that no further analysis was necessary regarding *any* environmental issues, that is, including ones arising under the [Clean Water Act]." *Federal Claims Decision*, 2019 WL 2156459, at *10.

The Categorical Exclusion states, moreover, that the FHA estimated that approximately forty-three acres of wetlands would be "permanently impacted" by the Deweyville project. J.A. 350. Importantly, however, notwithstanding the fact that the Categorical Exclusion represents that the waste sites were "included in [the FHA's] analysis of environmental resource impacts," J.A. 348, the agency's estimate of the wetlands that would be impacted by the project was based only on wetlands in the roadway corridor and not on the presence of any wetlands at the waste disposal areas. *See* J.A. 126; *see also* J.A. 489. The fact that the FHA included the waste sites in its environmental resource impacts analysis—and yet did not identify any wetlands at those sites—confirmed Kiewit's reasonable conclusion, based on RSS 105.06, that it would not need to perform wetland delineation at the government-designated waste areas.

The Waste Site Report, which was provided to all bidders and which discussed the details of twelve government-identified waste sites, J.A. 369–83, likewise supported

Kiewit's pre-bid determination that wetland delineation at the waste sites would be unnecessary. That report notes that many of the designated waste sites were situated in existing rock quarries.[11] J.A. 372, 376–79, 382–83. It further states that "[t]he criteria for establishing waste disposal sites included identifying locations that would minimize negative impacts to wetlands." J.A. 372.[12] The fact that the waste sites were selected to minimize any impact to wetlands reinforced Kiewit's conclusion that wetland delineation at those sites would not be required.

In sum, we conclude that Kiewit reasonably interpreted RSS 105.06 to mean what it says—that no further environmental impacts analysis would be required if a contractor chose to dispose of waste and excess material at government-designated waste sites. *See* J.A. 330. The FHA therefore effected a constructive contract change

[11] On appeal, the government argues that Kiewit should have recognized that there were wetlands at the government-designated waste sites because the Waste Site Report stated that there was a "palustr[ine] stream" on one of the sites. J.A. 379. Because this argument was not adequately presented to the Court of Federal Claims, however, we decline to address it on appeal. *See, e.g.*, *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1170–71 (Fed. Cir. 2018); *DuMarce v. Scarlett*, 446 F.3d 1294, 1304 (Fed. Cir. 2006). We note, moreover, that the presence of a palustrine stream on one of twelve government-designated waste sites would not necessarily alert a bidder to the presence of approximately nineteen acres of wetlands, *see* J.A. 386, in the waste disposal areas.

[12] As Traffalis, the Deweyville project manager, acknowledged, moreover, the contract documents furnished to bidders did not contain "any affirmative statement" that there were wetlands at the government-designated waste sites. J.A. 540.

when it required Kiewit to perform wetland delineation at the government-designated waste sites.

E. Damages Calculations

Before the Court of Federal Claims, the government argued that even if Kiewit prevailed on its constructive change claim, its right to damages was limited because its total wetland mitigation costs were less than $1 million. *See Federal Claims Decision*, 2019 WL 2156459, at *2. It also argued that the amount of damages should be reduced because Kiewit had expanded the boundaries of the government-designated waste sites. *See id.* Nothing in this opinion should be interpreted to preclude the Court of Federal Claims from addressing these issues on remand.

III. CONCLUSION

Accordingly, the judgment of the United States Court of Federal Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED

COSTS

Kiewit shall have its costs.

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 22, 2020

CBCA 5683

PERNIX SERKA JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

J. Randolph MacPherson of Halloran & Sage LLP, Washington, DC; and Douglas L. Patin of Bradley Arant Boult Cummings, Washington, DC, counsel for Appellant.

Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **VERGILIO**, and **SHERIDAN**.

SOMERS, Board Judge.

Appellant, Pernix Serka Joint Venture (PSJV), faced with concerns about performing a contract in Freetown, Sierra Leone, during an Ebola virus disease (Ebola) outbreak, sought guidance from the Department of State (DOS) contracting officer as to how to respond. DOS provided no guidance, stating that PSJV would need to make its own decisions about the process for completing contract performance under such conditions. PSJV temporarily demobilized, later returning to the site having contracted for additional medical services for its employees. After contract completion, PSJV requested an equitable adjustment for costs incurred. DOS moves for summary judgment on the grounds that the risk of performance in this firm, fixed-price contract remained with PSJV PSJV has identified no genuine issues

of material fact, and DOS is entitled to prevail as a matter of law. After considering the motion, opposition, and reply, we grant DOS's motion and deny the appeal.

Statement of Facts

In September 2013, DOS awarded a firm, fixed-price contract in the amount of $10,864,047 to PSJV. The contract required PSJV to construct a rainwater capture and storage system in Freetown, Sierra Leone. The initial price included all labor, materials, equipment, and services necessary to complete the project. In addition to the fixed-price sum, the contract limited additional reimbursement for value added taxes, not to exceed $1,626,195. The contract included a clause entitled "Excusable Delays," which stated:

> F.8.1 The Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10, Default (see Section/Paragraph I.153). Examples of such cases include (1) acts of God or of the public enemy; (2) acts of the United States Government in either its sovereign or contractual capacity; (3) acts of the government of the host country in its sovereign capacity; (4) acts of another contractor in the performance of a contract with the Government; (5) fires; (6) floods; (7) epidemics; (8) quarantine restrictions; (9) strikes; (10) freight embargoes; and (11) unusually severe weather.
>
> F.8.2 In each instance, the failure to perform must be beyond the contract and without the fault or negligence of the Contractor, and the failure to perform furthermore (1) must be one that the Contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.

DOS issued a notice to proceed to PSJV on December 17, 2013. The contract required PSJV to complete the project within 335 calendar days, with a completion date of November 17, 2014. PSJV began performance, completing sixty-five percent of the project by August 7, 2014.

An outbreak of the Ebola virus began in the Republic of Guinea in March 2014. Ebola spread to Freetown, Sierra Leone, by July 2014. PSJV became concerned about the potential impact of the spread of the virus and the ability to support contractor personnel should they need to be evacuated. In an email to the contracting officer on July 31, 2014, PSJV sought "instructions on the way forward." On August 6, 2014, PSJV told the contracting officer that "we do not want to act unilaterally and need to have a discussion with

you, get directions, or at least a consensus of the right action of the way forward." The contracting officer responded via email on August 6:

> I just got off the phone with Najib Mahmood [the Africa Branch Chief for the Bureau of Overseas Operations (OBO), a branch within DOS] and understand that the Post has NOT issued an ordered departure for the Embassy at the present time. Therefore, I can't at this time tell you to leave the Post due to current conditions. I do understand that the situation there is go [sic] downhill fast and flights in and out of there have [decr]eased or stopped all together. It is up to you to make a decision as to if your people should stay or leave at this time. Until we get further word on this issue we can't tell you to leave the Post but the decision for your people to stay or leave for life safety reasons rests solely on your shoulders. Your peoples [sic] safety should be of the most utmost [sic] concern! Please let me know what action you decide to take in reference to this situation.

At least two members at PSJV then realized that DOS would not be providing any direction or guidance as to whether PSJV should leave the jobsite. A member of its executive committee testified in a deposition that he was the one who made the decision that PSJV should demobilize. On August 7, 2014, PSJV sent a notice of delay related to the crisis to DOS.

On August 8, 2014, the World Health Organization (WHO) declared the outbreak an "international public health emergency." Airlines suspended flights. Some contractor and subcontractor personnel asked to leave Sierra Leone because of the escalated Ebola threats and the increased risk of not being able to leave Sierra Leone should conditions worsen. The U.S. Embassy in Freetown ordered eligible family members of embassy personnel to depart from the post. However, the U.S. Embassy and staff, as well as OBO, continued to operate throughout the outbreak.

On August 8, PSJV directed that the project be shut down and that all personnel in the country be evacuated. That same day, PSJV notified DOS of its decision to temporarily shut down the project work site as a temporary measure:

> We have been planning to keep a small crew on the project site in Freetown to continue work as best as possible, mainly Tank #2 installation. However, with the further downside developments of today, the local Government declaring a curfew, and the WHO declaring an "international public health emergency" our plans have changed. All of our personnel and our subcontractor personnel have requested to leave Freetown in light of the

> escalated virus threats and increased risk of not being able to depart Sierra Leone, if and when the conditions worsen. They all requested to be removed outside Sierra Leone immediately, to their points of origin. We could not leave a small work crew without necessary safety, security, quality and management attendance and supervision, so we had to arrange for a temporary site shut down, and the evaluation of all our expat and TCN personnel out of Sierra Leone. . . . This is only a temporary site shut down; we intend to re-mobilize our personnel once the EBOLA epidemic is under better control, and the life-threatening risks to our employees are reduced.

In response, DOS stated:

> We are aware and acknowledge your concerns in your letter dated 08AUG2014 about the impact the Ebola Outbreak has towards continuing work on this project. Since you are taking this action unilaterally based on circumstances beyond the control of either contracting party, we perceive no basis upon which you could properly claim an equitable adjustment from the Government with respect to additional costs you may incur in connection with your decision to curtail work on this project.

DOS's contracting officer instructed PSJV "to keep us advised as to your plans and timeline to resume work." Ultimately, based upon the situation and its concerns for the safety of its employees, PSJV decided to secure all material and equipment, in part on-site and at an off-site location in Sierra Leone, and close the jobsite.

On August 15, OBO's project director emailed PSJV:

> A week before you finalized your planned departure, I have indicated to you that OBO site office will be operating on business as usual until such time that the embassy issued an ordered evacuation for American workers. When you told me three days prior to your departure that you decided to turn off the site power I do not have any choice but to move my operation from the site to the embassy. PSJV's decision, planning and execution of shutting down the site did not include OBO staff and offices, we were informed accordingly as it evolved.
>
> It is up to PSJV whether to maintain power and provide personnel at the site during the duration of the shutdown. If site power is restored OBO office will continue to operate at the site. It will be business as usual with the ACF activated and normal security checks of personnel including security will be

> allowed access to the site on a regular basis provided names are submitted in advance as what we have done in the past.

PSJV responded, stating that it would keep the power on at the site. On August 16, PSJV's construction manager gave respondent keys to its on-site office and to its storage containers. PSJV arranged for temporary power and lighting at the construction site and hired local security to maintain the generator. OBO cancelled its plans to move and remained on the construction site. PSJV informed DOS that it intended to re-mobilize its personnel once the Ebola outbreak was under control and the risk posed to employees was reduced. Later, during his deposition, a PSJV representative explained PSJV's concerns:

> We felt we were cornered to make a unilateral decision to save our people's lives essentially, and it felt like it was a chicken game with the Government. They waited us out until we had to leave, and then immediately you get a response that says this is unilateral.

PSJV and DOS representatives met on multiple occasions from August 2014 through January 2015, to discuss the ongoing crisis. PSJV continued to request guidance from DOS and expressed frustration that DOS would not provide any. As reflected in the minutes of a meeting held on September 30, 2014, DOS

> clarified that DOS cannot agree upon or advise of any metrics, such as CDC [Centers for Disease Control and Prevention] travel warnings, infected cases declining, or airline carriers resuming flights, since these are neither known in terms of when they may occur nor under any direct control of DOS. . . . [and] confirmed that the measurement of any metrics and the decisions for any action on the way forward, which is related to PSJV employee[s] and their life safety for return to Freetown, will solely rest on PSJV determination and consequent decisions. As such, DOS will not provide any instructions or directions in this regard.

PSJV alleges that in October the contracting officer "verbally agreed that PSJV could submit a 'rough order of magnitude' [ROM] cost proposal for the additional life safety measures needed to complete the project." However, after receiving PSJV's cost proposal on November 6, 2014, DOS rejected it, stating, in part:

> PSJV may be entitled to a non-compensable time extension under the excusable delay clause if it can prove that performance of the contract was impossible . . . . If the [U.S. Government] agrees to the existence of excusable delay conditions, PSJV would be entitled to a time extension only, and not an

> equitable adjustment for delay costs or the other types of expenses included in PSJV's [cost proposal].

Later, on November 24, 2014, following a call with DOS representatives, including the contracting officer, PSJV sent an internal email to other PSJV personnel, stating:

> It is now obvious [DOS] will neither provide directions, nor approve or pay extra money over this Ebola thing, and we will have to take the risks and bite the bullet to go back and get the job done, then seek compensation.

In January 2015, PSJV visited the project site to examine the availability and reliability of local medical facilities. After determining that the "resumption of construction works on the Project site should be planned and executed as soon as possible," PSJV decided "to contract . . . . for basic medical facilities and services on the project site" and that remobilizing the crews should not have "a condition precedent of OBO approving our proposal." In a letter to the contracting officer dated January 2, 2015, PSJV raised the issue of OBO's failure to provide directions to address "cardinal change conditions" arising from the outbreak.

PSJV continued to press for compensation for the costs incurred during this time period. After a meeting with DOS personnel, although PSJV was under the impression that it would be compensated, no one from DOS explicitly made any promises.

In mid-March 2015, PSJV returned to the project site. When PSJV remobilized, it expanded the medical facility by converting a changing room to a medical facility and providing a licensed paramedic. On March 31, 2015, PSJV updated DOS on the status of remobilization activities and discussed a draft ROM estimate that it had prepared for the cost of the added medical, health, and safety provisions, as well as other costs arising from the Ebola outbreak.

PSJV submitted a revised baseline project execution schedule in April 2015, which shifted the project's substantial completion date to September 30, 2015. DOS accepted the revised schedule.

On July 6, 2015, PSJV submitted a request for equitable adjustment (REA), identified as REA-03, seeking $907,110 for the "cost impacts associated with the additional Life Safety and Health provisions . . . undertaken to enable the return of our expat and TCN employees and workforce to the site, and complete the construction works within the adverse conditions of the Ebola Virus outbreak in Sierra Leone." Later, on August 4, 2015, PSJV submitted to DOS/OBO another REA, identified as REA-04, seeking $844,402 "for time and cost impacts

associated with the additional works and efforts PSJV had undertaken in response to the project execution changed conditions resulting from the Ebola Virus Outbreak in Sierra Leone."

The contracting officer denied REA-03 on August 5, 2015, stating that "there is no contractual basis for an adjustment to the contract price." The contracting officer did not take action on REA-04.

On September 30, 2015, DOS issued a contract modification extending the project's completion date to October 9, 2015. The time extension covered the 195 additional calendar days requested by PSJV for the Ebola outbreak. Over the next few months, DOS and PSJV discussed the REAs, but reached no mutually agreeable solution. On January 17, 2017, PSJV submitted a certified claim for $1,255,759.88. The claim sought "(1) $608,891 in additional life safety and health costs incurred due to differing site conditions, disruption of work and the need to maintain a safe work site for the Pernix Serka Joint Ventures work and Government personnel, and (2) $646,868.88 in additional costs incurred resulting from that disruption of work, and the need to demobilize and remobilize at the work site." The notice of appeal also stated that the claim "involves one or more breaches of the Department of State of the implied covenant of good faith and fair dealing."

DOS argues in its motion for summary judgment that, because this involves a firm, fixed-price contract, PSJV assumed the risks of any unexpected costs not attributable to the Government. PSJV contends that genuine issues of material fact preclude summary judgment on its claims, described in its brief as cardinal change, constructive change, and breach of implied duty to cooperate.

Discussion

I. Standard for Summary Judgment

The standards of review and obligations of each party to prevail on a motion for summary judgment are well established, and are followed here. *See CSI Aviation, Inc. v. General Services Administration*, CBCA 6543 (Apr. 9, 2020); *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 19-1 BCA ¶ 37,376, *motion for reconsideration denied*, 19-1 BCA ¶ 37,465.

After examining all of the pleadings, the motions, and the record, we conclude that the material facts are undisputed. The issue presented is a legal issue, appropriate for resolution through summary judgment.

II. A Firm, Fixed-Price Contract Places the Risk on Contractor

It is "well-established that 'a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.'" *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119); *see also Fluor Intercontinental, Inc. v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334. "[A]bsent a special adjustment clause, a contractor with a fixed price contract assumes the risk of increased costs not attributable to the Government." *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-1 BCA ¶ 34,139.

PSJV's firm, fixed-price contract obligated PSJV to perform and receive only the fixed price. The contract, in clause F.8.1 and the referenced FAR clause 52.249-10, explicitly addresses how acts of God, epidemics, and quarantine restrictions are to be treated. A contractor is entitled to additional time but not additional costs. Appellant's attempts to shift the risks clearly articulated by the contact are unavailing. *See, e.g., Fluor Intercontinental, Inc.*

Particularly given the Excusable Delays clause, PSJV has not identified any clause in the contract that served to shift the risk to the Government for any costs incurred due to an unforeseen epidemic. Nor does the contract require the Government to provide PSJV with direction on how to respond to the Ebola outbreak. Thus, under a firm, fixed-price contract, PSJV must bear the additional costs of contract performance, even if PSJV did not contemplate those measures at the time it submitted its proposal or at contract award.

III. PSJV Attempts to Shift the Risk to the Government

PSJV pursues several legal theories that it maintains shift the risks of increased costs of performance from itself to the Government. It claims that PSJV "was forced to perform in cardinal change conditions," or "was constructively ordered to provide medical and life safety measures outside the scope of the contract," or "incurred costs due to the breach of the government's implied duty to cooperate." Finally, PSJV contends that a "constructive suspension of work may occur from causes not the fault of the contractor or government." These legal theories do not entitle it to relief.

A. Cardinal Change

A cardinal change is a breach that occurs if the Government effects a change in the contractor's work "so drastic that it effectively requires the contractor to perform duties materially different from" those found in the original contract. *Krygoski Construction Co.*

v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996). In typical cases, a cardinal change arises from a unilateral modification that then results in a large increase in the contract burden.

PSJV asserts a cardinal change occurred here when:

> OBO expected PSJV to work in . . . Ebola crisis conditions without any guidance or direction from OBO, or a suspension of work, and that OBO forced PSJV to return to the project site adding life safety measures not in PSJV's approved work plan.

PSJV points to DOS's internal discussions about whether DOS should issue a suspension of work. PSJV further claims that, when it entered into the contract, it did not know "the agency would pressure the contractor to remobilize and assume the risk and cost of providing independent medical treatment to its staff and subcontractor personnel because no safe local medical treatment could be relied upon in a city and country trying to recover from an Ebola epidemic that killed hundreds of people."

This argument fails to establish a cardinal change to the contract. Despite the difficulties encountered during the Ebola outbreak, the Government never changed the description of work it expected from the contractor. Throughout communications with PSJV, the Government repeatedly stated that it would not give directions to the contractor on how it should respond to the ongoing outbreak, instead leaving the decisions solely in the hands of the contractor. Any changes in conditions surrounding performance of the contract arose from the Ebola outbreak and the host country's reaction to the outbreak. This situation forced PSJV to reevaluate how it wished to proceed with the work outlined in the contract. Throughout the situation, DOS informed PSJV, on multiple occasions, that it would not order PSJV to evacuate the site and that PSJV must make its own business choices as to whether it needed to demobilize from the site.

The two cases that PSJV cites in support of its claim that working under Ebola conditions constituted a cardinal change are inapposite. In *Freund v. United States*, 260 U.S. 60 (1922), the Government awarded a contract for delivery of mail "on a particular route described by a schedule, for a certain annual gross sum, which being divided by the miles to be covered made a certain rate per mile." *Id.* at 61. When the performance period began, the post office that should have been the starting point for the route became unavailable, requiring the contractor to use a post office thirteen blocks away. *Id.* Despite the longer route, the Government refused to increase the contractor's per-mile payment. *Id.* The Court found the Government bore responsibility for changing the route, entitling the contractor to compensation.

In *Aragona Construction Co. v. United States*, 165 Ct. Cl. 382 (1964), a contractor constructing a Veterans Administration hospital during World War II alleged a cardinal change because the Government required it to use different building materials than it initially planned. The Government restricted the use of the planned materials in order to preserve the materials for production of armaments. The Court of Claims held:

> In deciding whether a single change or a series of changes is a cardinal change and a breach of the contract, we must look to the work done in compliance with the change and ascertain whether it was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct.

Id. at 390-91. The court concluded that "[a]ll of the changes that plaintiff was asked to make on this contract were interstitial in nature" and "did not materially alter the nature of the bargain into which plaintiff had entered or cause it to perform a different contract." *Id*. at 391. Here, the work required of PSJV was detailed in the contract. The addition of life safety measures after remobilization did not alter the nature of the thing it had contracted for; the contractor remained obligated to perform at the fixed price.

B. Constructive Change

"A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government." *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). To recover on a constructive change claim, a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered–expressly or implicitly– the contractor to perform the additional work. *Bell/Heery v. United States*, 106 Fed. Cl. 300, 313 (2012), *aff'd*, 739 F.3d 1324 (Fed. Cir. 2014); *IAP World Services, Inc*. A contractor cannot invoke a claim for constructive change against the Government unless the Government "effect[s] an alteration in the work to be performed." *Bell/Heery*, 739 F.3d at 1335.

PSJV argues that both the demobilization and remobilization of its personnel and the additional site safety measures put in place due to the Ebola outbreak should be considered constructive changes made by the Government, thus entitling PSJV to an equitable adjustment for the increased costs. However, in both areas, PSJV's arguments fall short in proving that the Government ordered it to take an action in response to the Ebola outbreak or that the Government's inaction rose to the level of a constructive change.

PSJV acknowledges that DOS did not give it directions or orders to evacuate the project site. In effect, while PSJV concedes that the Government had no contractual obligation to provide direction, it continues to assert that the Government should have done so nonetheless. Simply put, PSJV fails to demonstrate a constructive change because no change to the contract occurred. PSJV remained obligated to perform throughout the performance period, and the Excusable Delay clause provided for additional time, but not additional money.

C. Constructive Suspension of Work

PSJV raises a constructive suspension of work claim in its opposition brief. As DOS notes, PSJV's new claim does not arise from the same set of operative facts as the legal theories raised in its certified claim, raising the question of whether we possess jurisdiction to entertain this claim. *See VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928 (2017). This is not a timely claim for this proceeding and is not addressed.

Decision

We grant DOS's motion for summary judgment. The appeal is **DENIED**.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Raytheon Company	)	ASBCA Nos. 60448, 60785
	)	
Under Contract Nos. FA8675-11-C-0030	)	
FA8675-12-C-0011	)	
FA8675-13-C-0003	)	

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OPINION BY ADMINISTRATIVE JUDGE SWEET

These appeals involve contracts FA8675-11-C-0030 (Lot 25), FA8675-12-C-0011 (Lot 26), and FA8675-13-C-0003 (Lot 27) (collectively Disputed Lots)—three in a series of annual contracts between the United States Air Force and appellant Raytheon Company (Raytheon) to produce and deliver Advanced Medium Range Air-to-Air Missiles (AMRAAM or missiles). The Disputed Lots' Statements of Content (SOCs)[1]—like the prior SOCs—contained two relevant paragraphs. First SOCs 2.a required Raytheon to produce a certain number of missiles (Disputed Lots missiles) over an approximate three-year period of performance (PoP). Second, SOCs 2.b required Raytheon to provide Systems Engineering/Program Management (SEPM) over an approximate one-year PoP.

These appeals turn upon whether SOCs 2.a or SOCs 2.b covered what became known as production SEPM—*i.e.*, SEPM that supports missile production—because the Disputed Lots would have required Raytheon to provide production SEPM to

[1] As discussed in greater detail below, an SOC is similar to a statement of work, but is more collaborative and contains less detail.

support the Disputed Lots missiles for about three years each if SOCs 2.a covered production SEPM, but only for about one year each if SOCs 2.b covered production SEPM. Under the contracting officer (CO)s' interpretation, SOCs 2.a covered production SEPM, such that the Disputed Lots required Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots SOCs 2.a three-year PoP. Raytheon argues that SOCs 2.b covered production SEPM, such that the Disputed Lots only required Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOCs 2.b one-year PoP. As a result, Raytheon argues, the government constructively changed the Disputed Lots when the COs incorrectly interpreted SOCs 2.a as covering production SEPM because that interpretation compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOCs 2.a three-year PoP instead of during the SOCs 2.b one-year PoP that the Disputed Lots actually required.[2]

After holding a hearing on entitlement and quantum, we conclude that the Disputed Lots are ambiguous as to whether SOCs 2.a or SOCs 2.b covered production SEPM. However, the parties' prior course of dealing established a common basis of understanding that SOCs 2.b covered production SEPM. Thus, the government constructively changed the Disputed Lots when the COs incorrectly interpreted SOCs 2.a as covering production SEPM because that interpretation compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOCs 2.a three-year PoP, instead of during the SOCs 2.b one-year PoP that the Disputed Lots actually required. As a result, Raytheon is entitled to an equitable adjustment of $48,363,983, which Raytheon has shown with reasonable certainty were the actual costs of the production SEPM to support the Disputed Lots missiles that Raytheon provided after the expiration of the Disputed Lots' SOCs 2.b one-year PoP, plus a reasonable profit.

FINDINGS OF FACT

I. Background

1. The AMRAAM program began in 1975.[3] Raytheon and Hughes Missile Systems were the contractors for production through approximately 1997, when the

[2] In the alternative, Raytheon argues that there was a mutual mistake or a unilateral mistake (app. br. at 217-34). Because we agree with Raytheon that there was a constructive change, we do not reach its alternative arguments.

[3] The AMRAAM program involves AMRAAM development, production, and sustainment contracts (tr. 1/78-79, 1/128-29). Because these appeals only involve the production contracts, we do not address the development or the sustainment contracts.

two companies merged. Since then, Raytheon has been the sole AMRAAM producer. (Tr. 1/77-78)

2. Following the merger, the government and Raytheon would enter into a contract each year or exercise an annual option—both called a Lot—for missile production (tr. 1/78-79, 1/118, 1/129, 1/148; app. ex. A-5 at 12). Beginning with Lot 12—the first Lot after the Raytheon/Hughes merger—the Lots switched from using statements of work to SOCs. The purpose of the shift was to move from a detailed statement dictated by the government to collaboratively developed, broader guidelines. (App. ex. A-78 at 1)

3. The SOCs contained two relevant paragraphs. First, SOCs 2.a required Raytheon to produce a certain number of missiles for each Lot (R4, tab 10 at 2-3; app. ex. A-2 at 51, ex. A-16 at 48, ex. A-78 at 1). Second, SOCs 2.b required other tasks, including SEPM and its predecessors (R4, tab 10 at 3-5; app. ex. A-2 at 52-53, ex. A-16 at 48-49, ex. A-78 at 1; tr. 1/144-45).[4] While Lot 27 does not define the term "SEPM," the prior Lots defined it as "the acceptance of responsibility to do what is necessary and sufficient to deliver, warrant, and support missiles that are affordable, combat capable, and readily available" (R4, tab 20 at 2, tab 24 at 2, tab 25 at 2).

4. SOCs 2.a had an approximate three-year PoP (tr. 1/130; 1/143-44). However, under the parties' course of dealing, SOCs 2.b only had about a one-year PoP for SEPM (tr. 1/100, 1/144-45, 1/152, 1/167, 1/174; app. ex. A-19, ex. A-47 at 1, ex. A-78, ex. A-79 at 2, ex. A-114 at 4, ex. A-127 at 2; R4, tabs 91-92). Thus, Raytheon typically would be producing three different Lots' missiles under SOCs 2.a during any particular Lot's SOC 2.b SEPM PoP (tr. 1/130, 1/144-45; *see also* app. ex. A-78 at 1). For example, "the Lot 20 contract [SEPM] . . . would be covering . . . the second year of Lot 19, and then third year of Lot 18" in addition to the first year of Lot 20 (tr. 1/130-31).

5. Some SEPM supported missile production (production SEPM) (tr. 1/179). In a practice known as block charging, Raytheon charged all production SEPM for a given year to the current Lot, regardless of which Lots' missiles that SEPM supported. Thus, to continue the above example, Raytheon would charge all SEPM provided in

[4] The terminology for SEPM changed over time. Lot 12 through Lot 19 used the term "Total Systems Performance Responsibility" (TSPR) (app. ex. A-2 at 51). Lot 20 changed the term to "Systems Engineering & Performance Responsibility" (SEPR) (app. ex. A-16 at 48). Finally, Lot 24 changed the term to SEPM (R4, tab 91 at 4). While the terminology changed, the definition remained substantively the same (R4, tab 20 at 2, tab 24 at 2, tab 25 at 2; app. ex. A-2 at 51, ex. A-16 at 48; *see also* tr. 1/145-46). Therefore, for ease of reference, we refer to TSPR, SEPR, and SEPM collectively as SEPM.

the first year of Lot 20 to Lot 20, regardless of whether that SEPM supported the Lot 18 missiles, the Lot 19 missiles, or the Lot 20 missiles. (Tr. 1/130, 1/144-45, 3/128-29)

6. The government became concerned about a potential SEPM gap—that is, a period at the end of the AMRAAM program when there would be no SEPM to support missile production because of the difference between the SOC 2.a missile production PoP and the SOC 2.b SEPM PoP (app. ex. A-28 at 2-3, ex. A-32 at 1-2). To address that potential SEPM gap, during the Lot 22 negotiations, the parties attempted to identify all production SEPM under SOC 2.b, and move those tasks to SOC 2.a (R4, tabs 8-9; app. ex. A-24 at 2, ex. A-31 at 3, 6-8, ex. A-57 at 2-48). However, moving production SEPM from SOC 2.b to SOC 2.a would have increased costs—and therefore reduced the number of missiles—because of SOC 2.a's longer PoP. Thus, the government abandoned its attempt to move production SEPM from SOC 2.b to SOC 2.a, and left production SEPM under SOC 2.b (app. exs. A-58, A-59, A-74; tr. 1/179-80, 2/91-93).

7. Beginning with Lot 22, the government altered SOC 2.a's language to state that Raytheon "shall manufacture, test, integrate and deliver the [missiles] specified in the CLINS. The effort below includes all the activities necessary to produce these end items." (App. ex. A-47 at 4) The government also altered the language of SOC 2.b to state that Raytheon "shall support future missile production and sustainment of fielded missiles" (*id*. at 5).

II. Course of Dealing

8. After Lot 22, the parties continued to engage in a collaborative process to identify specific SEPM tasks because the SOC only provided general guidance (tr. 1/138-41). Beginning with Lot 22, the government and Raytheon held SEPM reviews, during which Raytheon walked the government through all of the SEPM activities that had occurred over the prior period (tr. 1/244-45; app. exs. A-76, A-91, A-95, A-102, A-104, A-125, A-131, A-173, A-184, A-213). In addition, the government monitored SEPM tasks by embedding personnel at Raytheon, and through weekly video conferences on SEPM progress (tr. 1/245-46).

9. Based upon that close cooperation, the parties' course of conduct established a common basis of understanding that SOC 2.b covered production SEPM, even after Lot 22. Indeed, the government repeatedly expressed its understanding, based upon the parties' course of conduct, that SOC 2.b SEPM included production SEPM—*i.e.*, SEPM that supported missile production. (R4, tab 42 at 9-10, tab 66 at 1-2, tab 68 at 1; app. ex. A-28 at 2-3, ex. A-83 at 1, ex. A-148 at 2-4, ex. A-157 at 1-2, ex. A-159 at 2, ex. A-175 at 13, ex. A-179 at 1, ex. A-207 at 84, ex. A-243 at 5)

10. First, the COs repeatedly expressed an understanding that, based upon the parties' course of conduct, SOC 2.b SEPM included production SEPM. For example, in a September 29, 2014 slide presentation, Melissa St. Vincent—an AMRAAM CO—recognized that "[e]lements awarded [prior to Lot 28] as part of [SOC] 2.b were necessary for missile production" (app. ex. A-207 at 84). Similarly, in a May 29, 2013 email, Benjamin Collins—another AMRAAM CO—acknowledged that:

> Rather than tying to a particular lot, Raytheon's proposal[s] tie to a particular time span. Thus, the Lot 26 SEPM "PoP" was perceived by Raytheon as covering 1 Apr 2012 to 31 Mar 2013. Accordingly, Raytheon bills all SEPM costs during that timeframe to the Lot 26 SEPM charge number—regardless if it was an issue that pertained to Lot 23, 24, 25, or 26. This was, apparently, a conscious decision made by the respective parties going into Lot 12 in order to handle the pricing of such overarching activities post-merger (Raytheon/Hughes) . . . . Currently, the Government believes approximately 2/3 of the costs incurred each year under [SOC 2.b] SEPM go to the lot in production (e.g.—Lot 26 SEPM covers mostly work on Lot 24 production line). . . . [A]bout 75% of the heads on "SEPM" [under SOC 2.b] are doing work related to the current production of missiles . . . yet probably 2/3 of that labor goes to the "current" lot. Meaning, the majority of the activities being charged to Lot 26 SEPM is really Lot 24 production support.

(App. ex. A-148 at 2-4)

11. Second, Paul Garvey—the program manager—repeatedly expressed an understanding that, based upon the parties' course of conduct, SOC 2.b SEPM included production SEPM. For example, in a November 19, 2008 e-mail, Mr. Garvey acknowledged that "not all support tasks fit neatly into a [SOC] 2a or [SOC] 2b bin. Many cut across current and future production . . . . Also, many cut across current production and sustainment of fielded missiles . . . . Our precedent has been to capture these efforts under [SOC] 2b and I'm good with that." (App. ex. A-83 at 1) In a February 24, 2009 memorandum, Mr. Garvey also acknowledged that SOC 2.b SEPM included production SEPM by stating that there was a need to "[m]ove the engineering support that is related to production out of SOC 2b and into SOC 2a" (app. ex. A-90 at 2). Likewise, in a December 11, 2015 memorandum, Mr. Garvey acknowledged that "the people involved in negotiating AMRAAM Production contract awards from Lot 12 and beyond did know about the PoP mismatch, and the fact that we had Raytheon people required to support production in the SEPM task" under SOC 2.b

(R4, tab 66 at 1). Mr. Garvey continued that "SEPM (SOC 2b) was and is required to support production" (*id*. at 2).

12. Third, Lt Col Bortle—the Lot 28 Requirements Manager—repeatedly verified the government's understanding that, based upon the parties' course of conduct, SOC 2.b SEPM included production SEPM. For example, in a June 25, 2013 memorandum, Lt Col Bortle recognized that:

> [O]ver time, [Raytheon] has adopted a practice of augmenting missile delivery CLINs with a growing portion of this SEPM activity. Estimates are as high as 75% of all SEPM activity. This is somewhat of a gray area because when a manufacturing, reliability, or design issue affects current[] lots, it arguably affects future lots.

(App. ex. A-159 at 2) Similarly, in an October 28, 2013 internal presentation, Lt Col Bortle stated that, "[i]n practice, Raytheon treats SEPM [under SOC 2.b] as a pool of expertise to . . . resolve production issues that arise" (app. ex. A-175 at 13). Further, in a February 11, 2014 email, Lt Col Bortle acknowledged that a "significant portion of activity bid under the SEPM requirement [of SOC 2.b] had migrated to support instant item missile production" (app. ex. A-179 at 1).

13. Fourth, other government employees involved in the AMRAAM program verified the government's understanding that, based upon the parties' course of conduct, SOC 2.b SEPM included production SEPM. For example, in a July 24, 2007 email, Lee Anderson—the government's Chief of AMRAAM Production—acknowledged that "[e]ngineering support and configuration management is needed to produce missiles" (app. ex. A-28 at 3). Similarly, in a December 15, 2015 email, Gregg Thomas—the government's chief engineer from 2009 through 2012—acknowledged that "my understanding of joint Government/Raytheon expectations were [sic] that every production contract award would include SEPM [under SOC 2.b], which would then be used to address all ongoing missile production issues" (R4, tab 68 at 1).

14. Fifth, the Lot 28 Production Support and Annual Sustainment (PSAS)[5] contract technical evaluation acknowledged that, based upon the parties' course of conduct, SOCs 2.b SEPM included production SEPM. The technical evaluation stated that "multiple segments of the SEPM function [under SOC 2.b] were responsible for

[5] As discussed below, the government separated production SEPM and non-production SEPM into separate contracts for Lot 28, with the PSAS contract covering non-production SEPM.

addressing reoccurring impediments to ongoing missile production that require senior engineering support to resolve." (R4, tab 42 at 9)

III. The Disputed Lots

15. The government awarded the Disputed Lots to Raytheon on August 31, 2011, March 30, 2012, and June 17, 2013 respectively (R4, tab 31 at 1; app. ex. A-113 at 1, ex. A-116 at 1). The Disputed Lots were firm fixed price contracts to provide the missiles identified in the CLINs "in accordance with (IAW) . . . the Statement of Content (SOC) paragraphs 2.a, 2.b" (R4, tab 31 at 2; app. ex. A-113 at 2, ex. A-116 at 2). The Lot 25 CLINs 0001 through 0011, Lot 26 CLINs 0001 through 0009, and Lot 27 CLINs 0001 through 0010 were for specified numbers of missiles (collectively Disputed Lots missiles) (R4, tab 31 at 3-7; app. ex. A-113 at 3-11, ex. A-116 at 4-8). The PoPs for those CLINs were about three years (R4, tab 3 at 48-49; app. ex. A-113 at 50-52, ex. A-116 at 48-49). Lot 27 contained a separate CLIN—CLIN 0011—which stated that "[t]he contractor shall accomplish the systems engineering and program management (SEPM) objectives outlined in paragraph [] 2(b) of Attachment 1 – Statement of Content (SOC) Production." (R4, tab 31 at 8) CLIN 0011 had a completion date of March 31, 2014 (*i.e.*, about a one-year PoP), and its funding was included in the missile CLINs (*id*.).

16. While Lot 25 and Lot 26 did not have separate CLINs for SEPM, the Requests for Proposals (RFPs) made clear that there was about a one-year PoP for SEPM under Lot 25 and Lot 26 (app. ex. A-101 at 3, ex. A-114 at 4). Moreover, as CO Collins recognized, Raytheon "bid[] SEPM on an annual/12-month basis," and that "the Gov't used/didn't challenge" those bids (app. ex. A-156 at 35, 38). Therefore, as with Lot 27, the Lot 25 and Lot 26 SEPM PoPs were about one year.

17. As with the prior Lots, the Disputed Lots' SOC 2.a were entitled "AMRAAM—Production of Lot [25, 26, or 27] Missiles," and required Raytheon to "manufacture, test, integrate, and deliver the items specified in the CLINs. The effort includes all the activities necessary to produce" the missiles. The Disputed Lots' SOC 2.a did not refer to SEPM or production SEPM. As with the prior Lots, the Disputed Lots SOC 2.b were entitled "AMRAAM—Systems Engineering/Program Management (SEPM)," and required Raytheon to "support future missile production and sustainment of fielded missiles as follows[.]" The Disputed Lots' SOC 2.b then listed numerous general tasks. The Disputed Lots' SOC 2.b did not distinguish between production SEPM and non-production SEPM. Nor did they define "future missile production." (R4, tab 31 at 129-32; app. ex. A-113 at 126-28, ex. A-116 at 114-16)

18. The Disputed Lots incorporated by reference the Changes Clause in Federal Acquisition Regulation (FAR) 52.243-01, CHANGES-FIXED PRICE (AUG.

1987) (R4, tab 31 at 98; app. ex. A-113 at 92, ex. A-116 at 88). Under the Changes Clause, Raytheon would be entitled to an equitable adjustment for any increase in the cost of performance that resulted from any written changes by the CO to any specifications. FAR 52.243-01(b).

IV. Lot 28 and Program Support and Annual Sustainment Contract

19. While negotiating Lot 27, the government began to consider placing production SEPM to support the Lot 28 missiles in the Lot 28 SOC 2.a, and moving non-production SEPM into a separate contract (app. ex. A-140 at 1, ex. A-141 at 5, ex. A-149 at 1, ex. A-157 at 1).

20. Raytheon expressed a concern to the government that its plan would create a two-year production SEPM gap, during which there would be no production SEPM coverage to support the Disputed Lots missiles. According to Raytheon, that was because the Disputed Lots' SOC 2.a three-year PoP to produce missiles would expire after the Disputed Lots' SOC 2.b one-year PoP for production SEPM to support those missiles. Moreover, after the Disputed Lots' SOC 2.b one-year PoP expired, Lot 28 SOC 2.a would not cover the Disputed Lots missiles, and the non-production SEPM contract would not cover production SEPM. (App. ex. A-157 at 1)

21. In a June 24, 2013 email, CO Collins responded by calling into question Raytheon's assumption that production SEPM fell under the Disputed Lots' SOC 2.b one-year PoP. Instead, he interpreted production SEPM as falling under the Disputed Lots' SOC 2.a three-year PoP, such that there would be no production SEPM gap for the Disputed Lots missiles. He stated:

> What is a bit unclear is how [Raytheon's assumption that SOC 2.b covers production SEPM] reconciles with the SOC "2a" requirement for the inclusion of all the activities to produce missiles . . . . Likewise, the SOC "2b" activities was [sic] listed as support required for "future missile production and sustainment of fielded missiles."
> Accordingly, if I were to contract for SEPM separately, or even not at all, it would appear to have no bearing on the delivery of missiles already on contract. Please advise on your understanding of the nature of SEPM as well as your opinion on the immediate preceding statement.

(App. ex. A-157 at 1)

22. Raytheon responded by asking, "[a]re you saying that you do not agree that Raytheon has a two year problem with regard to SEPM if the Gov't changes the way it has been looked at and bid for the last decade or so" (app. ex. A-161 at 3)?

23. CO Collins responded on July 18, 2013. He reiterated his interpretation of SOC 2.b as covering production SEPM by stating that:

> To a certain degree—yes, I am saying I have challenges with acknowledging the concept of a contingent liability on previously let production contracts without further data. . . . If that migration [of production SEPM to SOC 2.b] did occur . . . I just want that data. With that data and with more specific data re: the perceived 'shortfall' associated with the last lot or two...then I think I can craft a requirement and path-forward that could satisfy all parties.

(App. ex. A-161 at 1-2)

24. On July 10, 2013, the government issued the Lot 28 RFP, which it amended on August 15, 2013. The RFP indicated that the government would issue a separate solicitation for an annual PSAS contract for non-production SEPM. (App. ex. A-160 at 3, ex. A-166 at 3-4)

25. In August and September 2013, representatives of the government, including CO Collins, and Raytheon met several times (tr. 3/17-18). At those meetings, the parties discussed how SEPM had been funded in the past across active production Lots, that changing the way Raytheon charged for SEPM in Lot 28 would create a production SEPM gap for the Disputed Lots missiles, and how Raytheon could recover for that SEPM gap (*id*. at 3/18-19). At the meetings, CO Collins stated that he would work with Raytheon to address recovery for the production SEPM gap (*id*. at 3/19). In particular, the government told Raytheon to propose recovery for the production SEPM gap in its PSAS proposal (*id*. at 3/32-33).

26. However, on October 9, 2013, the government issued the PSAS RFP for non-production SEPM only (R4, tab 35 at 1, 6).

27. On October 14, 2013, Raytheon emailed the government about the PSAS RFP, inquiring:

> What is the plan for the recovery of the Lot 26 and 27 SEPM? There is no CLIN on here, nor any words/direction regarding this.

> I want to make certain we are all on the same page. Right now, it seems as though the meeting we had a little over a month ago was not really applied to this RFP.

(R4, tab 36 at 2)

28. Jeffrey Mixson—the PSAS contract specialist—responded to Raytheon that "I don't think we fully know the answer yet, but I can tell you that our intention is to pay for some/all of this on this contract" (R4, tab 36 at 1).

29. In its PSAS proposal, Raytheon proposed recovery for the production SEPM gap (R4, tab 37 at 9-10, tab 38 at 3).

30. Lt. Col. Bortle circulated a responsive presentation internally recommending funding the production SEPM gap because it was the "[r]ight thing to do based on government's position on prior proposal evaluations" (app. ex. A-223 at 40).

31. Despite his understanding that the parties treated SOC 2.b as covering production SEPM in the past, and his noting that it was "slightly 'unfair'" to not pay Raytheon for the production SEPM gap, CO Collins concluded that the plain language of the SOCs compelled the conclusion that SOC 2.a covered production SEPM (app. ex. A-157 at 1, ex. A-178 at 2).

32. Therefore, the government's March 2014 technical evaluation of Raytheon's PSAS proposal rejected Raytheon's production SEPM gap recovery proposal (R4, tab 42 at 15-16).

33. On June 27, 2014, the government awarded the PSAS contract for non-production SEPM to Raytheon, with an effective date of June 12, 2014 (R4, tab 45 at 3, 100). The government awarded the Lot 28 contract, effective December 22, 2014. The Lot 28 SOC 2.a covered missile production and production SEPM to support the Lot 28 missiles (R4, tab 52 at 101).[6]

V. Notice of Change, Request for Equitable Adjustment, and Claims

34. On April 30, 2014, Raytheon submitted a notice of change (R4, tab 41 at 1).

[6] Because the parties did not finish negotiating Lot 28 by the time the Lot 27 SOC 2.b PoP was set to expire, the parties entered into two modifications of the Lot 27 contract on April 2, 2014, and August 19, 2014, for non-production SEPM in the interim (R4, tabs 39, 48).

35. By memorandum to Raytheon dated May 20, 2014, CO St. Vincent sought more information concerning the notice of change (R4, tab 44 at 1).

36. On September 25, 2014, Raytheon submitted a Request for Equitable Adjustment (REA). The REA asserted that there was a constructive change when the COs interpreted SOC 2.a as covering production SEPM, which compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoP, instead of during the SOC 2.b one-year PoP that the Disputed Lots actually required (R4, tab 50 at 10, 12-13).

37. On December 3, 2014, CO St. Vincent denied Raytheon's REA. CO St.-Vincent reasoned that SOC 2.a covered production SEPM, such that Raytheon had to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoP. (R4, tab 51 at 1-2)

38. On July 6, 2015, Raytheon submitted a certified claim to CO Patricia Chisolm for $48,195,181 for its costs of providing production SEPM to support the Disputed Lots missiles after the last Disputed Lot (Lot 27)'s SOC 2.b PoP expired on March 31, 2014 (R4, tabs 57-58). She received the claim on July 14, 2015 (R4, tab 57 at 1). The claim included actual production SEPM Costs to support the Disputed Lots missiles incurred from April 2014 through June 2015, and estimated costs between July 2015 and May 2016. Raytheon then added a 12.6% profit. Raytheon calculated its actual costs based upon its accounting book of records. Raytheon based labor charges on time charging for personnel supporting production SEPM. Raytheon based material and other direct cost charges on material purchased by engineers and travel expenditures as recorded through expense reports (R4, tab 58).

39. On February 16, 2016, CO Chisolm issued a decision denying Raytheon's claim (R4, tab 78).

40. On February 17, 2016, Raytheon filed a notice of appeal, which the Board docketed as ASBCA No. 60448 (R4, tab 79).

41. On June 30, 2016, Raytheon filed a supplemental claim, which added new facts and legal theories. The supplemental claim also amended the claim amount to $48,311,385, based upon actual costs for the entire period. (R4, tab 99)

42. On August 22, 2016, CO Chisolm denied Raytheon's supplemental claim (R4, tab 100).

43. On September 9, 2016, Raytheon filed a notice of appeal, which the Board docketed as ASBCA No. 60785 and consolidated with ASBCA No. 60448.

VI. Facts Regarding Quantum

44. In the Lot 27 Final Price Negotiation Memorandum (FPNM), the parties agreed to a profit rate of about 12.9 percent (app. ex. A-154 at 1).

45. Brian Hammer—Raytheon's government contracts accounting expert—reviewed Raytheon's cost reports, and made minor adjustments to Raytheon's supplemental claim, which increased the claimed amount to $48,363,983 (app. ex. A-240 at 13, 16). Subject to that change, Mr. Hammer opined that the claims' cost calculations were well-accepted in the industry, were reasonable, captured Raytheon's actual costs for production SEPM to support the Disputed Lots missiles, and were supported by accounting reports and other program records (app. ex. A-240 at 12-13; tr. 3/189-90). Mr. Hammer calculated the $48,363,983 amount as follows:

	Lot 25 Missiles	**Lot 26 Missiles**	**Lot 27 Missiles**	**Total**
Total Cost	$3,576,541	$4,088,783	$35,286,703	$42,952,027
Profit (12.6%)				$5,411,955
Total				$48,363,983

(App. ex. A-240, at 17)

46. The government did not present any witnesses or evidence regarding costs or profits.

DECISION

The dispositive issue in these appeals is whether the Disputed Lots' SOC 2.a or SOC 2.b covered production SEPM because SOC 2.a had about a three-year PoP, while SOC2.b only had about a one-year PoP (findings 4, 15-16). As discussed in greater detail below, the parties' prior course of dealing established that SOC 2.b covered production SEPM, such that the Disputed Lots only required Raytheon to provide production SEPM to support the Disputed Lots missiles for about one year under Disputed Lots' SOC 2.b. Thus, the government constructively changed the Disputed Lots when the COs interpreted SOC 2.a as covering production SEPM because that interpretation compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoP, instead of during the SOC 2.b one-year PoP that the Disputed Lots actually required. Moreover, Raytheon has demonstrated with reasonable certainty that its actual costs—plus a reasonable profit—for providing production SEPM to support the Disputed Lots missiles after the Disputed Lots' SOC 2.b one-year PoP expired were $48,363,983.

I. On the Merits, the Government Constructively Changed the Disputed Lots

The government constructively changed the Disputed Lots when the COs interpreted SOC 2.a as covering production SEPM because that interpretation compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoP instead of during the SOC 2.b one-year PoP that the Disputed Lots actually required.

> [I]f a contracting officer compels the contractor to perform work not required under the terms of the contract, his order to perform, albeit oral, constitutes an authorized but unilateral change in the work called for by the contract and entitles the contractor to an equitable adjustment in accordance with the 'Changes' provision.

Len Co. & Assocs. v. United States, 385 F.2d 438, 443 (Ct. Cl. 1967). In order to establish a constructive change, a contractor must show that: (1) there was a change (*i.e.*, performance not required by the contract); (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and (4) an order (*i.e.*, the additional work was not volunteered, but was directed by a government officer). *MC II Generator & Elec.*, ASBCA No. 53389, 04-1 BCA ¶ 32,569 at 161,169. Here, the dispositive issues are whether there was a change and an order. As discussed in greater detail below, Raytheon has established both elements.

A. There was a Change

There was a change because the parties' prior course of dealings established that the Disputed Lots only required Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.b one-year PoPs, but Raytheon provided such production SEPM after those PoPs expired. A "course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *T&M Distribs., Inc.*, ASBCA No. 51405, 00-1 BCA ¶ 30,677 at 151,509 (quoting RESTATEMENT (SECOND) CONTRACTS § 223 (1979)). We may use course of dealing evidence in two different ways: as (1) extrinsic evidence to interpret the ambiguous contract terms; or (2) evidence of a waiver of unambiguous contract terms. *Id*. A prerequisite for the first use is that the contract be ambiguous. *City of Tacoma, Dept. of Pub. Util. v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994). "An ambiguity exists when a contract is susceptible to more than one reasonable interpretation." *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004) (citing *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999)).

However, the second use of prior course of dealing evidence does not require that the contract be ambiguous. As we have held:

> [A] prior course of dealing between contractual parties can extinguish an otherwise explicit contract requirement [if there is] actual knowledge by both parties of consistent conduct by one party in its contractual dealings with the other over an extended period of time regarding a particular contract provision upon which the other is reasonably entitled to rely.

Comptech Corp., ASBCA No. 55526, 08-2 BCA ¶ 33,982 at 168,085-86; *see also W. Avionics, Inc.*, ASBCA No. 33158, 88-2 BCA ¶ 20,662 at 104,421. Thus, a "course of dealing can supply an enforceable term to a contract (or may even supplement or qualify that contract) provided the conduct which identifies that course of dealing can reasonably be construed as indicative of the parties intentions—a reflection of the joint or common understanding." *T&M Distribs.*, 00-1 BCA ¶ 30,677 at 151,509 (quoting *Sperry Flight Sys. Div. of Sperry Rand Corp. v. United States*, 548 F.2d 915, 923 (Ct. Cl. 1977)) (emphasis omitted); *see also W. Avionics*, 88-2 BCA ¶ 20,662, at 104,421. In order to show waiver through a prior course of dealing, a contractor must show that the current contract and prior course of dealing involved the same contracting agency, the same contractor, and essentially the same contract provision. *T&M Distrib.*, 00-1 BCA ¶ 30,677 at 151,509 (citing *L.W. Foster Sportswear Co. v. United States*, 405 F.2d 1285 (Ct. Cl. 1969)).

Here, the Disputed Lots' SOCs are ambiguous as to whether SOC 2.a or SOC 2.b covered production SEPM. On the one hand, it is reasonable to interpret SOC 2.a as covering production SEPM because SOC 2.a covers "all the activities necessary to produce" the missiles, while SOC 2.b only covers work to "support future missile production and sustainment of fielded missiles" (finding 17). On the other hand, it also is reasonable to interpret SOC 2.b as covering production SEPM. The Disputed Lots do not define the term "future missile production" (finding 17). Moreover, SOC 2.a does not mention SEPM—let alone production SEPM—while SOC 2.b covers "AMRAAM—Systems Engineering/Program Management (SEPM)"—without limitation to non-production SEPM (finding 17). Because there are two reasonable interpretations, the Disputed Lots' SOCs are ambiguous.

Turning to the prior course of dealing evidence,[7] the parties' conduct on the earlier Lots is fairly to be regarded as establishing a common basis of understanding

[7] Even if the SOC were not ambiguous, we would turn to prior course of dealing evidence to determine whether the parties waived any unambiguous contract terms. *Comptech Corp.*, 08-2 BCA ¶ 33,982 at 168,085-86. There would have

that SOC 2.b covered production SEPM (finding 9). CO St. Vincent, CO Collins, Mr. Garvey, Lt Col Bortle, Mr. Anderson, Mr. Thomas, and the PSAS technical evaluation all expressed an understanding, based upon the parties' course of conduct, that SOC 2.b's SEPM included production SEPM (findings 10-14). Indeed, the facts that the parties unsuccessfully attempted to identify and move production SEPM from SOC 2.b to SOC 2.a during the Lot 22 negotiations support the conclusion that the parties understood that SOC 2.b covered production SEPM (finding 6). Thus, the parties' prior course of conduct is fairly to be regarded as establishing a common basis of understanding that SOC 2.b covered production SEPM, such that the Disputed Lots' SOC 2.b required Raytheon to provide production SEPM to support the Disputed Lots missiles only for the Disputed Lots SOC 2.b's one-year PoP. As a result, there was a change when Raytheon was required to provide production SEPM to support the Disputed Lots missiles after the Disputed Lots' SOC 2.b PoPs expired.

B. There was an Order

There was an order because the government compelled the change when the COs interpreted SOC 2.a as covering production SEPM. To show that there was an order, it is not enough for a contractor to show that the authorized government official offered advice, comments, suggestions, or opinion. Rather, the contractor must show some force, coercion, or compulsion. *MC II Generator & Elec.*, 04-1 BCA ¶ 32,569 at 161,169. A government interpretation that requires more services than actually required by the contract constitutes a compelled change. *Dale Constr. Co.*, ASBCA No. 1202, 58-1 BCA ¶ 1768; *Fields Corner Brass Foundry, Inc.*, ASBCA No. 2226, 56-2 BCA ¶ 1101.

Here, the COs interpreted SOC 2.a as covering production SEPM. In his June 24, 2013 and July 18, 2013 emails, CO Collins communicated to Raytheon his interpretation that SOC 2.a covered production SEPM. In particular, CO Collins challenged Raytheon's conclusion that there was a production SEPM gap by questioning that conclusion's assumption that production SEPM fell under the SOC 2.b's one-year PoP, instead of under the SOC 2.a's three-year PoP. (Findings 21, 23) It appears CO Collins contemplated retreating from that interpretation when he suggested at the September and August 2013 meetings that there was a production SEPM gap (finding 25). Nevertheless, CO Collins ultimately reverted to his interpretation that SOC 2.a covered production SEPM by concluding that there was no production SEPM gap (finding 31).

> been such a waiver here because Raytheon reasonably relied upon that prior course of dealing under *T&M Distribs.*, 00-1 BCA ¶ 30,677 at 151,509. First, it is undisputed that the prior lots involved the same contracting agency—namely the Air Force—and the same contractor—namely Raytheon (findings 1, 15). Moreover, since Lot 22, the Lots have involved essentially the same contract provisions (findings 7, 17).

Moreover, the government communicated that interpretation to Raytheon when its PSAS technical evaluation denied Raytheon's proposal for a production SEPM gap recovery (finding 32). CO St. Vincent confirmed the government's interpretation that SOC 2.a covered production SEPM in her denial of Raytheon's REA (finding 37).

By interpreting the Disputed Lots' SOCs 2.a as covering production SEPM, the COs compelled Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a's three-year PoPs. *See Dale Constr.*, 58-1 BCA ¶ 1768; *Fields Corner Brass Foundry*, 56-2 BCA ¶ 1101. That constituted a constructive change because, as discussed above, the Disputed Lots' SOC 2.b actually covered production SEPM, such that the Disputed Lots only required Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOCs 2.b one-year PoPs.

II. The Government's Arguments Are Unavailing

In its post-hearing brief, the government abandons any attempt to show that the Disputed Lots' SOC required Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoPs, instead of during the Disputed Lots SOC 2.b one-year PoPs (gov't br. at 11-18). Rather, the government argues that Raytheon's purported interpretation of the Disputed Lot's SOCs as requiring the government to pay additional future costs for production SEPM after the Disputed Lots' SOC 2.b's PoPs expired is unreasonable, and would create an unfunded side deal in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341 (*id.* at 11-13).

That argument demonstrates a fundamental misunderstanding of Raytheon's constructive change claim. Raytheon is not arguing that the *Disputed Lots* required the government to pay for production SEPM after the Disputed Lots' SOC 2.b PoPs had expired. On the contrary, Raytheon argues that the Disputed Lots' SOC 2.b only required the government to pay for—and Raytheon to provide—production SEPM until the SOC 2.b's PoPs expired. Instead, it was *the COs' interpretation* of SOC 2.a as covering production SEPM that compelled Raytheon to provide production SEPM after the SOC 2.b's PoPs expired. (App. br. at 4-5, 147-49) Under the constructive change doctrine, the government must provide an equitable adjustment to pay for those additional services.

III. Quantum

Raytheon has shown that it is entitled to an equitable adjustment for the additional services the government compelled Raytheon to perform. However, now Raytheon bears the burden to show that its costs incurred ($48,363,983) were reasonable. There is no presumption of reasonableness. *Kellogg Brown & Root*

Services, Inc., ASBCA No. 58175, 18-1 BCA ¶ 37,006 at ¶ 180,233. "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business" *id*., citing FAR 31.201-3(a).

A contractor need only establish quantum with reasonable certainty. *Shell Oil Co. v. United States*, 896 F.3d 1299, 1312 (Fed. Cir. 2018); *Sw. Marine, Inc.*, ASBCA No. 54550, 11-2 BCA ¶ 34,871, at 171,525. The measure of an equitable adjustment is the difference between the reasonable cost of performing the contract as awarded absent the change, and the reasonable cost of performing with the change. *Nager Elec. Co. v. United States*, 442 F.2d 936, 946 (Ct. Cl. 1971); *Keco Indus., Inc. v. United States*, 364 F.2d 838, 850 (Ct. Cl. 1966). A contractor usually demonstrates that amount with evidence of the costs actually incurred. *Leopold Constr. Co., Inc.*, ASBCA No. 23705, 81-2 BCA ¶ 15,277 (citing *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963); *Globe Constr. Co.*, ASBCA No. 21069, 78-2 BCA ¶ 13,337). Moreover, an equitable adjustment may include a reasonable profit. *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004) (quoting *Rumsfeld v. Applied Cos.*, 325 F.3d 1328 (Fed. Cir. 2003)); *Bennett v. United States*, 371 F.2d 859, 864 (Ct. Cl. 1967); *Mo. Dep't of Social Servs.*, ASBCA No. 61121, 19-1 BCA ¶ 37,240 at 181,279.

Here, as discussed above, the constructive change was the government's compelling Raytheon to provide production SEPM to support the Disputed Lots missiles during the Disputed Lots' SOC 2.a three-year PoPs, instead of during the Disputed Lots' SOC 2.b one-year PoPs. Therefore, the proper measure of the equitable adjustment to which Raytheon is entitled is the difference between the reasonable cost of production SEPM to support the Disputed Lots missiles, plus a reasonable profit during the Disputed Lots' SOC 2.a three-year PoPs, and during the Disputed Lots SOC 2.b one-year PoPs. That equals the reasonable cost of providing production SEPM to support the Disputed Lots missiles after the expiration of the last Disputed Lot (Lot 27) SOC 2.b one-year PoP on March 31, 2014, plus a reasonable profit (finding 15).

We conclude that Raytheon has demonstrated with reasonable certainty that its actual costs to provide production SEPM to support the Disputed Lots missiles after March 31, 2014 were $42,952,027. In particular, Raytheon presented a government contracts accounting expert, who testified based upon his review of Raytheon's detailed cost reports, that Raytheon's actual costs to perform production SEPM to support the Disputed Lots missiles after March 31, 2014 were $42,952,027, and that those costs were reasonable (finding 45). The government did not present a cost expert—or any other evidence—contradicting that testimony (finding 46). Therefore, we conclude that Raytheon's actual costs to perform production SEPM on the

Disputed Lots missiles after March 31, 2014 were $42,952,027, and that those actual costs were reasonable.

Moreover, Raytheon is entitled to a 12.6 percent reasonable profit. That profit is consistent with the profit percentage that the parties negotiated in the Lot 27 FPNM (finding 44). Further, Raytheon's expert testified that those profits were reasonable (finding 45). The government has not presented any evidence that those profits are unreasonable (finding 46). Therefore, we conclude that a 12.6 percent profit is reasonable. As a result, Raytheon has shown with reasonable certainty that it is entitled to an equitable adjustment of $48,363,983 (finding 45).

CONCLUSION

For the foregoing reasons, the appeal is sustained in the amount of $48,363,983, with interest to run from July 14, 2015, under the Contract Disputes Act, 41 U.S.C. § 7109.

Dated: June 24, 2020

James R. Sweet

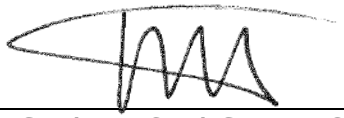
JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

CHERYL L. SCOTT
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

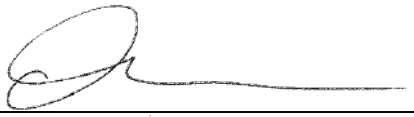
(Signatures continued)

I concur



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

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 60448, 60785, Appeals of Raytheon Company, rendered in conformance with the Board's Charter.

Dated: June 25, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

In the United States Court of Federal Claims

No. 15-767C
(consolidated with 16-309C)

(E-Filed: April 6, 2020)[1]

ACLR, LLC, Plaintiff, v. THE UNITED STATES, Defendant.	)	Summary Judgment; RCFC 56; Termination for Convenience; Constructive Termination for Convenience; Breach of Contract.

Thomas K. David, Reston, VA, for plaintiff. John A. Bonello, of counsel.

Adam E. Lyons,[2] Trial Attorney, with whom were Joseph H. Hunt, Assistant Attorney General, Robert E. Kirschman, Jr., Director, Martin F. Hockey, Jr., Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Lucy Mac Gabhann, Office of General Counsel, United States Department of Health and Human Services, Baltimore, MD, of counsel.

OPINION AND ORDER

CAMPBELL-SMITH, Judge.

Currently before the court are plaintiff's motion for partial summary judgment, ECF No. 51, and defendant's cross-motion for summary judgment, ECF No. 52, which

[1] This opinion was issued under seal on March 23, 2020. Pursuant to ¶ 3 of the ordering language, the parties were invited to identify proprietary or confidential material subject to deletion on the basis that the material was protected/privileged. No redactions were proposed by the parties. Thus, the sealed and public versions of this opinion are identical, except for the publication date and this footnote.

[2] Mark E. Porada was the Trial Attorney on defendant's response and cross-motion for summary judgment.

have been extensively briefed. The parties' motions are brought pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). In ruling on the motions, the court has also considered: (1) plaintiff's motion for partial summary judgment memorandum, ECF No. 51-1; (2) plaintiff's proposed findings of uncontroverted fact, ECF No. 51-11; (3) plaintiff's exhibits, ECF No. 51-2 through 51-10; (4) defendant's response to plaintiff's motion and cross-motion for summary judgment, ECF No. 52; (5) defendant's proposed findings of uncontroverted fact and response to plaintiff's proposed findings of uncontroverted fact, ECF No. 53; (6) defendant's appendices, ECF No. 52-1 and 52-2; (7) plaintiff's response/reply brief, ECF No. 58; (8) plaintiff's response to defendant's proposed findings of uncontroverted fact, ECF No. 58-6; (9) plaintiff's supplemental exhibits, ECF No. 58-1 through 58-5; (10) defendant's reply brief, ECF No. 61; (11) plaintiff's sur-reply brief, ECF No. 65; (12) plaintiff's supplemental brief, ECF No. 69; (13) defendant's response to plaintiff's supplemental brief, ECF No. 70; (14) plaintiff's addendum to its supplemental brief, ECF No. 71; (15) plaintiff's supplemental reply brief, ECF No. 73; (16) defendant's supplemental sur-reply, ECF No. 74.[3] The parties did not request oral argument, and the court deems such argument unnecessary.

For the following reasons, plaintiff's motion for partial summary judgment is **DENIED**, and defendant's cross-motion for summary judgment is **GRANTED**.

I. Background

A. Procedural History

Jurisdiction in these consolidated cases is governed by the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (2012) (CDA). As required by the CDA, plaintiff filed two certified claims with the contracting officer. The first—which was submitted on March 12, 2015, in the amount of $28,506,591—included damages related to the 2007 audit and the 2010 audit. See ECF No. 52-1 at 132-36. That certified claim was denied on June 5, 2015. See id. at 138-45. Plaintiff filed suit in this court on July 22, 2015, contesting the denial of its certified claim for $28,506,591. See ACLR, LLC v. United States, Case No. 15-767C, ECF No. 1 (complaint).

The second certified claim—which was submitted on September 10, 2015, in the amount of $79,314,795—included damages related to the 2012/2013 sales tax audit. See ECF No. 52-1 at 164-67. This certified claim was denied on January 15, 2016. See ECF No. 51-9 at 30-34. Plaintiff filed suit in this court on March 9, 2016, contesting the denial of its certified claim for $79,314,795. See ACLR, LLC v. United States, Case No.

[3] The court recognizes the extensive briefing in this case. Subsequent briefing to the parties' initial cross-motions revealed and narrowed the dispositive issues in this case. The court addresses herein only those dispositive issues.

16-309C, ECF No. 1 at 6 (complaint). Plaintiff increased its claimed damages in the suit before this court to $112,002,489. See id. at 8.

Following discovery these two cases were consolidated on February 8, 2018. See ECF No. 48 (order). Plaintiff seeks summary judgment on all of its claims related to the 2007 audit and 2010 audit (in Case No. 15-767C), and partial summary judgment on its claims related to the 2012/2013 sales tax audit (in case No. 16-309C). See infra n.5. Defendant seeks summary judgment in its favor on all of plaintiff's claims, and dismissal on jurisdictional grounds of the portion of plaintiff's claim in Case No. 16-309C that was not presented to the contracting officer. The motions are fully briefed and ripe for decision by the court. See ECF No. 74.

B. Medicare Part D

This lawsuit arises out of the Medicare Part D program, which is a voluntary prescription drug reimbursement program that went into effect on January 1, 2006. See ECF No. 51-1 at 7-8; ECF No. 52 at 10 (citing 42 U.S.C. § 1395w-101 et seq. (2012)). The prescription drug coverage is offered by private providers, known as plan sponsors, who pay the costs for the prescription drugs and are reimbursed by their beneficiaries and the government. See ECF No. 52 at 10.

The Centers for Medicare & Medicaid Services (CMS), a component of the United States Department of Health and Human Services (HHS), "pays plan sponsors a monthly prospective payment throughout each year for each beneficiary enrolled in the plan." Id. (citation omitted). The payments are then reconciled after the end of each year with the plans' "actual level of enrollment, risk factors, levels of incurred allowable drug costs, reinsurance amounts, and low-income subsidies." Id. at 11 (citation omitted). Final reconciled plan years can be reopened and corrected within four years for good cause. See id.

CMS uses electronic records submitted by the plans called prescription drug events (PDEs) to conduct the reconciliations. See id. Plan sponsors submit a PDE recording information about the drug prescribed, its cost, payment details, and other information "[w]henever a Medicare Part D beneficiary fills a prescription." Id. For the years at issue in this dispute, HHS estimated that gross payment errors (both over- and under-payments) in its Medicare Part D payments to plan sponsors ranged from just over one billion dollars at the lowest to over five billion at the highest. See ECF No. 51-1 at 28; ECF No. 53 at 32-33.

C. The General Services Administration (GSA) Federal Supply Schedule Contract

On June 17, 2010, plaintiff entered into a federal supply schedule contract for financial and business solutions issued by the General Services Administration (GSA),

contract number GS-23F-0074W (GSA contract). See ECF No. 70 at 12. Pursuant to the contract, plaintiff offered "Financial Management & Audit Services" including "Recovery Audits." ECF No. 71-1 at 1, 5. Plaintiff stated in its contract with GSA that it was able and ready to provide services to "accurately quantify, verify, and recover improper payments." Id. at 5.

The GSA contract contained a "Contract Clause Document" establishing the terms of the contract. ECF No. 70-1 at 6. Included in the contract terms was Federal Acquisition Regulation (FAR) clause 52.212-4(l), termination for the government's convenience, which permits the ordering agency to "terminate this contract or any part hereof, for its sole convenience." Id. at 21. Under FAR 52.212-4(l), should the agency elect to terminate the contract for convenience, plaintiff would be owed "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor [could] demonstrate to the satisfaction of the ordering [agency] using its standard record keeping system, [to] have resulted from the termination." Id.

The GSA contract also included FAR clause 52.246-4, inspection of services—fixed price, which permits the ordering agency to "inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract." Id. at 81. Under FAR 52.246-4, should the agency find that the services provided "do not conform with contract requirements, the ordering activity [might] require the Contractor to perform the services again in conformity with contract requirements." Id. "If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with the contract requirements, the ordering activity may: . . . (2) terminate the contract for default." Id.

D. The GSA Contract Recovery Audit Task Order

The passage of the Patient Protection and Affordable Care Act in 2010 required CMS to enter into a contract to obtain "recovery audit" services for Medicare Part D. See ECF No. 52 at 12 (citing PPACA, Pub. L. No. 111-148, § 6411(b), 124 Stat. 119, 775 (2010) (codified at 42 U.S.C. §1395ddd(h))). The purpose of such services was to identify and assist in recovering improper payments. Id. On December 2, 2010, CMS issued a Request for Quote (RFQ) under the GSA contract to plaintiff for recovery audit contractor (RAC) services. See id. "Pursuant to the terms and conditions of Contract No. GS-23F-0074W," CMS awarded plaintiff task order HHSM-500-2011-00006G (task order) on January 13, 2011, to identify improper payments and to recover overpayments made under the Medicare Part D program "on a national scale." ECF No. 51-3 at 152-54; ECF No. 51-1 at 8. Only the terms in the task order that were different from the GSA contract were included in the task order; otherwise, "all terms and conditions of the contract remain in effect." ECF No. 51-3 at 154.

The task order, pursuant to which the contractor was paid a firm, fixed-price contingency fee, included a base period and four option years. See ECF No. 53 at 3. Any payments to plaintiff were contingent upon the recovery of improper payments from plan sponsors and were to be fixed as a percentage of such recoveries.[4] See ECF No. 51-3 at 155.

Under the terms of the task order, ACLR was to "perform the work required in accordance with the attached Performance Work Statement (PWS)." Id. at 154; ECF No. 53 at 3. The term of the PWS extended from January 13, 2011, to December 31, 2013. See ECF No. 51-3 at 154; ECF No. 52 at 16. The PWS generally described the audit process, ECF No. 51-3 at 184-93, provided for a review of duplicate payments, id. at 186, and indicated that CMS input and approval would likely be required for the various audit processes, see, e.g., id. at 187, 190. The PWS does not expressly require approval by CMS for data audit activity undertaken by plaintiff; instead the PWS states that "[o]nce the Data Audit has been complete [ACLR] will discuss [its] findings with CMS." Id. at 189. The PWS does require CMS approval for any documentation audits. See id. The terms of the PWS did not reference or modify the terms of the task order or the GSA contract.

The parties later implemented a Statement of Work (SOW), replacing the PWS, that had two phases. The first SOW extended from January 1, 2014, through December 31, 2014 (2014 SOW), and the second SOW extended from January 1, 2015, through December 31, 2015 (2015 SOW). See ECF No. 51-5 at 6, 45. The SOWs explicitly required CMS approval for any audit conducted by plaintiff and set forth a process by which plaintiff was to request that approval. See id. at 14, 17. Neither SOW expressly addressed the cancellation of an audit after CMS had approved it.

Difficulties and delays occurred early in ACLR's contract performance. See ECF No. 51-1 at 10-11. The parties disagree regarding the extent of the difficulties and delays, and whether CMS's actions failed to meet the contract requirements. See ECF No. 53 at 5-7. Plaintiff eventually did begin its work under the contract, and plaintiff does not allege any breach by CMS during the initial period of performance. See ECF No. 51-1 at 33-34, 52. Rather, in two cases, plaintiff alleges three separate breaches by CMS as ACLR attempted to perform pursuant to the contract; the three audits are discussed more fully herein. See id.

[4] The contingency fee percentage was raised twice, pursuant to contract modifications, with respect to certain audit activities conducted by plaintiff. See ECF No. 58-6 at 11. There was also a general increase in the contingency fee percentage that was instituted in 2014, for newly approved audit tasks. See ECF No. 53 at 15.

1. Plaintiff's 2007 and 2010 Audit Claims (Case No. 15-767C)

a. 2007 Audit[5]

Plaintiff began receiving PDE data from CMS in November 2011 and immediately undertook an audit of 2007 PDEs (2007 audit). See ECF No. 53 at 9, 12. The parties do not dispute that, at the time of the 2007 audit, the GSA contract, the task order, and the PWS were in effect. See ECF No. 53 at 3. Pursuant to the task order and the PWS, ACLR was to conduct a "duplicate payments" audit for particular calendar years. ECF No. 51-11 at 6; ECF No. 53 at 10-11. What the parties do dispute is whether plaintiff was required to seek CMS approval prior to conducting an audit. See ECF No. 51-1 at 15; ECF No. 52 at 15.

According to plaintiff, its audit of the 2007 PDE records identified $313,808,241 in improper duplicate payments using a technical method deemed acceptable by CMS. See ECF No. 51-1 at 15; ECF No. 53 at 12. When plaintiff communicated its overall result to CMS, the contracting officer directed plaintiff not to issue any notification letters to the plan sponsors about these findings. See ECF No. 51-1 at 15; ECF No. 53 at 12. Plaintiff asserts that it is due $23,535,618 in contingency fees for the 2007 audit. See ECF No. 51-1 at 49.

b. 2010 Audit

CMS authorized plaintiff to conduct a duplicate payments audit for calendar year 2010 (2010 audit). See ECF No. 53 at 16-17. Plaintiff conducted the audit in 2014, pursuant to the GSA contract, task order, and the 2014 SOW. See ECF No. 51-1 at 20; ECF No. 52 at 17. In accordance with the procedure set forth in the 2014 SOW, plaintiff sought approval for the audit and the methodology it would use. See ECF No. 51-1 at 20. CMS granted its approval. See id.

According to defendant, its data validation contractor found errors in plaintiff's audited data. See ECF No. 52 at 31-33. Plan sponsors also voiced concerns that a significant portion of the duplicate payments identified by plaintiff were legitimate, rather than duplicative, but would require extensive time and effort to support. Id. Defendant, in turn, requested that plaintiff use a revised audit protocol to review the 2010 data. See id. at 33. Although plaintiff complied with the request, it now argues that defendant had no right, under the contract, to modify the previously approved methodology for plaintiff's audit. See ECF No. 51-1 at 22-23.

[5] In addition to the audits at issue here, the court notes that plaintiff completed seven audits for which it was paid contingency fees under the GSA contract and task order. ECF No. 53 at 47; ECF No. 58-6 at 24-25. The payments for these audits do not appear to have been the subject of any claim submitted by plaintiff to the contracting officer.

After reviewing the evidentiary support documentation from plan sponsors, plaintiff submitted its 2010 audit review package to CMS. See ECF No. 51-1 at 23. Defendant contends that plaintiff failed to use the revised methodology, and that defendant's data validation contractor once again found errors in plaintiff's audited data. See ECF No. 52 at 34-35. Defendant requested that plaintiff provide additional information to address the raised concerns; plaintiff declined to do so. See id. at 35. Plaintiff does not deny that it refused to comply; plaintiff explains that it refused to do so because defendant acted in contravention of the contract terms. See ECF No. 51-1 at 23.

CMS terminated the 2010 audit, reasoning that it had unaddressed concerns about the validity of the audit results. See ECF No. 52 at 35. Having identified $15,909,552 in improper duplicate payments during the 2010 audit, plaintiff seeks, as its contingency fee for that work, $2,209,146. See ECF No. 51-1 at 23.

3. The 2012/2013 Sales Tax Audit (Case No. 16-309C)

Pursuant to the 2015 SOW, ACLR prepared, in 2015, a new audit issue review package (NAIRP) for the audit of sales tax payments from calendar years 2012 and 2013 (2012/2013 sales tax audit). See id. at 25. CMS did not approve the proposed sales tax audit. See id. According to plaintiff, CMS's refusal to approve the NAIRP for the sales tax audit was procedurally and factually improper. See id. at 25-27. From the sales tax audit, plaintiff identified $626,326,618 in improper sales tax payments, which, plaintiff alleges, should have earned it $75,459,194 in contingency fees.[6] Id. at 65-66.

II. Legal Standards

According to RCFC 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "[A]ll evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable factual inferences should be drawn in favor of the nonmoving party." Dairyland Power Coop. v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citations omitted).

A genuine dispute of material fact is one that could "affect the outcome" of the litigation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The moving party . . . need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing the court that there is an absence of evidence to support the nonmoving party's case." Dairyland Power, 16 F.3d at 1202

[6] Of note, plaintiff has not sought summary judgment for the portion of its work on the 2012/2013 sales tax audit pertaining specifically to sales tax issues in the state of Louisiana. See ECF No. 51-1 at 50 n.3, 66 n.9 ("ACLR is not seeking summary judgment on the sales tax NAIRP with respect to the Louisiana sales tax issues."). Defendant seeks summary judgment as to all of plaintiff's claims in their entirety.

(citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). A summary judgment motion is properly granted against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case and for which that party bears the burden of proof at trial. Celotex, 477 U.S. at 324.

The Supreme Court of the United States has instructed that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. A nonmovant will not defeat a motion for summary judgment "unless there is sufficient evidence favoring the nonmoving party for [the fact-finder] to return a verdict for that party." Id. at 249 (citation omitted). "A nonmoving party's failure of proof concerning the existence of an element essential to its case on which the nonmoving party will bear the burden of proof at trial necessarily renders all other facts immaterial and entitles the moving party to summary judgment as a matter of law." Dairyland Power, 16 F.3d at 1202 (citing Celotex, 477 U.S. at 323).

III. Analysis

A. Defendant Did Not Breach Its Contract with Plaintiff When It Denied or Terminated the Audits

"To recover for breach of contract, a party must allege and establish: (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." San Carlos Irr. & Drainage Dist. v. United States, 877 F.2d 957, 959 (Fed. Cir. 1989) (citations omitted).

The parties agree that they had a valid contract—arising from the GSA contract, the task order, and the PWS or the SOWs—that controlled the parties' relationship. See ECF No. 53 at 3; ECF No. 69 at 10. They disagree, however, over the extent of the defendant's ability under that contract to control the work done by plaintiff. Plaintiff argues that defendant had no right to terminate or deny plaintiff's audits under either the PWS or the SOWs. See ECF No. 51-1 at 33-35, 53. Defendant argues that the terms of the GSA contract permitted it to reject plaintiff's work for nonconformance with the contract terms, if necessary, and to terminate—for its sole convenience—any part of the contract. See ECF No. 70 at 15-17. The plain language of the GSA contract establishes that defendant was entitled to terminate any portion of the contract for its sole convenience. Because defendant's actions in denying and terminating the audits were consistent with the terms of the contract, the court finds that, as discussed below, no breach of the contract has occurred.

1. Defendant Terminated Plaintiff's Work on the 2007 and 2010 Audits Pursuant to Its Contractual Authority

a. The Parties' Contract Permits Termination for Defendant's Convenience

The parties agree that the GSA contract, the task order, and the PWS or the SOWs, controlled the parties' relationship. See ECF No. 53 at 3; ECF No. 69 at 10. But plaintiff argues that "CMS cannot point to any Part D RAC Contract provisions that justify CMS's" terminations of the 2007 and 2010 audits. ECF No. 58 at 10. Defendant counters that the GSA contract's terms allow it to inspect and reject plaintiff's services for nonconformance or, alternatively, to terminate any part of the contract for its sole convenience. See ECF No. 70 at 12-14. In support of its position, defendant points to FAR clauses 52.212-4(l) (termination for convenience) and 52.246-4 (inspection of services) in the GSA contract. See id. Although defendant extensively briefed the issue of its ability to terminate the audits for nonconformance with the contract, the court need not reach this argument; the court agrees that—based on the language of the contract—defendant had the right to terminate any portion of it for defendant's sole convenience.

"Contract interpretation begins with the language of the written agreement." Bell/Heery v. United States, 739 F.3d 1324, 1331 (Fed. Cir. 2014) (quotations omitted). If the contract language is unambiguous, then it must be given its plain and ordinary meaning, such as "would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." TEG-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (quoting Metric Constrs., Inc. v. Nat'l Aeronautics & Space Admin., 169 F.3d 747, 752 (Fed. Cir. 1999)).

The plain language of FAR clause 52.212-4(l) permits the government to terminate the contract, or any part of it, for its sole convenience:

> Termination for the Ordering Activity's convenience. The ordering activity reserves the right to terminate this contract or any part hereof, for its convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the ordering activity any right to audit

the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

ECF No. 70-1 at 21 (GSA contract).

Neither party argues that "a mutually intended and agreed to alternative meaning exists" for this clause. Forman v. United States, 329 F.3d 837, 842 (Fed. Cir. 2003). Plaintiff instead points to the PWS and the SOW as support for its position, but fails to identify any part of the task order, the PWS, or the SOW that modifies the termination for convenience clause of the GSA contract. See ECF No. 73 at 6. The court, therefore, construes the words of the clause, consistent with their ordinary meaning, to permit the government to terminate any part of the contract for its convenience.

Termination for convenience—the right of the government to end a contract when there has been no fault or breach by the non-governmental party—emerged after the Civil War as a means to end war production that was no longer needed. See Torncello v. United States, 681 F.2d 756, 764 (Ct. Cl. 1982) (detailing the history of the termination for convenience clause). Throughout its evolution and eventual incorporation into non-military contracts executed during periods of peace, the clause has retained its fundamental purpose—"to reduce governmental liability for breach of contract, by allocating to the contractor a share of the risk of unexpected change in circumstances." Maxima Corp. v. United States, 847 F.2d 1549, 1552 (Fed. Cir. 1988) (citing Torncello, 681 F.2d at 765-66).

Although a termination for convenience clause gives the government considerable leeway in the cancellation of contracts, the clause is not unbounded. "When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments." Perry v. United States, 294 U.S. 330, 352 (1935). As such, the termination for convenience clause may only be invoked "'in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties.'" Maxima, 847 F.2d at 1553 (quoting Municipal Leasing Corp. v. United States, 7 Cl. Ct. 43, 47 (1984)). The government may justify a breach as a termination for convenience to minimize damages when the action lawfully falls under that clause, even if the contracting officer calls the action a cancellation or "erroneously thinks that he can terminate the work on some other ground." Id. (quoting G.C. Casebolt Co. v. United States, 421 F.2d 710, 712 (Ct. Cl. 1970)).

Defendant does not argue that the terminations at issue were, at the time, called terminations for convenience by the contracting officer. Defendant does, however, argue that it had the right to, and in fact did, inspect the services offered by plaintiff and then reject them because they failed to conform to the contract. See ECF No. 70 at 15-16. And, defendant continues, if its actions were not justified by the contract, the terminations should be considered constructive terminations for convenience. See id. at

17. Plaintiff contends that CMS breached the contract when it terminated the audits. See ECF No. 73 at 6-7. Plaintiff reasons that there is no evidence to support CMS's claim that it inspected the audits and rejected them on the basis that they failed to conform to contractual requirements. See id. at 6. The parties agree as to the material facts concerning the terminations; they disagree as to whether defendant was authorized to effect the terminations, and, if defendant was authorized to do so, they disagree as to whether those terminations can now be deemed constructive terminations for convenience. The court turns next to determine whether defendant's alleged breaches were constructive terminations for convenience.

b. Defendant Constructively Terminated Plaintiff's 2007 and 2010 Audits for Convenience Pursuant to the Contract

A constructive termination for convenience is a judicially created concept to retroactively justify a breach by the government when "the basis upon which a contract was actually terminated is legally inadequate to justify the action taken." Maxima, 847 F.2d at 1553. Thus, the court will deem a breach a termination for convenience in circumstances in which the government "has stopped or [has] curtailed a contractor's performance for reasons that turn out to be questionable or invalid." Torncello, 681 F.2d at 759; see also Praecomm, Inc. v. United States, 78 Fed. Cl. 5, 12 (2007) (deeming a "deletion of work" from the contract at issue a termination for convenience).

A constructive termination for convenience, like an actual termination, may only be employed when there has been a change in circumstances or expectations. Maxima, 847 F.2d at 1553. It may not be invoked to justify a breach in a way that leaves the non-governmental party with no consideration for its bargain. See Torncello, 681 F.2d at 769 (holding that a requirements contract, when paired with a termination for convenience clause that permitted the government to give no work, was illusory). It also may not be invoked to create a breach where there has been no breach and the contract was fully performed on both sides. See Maxima, 847 F.2d at 1554-55 (reasoning that the clause is not intended to permit "unilateral renegotiation of a contract after it has been fully performed").

The parties agree that CMS did not allow plaintiff to proceed with the 2007 audit after it had reviewed the data and presented defendant with its findings. See ECF No. 52 at 58. Defendant explains that it requested that plaintiff not proceed with the audit because plaintiff had not identified for defendant the PDE records it audited, plaintiff's findings had not been validated, and defendant had not implemented a framework for collecting the overpayments identified. See id. at 26. As with the 2007 audit, the parties agree that defendant put an end to the 2010 audit after it had approved the audit and methodology and plaintiff had undertaken review of the data. See id. at 30. Defendant explains that, through a fairly extensive back-and-forth process with plaintiff, it determined that there were issues with the validity of the data generated by the audit. See id. at 30-35.

Plaintiff argues that defendant failed to produce evidence to support the claim that defendant rejected the audits because they did not conform to contractual requirements. See ECF No. 73 at 6-7. Plaintiff further argues that defendant cannot avail itself of a "retroactive termination for convenience" because defendant entered into the contract knowingly not intending to honor its obligations. Id. (citing Torncello, 681 F.2d at 756). Plaintiff observes that defendant did not develop a recoupment mechanism until the second year of contract performance and thus, "could not have entered into the contract in good faith when ACLR's sole basis for payment relied on a mechanism that did not exist." ECF No. 73 at 7. Plaintiff claims that the contract contained no language permitting the termination of either the 2007 or 2010 audit, and plaintiff asserts that defendant's procedure for terminating the 2010 audit was flawed. See id. at 8-9.

The court may find a constructive termination for convenience when the government's reasons for halting contract performance "turn out to be questionable or invalid." Torncello, 681 F.2d at 759. Here, the court is persuaded that defendant's actions may appropriately be deemed a constructive termination for convenience. Defendant's expressed concern regarding the validity of the data generated by the audits, and its uncertainty about the workability of the PWS as it pertained to the 2007 audit, constitute changed circumstances that would have supported a termination for convenience by defendant at the time and therefore, may be constructively effected now. See ECF No. 52 at 26-27; see also Maxima, 847 F.2d at 1553; Praecomm, 78 Fed. Cl. at 12 (finding a partial termination for convenience where defendant accepted portions of plaintiff's work).

Plaintiff's contention that the finding of a termination for convenience would render the contract illusory is unavailing. The contract was not fully performed such that a constructive termination for convenience would effectively permit a unilateral renegotiation. See Maxima, 847 F.2d at 1554-55. Moreover, a constructive termination for convenience does not leave plaintiff without consideration for its bargain. See Torncello, 681 F.2d at 769. The court finds that defendant's termination of the 2007 and 2010 audits was not a breach of the contract, but rather a constructive termination for convenience. As such, plaintiff's motion for summary judgment as to these claims is denied, and defendant's motion for summary judgment as to these claims is granted.

2. Defendant Denied Plaintiff's Proposed 2012/2013 Sales Tax Audit Pursuant to Its Contractual Authority

a. The Portion of Plaintiff's 2012/2013 Sales Tax Audit Claim That Was Not Presented to the Contracting Officer Is Not Properly Before the Court

As an initial matter, the court must address defendant's jurisdictional challenge to the portion of plaintiff's 2012/2013 sales tax audit claim that exceeds the amount of the sales tax audit certified claim that plaintiff presented to the contracting officer. See ECF

No. 52 at 55-57. Plaintiff responds that its claim represents an enlarged claim and that the court should address it, as an exercise of judicial economy. See ECF No. 58 at 6-7. The court, however, lacks jurisdiction over any portion of plaintiff's claim that was not presented to the contracting officer. See, e.g., Johnson Controls World Serv., Inc. v. United States, 43 Fed. Cl. 589, 592 (1999) ("A valid final decision by the contracting officer is thus 'a jurisdictional prerequisite to further legal action thereon.'") (quoting Sharman Co. v. United States, 2 F.3d 1564, 1568 (Fed. Cir. 1993)). Plaintiff may not "circumvent the statutory role of the contracting officer to receive and pass judgment on the contractor's entire claim." Cerberonics, Inc. v. United States, 13 Cl. Ct. 415, 418 (1987). Here, plaintiff failed to present a portion of its claim to the contracting officer. Therefore the court does not have jurisdiction over that claim unless it represents an appropriate enlarged claim. Id.

To establish that its additional damages represent an enlarged claim over which this court may exercise jurisdiction, plaintiff must demonstrate that the claim arose out of the same set of operative facts as the original claim and that plaintiff neither knew, nor reasonably should have known, of the factors justifying the increased claim when it presented it to the contracting officer. See Kunz Const. Co. v. United States, 12 Cl. Ct. 74, 79 (1987). Plaintiff admitted that the increase in its claim came about when ACLR identified additional "granular and less conspicuous markers" of questionable payments in the 2012/2013 sales tax audit data after it had submitted the claim to the contracting officer. See ECF No. 58 at 6. Plaintiff is, by its own description, experienced in conducting recovery audits, and therefore plaintiff should have known of the factors needed to justify the increase in its claim when it presented the claim to the contracting officer. See ECF No. 51-3 at 42. As such, the court finds that plaintiff's enlarged claim is not permissible. See Kunz, 12 Cl. Ct. at 79 (finding that plaintiff was an experienced contractor and therefore should have known that its additional damages existed and had to be submitted to the contracting officer).

Accordingly, the portion of plaintiff's 2012/2013 sales tax audit claim (submitted under Case No. 16-309C) that was not presented to the contracting officer is dismissed for lack of subject matter jurisdiction. The court addresses herein only the portion of plaintiff's 2012/2013 sales tax audit claim that plaintiff did present to the contracting officer in its certified claim, which the contracting officer denied—that is, plaintiff's certified claim of $79,314,795.

b. Defendant Properly Denied Plaintiff's Proposed 2012/2013 Sales Tax Audit

Defendant reports that plaintiff received data from CMS regarding the 2012 calendar year in January 2014, data for the 2013 calendar year in late March 2015, and corrected data for the 2013 calendar year in June 2015. See ECF No. 52 at 38; ECF No. 52-1 at 164-65, 338-42; ECF No. 58-6 at 50. Plaintiff reviewed the data and submitted to defendant a NAIRP, which defendant denied on September 3, 2015, in a short email. See

ECF No. 51-1 at 52; ECF No. 51-9 at 11 (September 3, 2015 denial email). Because plaintiff's analysis of the PDEs, its submission of the NAIRP, and the denial of the NAIRP all occurred in 2015, the parties' contractual relationship was governed by the GSA contract, the task order, and the 2015 SOW. See ECF No. 53 at 21.

Plaintiff argues that the denial of the NAIRP constituted a breach of contract because CMS failed to follow the SOW procedures governing the approval of a NAIRP. See ECF No. 51-1 at 51-53. Defendant responds that CMS's failure to "mechanically follow all of the Appendix E timeline steps, when it already had decided to deny the sales tax NAIRP for legitimate reasons, does not invalidate its decision." ECF No. 52 at 70. The court agrees with defendant. The specific steps outlined in the SOW's "Appendix E" chart detailing the timeline for the approval of a NAIRP provide guidance, but not requirements, for every circumstance. See ECF No. 52 at 70; see also ECF No. 51-5 at 79-80 (setting forth the "New Issues Submission and Approval Process"). The SOW does not require that every NAIRP follow each step in the Appendix E approval process chart. See ECF No. 52 at 62. Instead, it calls for the contractor to "work[] with CMS[] to refine and approve or deny the NAIRP. Once approved the RAC begins audit activities." Id. On review of the SOW procedures, the court finds no contract breach occasioned by the manner in which CMS denied the proposed sales tax audit.[7]

Plaintiff also argues that the denial of the NAIRP itself constituted a contract breach. See ECF No. 51-1 at 54-57. In denying the NAIRP, CMS cites section 1.2.3 of the SOW. ECF No. 51-9 at 11. CMS notes that, pursuant to section 1.2.3, it "consistently ensures RAC efforts are not duplicative," and stated that the "audit issue is currently open and active with another CMS contractor." Id. Plaintiff asserts that because its efforts were not duplicative and because there was no other "open and active" audit for sales tax at the time, defendant breached the contract. ECF No. 51-1 at 54. Defendant responds by offering an extensive explanation of the various sales tax application issues that it was pursuing with another contractor, and insisting that CMS's right to deny a proposed audit issue was absolute and not conditioned on section 1.2.3 of the SOW. See ECF No. 52 at 69-71.

The court again agrees with defendant—the SOW does not condition CMS's ability to deny a NAIRP. Rather, it provides that a submitted NAIRP will either be revised and approved, or denied. See ECF No. 51-5 at 52 ("Once submitted the RAC works with CMS/CPI to refine and approve or deny the NAIRP."). In its denial email, defendant provided an explanation to plaintiff, and provided a fuller explanation in its briefing. See ECF No. 52 at 69-71.

[7] In its email denying plaintiff's NAIRP, defendant offered ACLR the opportunity to learn more concerning CMS's denial, but plaintiff elected to file a certified claim regarding the proposed 2012/2013 sales tax audit instead. See ECF No. 51-9 at 11.

The terms of the SOW permitted defendant to deny plaintiff's NAIRP. Because defendant's actions were consistent with the terms of the contract, plaintiff's breach of contract claim related to the 2012/2013 sales tax audit cannot stand and must be denied. Defendant's motion for summary judgment must be granted as to this count.

3. Defendant Did Not Breach the Implied Covenant of Good Faith and Fair Dealing

As a matter of basic contract law, "[b]reach of the duty of good faith and fair dealing is a theory of breach of the underlying contract, not a separate cause of action." CFS Int'l Capital Corp. v. United States, 118 Fed. Cl. 694, 701 (2014) (citations omitted). "To state a claim for breach of the implied covenant of good faith and fair dealing, a party . . . generally must allege some kind of 'subterfuge[ ]' or 'evasion[ ],' such as 'evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, [or] interference with or failure to cooperate in the other party's performance.'" Dotcom Assocs. I, LLC v. United States, 112 Fed. Cl. 594, 596 (2013) (citing Restatement (Second) of Contracts § 205 (1981)). Importantly, to maintain both a breach of contract and a breach of good faith and fair dealing claim, plaintiff must show that each claim is founded upon different allegations. See CFS Int'l, 118 Fed. Cl. at 701.

Plaintiff argues that its reasonable expectation of pursuing recovery payments and receiving a "sizeable contingency fee payment" was thwarted by defendant's actions in delaying, denying, and ultimately terminating the audits at issue here. See ECF No. 51-1 at 38-40, 60-61. Plaintiff asserts that defendant's insistence that the audits could not proceed under the PWS, and that the audit data must have been validated, interfered with plaintiff's performance and disregarded plaintiff's consideration under the contract. See id. at 42-46, 62-63. Defendant responds that, because its actions were consistent with its contractual rights, it cannot be found to have breached the duty of good faith and fair dealing. See ECF No. 52 at 64-65. Defendant asserts that it did, in fact, act in good faith and with reason when it terminated each of the audits at issue, and that its decision was not "irrational or unreasonable under the circumstances known to the agency at that time." Id. at 73.

Underlying plaintiff's assertions regarding breach of the duty of good faith and fair dealing are the same facts and circumstances that inform plaintiff's breach of contract assertions. Plaintiff alleges that, by acting as it did to deny and terminate the audits, defendant interfered with plaintiff's ability to perform. See ECF No. 51-1 at 38-46, 60-63. This is merely a breach allegation couched in different language. Not all government action that affects a contract violates the duty of good faith and fair dealing. See Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010). Plaintiff's claim that defendant's interference dispensed with its consideration under the contract is not supported by the record and does not rise to the level of an "evasion of the spirit of the bargain." Dotcom Assocs., 112 Fed. Cl. at 596 (internal quotation marks

removed); see also Precision Pine, 596 F.3d at 831 (finding that government action that delays performance does not destroy the contemplated benefit or the parties' reasonable expectations under the contract when the contract does not guarantee uninterrupted performance but expressly contemplates modification, suspension, or cancellation). As already discussed, defendant's denial of the 2012/2013 sales tax audit and terminations of the 2007 and 2010 audits fell within defendant's contemplated contractual right to cancel. See supra. Because plaintiff's good faith and fair dealing claim is premised on the same factual allegations as its breach claims, plaintiff's motion for summary judgment must be dismissed, and defendant is entitled to summary judgment on this count as well.

B. Plaintiff Is Entitled to Compensation for Defendant's Termination for Convenience Pursuant to the GSA Contract

While defendant's actions do not constitute a breach of contract, the termination of the 2007 and 2010 audits effected constructive terminations for convenience. As such, under the terms of the contract, defendant is liable to plaintiff for "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the ordering activity using its standard record keeping system, [that] resulted from the termination." ECF No. 70-1 at 21 (GSA contract).

Plaintiff's current damages claim is for an amount that would "place ACLR in as good a position as ACLR would have been in if CMS had performed in accordance with the Part D RAC Contract or had complied with its duty of good faith and fair dealing." ECF No. 51-1 at 47, 64. However, "[i]n contrast with damages stemming from a breach of contract, the sum due a contractor after a termination for convenience is significantly circumscribed." Praecomm, 78 Fed. Cl. at 12. Plaintiff presented no evidence or argument as to the amount of damages owed upon a termination for convenience.

Defendant argues that even under a termination for convenience scenario, plaintiff has no damages because "it did not put in any significant work on these audits." ECF No. 70 at 20. Defendant further argues that, although plaintiff made a claim to the contracting officer for "$2,668,553 in operating costs and lost profit," plaintiff "does not know what of [that] amount" is related to plaintiff's work on the audits at issue, and "has not made a claim for it, and cannot recover." Id.

The parties have not presented sufficient evidence and argument regarding the percentage of work performed by plaintiff, or its reasonable charges resulting from a termination for convenience, to enable the court to determine the amount of compensation to which plaintiff is entitled. Plaintiff's damages calculations clearly did not contemplate a termination for convenience, and defendant's bare assertion that plaintiff is not entitled to damages is inadequate. The court will, therefore, require additional submissions from the parties on this issue.

IV. Conclusion

For the foregoing reasons:

(1) Plaintiff's motion for partial summary judgment, ECF No. 51, is **DENIED**; and plaintiff's claim for damages in Case No. 16-309C above that which it presented to the contracting officer is **DISMISSED** for lack of jurisdiction;

(2) Defendant's cross-motion for summary judgment, ECF No. 52, is **GRANTED**;

(3) On or before **April 13, 2020**, the parties shall **CONFER** and **FILE** a **notice** attaching the parties' **proposed redacted version** of this opinion, with any protectable information blacked out; and

(4) On or before **April 20, 2020**, the parties shall **CONFER** and **FILE** a **joint status report** proposing next steps for addressing the remaining issues in this matter.

IT IS SO ORDERED.

s/Patricia E. Campbell-Smith
PATRICIA E. CAMPBELL-SMITH
Judge

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON MAY 12, 2020

GRANTED IN PART: May 5, 2020

CBCA 4026

VALERIE LEWIS JANITORIAL,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Theodore P. Watson of Watson & Associates, LLC, Aurora, CO, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR, counsel for Respondent.

Before Board Judges **DRUMMOND**, **KULLBERG**, and **O'ROURKE**.

KULLBERG, Board Judge.

Appellant, Valerie Lewis Janitorial (VLJ), timely appealed the contracting officer's final decision (COFD) that denied its two certified claims and asserted two counterclaims related to VLJ's contract with the Department of Veterans Affairs (VA) for custodial and aseptic cleaning services. In its first claim, VLJ sought to recover $272,751.03 for the increased cost of using a two-step process of aseptic cleaning. In its second claim, VLJ sought to recover $441,138.06 for the cost of the increased frequency of cleaning certain buildings. The counterclaims included a claim in the amount of $112,682.12 for the use of

the VA's mops and laundry services, and a claim in the amount of $56,924.20 for the cost of janitorial services for two buildings after VLJ stopped cleaning those buildings. A three-day hearing of the appeal was held at the Board, and the parties submitted briefs and reply briefs. Only entitlement is at issue. Board Order (Aug. 7, 2014).

As discussed below, the Board grants the appeal in part. The Board finds entitlement with regard to VLJ's implementation of the two-step aseptic cleaning process at the VA's direction. The Board denies VLJ's claim for increased frequency of cleaning. Additionally, the Board denies the VA's two counterclaims.

Background

Solicitation

On or about September 5, 2008, the VA issued solicitation VA-261-08-UP-0083 (solicitation). Appeal File, Exhibit 3 at 1.[1] The intent of the solicitation was "to enter into a contract to procure janitorial services and hospital aseptic maintenance services for the VA Northern California Health Care System, Martinez facility." *Id*. at 3. The solicitation stated that the Government "comtemplate[d] award of a (Firm Fixed Price) contract." *Id*. at 48. Additionally, the solicitation was a set-aside for "[s]ervice-disabled veteran-owned small business concern[s]." *Id*. at 101.

The Martinez facility included buildings for in-patient and out-patient care and various other buildings related to research ("R" buildings), and administration ("AB" buildings). Exhibit 1 at 405-16. Building 20, the Center for Rehabilitation and Extended Care (CREC), consisted of three patient-care wings: Tahoe, 11,493 square feet (sq. ft.); Shasta, 12,753 sq. ft.; and Napa, 13,051 sq. ft. Exhibit 56 at 1. The cleanable area of other buildings on the campus included the following: building 19, outpatient clinic (OPC), 14,017 sq. ft.; building 18, bio-med, 1292 sq. ft.; the magnetic resonance imaging (MRI) trailer, 1295 sq. ft; R1, 12,348 sq. ft.; R2, 1412 sq. ft.; R3, 1800 sq. ft.; R4, 7920 sq. ft.; AB2, 3981 sq. ft.; AB4, 1937 sq. ft.; AB5, 1321 sq. ft.; AB6, 7409 sq. ft.; AB7, 11,702 sq. ft.; and AB21, 22,083 sq. ft. Exhibits 56, 61.[2]

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[1] All exhibits are found in the appeal file, unless otherwise noted. The appeal file consists of six volumes.

[2] Subsequent to the hearing the Board determined that various documents in the record contained inconsistent information as to the area of various buildings, and, in some cases, such information was lacking. The Board directed the VA to provide complete information as to the area, as measured in square feet, of the buildings and areas within

The solicitation provided for a contract performance period that consisted of a base year and four option years. Exhibit 3 at 6-7. The pricing schedule required that offerors propose a monthly unit price and total price for the base year and each option year. *Id*. Additionally, offerors were required to submit information regarding technical capability, technical approach, and past performance. *Id*. at 30-33.

The solicitation scope of work (SOW) set forth the following in pertinent part:

> The Contractor shall furnish all management, labor, supervision, management support, transportation, equipment and materials to provide Hospital Aseptic [M]aintenance Services to Northern California Health Care Systems VA Martinez . . . and the VA Outpatient Clinic building . . . administration building[s,] and outl[ying] trailers. . . . An estimated total of **104,019** square footage is to be serviced by the contractor. Note: This figure does not include the kitchen square footage; see attachment 2 for Kitchen Work Statement.

Exhibit 3 at 51.

Section 1.3.1 of the SOW required that the contractor employ a certified executive housekeeper (CEH). Exhibit 3 at 52. The SOW further required that the CEH be "fully International Executive Housekeeping Association (IEHA) Certified at the contract start date or must possess an associate [IEHA] certification at the time of contract start and submit proof of full [IEHA] certification within nine months of contract start date." *Id*.

The quality control section of the SOW stated, in pertinent part, the following:

> 1.4.4 Contractor Quality Control Program. Contractor shall have a quality control program to assure all requirements of the contract are provided as specified. The program shall be continuously improved and . . . documented in loose-leaf manual format. The program shall include, but not be limited to the following:
>
> . . . .

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certain buildings in Martinez facility, which are relevant to this appeal. Board Order (Aug. 16, 2018). Several exchanges with the parties followed. Without objection, the Board received from the VA the requested information, which is found at exhibits 56 through 61. Board Order (Apr. 15, 2019).

> 1.4.4.2 An inspection system (implemented by a work instruction as required in paragraph 1.4.4.1) covering the Hospital Aseptic Management System (HAMS) services stated in the Statement of Work. This inspection system shall include as a minimum, daily sampling inspection of the rooms . . . listed in attachment J-1.
>
> . . . .
>
> 1.4.4.6 The Awardee shall provide to the [contracting officer's technical representative (COTR)] its HAMS Policy and Procedure Manual it will use to implement the HAMS program. This will be provided at the time proposals are submitted as part of each offeror's package.

Exhibit 3 at 61-62.[3]

The definitions section of the solicitation provided the following:

> 2.1 GENERAL DEFINITIONS: As used throughout this Performance Work Statement (PWS), the following terms shall have the meaning set forth below:
>
> HAMS POLICY AND PROCEDURES MANUAL.
>
> Adapted manuals work instructions, quality control instruction, that are composed of all procedures/training, and other literature and directives that implement the HAMS program.

Exhibit 3 at 65.

Section 2.4 of the SOW stated the following in pertinent part:

> 2.4 HANDBOOK DEFINITIONS: The following definitions are from the American Hospital Association "Infection Control in the Hospital and Hospital Housekeeping Handbook, 1979.["]

[3] The term COTR is often used throughout the record interchangeably with contracting officer's representative (COR).

> 2.4.1.1 Cleaning: This is the removal of soil from a surface and is the primary responsibility of the housekeeping staff.
>
> . . . .
>
> 2.4.2 Soil is dust, dirt, stains, grease, smudges, streaks, spots, lint, odors, organisms, vomits, or any agent that is injurious to health. Soil can be visible such as dust, or can be invisible such as organisms, and odors.
>
> 2.4.2.1 Soil can be removed chemically, mechanically, or by a combination of both. Mechanical soil removal is removing soil with a machine such as a vacuum cleaner. Chemical soil removal is removing soil with a liquid that contains cleaning agents, such as detergents, disinfectants, and sanitizes [sic]. The combination of chemical and mechanical methods, such as an automatic floor-scrubbing machine, uses the chemical method to break down and loosen the soil while the mechanical method picks up and carries the soil away. Which soil removal method is used depends on the cleaning objectives and on the size, location, and type of surface to be cleaned and is the prerogative of the Contractor.

Exhibit 3 at 65-66.

Section 4.2 of the SOW provided the following:

> DISINFECTANT/DETERGENT: The disinfectant/detergent shall be currently Environmental Protection Agency (EPA) approved and registered as pseudomon[a]cidal, fungicidal, and viricidal at the recommended use dilution even in hard water 400 (Parts Per Million) PPM (CaC03). The germicidal detergent shall be coupled with a non-phonelic-based environmental disinfectant. Use dilution shall be that recommended by the Association of Official Analytical Chemists (AOAC) use dilution confirmation tests and maintain a record of tests. Any germicidal detergents must be presented to the ICC for approval prior to use. Automatic dilution centers will be used.

Exhibit 3 at 71. The solicitation did not include any historical data of infectious disease outbreaks. Exhibit 55 at 4, ¶ 13.

Section 5.2.2 of the SOW provided the following with regard to frequency of cleaning:

> Categories of Time: There are three (3) categories of times housekeeping services are required to be performed:
>
> Aseptic Seven (7) day per week minimum once per day. Aseptic Five (5) day week, (Mon through Fri) minimum once per day. Cycle task cleaning. Frequency task list cited on Attachment J.1 to J.10.
>
> Custodial three (3) day a week minimum once per day.
>
> Critical Care Areas, (Ref para 2.12.1) and Patient Use/Visit Areas. (Ref para 2.12.2) consist of rooms/areas that require housekeeping services to [b]e performed in one of the above categories. Specific rooms/areas are identified in the Room Listing Charts (see Attachments J.1–J.10).

Exhibit 3 at 76.

Section 5.2.2.2 of the SOW provided the following for cleaning a room after a patient's departure:

> Unit Checkout Service: is a seven (7 day per week "as necessary" required service and includes patient rooms, On Call Staff/Residents Bedrooms. During the day shift and until 9:30 PM on the evening shift, the Contractor shall begin cleaning within 15 minutes. After 9:30 PM if the rooms vacated, cleaning shall start within 30 minutes of the following day shift. Except as to this requirement will be considered as an emergency response. All unit checkout cleaning includes obtaining clean linens for the rooms and bathrooms, removal of all soiled hospital linens and making the beds. It also includes the housekeepers changing of cubical curtains when visibly soiled or as required by [Veterans Administration Medical Center] personnel. Unit checkout service shall continue without interruption until completed.

Exhibit 3 at 77.

Section six of the SOW stated, in pertinent part, the following:

> Administration Building and Trailers
>
> 6.1 The contractor shall provide all labor, equipment and materials required to provide custodial services Monday through Friday at the VA. Work shall start no later than 4:30 pm. DAILY TASKS:

> Empty wastebaskets/replace liners when soiled
>
> Relocate all recycle material to designated location.
>
> Clean/sanitize wash basins, urinals, commodes, partitions, mirrors, chrome fixtures, paper and soap dispensers and sanitary napkin disposal containers. Replenish and refill paper/soap dispensers as needed.
>
> Dust mop, damp mop (with generic detergent to sanitize), then buff all hard surface floors.
>
> Vacuum all carpets/mats, spot clean as needed. (Move all furniture to clean and vacuum, replace in original position)
>
> Pick up and dispose of all litter/debris in offices, restrooms and staff rooms.
>
> Place marked "RED BAG" medical waste bags in locked container outside building for separate contractor's pick-up.
>
> Clean fingerprints/smudges from the entrance doors and walls as necessary.
>
> Mid day: Cleaning of restrooms and restocking of supplies.

Exhibit 3 at 82-83. Section six also listed various tasks that were to be completed either daily, weekly, monthly, quarterly, or semi-annually. *Id*. at 82-83. Monthly tasks included waxing all hard floors; those floors were also to be stripped and waxed semi-annually. *Id*.

Attachments J.1 through J.10 of the SOW were spreadsheets that listed the buildings and rooms in each building that were to be cleaned. Exhibit 3 at 85-107. The SOW required either aseptic or custodial cleaning in the three wings of the CREC (Tahoe, Shasta, and Napa), the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med, but the SOW lacked information about the cleanable area for all of the buildings. *Id*. Based upon information obtained after the hearing, the actual combined cleanable area of those buildings was 108,112 sq. ft. Exhibit 56.

A note at the top of the first page of attachment J.1 stated "FTE = Full Time Equivalent." Exhibit 3 at 85. For each of the three wings in the CREC, an additional note at the heading with attachments J.1 through J.3 stated "2 FTE," which amounted to six FTEs for the CREC. *Id*. at 85-87. In attachments J.4 through J.10, a note at the heading for each

building stated "2nd Shift Responsibilities 1 FTE," which amounted to an additional six FTEs for the buildings to be cleaned.[4] *Id*. at 89-96.

The rooms in each of the three wings of the CREC (Tahoe, Shasta, and Napa) were listed in attachments J.1, J.2, and J.3. Exhibit 3 at 85-88. There were sixty-six patient rooms in the CREC that required aseptic cleaning seven days per week. *Id*. Other rooms in the CREC, such as offices, lounges, and storage rooms, only required custodial cleaning. *Id*. Most of the rooms specified five days per week for custodial cleaning, but other rooms did not specify a minimum number of days per week for custodial cleaning. *Id*. The dining rooms (Shasta 103 and Napa 102) both showed a "0" frequency for aseptic cleaning. *Id*. at 86-87.

With regard to buildings AB6 and AB7, attachments J.4 and J.5 specified either aseptic or custodial cleaning five days per week. Exhibit 3 at 89-90. In the case of buildings AB4, AB21, R1, and bio-med, attachments J.7 through J.10 did not specify a minimum number of days per week for janitorial services. *Id*. at 93-94, 96-97. Although the majority of rooms in the administration and research buildings required only custodial cleaning, certain rooms, such as restrooms and some labs, required aseptic cleaning. *Id*. at 89-97.

Attachment two to the SOW described the work to be performed in the kitchen and canteen area, which had a combined area of 6777 sq. ft. Exhibit 3 at 104-08. Additionally, attachment two stated, in pertinent part, the following:

> Provide daily janitorial services in the kitchen, dining, canteen area, offices, dressing rooms and lounge from Mondays [through] Fridays between 1 pm to 5 pm. The contractor shall use approved solutions to mop flooring, walls, clean tables, chairs, floors, walls, vents, lights, glass, empty [and] relined containers. On a daily basis, provide full service to the restrooms as outline[d] in the standards below. Follow daily schedule for canteen, dining areas as prescribed in the Frequency and Task schedule.

Id. at 104. Section 4 of the SOW provided that "[t]he Contractor shall furnish and maintain all equipment and supplies (other than that specified as Government-furnished) necessary to perform all services required by the contract." *Id*. at 71.

[4] Bio-med, which is listed at attachment J.10, did not have an FTE designated, but that building appeared to utilize the FTE associated with building R1. Exhibit 3 at 94-95.

The solicitation provided the opportunity for a site visit on September 17, 2008. Exhibit 3 at 49. Ms. Valerie Lewis, the owner of VLJ, attended the site visit. Exhibit 1 at 150, Exhibit 3 at 153. On or about October 20, 2008, VLJ executed a teaming agreement with ADS-Myers, Inc. (ADS). Exhibit 1 at 137-46. The agreement provided, generally, that ADS would work with VLJ "in preparing, performing and completing [the] contract." *Id*. at 138.

Solicitation Amendments 0001, 0002, and 0004

On September 26, 2008, the CO issued amendment 0001 to the solicitation. Exhibit 1 at 402-16. Amendment 0001 extended the date for submission of proposals and "additional details of areas to be serviced via drawing attachments . . . [and] areas that will NOT be serviced." *Id*. at 402. Those areas that amendment 0001 removed from the SOW included: Napa rooms 100–106, 2328 sq. ft.; Shasta rooms 100–107, 2637 sq. ft.; Tahoe rooms 100–102, 2200 sq. ft.; and the third and fourth floors of AB21, 11,091 sq. ft. *Id*. at 403; Exhibit 56 at 2-3.

Additionally, amendment 0001 included architect drawings of the CREC, the outpatient clinic, AB2, AB4, AB5, AB6, AB7, AB21 (first and second floors), and R4. Exhibit 1 at 405-15. A separate drawing that showed the entire Martinez campus included the aforementioned buildings as well as AB3, R1, R2, R3, and the MRI trailer.[5] *Id*. at 416. The amendment also had a note that stated, "All other areas (drawings) that are attached . . . will be cleaned by the Contractors." *Id*. at 403. VLJ acknowledged receipt of amendment 0001 on October 14, 2008. Exhibit 2 at 2.

The CO issued amendment 0002 on October 8, 2008. Exhibit 1 at 420. That amendment responded to the following:

> Question 3). Are we responsible to wipe down and clean the MRI machine?
>
> Answer: Yes. The entire department will require daily cleaning. (Monday thru Friday). It will also be the responsibility of the contractor to clean on week-ends should there be cases.

Id. at 421.

[5] Although building AB3 was shown on a drawing of the Martinez facility, the Government has represented that building AB3 was demolished before the solicitation. Exhibit 56 at 3.

The CO also issued amendment 0004 on October 8, 2008, which responded to an inquiry regarding the buildings listed in amendment 0001. Exhibit 1 at 426. That inquiry asked in pertinent part:

> Question 10): Amendment 1 indicates Buildings [AB2]; [AB5]; [R4] are to be serviced. We have no J attachments for them giving description and [square] footage. We have J attachments for [R1] but it was excluded in the Attachment 1 maps indicated to be cleaned. Would you confirm servicing status and forward any J attachments necessary?

Id. at 427. In response, amendment 0004 provided a spreadsheet for building R4 that required either aseptic or custodial cleaning five days a week for each of the rooms in that building. *Id*. The amendment, however, did not provide any information regarding buildings AB2 and AB5. *Id*.

Amendment 0004 also responded to the following:

> Question 12): Please confirm that most of the non clean square footage in amendment 1 was not a part of the original identified cleanable square footage of 104,019. The room numbers do not seem to coincide with those in the J attachments other than in [AB21] – 3rd and 4th floors.
>
> Answer: We still have over 180,000 sq ft cleaned by VA staff and the contract has the 104,000.

Exhibit 1 at 428. VLJ acknowledged amendment 0004 on October 23, 2008. Exhibit 2 at 6. The closing date for proposals was changed to October 28, 2008. *Id.*

VLJ's Initial and Revised Proposals

On or about October 26, 2008, VLJ submitted its first technical and cost proposal. Exhibit 4 at 5. VLJ's proposed cost for the base year and four option years was $4,603,668. *Id*. at 10-11. VLJ's monthly unit price for the base year, November 1, 2008, to October 31, 2009, was $76,111. *Id*. at 10. The scope of work section of VLJ's proposal stated that it would be providing services for "[a]n estimated total of 104,019 square feet." Exhibit 1 at 194. VLJ had previous experience performing a contract for janitorial services at a VA nursing facility. Transcript at 189.

VLJ's technical proposal stated the following with regard to the control of bloodborne pathogens stated the following:

> Universal Precautions is an approach to infection control in which all human blood and other potentially infectious materials are handled as if they were known to be infectious for Bloodborne pathogens. ADS, as a provider of environmental services, works with each hospital to ensure compliance with the facility's engineering and work practice controls. The on-site supervisor is responsible for overseeing the implementation of the hospital's work practice and controls and for work in conjunction with the hospital's Infections Control Officer to assure the effectiveness of these controls.

Exhibit 4 at 33.

By letter dated February 23, 2009, the CO, Mr. William L. Ulibarri, requested that VLJ submit a revised technical proposal. Exhibit 4 at 131. Additionally, Mr. Ulibarri's letter noted that "all offerors continue to propose a level of staffing that is inadequate and below the Government estimate." *Id*. The letter directed VLJ to address the following:

> 1. General Introduction. Overall analysis of FTEs proposed and VA position, per the VA Environmental Programs Service Staffing Guide (provided to each offeror prior to the meeting).
>
> 2. General Discussion of VA Northern California housekeeping requirements, to include the following: general housekeeping (daily routines, floor care), linen, kitchen, inpatient and outpatient administration.

Id.

VLJ subsequently submitted its revised technical proposal and cost proposal. Exhibit 1 at 214-79. The cost proposal included rates for a base year commencing on November 1, 2008, and four option years with a total contract price of $4,863,324. *Id*. at 265-66. VLJ's revised technical proposal stated, in pertinent part, the following:

> The standard for hospital cleaning is 14,000 square [feet] per [f]ull-time employee (FTE). We believe that to have proper controls . . . to ensure patient, staff and employee safety the benchmark we strive for is 8,000 square feet per FTE. Custodial (non-aseptic) cleaning benchmarks are higher. Based on this standard and what the Martinez facility currently employ[s], we should be able to meet this staffing requirement with the proposed full-time employees and a C.E.H. Below is a sample CREC cleaning procedure:

> 6:00 a.m - 8:00 a.m. there will be two (2) to a ward. These housekeepers will dust mop and mop all hallways. Empty trash in rooms and vacuum all carpeted areas.
>
> 8:00 a.m. - 12:30 p.m. (approximate times) Team cleaning begins: After completion of ward cleaning, the housekeepers will report to lead and/or supervisor for other assigned tasks. The other tasks will include shampooing, buffing, afternoon trash pick-up, window cleaning, checking all restrooms inpatient rooms and hallways, and bed cleanings where needed.
>
> After wards are cleaned this should leave an approximate 2 hour window to do other duties listed above.

Id. at 217-18. Ms. Lewis has represented that she had assistance in preparing her proposal from her attorney, certified public accountant, consultant, and ADS. Exhibit 34 at 25; Transcript at 151.

A VA evaluation Board convened and issued its recommendations in a memorandum dated May 27, 2009. Exhibit 4 at 135. The VA board recommended awarding the contract to a firm other than VLJ. *Id*. For reasons not reflected in the record, no award was made.

In an email dated January 28, 2010, Mr. Ulibarri informed VLJ that "things are still in 'play' as far as the award at VA Northern Calif[ornia]." Exhibit 4 at 139. Mr. Ulibarri also raised the question as to how VLJ "would meet the 51% requirement for cost of personnel." *Id*. In response, VLJ represented that it would "team with the very capable . . . ADS Myers who brings the experience necessary to handle the 49% on a sub contract to VLJ." *Id*.

By a fax, which was dated March 15, 2010, VLJ sent to Mr. Ulibarri a copy of its revised teaming agreement with ADS. Exhibit 4 at 141. The teaming agreement stated, in pertinent part, that "ADS is expected to be awarded a subcontract, subject to the negotiation of mutually acceptable terms and conditions between the Parties." *Id*. at 143.

Solicitation Amendments 0013 and 0014

On May 25, 2010, Mr. Ulibarri issued amendment 0013, which extended the date for receipt of proposals to June 15, 2010. Exhibit 1 at 294. The page number block on the first page of amendment 0013 showed that it consisted of seventy-one pages. *Id*. VLJ acknowledged receipt of amendment 0013 on July 13, 2010. Exhibit 2 at 19.

Amendment 0013 included a revised SOW. Exhibit 1 at 297-364. The SOW in amendment 0013 stated, in pertinent part, the following:

> The Contractor shall furnish all management, labor, supervision, management support, transportation, uniforms, equipment and materials/supplies to provide Hospital Aseptic [M]aintenance Services to the Northern California Health Care System's VA Martinez Building 19 VA Outpatient Clinic, Building 20 CLC/CREC, Building [AB21] Administration, and outlying trailers (except as specified herein as Government-furnished). An **estimated** total of **127,931** square footage is to be serviced by the contractor. Note: This figure does not include the kitchen square footage; see attachment 2 for Kitchen Work Statement.

Id. at 297.

Section 5.2.2, categories of time, of the revised SOW in amendment 0013 required aseptic cleaning seven days per week and custodial cleaning a minimum of three days per week. Exhibit 1 at 323. Section 6.1 of the SOW in amendment 0013 listed the same requirements for cleaning trailers and administration buildings as shown in section 6.1 of the solicitation. *Id*. at 329-30. Additionally, section 6.1 added a weekly requirement that stated in pertinent part:

> Patient rooms/Offices/Exam Rooms/Halls to be burnished min[imum] of 2 times per/week and/or as often as necessary to maintain floors in an ASEPTIC appearance free from scratches, dulling and walk off of wax. High traffic areas may require 3 to 5 times per week burnishing. Top scrubbing and waxing to be on a[n] as needed basis to maintain the floors in an aseptic appearance.

Exhibit 1 at 330.

Attachments J.1 through J.10 of the revised SOW in amendment 0013 required either aseptic or custodial cleaning for the three wings of the CREC, the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med. Exhibit 1 at 332-45. The revised SOW required aseptic cleaning seven days a week in the dining rooms and custodial cleaning five days per week in buildings AB4, AB21, and R1. *Id*. at 333-34, 340-45. Although amendment 0001 had deleted Napa 100-106, Shasta 100-107, Tahoe 100-102, and the third and fourth floors of AB21 from the SOW, the revised SOW in amendment 0013 included those areas. *Id*. at 332-34, 340-43.

On June 6, 2010, the CO issued amendment 0014, which extended the date for submission of proposals to June 22, 2010. Exhibit 2 at 20. VLJ acknowledged the amendment on June 18, 2010. *Id*. The amendment also included responses to questions submitted by potential offerors regarding floor work, and included the following:

> Q6: Is there something else that was added that is considered a "new" scope or a change to the previous scope that I might possibly be overlooking?
>
> A6: None that we are aware of.

Id. at 22-23. Amendment 0014 also incorporated VA clause 852,219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside. *Id.* at 21. That clause defined such a business concern as "[n]ot less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans." *Id*.

Contract Award

The VA awarded to VLJ contract VA261-P-0356 (contract), Aseptic and Nonaseptic Janitorial services for northern California, with an effective date of October 1, 2010. Exhibit 2 at 29. The contract award, which was issued on a standard form 1449, referenced the solicitation number in block 5. *Id*. VLJ signed the contract on July 13, 2010, and the CO, Mr. Mark J. Mikus, signed it on August 18, 2010.[6] *Id*. The total contract price for the base year and four option years was $5,158,632. *Id*. at 24. VLJ's monthly rate for the base year, which commenced on October 1, 2011, and first option year was $85,368. *Id*. The monthly rate for the second and third option years increased to $86,271, and the monthly rate for the final option year was $86,608. *Id*.

The SOW in the contract required either aseptic or custodial cleaning in the three wings of the CREC, the outpatient clinic, AB4, AB6, AB7, AB21, R1, and bio-med. Exhibits 2 at 83-95, 3 at 85-97. The contract SOW and attachments J.1 through J.10 were the same as those set forth in the original solicitation. Exhibits 2 at 47-106, 3 at 51-108. The contract included copies of the standard form (SF) 30 for each solicitation amendment with VLJ's signed and dated acknowledgment.[7] Exhibit 2 at 2-23.

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[6] Mr. Mikus was Mr. Ulibarri's supervisor. Transcript at 564.

[7] Amendment 0012 was not issued. Exhibit 1 at 3 n.6.

The contract incorporated in full text Federal Acquisition Regulation (FAR) clause 52.212-4, Contract Terms and Conditions-Commercial Items (FEB 2007), which provided, in pertinent part, the following:

> (a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its post-acceptance rights-
>
> (1) Within a reasonable time after the defect was discovered or should have been discovered; and
>
> (2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.
>
> . . . .
>
> (c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.
>
> (d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action rising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

Exhibit 2 at 32-33.

Modification of the Date for Starting Contract Performance

On January 4, 2011, Mr. Ulibarri advised VLJ in an email that he would arrange a meeting with a VA employee and technical staff member, to determine "the exact areas that [VLJ] will be responsible for." Exhibit 1 at 78. In a later January 14, 2011, email to VLJ, Mr. Ulibarri stated the following:

> In order to maintain some grip on workload (which I am gradually losing) I need to be as efficient as possible, therefore, I'd prefer to get everything done at once. You can send me the wage determination part, I'll hold it pending final figures on the addition which I should [have] heard . . . about first, not you. In fact, this makes me think we'd better wait until you and he are done with the walk through before I issue anything. The sooner you meet with him, the better.

Id. at 80. Mr. Ulibarri testified that meetings were held with VLJ to "get on the same page . . . and then . . . get pricing and fix . . . the contract . . . and then fix the statement of work." Transcript at 28.

In an email dated January 13, 2011, the VA's technical staff member informed VLJ of the following:

> Just wanted to follow up with an E-mail concerning our earlier conversation. As we talked about, the start date is confirmed for 2/1/2011. Since you haven't enough time to place an order for equipment and for it to be delivered by the start date, we will let you use VA equipment until yours arrive[s]. . . . Please let us know when you need us to remove our supplies so you can start stocking your supplies.

Exhibit 1 at 82. Mr. Ulibarri testified to the following regarding that email:

> Q – would you agree that the VA gave [VLJ] permission to use their mops?
>
> A Yes, but – yes, but there's a but in there, you know, what's reasonable.
>
> Q So the answer to my question is, yes, the VA did give her permission?
>
> A That's what he did. I mean, I didn't, you know.

Transcript at 35-36. Mr. Ulibarri also testified that "we didn't set a deadline on that but reasonably speaking you would think she'd get her equipment within a short period." *Id*. at

144. The VA did not have storage space available for VLJ when it allowed VLJ to use government-owned mops and laundry facilities. Exhibit 1 at 376. The record does not show when such storage space became available.

In a January 25, 2011, email to VLJ, Mr. Ulibarri stated the following:

> We have a contract with a statement of work that we signed. We've had enough misery over the past three and one half years, now there are questions as to just what areas [VLJ] is responsible for - will this never end? I suggest you both review the SOW and any attachments (the ones that specify room numbers in particular areas). Whatever is not in there that . . . needs [to be] covered should be in a quote [VLJ] will provide five years pricing for. That should be clear cut. I need this immediately because she starts in one week.

Exhibit 1 at 84.

On January 28, 2011, the VA's technical staff member sent VLJ an email that stated the following:

> According to Bill Ulibarri you are sending him a "catch all["] quote for the mod. Please make sure you include the offices in primary Care as well as the waiting area and receptionists desk, X-ray waiting area and receptionist desk, Primary Care and the 3 offices in the kitchen. The 5 offices in AB7 should have been part of your original quote. The sheet was cut off. Also AB5 and AB2 should also be in the package.

Exhibit 1 at 88.

In an email dated February 2, 2011, the VA's technical staff member advised Mr. Ulibarri, that VLJ "is not cleaning MRI, Bio Med, AB5 which was included [i]n the contract and questions & answers." Exhibit 1 at 462. In an email on that same date, VLJ's response stated that "[w]e have BIO MED INCLUDED and [it] is getting cleaned by our crew now. We are working on the MODS for the rest." *Id*. at 461.

In his February 2, 2011, response to VLJ's email, the VA's technical staff member stated that "MRI is part of the contract, Reference Amendment 2, question 3. To be serviced 5 days a week. AB2 & 5 also to be cleaned (see attachment for amendment 4, question 10. Reference amendment 1)." Exhibit 1 at 461. On that same day, VLJ responded to Mr. Zabadal's email with the following:

> Amendment 13 modified the Scope of Work and outlined what was included. I signed the paperwork/contract that had all the rooms numbers & identified what they wanted cleaned. The VA answered the question back in 2008 and they still directed us to the Spreadsheet for further clarification. The Spreadsheet did not list any detail for AB2, or AB5 nor did it list the MRI. And, it is not listed anywhere else in the detail spreadsheet. The VA went through great detail to outline the rooms, square footage, description, area and so on. We never walked the Day Treatment Building and we did not walk the Magnetic MRI. Mr. Ulibarri already told us to give the price for those areas.
>
> In the spirit of unity and more importantly, in order to bring this issue to a close; I will throw in the MRI and AB2. Please remember, I am a Small Business and I don't have the government's unlimited resources. The only way I can provide the services you are requiring is if you are willing to pay for them. I want to do a very good job and the VA hospital is near and dear to my heart. I am concerned about the cleanliness of the hospital, safety of all those who work here and well-being of the patients and my employees. Cutting corners is not my forte.
>
> Please also note that we are already doing the MRI Building and AB2.

Id. at 460. VLJ disputed whether the contract included janitorial services for buildings AB4 and AB5. *Id*. at 376-77.

On February 11, 2011, VLJ executed bilateral modification P0002 to the contract, and the VA subsequently executed it on February 15, 2011. Exhibit 1 at 444. The modification stated, in pertinent part, the following:

> This supplemental agreement is issued to: 1. Reset the start date for this contract to 2/1/11. 2. Incorporate the latest Dept. of Labor Wage Determination rates per Wage Determination 2005-2051, Rev. 10 dated 7/16/10 and 3. Incorporate the MRI and AB2 areas at no additional charge (excluding carpets/strip/wax). All other terms and conditions shall remain the same.

Id. The contract price increased to $5,193,007.20. *Id*. at 457. The cleanable space in building AB2 and the MRI trailer amounted to 5276 sq. ft.

Mr. Ulibarri testified that modification P0002 was issued to include the MRI trailer and building AB2 in the SOW because those buildings were not in the contract. Transcript

at 70. Ms. Lewis testified that "the VA wanted more when we did the initial walk-through and Mr. Ulibarri had directed me to go back to the COR and for us to get straight what areas they wanted." *Id*. at 155. She executed modification P0002 and agreed to clean building AB2 and the MRI trailer with no increase to the contract price "because they were . . . very small areas." *Id*. However, she also expected to be paid for the "carpet, strip and wax" work referenced in modification P0002 under a separate modification, but no such modification was ever issued. *Id*. at 156-58.

The VA did not issue a written modifications to the contract to reflect other changes to those area where VLJ was supposed to work. Shortly after contract award, Mr. Ulibarri and VLJ's representative reached a verbal agreement in which VLJ would perform custodial services in buildings R2, R3, and R4, and the parties would execute a written modification at a later date. Exhibit 32 at 11; Transcript at 425-26. The combined cleanable area of buildings R2, R3, and R4 was 11,132 sq. ft. Exhibit 56 at 4. VLJ only cleaned the first and second floors of building AB21 because "the third and fourth floor[s] . . . [were cleaned by] VA personnel." Transcript at 461. VLJ, consequently, only had to clean 10,992 square feet of building AB21. Exhibit 56 at 3. As a result of those changes, VLJ would have been responsible under the contract for a cleanable area of 113,402 square feet, which would have included the CREC, the outpatient clinic, buildings AB2, AB4,AB6, AB7, AB21 (first and second floors), R1, R2, R3, R,4, bio-med, and the MRI trailer. *Id*. at 3-4.

On March 8, 2011, ADS advised Mr. Ulibarri of the following:

> As you know, I am looking to Terminate [ADS'] Teaming Agreement with Valerie Lewis Janitorial and our involvement with the Martinez contract. . . . Please let me know as I plan on terminating on March 22, unless you state there could be a problem with ADS' performance rating if I were to terminate. I would also like to let you know that the CEH we trained has the capabilities and management skills to be able to run and do an excellent job for [VLJ] and intends to stay on as CEH. [He] has worked for ADS for over 7 years working in an aseptic environment. ADS has provided [VLJ] with [HAMS] and QC documents and training which she has at her disposal and the CEH knows those aspects of Aseptic cleaning and [Joint Commission on Accreditation of Healthcare Organizations] [regulations]. [VLJ] should do well on her own and we would still be available to assist her with any questions she might have.

Exhibit 1 at 202. ADS terminated its teaming agreement with VLJ on March 22, 2011. Exhibits 5 at 5, 55 at 4, ¶ 22. Mr. Ulibarri testified that he did not have any concerns about VLJ's ability to perform the contract. Transcript at 145.

VLJ's October 14, 2011, email to Mr. Ulibarri stated the following:

> Since we are at the point where we need to do some internal housekeeping, I think the time has come for us to clean up the whole contract or it will keep getting pushed back and I never get paid for any of this work.
>
> . . . .
>
> At this point, I will settle for getting a modification that adds the floor work for carpet/stripping/waxing for AB2.

Exhibit 1 at 393.

Clostridium Difficile (C. diff) Outbreak in the CREC

On or about February 1, 2012, VA staff at the Martinez facility determined that an outbreak of clostridium difficile (C. diff) had occurred among patients in the CREC. Exhibit 55 at 5, ¶37. C. diff is transmitted through spores, which are difficult to eradicate, and affects the colon, causing severe and persistent diarrhea and posing increased risk among persons who are either elderly, have compromised immunity, or suffer from other illnesses. Exhibit 42. A nurse and infection control coordinator at the Martinez facility, advised VA housekeeping staff in a February 6, 2012, email about "a rash" of C. diff. Exhibit 7 at 1. He further advised that alcohol in hand sanitizers and antibacterial soaps were ineffective and "bleach must be used to kill it as it is often in spore form." *Id*. The infection control organization at the Martinez facility set the guidelines for cleaning in a hospital environment, and VA staff were responsible for instructing the contractor's employees as to those methods. Transcript at 819. On May 29, 2012, the COR, sent an email that stated she was "[s]haring with [the] Housekeeping contractor for appropriate response: -ensure EMS/housekeeping using bleach for disinfection for residents . . . and 48 hour after, then terminal clean; two step process (clean then disinfect)." Exhibit 9 at 1.

In a June 14, 2012, email, VLJ advised Mr. Ulibarri of the following:

> This is all above and beyond and we are going through supplies at an alarming rate. I have tried to keep down costs but now they have changed their processes and throwing out [a lot] of things and because of the numerous outbreaks instituted a "two-step" process which used to be one which is more time-consuming and costly in manpower. I will be meeting with my staff today at the site to ensure that our steps [are] documented and followed to a tee. I will have to increase manpower and it seems because Napa is a problem

> unit that I need supervision/quality control management just for that area and it will require dedicated people until the situation gets under control.

Exhibit 10 at 5-6. In response, Mr. Ulibarri advised VLJ that "what we currently have [is] the statement of work [versus] changing conditions that are causing your increased costs." *Id*. at 5.

In an email dated October 16, 2012, Mr. Ulibarri advised VLJ of the following:

> Two-Step Cleaning Process, as defined by VA [Northern California Health Care System] Infection Control Prevention . . . Staff:
>
> 1) Use hospital-grade detergent to clean. This removes soil and organic material allowing disinfectant to have maximum effect.
>
> 2) Use a disinfectant that kills [C. diff]. Generally, only bleach will kill [C. diff] in spore form.
>
> 3) Follow manufacturer['s] recommendations for product, paying attention to "wet" or "dwell" times.

Exhibit 1 at 33. Before the C. diff outbreak, VLJ used only quaternary (QUAT) disinfectant for aseptic cleaning of patients' rooms. Transcript at 194-95. After the outbreak, VLJ used bleach as a disinfectant. *Id.* at 781. The two-step process required that VLJ's employees spray a surface to clean it, wait ten minutes before wiping it off, and then repeat the same procedure to disinfect with diluted bleach. Exhibit 34 at 56-59. Those ten-minute waiting periods were industry-standard dwell times. *Id*.

Contract Administration Issues

In an exchange of emails with Mr. Ulibarri on June 26, 2012, VLJ raised the issue of whether it was cleaning buildings and other areas that were not part of the contract, and they subsequently agreed to the removal of certain areas from the contract. Exhibit 10 at 14-15; Transcript at 296-97. In an August 8, 2012, email to Mr. Ulibarri, VLJ summarized their agreement as follows:

> Here is a list of the areas that we will discontinue service in effective immediately. We are willing to negotiate to do the work per an Amendment/Modification to the Contract.

As agreed, the following areas are not included in this contract:

AB4
R1
R2
R3
Shasta Rooms 100-107
Tahoe Rooms 100-102D
Napa Rooms 100-106
Extra Trash Pickup

Exhibit 12 at 11. The combined cleanable area of those buildings and portions of the CREC in which VLJ ceased work totaled 24,662 sq. ft. Exhibit 56 at 1-4. In an August 9, 2012, email, Mr. Ulibarri stated that VLJ was "rightfully discontinuing the work we've been getting for free." Exhibit 12 at 10.

In an August 6, 2012, email to VLJ, the COR stated that "VLJ needs to provide their own mop service as specified in [the] contract." Exhibit 12 at 18. VLJ's use of the VA's mops and laundry service had not been an issue until the COR raised it. Exhibit 1 at 375. VLJ then ceased use of the VA's mops and laundry. *Id*.

On February 15, 2013, VLJ sent an email to Mr. Ulibarri that stated the following:

> I need a Modification to reflect that the hospital wants five (5) days a week Custodial and not three (3). The contract was supposed to be a working document and we were in the process of cleaning it up. . . . To go back and mock up the contract and input five (5) days . . . **is not fair to me**. It is a clear violation and I am willing to negotiate the work but have waited long enough.

Exhibit 17 at 29. In an April 3, 2013 email dated, Mr. Ulibarri responded to VLJ's February 15, 2013, email and stated the following:

> It's been nearly a year since we started trying to revise and adjust the SOW fairly. The contract is now over two years old and it could almost be argued a precedent has been established for leaving some things the way they are. Let me know. I'd like to get this done and over with at some point, preferably sooner than later.

Exhibit 19 at 9. The VA and VLJ never reached an agreement that resulted in a written modification to the contract SOW.

The VA's Time Study and Proposed Increase for Two-Step Aseptic Cleaning

On May 20, 2013, VLJ requested a contract modification regarding its use of the two-step process for aseptic cleaning. Exhibit 21 at 10. On May 30-31, 2013, the COR conducted a study of the time VLJ's employees spent cleaning patients' rooms. Exhibit 23 at 1-3. The COR attached the results of the study to an August 30, 2013, email to the contract specialist, Ms. Felicia DeMita.[8] *Id*. at 1. The record of the COR's time study showed, in detail, the time VLJ's employees spent performing similar cleaning tasks in three different double-occupancy rooms, including the time employees spent applying a bleach solution to surfaces, waiting, and then wiping it up. *Id*. at 3-4. The results of the time study showed the following:

> Summary/Averages for Bleach Wipe:
>
> 9.3 minutes per double occupancy room = 4.6 minutes per each bed/space
>
> 4.6 minutes x 120 beds = 552 minutes (9.2) hours per day

Id. at 3. The COR testified that the average time VLJ's employees spent cleaning a room was thirty minutes. Transcript at 737. The VA did not notify VLJ that the COR was going to conduct such a time study. *Id*. at 620-21.

In his December 13, 2013, memorandum Mr. Mikus justified a contract modification in the amount of $179,049.48 for VLJ's increased costs related to the two-step aseptic cleaning process. Exhibit 26 at 17-19. He stated the following:

> The purpose of the contract modification is to compensate Valerie Lewis Janitorial (VLJ) for a constructive change to the contract beginning February, 2012, for the two-step cleaning process. The two-step cleaning process requires the contractor to wipe surfaces in the CREC twice as opposed to once. The second wipe of the surface is made with diluted bleach as a method of decontaminating the area for [C. diff], which is a particularly virulent bacteria that spreads rapidly in the hospital environment.

[8] Ms. DeMita was assigned to the contract as a contract specialist in March of 2013 and took over Mr. Ulibarri's responsibility for the contract in April 2013. Transcript at 563-64. Mr. Mikus was her supervisor, and she became the CO responsible for the contract in January of 2014. *Id*.

Id. at 17. Mr. Mikus summarized the proposed increase for VLJ's use of the two-step process as follows:

> Labor: The Government's anticipated labor costs are based on actual observations of the additional amount of time contractor employees spent doing the two-step process. The previous COR . . . made three observations of different areas to calculate the amount of extra time required of the contractor. The COR's observations indicated it would take 9.2 additional labor hours per day, seven days per week.
>
> GSA labor rates for janitorial in this area is $26.62, and is fully burdened and with overhead and profit included.
>
> Each day: $26.62*9.2 = $244.90
>
> Each year: $244.90*365 days = **$89,388.50**
>
> Supplies: The contractor is required to use diluted bleach to clean the surfaces. Rags may also have been used, but for the majority of the time in question, the contractor was using VA linens without permission thus negating the cost for rags.
>
> Cost of bleach: $4.75 per 96 oz with dilution of 1:10,
>
> Bleach calculation: 96 oz of bleach equals 960 oz of dilution. [The COR] estimated the CLC requires 64 oz of dilution per day. Thus, one bottle of undiluted bleach will last 15 days. (960 oz / 64 oz per day = 15 days). Two bottles of bleach are required for one month, which is $9.14 per month.
>
> Year = $9.14 * 12 - $109.68
> Round up for waste = $120.00
> Overhead of 6%= $7.20
> Profit of 5% - 6.04
> Total for Bleach per Year = $133.24
>
> **Total $89,521.74 per year**
> **Two years: $179,049.48**

Id. at 18.[9] By email dated December 19, 2013, Ms. DeMita informed VLJ's legal counsel of the VA's proposed cost increase in the amount of $179,049.48. Exhibit 26 at 21-22.

VLJ's Claim for the Two-Step Cleaning Process

On January 10, 2014, VLJ submitted a certified claim in the amount of $272,751.03 for the additional costs of supplies and labor for performing the two-step process for aseptic cleaning at the VA's direction since February of 2012. Exhibit 1 at 26-31. VLJ described the two-step process, in pertinent part, as follows:

> *First*, clean with disinfectant (QUAT), allowing a proper dwell time of 10 minutes. The surface is then wiped down. The surface must then be allowed to air dry - keeping in mind that chemicals cannot be mixed.
>
> *Second*, VLJ employees apply bleach solution to surface, allowing dwell time of 10 minutes. Then the surface is wiped down. Wipe down surface. Please consider that this is one process within a room and it only accounts for surfaces.
>
> If done properly, the process should take a minimum of forty-five minutes, which may vary based on efficiency (to a degree) and whether the curtains need to be re-hung. To date, VLJ has not been written up by the VA for failing to meet its standards.
>
> . . . .
>
> It should be noted that while it is not enumerated in the SOW or the current Contract, the VA has directed VLJ to change the curtains upon every instance of a patient room change, discharge, or terminal clean. . . . This required the curtains to be taken down, segregated, then re-hung, tagged and dated every time a patient moves his room. This practice has increased the number of labor hours expended by VLJ.

Id. at 28. VLJ stated that "it estimates that it has added the equivalent of ***a minimum*** one and half full-time employees in order to accomplish the additional duties required under the Two-Step Process." *Id*. at 30. According to VLJ, the time required to clean a patient's room

[9] Mr. Mikus did not testify at the hearing.

before the C. diff outbreak was fifteen to twenty minutes, but the two-step process required a cleaning time of forty-five minutes. Exhibit 34 at 68; Transcript at 413.

Additionally, VLJ claimed an annual cost of $20,645.52 for materials and supplies, which included an annual cost for bleach in the amount of $12,765.60. Exhibit 34 at 61. Also, VLJ claimed costs for various other cleaning products such as QUAT, hand towels, and hand soap. *Id*. Finally, VLJ claimed "start-up" costs for cleaning equipment, such as carts, in the amount of $1808.97. *Id*. VLJ, however, did not provide any documentary evidence of actual expenses for the purchase of cleaning supplies.

On January 27, 2014, VLJ and the VA executed bilateral modification P00019 to the contract. Exhibit 27 at 19. The modification stated the following:

> 1. The purpose of this bilateral modification is to formally add the two-step cleaning process to the Statement of Work incorporated into the contract. The two-step cleaning process is added as an addendum and is shown in full on the following page of this modification. The two-step-process is considered vitally significant to continued operations at the VA Northern California Health Care Clinic in Martinez.
>
> 2. The contractor has been performing the two-step process since February 2012 at the Government's request. The contractor submitted a certified claim for the two-step process [on] January 10, 2014. The consideration required for the two-step process will be determined upon resolution of the certified claim. Upon resolution, the contract will again be modified to provide fair and reasonable consideration for the same.
>
> 3. The contractor agrees to continue performing the two-step process for the duration of the contract, including any and all option periods.

Id.

VLJ's Frequency of Cleaning Claim

On March 17, 2014, VLJ filed its second certified claim in the amount of $441,138.06. Exhibit 1 at 74. In pertinent part, VLJ's claim stated the following:

> This is a request . . . for equitable adjustment based on the additional janitorial services VLJ has been required to perform that are not enumerated in the . . . [contract]. This request covers the following areas of the Martinez campus:

> AB21, R4, AB2, MRI and other areas where "custodial" services were either added or increased in frequency. This totals approximately 136 rooms with varying square footage and departments with the Martinez campus. VLJ has been performing these additional services from Contract's start date on February 1, 2011 and will continue performing these services under VA direction through April 30, 2014.
>
> To summarize . . . VLJ requests compensation for the hiring of the equivalent to 1.8 full-time equivalents: one full-time janitor, one half-time janitor, and an additional part-time employee to perform floor work and detailing. These employees were necessitated by the additional work directed by the VA, equaling 3360 . . . additional labor hours per contract year. VLJ also requests compensation for the costs of additional supplies necessary to perform this work. **This has resulted in a total increased actual cost to VLJ of $441,138.06, which accounts for February 1, 2011 through April 30, 2014.**

Id.

With regard to building AB21, VLJ represented in its April 24, 2014, letter to the CO the following:

> The custodial work VLJ performs is enumerated in the Schedules attached to the Contract, labeled as Attachments J.1 to J.10 (*See* . . . the "Schedules," beginning on page 53 of the Contract). These Schedules identify the rooms VLJ is required to clean under the Contract, including the following: approximate square feet, the area to be cleaned, the room number, the type of room, housekeeping, and the type of cleaning. As you will note, the Schedules do not provide for frequencies for certain areas (see, specifically, AB21 at J.7 of the schedules); for others, the Contract specified that custodial work was to be performed three times a week but VLJ was directed by COTR to instead perform such work five times per week, or VLJ was directed to change the cleaning performed to "aseptic."

Exhibit 1 at 75. VLJ also acknowledged that the cleaning frequencies for buildings R4 and AB2 and the MRI trailer were not in the contract but, instead, were the result of an agreement reached in a meeting with Mr. Ulibarri, the COR, and VLJ's attorney. *Id*. at 76.

After VLJ submitted its frequency of cleaning claim, the CO requested additional information, which VLJ provided in its April 24, 2014, letter. Exhibit 1 at 372-78. VLJ represented that modification P0002 was executed with the parties agreeing that "VLJ would

add MRI and AB2, so long as costs associated with supply usage and the cost associated with carpets/strip/wax were excluded and separately modified." *Id*. at 375. With regard to the research buildings, VLJ represented to the CO the following:

> Pursuant to [amendment 0004], VLJ did not propose costs to service [R1], [R2] or [R3]. VLJ proposed costs for [R4] at the three (3) day a week frequency as there was ambiguity and ongoing discussions with the VA with regard to whether R buildings would be serviced by VLJ. After much discourse with regard to the R buildings and which were to be exempted, VLJ and the agency reached an agreement that VLJ would service all R buildings and a modification would be forthcoming. After VLJ began performance on the R buildings, the Agency never issued the modification. Eventually at the government's sole decision all R buildings with the exception of [R4]; were returned to the VA. VLJ seeks compensation for the efforts up until the time the areas were returned to the VA.

Id. at 376. With regard to amendment 0013,VLJ represented that it "was only provided page one (1), the cover sheet for this amendment." *Id*. at 373.

The CO exercised the options for the first and second option years of the contract, but did not exercise the option for the third year that began on February 1, 2014. Exhibit 1 at 3. VLJ, however, performed the contract through April 30, 2014. Exhibit 29 at 6.

The COFD

On May 23, 2014, Ms. DeMita, issued the COFD that denied both of VLJ's claims. Exhibit 1 at 1-23. With regard to VLJ's claim that the two-step process increased the time required to clean patients' rooms, the COFD stated the following:

> Through contractor employee interviews the Contracting Officer observed that it takes a total of 15 to 20 minutes to clean each room completely, first and second step, on a daily basis. Five employees provided the janitorial services to the patient rooms in the CREC. Of those five, the Contracting Officer asked two VLJ employees separately how long it took to clean a patient's room. The first employee indicated it took between 15 to 20 minutes to clean a room, and she added that included the two-step process. The second VLJ employee also indicated it takes approximately 20 minutes to clean a room. A VA housekeeping supervisor also asked another VLJ employee the same question within hearing distance of the Contracting Officer, and the employee responded its takes about 20 minutes to clean the room in its entirety. The

> Contracting Officer asked the VA nursing staff, who were unaware of any dispute between the Government and the contractor, how long it takes for a patient's room to be cleaned, and the nurse indicated it took approximately 20 minutes total.

Id. at 4. None of the persons referenced in that quoted portion of the COFD was ever identified. Additionally, the COFD did not mention the results of the VA's time study, which was conducted by the COR on May 30-31, 2013.

With regard to VLJ's claim for the increased costs of cleaning certain buildings five times per week as opposed to three times per week, the COFD represented that the inclusion of the original solicitation SOW in the contract was "an obvious, critical mistake upon contract award and incorporated the original, incomplete SOW into the contract." Exhibit 1 at 10. The COFD explained the following with regard to the amendments to the solicitation:

> In this case, the contractor was provided a list of facilities in [amendment 0001] with the express intent that the contractor would provide service to those areas, which includes in part [AB2], [AB4], [AB5], [R4], and the first and second floors of [AB21]. Furthermore, [amendment 0002] discusses the cleaning requirements for [the] MRI [trailer]. Vendors note in question 10 of [amendment 0004] that [AB2], [AB5], and [R4] require service. The thirteen[th] amendment, [0013], provides a revised SOW showing a frequency schedule for [AB4] and [R1], followed by blank pages. A review of the amendments shows that the Government answered questions with a question and answer section rather than by revising the SOW, with the exception of [amendment 0013], and that generally the contractors understood which areas were to be serviced by considering all the amendments together in context to determine what was required.
>
> When the Government amended the Request for Proposal with [amendment 0013], its revised SOW created an obvious patent ambiguity in relation to the requirement, because it did not mention several of the buildings provided by the other amendments.

Id. at 14-15. The COFD also cited a cost proposal, which was prepared by ADS, and contended that VLJ had intended to clean the disputed areas five times a week. *Id*. at 18-19. However, the cost proposal referenced a different solicitation number than the one related to the contract and a bid date of January 31, 2001, which was before VLJ was in business. *Id*. at 474; Transcript at 303, 306.

The COFD also asserted two counterclaims. Exhibit 1 at 20-22. First, the COFD claimed $112,682.12 for VLJ's use of the VA mops and laundry service from February 1, 2011, through August 31, 2012. *Id*. at 21. Second, the COFD claimed $56,924.20 the cost of janitorial service in buildings R1 and AB4 from September 1, 2012, through April 30, 2014. VLJ timely appealed the COFD.

Discussion

This appeal is before the Board pursuant to the Contract Act Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). VLJ asserts claims for the cost of implementing the two-step process of aseptic cleaning after the C. diff outbreak and the cost of cleaning buildings AB21, R4, AB2, the MRI trailer, and other areas five times, instead of three times, per week. The VA asserts two counterclaims that seek reimbursement from VLJ for the use of mops and laundry service and the cost of cleaning R1 and AB4 after VLJ ceased work in those buildings.

Two-Step Process of Aseptic Cleaning

The issues before the Board are whether, after the C. diff outbreak, the VA directed VLJ to change its process of aseptic cleaning to a two-step process and whether such a change is compensable. In general, a contractor asserting a claim for an equitable adjustment has the burden of proving "three necessary elements–liability, causation, and resultant injury." *Servidone Construction Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991) (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). The Veterans Administration Board of Contract Appeals (VABCA) recognized that "when the Government informally orders a method of performance more stringent than that required by the contract, a constructive change can be found to have occurred." *Caddell Construction Co.*, VABCA 5608, 03-2 BCA ¶ 32,257 (citing *Aydin Corp. v, Widnall*, 61 F.3d 1571, 1578 (Fed. Cir. 1995); *Len Co. & Associates v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967)). The VABCA also recognized the following:

> To establish a constructive change, two essential elements must be present: a change and an order or direction, by word or deed. To find the change element, one must first examine the actual performance to see whether it went beyond the minimum standards demanded by the terms of the contract. Then it is necessary to find that the change was one that the Government's representative ordered the contractor to perform. . . . In particular, the rejection of a method or manner of performance selected or used by a contractor is a constructive change if the method was permitted by the contract.

John R. Hundley, Inc., VABCA 3493, et al., 95-1 BCA ¶ 27,494 (citations omitted).

The VA's direction that VLJ use a two-step process for aseptic cleaning amounts to a constructive change. Although the contract required aseptic cleaning for the patients' rooms in the CREC and other areas, it did not specify any particular method, and the contractor was tasked with preparing a HAMS policy and procedures manual. The VA's personnel first identified the C. diff outbreak on February 1, 2012, and that outbreak resulted in a significantly heightened concern about controlling infection. The VA's infection control personnel determined that diluted bleach was the only effective means of destroying the C. diff spores. The COR's February 8, 2012, email showed that VLJ was using diluted bleach as a disinfectant by that date. The first mention in the record of a two-step process for cleaning in response to the C. diff outbreak appeared in an email dated May 29, 2012. Mr. Ulibarri directed VLJ to implement that two-step process with specific directions.

The VA's time study showed how the COR measured the time that VLJ's employees spent to accomplish various tasks while cleaning patients' rooms. In particular, the time study analyzed the time that VLJ's employees spent applying, waiting, and wiping up diluted bleach. The COR computed an average cleaning time of thirty minutes per room and an average "bleach wipe time" of 9.3 minutes per double occupancy room, which amounted to an additional 9.2 labor hours per day. Mr. Mikus, determined that VLJ was entitled to compensation for the two-step process of aseptic cleaning based upon that increase of 9.2 labor hours per day for a two-year period, plus the additional cost of bleach during that same period. After VLJ submitted its claim, the VA issued a bilateral modification that implemented the two-step process of aseptic cleaning, but the modification did not include any increase in the contract price to reflect that change.

In spite of the findings of the time study and Mr. Mikus' recommended contract modification, the VA now takes the position that VLJ is not entitled to any compensation for implementing the two-step process of aseptic cleaning. The COFD made reference to statements from unidentified VA and VLJ employees regarding the time required for the two-step process of aseptic cleaning. The factual basis for such comments is unknown, and no affidavits or testimony from those persons is in the record. The VA has offered no evidence to disprove its own time study or Mr. Mikus' recommended contract modification for VLJ's increased costs due to implementing the two-step process for aseptic cleaning. Although the VA has offered various theories in an attempt to show that the two-step aseptic cleaning process did not increase the time that VLJ's employees spent cleaning rooms, such theories are of no avail where the VA has not refuted its own time study that contradicts those theories. Based upon those determinations by the COR and Mr. Mikus, the Board finds that the VA's direction to VLJ to implement the two-step aseptic cleaning process was a constructive change to the contract.

The Board's discussion, accordingly, turns to the measure of VLJ's recovery for its increased costs that resulted from the VA's direction to implement the two-step process of aseptic cleaning after the C. diff outbreak. The Court of Claims has held that "[t]he ascertainment of damages, or of an equitable adjustment, is not an exact science, and where responsibility for damage is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision." *Electronic &Missile Facilities, Inc. v. United States*, 416 F.2d 1345, 1358 (Ct. Cl. 1969). This Board has recognized the following:

> As the court stated in *Dawco Construction Inc. v. United States*, 18 Cl. Ct. 682, 698 (1989), *aff'd in part*, 930 F.2d 872 (Fed. Cir. 1991), "All that is necessary is a reasonable showing of the extra costs. Defendant cannot be permitted to benefit from its wrong to escape liability under the guise of a lack of a perfect measure. *See generally Dale Construction Co. v. United States*, 161 Ct. Cl. 825 (1963)." In *Dawco*, the court had decided quantum on the basis of a jury verdict, a less-favored approach than total cost.

Moshe Safdie & Associates, Inc. v. General Services Administration, CBCA 1849, et al.,14-1 BCA ¶ 35,564. The Armed Services Board of Contract Appeals (ASBCA) recognized that a government estimate was "sufficient to support an award . . . under a 'Jury verdict' theory of arriving at a fair approximation of the damages." *Freeman General, Inc.*, ASBCA 34611, 02-1 BCA ¶ 31,758 (1991) (quoting *Freeman General, Inc. v. United States*, No. 90–1025, 1990 WL 165558 (Fed. Cir. Oct. 31, 1990) (unpublished)[10]).

The Board finds that the VA's estimate, which Mr. Mikus prepared, is the proper measure of recovery for VLJ's increased costs of implementing the two-step process of aseptic cleaning. VLJ's claim was not based on a time study similar to the COR's time study, but rather, the claim assumed that employees spent forty-five minutes cleaning each room using the two-step process. Additionally, VLJ did not have documentary evidence to support an increased cost of cleaning supplies in excess of $20,000. The Board, accordingly, adopts Mr. Mikus' estimate of recovery for VLJ's labor hours and material costs in the amount of $179,049.48 for the two-year period from February 2012 to February 2014, plus the additional two months VLJ performed the contract from March 1 to April 30, 2014. As directed in this decision, the Board remands this portion of the appeal back to the CO to compute quantum, including interest, consistent with this decision.

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[10] In its unpublished opinion, the Court of Appeals for the Federal Circuit reversed the ASBCA's earlier decision in *Freeman General, Inc.*, ASBCA 34611, 89-2 BCA ¶ 21,809, *reconsideration denied*, 89-3 BCA ¶ 22,096, *rev'd*, *Freeman General, Inc. v. United States*, 918 F.2d 188 (Fed. Cir. 1990) (table).

Frequency of Cleaning Claim

VLJ's frequency of cleaning presents the issue of how the Board should interpret a contract in which the SOW in the executed contract does not reflect the solicitation amendments and the parties dispute which of those amendments, if any, should comprise the terms of the contract. In general, the Board looks to the following:

> In interpreting a contract, "[w]e begin with the plain language." *McAbee Constr., Inc. v. United States*, 97 F.3d 1431,1435 (Fed. Cir. 1996). "We give the words of the agreement their ordinary meaning unless the parties mutually intended and agree to an alternative meaning." *Harris v. Dep't of Veterans Affairs*, 142 F.3d 1463,1467 (Fed. Cir. 1998). In addition, "[w]e must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee*, 97 F.3d at 1435.

Jowett, Inc. v. United States, 234 F.3d 1365, 1368 (Fed. Cir. 2000). "[A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). "[I]t is elementary that the language of a contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Id*. at 975.

The VA and VLJ dispute whether amendment 0013 became part of the contract. In general, when a contractor acknowledges an amendment to a solicitation, that amendment becomes part of the contract. *See Charles Cunningham Construction Corp.*, GSBCA 7420, 85-2 BCA ¶ 17,965; *West Coast Research Corp.*, ASBCA 21087, 77-1 BCA ¶ 12,510; *Window Master Corp.*, GSBCA 4183, 76-1 BCA ¶ 11,735. Even if the awarded contract omits the terms of the solicitation amendment, that amendment is still part of the contract. *See ALCAN-JHW, A Joint Venture*, ASBCA 10773, 66-2 BCA ¶ 5932 ("To hold that the contract as awarded required something different from the advertised invitation as bid would be to find that the contracting officer had violated the statutes and regulations pertaining to procurement by advertising.").

VLJ acknowledged amendment 0013 but contends that it only received the cover page to that amendment. This Board has recognized that when a contractor acknowledges an amendment that does not have all of the indicated number of pages, the contractor is responsible for inquiring as to the content of those missing pages. *See Future Forest, LLC v. Department of Agriculture*, CBCA 5764, 19-1 BCA ¶ 37,238 (2018). Additionally, the

fact that a contractor lacked all of the pages of an amendment does not mean that those pages "magically 'dropped out' of the [contract]." *Id.*

The awarded contract referenced the solicitation and the amendments, which included amendment 0013, and the Board reads all of those parts of the contract together so as to give a reasonable meaning to the contract as a whole. Amendment 0013, consequently, revised the entire contract SOW, and that revised SOW would have replaced any conflicting terms in the earlier amendments. *See Enterprise Information Services, Inc. v. Department of Homeland Security*, CBCA 4671, 15-1 BCA ¶ 36,010. In spite of the fact that the VA awarded the contract with a SOW that did not reflect those changes set forth in the solicitation amendments, nothing in the record would suggest that either the VA or VLJ intended to proceed as though the solicitation amendments had no meaning. VLJ referenced amendment 0013 in its February 2, 2011, email that questioned the VA's position that it was required to clean buildings AB2, AB5, and the MRI trailer. The Board infers that the VA agreed with VLJ because it executed bilateral modification P0002 to add building AB2 and the MRI trailer to the contract.

The Board, accordingly, finds that amendment 0013 changed the frequency of cleaning requirements under the contract. The revised SOW in amendment 0013 required custodial cleaning five days per week in building AB21 and aseptic cleaning seven days per week in the CREC dining rooms. In the case of building AB2 and the MRI trailer, which were added by modification P0002, there was no schedule for frequency of cleaning, but other contract provisions provided guidance. Section 6.1 of the SOW required that the contractor perform specific custodial services five days per week in administration buildings and trailers. Those tasks included removal of trash and recycling, vacuuming, dust and damp mopping, cleaning and sanitizing restrooms, disposing of litter and debris, removal of medical waste, and cleaning fingerprints and smudges. Building AB2 and the MRI trailer were subject to those requirements. Additionally, that same language in section 6.1 was also in the solicitation SOW. VLJ and other bidders would have been on notice as to those requirements for custodial cleaning in excess of three days per week.

In the case of building R4, the awarded contract SOW did not list that building, and there is no way for the Board to determine a frequency of cleaning requirement. However, the VA added that building to the contract without a written contract modification. When VLJ identified in its August 8, 2012, email those buildings that it deemed not to be part of the contract, it did not include building R4 in that list, but rather, appeared to consider that building part of the contract. To the extent that VLJ is attempting to claim the cost of cleaning building R4 five times a week instead of three times, its claim fails. VLJ has not shown that the contract required it to clean building R4 only three times a week and that the VA directed a greater frequency of cleaning. Amendment 0013, which was the contract

SOW, required custodial cleaning five times a week for research and administration buildings. At most, VLJ has only shown that it believed that it was responsible for cleaning building R4 only three days a week, but such a belief is insufficient to support its claim.

VLJ's frequency of cleaning claim also fails to prove the amount of a financial loss in connection with its claim. As discussed above, a contractor's claim for a constructive change must prove the "liability, causation, and resultant injury." *Servidone Construction Corp.*, 931 F.2d at 861. VLJ contends that the VA's direction to provide custodial cleaning five days a week resulted in the hiring of an additional 1.8 FTEs, but the claim lacks any supporting evidence to show the extent that its actual costs of performing the contract exceeded its proposed cost of performing the contract.

Additionally, VLJ's claim does not account for changes in the number of buildings that were part of its contract and the financial benefit of such a reduction. Its claim states that it incurred costs for increased frequency of cleaning from February 1, 2011, to April 30, 2014. However, VLJ's claim ignores the fact that on August 8, 2012, the VA agreed to remove buildings AB4, R1, R2, and R3 and several rooms in the CREC, including the two dining rooms, from the contract. The removal of those areas from the contract, at VLJ's request, amounted to a reduction of 24,662 sq. ft. of cleanable space from the contract. VLJ has represented that the benchmark for its technical proposal would have been one FTE for every 8000 sq. ft. VLJ's claim does not account for that reduction in work, as it would have amounted to a reduction of three FTE's during the last half of the contract performance period.

As part of its frequency of cleaning claim, VLJ argues that the VA did not pay for work described as "carpet, strip, wax" under modification P0002, but the VA points out that VLJ's claim did not mention that modification. Appellant's Posthearing Brief at 77-78; Respondent's Posthearing Brief at 43. "It is well established that the 'proper scope of an appeal processed under the CDA is circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom.'" *Guilltone Properties, Inc.*, HUDBCA 02-C-103-C4, 2006 WL 990150 (Mar. 30, 2006) (quoting *Stencel Aero Engineering Corp.*, ASBCA 28654, 84-1 BCA ¶ 16,591 (1983)). VLJ's frequency of cleaning claim did not assert a claim for the cost of "carpet, strip, wax," and it does not mention modification P0002. At most, VLJ's claim makes a vague reference to "floor work" that required an additional part-time FTE without any specific reference to building AB2 and the MRI trailer. While there are several emails in the record in which VLJ indicated that it expected a contract modification subsequent to modification P0002 that would pay for "carpet, strip, wax" for building AB2 and the MRI trailer, its frequency of cleaning claim did not assert such a claim. The Board has no authority to supplement VLJ's claim. In any case,

VLJ provided no documentary evidence to support the costs incurred for such work, and the Board does not have the means to even speculate as to the amount of such costs.

The VA's Counterclaims

The VA asserts two counterclaims against VLJ regarding its use of mops and laundry services and stopping work in buildings R1 and AB4, but the counterclaims ignore the fact that VLJ did so with Mr. Ulibarri's authorization.[11] "[T]he Government can be bound by a contracting officer's 'unfettered opinion [as] the person delegated as decision maker by the parties to the contract,' . . . even when that opinion is expressed in internal correspondence." *Texas Instruments Inc. v. United States*, 922 F.2d 810, 814 (Fed. Cir. 1990) (quoting *General Electric Co. v. United States*, 412 F.2d 1215, 1221, *reh'g denied*, 416 F.2d 1320 (Ct. Cl. 1969)). The Government is bound by such an agreement and it cannot be revoked "based on unsupported and unverified allegations of impropriety not revealed to the contractor." *Id.* at 816. The VABCA has recognized that in the absence of a formal written modification, the contract will be deemed to have been modified where "there are present . . . sufficient writings either setting forth the terms of the agreement or reflecting the parties' intention to be bound." *Adams Construction Co.*, VABCA 4669, 97-1 BCA ¶ 28,801.

The Board finds no merit in the VA's counterclaim in the amount of $112,682.12 for the use of the VA's mops and laundry service. The VA's technical staff member, with Mr. Ulibarri's knowledge, directed VLJ to commence work and authorized the use of the VA's mops and laundry service. The VA had held up commencement of work under the contract and had not made storage space available to VLJ. VLJ's use of the VA's mops and laundry service was for the benefit of both parties. The record does not explain why VLJ used the VA's resources for almost a year-and-a-half into the contract performance period, but VLJ stopped when directed to do so. There is no evidence of any impropriety on VLJ's part. Although the contract stated, generally, that the VLJ was to use its own resources, the Board does not construe that clause as giving the CO authority to charge a fee after-the-fact for such use. In any case, the VA made no effort to prove its asserted costs and the COFD is the only document in the record that relates to that counterclaim.

The VA's counterclaim in the amount of $56,924.20 for the cost of cleaning buildings R1 and AB4 is also without merit. In response to VLJ's request, Mr. Ulibarri allowed VLJ

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[11] VLJ argued that the VA did not assert its counterclaims in its answer. The Board does not find it necessary to address that argument because the COFD asserted the counterclaims and VLJ appealed the COFD. The counterclaims are properly before the Board under the CDA. 41 U.S.C. § 7104(a).

to stop work in buildings R1 and AB4 as well as other buildings. While the VA may now disagree with the terms of Mr. Ulibarri's agreement with VLJ, the Board will not undermine that agreement. Also, the VA has offered no proof to support the amount of its counterclaim.

Summary

As discussed above, this appeal consists of two claims by VLJ and two counterclaims by the VA. The Board finds entitlement with regard to VLJ's claim for implementing the two-step process of aseptic cleaning at the VA's direction. Using the jury verdict method to determine the amount of recovery, the Board adopted the VA's estimate of the cost of such work for the period from February 2012 to February 2014, which was $179,049.48, plus two additional months, March and April of 2014, to be computed in accordance with the daily rate set forth in Mr. Mikus' December 13, 2013, memorandum. VLJ is also entitled to interest on that amount as calculated under the CDA. The Board, accordingly, remands this appeal to the contracting officer to compute quantum consistent with this decision. The Board denies VLJ's claim for increased costs for frequency of cleaning. Finally, the Board denies both of the VA's counterclaims regarding VLJ's use of mops and laundry facilities and the cost of cleaning buildings AB4 and R1.

Decision

The appeal is **GRANTED IN PART**. The appeal is remanded to the contracting officer for the computing of quantum as directed in this decision.

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

United States Court of Appeals for the Federal Circuit

AGILITY PUBLIC WAREHOUSING COMPANY K.S.C.P.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-1886, 2019-1887

Appeals from the United States Court of Federal Claims in Nos. 1:15-cv-00351-TCW, 1:18-cv-01347-TCW, Judge Thomas C. Wheeler.

Decided: August 12, 2020

DEREK L. SHAFFER, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC, argued for plaintiff-appellant. Also represented by JONATHAN GORDON COOPER; KRISTIN TAHLER, Los Angeles, CA.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by ETHAN P. DAVIS, CLAUDIA BURKE, ROBERT EDWARD KIRSCHMAN, JR.

Before REYNA, TARANTO, and STOLL, *Circuit Judges*.

REYNA, *Circuit Judge*.

In Appeal No. 19-1886, Appellant Agility Public Warehousing Company K.S.C.P. challenges a final decision from the United States Court of Federal Claims relating to the United States' offset of moneys due to Agility. The Court of Federal Claims determined that the United States' offset was valid and, thus, granted judgment in favor of the United States. Because the Court of Federal Claims did not evaluate the merits of the United States' offset determination nor the procedures required by law, we vacate the decision and remand for further proceedings. Consolidated with Appeal No. 19-1886 is Appeal No. 19-1887, in which we affirm the Court of Federal Claims' dismissal for lack of subject matter jurisdiction.

BACKGROUND

Following the United States' invasion of Iraq, appellee United States and its coalition partners created the Coalition Provisional Authority ("CPA") to provide support for the reconstruction of Iraq. These appeals arise from the United States' offset of an overpayment it purportedly made to appellant Agility Public Warehousing Company K.S.C.P. ("Agility") during the reconstruction of Iraq.

I

On June 6, 2004, the CPA awarded a contract to Agility for the provision of logistics and management support for two separate staging area operations ("the PCO contract"). The PCO contract was a contract for indefinite delivery, indefinite quantity, under which the CPA could issue individual task orders to Agility.

The PCO contract noted that funds obligated under the contract were sourced from the Development Fund for Iraq ("DFI"). The CPA controlled the DFI, which was comprised

of Iraqi moneys, including revenue from sales of Iraqi petroleum and natural gas. The PCO contract provided that "*[n]o funds, appropriated or other, of any Coalition country are or will be obligated under this contract*." J.A. 2025–26 (emphasis in original). The PCO contract also noted that Agility "recognize[d] that a transfer of authority . . . from the [CPA] to the interim Iraqi Governing Council [(the "IIG")]" would occur on June 30, 2004. J.A. 2026. The contracting parties to the PCO contract were the CPA and Agility. *Agility Logistics Servs. Co. KSC v. Mattis*, 887 F.3d 1143, 1149 (Fed. Cir. 2018) ("*Agility I*").

The PCO contract afforded the United States certain protections. First, the United States would not be liable to Agility under the PCO contract after the transfer of authority from the CPA to the IIG. *See* J.A. 2026 (providing that the "CPA, *U.S. Government* or Coalition Government will not be liable to the contractor for any performance undertaken after the [transfer of authority]" between the CPA and IIG (emphasis added)); *see also id.* (providing that "[t]he contractor hereby waives any claims and rights it now has or may have in the future against the CPA, U.S. Government or Coalition Governments in connection with the contract"). Second, the PCO contract expressly preserved the right of the United States to assert its own claims against Agility. *Id.* (providing that "[n]othing herein shall be construed as a waiver of any rights the CPA, U.S. Government or a Coalition Government may have against the contractor"). The PCO contract terminated on November 5, 2008.

II

In late June 2004, as planned, authority over the reconstruction of Iraq transferred from the CPA to the IIG, and the CPA dissolved. At this point, the IIG assumed the PCO contract from the CPA and, thus, became a party to the contract. Additionally, when authority was transferred from the CPA to the IIG, a June 2004 amendment to the

PCO contract provided that any claim Agility had under the contract could no longer be brought before the Armed Services Board of Contract Appeals but could now only be brought in an Iraqi court under the laws of Iraq.

Shortly before the transfer, the IIG issued a June 15, 2004 memorandum which designated the United States Army ("Army") as the contract administrator of all CPA contracts funded with moneys from the DFI entered on or before June 30, 2004, which included the PCO contract. As contract administrator, the Army had the authority to "enter into, administer, and/or terminate th[e] contract and make related determinations and findings." J.A. 1550. The Army was not a party to the PCO contract. *See Agility I*, 887 F.3d at 1151.

The June 15, 2004 IIG memorandum also made clear that the IIG controlled the funding for CPA-issued contracts, which included the PCO contract. The memorandum stated that the value of all CPA contracts could not exceed $800 million, provided that the IIG "may, at our discretion, increase this limit." J.A. 1657. The memorandum provided that "[a]ll disbursements made under the authority of this memorandum shall be accounted for on the books of the sub-account entitled 'Central Bank of Iraq/Development Fund for Iraq Transition.'" J.A. 1658. The memorandum also noted that:

> So long as [the Army] compl[ies] with all of the requirements set forth in this designation . . . [the IIG] will direct, as [the IIG] deem[s] appropriate, the Central Bank of Iraq to transfer (from time to time) funds from the Central Bank of Iraq/Development Fund for Iraq Transition account into an account in the Central Bank of Iraq . . . and [the Army] shall have the authority to make disbursements from that account in order to carry out your duties herein.

Id.

Throughout the lifecycle of the PCO contract, the Army issued a total of twenty task orders. Agility submitted invoices under each task order and the Army paid Agility. Notably, the Army paid Agility's invoices under task orders 1 and 2 with moneys from the DFI. In contrast, the Army paid Agility's invoices for task orders 3, 6, 9–12, and 14–20 with United States appropriated funds ("U.S. Funds"). The U.S. Funds were funds which Congress appropriated to the United States Army Corps of Engineers for the specific purpose of aiding in the "reconstruction of Iraq." Oral Arg. at 20:50–21:05, *available at* http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2019-1886.mp3; *see also* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225 (2003) ("Appropriations Act") (appropriating over $18.6 billion "for security, relief, rehabilitation and reconstruction in Iraq" to be "apportioned only to" various governmental entities, including the Department of Defense).[1]

III

In September 2010, following the United States Defense Contract Audit Agency's (DCAA) audit of Agility's invoices under the PCO contract, the Army contracting officer issued final decisions regarding various task orders, under which the Army paid Agility with U.S. Funds. The Army contracting officer then sent demand letters for overpayments allegedly made under twelve task orders. Each demand letter explained that the overpayment "resulted from claimed subcontractor costs that were insufficiently supported by proffered information, expenses incurred beyond the obligation limit and authorized period of

[1] In its briefing in *Agility I*, Agility recognized that the task orders at issue were paid with "U.S.-appropriated funds" and cited to this Appropriations Act. *See* Appellant's Br. at 39, *Agility I*, No. 15-1555, ECF No. 14.

performance and the associated indirect costs" that were previously paid. *See, e.g.*, J.A. 1663. Each letter noted that Agility was "indebted to the United States Government" for the overpayments. *See, e.g.*, *id.* Each letter provided that Agility should contact the Army contracting officer if Agility believed the debt to be incorrect. *Id.* Each letter also warned Agility that its alleged debt could be subject to "offset from Federal payments due." J.A. 1664. When combined, the demand letters identified a total of $80,830,305.62 of U.S. Funds allegedly overpaid to Agility.[2]

On July 8, 2011, the Army sent twelve letters, with attached bills, notifying Agility that it was going to initiate a collection action. The letters explained that payment was due under the "Debt Collection Act of 1982." *See, e.g.*, J.A. 2173.

In addition to its overpayment determination, the Army denied Agility's claim for $47 million under various task orders to the PCO contract. According to Agility, the

[2] The record provides that in related litigation before the Armed Services Board of Contract Appeals and the United States District Court for the District of Columbia, actions discussed later in this opinion, Agility did not challenge the contracting officer's overpayment determination as to the alleged $81 million overpayment. Agility agreed that the United States overpaid it approximately $2 million. Thus, Agility only appealed approximately $79 million of the United States' $81 million overpayment claim. In its appeal before the Board, Agility separately explained that it recalculated its catering invoices using the preferred DCAA method and discovered that it had overbilled the United States approximately $38,000, which it excluded from that appeal.

Army had underpaid Agility $47 million rather than overpaying it $81 million.

By September 2012, the Army had not received payment from Agility for the PCO contract overpayment claims. Thus, around this time, the Army notified Agility that the Army was withholding payments in the amount of $17 million on a separate contract (the "DDKS contract") between Agility and the United States in order to offset a portion of its purported $81 million overpayment under the PCO contract.

IV

Agility sought review of the Army's overpayment determination under the PCO contract in various forums. First, Agility filed suit at the Armed Services Board of Contract Appeals (the "Board"). In that action, Agility sought review of the Army's determination that Agility had been overpaid and challenged the Army's denial of Agility's claim for $47 million. The Board dismissed Agility's appeal for lack of jurisdiction under the Contracts Disputes Act ("CDA"). The Board determined that CDA jurisdiction was limited to contracts made "by an executive agency," pursuant to 41 U.S.C. §§ 7101(8), 7102(a). The Board determined that the PCO contract was not made by an executive agency but by the CPA. The Board also determined that the United States was not a contracting party but merely a contract administrator. Agility appealed this decision to our court.

In *Agility I*, we affirmed the Board's dismissal. 887 F.3d at 1148. We determined that the United States acted "as a contract administrator and not as a contracting party" to the PCO contract. *Id.* at 1151. Thus, we held that the Board lacked CDA jurisdiction to hear Agility's challenges related to the PCO contract, which was not "made by an

executive agency." *Id.* at 1148 (internal quotation marks omitted).

Having been shut out from the Board, Agility then sought recourse before the United States District Court for the District of Columbia ("District Court") and the United States Court of Federal Claims.

At the District Court, Agility challenged the validity of the Army's offset. *See generally Agility Public Warehousing Co. v. United States Dep't of Defense*, No. 16-cv-01837. Specifically, Agility alleged that:

> Defendants' actions in offsetting—or making available for offsetting—Agility's claimed debts against amounts owed to Agility under other Government contracts were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A), and were imposed without observance of procedure required by law, in violation of 5 U.S.C. § 706(2)(D).

J.A. 9; J.A. 2496. This District Court action is currently stayed pending this appeal. *See* Order, *Agility Public Warehousing Co. v. United States Dep't of Defense*, No. 16-cv-01837 (D.D.C. July 12, 2019).

At the Court of Federal Claims, Agility filed two separate cases, which were consolidated below. *See Agility Public Warehousing Co. v. United States*, Nos. 15-351C, 18-1347C. This appeal stems from these two actions. Before the Court of Federal Claims, Agility challenged the United States' offset. Specifically, Agility argued that our decision in *Agility I*, in which we determined that the Army was not a party to the PCO contract, "is conclusive and authoritative." J.A. 1418. According to Agility, because the Army was not a party to the PCO contract, any overpayment made under that contract was due to Iraq, and, thus, the Army had no right to seek this overpayment via an offset. Agility also argued that the Army's offset constituted a

breach of the DDKS contract, a breach of the Army's duty of good faith and fair dealing under the DDKS contract, and an illegal exaction. Agility sought $17 million in monetary damages and a declaratory judgment that the United States may not, based on any alleged debt under the PCO contract, withhold funds the United States owes Agility.

The parties moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of the Court of Federal Claim ("RCFC") in Case Nos. 15-351 and 18-1347. The government also separately moved to dismiss both cases for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1).

In addition to the arguments noted above, Agility argued in its RCFC 12(c) motion that the government should be judicially estopped from claiming entitlement to the alleged $81 million overpayment. Agility relied on the government's briefing in *Agility I*, as well as the parties' oral argument in that appeal, to argue that the government has now taken an inconsistent position as to its liability under the PCO contract.

In its RCFC 12(c) motion, the government argued that while it was not a party to the PCO contract, the United States overpaid Agility under the PCO contract with U.S. Funds. Thus, the government argues, the overpayment was owed to the United States, not Iraq. The government also argued that it was authorized, by the Debt Collection Act of 1982 ("DCA") and the common law, to offset the alleged $81 million overpayment with moneys it owed Agility under the DDKS contract.

The Court of Federal Claims granted the government's RCFC 12(c) motion in Case No. 15-351, determining that (1) the United States was owed the alleged overpayment and (2) the DCA authorized the United States to offset the alleged overpayment. *Agility Public Warehousing Co. v. United States*, 143 Fed. Cl. 157, 161, 172 (2019) ("*Decision*"). The Court of Federal Claims rejected Agility's

argument that the government should be judicially estopped from asserting entitlement to the alleged overpayment and that the government breached the covenant of good faith and fair dealing under the DDKS contract. *Id.* at 171–72. The Court of Federal Claims also rejected the government's alternative argument that it was authorized under the common law to offset the alleged overpayment. *Id.* at 169–70. This decision gives rise to Appeal No. 19-1886.

The Court of Federal Claims granted the government's RCFC 12(b)(1) motion in Case No. 18-1347 and dismissed that case for lack of subject matter jurisdiction. *Id.* at 172. This decision gives rise to Appeal No. 19-1887. We have jurisdiction over both appeals under 28 U.S.C. § 1295(a)(3).

DISCUSSION

As an initial matter, although Agility appealed the dismissal of Case No. 18-1347, giving rise to Appeal No. 19-1887, Agility did not challenge the dismissal in its briefing on appeal or at oral argument. We see no error in the Court of Federal Claims' dismissal and affirm the judgment in Appeal No. 19-1887.

Turning to Appeal No. 19-1886, Agility raises four challenges. First, Agility argues that the United States' offset was invalid under the DCA. Second, Agility argues that even if the United States' offset was valid under the DCA, the United States should be judicially estopped from claiming entitlement to the offset. Third, Agility argues that the United States' offset constitutes a breach of the covenant of good faith and fair dealing stemming from the DDKS contract. Lastly, Agility argues that at a minimum, this case should be remanded because material factual disputes precluded the Court of Federal Claims' grant of the government's RCFC 12(c) motion. We discuss each argument in turn.

We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *SUFI Network Servs., Inc. v. United States*, 785 F.3d 585, 589–90 (Fed. Cir. 2015). We review de novo the Court of Federal Claims' grant of judgment on the pleadings under RCFC 12(c). *Sunoco, Inc. v. United States*, 908 F.3d 710, 715 (Fed. Cir. 2018). A "court should only grant a defendant's motion for judgment on the pleadings if the defendant is clearly entitled to judgment on the basis of the facts as the plaintiff has presented them." *Owen v. United States*, 851 F.2d 1404, 1407 (Fed. Cir. 1988). A court "must presume that the facts are as alleged in the complaint[] and make all reasonable inferences in favor of the plaintiff." *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009).

I

A

Before turning to the merits of Agility's challenge to the government's offset under the DCA, we believe it necessary to clarify two aspects of the DCA. First, the DCA does not give the United States a freestanding mechanism to create a debt but rather provides only a mechanism to offset a pre-existing, valid debt. Pursuant to the DCA, the United States government is authorized to "withhold[] funds payable by the United States . . . to satisfy a *claim*." 31 U.S.C. § 3701(a)(1) (emphasis added). Under the DCA, a "'claim' . . . means any amount of funds or property that has been determined by an appropriate official of the Federal Government to be *owed to the United States*[.]" *Id.* § 3701(b)(1) (emphasis added). "A claim includes, without limitation . . . over-payments[.]" *Id.* § 3701(b)(1)(C). Thus, under the DCA, a recoverable "claim" is one that must be first "owed to the United States." *Id.* § 3701(b)(1).

The context and history of the DCA enforces our interpretation that the DCA is a mechanism for collecting pre-existing, valid debts. Congress enacted the DCA to supplement the common law right of offset, which requires a pre-

existing debt owed to the offsetting party. *See McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562, 1566 (Fed. Cir. 1993) ("[I]t must be emphasized that the Debt Collection Act was intended to supplement, and not displace, the government's pre-existing offset rights under the common law."). As provided in the enacting clause of the DCA, the Act's purpose is to "increase the efficiency of Government-wide efforts to collect *debts owed the United States* and to provide additional procedures for the collection of debts owed the United States." Pub. L. No. 97–365, 96 Stat. 1749, 1749 (1982) (emphasis added). This stated purpose "speaks of 'additional procedures' for debt collection, not replacement or revision of existing contract law doctrines." *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1055 (Fed. Cir. 1993). Thus, Congress understood that to trigger the DCA offset provision, a pre-existing, valid debt must first be owed to the United States.

Second, the DCA cannot be reasonably interpreted as shielding from judicial review the United States' determination that a pre-exiting debt is owed. As the United States argued in this appeal, and Agility does not contest, "[c]ontractors may challenge offsets under their contracts, as Agility did below, or challenge the debt itself in district court, as Agility does in the D.C. District Court." Appellee's Br. at 34–35. Thus, when a court reviews a challenge to a DCA offset, it stands to reason that such review encompasses the underlying inquiry of whether the United States was even owed a pre-existing debt. This reading of the DCA parallels the case law on the common law of offsets, which calls for judicial review of the merits of the claim being invoked as an offset of a government debt. *See United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 240 (1947) ("This power given to the Court of Claims to strike a balance between the debts and credits of the government, by logical implication gives power to the Comptroller General to do the same, *subject to review by that court*." (emphasis added)); *Wisconsin Cent. R.R. Co. v.*

United States, 164 U.S. 190, 211 (1896); *United States v. Bank of the Metropolis*, 40 U.S. 377, 401 (1841); *see also United States v. Mead*, 426 F.2d 118, 124–25 (9th Cir. 1970). With this backdrop in place, we now turn to Agility's challenge.

B

Agility argues that any overpayment of U.S. Funds issued to Agility under the PCO contract cannot qualify as a pre-existing debt "owed to the United States" under the DCA. Specifically, Agility argues that any overpayment of U.S. Funds to Agility was never owed to the United States but rather to Iraq. Agility argues that "because the United States made the supposed 'overpayments' while acting as Iraq's agent" under the PCO contract, "any claim stemming from those overpayments would, if anything, attach solely to ***Iraq***." Appellant's Br. at 30 n.2 (emphasis in original). We disagree. To the extent the United States overpaid Agility with U.S. Funds, the United States is owed these funds, notwithstanding its role as contract administrator. This is because the United States has an independent and inherent right to recover erroneously expended congressionally appropriated funds.

The "[p]ower to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution." *Royal Indem. Co. v. United States*, 313 U.S. 289, 294–95 (1941); *see* U.S. Const. art. 4, § 3, cl. 2 ("The Congress shall have Power to dispose of . . . Property belonging to the United States."); *see also* U.S. Const. art. 1, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). Thus, the executive branch must spend appropriated funds in accordance with the purpose for which Congress made the appropriations. *See* 31 U.S.C. § 1301 ("Appropriations shall be applied only to the objects for which the appropriations were made . . . .").

When a payment is erroneously or illegally made, as is alleged here, "it is in direct violation of . . . the Constitution." *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1063 (Fed. Cir. 2001) (quoting *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959)). To correct for this violation, the United States may exercise its "[well]-established right to sue for money wrongfully or erroneously paid from the public treasury," a right arising separate and apart from statute, regulation, or contract. *United States v. Wurts*, 303 U.S. 414, 416 (1938); *see also Bank of the Metropolis*, 40 U.S. at 401; *Barrett*, 242 F.3d at 1063; *Maryland Small Bus. Dev. Fin. Auth. v. United States*, 4 Cl. Ct. 76, 80 (1983); *Aetna Cas. & Sur. Co. v. United States*, 526 F.2d 1127, 1130 (Ct. Cl. 1975) ("It is a well-settled principle that the Government has *inherent authority* to recover sums illegally or erroneously paid . . . ." (emphasis added)); *Heidt v. United States*, 56 F.2d 559, 560 (5th Cir. 1932) (explaining that an individual who receives an overpayment from the government, regardless of whether the overpayment arose under a contract, is "liable to refund it" to the United States). The only time the United States is barred from exercising its inherent right to recover overpayments is when Congress has "clearly manifested its intention to raise a statutory barrier." *Wurts*, 303 U.S. at 416 (internal quotation marks omitted).

Here, no party disputes that the funds at issue under the PCO contract were congressionally appropriated U.S. Funds. Additionally, as the government explained at oral argument, Congress appropriated these funds to the United States Army Corps of Engineers for the narrow and explicit purpose of assisting the United States' efforts in the "reconstruction of Iraq." Oral Arg. at 20:50–21:05; *see also* J.A. 2638:22–2639:3; Appropriations Act, 117 Stat. at 1225. The government also noted, and Agility did not dispute, that to the extent the funds paid by the Army exceeded the cost for work actually performed for the

reconstruction of Iraq, such payments were not applied to the funds' congressionally authorized purpose. *See* Oral Arg. at 31:04–39. Thus, under these circumstances, the United States has an independent and inherent right to recover any overpayment of U.S. Funds. *See Wurts*, 303 U.S. at 416; *Barrett*, 242 F.3d at 1063; *Aetna*, 526 F.2d at 1130. On this basis, the United States is "owed" any overpayment of U.S. Funds issued under the PCO contract. The DCA is an appropriate vehicle for the United States to recover any such overpayment.

To be clear, Congress did not voluntarily gift these funds to Iraq to use at its discretion. *See* Oral Arg. at 22:40–48, 25:15–28. If this were the case, then potentially the United States could not recover these moneys:

> A voluntary payment made by an individual under no mistake of fact is ordinarily not recoverable, because he may do what he wills with his own money. But the rule is quite otherwise in payments of public money made by public officers. They have no right of disposal of the money, but must act according to law, the law operating as a limitation on their authority to pay.

Heidt, 56 F.2d at 560 (citation omitted). Here, Congress expressly provided that these funds would be apportioned to United States agencies assisting in the reconstruction of Iraq. *See* Oral Arg. at 20:50–21:05, 25:15–28; *see also* Appropriations Act, Pub. L. No. 108-106, 117 Stat. at 1225. Thus, stemming from this appropriations, the United States has an independent and inherent right to recover an overpayment of these funds.[3]

[3] Agility argued for the first time in its rebuttal at oral argument that it could be subject to "double exposure" for the alleged $81 million overpayment if we decide that the United States has an independent right to the

Agility argues that the United States' recourse for recovering any overpayment "would be through its principal, the Iraqi Government." Appellant's Br. at 29. Agility argues that "[a]n agent does not itself assume rights or liabilities when dealing with a third party on behalf of its principal." *Id.* (citing Restatement (Third) of Agency § 6.01 cmt. b (Am. Law Inst. 2006)). Agility's argument, however, ignores the United States' independent and inherent right to recover misappropriated funds. *See Wurts*, 303 U.S. at 416; *Barrett*, 242 F.3d at 1063; *Aetna*, 526 F.2d at 1130.

In sum, we determine that the United States has a right to offset any overpayment of U.S. Funds under the PCO contract, notwithstanding its role as a contract administrator.

C

That the United States has a right to any overpayment, however, does not fully address whether the United States' offset under the DDKS contract was valid. For the United States' offset to be valid, either under the DCA or the common law, the United States must have actually overpaid Agility under the PCO contract. Here, Agility disputes the United States' overpayment determination. Specifically, according to Agility's complaint below, the United States "erroneously asserted that Agility had been overpaid" overpayment. *See* Oral Arg. at 43:35–45. Whether Iraq could bring a claim against Agility for the overpayment is not at issue in this appeal. Additionally, our ruling as to the government's offset right is not dependent on whether Agility could potentially face double liability. However, to the extent that Agility could be doubly exposed, Agility could potentially avail itself of procedural avenues for addressing that possibility. *See* RCFC 14(b) (third-party practice); Fed. R. Civ. P. 20 (permissive joinder), 22 (interpleader).

$81 million under the PCO contract. J.A. 1427. Rather, Agility alleged below, the government still owed it approximately $47 million for work performed under the PCO contract. *Id.*

Notably, the Court of Federal Claims denied judicial review of the substantive validity of the United States' overpayment determination. *See Decision*, 143 Fed. Cl. at 171. The Court of Federal Claims reasoned that once the Army contracting officer made the overpayment determination, the determination itself was sufficient to establish a valid "claim" under the DCA and that it was "powerless" to determine otherwise. *Id.* This was legal error.

As noted earlier, a party's challenge to a government offset taken under the DCA is subject to judicial review. This review logically encompasses whether the government correctly assessed an overpayment. To illustrate, if Agility is correct that the government underpaid it rather than overpaid it under the PCO contract, then there would be no erroneous payment of U.S. Funds giving rise to the United States' "claim" under the DCA. In turn, the United States would have "no legal basis for withholding" the money owed to Agility under the DDKS contract based on a debt under the PCO contract, as Agility alleged in its complaint below. J.A. 1439; *see also* J.A. 1443.[4]

Thus, we vacate the decision of the Court of Federal Claims granting judgment in favor of the government. We remand for the Court of Federal Claims to review in the first instance the merits of the United States' overpayment determination under the PCO contract, which serves as the basis for the United States' offset under the DDKS contract.

[4] If the United States underpaid Agility under the PCO contract, Iraq, as the principal to the PCO contract, would be liable to Agility for these underpayments.

II

Agility argues that even assuming the United States' offset under the DCA was valid, the Court of Federal Claims abused its discretion in declining to judicially estop the United States from claiming entitlement to this overpayment. We disagree.

"The decision whether to invoke judicial estoppel lies within the court's discretion, and a refusal to apply the doctrine is reviewed under the 'abuse of discretion' standard." *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996). "The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed." *Id.* Courts will review the following three non-exclusive factors to determine whether judicial estoppel applies:

> (1) whether the party's later position [is] clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (internal quotation marks omitted).

Agility first argues that the United States should be judicially estopped because it "previously maintained" in the *Agility I* litigation "that *all* payments on the PCO Contract were made by *Iraq*, *not* the United States." Appellant's Br. at 47 (emphasis in original). According to Agility,

"[t]hat prior, successful submission forecloses the notion that the U.S. Government paid anything to anyone other than Iraq under the PCO Contract." *Id.* at 47–48. We are not persuaded.

The United States did not assert in *Agility I* that it paid the task orders at issue with Iraqi funds. Rather, the United States maintained that the funds obligated under these task orders were U.S. Funds. Thus, as the Court of Federal Claims determined below, the United States has not advanced an inconsistent position in this appeal with its prior litigation position in *Agility I*. *See Decision*, 143 Fed. Cl. at 172. Regardless, the United States did not persuade the Board or this court in the *Agility I* litigation that it used Iraqi funds to pay the task orders at issue. *See Trustees*, 593 F.3d at 1354. In *Agility I,* the Board noted in its decision that the United States paid the task orders at issue with U.S. Funds. On appeal, we noted that the task orders at issue were paid with "U.S. funds." *Agility I*, 887 F.3d at 1147.

Agility also argues the United States should be judicially estopped because the United States previously contended that it made the offset as a contract administrator for the PCO contract but now maintains that it took the offset separate and apart from its role as a contract administrator. Agility, however, has not shown that the United States persuaded the Board or this court in the *Agility I* litigation to accept the United States' earlier asserted position. *See Trustees*, 593 F.3d at 1354. In *Agility I*, the Board did not substantively address the offset, noting that "there [were] no appeals before us with respect to" the offset. J.A. 2031. On appeal, we reviewed only one issue: whether the CPA was an "executive agency" for purposes of CDA jurisdiction. *See Agility I*, 887 F.3d at 1150. Whether the United States issued an offset to recover the $81 million overpayment as a contract administrator was irrelevant to this jurisdictional issue. Indeed, we made no mention of

the offset in our opinion. Thus, we decline to judicially estop the United States on this ground.

Finally, Agility argues the United States should be judicially estopped because the United States would derive an unfair advantage and impose an unfair detriment on Agility. Specifically, Agility argues the United States is "escap[ing] from liability on Agility's PCO Contract claims . . . while nonetheless collecting on its own behalf in disregard of the essential role of the Iraqi Government as the only party with any *bona fide* claim under the PCO Contract." Appellant's Br. at 52. We reject this argument. First, the terms of the PCO contract gave the United States the unfair advantage of which Agility now complains. Under the PCO contract, Agility waived any rights it could bring against the United States under the contract while the United States reserved the right to bring any claims it otherwise had against Agility. *See* J.A. 2026. Additionally, as noted earlier, the United States has an independent right to the overpayment of U.S. Funds separate and apart from the PCO contract. *See Wurts*, 303 U.S. at 416; *Barrett*, 242 F.3d at 1063; *Aetna*, 526 F.2d at 1130. Thus, the United States gains no unfair advantage by offsetting the overpayment but rather collects a portion of the debt that Agility allegedly owes the United States.

For the above reasons, we determine that the Court of Federal Claims did not abuse its discretion in declining to judicially estop the United States from claiming entitlement to the overpayment.

III

Agility argues that the United States violated the covenant of good faith and fair dealing stemming from the DDKS contract. According to Agility, by taking the offset, the government has "effectively den[ied] Agility a forum for recovering payments" under the DDKS contract "that have been unilaterally withheld." Appellant's Br. at 41–42. We are not persuaded. As demonstrated in this case, both the

Court of Federal Claims and this court have reviewed Agility's argument that the United States is not authorized to take an offset under the DCA because the United States was a contract administrator under the PCO contract. Additionally, the Court of Federal Claims will review the merits of the government's overpayment determination in the first instance on remand. For these reasons, Agility's breach of the covenant of good faith and fair dealing argument fails.

IV

Lastly, Agility argues that the Court of Federal Claims "overlooked" "gaps concerning whether the U.S. Government procedurally complied with the DCA." Appellant's Br. at 53. We agree.

Congress afforded debtors procedural protections under the DCA. In particular, before taking an offset under the DCA, the government is required to provide the debtor with:

> (1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;
>
> (2) an opportunity to inspect and copy the records of the agency related to the claim;
>
> (3) an opportunity for a review within the agency of the decision of the agency related to the claim; and
>
> (4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

31 U.S.C. § 3716(a)(1)–(4).

Here, the Court of Federal Claims concluded in passing that the July 8, 2011, letters and attached bills sent to

Agility "indicate that the Government acted in accordance with the Debt Collection Act." *Decision*, 143 Fed. Cl. at 171. However, upon review, these letters and bills did not provide Agility with all of the required procedural safeguards due under the DCA. These bills arguably provided Agility with notice of the debt and an opportunity for agency review. They, however, do not offer Agility an opportunity to inspect and copy the records of the agency related to the claim or an opportunity to make a written agreement with the head of the agency to repay the amount of the claim. *See* 31 U.S.C. § 3716(a)(2), (4). Thus, the July 8, 2011, letters and bills do not, as a matter of law, establish that the government afforded Agility all of the required DCA procedures.[5] Whether Agility received the required DCA procedures is a material factual dispute which should have precluded judgment in favor of the United States. For this additional reason, we remand for further proceedings.

CONCLUSION

We have considered the parties' remaining arguments and find them unpersuasive. In Appeal No. 19-1886, we

[5] Additionally, the September 2010 demand letters do not, as a matter of law, establish that the government afforded Agility all of the required DCA procedural protections. *See, e.g.*, J.A. 1663. For example, these letters do not mention Agility's right to inspect and copy records of the agency related to the overpayment claim as required under 31 U.S.C. § 3716(a)(2). The government noted in passing for the first time at oral argument, and without citing to any record evidence, that it provided Agility with the records related to the overpayment claim. *See* Oral Arg. at 37:25–37. We decline to consider this new argument, which comes too late. *See Henry v. Dep't of Justice*, 157 F.3d 863, 865 (Fed. Cir. 1998) (declining to consider the government's argument raised for the first time at oral argument).

vacate the judgment below and remand the case for further proceedings. In Appeal No. 19-1887, we affirm the judgment below.

AFFIRMED IN PART, VACATED AND REMANDED IN PART

COSTS

No costs.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1241

In re: FLUOR INTERCONTINENTAL, INC., a California corporation; FLUOR FEDERAL GLOBAL PROJECTS, INC.; FLUOR FEDERAL SERVICES, LLC,

Petitioners.

On Petition for Writ of Mandamus. (1:19-cv-00289-LO-TCB)

Submitted: March 2, 2020 Decided: March 25, 2020

Before DIAZ, THACKER, and RUSHING, Circuit Judges.

Petition granted by unpublished per curiam opinion.

Mark C. Moore, Jennifer S. Cluverius, NEXSEN PRUET, LLC, Greenville, South Carolina; John P. Elwood, Craig D. Margolis, Tirzah S. Lollar, Christian D. Sheehan, Samuel M. Shapiro, ARNOLD & PORTER KAYE SCHOLER LLP, Washington, D.C., for Petitioners. Eric N. Heyer, Thomas O. Mason, THOMPSON HINE LLP, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

On March 13, 2020, we granted a petition by Fluor Intercontinental, Inc., Fluor Federal Global Projects, Inc., and Fluor Federal Services, LLC (collectively "Fluor") for a writ of mandamus. We directed the district court to vacate portions of three orders that required Fluor to produce information over which the district court concluded Fluor had waived attorney-client privilege. We set out our reasons here.

I.

In 2017, Fluor, a government contractor, began an internal investigation of an alleged conflict of interest involving an employee, Steven Anderson, and a company (Relyant Global, LLC) to which Fluor planned to award a contract. Fluor's legal department supervised the investigation, providing advice about Fluor's potential legal exposure and the need to report any wrongdoing to the government. Following its investigation, Fluor terminated Anderson. It also sent a summary of its findings to the government pursuant to 48 C.F.R. § 52.203-13(b)(3)(i), which provides that "[t]he Contractor shall timely disclose, in writing, to the agency Office of the Inspector General . . . whenever . . . the Contractor has credible evidence" that an employee has violated certain federal criminal laws, including the False Claims Act.[1]

[1] In addition to the disclosure requirement, this regulatory regime, called the "Contractor Code of Business Ethics and Conduct," requires government contractors to have a written code of business ethics and conduct, exercise due diligence to prevent and detect criminal conduct, and establish an ongoing business ethics awareness and compliance program as well as an internal control system. *Id.* § 52.203-13(b)–(c). The

The summary of Fluor's findings includes the following statements: (1) "Anderson had a financial interest in and appears to have inappropriately assisted [a] Fluor supplier and potential subcontractor"; (2) "Fluor considers this a violation of its conflict of interest policy and Code of Business Conduct and Ethics"; (3) "Anderson used his position as the [Afghanistan] project manager to pursue Relyant concrete contracts with the German military, and Mr. Anderson used his position as the [Afghanistan] project manager to obtain and improperly disclose nonpublic information to Relyant"; and (4) "Fluor estimates there may have been a financial impact to the Government because Mr. Anderson's labor was charged to the contract task order while he engaged in improper conduct." Pet. Writ of Mandamus 13.

Anderson filed suit against Fluor, asserting claims of, among other things, wrongful termination, defamation, and negligence stemming from Fluor's internal investigation and disclosure to the government. In discovery, Anderson sought copies of Fluor's files regarding the internal investigation. Fluor objected, arguing that the files were protected by attorney-client privilege and the work-product doctrine. Anderson moved to compel production, but a magistrate judge denied the motion, agreeing with Fluor that the files were protected from disclosure.

internal control system must provide for, among other things, "[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions." *Id.* § 52.203-13(c)(2)(ii)(G). The disclosure requirement is meant to "emphasize the critical importance of integrity in contracting." Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064-02, 67071 (Nov. 12, 2008).

On November 8, 2019, the district court overruled (in part) the magistrate judge's order. As relevant here, the court concluded that the four statements described above in Fluor's disclosure to the government revealed "legal conclusions which characterize [Anderson's] conduct in a way that reveals attorney-client communications," Pet. Writ of Mandamus Ex. D, at 10, and thus that Fluor had waived attorney-client privilege as to those statements, other communications on the same subject matter, and the details underlying them, including fact work product. The district court also concluded that Fluor's description of the disclosure as "voluntary" in its answer and counterclaim was a binding judicial admission. And it asserted that 48 C.F.R. § 52.203-13(b)(3)(i) requires only "a mere notice disclosing the fact that the contractor has credible evidence," so Fluor's disclosure of information beyond that fact was voluntary. Pet. Writ of Mandamus Ex. D, at 12 n.1. Fluor moved for reconsideration of the district court's ruling, but the court denied the motion on December 20, 2019.

The magistrate judge then ordered Fluor to produce the relevant internal investigation files. But based on Fluor's representation that it would promptly seek appellate review, the magistrate judge stayed the production order. On February 26, 2020, the district court overruled the magistrate judge's order staying production and ordered Fluor to produce the relevant materials within seven days.

Fluor then sought mandamus relief in our court.

II.

"Mandamus is a 'drastic' remedy that must be reserved for 'extraordinary situations[.]'" *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48, 52 (4th Cir. 2016) (quoting *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976)). We provide mandamus relief "only when (1) petitioner 'ha[s] no other adequate means to attain the relief [it] desires'; (2) petitioner has shown a 'clear and indisputable' right to the requested relief; and (3) the court deems the writ 'appropriate under the circumstances.'" *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004)). As we explain, we conclude that Fluor has satisfied these exacting standards.

A.

We consider first whether Fluor has other adequate means to attain the relief it seeks. Anderson argues that Fluor has available to it three such means—(1) disobey the district court's order, be found in contempt, and appeal the contempt order; (2) seek certification of an interlocutory appeal under 28 U.S.C. § 1292(b); and (3) appeal after final judgment.

But under the circumstances of this case, we cannot agree that these means are adequate. As to appealing from a contempt order, we have previously held that "such an appellate remedy is hardly 'adequate.'" *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (noting that "forcing a party to go into contempt is not an 'adequate' means of relief"). As we have explained, a civil contempt sanction is not immediately appealable as an interlocutory order. *United States v. Myers*, 593 F.3d 338, 344 (4th Cir. 2010). And while

"a party to an action may immediately appeal an order of *criminal* contempt," Fluor couldn't have known in advance "whether the [d]istrict [c]ourt would punish its disobedience with an appealable criminal sanction or an 'onerously coercive civil contempt sanction with no means of review until the perhaps far distant day of final judgment.'" *See In re The City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice and Procedure* § 3914.23, at 146 (2d ed. 1992)).

As to seeking certification of an interlocutory appeal under § 1292(b), we agree with Fluor that this means of relief is inadequate in light of the district court's suggestion that such an effort would be futile. When considering the magistrate judge's order staying production, the district court evaluated Fluor's likelihood of success on appeal. In doing so, it noted that, despite Fluor's "significant briefing and argument," Fluor "ha[d] not gone so far as to identify specific grounds which will satisfy the preconditions for [interlocutory appeal]." Pet. Writ of Mandamus Ex. K, at 8.

Nor are we satisfied that appealing after a final judgment is an adequate means of relief here. True, in *Mohawk Industries, Inc. v. Carpenter*, the Supreme Court concluded that post-judgment appeals are generally adequate means of relief from disclosure orders adverse to attorney-client privilege. 558 U.S. 100, 109 (2009). But it also noted that in "extraordinary circumstances," such as "when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice," a party may still "petition the court of appeals for a writ of mandamus." *Id.* at 111 (quoting *Cheney*, 542 U.S. at 390).

We conclude that such circumstances are present in this case. First, for the reasons discussed below, the district court's ruling that Fluor's disclosure waived attorney-client privilege is clearly and indisputably incorrect. Second, the ruling implicates "the important legal principles that protect attorney-client relationships," which we recently "elucidate[d]" in *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 172–74 (4th Cir. 2019). Third, requiring Fluor to produce privileged materials is particularly injurious here, where Fluor acted pursuant to a regulatory scheme mandating disclosure of potential wrongdoing. Government contractors should not fear waiving attorney-client privilege in these circumstances. We think that together, these circumstances work a manifest injustice.

For these reasons, we conclude that Fluor has no other adequate means to attain the relief it desires.

B.

We consider next whether Fluor has shown a clear and indisputable right to relief. Fluor contends that it has done so as to three erroneous conclusions by the district court: (1) that Fluor's disclosure revealed attorney-client communications and thus waived attorney-client privilege, (2) that Fluor's disclosure was voluntary under 48 C.F.R. § 52.203-13, and (3) that Fluor's description of the disclosure as "voluntary" in its answer and counterclaim was a binding judicial admission. We agree that the district court clearly and indisputably erred as to the first conclusion, and so find it unnecessary to address the others.

The district court overruled the magistrate judge's denial of Anderson's motion to compel production of the internal investigation files because it concluded that the four

statements described above in Fluor's disclosure to the government waived attorney-client privilege. It focused on the following portions of the statements: "(i) Plaintiff 'appears to have inappropriately assisted . . .'; (ii) 'Fluor considers [that] a violation . . .'; (iii) Plaintiff 'used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information . . .'; and (iv) 'Fluor estimates there may have been a financial impact . . . [due to] improper conduct.'" Pet. Writ of Mandamus Ex. D, at 9–10.

According to the district court, because these four statements are "conclusions which only a lawyer is qualified to make," *id.* at 10 (quoting *In re Allen*, 106 F.3d 582, 605 (4th Cir. 1997)), they revealed attorney-client communications and thereby waived attorney-client privilege. Respectfully, the district court's conclusion was clearly and indisputably incorrect.

To find waiver, a court must find that there has been "disclosure of a communication or information covered by the attorney-client privilege or work-product protection." Fed. R. Evid. 502. But we will not infer a waiver merely because a party's disclosure covers "the same topic" as that on which it had sought legal advice. *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 885 F.3d 271, 276 (4th Cir. 2018); *see also United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney.' In order to waive the privilege, the client must disclose the communication with the attorney itself." (internal citation omitted)).

Relatedly, in determining whether there has been disclosure of a communication covered by the attorney-client privilege, we distinguish between disclosures based on the

advice of an attorney, on the one hand, and the underlying attorney-client communication itself, on the other. *See In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003). In *In re Grand Jury Subpoena*, we considered whether the appellant waived attorney-client privilege by answering "no" to a question on a publicly filed document based on the advice of his attorney, and whether the appellant waived privilege by telling FBI agents that he answered "no" to the question "under the advice of an attorney." *Id.* at 334, 336.

We concluded that the appellant's statement—based on the advice of his attorney—on a publicly filed document did not waive privilege. *Id.* at 336. We explained that "[t]he underlying *communications* between Counsel and Appellant regarding his submission of [the publicly filed document] are privileged, regardless of the fact that those communications may have assisted him in answering questions in a public document." *Id.* Put differently, "Appellant filled out and submitted [the publicly filed document] himself; that he may have answered a question in a particular way on the advice of his attorney does not subject the underlying attorney-client communications to disclosure." *Id.* Ruling otherwise, we noted, "would lead to the untenable result that any attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—would be unprotected." *Id.*

But, as to the appellant's statements to the FBI agents, we concluded that he waived attorney-client privilege because he "clearly stated to a third party that his attorney had advised him to answer 'no'" to the relevant question, thereby disclosing the content of the underlying attorney-client communication itself. *Id.* at 337.

These principles reveal the clear and indisputable error in the district court's assertion that Fluor's disclosure contained "legal conclusions as to past events, as well as recommendations for future conduct, [] conclusions which only a lawyer is qualified to make." Pet. Writ of Mandamus Ex. D, at 10 (quoting *In re Allen*, 106 F.3d at 605). Setting aside whether Fluor's statements were in fact legal conclusions that only a lawyer could make, that is not the test for whether waiver of attorney-client privilege has occurred.[2] Instead, to find waiver, a court must conclude that there has been disclosure of *protected communications*.

As applied here, the fact that Fluor's disclosure covered the same topic as the internal investigation or that it was made pursuant to the advice of counsel doesn't mean that privileged communications themselves were disclosed. The district court clearly and indisputably erred in finding otherwise.

We also disagree with the district court's conclusion that this case is similar to *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). On the contrary, that case highlights the problem with the district court's determination that Fluor disclosed privileged communications. There, we concluded that the appellant waived privilege over protected internal audit interviews because its disclosure to the government quoted from the interviews, and it waived privilege over protected internal notes and memoranda on the

[2] As Fluor correctly notes, *In re Allen* has nothing to do with waiver. There, we held simply that because documents prepared by a lawyer contained legal conclusions that only an attorney was qualified to make, the documents were prepared in the attorney's capacity as an attorney rather than as a lay investigator. 106 F.3d at 605.

interviews because the disclosure "summariz[ed] in substance and format the interview results." *Id.* at 626 n.2. For example, the disclosure stated that "'of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud,' and 'there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its [] contract.'" *Id.* at 623. By directly quoting and summarizing what employees had said to counsel in the interviews, the appellant in *In re Martin Marietta Corp.* revealed privileged communications.

But here, there is no evidence to suggest that the four statements in Fluor's disclosure quoted privileged communications or summarized them in substance and format. Rather, the statements do no more than describe Fluor's general conclusions about the propriety of Anderson's conduct. We are unwilling to infer a waiver of privilege on these facts. The most that can be inferred from this record is that Fluor's statements were based on the advice of its counsel. Because that is clearly and indisputably insufficient to show waiver, Fluor has shown a clear and indisputable right to relief.

C.

Lastly, we are satisfied that a writ is appropriate under the circumstances. In addition to being manifestly incorrect, the district court's decision has potentially far-reaching consequences for companies subject to 48 C.F.R. § 52.201-13 and other similar disclosure requirements. We struggle to envision how any company could disclose credible evidence of unlawful activity without also disclosing its conclusion, often based

on the advice of its counsel, that such activity has occurred. More likely, companies would err on the side of making vague or incomplete disclosures, a result patently at odds with the policy objectives of the regulatory disclosure regime at issue in this case.

The district court's decision also introduces uncertainty and irregularity into waiver determinations. Whether a conclusion is one that only an attorney could make is a subjective determination that will likely depend on the particular legal question at issue. The Supreme Court has stated that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). We agree, and therefore find it necessary to issue the writ here.

***

For the reasons given, we grant Fluor's petition for a writ of mandamus on the terms set out in our March 13 order.

PETITION GRANTED

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Odyssey International, Inc.	)	ASBCA No. 62062
	)	
Under Contract No. W912DR-15-C-0038	)	

APPEARANCES FOR THE APPELLANT: Brian C. Johnson, Esq.
H. Burt Ringwood, Esq.
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Salt Lake City, UT

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Scott C. Seufert, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Baltimore

OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS

Pending before the Board is the motion to dismiss for lack of jurisdiction submitted by respondent, the United States Army Corps of Engineers (government). The government alleges that the Board lacks jurisdiction to entertain Counts I, II, and III of the complaint filed by appellant, Odyssey International, Inc. (Odyssey), because they were not presented to the contracting officer for a final decision. The government additionally asserts that the Board lacks jurisdiction to entertain Odyssey's claim for consequential damages because the asserted damages are too remote and speculative, because Odyssey does not assert a sum certain, and because they were not presented to the contracting officer. For the reasons stated below, we grant the government's motion to dismiss with regard to Odyssey's claim for consequential damages (compl. ¶ 123), Count I regarding contract withholding (compl. ¶¶ 125.c, 128) and Count II regarding an implied-in-fact contract for payment of invoices or to respond to requests for information (RFI) within 14 days (compl. ¶¶ 133-137). We deny the government's motion with regard to the remainder of Odyssey's complaint.

STATMENT OF FACTS (SOF) FOR PURPOSES OF THE GOVERNMENT'S MOTION

The government awarded contract W912DR-15-C-0038 for construction of the Component Rebuild Facility at the Letterkenny Army Depot, Chambersburg,

Pennsylvania, to Odyssey on September 28, 2015 (compl. ¶ 30).[1] The design for the building included the use of "micropiles," a building foundation system that involves drilling small diameter holes into bedrock and inserting grout into any voids in the rock before inserting a metal pole and casing (compl. ¶ 17). The solicitation for the contract informed bidders to assume that two micropiles would be installed at each pile cap, for a total of 60 micropiles, with each micropile drilled to a depth of 10 feet into bedrock, with 15 feet of overburden soil (compl. ¶¶ 19-20). However, the solicitation also provided that the contractor would assume responsibility for the design and performance of the micropile foundation system, and that the contractor would need to obtain government approval for the micropile design (compl. ¶¶ 21-22). Odyssey raised micropile design issues at the preconstruction meeting on November 12, 2015, and the government told Odyssey to submit an RFI regarding the issue (compl. ¶¶ 36-37). Odyssey submitted an RFI, and in response, the government told it to prepare its micropile system design "independent of the assumptions provided in the contract for bidding purposes" (compl. ¶ 40). On March 16, 2016, Odyssey submitted another RFI to the government in which it described its increased costs for the micropile design recommended by its engineering subcontractor, and provided an alternative proposal that would be less expensive (compl. ¶ 45). Odyssey's micropile design called for the use of 80 micropiles, rather than the 60 micropiles specified for bidding purposes. The micropiles additionally were to be installed at greater depth than specified for bidding purposes, resulting in additional costs to Odyssey. (R4, tab 3a at 4-5) The increased costs for the micropile system were discussed in various meetings between Odyssey and the government, and on April 22, 2016 the government responded to Odyssey's RFI, stating in part that a request for proposal (RFP) would be issued to address the increased costs of the micropile design (compl. ¶¶ 46-49). On May 10, 2016, the government issued an RFP for the additional costs of the proposed micropile system as compared to the system specified for bidding purposes (compl. ¶¶ 50-51). The following day, May 11, 2016, Odyssey submitted its proposal in response to the RFP seeking $512,162.74 and 116 days of additional time (compl. ¶ 52). The government approved Odyssey's micropile design on May 13, 2016 (this approval did not address costs or delays) (compl. ¶ 56).

Upon receipt of government approval of the micropile design, Odyssey did not begin work, because the government had previously informed it that the RFP for additional micropile costs was not a notice to proceed and that it should not commence work on the subject of the RFP without a signed modification or directive to proceed (compl. ¶ 51). On May 18, 2016, Project Engineer and Contracting Officer's Representative Barry Treece and Contracting Officer's Representative Remigio Bollana, in separate email communications, told Odyssey to begin work on the micropiles despite the lack of an executed modification (compl. ¶¶ 59-61). Odyssey interpreted the emails

[1] Odyssey's non-jurisdictional factual allegations are assumed to be true for the purpose of this motion.

as a change order from the government and began work on the micropile foundation (compl. ¶ 62).

By letter dated June 2, 2016, the government canceled the proposed contractual change requested in the May 10, 2016 RFP (compl. ¶ 64). On August 2, 2016, the government informed Odyssey by letter that it was considering a change to the contract that would compensate Odyssey for 8 of the 20 additional micropiles (compl. ¶ 91). On September 23, 2016, the parties entered into a modification of the contract that compensated Odyssey in the amount of $54,800 and 4 additional days for the 8 additional micropiles (compl. ¶¶ 93-94). On January 23, 2017, Odyssey filed a request for equitable adjustment (REA) seeking compensation for the additional micropile costs (compl. ¶ 97). On March 27, 2017, the government found partial merit in Odyssey's REA and offered to settle for $141,400 plus 43 non-compensatory days (compl. ¶ 98). Odyssey rejected the government's offer on April 20, 2017 (compl. ¶ 99). On August 30, 2018, Odyssey submitted a second REA that was denied by the government on October 5, 2018 (compl. ¶¶ 112-13).

On January 8, 2019, Odyssey submitted a claim to the contacting officer. As the government's motion to dismiss for failure to submit its claims to the contracting officer depends upon the facts and legal theories asserted in Odyssey's claim, the allegations contained in the claim are addressed in detail. Odyssey's claim states that it is for "additional time, subcontract costs and extended overhead." (R4, tab 3a at 2) Odyssey asserts in its claim that it was concerned with the specification for contract line item (CLIN) 007 stating that, "[f]or bidding purposes, the contractor shall assume that 2 micropiles will be installed at each pile cap, with each micropile drilled to a depth of 10 feet into bedrock, with 15 feet of overburden soil" (*id.*). Odyssey encountered problems because the contracting officer failed to provide direction regarding the location of probe holes and its drill and probe logs show that it had to drill deeper than specified in the criteria for bidding (*id.* at 3). In addition, the severely fractured bedrock and massive voids were unforeseen site conditions that caused Odyssey to incur additional costs (*id.* at 3-4).

Odyssey's claim states that the criteria for bidding specified 60 micropiles of 20 feet each, for a total of 1,200 linear feet, but that it was required to drill 80 probe holes with a total depth of 2,215 feet, or 1,015 additional linear feet[2] (*id.* at 4). This added depth required the use of an additional 1,015 linear feet of micropile casing and reinforcing bar (*id.*). Odyssey attempted to raise these issues at the preconstruction meeting, but was told by the government to submit an RFI (*id.*). Odyssey submitted

[2] Odyssey inconsistently states elsewhere in its claim that the criteria for bidding required 60 micropiles of 25 feet for a total of 1,500 linear feet and that it actually drilled 2,520 linear feet, or an additional 1,020 linear feet (R4, tab 3a at 3).

the RFI on November 23 and, in response, the government told Odyssey to submit its micropile design independent of the bidding assumptions (*id.* at 5). The government directed Odyssey to use additional micropiles in some areas and indicated that additional micropiles would be needed in other areas to meet loading requirements, and this increased the number of micropiles from 60 to 80 (*id.*). Odyssey proposed an alternative method for soil stabilization but this was rejected by the government (*id.*). The government approved Odyssey's micropile design on May 13, 2016 (*id.*).

Odyssey's subcontractor responsible for the micropiles, Hills-Carnes, bid its subcontract based on the assumption of 60 micropiles contained in the solicitation (*id.*). The government repeatedly told Odyssey that it would receive an RFP and modification to pay for the additional micropiles and that there would be a unit cost line for additional grout (*id.* at 5-6). After the government approved Odyssey's micropile design including 80 micropiles, Odyssey's subcontractor costs increased from $221,516.80 to $510,643.00 for the extra piles (*id.* at 6). The extra depth and grout overages increased the total subcontractor costs to $613,913.65 (*id.*).

On May 10, 2016, Odyssey received the government's RFP for the increased costs of the micropile system as compared to the bidding assumptions (*id.*). Odyssey submitted its proposal for $512,162.74 and 116 additional days to the government on May 11, 2016 (*id.*). In an email chain on May 11, 2016, government employee Mike Notto stated that "the Government is in agreement that there are additional costs associated with performing the work to meet this contract requirement, as indicated in the RFP letter" and requested that Odyssey provide back-up documentation for its estimate of additional grout (*id.*).

While the RFP was under consideration, the government indicated that Odyssey was delaying the project (*id.* at 6-7). However, Odyssey's claim asserts that the government's delay in approving the micropile design delayed Odyssey's performance (*id.*). Odyssey indicated that it could not proceed with the micropile work without direction from the government (*id.* at 7). Once the government approved the micropile design Odyssey began work due to pressure from the government and on the basis of the RFP (*id.*). However, on June 2, 2016, the government cancelled the RFP for the change to the micropile work (*id.* at 8). The government did compensate Odyssey in a modification for 8 of the 20 additional micropiles, but not the associated additional drill depth of those 8 micropiles (*id.*). In the claim, filed on January 8, 2019, Odyssey asserted entitlement to 357 additional compensable days and $651,099.13 (*id.* at 9-10). On April 8, 2019, the government's contracting officer issued a final decision denying Odyssey's claim (compl. ¶ 88). Odyssey timely appealed the final decision to the Board.

DECISION

The government moves to dismiss each count of Odyssey's complaint for failure to submit the claims to the contracting officer for decision. The government additionally moves to dismiss Odyssey's claim for consequential damages as too remote and vague to recover, for failure to state a sum certain, and because the claim was not presented to the contracting officer for a decision.

I. Standard of Review for Motions to Dismiss

Odyssey bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277 at 173,156. Pursuant to the Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-09, a contractor may, "within 90 days from the date of receipt of a contracting officer's decision" under 41 U.S.C. § 7103 appeal the decision to an agency board. 41 U.S.C. § 7104(a). Our reviewing court, The Court of Appeals for the Federal Circuit, has held that CDA jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

II. Consequential Damages

Odyssey's complaint includes a claim for consequential damages in an amount of "at least $15,033,862" (compl. ¶ 123). The government moves to dismiss this portion of the complaint as speculative, for failure to state a sum certain, and because the claim for consequential damages was not presented to the contracting officer.

The Board has long held that qualifications to a numerical amount, such as the use of the word "approximately," "no less than," or "well over" prevent its consideration as a sum certain. *See, e.g., M.J. Hughes Constr. Inc.*, ASBCA No. 61782, 19-1 BCA ¶ 37,235 at 181,235 (citing cases holding that expressing a minimum amount for a claim does not state a sum certain). In fact, Board precedent has specifically held that a claim amount prefaced by the specific phrase "at least" fails to state a sum certain. *Precision Standard, Inc.*, ASBCA No. 55865, 11-1 BCA ¶ 34,669 at 170,788.

Odyssey argues that the sum certain requirement is a triumph of form over substance and that all Board precedent "is suspect because those decisions give unwarranted deference to the regulations' definition of a 'claim,' and that definition runs afoul of clear Congressional intent, at least in this instance" (app. resp. at 12). We are bound by our precedent, including *Precision Standard* and therefore must

dismiss Odyssey's request for consequential damages. *Precision Standard*, 11-1 BCA ¶ 34,669 at 170,788; *see also SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,220 (explaining that a prior three judge decision by this Board is binding precedent for future panels). In any event, reliance upon the FAR's definition of a claim is well-settled law as expressed by our reviewing court, the United States Court of Appeals for the Federal Circuit. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).

As we hold that Odyssey's demand for consequential damages must be dismissed for failure to state a sum certain, we need not reach the government's other arguments; though we would view these claims with some skepticism were they properly before us as they indeed appear speculative. *See John Shaw, LLC d/b/a Shaw Building Maintenance*, ASBCA Nos. 61379, 61585, 19-1 BCA ¶ 37,216 at 181,184 (citing *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1325 (Fed Cir. 2002). Moreover, we note that Odyssey's claim stated that it was for "additional time, subcontract costs and extended overhead" (R4, tab 3a at 2). Odyssey's demand for consequential damages relies upon facts regarding its expected profits from this contact, and how it would have used these anticipated profits to increase its bonding capacity to take on additional contracts (compl. ¶¶ 119-23). These facts were not alleged in Odyssey's claim and we find, as an alternative basis for our holding, that this constitutes a new claim. Thus, we grant the government's motion with regard to Odyssey's demand for consequential damages.

III. Count I – Breach of Express Contract

Count I of Odyssey's complaint asserts a breach of contract. Odyssey asserts that the government breached a contractual duty to adjust for increased costs when it approves a shop drawing, such as the micropile system design, that contains variations in the requirements of the contract (compl. ¶¶ 125.a, 126). Odyssey additionally alleges breach of the duty to issue an equitable adjustment following the government's alleged change order forcing Odyssey to begin performance of the micropile system before issuing a modification based on the RFP (compl. ¶¶ 59-62, 125.b, 127). Odyssey next alleges a breach of the government's obligation to make payment within 14 days of receipt of an invoice approved by the contracting officer (compl. ¶ 125.c, 128). Odyssey also alleges breach of an express and enforceable contract created by the government's promise to issue an RFP regarding the micropile system (compl. ¶ 129) and a breach of contractual obligations by frustrating Odyssey's performance (compl. ¶ 130). The government moves to dismiss Count I of the complaint because Odyssey did not present these claims to the contracting officer for a final decision (gov't mot. at 12-14).

The Board has recognized that it possesses jurisdiction to entertain an appeal, when the theory of recovery is different than the theory presented in the claims, so

long as they both are based on substantially the same operative facts. *Macro-Z Technology,* ASBCA No. 60592, 19-1 BCA ¶ 37,358 at 181,659. Moreover, "[t]he test for what constitutes a 'new' claim is whether 'claims are based on a common or related set of operative facts.'" *Unconventional Concepts, Inc.*, ASBCA No. 56065 *et al.*, 10-1 BCA ¶ 34,340 at 169,591 (quoting *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). Adding facts or legal arguments does not create a different claim. *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015). "The introduction of additional facts which do not alter the nature of the original claim . . . or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims." *Trepte Constr. Co. Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. A claim is new when it "'present[s] a materially different factual or legal theory' of relief." *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *K-Con Bldg. Sys., Inc.*, 778 F.3d at 1006). "Materially different claims 'will necessitate a focus on a different or unrelated set of operative facts.'" *Id.* (quoting *Placeway Constr.*, 920 F.2d at 907).

Odyssey's Count I contains at least five breach of contract theories. The main theory, that the government had a duty to adjust for increased costs when it approved a shop drawing, relies upon the fact that the solicitation had assumptions for bidding purposes and that Odyssey was required to seek government approval for a micropile design that differed from the bidding assumptions. These facts were included in Odyssey's claim (R4, tab 3a at 3-8), although Odyssey's claim asserted constructive change, a different legal theory. Here, we find Odyssey's breach of contract by failing to adjust for the increased micropile costs is the same claim for CDA jurisdictional purposes.

Odyssey's second breach theory in Count I is that the government failed to issue a modification after a change order. This theory relies on the asserted facts that the government promised a contract modification and forced Odyssey to begin work before the change order was issued. Once again, we find that Odyssey asserted these facts in its claim (R4, tab 3a at 6-8) and that it is the same claim despite being a new legal theory.[3]

Odyssey's third asserted breach of contract in Count I alleges that the government failed to make prompt payment of invoices approved by the contracting officer. This breach depends on facts regarding the government's alleged arbitrary

[3] We note that the government's motion seeks dismissal only on the basis that the claim was not submitted to the contacting officer. Odyssey's claim may be subject to dismissal for failure to allege the necessary elements of a contract, such as authority of the government official entering into the purported agreement.

withholding of contract funds. These facts were not included in Odyssey's claim and we find that this is a new claim that we lack jurisdiction to entertain.

Odyssey's fourth asserted breach in Count I is the breach of an express and enforceable contract created by the government's promise to issue an RFP. This breach basically depends on the same facts as Odyssey's alleged breach due to the government's failure to issue a change order discussed above. Once again, this is a new legal theory based on the same facts.

We interpret Odyssey's fifth asserted breach in Claim I, that the government frustrated its contract performance, as a claim for delay costs that would depend on facts related to delays in the government's review of the micropile design and find that these facts were asserted in Odyssey's claim (R4, tab 3a at 3-8). Thus, we grant the government's motion to dismiss with regard to Odyssey's claim regarding contract withholding (compl. ¶¶ 125.c, 128), but deny the government's motion with regard to the remainder of Count I.

IV. Count II – Breach of Implied-In-Fact Contract

Count II of Odyssey's complaint asserts breach of an implied-in-fact contract. The complaint is vague as to the terms of the implied-in-fact contract, but we read it to assert an implied-in-fact contract to compensate Odyssey for the additional micropiles, to pay Odyssey's invoices after approval by the contracting officer's representative, and to respond to RFIs within 14 days. To the extent Odyssey asserts an implied-in-fact contract for additional compensation for the micropiles (compl. ¶ 133), and for the same reasons stated with regard to Count I, we find that this is a new legal theory based upon facts asserted in its claim[4] (R4, tab 3a at 3-8). To the extent Odyssey's complaint asserts an implied-in-fact contract regarding the government's payment of invoices (compl. ¶ 134), these facts were not alleged in Odyssey's claim and we find that this portion of Count II is a new claim. Additionally, to the extent Odyssey's complaint asserts an implied-in-fact contract to respond to RFI's within 14 days (compl. ¶ 135), this also relies upon facts not alleged in Odyssey's claim and thus, represents a new claim. We deny the government's motion to dismiss Count II of Odyssey's complaint to the extent Odyssey asserts an implied-in-fact contract for compensation regarding the additional micropiles. We grant the government's motion to dismiss Count II of

[4] Once again, we note again that the government's motion was based upon failure to submit the claim to the contracting officer, and that the count may suffer from additional jurisdictional problems. In addition to problems identified in footnote 3, *supra*, we note that an implied-in-fact contract cannot exist where a written contract addresses the same issue. *See, e.g., Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997).

Odyssey's complaint to the extent Odyssey asserts an implied-in-fact contract for payment of invoices or to respond to RFI's within 14 days.

V. Count III – Breach of the Implied Covenant of Good Faith and Fair Dealing

In Count III of its complaint, Odyssey asserts a breach of the duty of good faith and fair dealing (compl. ¶¶ 140-44). Every contract "imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting Restatement (Second) of Contracts § 205 (1981)). This duty of good faith and fair dealing "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id.* at 991 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). However, the implicit duty prevents a contracting party from "interfer[ing] with the other party's performance and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*." *Id.* (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (emphasis in original)). We recently explained that "the doctrine imposes duties that fall within the broad outlines set forth by the express terms of the contract, approximating the parties' intent, as divined by the express terms of the contract, for addressing circumstances not specifically set forth by the contract." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539.

Odyssey's complaint alleges that the government breached the duty of good faith and fair dealing by failing to fairly compensate it for the costs of the micropile design and delays (compl. ¶¶ 142-43). Although Odyssey's complaint contains an extended discussion with new factual allegations regarding the government's purportedly improper actions, Odyssey does not rely upon these facts in Count III of its complaint. Instead, Count III of its complaint relies upon a duty for the government to compensate it for the costs of the micropile design. These facts were asserted in its claim (R4, tab 3a at 3-8), and therefore, we find that Odyssey is asserting a new legal theory based on the same facts as contained in its claim. Accordingly, we deny the government's motion to dismiss Count III.

CONCLUSION

For the reasons stated above, we grant the government's motion to dismiss with regard to Odyssey's claim for consequential damages (compl. ¶ 123)[5], and Count I regarding contract withholding (compl. ¶¶ 125.c, 128), Count II regarding an

[5] We note that on December 4, 2019, the Board docketed as ASBCA No. 62279, Odyssey's appeal from a Contracting Officer's Final Decision denying Odyssey's claim for consequential damages.

implied-in-fact contract for payment of invoices or to respond to RFIs within 14 days (compl. ¶¶ 133-37). We deny the government's motion with regard to Odyssey's remaining claims.

Dated: January 28, 2019

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. 62062, Appeal of Odyssey International, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kamaludin Slyman CSC	)	ASBCA Nos. 62006, 62007, 62008
	)	
Under Contract No. H92237-12-C-0089	)	

APPEARANCES FOR THE APPELLANT:	Bryant S. Banes, Esq. Sean D. Forbes, Esq. Neel, Hooper & Banes, P.C. Houston, TX
APPEARANCES FOR THE GOVERNMENT:	Jeffrey P. Hildebrant, Esq. Air Force Deputy Chief Trial Attorney Christopher M. Judge, Esq. Kyle E. Gilbertson, Esq. Trial Attorneys

DECISION OF THE BOARD BY THE SENIOR DECIDING GROUP

OPINION BY ADMINISTRATIVE JUDGE PROUTY

For more than a decade, this Board has held that a typed signature block does not meet the requirement for a signature necessary for claims certification pursuant to the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, (CDA). *See, e.g.*, *NileCo General Contracting LLC*, ASBCA No. 60912, 17-1 BCA ¶ 36,862; *ABS Development Corp*., ASBCA No. 60022 *et al*., 16-1 BCA ¶ 36,564; *Tokyo Company*, ASBCA No. 59059, 14-1 BCA ¶ 35,590; *Teknocraft Inc*., ASBCA No. 55438, 08-1 BCA ¶ 33,846. We have, however, also held that a "digital signature," created by software requiring the use of some sort of unique identification, could satisfy the CDA's certification requirement. *URS Federal Servs., Inc.*, ASBCA No. 61443, 19-1 BCA ¶ 37,448. Although e-commerce has been with us for longer than the period of time encompassed by these decisions, the Board's own movement to an e-filing system, the continued increase in the use of digital conventions for transacting business in greater society, and the implications of our reasoning in *URS* have given us reason to revisit the subject.[1] The matter before us, in which we decide a government motion to dismiss appellant Kamaludin Slyman Construction and Supply Company's (Kamaludin's) appeals for failure to originate upon a claim certified with what the government considers to be a proper signature, presents us such an opportunity. Today, we hold that, so long as a mark purporting to act as a

[1] Because we have precedent of our own directly on point, any change of this rule of law for the Board must be accomplished through the Senior Deciding Group, unless it is reversed by our reviewing court, the Court of Appeals for the Federal Circuit. *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,220.

signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The Combined Joint Special Operations Task Force-Afghanistan awarded the above-captioned contract (the contract) to Kamaludin for the lease of certain heavy equipment in Afghanistan on December 23, 2011. The box identifying Kamaludin on the first page of the contract included the email address, K***.[2] In addition to many other provisions, the contract incorporated by reference the standard Federal Acquisition Regulation (FAR) Disputes clause, FAR 52.233-1, DISPUTES. (R4, tab 14 at 1, 4, 8) The Disputes clause requires that any claim exceeding $100,000 be certified. FAR 52.233-1(d)(2)(i).

By letter dated March 16, 2013, Kamaludin submitted a demand for payment in the amount of $155,500.00. Kamaludin's letter alleged that the government breached the contract by moving the equipment from the agreed upon place of performance to two different locations and also kept the equipment for five months after the lease expired. The letter contained a subject line which stated, "Letter of Claim." It also contained a handwritten signature from Kamaludin's president. The letter did not contain any reference to the CDA's claim certification language. (R4, tab 19 at 4)

An email to the Air Force dated March 11, 2019 from the K*** email address is below reproduced exactly as it appeared:

Hey Sir,

For contract numbers -12-C-0089, -12-C-0131, -11-C-0322, and the claims submitted in respect to them on March 16, 2013, I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

Sincerely,
Kamaludin Slyman

(R4, tab 19 at 1; tab 20 at 1[3])

[2] Following our usual practice, we do not replicate the full email address in this published decision, but represent it as K*** throughout.

[3] The email received by the government, as reproduced in tab 19 of the Rule 4 file, automatically reduced the email address in the "From" header to "Kamaludin Slyman," but, as reflected in tab 20 of the Rule 4 file, the same email was forwarded by Kamaludin's counsel to the government and, in its forwarded state,

On March 14, 2019, Kamaludin filed a notice of appeal with the Board, which we docketed as ASBCA No. 62006.[4] The notice of appeal stated that this was an appeal from the deemed denial of appellant's March 16, 2013 claim.[5]

DECISION

I. A CDA Claim in an Amount Greater Than $100,000 Must be Certified, Which Requires a Signature.

The CDA requires the certification of claims "of more than $100,000." 41 U.S.C. § 7103(b). This certification is required to be "executed by an individual authorized to bind the contractor with respect to the claim" and must state that:

> (A) the claim is made in good faith;
>
> (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
>
> (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

the reproduction also includes the K*** email address in brackets next to the Kamaludin Slyman name in the "From" header.

[4] Appellant has two additional appeals (ASBCA Nos. 62007 and 62008), which are consolidated with this appeal. The allegations in those appeals involve claims under $100,000. As such, the adequacy of the claim certification has no bearing on our jurisdiction in those appeals. We also note that the government's motion sought dismissal for failure to state a claim upon which relief can be granted in ASBCA No. 62007. We will not address that portion of the government's motion in this decision given that nothing in it requires consideration by the Senior Deciding Group.

[5] Nearly six years passed between appellant's demand for payment and its notice of appeal. However, only three days passed between appellant's purported claim certification and its notice of appeal. The government had the opportunity to argue that the appeal was premature when it filed its motion to dismiss on April 30, 2019. Instead, perhaps understandably, the government chose to focus its motion on the adequacy of the claim certification. At this point, far more than 60 days have passed from the date of the claim certification and the contracting officer has not issued a final decision. Under the circumstances, we see no useful purpose in dismissing the appeal as premature and requiring appellant to refile. *See ABS Development Corp.*, ASBCA No. 61042 *et al.*, 17-1 BCA ¶ 36,784.

(D) the certifier is authorized to certify the claim on behalf of the contractor.

41 U.S.C. § 7103(b).

"It is well settled that certification is a jurisdictional prerequisite for this Board for contractor claims over $100,000." *Special Operative Grp., LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860 at 171,480 (citation omitted). Although a defective certification does not deprive the Board of jurisdiction, 41 U.S.C § 7103(b)(3), the failure to certify at all does deprive the Board of jurisdiction and mandates dismissal. *Special Operative Group*, 11-2 BCA ¶ 34,680 at 171,480; *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1BCA ¶ 35,700 at 174,816; *Baghdadi Swords Co*., ASBCA No. 58539, 13 BCA ¶ 35,395 at 173,665.

And, as far as the law is concerned, an unsigned certification is considered to be not merely defective, but no certification at all. This is because the "execution" of a CDA certification requires a "certifier to sign the claim certification," *Teknocraft*, 08-1 BCA ¶ 33,846 at 167,504 (citing *Hawaii CyberSpace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455 at 160,535), thus making the failure to sign the certification language into the equivalent of "failure to certify," which may not be remedied. *Hawaii CyberSpace*, 04-1 BCA ¶ 32,455 at 160,535; *see also Tokyo Company*, 14-1 BCA ¶ 35,590 at 174,392.[6]

II. What Makes a Valid Signature?

The CDA does not define signature, thus we turn to the FAR for its definition.[7] *See, e.g.*, *URS*, 19-1 BCA ¶ 37,448 at 181,967. There, it is defined as "the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic symbols." FAR 2.101. In the past, we have looked at this definition as having two components: whether the symbol purporting to be the signature is "discrete" and whether it is "verifiable," with "verifiable" being the more critical of the two terms. *E.g.*, *URS*, 19-1 BCA ¶ 37,448 at 181,967-68. Here, we think it may also be helpful to consider a third element: whether the symbol indicates the present intention to authenticate the writing to which it is affixed.

[6] Judge Hartman's concurrence in result contends that the Federal Circuit's recent decision in *Dai Global, LLC v. Adm'r of the U.S. Agency for Int'l Dev*., 945 F.3d 1196 (Fed. Cir. 2019), has effectively overruled these cases. Without deciding the matter, we are not so certain that *Dai Global* goes that far. In any event, because we find herein that the certification was signed, we do not reach the issue of whether lack of signature is a curable defect.

[7] The FAR has been used elsewhere to flesh out the meaning of terms in the CDA, notably, for the pivotal word, "claim." *E.g.*, *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564-65 (Fed. Cir. 1995).

A. The Meaning of a "Discrete" Symbol

In *URS* we selected a typical dictionary definition of "discrete," which was that it was "separate and distinct." *URS*, 19-1 BCA ¶ 37,448 at 181,968. This remains a satisfactory definition.

B. "Verifiable" Means That a Mark Can Be Tied to an Individual

URS turned on the meaning of "verifiable." In it, we held that, "if one can later establish that a mark is tied to an individual, it is verifiable." *URS*, 19-1 BCA ¶ 37,448 at 181,968. We continue to find this to be an appropriate definition. As discussed in *URS*, our practice (and the practice of other bodies) in accepting "ink" signatures, when neither the government recipient of the certification nor the reviewing court might have any basis to recognize, on its face, that the handwritten mark comes from a particular individual, argues for an expansive reading of "verifiable." Moreover, we see no policy grounds for an overly-narrow reading of this phrase.

We and our reviewing court, the United States Court of Appeals for the Federal Circuit, have long held that the purpose of the CDA's certification requirement is to encourage accurate claims and to discourage (through the potential of civil and criminal penalties) the submission of unfounded claims to the contracting officer. As we said in *Hawaii CyberSpace*:

> "The purposes of the certification requirement are to discourage the submission of unwarranted contractor claims and to encourage settlements," *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354, 230 Ct. Cl. 11, 14 (1982); "to push contractors into being careful and reasonably precise in the submission of claims to the contracting officer," *Tecom, Inc. v. United States*, 732 F.2d 935, 937 (Fed. Cir. 1984); and to enable the government "to hold a contractor personally liable for fraudulent claims," *Transamerica Insurance Corp.* v. *United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992).

04-1 BCA ¶ 32,455 at 160,533; *see also Teknocraft*, 08-1 BCA ¶ 33,846 at 167,505 (signing claim is necessary for holding the signer responsible for falsities contained within it).

The policy goal of requiring signatures to deter fraud, though, is bottomed upon the notion of its use to identify the person making the false claim so that the claimant can be held accountable for it. Hence, we rejected typed "//signed//" (above a typed name as a signature) in *Teknocraft*, and a typed name in *ABS*. In *Teknocraft*, we stated that "[w]ithout a signature, the purported author of the certification could just as easily disavow the certification because "//signed//" cannot be authenticated." 08-1 BCA

¶ 33,846 at 167,505. In *ABS* (relying on *Teknocraft*), we used similar language, stating that "a typewritten name, even one typewritten in Lucida Handwriting font, cannot be authenticated . . . . [A]nyone can type a person's name; there is no way to tell who did so from the typewriting itself." 16-1 BCA ¶ 36,564 at 178,099. *NileCo*, too, followed the *Teknocraft* line of cases without particular elaboration. *See* 17-1 BCA ¶ 36,862 at 179,606.

Thus, our conclusions in the prior cases requiring signatures to deter fraud were about identification and were not premised on the notion that the legal jeopardy attaching to an individual submitting a false claim is any different if the signature is in notarized ink than if it is a typed "X" purporting to stand for the individual. Nor could they be. The CDA's fraud provision, 41 U.S.C. § 7103(c)(2), requires only a misrepresentation of fact or fraud in the claim, and, in fact, makes no distinction between claims of a monetary value that must be certified and those which need not be. Thus, signature is immaterial to the applicability of this anti-fraud provision. The False Claims Act, 31 U.S.C. § 3729, prohibits and punishes presentment of false claims or false records or materials to the government, but does not hinge upon there being accompanying signatures of any form. Likewise, the general federal false official statement criminal statute, 18 U.S.C. § 1001, makes no reference to signatures, whether they be ink, typewritten, or non-existent. For the perpetrator to be liable under the law, it is enough that the perpetrator use a materially false statement, representation, writing, or document. 18 U.S.C. § 1001(a).

As Judge Posner noted almost 20 years ago in a Uniform Commercial Code case involving an exchange of emails, although a written signature may perhaps be better evidence of identity than a typed one[8], "the sender's name on an e-mail satisfies the signature requirement of the statute of frauds." *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 296 (7th Cir. 2002).

Thus, we conclude that a signature which is verifiable in the sense that it permits a determination of which individual is responsible for the claim, satisfies the anti-fraud policy objectives which are the reason for the CDA's certification requirement. And this is so whatever form the "signature" takes. *Teknocraft* and those cases following it did not allow for this possibility, and are expressly overruled to the extent that they, *per se*, preclude the use of a typed name, in conjunction with other evidence of the author's identity, from constituting a signature for purposes of CDA certification.

C. The Present Intention To Authenticate

The final component of the definition of signature in the FAR is that it demonstrate a present intention to authenticate the writing. That is generally read as a party's affixing its name at the end of a document. In *Hamdi Halal Market LLC v. United States*, 947 F.Supp.2d 159 (D. Mass. 2013), the district court applied the

[8] As discussed below, an email may, in fact, provide better proof of identity than an ink signature.

Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7006 (the ESIGN Act) and recognized that even a typed name at the end of a document could convey the intent to authenticate. *See* 947 F.Supp.2d at 164-65; *cf. Cloud Corp.*, 314 F.3d at 296 (same result, but not considering ESIGN Act). Whether the ESIGN Act strictly applies to CDA certifications is beside the point in our deciding this matter.[9] For purposes of answering the question of what intent is demonstrated by a typed name at the end of a document, the world in which the ESIGN Act applies to most commercial transactions is a world in which the use of a name at the end of an email conveys the intent to authenticate the writing therein.

III. The Typed Name at the End of the Email Here Counts as a Signature For Purposes of Claim Certification

Because the typed name at the end of the end of the March 11, 2019 email is a discrete verifiable mark made with intent to authenticate, it constitutes a signature sufficient for the CDA's certification purposes.

To be sure, a typed name, without more, does nothing to verify the identity of the person submitting it (the point we made in *ABS* being well-taken), but we have more here. Crucially, the name came from an email correspondence which demonstrates that the document came from the sender's email address. If we can satisfy ourselves that the email address is linked to the certifier (and there are numerous ways we may do that, including the practice of the government in communicating with Kamaludin during contract performance through that very same email address), then the signature is verifiable. Though the government argues that a typewritten name on an email is an unreliable marker of identity (thus implying that email, itself, is such an unreliable identifier) (*see* gov't reply at 8-11), we find this concern to be exaggerated and not any different than the risks of forged signatures in ink. In a thoughtful opinion permitting email documents to be authenticated by virtue of the email addresses, the district court in *United States v. Safavian*, 435 F. Supp. 2d 36 (D. D.C. 2006), rejected the notion that email was particularly subject to alteration compared to, say, paper records:

> While the defendant is correct that earlier e-mails that are included in a chain – either as ones that have been forwarded or to which another has replied – may be altered, this trait is not specific to e-mail evidence. It can be true of any piece of documentary evidence, such as a letter, a contract or an invoice. Indeed, fraud trials frequently center on altered paper documentation, which, through the use of techniques such as photocopies, white-out, or wholesale forgery, easily

[9] Kamaludin argues that it does (app. resp. at 2 n.1); the government argues that it does not (gov't reply at 2-5). But the FAR's definition of signature expressly permits the use of electronic symbols, which is the whole point Kamaludin is attempting to make through its reference to the ESIGN Act (app. resp. at 2 n.1).

> can be altered. The *possibility* of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents). We live in an age of technology and computer use where e-mail communication now is a normal and frequent fact for the majority of this nation's population, and is of particular importance in the professional world.

435 F. Supp. 2d at 41.

Indeed, other courts have routinely found an email address, combined with other indicia within the email, to be sufficient to authenticate the email for admission as evidence. In *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000), the court of appeals upheld the trial court's decision to admit emails written by the criminal defendant in a fraud case, and considered the email address and the content of the emails to be sufficient circumstantial evidence that they originated from the defendant. 235 F.3d at 1322-23. In *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), the district court recognized *Siddiqui* and other cases that supported a finding that email addresses provide circumstantial proof of authorship, *see* 241 F.R.D. at 546, 554, and even suggested that there might be room for a business email to be self-authenticating. *Id*. at 554. Numerous other courts have followed suit. *See, e.g., Am. Fed'n of Musicians of United States & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 976 (9th Cir. 2018); *United States v. Fluker*, 698 F.3d 988, 999-1000 (7th Cir. 2012) (circumstantial evidence of authorship of email); *Copeland Corp. v. Choice Fabricators Inc.*, 345 F. App'x 74, 77 (6th Cir. 2009) (email from known email address with typed name at end is considered "signed"); *cf. Cloud Corp.* 314 F.3d at 296.

At this stage of the proceedings, we are satisfied that the typed name at the end of the email from the same email address with which the government corresponded with Kamaludin is a discrete and verifiable mark made with the intent to authenticate the certification and we have no basis to suppose that any other individual would have reason to falsify the signature. Thus, we treat it as we would a handwritten mark purporting to be a signature or a digital signature – no better, no worse: absent the later production of evidence proving otherwise, we find that the claim that is the basis of ASBCA No. 62006 is certified.

CONCLUSION

Because the typed name of Mr. Slyman following the certification language in his March 11, 2019 email satisfied the signature requirement for Kamaludin's claim, the government's motion to dismiss is denied. Because of this result, we need not reach Kamaludin's additional arguments regarding the absence of a signature being a curable defect (app. resp. at 4-5) or the government's supposed waiver of the signature requirement (*id*. at 5-6) – both of which appear to be contrary to our precedent in any event.

Dated: September 25, 2020

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

I concur

JOHN J. THRASHER
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

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

I concur

OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

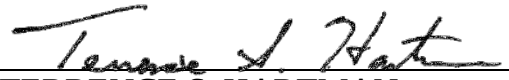
I concur

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

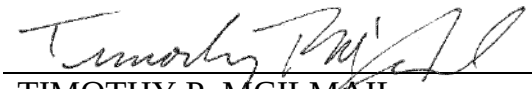


TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur in result (see separate opinion)

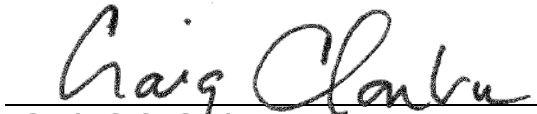


TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

SEPARATE OPINION BY ADMINISTRATIVE JUDGE CLARKE

I concur in the result and the reasoning of the majority which finds the typed signature block to be a signature in these circumstances, although I believe that *Teknocraft* and the cases that followed it may be distinguished on the facts and need not be overruled to obtain this result.

Dated: September 25, 2020

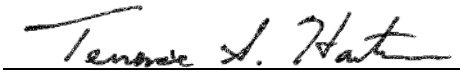


CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

SEPARATE OPINION BY ADMINISTRATIVE JUDGE HARTMAN

I concur in the result because I agree with the concurring opinions of Judges McIlmail and Melnick that the email here is not a valid CDA claim certification. I note simply that the Federal Circuit's recent decision in *Dai Global, LLC v. Adm'r of the U.S. Agency for Int'l Dev*., 945 F.3d 1196 (Fed. Cir. 2019), effectively has overruled our prior line of precedent that unexecuted documents, such as the email here, do not constitute a "defective certification" that later can be corrected.

Dated: September 25, 2020



TERRENCE S. HARTMAN
Administrative Judge
Armed Services Board
of Contract Appeals

SEPARATE OPINION BY ADMINISTRATIVE JUDGE MELNICK

I concur in the result that the motion to dismiss should be denied. Though the email is not a valid CDA certification, it is a defective certification that can be corrected.

I. Email

The CDA requires a contractor to certify that a claim exceeding $100,000 meets the statute's well-known criteria. 41 U.S.C. § 7103(b). In the nearly half century since the CDA was enacted, the Board has never found that a conventional email is a satisfactory certification. In fact, it has held the opposite multiple times. It was correct.

Congress ascribed great importance to the certification requirement so as to discourage unwarranted claims. *Paul E. Lehman, Inc. v. United States*, 673 F.2d 352, 354 (Ct. Cl. 1982). It is also well established that the CDA, along with its certification requirement, is a waiver of sovereign immunity. *Winter v. FloorPro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009). As such, its language must be strictly construed, or construed narrowly. *Id*. at 1370, 1373. Strictly applying the legal definition in use at the time of enactment, to certify means "to testify in writing." *Certify*, *Black's Law Dictionary* (rev. 4th ed. 1968). In turn, to "testify" is "to bear witness; to give evidence as a witness." *Testify*, *Black's Law Dictionary* (rev. 4th ed. 1968).

These definitions suggest that a certification evokes a degree of formality. Merely firing off a run-of-the-mill email reciting the language in section 7103(b) does not rise to the level of formally giving testimony or evidence as a witness, just as I think an email fails to satisfy the requirements for making a declaration under 28 U.S.C. § 1746. It is proper under these definitions to expect more. Indeed, appellant has failed to cite, nor have I found, any precedent holding that a certification mandated by a federal statute can be made in an email. Considering the significance of the CDA certification to Congress, I am confident that if squarely confronted with that question it would have expected something more solemn than an email.

Up until now the Board's holdings have comported with my conclusion, though it has analyzed the matter differently. Rather than concentrate upon the meaning of the word "certify," the Board has found that the generic definition of the word "signature" contained in FAR 2.101 controls whether an email is a certification. That provision requires a symbol that is discrete and verifiable. I would not have taken this approach because nothing in the FAR indicates that its definition of "signature" also defines the word "certify" in section 7103(b). Regardless, the Board has found that emailed certification language accompanied only by a typed name is not sufficiently discrete and verifiable to support a certification. *Teknocraft Inc.*, ASBCA No. 55438, 08-1 BCA ¶ 33,846; *see also Nileco Gen. Contracting LLC*, ASBCA No. 60912, 17-1 BCA ¶ 36,862; *ABS Dev. Corp.*, ASBCA No. 60022, 16-1 BCA ¶ 36,564; *RECO Rishad Eng. Constr. ORG*, ASBCA No. 60444, 16-1 BCA ¶ 36,558. Viewed through the Board's chosen lens, these conclusions make sense. Email accounts are commonly used by more

than one individual. That is not typically the case for either "wet" or digital signatures. Email accounts can be cancelled. Email accounts can be hacked. There is little basis to conclude an email is any more trustworthy than a typed name on company letterhead. That is not adequate.

Appellant now asks the Board to change its mind and repudiate its well established precedent rejecting emailed certifications. I agree with Judge McIlmail that the doctrine of stare decisis requires adherence to the Board's past holdings. Stare decisis enhances predictability and efficiency by establishing settled expectations through prior rulings. *Decker Corp. v. United States*, 752 F.3d 949, 956 (Fed. Cir, 2014). Explaining why reexamination of well-settled precedent can be harmful, the Supreme Court has said:

> Justice Brandeis once observed that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion and uncertainty for necessary legal stability.

John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) (quoting *Burnet Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (dissenting opinion)). Stare decisis directs us to disfavor revisiting a debate simply because reasonable arguments continue to exist on both sides. *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1283 (Fed. Cir. 2014) (en banc), *vacated sub nom. Lighting Ballast Control LLC v. Universal Lighting Techs., Inc.*, 135 S. Ct. 1173 (2015) (quoting *Morrow v. Balaski*, 719 F.3d 160, 181 (3rd Cir. 2013) (Smith, J. concurring)).

Of course, the Board recognizes stare decisis. *See Boeing Co.*, ASBCA No. 30404, 86-3 BCA ¶ 19,314. Furthermore, stare decisis applies to the Senior Deciding Group's reconsideration of issues previously decided (here multiple times) by our panels. This is because the panel decisions reflect Board precedent entitled to due regard for its value to the law's stability, requiring good and sufficient reasons to reject it at a later date. *See Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013) (en banc) (explaining that stare decisis concerns apply to court of appeals panel opinions when the issues decided are reconsidered by the en banc court). Finally, stare decisis has special force upon a prior interpretation of a jurisdictional statute. The reason is that the statute can always be changed. *John R. Sand & Gravel Co. v. United States*, 552 U.S. at 139; *but cf. Procopio v. Wilkie*, 913 F.3d 1371, 1380 n.7 (Fed, Cir. 2019) (en banc) (observing that it is not the case that a statute's interpretation can never be overruled).

I am unaware of anything happening in the three years since the Board most recently rejected emailed certifications in *Nileco* that overcomes the special stare decisis

force upon our settled law. The appellant has not identified any intervening development showing the national body of law applicable to statutorily mandated certifications is moving counter to us. There is also no other basis for making such a radical change. The Board has recently recognized certifications executed with digital signatures that use unique software generated identifiers. *URS Fed. Servs., Inc.*, ASBCA No. 61443, 19-1 BCA ¶ 37,448. These distinct devices are regularly used in formal transactions. And a claimant may always send its certification with a traditional wet signature. This requires little more than an envelope and postage. *See Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 61 (D.C. Cir. 2014), *aff'd*, 136 S. Ct. 750 (2016). Neither option presents an unusual burden. Moreover, if traditional wet signatures (which have customarily been accepted for generations) pose the potential for falsification, we should not compound that risk by now accepting emails with all of their own verification problems. The Board's current law is thoroughly reasonable and consistent with the formality associated with a certification. For these reasons, I would reject common emails that purport to certify claims under section 7103(b).

II. Correction of a Defective Certification

Where I do part ways with the Board's prior law is with its refusal to recognize that an email is a sufficient attempt at a certification to be correctible. As it is also well known, a defective certification does not deprive the Board of jurisdiction. It can be corrected. 41 U.S.C. § 7103(b)(3). As far as I can tell, the Board first held in *Hawaii Cyberspace*, ASBCA No. 54065, 04-1 BCA ¶ 32,455, that a purported certification containing a typed signature is not subject to correction. The Board stated in a somewhat conclusory fashion that the legislative purposes for certification dictate that "the failure to sign is more akin to a 'failure to certify'" and is therefore not curable. *Id*. at 160,535. However, since then the right to correct defective certifications has been readily applied at the appellate level. Nontechnical defects are correctible. Even a defect arising from an intentional, reckless, or negligent disregard for the applicable certification requirements is correctible. *Dai Global, LLC v. Adm'r of the United States Agency for Int'l Dev.*, 945 F.3d 1196 (Fed. Cir. 2019). The legislative purposes for permitting correction dictate allowing it here. Accordingly, though I would reject appellant's request that we deem its emailed certification valid, I concur in the result that the government's motion to dismiss should be denied.

Dated: September 25, 2020

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

SEPARATE OPINION BY ADMINISTRATIVE JUDGE MCILMAIL

I concur in the result. I agree with Judges Melnick and Hartman that, following *Dai Global v. Administrator of the United States Agency for International Development*, 945 F.3d 1196 (Fed. Cir. 2019), the certification is defective, but curable. I do not agree that the certification here was signed. The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. *June Med. Servs. L. L. C. v. Russo*, No. 18-1323, 2020 WL 3492640, at *22 (U.S. June 29, 2020) (Roberts, C.J., concurring). The question whether the certification is signed is controlled by our decisions of only a few years ago; no special circumstance justifies a different conclusion. *See id*. at *29.

Additionally, from *Fid. & Deposit Co. of Maryland v. United States*, 2 Cl. Ct. 137, 144 (1983) (emphasis added), comes the following legislative history:

> Admiral Rickover was the prime mover of the certification provisions before the Congress. At hearings on the CDA on June 14, 1978, he advised that the new law should:
>
> "[r]equire as a matter of law that prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. *In other words, you put the contractor in the same position as our working man, the income tax payer who must certify his tax return....*"
>
> Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 & S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 21 (1978).
>
> The Court of Claims cited this testimony in Paul E. Lehman, Inc. and commented notably on the legislative history of the CDA:
>
> "Admiral Rickover wanted to deter contractors from filing inflated claims which cost the Government substantial amounts to defeat. He sought to do so by subjecting contractors to financial risk if their claims were unreasonable.... [He] viewed the certification requirement as a necessary prerequisite to the consideration of any claim. The provisions Congress adopted to include the certification requirement were based upon Admiral Rickover's written

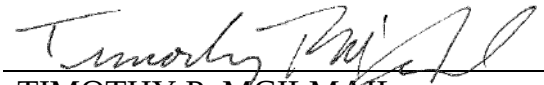
> suggestions and fairly must be deemed to have incorporated his view concerning the effect of the certification requirement. [citing *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31–32, 102 S. Ct. 821, 830–31, 70 L. Ed. 2d 792 (1982)] .... "The import of the language of the Act and its legislative history is that unless a claim has been properly certified, it cannot be considered under the statute..... Unless that requirement is met, there is simply no claim that this court may review under the Act." *Id*. at ––, 673 F.2d at 355.

In view of that history, our precedent reflects a perfectly reasonable position, particularly given the importance of the certification requirement. It is not too much to ask that a contractor affix a hand-written signature or what we all understand to be a "digital" signature to express ceremoniously his solemn vow (much like witnesses raise right hands to give their oaths to provide truthful testimony) that:

> [t]he claim is made in good faith, the supporting data are accurate and complete to the best of the contractor's knowledge and belief, the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable, and the certifier is authorized to certify the claim on behalf of the contractor.

Indeed, not only have we followed our precedent several times in recent years, the Government Accountability Office expressly followed our lead only two years ago in *Distributed Solutions, Inc.*, B-416394 (Aug. 13, 2018). In this sense, our change in direction is a solution in search of a problem. What box this watering-down will open, and what slippery slope this unwarranted and unnecessary relaxation establishes (presumably requiring litigation to sort out, including, perhaps, in the United States Court of Federal Claims and federal district courts handling fraud and false claims cases), we can only guess.

Dated: September 25, 2020



TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 62006, 62007, 62008, Appeals of Kamaludin Slyman CSC, rendered in conformance with the Board's Charter.

Dated: September 29, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Mountain Movers/Ainsworth-Benning, LLC	)	ASBCA No. 62164
	)	
Under Contract No. W9128F-12-D-0027	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS ON THE GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Pending before the Board is the motion to dismiss for lack of subject matter jurisdiction, filed by respondent, the United States Army Corps of Engineers (USACE or government). The government contends that the Board is without jurisdiction to entertain this appeal due to a suspicion of fraud involving appellant, Mountain Movers/Ainsworth-Benning, LLC (MM/AB) related to the contract in this appeal.

This appeal involves a 2014 task order for repairs to the Fort Peck Dam in Montana. MM/AB was delinquent in obtaining bonding for the task order, and in November 2014, the government terminated MM/AB for default, in a contracting officer's final decision that may have suffered from procedural problems. MM/AB informed the government that the bonding problems related to financial problems with joint venture partner Ainsworth-Benning. In a series of factually disputed communications in December 2014, the government contends that MM/AB made false representations regarding Ainsworth-Benning's participation in MM/AB. There is no dispute, however, that the government rescinded the termination for default, and MM/AB obtained the required bonds in January 2015, and performed the contract. In June 2019, MM/AB filed a claim for certain work on the project, and in August 2019, the contracting officer issued a final decision finding partial merit in the claim. MM/AB timely filed an appeal to the Board. Approximately two months after the appeal was docketed, the contracting officer rescinded his final decision, upon discovery of the purportedly fraudulent statements made by MM/AB in December 2014.

The government moves to dismiss MM/AB's appeal for lack of subject matter jurisdiction because the contracting officer rescinded his final decision based upon a determination of fraud. The government's motion essentially seeks to create a government right of removal that would allow the government to unilaterally compel contractors to litigate their appeals before the United States Court of Federal Claims. As the government's motion is directly contrary to the binding precedent of the United States Court of Appeals for the Federal Circuit, and our own precedent, we deny the government's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE GOVERNMENT'S MOTION

With the exception of the details of a December 2014 telephone conversation, the parties generally agree regarding the facts of this appeal. The Board is permitted to decide jurisdictional facts in resolving a motion to dismiss; however, as explained below, we do not find the disputed facts to be material to resolving the pending motion.[1]

On April 17, 2012, the government issued Solicitation No. W9128F-12-R-0030, restricted to USACE Region VIII small businesses, for design-build and construction services under a Multiple Award Task Order Contract (MATOC) intending to award up to five contracts (R4, tab 1 at USACE 5, 27-28). The solicitation required bidders to disclose "Contractor Team Arrangements" in their bids "(i.e., Mentor-Protege agreements, joint ventures, partnerships, etc.)" (R4, tab 1 at USACE 51). MM/AB asserts that it detailed the identities of its joint venture partners in its proposal (app. resp. at 3-4). On June 25, 2012, MM/AB received one of the MATOC awards (R4, tab 2).

On September 25, 2014, the government awarded to MM/AB task order No. W9128F-12-D-0027-0002 for rehabilitation of emergency gate control systems at Fort Peck, Montana, in the amount of $2,401,011.84 (R4, tab 3).

Pursuant to the task order, MM/AB was to submit performance and payment bonds within 10 days of its receipt of the notice of award, which occurred on September 25, 2014 (R4, tab 3 at USACE 397, 406). It is undisputed that MM/AB did not timely submit performance and payment bonds, and that the government did not follow-up with MM/AB regarding the missing bonds until sometime in November 2014. On November 24, 2014, Ms. Jacqueline Nettleton, President of

[1] For this reason, we deny MM/AB's request for an evidentiary hearing.

MM/AB, sent an email to Thomas Westenburg, the Administrative Contracting Officer stating:

> I was notified late last week that the bonding company (Travelers) for MM/AB could not honor indemnifications from Ainsworth Benning. Basically, their bonds are not good, James Benning has left the state with his family, literally in the middle of the night, another one of their partners (in a different company - which I am not involved in) has been arrested.
>
> I am uncovering more information literally hourly.

(R4, tab 5) On December 3, 2014, Donald Miller, the USACE Contracting Officer (CO) terminated MM/AB for default (R4, tab 7). The government did not issue a cure notice to MM/AB before terminating the contract for default (R4, tab 14 at USACE 511).

Between December 3 and December 18, 2014, Ms. Nettleton and CO Miller exchanged several emails regarding the termination for default (R4, tab 8). In short, the government rejected MM/AB's proposal to have bonds issued in the name of Mountain Movers, rather than the MM/AB joint venture (R4, tab 8 at USACE 468-69). By letter dated December 15, 2014, MM/AB's attorney advised CO Miller that the termination for default would be appealed to the ASBCA (R4, tab 9). Based on subsequent documentation, it appears that the government was concerned that its failure to promptly enforce the bonding requirement could be held to constitute an implied waiver, requiring that it first issue a cure notice before terminating the contractor (R4, tab 14 at USACE 511).[2] These communications culminated in a December 18, 2014 phone call that is the basis for the government's allegations of fraud.

On December 18, 2014, CO Miller and his supervisor, Lee McCormick, discussed the termination with Ms. Nettleton by telephone (R4, tab 014 at USACE 510). The parties have submitted conflicting declarations regarding the specific statements made by Ms. Nettleton during the telephone call. The government contends that, during the telephone call, its representatives stated that a major concern was the financial status of the MM/AB joint venture (R4, tab 14 at USACE 510). According to the government, Ms. Nettleton represented that Ainsworth-Benning Construction, Inc. was the entity that was in financial difficulty but that a different company, Ainsworth Benning of Wyoming, Inc., was the joint venture partner of Mountain Movers Construction, Inc.

[2] The termination for default was subsequently rescinded, and is not before us. We make no findings of fact as to whether the termination would have been sustained.

under the MATOC (*id.*). MM/AB contends that Ms. Nettleton actually stated that Ainsworth-Benning Construction, Inc. no longer had an interest in the MM/AB joint venture (app. sur-reply, ex. 1). Earlier that same day, Ainsworth-Benning Construction, had withdrawn from the MM/AB joint venture, leaving Mountain Movers as the sole member of the joint venture (app. sur-reply, ex. 1 at ¶¶ 16-17, decl. ex. 1). MM/AB further contends that Ms. Nettleton raised the possibility that, to resolve the bonding issue, Ainsworth-Benning of Wyoming, could take the place of Ainsworth-Benning Construction in the MM/AB joint venture, if the SBA approved of this change (app. sur-reply, ex. 1 at ¶¶ 10, 17). On January 5, 2015, Ms. Nettleton signed articles of incorporation for Ainsworth-Benning of Wyoming, which was organized as a South Dakota corporation (R4, tab 13 at USACE 501).[3] The South Dakota Secretary of State issued a certificate of incorporation for Ainsworth-Benning of Wyoming on January 12, 2015 (R4, tab 13 at USACE 499).

Following the telephone call, the Government issued MM/AB a cure notice, dated December 19, 2014 (R4, tab 10). The cure notice contained the government's recitation of the discussion during the telephone conversation the previous day:

> The detailed explanation that you provided stated that Ainsworth-Benning (A-B) has multiple subsidiaries, and that one of the subsidiaries, Ainsworth-Benning Construction, Inc., was the entity that was encountering managerial collapse that affected the remaining A-B subsidiaries['] ability to bond. You further explained that the Mountain Movers/ Ainsworth-Benning LLC JV is solvent because your JV is with Ainsworth-Benning of Wyoming, Inc., not Ainsworth-Benning Construction, Inc.
>
> . . . .
>
> Per the 3 December discussions and subsequent emails, you stated you will provide consideration in the amount of $48,000 if the Termination for Default was rescinded. The basis for consideration was stated that the original bonds bond fees have been reduced as part of the indemnification

[3] Adding to the confusion, Ms. Nettleton appears to have been a Vice President of a Wyoming corporation, named Ainsworth-Benning of Wyoming, that was dissolved for failure to pay taxes in 2012 (R4, tab 20 at USACE 571). It is not clear from the record whether Ms. Nettleton was suggesting replacing Ainsworth-Benning Construction Inc. in the MM/AB joint venture with the South Dakota corporation named Ainsworth-Benning of Wyoming, or with the Wyoming corporation, similarly named Ainsworth-Benning of Wyoming.

> process for the bond for Mountain Movers/Ainsworth Benning JV. Mountain Movers/Ainsworth-Benning LLC also agreed not to appeal the Termination for Default with the Armed Services Board of Contract Appeals (ASBCA).

(R4, tab 10 at USACE 472) The cure notice then provides the government's conditions for holding the termination for default in abeyance:

> You are notified that the Government agrees to place the Termination for Default in abeyance until 31 December, 2014 to allow Mountain Movers/Ainsworth-Benning LLC to submit proper performance and payment bonds that are legally and fiscally sufficient to cure the issue of providing bonds. In doing so, Mountain Movers/ Ainsworth-Benning LLC also agrees not to appeal the Termination for Default with the ASBCA and accept a $48,000 reduction of contract price.

(R4, tab 10 at USACE 472-73) Ms. Nettleton signed the Cure Notice Receipt, and Agreement Acknowledged on December 30, 2014 (*id.* at USACE 473). The signature block had an option allowing her to agree or not agree with the terms contained in the cure notice. She checked the box that she agreed "with the terms contained herein" (*id.*). The government cites Ms. Nettleton's signature on the cure notice as proof that she made the alleged statements during the December 18, 2014 telephone call, while MM/AB contends that Ms. Nettleton's signature was only with regard to the "agreed" terms of the cure notice (viz. obtaining bonds by December 31, 2014, a reduction in contract price of $48,000, and not appealing the termination to the Board) (gov't mot. at 4; app. resp. at 8).

On December 30, 2014, the government issued an extension to the cure notice, allowing MM/AB until January 9, 2015, to submit its bonds (R4, tab 11). On January 22, 2015, CO Miller drafted a written determination to modify task order two by rescinding the termination for default (R4, tab 14). CO Miller indicated that Ms. Nettleton's representations regarding the Ainsworth-Benning corporate entity that made up the joint venture had satisfactorily addressed a major Government concern about the financial stability of MM/AB (R4, tab 14 at USACE 510). CO Miller then indicated that he had determined that the termination for default was improper because the government "took action that might be construed as a waiver to the contract delivery or performance date" and had not first issued a cure notice pursuant to Federal Acquisition Regulation (FAR) 49.402-3 (*id.* at USACE 511). CO Miller further determined that the construction was still needed and that it would be advantageous to the government to reinstate the delivery order (*id.*).

Effective February 2, 2015, the parties signed Modification No. 2, rescinding the termination for default and reducing the task order by $48,000 to $2,353,011.84 (R4, tab 15). That same day, the government issued MM/AB a notice to proceed (R4, tab 16). MM/AB subsequently performed the task order.

On April 12, 2019, MM/AB submitted a request for equitable adjustment (REA) to the contracting officer alleging entitlement to $535,056.87, plus interest, a contract extension of 538 days, remission of liquidated damages in the amount of $132,600 and the remaining contract balance of $181,121.23 (R4, tab 17). By letter dated June 27, 2019, MM/AB converted its REA to a certified claim (R4, tab 18). MM/AB's certified claim reduced the amount sought to $507,083.71 due to a revision of the amount sought associated with the reduction in bonding costs (*id.* at USACE 549-50 n.1). On August 26, 2019, CO Miller issued a contracting officer's final decision, finding partial merit to MM/AB's claim (R4, tab 19). MM/AB timely appealed to the Board by letter dated September 3, 2019.

On October 29, 2019, CO Miller issued a new final decision purporting to rescind the August 26, 2019 final decision (R4, tab 20). In the October 29 final decision, CO Miller indicated that he had recently obtained a copy of MM/AB's March 1, 2011 operating agreement indicating that Ainsworth-Benning Construction, Inc., and not Ainsworth-Benning of Wyoming, was a member of the joint venture (*id.* at USACE 570). Mr. Miller determined that Ms. Nettleton had knowingly misrepresented the identity of the Ainsworth-Benning entity that was a member of the MM/AB joint venture in December of 2014 following the termination for default (*id*). He also concluded that he had a reasonable suspicion that MM/AB had made fraudulent misrepresentations to the government in connection with that matter, which had the effect of divesting his authority to issue a final decision under FAR 33.210(b) (*id.* at USACE 571).

DECISION

I. Standard of Review

Mountain Movers bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988); *United Healthcare Partners, Inc.*, ASBCA No. 58123, 13 BCA ¶ 35,277 at 173,156. Pursuant to the Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-09, a contractor may, "within 90 days from the date of receipt of a contracting officer's decision" under 41 U.S.C. § 7103 appeal the decision to an agency board. 41 U.S.C. § 7104(a). Our reviewing court, the Federal Circuit, has held that CDA jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc.*

v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

When a motion to dismiss for lack of subject matter jurisdiction denies or controverts allegations of jurisdiction, only uncontroverted factual allegations are accepted as true for purposes of the motion, and other facts underlying the jurisdictional allegations are subject to fact-finding. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). The facts supporting jurisdiction are subject to fact-finding by the Board based on our review of the record. *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816; *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,016. However, when the factual dispute involves the allegation of a fact that is not jurisdictional, but an essential element of a claim for relief, this is a matter that goes to the merits. *Arbaugh*, 546 U.S. at 514.

II. Limitations On The Board's Jurisdiction Regarding Fraud

The government's motion is premised upon its novel theory it should be entitled to unilaterally remove litigation from the boards of contract appeals, whenever it suspects fraud. The government argues:

> Congress did not intend for the Government to have to defend claims involving fraud in agency boards, where the government has no ability to avail itself of the various defenses and fraud based counterclaims that would be available were the same contract claim to have been filed in federal court. *See* [*Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 543-44 (Fed. Cir. 1988)]. If the Board were to retain jurisdiction over this claim, it would provide a safe forum for contractors perpetrating fraud to sue the government while avoiding any liability for its related fraudulent behavior. Both the CDA and judicial economy considerations recommend the resolution of such cases in the Court of Federal Claims rather than the boards of contract appeals.

(Gov't mot. at 11) Thus, under the government's theory, a contracting officer could unilaterally withdraw a final decision at any point and thus, divest jurisdiction from an agency board of contract appeals. According to the government, the contractor would still have a remedy before the Court of Federal Claims (gov't. mot. at 9-10 n.1). However, the government has not explained how its interpretation of the CDA as divesting this Board of jurisdiction would not similarly divest the Court of Federal Claims of its jurisdiction, since the jurisdiction of both fora originate with a contracting

officer's final decision as specified in 41 U.S.C. § 7103. Further, the government's argument that the Board provides a "safe forum for contractors perpetrating fraud to sue the government while avoiding any liability for its related fraudulent behavior" (gov't mot. at 11) ignores the Board's ability to consider the affirmative defense of prior material breach, *Laguna Construction Co., Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016), the Board's ability to make findings of material misrepresentation of fact in holding a contract *void ab initio*, *Vertex Construction & Engineering*, ASBCA No. 58988, 14-1 BCA ¶ 35,804, and the government's ability to bring suit pursuant to the False Claims Act in Federal District Court. 31 U.S.C. § 3729.

The CDA provides the agency contracting officer with authority to decide claims submitted by contractors. 41 U.S.C. § 7103(a)(3). However, the CDA "does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud." 41 U.S.C. § 7103(c)(1). As noted above, the Board's jurisdiction depends on a valid contractor claim, and a contracting officer's decision on that claim. *M. Maropakis Carpentry*, 609 F.3d at 1327. Consistent with the CDA, the FAR provides that a contracting officer's "authority to decide or resolve claims does not extend to . . . (b) The settlement, compromise, payment or adjustment of any claim involving fraud." FAR 33.210. However, by the plain language of the CDA, the restriction on the contracting officer's authority applies to "any claim involving fraud" and not "any contract." Thus, the alleged fraud must relate to the "claim" and not just be a belief that there was fraud somewhere in the contract. *Joseph Morton, Co. v. United States*, 757 F. 2d 1273, 1281 (Fed. Cir. 1985).

Even if the contracting officer issues a final decision on a contractor claim involving fraud, the Board possesses jurisdiction to review that final decision if the final decision asserts a basis that the contracting officer is permitted to assert – that is, a basis other than fraud. *Daff v. United States*, 78 F. 3d 1566, 1572 (Fed. Cir 1996); *PROTEC GmbH*, ASBCA No. 61161 *et al*., 18-1 BCA ¶ 37,010 at 180,244-45; *Sand Point Services, LLC*, ASBCA Nos. 61819, 61820, 19-1 BCA ¶ 37,412 at 181,859. However, if a contracting officer issues a final decision based solely upon a suspicion of fraud it is not a valid contracting officer's final decision and does not provide the Board with jurisdiction to entertain an appeal. *Medina Construction, Ltd. v. United States*, 43 Fed. Cl. 537, 556 (1999).

III. The Board Possesses Jurisdiction To Entertain The USACE's August 26, 2019 Final Decision Because It Was Not Based On A Finding Of Fraud, And The USACE's October 29, 2019 Final Decision Did Not Divest The Board Of Jurisdiction

The government asserts that the Board is without jurisdiction to entertain MM/AB's appeal due to the contracting officer's suspicion of fraud. According to the government the "Contracting Officer and this Board lack jurisdiction to render any

decision on a claim involving fraud" (gov't mot. at 1). According to the government, a "reasonable suspicion of fraud deprives the Board of jurisdiction" (gov't reply at 2). The government additionally contends that:

> It is of no moment that the Contracting Officer issued the [final decision finding partial merit to MM/AB's claim] without knowledge of MM's fraudulent misrepresentations that took place during the course of the contract. The Contracting Officer's prior reasons for the [sic] denying the claim are rescinded, because the agency (including the Board) does not have authority to raise or settle other issues when there is a reasonable suspicion of fraud.

(Gov't reply at 3) The government's statement is plainly incorrect as a matter of law. As explained above, a contracting officer may issue a final decision resolving a claim on a basis other than fraud, and the Board possesses jurisdiction to review such a decision. *Daff*, 78 F. 3d at 1572; *PROTEC GmbH*, 18-1 BCA ¶ 37,010 at 180,244-45; *Sand Point Services*, 19-1 BCA ¶ 37,412 at 181,859. Here, the contracting officer issued a final decision on August 26, 2019, finding partial merit to MM/AB's claim (R4, tab 19). The August 26 final decision was not based on a finding of fraud. The decision did not mention fraud. In fact, the final decision could not be based on fraud, because the contracting officer contends that he was unaware of the purported fraud at the time he issued his final decision (R4, tab 20 at USACE 570). MM/AB timely appealed to the Board on September 3, 2019. Thus, the Board possesses jurisdiction to entertain MM/AB's appeal.

The government's reliance on *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540 (Fed. Cir. 1988); *Medina Constr.*, 43 Fed. Cl. at 555-56; and *Savannah River Nuclear Solutions, LLC v. Dept of Energy*, CBCA No. 5287, 17-1 BCA ¶ 36,749 is clearly misplaced. The government's citation of *Medina* and *Savannah River* are easily distinguishable. In *Medina*, the contracting officer explicitly premised the final decision on unproven allegations of fraud. *Medina*, 43 Fed. Cl. at 556. The court held:

> Even if the CO's final decision is read in the broadest possible light, the government has not established that the CO incorporated a reason, separate and distinct from the fraud allegations, for the denial of Medina's [termination

> settlement proposal] which would form a basis for its validity and thereby support this Court's jurisdiction. *Cf. Daff*, 78 F.3d at 1572.

Id. Thus, the *Medina* court recognized that it would possess jurisdiction to entertain a claim premised on a basis other than fraud pursuant to the Federal Circuit's holding in *Daff*, but that the final decision at issue in that case was solely based on fraud. Here, the contracting officer issued a final decision that could not have been premised upon fraud, because the contracting officer was not even aware of the purportedly fraudulent statements when he issued the August 26, 2019 final decision.

The facts in *Savannah River* are similarly distinguishable. In that appeal, the Department of Justice filed a False Claims Act suit against the contractor while the contractor's CDA claim was pending before the contracting officer. The contracting officer issued a letter to the contractor, indicating that he suspected that costs in the claim were fraudulent, and that he had referred the matter to the relevant agency officials, and that he was without authority to take action on the claim. *Savannah River*, 17-1 BCA ¶ 36,749 at 179,114. The Civilian Board of Contract Appeals held that the contracting officer was not authorized to issue a final decision, and that there could not be a deemed denial of a claim where the contracting officer was without jurisdiction to issue a final decision.[4] *Id.* at 179,115-16. We recently held in *ESA South, Inc*., ASBCA Nos. 62242, 62243, 2020 WL 4355244 (June 9, 2020) that we possess jurisdiction to entertain an appeal on facts similar to those in *Savannah River*. In *ESA*, the contractor appealed from a deemed denial of its claim before the contracting officer issued a letter declining to issue a final decision due to a suspicion of fraud. *Id.*

The government cites *Martin J. Simko Constr.*, the only one of the three cited decisions that is binding authority for us, for the unremarkable proposition that Congress intended that fraud claims be resolved outside the disputes resolution process (gov't reply at 2-3). However, here, the contracting officer did not know of MM/AB's alleged fraud when he issued his final decision, and did not assert fraud as a basis for his final decision.

Similarly, we find the government's attempts to distinguish our holdings in *PROTEC* and *Sand Point* unavailing. The government contends that *PROTEC* does not control because the final decision in *PROTEC* did not mention fraud (gov't reply

[4] Decisions of the Civilian Board of Contract Appeals are not binding on us. As we hold that we possess jurisdiction to entertain MM/AB's appeal from the August 26, 2019 contracting officer's final decision, we do not reach the issue of whether, under proper circumstances, we would possess jurisdiction under a deemed denial theory.

at 24). The government is apparently trying to distinguish *PROTEC* based on the October 29, 2019 final decision purporting to rescind the earlier, August 26, 2019 final decision. However, the August 26, 2019 final decision, the document that created jurisdiction in this Board, similarly did not mention fraud.

The government also attempts to distinguish our holding in *Sand Point* because the contracting officer in that appeal did not refer the matter to the appropriate agency officials for investigation (gov't reply at 24). As noted above, the contracting officer issued the August 26, 2019 final decision without referring the matter for a fraud investigation. According to the government, the Board established a jurisdictional test in *Sand Point*, providing that the Board possesses jurisdiction to entertain an appeal involving fraud if "we do not have to make factual determinations of fraud" (*id.* at 24-25, quoting *Sand Point*, 19-1 BCA ¶ 37,412 at 181,859). The government then contends that the Board would need to make factual determinations of fraud to adjudicate this appeal (gov't reply at 25). We disagree.

Just as the contracting officer was able to review MM/AB's claim in rendering his final decision without reference to fraud, the Board can review the claim without reference to fraud. As explained in *Sand Point*, a determination of fraud would require the board to "determine whether any incorrect statements were made knowingly and with the intent to deceive." *Sand Point*, 19-1 BCA ¶ 37,412 at 181,859, (quoting *SIA Constr., Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,984 (quoting *Pub. Warehousing Co., K.S.C.*, ASBCA No. 58078, 13 BCA ¶ 35,460 at 173,896)). Here, the government alleges that the entire contract performance was fraudulent because the alleged misrepresentations induced the contracting officer to reinstate the contract (gov't reply at 23). As noted above, the CDA jurisdictional prohibition applies to alleged fraud related to the *claim*, and does not apply to a general belief that there was fraud somewhere in the contract. *Joseph Morton*, 757 F.2d at 1281. At best, the government notes that MM/AB's claim seeks to modify the $48,000 contract price reduction discussed in the December 18, 2014 phone call and contained in the December 19, 2014 cure notice (gov't reply at 10, 25). However, we can adjudicate this claim based on the terms of the modification. We do not need to determine whether MM/AB agreed to the modification of the contract amount "knowingly and with the intent to deceive." The simple fact that MM/AB agreed to a price adjustment with such terms, subject to any defenses MM/AB may assert, would allow us to adjudicate the claim.

Having found that we possess jurisdiction to entertain MM/AB's appeal from the August 26, 2019 final decision, we hold that the contracting officer's final decision dated October 29, 2019, purporting to rescind the August 26, 2019 final decision, does not divest us of jurisdiction. The government argues that once the contracting officer rescinded the August 26, 2019 final decision, "there was neither a valid decision nor a deemed denial of the claim upon which to base CDA jurisdiction" (gov't mot. at 11).

However, the government is incorrect in asserting that the contracting officer's purported rescission of the August 26, 2019 would have any effect on our jurisdiction. The Board was vested with jurisdiction when MM/AB filed its notice of appeal on September 3, 2019. *Triad Microsystems, Inc.*, ASBCA No. 48763, 96-1 BCA ¶ 28,078 at 140,196. "Once the Board is vested with jurisdiction over a matter, the contracting officer cannot divest it of jurisdiction by his or her unilateral action." *Id.* (citing *Fairfield Scientific Corp.*, ASBCA No. 21151, 78-1 BCA ¶ 13,082 at 63,905-06 *aff'd on reconsid.* 78-2 BCA ¶ 13,429, *aff'd in part rev'd in part on other grounds* 611 F.[2]d 854 (Ct. Cl. 1979)). Moreover, the government's rescission of the August 26, 2019 final decision did not moot the issues before us, because MM/AB has not received all the relief requested, as would be the case if the government had withdrawn a government claim. *Shiloh Services, Inc.*, ASBCA No. 61134, 18-1 BCA ¶ 37,117 at 180,662 (citing *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007)).

CONCLUSION

For the reasons stated above, the government's motion to dismiss is denied. The government is directed to answer MM/AB's complaint within 30 days of the date of this opinion.

Dated: August 7, 2020

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

OWEN C. WILSON
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. 62164, Appeal of Mountain Movers/Ainsworth-Benning, LLC, rendered in conformance with the Board's Charter.

Dated: August 7, 2020

Catherine A. Stanton for

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

United States Court of Appeals for the Federal Circuit

KELLOGG BROWN & ROOT SERVICES, INC.,
Appellant

v.

SECRETARY OF THE ARMY,
Appellee

2019-1683

Appeal from the Armed Services Board of Contract Appeals in Nos. 57530, 58161, Administrative Judge Mark A. Melnick, Administrative Judge Owen C. Wilson, Administrative Judge Richard Shackleford.

Decided: September 1, 2020

EDWARD SANDERSON HOE, Covington & Burling LLP, Washington, DC, argued for appellant. Also represented by RAYMOND B. BIAGINI, HERBERT L. FENSTER; ALEJANDRO LUIS SARRIA, JASON NICHOLAS WORKMASTER, Miller & Chevalier Chartered, Washington, DC.

DAVID W. TYLER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by ETHAN P. DAVIS, RUSSELL B. KINNER, WILLIAM JAMES GRIMALDI, ROBERT EDWARD KIRSCHMAN, JR., PATRICIA M. MCCARTHY,

MICHAL L. TINGLE, ANDY J. MAO, PATRICK KLEIN, II; CAROL MATSUNAGA, Defense Contract Management Agency, Carson, CA; KARA KLAAS, Chantilly, VA.

Before NEWMAN, DYK, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

DYK, *Circuit Judge*.

Kellogg Brown and Root Services, Inc. ("KBR") contracted with the government to provide trailers to house coalition personnel at military camps in Iraq. KBR claimed that the government breached the contract by failing to provide "force protection" to the trucks delivering the trailers to the military camps. KBR sought to recover payments made to its subcontractor, First Kuwaiti Co. of Kuwait ("Kuwaiti"), for costs caused by the government's alleged breach. The administrative contracting officer in large part denied the claim, and KBR appealed to the Armed Services Board of Contract Appeals ("Board"). The Board found that KBR was not entitled to any additional recovery and denied its appeal.

We affirm the Board's decision on the ground that the Board properly determined that KBR's costs had not been shown to be reasonable, and we do not reach the question whether the government breached the "force protection" provision of the contract.

BACKGROUND

In 2001, the United States Army awarded Contract No. DAAA09-02-D-0007 ("Contract 0007") in the U.S. Army's Logistics Civil Augmentation Program ("LOGCAP III") to KBR. Among other things, the contract required KBR to provide logistical support in the form of goods (such as trailers used for temporary housing) for the government

pursuant to a series of task orders. LOGCAP III contained a provision ("the Force Protection Clause") requiring that the Army provide "force protection" for the contractor's convoys for providing these goods and services. It stated:

> H-16 Force Protection
>
> While performing duties [in accordance with] the terms and conditions of the contract, the Service Theatre Commander will provide force protection to contractor employees commensurate with that given to Service/Agency (e.g. Army, Navy, Air Force, Marine, DLA) civilians in the operations area unless otherwise stated in each task order.

J.A. 242.

In June 2003, the government executed Task Order 59, a cost-plus-fixed-fee order for KBR to provide support to operations in Iraq. This case concerns the government's October 10, 2003, modification to Task Order 59 ("Change 5"), which required KBR to "provide accommodations and life support services to [Command Joint Task Force 7 ("CJTF7")] and coalition forces in various locations in Iraq." J.A. 291. The "accommodations and life support services" were trailers for temporary housing of Army personnel. Change 5 states that "[i]t is the Commander's intent to rapidly bed down the remainder of CJTF soldiers, building within battalion sets, simultaneously as opposed to sequentially, in accordance with established and provided priorities." *Id.* KBR was originally required to furnish the trailers by December 15, 2003.

The trailers were to be manufactured in Kuwait and then transported to Iraq by Kuwaiti in truck convoys. Section 1.10 of Change 5 again addressed the issue of force protection, stating that "[t]he government will provide for the security of contractor personnel in convoys and on site, commensurate with the threat, and [in accordance with]

the applicable Theater Anti-Terrorism/Force Protection guidelines." J.A. 292.

On October 17, 2003, KBR and Kuwaiti entered into a firm-fixed-price subcontract ("the Subcontract") for the procurement and delivery of 2,252 trailers to Camp Anaconda in fulfillment of part of KBR's obligations under Change 5. In accordance with Change 5, the Subcontract required Kuwaiti to complete performance by December 15, 2003, with "[a]llowances" in the event of "delays in KBR convoy coordination and support." J.A. 1153. The Subcontract provided that if KBR ordered any changes to performance that resulted in an increased cost of performance to Kuwaiti, Kuwaiti would be entitled to request an equitable adjustment. On December 13, 2003, KBR issued another change order, directing Kuwaiti to deliver and install an additional 1,760 trailers to a second Army camp in Iraq, Camp Victory.

The Army's failure to provide force protection in Iraq became an issue between the government and KBR, and another such dispute resulted in a previous Board decision finding that the Army failed to meet its force protection obligations. *See Sec'y of the Army v. Kellogg Brown & Root Servs., Inc.*, 779 F. App'x 716, 718 (Fed. Cir. 2019). As relevant here, the Board found that by late November of 2003, "dangerous conditions in Iraq" and "limitations upon the military's resources to escort convoys" and the prioritization of other Army needs resulted in the failure to provide necessary force protection and convoy delays. J.A. 7.

Kuwaiti alleged that the delays resulted in delivery delays and a backup of trailers at the Kuwait/Iraq border. It alleged that it was eventually required to store the trailers on rented land (a "laydown yard") in Kuwait and incurred

costs for double handling, i.e., unloading and then reloading the trailers onto its trucks.[1] J.A. 7.

On August 1, 2004, and August 4, 2004, KBR and Kuwaiti executed two change orders adding a total of $48,754,547.25 in equitable adjustments for idle truck costs due to the backup of trailers at the border and double-handling costs.

As would be expected, KBR, as the prime contractor, then filed two requests for equitable adjustments with the government, asserting that it was entitled to recover the payment to Kuwaiti because the delay and double-handling costs were due to the government's failure to provide the required force protection. The final amount sought by KBR, which included the $48,754,547.25 paid to Kuwaiti as well as indirect costs and the award fee,[2] totaled $51,273,482.

On July 29, 2011, the administrative contracting officer issued a final decision allowing $3,783,005 in costs associated with the land leased to store the trailers (including indirect costs and award fees) but rejecting the remainder of KBR's requested costs for delay and double handling.

KBR timely appealed to the Board, arguing that it was entitled to recover the rejected delay costs and double-handling costs because the government violated the contract by failing to provide the required force protection. It

[1] "The term 'double handling' . . . refer[red] to both the transfer on and off trucks at the camps [due to delays in site preparation], as well as onto and off the [laydown yard]." J.A. 8.

[2] Under the Federal Acquisition Regulation ("FAR"), an "award fee" is "an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance." 48 C.F.R. § 16.305.

argued that it was entitled to recover the disallowed costs ($47,490,477) and that these costs were reasonable.

The Board found that KBR was not entitled to reimbursement on the ground that the government had not breached the Force Protection Clause because "nothing in Change 5 required the government to place [Kuwaiti]'s trailers into convoys without delay." J.A. 16. The Board further concluded that even if the government had breached the contract by failing to meet its force protection obligations, KBR had not shown that its settlement costs with Kuwaiti were reasonable. The Board concluded that (1) "KBR ha[d] not shown that a prudent person conducting a competitive business would have resolved [Kuwaiti]'s delay [equitable adjustment] based upon the model submitted by [Kuwaiti]," J.A. 21, and (2) for similar reasons, "KBR ha[d] not shown that its settlement of the double[-]handling [equitable adjustment] . . . was reasonable," J.A. 22. The Board stated that KBR had failed to provide the actual costs incurred by Kuwaiti, as is typical in claims for equitable adjustments in other contracts. Instead, KBR's claimed costs were based solely on Kuwaiti's estimates. The Board found that the damages models were "unrealistic," "inconsistent," "flaw[ed]," "unreasonable" and assumed a "perfect world." J.A. 10, 17–18, 21. The Board concluded that "KBR [was] not entitled to any recovery." J.A. 22.

KBR appeals, and we have jurisdiction under 41 U.S.C. § 7107(a)(1)(A) and 28 U.S.C. § 1295(a)(10).

DISCUSSION

Our review of the Board's decision is limited by statute. *See* 41 U.S.C. § 7107. We review the Board's legal conclusions de novo, but we may only set aside a factual finding if it is "(A) fraudulent, arbitrary, capricious; (B) so grossly erroneous as to necessarily imply bad faith; or (C) not supported by substantial evidence." *Id.* § 7107(b). Contract interpretation is a question of law. *Agility Logistics Servs.*

Co. KSC v. Mattis, 887 F.3d 1143, 1148 (Fed. Cir. 2018). The reasonableness of a cost is a question of fact based on applicable legal principles. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1360 (Fed. Cir. 2013).

I

KBR argues that, under Change 5, the government was obligated to "furnish convoy escorts well before the [Change 5] deadlines," Appellant's Br. 19, and that but for the government's breach, KBR would have been able to "meet the express dates for trailer installation," Reply Br. 12. We need not reach the issue of whether the government breached the contract by failing to provide adequate force protection because the Board did not err in concluding that KBR's claimed costs were not shown to be reasonable (a prerequisite to its requested relief). *See Castle v. United States*, 301 F.3d 1328, 1341 (Fed. Cir. 2002) ("[W]e find that [the plaintiffs] have not established their entitlement to damages . . . . Accordingly, . . . we expressly decline to consider the liability issue."). In addressing the issue of cost reasonableness, we assume that the government was required to provide reasonable force protection to enable KBR to timely perform under the contract.[3]

Before addressing the reasonableness issue, we note that the government argues on appeal that KBR was required to submit not only the actual costs that KBR incurred, but the actual costs incurred by its subcontractor, Kuwaiti. It argues that under the Subcontract, Kuwaiti was required to maintain "'records [that] relate to cost reimbursement,' and provide to KBR '[c]opies of documents

[3] However, as the Board found, nothing in Change 5, including the Force Protection Clause, "constituted a guarantee by the government that its convoy security would enable KBR to comply" with the December 15, 2003, completion date. J.A 16.

and records supporting requests for payment.'" Appellee's Br. 53 (alterations in original) (quoting J.A. 1166). The government's reliance on the Subcontract is misplaced. As the government conceded at oral argument, the amounts paid by KBR to Kuwaiti were "costs" under the prime contract, and there is no provision in the prime contract that required KBR to submit the actual costs incurred by its subcontractor. KBR's obligation was to show that the payments to Kuwaiti were "reasonable." *See* 48 C.F.R. § 31.201-2(a)(1). While the failure to collect and submit Kuwaiti's costs bears on the reasonableness of the payments, submission of the subcontractor's costs is not a separate requirement.

The FAR provides:

> A cost is allowable only when the cost complies with all of the following requirements: (1) Reasonableness . . . .

Id. § 31.201-2(a).

> (a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial 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.
>
> (b) What is reasonable depends on a variety of considerations, including . . . [g]enerally accepted sound business practices, arm's length bargaining,

> and . . . [a]ny significant deviations from the contractor's established practices.

Id. § 31.201-3 (emphasis added).

The FAR thus makes clear that the burden is on the contractor to establish the reasonableness of its costs and that there is no presumption of reasonableness. We have similarly explained that there is no presumption that a contractor is entitled to reimbursement "simply because it incurred . . . costs." *Kellogg*, 728 F.3d at 1363.

A

KBR only devotes two pages of its brief to defending the reasonableness of its costs and fails to describe in any detail KBR's cost calculation methodology or why its methodology was reasonable. This alone would justify affirmance, since KBR has not meaningfully briefed the issue. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). We nevertheless have looked to KBR's justifications for its claimed costs (as argued to the Board) to determine whether the costs were reasonable. We begin with KBR's arguments directed to the alleged delays at the Iraq/Kuwait border.

KBR stated that the claimed costs related to delays were not based on documented costs incurred by Kuwaiti, but were instead estimated "based upon 83,078 days of idle truck time and a truck and driver daily cost rate of $300." J.A. 2928. We briefly describe how KBR arrived at those numbers.[4]

Under Change 5, KBR was required to deliver 2,252 trailers to Camp Anaconda and 1,760 trailers to Camp

[4] In its certified claim, KBR used the same estimates that Kuwaiti used in its original request for equitable adjustments. For convenience, we refer to these as KBR's estimates.

Victory by December 15, 2003. It was understood as a practical matter that the delivery of the trailers would occur over the entire period of performance. KBR began with the assumption that, if the government had provided adequate force protection, Kuwaiti would have delivered a uniform number of trailers each day to each camp. Under this assumption, KBR estimated that it would have delivered 135 and 58 trailers per day for Camp Victory and Camp Anaconda, respectively, to complete the deliveries in accordance with the December 15, 2003, deadline in Change 5. This translated to an assumption that 193 trucks would have crossed the Iraq/Kuwait border each day during the original period of performance. We refer to this as the "uniform rate assumption."

KBR then assumed that any deviation from the uniform rate assumption was attributable to government-caused delay. To calculate the number of supposedly idle trucks on a particular day, KBR subtracted the total number of trucks that had crossed the border (from the start date of the Subcontract up to that day) from the total number of trucks that would have crossed the border under the uniform rate assumption. For example, if, on a particular day, Kuwaiti's records showed that a total of 100 trucks had crossed the border, but 193 trucks would have crossed the border under the uniform rate assumption, KBR's model would claim 93 idle truck days. KBR then multiplied the total number of idle truck days by $300, which it adopted as a "reasonable market price for idle trucks based upon a review of other business KBR conducted." J.A. 17.

There are several reasons why KBR's model is not a reasonable cost calculation—each of which, standing alone, is sufficient to defeat its claims.

First, contrary to KBR's model, the Board found that Kuwaiti "did not always have the number of trucks available at the border dictated by the model or have access to the model's required number of trucks." J.A. 10. "In fact,

it was not known where all the trucks were at any given time." *Id.* A December 15, 2003, email from the Operations Manager at Camp Anaconda stated that Kuwaiti did not have trailers ready at the border, and that, "[w]hile [Kuwaiti] may have [had] hundreds of trailers waiting at the border, they apparently [were] not bound for [Camp] Anaconda." J.A. 4065. KBR assumed "perfect performance where everything worked flawlessly" on the part of Kuwaiti (despite records showing the contrary). J.A. 10. As the Board found, "KBR has not demonstrated that [the] model approximates the actual events that occurred." J.A. 18.

Indeed, the Board found that KBR's estimates as to the number of trucks at the border were inconsistent with the only evidence that KBR did submit. For example, "[Kuwaiti] reported on December 2, 2003, that it had 150 trucks waiting, but the model charged for 403 [idle truck days]." J.A. 10. The Board noted that "[Kuwaiti] and KBR also maintained status reports showing the number of trailers waiting at the border on specific days, and a Delivery Report for particular days showing the number of trailers waiting on trucks," and that "[t]hese reports generally showed lower numbers than" KBR's estimates. *Id.* Finally, the Board cited "numerous communications" attached to the request for equitable adjustment "discussing significantly different numbers of trucks and trailers available at the border than shown in the [KBR] model." *Id.* KBR provided no explanation for why its model could be reliable when it was "inconsistent" with the records that Kuwaiti did maintain. J.A. 9.

Second, KBR's model "assumed [that] every truck arriving at the [Iraq/Kuwait] border would be placed into a convoy for Iraq the very next day" and that all delays at the border were the result of inadequate government force protection. J.A. 10. In fact, substantial evidence supported the Board's findings that other factors outside of the government's control (in addition to KBR's delay in providing trucks at the border) contributed to delays. *See Sauer Inc.*

v. Danzig, 224 F.3d 1340, 1348 (Fed. Cir. 2000) ("[T]o establish a compensable delay, a contractor must separate government-caused delays from its own delays."). Even with "unlimited force protection assets, security threats and other constraints, such as the status of communication lines," "intelligence [reported] that the roads were too dangerous for travel at all," and insurgent attacks could delay the delivery of the trailers. J.A. 6. Yet KBR assigned every delay at the border to the lack of force protection without attempting to disaggregate the causes of those delays. KBR's assumption was simply "not realistic." J.A. 10.

Third, KBR's spreadsheets calculating idle truck days, "without substantiating data or records," were insufficient to establish the reasonableness of its costs. J.A. 9. KBR offered no fact or expert witnesses to support the reasonableness of its estimated number of idle truck days. Although Change 5 did not require KBR to provide actual costs to support its claim, the Board properly determined that KBR's failure to provide any supporting data was fatal to its claim. Under KBR's contract with Kuwaiti, Kuwaiti was obligated to "maintain books and records" reflecting actual costs, and KBR had the right to "inspect and audit" those records. J.A. 1166. As the Board found, it was simply not plausible that Kuwaiti did not record "how long trucks actually waited" at the border, J.A. 18, and KBR made no attempt to access or utilize these records. At bare minimum, KBR was required to support its estimates with representative data as to the number of trucks actually delayed. In fact, KBR supplied no representative data whatsoever. Without further evidence demonstrating the reliability of KBR's estimates, the Board properly found that KBR's claimed costs were not reasonable.

Fourth, KBR only offered conclusory testimony, unsupported by any data or evidence in the record, that the daily rate of $300 was a reasonable "composite rate" for each truck, trailer, and driver, "based on [KBR's] market research and . . . pricing data available . . . at the time."

J.A. 3002. In fact, KBR knew (from the redacted truck leases submitted by Kuwaiti) that Kuwaiti had records showing more precise daily costs for its idle trucks. The Board found that "[i]t simply strain[ed] credulity" that Kuwaiti, a "sophisticated company" having "over 70 subcontracts with KBR alone," would "not record how much it actually paid its drivers while they waited at the border . . . , especially given that it would ultimately seek millions of dollars in additional compensation for these events." J.A. 18. At oral argument, the only reason KBR gave for its failure to inquire into the costs charged by Kuwaiti was that it "wanted to move this matter along." Oral Arg. at 40:08–12. The Board properly concluded that KBR's testimony did not establish what Kuwaiti "actually paid to lease the trucks (which [Kuwaiti] knew but did not disclose) and how much it actually paid its drivers." J.A. 18.

Finally, KBR charged a $300 rate for all claimed delay days, implicitly assuming that each trailer was always attached to a truck with a driver. This was despite the fact that Kuwaiti was also claiming double-handling costs for the trailers, which it claimed were offloaded and stored—unattached to any trucks—in its laydown yard. The basis for claiming additional delay costs related to drivers and trucks for such stored trailers was not explained and, as the Board found, "ignored the fact that, once [Kuwaiti] procured land for a laydown yard at the border, it removed the trailers from trucks and placed them in the yard, relieving at least some trucks and drivers from having to remain idle the entire time the trailers were delayed." J.A. 18.

In *Kellogg*, another case between the same parties, KBR "declined to present independent evidence of the reasonableness of . . . [its] costs." *Kellogg*, 728 F.3d at 1363. We held that KBR failed to satisfy its burden of proving the reasonableness of its costs. *Id.* The record in this case leads to the same result. Despite having ample opportunity to do so, KBR supplied no meaningful evidence to

the Board showing the reasonableness of its costs, nor has it explained the inconsistencies between its proposed cost model and the factual record.

We conclude that the Board's determination that KBR had failed to demonstrate that its delay costs were reasonable was supported by substantial evidence.

B

We turn to KBR's costs related to double handling. Here, KBR sought reimbursement for the cost of the entire facility used to store the trailers, apparently on the theory that every cost related to the facility was attributable to the alleged government delay.[5] In this respect, KBR's double-handling claim suffered from many of the same deficiencies as its delay claim. There were, in addition, other deficiencies.

KBR failed to support the reasonableness of its claimed costs with any record evidence. Although KBR stated that it "engaged . . . procurement personnel to obtain pricing from sources other than [Kuwaiti] to negotiate the double[-]handling claim," J.A. 2927, its certified claim for double-handling costs contained only spreadsheets summarizing monthly costs. KBR never submitted pricing data from its other sources.

Not only was the pricing not supported—the description of the work performed was lacking in necessary detail or described work unrelated to any government-caused delay. Kuwaiti had claimed costs related to "skilled workers," at various rates (ranging from $2,000 to $3,500 per person per month) without explaining what these workers did, or

[5] KBR also sought costs related to double handling due to "late site preparation." J.A. 21. As with KBR's other double-handling costs, it failed to support these claimed costs with adequate data.

even what their "skills" were. J.A. 8. Kuwaiti also charged $3,090,750 in "Repair Cost Consequent on Double Handling [sic]." J.A. 4798. The administrative contracting officer noted that, while "some damage [to the trailers] will occur during double handling," "some of the damage charged [for] in the [equitable adjustment] was also apparently attributed to vandalism." J.A. 1892. KBR's submissions to the Board "did not describe any [double-handling] repairs, or what might have happened to require any [repairs]." J.A. 8. KBR simply made no effort to "field verify any additional equipment, manpower, protection, land preparation, repairs, and double installations" from the double handling. J.A. 12.

KBR itself expressed concern with the reasonableness of Kuwaiti's proposed double-handling costs, stating that Kuwaiti's quoted prices were "too high" and that "if this was a claim and if this was being assessed as per the FAR[] . . . there would be a very high possibility that this would be dismissed." J.A. 4800. KBR also noted during its negotiations with Kuwaiti that "the numbers [of trailers] that were said to have been repaired daily . . . [did] not add up." J.A. 4801.

Under these circumstances, we conclude that the Board did not err in finding that KBR had failed to prove the reasonableness of its double-handling costs.

II

KBR finally argues on appeal that the Board failed to apply the "jury verdict" method. The jury verdict method is "not favored and may be used only when other, more exact, methods cannot be applied." *Dawco Const., Inc. v. United States*, 930 F.2d 872, 880 (Fed. Cir. 1991), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995). As previously discussed, KBR has not shown that other, more exact, methods were unavailable. We affirm the Board's holding that "[t]he jury verdict

method does not relieve KBR from FAR Part 31's limitation of its recovery to costs that are reasonable." J.A. 21.

AFFIRMED

United States Court of Appeals for the Federal Circuit

KELLOGG BROWN & ROOT SERVICES, INC.,
Appellant

v.

SECRETARY OF THE ARMY,
Appellee

2019-1683

Appeal from the Armed Services Board of Contract Appeals in Nos. 57530, 58161, Administrative Judge Mark A. Melnick, Administrative Judge Owen C. Wilson, Administrative Judge Richard Shackleford.

NEWMAN, *Circuit Judge*, dissenting.

With the expedition of United States forces to Iraq, the Army contracted with Kellogg Brown & Root Services, Inc. ("KBR") for various services including the provision of prefabricated housing for thousands of troops. As described by the Armed Services Board of Contract Appeals ("ASBCA"),[1] "soldiers slept wherever they could

[1] *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 57530, 19-1 BCA ¶ 37,205, 2018 WL 6431434 (Nov. 19, 2018) ("ASBCA Op.").

in . . . abandoned schools, . . . tents, vehicles, the ground, or any other place soldiers could put a sleeping bag." ASBCA Op. at 2. By contract LOGCAP III, KBR would "provide accommodations and life support services to [the soldiers] and coalition forces in various locations in Iraq . . . to rapidly bed down the remainder of [the soldiers]." J.A. 291. This "Bed Down Mission" was a priority Army activity, scheduled to be completed before Christmas 2003, for reasons of both morale and military preparedness. The ASBCA reports that over 18,000 such living trailers were included, for multiple military locations. ASBCA Op. at 2.

KBR and subcontractor First Kuwaiti Trading Company ("FKTC") designed, furnished, equipped, and brought to the Kuwait-Iraq border the contracted living trailers. However, delivery was often delayed due to unavailability of military force protection for convoys and installation. KBR paid an equitable adjustment to FKTC for this delay, but the ASBCA denied reimbursement to KBR, on the grounds that the government had not breached its obligation to provide force protection, and also that KBR had employed an incorrect methodology for calculating the equitable adjustment.

On KBR's appeal, my colleagues on this panel, while correctly rejecting the ASBCA's reasons for denying compensation as contrary to the contract, nonetheless err in implementing the correct standard. My colleagues hold that the correct standard is "reasonableness," and while complaining about the absence of evidence and witnesses and argument on this standard, my colleagues make extensive findings on information that has not been presented, and decide the issue of reasonableness without participation of the parties.

Thus the panel majority now finds that our new standard is not met, and denies all reimbursement. From this

flawed procedure and incorrect result, I respectfully dissent.

DISCUSSION

At issue in this appeal is the measure of damages for government-caused delay in performance of the contract to provide 2,252 living trailers for installation at Camp Anaconda by December 15, 2003, and 1,760 trailers for Camp Victory with completion extended to January 1, 2004. KBR and its subcontractors designed, obtained, furnished, equipped, and trucked the trailers to the Kuwait-Iraq border. The war was active, and transport along the main supply route from Kuwait was under attack, as the ASBCA reported:

> Because there was a war on, MSR [Main Supply Route] Tampa was extremely dangerous. Insurgent attacks began in the spring of 2003 and people were shot and killed. Among those who frequently lost their lives were KBR affiliate personnel. . . . In June 2003, the military imposed movement restrictions, requiring military control and escorts into Iraq of all assets, including contractors.

ASBCA Op. at 4–5 (internal citations omitted). The KBR contract and subcontracts required the government to provide force protection for delivery and installation of the trailers:

> H-16 Contractor Force Protection
>
> While performing duties [in accordance with] the terms and conditions of the contract, the Service Theater Commander will provide force protection to contractor employees commensurate with that given to Service/Agency (e.g. Army, Navy, Air Force, Marine, DLA) civilians in the operations area unless otherwise stated in each task order.

J.A. 242; *see also* J.A. 1157 (Subcontract 11, Prime Contract). The ASBCA found that "[b]ecause of the dangerous conditions in Iraq, and the limitations upon the military's resources to escort convoys, trailers backed up at the Kuwait/Iraq border waiting for escorts." ASBCA Op. at 6. Despite the priority of the Bed Down Mission, due to delays in military force protection the delivery of living trailers to Camp Victory was not completed until May 10, 2004, and to Camp Anaconda on June 28, 2004.

By its subcontract, FKTC was entitled to an equitable adjustment if government or KBR delay caused substantially increased cost or time of performance:

> § 3.2.5. If [FKTC's] performance of the Sublet Work is delayed by [the government or KBR's] failure to perform their obligations hereunder, or by orders of [KBR] delaying or suspending the work, [FKTC] shall be entitled to an equitable adjustment in the compensation or time of performance, or both, if the delay substantially increases the cost to [FKTC] of the Sublet Work or the time that [FKTC's] equipment and forces are required at the site.

J.A. 1162 (LOGCAP III); *see also* J.A. 1176–77 (Subcontract 11, Special Provisions, §§ 4.2, 4.4).

The ASBCA acknowledged that "Under the subcontract, KBR was responsible for paying an 'equitable adjustment' to FKTC in the event of a government performance failure causing delay." ASBCA Op. at 16. KBR and FKTC negotiated this adjustment, and KBR paid the negotiated amount. However, the ASBCA refused to reimburse KBR for this payment, or any portion thereof. That is the subject of this appeal.

A

It is not disputed that five to eight months of delays in delivery occurred due to the unavailability of force

protection, and that trailers "piled up" at the Kuwait-Iraq border. It is not disputed that heavy costs were incurred: costs of storage, handling, maintenance, repairs, personnel, and vandalism. KBR and FKTC agreed to the adjustment methodology of a fixed sum of $300 per delay day per trailer. The ASBCA disapproved of this methodology as not in conformity with the Federal Acquisition Regulation ("FAR"), and held that none of the equitable adjustment would be reimbursed.

I agree with my colleagues that the ASBCA applied an incorrect standard for measuring delay damages. As the majority reports, at the oral argument of this appeal the government conceded that "there is no provision in the prime contract that required KBR to submit the actual costs incurred by its subcontractor." Maj. Op. at 8. Thus I agree that the ASBCA's decision must be vacated.

I also agree that the correct standard is "reasonableness." However, my colleagues do not remand for application by the ASBCA of this standard; they do not discuss whether the methodology used by KBR was reasonable, although this aspect was the subject of testimony at the ASBCA; and they do not consider whether any of the costs of delay were reasonable in the circumstances that existed. Instead, my colleagues extract isolated costs from unbriefed documents, and rule, with no briefing and no argument, that reasonableness was not shown.

Although KBR requested remand to the ASBCA if this court agrees that the ASBCA's decision should be reversed, remand is not provided. KBR has no opportunity to meet this court's new standard. Instead, my colleagues scavenge among assorted materials that were provided in other contexts, and complain about the absence of evidence and expert testimony related to the court's new standard.

B

The ASBCA also held that "nothing in Change 5 required the government to place FKTC's trailers into

convoys without delay." ASBCA Op. at 15. The government argues that FKTC "assumed the risk" of delay, and that the government had not breached its contractual obligation to provide force protection. That is incorrect, and in a related case concerning the same contract, the ASBCA held that the government's failure to provide force protection was indeed a breach of contract.

In companion litigation on the same contract requirement, the ASBCA found that the government breached its contract obligation, when the Army "did not have sufficient resources to provide . . . protection to KBR[ ]." *Kellogg Brown & Root Servs., Inc.*, ASBCA No. 56358, 17-1 BCA ¶ 36,779, 2017 WL 2676674 (June 8, 2017).

The Federal Circuit affirmed that the contract was breached by the Army's insufficiency "to provide military escorts for its contractors and several KBR employees and subcontractors were killed in the attacks," stating that the breach "eviscerated the promise at the heart" of the contract. *Sec'y of the Army v. Kellogg Brown & Root Servs., Inc.*, 779 F. Appx 716, 717, 719 (Fed. Cir. 2019).

That final decision estops the government's present argument that the failure to provide force protection did not breach the contract. My colleagues state that they do not reach the question of breach, but they nonetheless appear to give weight to the government's argument that it was the war, not the government, that caused the Army's delays in providing force security. The government states that the delays were due to "efforts to militarily secure the country, discovery of explosives on the roads, and other reasons that inevitably occur while performing such operations over the extended distances in a warzone," Govt. Br. 19 (internal quotation marks omitted).

The panel majority agrees that "factors outside of the government's control" contributed to the delays, and appears to deem such factors to weigh on the side of withholding the contract-mandated adjustment for delays in delivery and installation of the living trailers. Maj. Op. at

11. However, an equitable adjustment is required by contract, and reinforced by the breach.

C

The issue before the ASBCA was the reasonableness of the methodology used to measure the equitable adjustment that KBR paid. The ASBCA held that the FAR requires actual costs and payments, and rejected the KBR methodology of negotiating a daily lump sum.

KBR summarized that costs arose from the delay-required storage, maintenance, handling, and repairs of trailers and trucks, as well as personnel costs and site preparation and installation. KBR argued to the ASBCA that its methodology was reasonable. Although my colleagues reject the ASBCA's requirement of detailed cost and payment records, my colleagues criticize the pieces of cost data that they can scour from various documents, and summarily deny all recovery. The court complains about the absence of evidence and expert testimony[2]—although the court does not remand for evidence and expert testimony.

The court denies KBR the opportunity to demonstrate reasonableness, and appears to require the same degree of detail for which the court has reversed the ASBCA. The court criticizes the absence of detailed evidence, stating that "KBR only devotes two pages of its brief to defending the reasonableness of its costs." Maj. Op. at 9. The court ignores that KBR's action in the ASBCA was to support the methodology by which it settled the equitable adjustment

[2] The panel majority complains that "KBR offered no fact or expert witnesses to support the reasonableness of its estimated number of idle truck days," Maj. Op. at 12. There indeed were expert witnesses, arguing for the reasonableness of the settlement methodology based on a fixed daily cost and the number of delay-days. KBR Br. 36.

owed to FKTC, not to meet this court's new and undefined reasonableness standard.

The panel majority concludes that KBR is entitled to no recovery at all, although there was no hearing, no testimony, no briefing, and no argument on the court's new standard—either to clarify this standard, or to provide evidence to which the standard is applied.

Instead, my colleagues cite records not presented for this purpose, and complain of their inadequacy. The various spreadsheets were presented to the ASBCA to support the argument that the methodology that was used was reasonable. There is no record for whatever standard of reasonableness the court now intends.

For example, in the criticized "two pages" on reasonableness in KBR's brief, KBR states that "the record at the ASBCA contained ample evidence upon which it could have calculated a 'fair, equitable and reasonable amount' of compensation" by the jury verdict method. KBR Br. 36. The majority does not mention KBR's evidence "including five delay day models, reports and testimony from multiple expert witnesses and the [Administrative Contracting Officer's] initial, unbridled conclusion that KBR was entitled to recover at least $25.5 million." *Id.* The Administrative Contracting Officer had found that the methodology that was used reflected "commercial procedures" and that "adequate price analysis was provided." ASBCA Op. at 10 (alterations omitted).

Precedent illustrates that when there is question concerning the method of determining compensable costs, this "[does not] mandate that Delco recover nothing." *Delco Elecs. Corp. v. United States*, 17 Cl. Ct. 302, 324 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990). The jury verdict method has served to determine an "appropriate amount for a reasonable recovery" that is a fair approximation of damages "in light of all the facts." *Id.* at 323–24. In *Delco* this method was invoked to determine damages in the absence

of adequate cost and pricing data—the issue on which my colleagues now focus.

KBR has requested remand, to provide the opportunity to establish "fair, equitable, and reasonable" compensation. At issue is not only the resolution of this case; at issue is the public's confidence in fair, equitable, and reasonable government dealings with those who are willing to provide their expertise and resources to the nation.

I respectfully dissent.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
MicroTechnologies, LLC	)	ASBCA No. 62394
	)	
Under Contract No. W52P1J-16-D-0029	)	

APPEARANCE FOR THE APPELLANT: Barbara Behn Ayala, Esq.
Counsel

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Nathaniel S. Canfield, Esq.
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OPINION BY ADMINISTRATIVE JUDGE STINSON

Appellant MicroTechnologies, LLC (MicroTech), appeals a contracting officer's denial of its September 11, 2019, claim, in the amount of $46,743.19 (R4, tabs 1-2). Appellant elected to proceed under the Board's Small Claims (Expedited) procedures, Board Rule 12.2, and the parties agreed to submit this appeal for a decision on the record without a hearing pursuant to Board Rule 11. The Contract Disputes Act, 41 U.S.C. § 7106(b)(4)-(5), as implemented by Board Rule 12.2, provides that this decision shall have no precedential value, and, in the absence of fraud, shall be final and conclusive and may not be appealed or set aside. For the reasons stated below, MicroTech's appeal is denied.

FINDINGS OF FACT

1. On February 22, 2016, the Army Contracting Command, Rock Island, Illinois, awarded MicroTech Contract No. W52P1J-16-D-0029 (the Contract), 1 of 17 multiple award, Indefinite Delivery Indefinite Quantity contracts for Information Technology Enterprise Solutions - 3 Hardware (ITES-3H) (R4, tab 3 at 000010). The government accepted and incorporated appellant's offer dated December 14, 2015, submitted in response to Request for Proposal No. W52P1J-11-R-0171, "to the extent it does not conflict with this RFP, SOW, terms and conditions" (*id.*). The Contract provided that an ordering guide for customers placing orders against the contract would be published to the Army Computer Hardware, Enterprise Software and Solutions (CHESS) IT e-Mart website (*id.*).

2. The Contract incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2015) (R4, tab 3 at 000047). Subparagraph (u) of that clause states:

> Unauthorized Obligations. (1) Except as stated in paragraph (u)(2) of this clause, when any supply or service acquired under this contract is subject to any End User License Agreement (EULA), Terms of Service (TOS), or similar legal instrument or agreement, that includes any clause requiring the Government to indemnify the Contractor or any person or entity for damages, costs, fees, or any other loss or liability that would create an Anti-Deficiency Act violation (31 U.S.C. 1341), the following shall govern:
>
> (i) Any such clause is unenforceable against the Government.
>
> (ii) Neither the Government nor any Government authorized end user shall be deemed to have agreed to such clause by virtue of it appearing in the EULA, TOS, or similar legal instrument or agreement. If the EULA, TOS, or similar legal instrument or agreement is invoked through an "I agree" click box or other comparable mechanism (e.g., "click-wrap" or "browse-wrap" agreements), execution does not bind the Government or any Government authorized end user to such clause.
>
> (iii) Any such clause is deemed to be stricken from the EULA, TOS, or similar legal instrument or agreement.
>
> (2) Paragraph (u)(1) of this clause does not apply to indemnification by the Government that is expressly authorized by statute and specifically authorized under applicable agency regulations and procedures.

48 C.F.R. § 52.212-4(u).

3. On June 29, 2017, MicroTech entered into a Master Purchase Agreement (MPA) with De Lage Landen Financial Services, Inc. (DLL), for the financing of loans by DLL for appellant to purchase equipment it leased to the government. DLL agreed to pay appellant the purchase price for leased equipment in return for title to the equipment and an assignment of appellant's lease payments received from the government on equipment orders. (App. supp. R4, tab 5 at 00012-14) In the event of a termination for convenience or non-renewal of a government contract that is the subject of the MPA,

appellant was required cooperate with DLL in preparing a claim to be submitted to the government in MicroTech's name for any unpaid lease payments, and seek appeal of any unfavorable final decision (app. supp. R4, tab 5 at 00016-18). Pursuant to Section 4.01 of the MPA, DLL assumed "all risks related to nonpayment of the Lease due to termination of the Prime Contract by User due to Non-renewal, Non-appropriation or Termination for Convenience" (app. supp. R4, tab 5 at 00017).

4. On March 8, 2018, the government issued a CHESS IT e-mart Request For Quote, Reference Number 232755, seeking to lease multi-functional devices/network printers, as well as annual maintenance and repair services (R4, tab 8).

5. On March 16, 2018, MicroTech submitted a quote in response to the government's request, identified as Proposal No. 0315ACEPortland. MicroTech's proposal included six supplemental terms and conditions. (R4, tab 8 at 000106, tab 9 at 000107, 000110)

6. Supplemental Term and Condition No. 1 stated the "Government agrees not to replace the Product with functionally similar Product or to revert to the use of any other Product to perform the functions performed by the Product for a period of one (1) year after any termination for convenience or non-renewal" (R4, tab 9 at 000110).

7. Supplemental Term and Condition No. 5 stated:

> Within fourteen (14) days after the date of expiration, nonrenewal or termination of the contract, the Government shall, at contractors expense, have the Products packed for shipment in accordance with manufacturer's specifications and return the Products to specified location in the continental United States, in the same condition as when delivered, ordinary wear and tear accepted, and certify in writing that all software has been deleted from all devices and is no longer in use by Government. Any expense necessary to return the Products to good and working order shall be at Government's expense.

(R4, tab 9 at 000110)

8. Supplemental Term and Condition No. 6 stated:

> Termination for Convenience – Contracts entered into hereunder may not be terminated except by the ordering office's contracting officer exercising the provisions of and providing notice in accordance with FAR 52.212.4, Contract

> Terms and Conditions-Commercial Item, paragraph (l) Termination for the Convenience of the Government. In the event of a Termination for Convenience, or a [sic] an event of non-renewal by the Government, the Government will promptly pay Contractor, or its assignee, the Termination Charges.

(R4, tab 9 at 000110)

9. On May 1, 2018, the United States Army Corps of Engineers (USACE), Portland District, solicited from MicroTech a firm fixed price Order No. W9127N18F0084 (the Order) under the Contract for "Printers/Copiers/Scanners Maintenance." The Order specified that the "Contractor maintains ownership of equipment; installs equipment; performs preventative and corrective maintenance; and provides standard printer consumbables [sic] (except paper)." (R4, tab 10 at 000164, 000167, 000206)

10. The Order solicited a base lease term of 5 months from, May 1, 2018, to September 30, 2018, with four 12-month options and one 7-month option, for a total of 60 months. MicroTech accepted USACE's offer on June 18, 2018. (R4, tab 10 at 164, 166) Bilateral Modification No. P00001, signed by the government on June 18, 2018, changed the base lease term to begin July 1, 2018, and run through September 30, 2018 (R4, tab 11 at 000219-20).

11. MicroTech executed a Bill of Sale dated August 14, 2018, selling to DLL its right, title, and interest in eight Ricoh printers that were the subject of the Order for a purchase price of $52,956.32 (app. supp. R4, tab 6).

12. On August 27, 2018, the government acknowledged receipt of the Federal Notice of Assignment and the Instrument of Assignment, indicating that monies due pursuant to the Order were assigned by MicroTech to DLL (R4, tab 20 at 000285).

13. On August 30, 2018, the government issued unilateral Modification No. P00002 incorporating into the Order the Federal Notice of Assignment. The Modification also stated, "Proposal number 0315ACEPortland, including all sections, is hereby incorporated into this Delivery Order by reference as if fully set forth herein." (R4, tab 12 at 000228)

14. On September 27, 2018, the government issued unilateral Modification No. P00003, exercising the first option, from October 1, 2018, through June 30, 2019, for a period of nine months (R4, tab 13). Bilateral Modification No. P00004, signed by the government on October 25, 2018, changed the base lease term to begin July 13, 2018, to match the acceptance date of the leased equipment (R4, tab 14).

15. By email dated March 20, 2019, the contracting officer notified MicroTech that USACE, Portland District, was in the process of transitioning all of its printer requirements, including those fulfilled under the Order, to the Defense Logistics Agency (DLA). Mr. Hayes stated that the "Portland District as a whole, along with other project offices, are in the works of transferring to a DLA enterprise solution for printers." (R4, tab 17)

16. On May 17, 2019, the government signed unilateral Modification No. P00005, with an effective date of July 1, 2019, exercising a three-month period of performance, from July 1, 2019, through September 30, 2019. The modification was issued under the authority of FAR 52.217-9, OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000), which was incorporated in the Order in full text. (R4, tab 10 at 000171, tab 15)

17. On July 23, 2019, the contracting officer notified MicroTech via email that the government would not exercise its option under the Order for the period that was to begin October 1, 2019 (R4, tab 18).

18. On or about August 2, 2019, the contracting officer confirmed with appellant during a telephone conference that the government planned to substitute the printers leased from MicroTech with functionally similar equipment (compl. ¶ 12; answer ¶ 12).

19. During the 15-month period of performance, the government made total payments of $23,928.00 (R4, tab 16).

20. On September 11, 2019, MicroTech submitted to the contracting officer via email its claim in the amount of $46,743.19 (R4, tab 1).

21. On November 25, 2019, the contracting officer issued a final decision denying MicroTech's claim (R4, tab 2). The contracting officer stated, in part:

> MicroTech's quotation was not incorporated into the order. Because task order no. W9127N18F0084 was solicited as an RFQ, MicroTech's quotation did not constitute a proposal that the Government accepted. Rather, the order itself constituted the Government's offer, which MicroTech accepted, per FAR 13.004. The order neither attached MicroTech's quotation nor used express and clear language

> incorporating MicroTech's quotation by reference, and therefore did not incorporate the quotation.

(R4, tab 2 at 000004) Appellant filed a timely notice of appeal, which was docketed as ASBCA No. 62394.

DECISION

The issue in this appeal is the effect, if any, of incorporating by reference into the Order, through unilateral modification, additional terms authored by the contractor, which taken together appear to create a right of MicroTech (or DLL as its assignee) to receive undefined "termination charges" in the event the government invokes its contractual right not to exercise an option for leased equipment and then within one year thereafter replaces the previously leased equipment with functionally similar equipment.

Appellant argues that the government materially breached Supplemental Term and Condition No. 1, which appellant refers to as the "Non Substitution Clause," and allegedly prohibits the government for one year "from replacing the leased equipment with functionally similar equipment" (app. br. at 1). According to appellant, the government's alleged breach "resulted in the inability of Appellant (and its financing source) to recover the purchase price paid by Appellant (and financed by its financing source) for the leased equipment through the 60-montlhly [sic] lease payments provided for in the Delivery Order" (app. br. at 2).

Appellant correctly notes that its Proposal No. 0315ACEPortland was incorporated into the Order pursuant to Modification No. P00002 (app. br. at 8, 12; finding 13). This is important because appellant's proposal was not part of the original agreement between the parties. *See Ricoh USA, Inc.*, ASBCA No. 59408, 17-1 BCA ¶ 36,584 at 178,198 (contract that resulted from the government's request for a quote included contractor's pricing schedule, but not its technical proposal). As stated in FAR 13.004(a):

> A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.[1]

[1] Consistent with FAR 13.004(a), the final decision recognized that the Order did not incorporate appellant's proposal, stating "[b]ecause task order

Appellant argues that "[t]he Contracting Officer was clearly authorized to bind the government to both the Non-Substitution and the Termination Charge Clauses that are included in Appellant's quote and were incorporated into the DO" (app. br. at 13). As support, appellant cites FAR 52.212-4, specifically, subparagraph (g)(1), which states, "[t]he Contracting Officer is the only person authorized to direct changes in any of the requirements under this contract" (app. br. at 13-14 (citing Appellant's Proposed Findings of Facts ¶ 22)).[2]

Notwithstanding FAR 52.212-4(g)(1), as cited by appellant, the supplemental terms and conditions contained in appellant's proposal, and relied upon by appellant here, are not binding upon the government. The contracting officer had no authority to modify the Order in favor of MicroTech to include the supplemental terms and conditions, without there being consideration to the Government. As noted in *Craft Machine Works, Inc.*, ASBCA No. 47457, 98-1 BCA ¶ 29,467, "[i]t is well settled that a contracting officer does not have the authority to agree 'to increase the remuneration to be paid a contractor without any increase whatever in the contractor's obligations to the Government.'" 98-1 BCA ¶ 29,467 at 146,264 (citing *Joseph J. Jaeger, Jr.*, ASBCA No. 11413, 66-2 BCA ¶ 5757 at 26,822). It does not matter that the contract terms exceeding the contracting officer's authority were embodied in a written modification. *Wheeler Bros., Inc.*, ASBCA No. 16112 *et al.*, 73-1 BCA ¶ 9916 ("Such lack of authority cannot be overcome by the issuance of a contractual document which has the effect of increasing the amount to be paid to the contractor without any increase in the latter's

no. W9127N18F0084 was solicited as an RFQ, MicroTech's quotation did not constitute a proposal that the Government accepted. Rather, the order itself constituted the Government's offer, which MicroTech accepted, per FAR 13.004. The order neither attached MicroTech's quotation nor used express and clear language incorporating MicroTech's quotation by reference, and therefore did not incorporate the quotation." (Finding 21) The final decision, however, failed to discuss or recognize the import of Modification No. P00002.

[2] Appellant's Proposed Findings of Facts ¶ 22 cites as support a version of FAR 52.212, which was included in the Contract "as an addendum to 52.212-4" and contains a section (g) entitled "Contract Authority" (app. br. at 8; R4, tab 3 at 000034-35). We note that, pursuant to FAR 12.302, TAILORING OF PROVISIONS AND CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS, the Contract also included a separate, tailored version, of FAR 52.212-4, "to reflect special contract terms and conditions that are unique for this contract" (R4, tab 3 at 000059). The Contract also incorporated by reference FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2015) (finding 2). Both the tailored version of FAR 52.212-4 and the May 2015 version include a section (g) entitled "Invoice" (R4, tab 3 at 000060). 48 C.F.R. § 52.212-4 (MAY 2015).

obligations to the Government, and such document will not be binding upon the Government.").

Appellant acknowledges that FAR 52.217-9 grants the government discretion to exercise options. Appellant argues, however, that this discretion "is constrained by the Non-Substitution clause" which "acts as a binding constraint on the Government in the event of a non-renewal and prohibits the Government from replacing the leased equipment with functionally similar equipment during the one-year period following any termination for convenience or non-renewal of the lease." (App. br. at 14-15)[3]

In essence, appellant's claim, based upon the application of Supplemental Term and Condition Nos. 1 and 6, renders void the government's right not to exercise its lease options, because the relief demanded by MicroTech seeks payment of monies appellant would have received pursuant to the Order, had the government exercised all options specified in the Order. Under appellant's theory, the government would be liable for full payment of the unexercised option years, even though appellant would not be required to provide the equipment or services specified in the Order.

The supplemental terms and conditions, as applied by appellant, would diminish the government's bargained-for right not to exercise its option to extend the lease. *Gov't Sys. Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988) (discussing the government's bargained-for right not to exercise a delivery order option). Indeed, at the time it accepted the Order, MicroTech "assumed any financial risks resulting from its financial planning based on the assumption that it would be awarded all option periods under the contract." *Phoenix Data Sols. LLC Aetna Gov't Health Plans*, ASBCA No. 60207, 18-1 BCA ¶ 37,164 at 180,923 (quoting *Vehicle Maint. Servs. v. GSA*, GSBCA No. 11663, 94-2 BCA ¶ 26,893 at 133,880). Inclusion of the supplemental terms and conditions into the Order, in essence, improperly transferred to the government the financial risk assumed by the contractor at the time it accepted the Order.

The government argues that application of the supplemental terms and conditions proffered by appellant together violated the Anti-Deficiency Act, 31 U.S.C. § 1341, and

[3] MicroTech claims entitlement to full payment of what it terms the "60 month lease" (app. br. at 1-2, 5-6, 10-11, 21-23, 26-27). Indeed, appellant alleges that the contracting officer "acknowledged that all of the equipment specified in the DO had been installed and accepted by the Government and that the lease commencement date for the 60-month lease plan shall be July 13, 2018" (app. br. at 6). In actuality, the contracting officer stated "[t]his is to acknowledge that the Equipment and Software referenced above has been installed and accepted and that the lease commencement date shall be 13 July 2018" (app. supp. R4, tab 2). The Order here included a base year, plus options, which totaled 60 months. The Order was not a 60-month lease. (Findings 10, 14).

FAR 52.212-4(u).[4] According to the government, the supplemental terms and conditions are unenforceable as they create an indeterminate liability requiring "the Government indemnify DLL, MicroTech's assignee, for losses resulting from the Government's decision not to exercise its option under the Order" (gov't br. at 7). The government likewise argues that the supplemental terms and conditions are unenforceable because they impose a penalty on the Government, also in violation of the Anti-Deficiency Act (gov't br. at 10-13).

In support of its argument, the government cites a decision of the Comptroller General, *Burroughs Corp.*, B-186313, 76-2 CPD ¶ 472 (Comp. Gen. Dec. 9, 1976), *modified in part, aff'd in part*, *Honeywell Info. Sys.*, B-186313, 77-1 CPD ¶ 256 (Comp. Gen. April 13, 1977), discussing a requirement that the government pay "separate charges" if it returned equipment to the contractor or terminated its use prior to the intended 60-month use of the system procured (gov't br. at 8-10). The Comptroller General held that the provision violated the Anti-Deficiency Act because payment would "subject the Government to an indeterminate liability." 76-2 CPD ¶ 472.

The government likewise cites *Fed. Data Corp.*, B-190659, 78-2 CPD ¶ 380 (Comp. Gen. Oct. 23, 1978), in which the Comptroller General held that "[t]he real effect of the 'separate charges' provision in the SEC contract was" to force "the contracting agency to purchase its requirements from the contractor for successive fiscal years or to pay damages for its failure to do so" (gov't br. at 10 (quoting *Fed. Data Corp*.)). The Comptroller General expressly rejected the argument that the government had ratified the "separate charges" provision, holding the government had no authority to contract for a provision in violation of funding statutes. *Id.*

We find the Comptroller General decisions, although not binding precedent, to be persuasive, and the supplemental terms and conditions appellant seeks to invoke here similar to the "separate charge" provisions, thereby imposing upon the government a penalty for not exercising the remaining option periods. See *JJA Consultants v. Dep't of the Treasury*, CBCA No. 432, 07-2 BCA ¶ 33,632 at 166,577 (issue is whether "charge represents the reasonable value of the work performed, or whether the charge amounts to a penalty for the agency's failure to continue to use the contractor's services.").

Appellant attempts to distinguish the Comptroller General decisions, stating that "[t]he Non-Substitution Clause at issue here contains no separate charge at all" (app. reply br. at 7), and that "[i]n contrast to the penalties addressed in the cases relied upon by the Government, it is undisputed that the 'Termination Charges' sought by MicroTech pursuant to the Termination Charge Clause in the Delivery Order refers to the termination

[4] Appellant's reply brief discusses FAR 52.212-4(l), but does not discuss the import of FAR 52.212-4(u) in the context of the Anti-Deficiency Act (app. reply br. at 3-4, 9-12).

charges provided for in FAR Clause 52.212-4(1) which include 'reasonable charges' that have resulted from the non-renewal" (app. reply br. at 9-10).[5]

Appellant's argument that it is "undisputed" the term "termination charges" equates to "reasonable charges" set forth in FAR 52.212-4(l) is misplaced. What is undisputed is that appellant's proposal contained no definition of "termination charges." Appellant offers only conjecture to link the two terms. It is appellant, not the government, that bears responsibility for failing to define the term in its proposal. *See, e.g*., *Selby Constr. Co.*, ASBCA No. 25533, 81-2 BCA ¶ 15,446 ("[u]nder the familiar *contra proferentem* rule the drafter of the contract must therefore suffer the consequences of its ambiguous terms.").

Even assuming that "termination charges" equates to "reasonable charges," appellant still would not be entitled to recover the damages it seeks. As noted by the government, "lost revenues and anticipatory profits are not among the 'reasonable charges' that are compensable pursuant to a termination for convenience" in a commercial items contract (gov't br. at 14-15 (citing *Nexagen Networks, Inc.*, ASBCA No. 60641, 19-1 BCA ¶ 37,258 at 181,328-29 (anticipated but unearned profits not compensable), and *Robertson & Penn, Inc*., *d/b/a Cusseta Laundry, Inc*., ASBCA No. 55625, 08-2 BCA ¶ 33,951 at 167,983 (lost revenue not compensable))).

Appellant claims that it "is not seeking lost revenues or anticipatory profits" and that the "reasonable charges" sought by MicroTech "represent the unavoidable and unrecovered costs incurred by MicroTech to purchase the Ricoh printers required by the Delivery Order for delivery to and acceptance by the Government" (app. reply br. at 11). Those remaining payments, however, were not incurred because of any non-renewal, or as stated in FAR 52.212-4(l), have not "resulted from the termination."

[5] Appellant attempts to escape the import of the Anti-Deficiency Act, arguing that "as with breach of contract damages, the Permanent Indefinite Judgment Fund, 41 U.S.C. § 7108(a) and (b); 31 U.S.C. § 1304(a)(3)(C), is available to pay any final judgment of this Board awarding Appellant termination charges within the meaning of FAR Clause 52.212-4(1)" (app. reply br. at 10). Appellant's argument misses the mark. Congress established the judgment fund to provide a way in which to reimburse lawful judgments. *S. Carolina Public Serv. Auth.*, ASBCA No. 53701, 04-2 BCA ¶ 32,651 at 161,605 ("[t]o the extent that the government is liable for CDA claims, the judgment fund is generally available"). Here, the alleged contractual obligation arose from an agreement that violated the Anti-Deficiency Act. The judgment fund does not provide an independent statutory basis upon which to make lawful an unlawful contract provision. Indeed, 41 U.S.C. § 7108(c) requires that judgment fund payments be reimbursed "by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement."

Of course, regardless of whether "termination charges" equates to "reasonable charges," or whether appellant's damages meet the requirements of FAR 52.212-4(l), it is of no consequence here because Supplemental Term and Condition No. 6, which contains the term "termination charges," is not properly part of the agreement between the parties, and appellant is not entitled to seek damages for the government's alleged "non-renewal" of the lease. Moreover, the Order here was not terminated for the convenience of the government, which is the type of termination to which FAR 52.212-4(l) applies.

Appellant also argues that "[e]very court and board that has addressed non-substitution provisions similar to the one at issue in this case has held that the Government's renewal option and its right to non-renew a lease contract can be legally restricted by contractual covenant from the Government that it will not replace the leased equipment with functionally similar equipment during the specified period of non-substitution" (app. br. at 15 (citing *Gov't Sys. Advisors*, 847 F.2d at 811; *Gov't Sys. Advisors, Inc. v. United States*, 21 Cl. Ct. 400 (1990), *vacated on reh'g*, 25 Cl. Ct. 554 (1990); *Mun. Leasing Corp. v. United States*, 1 Cl Ct. 771 (1983), and 7 Cl. Ct. 43 (1984) (cross-motions on summary judgment))).

A common thread running through the cases cited by appellant are that they involved lease to ownership contracts, whereby, at the end of the lease term, the government took ownership of the leased property. For example, in *Municipal Leasing*, the United States Claims Court noted that "[b]y paying the prorated monthly rates over the life of the contract . . . the Air Force would gain the ownership of the equipment." 1 Cl. Ct. at 772. Likewise, in *Government Systems Advisors*, the Claims Court noted that the delivery orders "were conditional sales contracts" whereby the government would "take title to the word processors after completion of a condition precedent, *i.e.*, a series of specified monthly payments, or buy-out." 21 Cl. Ct. at 408.

Appellant also cites a General Services Board of Contract Appeals decision, *Planning Research Corp. v. Dept. of Commerce*, GSBCA Nos. 11286-COM, 11576-COM, 96-1 BCA ¶ 27,954, in which the GSBCA noted that a lease to ownership provision may contain "'restrictions on the circumstances under which that party may decline to exercise its option to renew'" (app. br. at 18-19) (quoting *Planning Research Corp*., 96-1 BCA ¶ 27,954 at 139,636). However, the GSBCA held that the contract at issue there contained no such restrictions. *Id*. at 139,637. The Order at issue here was not a lease to ownership. Indeed, the Order specified that the "Contractor maintains ownership of equipment" (finding 9). The Claims Court and GSBCA decisions are neither controlling, nor binding upon us. The Federal Circuit decision cited by appellant, *Government Systems Advisors*, which is binding precedent upon this Board, is not controlling as it simply distinguished the Claims Court's decision in *Municipal Leasing*, noting that the delivery order under review by the court of appeals contained no restrictions like those at issue in the Claims Court decision. 847 F.2d at 813. Indeed, as

noted above, the Federal Circuit's decision recognized that the government (as the USACE here), had a bargained-for right not to exercise any delivery order options. *Id.* This bargained-for right not to exercise options is important in the context of this appeal, and it is that right which is impacted by the manner in which MicroTech seeks to invoke Supplemental Term and Condition Nos. 1 and 6.

Because the supplemental terms and conditions are not binding upon the parties, appellant's argument that its claim meets the elements of a breach of contract claim likewise is rejected. Appellant is not entitled to termination for convenience-type damages for "non-renewal." We have considered MicroTech's remaining arguments and find them unpersuasive.

CONCLUSION

For the reasons stated above, the appeal is denied.

Dated: June 9, 2020

DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62394, Appeal of MicroTechnologies, LLC, rendered in conformance with the Board's Charter.

Dated: June 9, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kellogg Brown & Root Services, Inc.	)	ASBCA Nos. 59385, 59744
	)	
Under Contract No. N62470-13-D-3008	)	

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Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MELNICK PARTIALLY DISMISSING THE APPEALS AND GRANTING SUMMARY JUDGMENT FOR THE GOVERNMENT UPON THE REMAINDER

These appeals are about a base support contract in the African nation of Djibouti. Kellogg Brown & Root Services (KBR) seeks compensation for additional costs it incurred and invoice deductions applied to it while performing a military base support contract in that country. The Djiboutian government backed a labor strike against KBR to pressure it into retaining more local national employees at higher wages for the contract's performance. Similarly, the Djiboutian government restricted the entry into the country of third country nationals hired by KBR to force it to retain even more local workers. KBR complains that the United States Navy breached the support contract by not doing enough to assist it with these obstacles, breached an Access Agreement between the United States Government and Djibouti that KBR claims is for its benefit as a third party, or must compensate it under other contractual theories. The third party beneficiary claim is dismissed for lack of jurisdiction and summary judgment is granted to the government upon the remainder of the appeals.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following facts are not the subject of genuine dispute.

1. The Republic of Djibouti is an African nation that is slightly smaller than New Jersey. It is strategically located on the Horn of Africa at the intersection of the Red Sea and the Gulf of Aden. Djibouti hosts several thousand American military personnel at Camp Lemonnier (R4, tab 2 at 174).[1] *Djibouti*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/resources/the-world-factbook/geos/dj.html.

2. In 2003, the United States Government executed an international agreement with Djibouti (Access Agreement) in support of their defense relationship (app. supp. R4, tab 10). *See also* Agreement Between the Government of the United States and the Government of the Republic of Djibouti on Access to and Use of Facilities in the Republic of Djibouti, Djib.-U.S., Feb. 19, 2003, T.I.A.S. No. 03-219, https://permanent.access.gpo.gov/gpo35805/191488.pdf. The Access Agreement authorized unimpeded access to the government and its contractors to Camp Lemonnier (app. supp. R4, tab 10 at 627). Accordingly, the agreement stated that government contractor employees would be required to obtain passports to enter the country, but not visas (*id.* at 628).

3. The Access Agreement provided that "[a]ny dispute that may arise from [its] application, implementation, or interpretation . . . shall be resolved by consultation between the Parties or their Executive Agents, including, as necessary, through diplomatic channels, and will not be referred to any national or international tribunal or any third party for settlement" (*id.* at 632). It omitted any mechanism for binding enforcement.

4. On December 6, 2012, the Commander Naval Facilities Engineering Command Atlantic (NAVFAC, Navy, or government) awarded the contract identified above to KBR (R4, tab 1). The majority of the contract required recurring base operation support services at Camp Lemonnier for a firm-fixed price (R4, tab 1 at 132-37, 140).

5. KBR had been the Camp Lemonnier base support contractor between 2002 and 2007 (app. supp. R4, tab 76 at 1047-48; gov't mot., ex. 3). Based upon this earlier experience, KBR's proposal stressed its understanding of the challenges and staffing requirements, as well as its working relationships with local labor brokers (*id.* at 1047). KBR described its prior partnerships with the Djiboutian government, leading to its award of $11,000,000 in contracts with local labor brokers that enhanced

[1] The government submitted a Rule 4 file for each of the docketed appeals. Unless otherwise stated, all Rule 4 references are for ASBCA No. 59385.

the economy and created an effective, functional, and dependable national labor force (*id*. at 1048). KBR acknowledged the effect of its local hiring upon the Djiboutian economy (*id*. at 1084).

6. As was its previous practice at Camp Lemonnier, KBR's proposal identified three categories of contract labor. They were directly hired U.S. "expat[s]," directly hired foreign nationals or third country nationals (TCNs), and subcontracted host nationals (or local nationals). (App. supp. R4, tab 7 at 232, tab 9 at 620-25, tab 76 at 1084) As before, KBR retained a local subcontractor labor broker "for [host national] labor services" (app. supp. R4, tab 7 at 234, tab 76 at 1084). KBR generated a staffing plan that would employ approximately 500 host country nationals (compl. and am. answer ¶ 13; app. prop. finding and gov't resp. ¶ 12; R4, tab 5 at 188).[2]

7. Before award, KBR met with Djiboutian government representatives. The officials expressed frustration that more local nationals were not working on the existing contract and the desire that wages remain stable or increase (gov't mot., exs. 3-4). KBR knew about the risk of strikes in the event a low bid led to wage reductions and the Djiboutian government's concerns about wage rates (gov't mot., ex. 95 at 41, ex. 56). Nevertheless, KBR's proposal reduced the number of host country nationals from the total used by the incumbent contractor (compl. and am. answer ¶¶ 13, 20). The Navy found KBR's staffing plan reasonable and it was incorporated into the contract along with the rest of the proposal (app. prop. finding and gov't resp. ¶¶ 14, 17; am. answer ¶ 121; R4, tab 1 at 3).

[2] Unless otherwise stated, the cited complaint and amended answer are in ASBCA No. 59385. KBR's July 31, 2019, statement of undisputed facts cites to the government's original answer in ASBCA No. 59385, dated October 3, 2014. However, on June 20, 2018, the Board granted the government's May 18, 2018, request to amend the answers in both appeals. The government explained that the amendments simply added affirmative defenses. Accordingly, the Board will cite to the amended answer in ASBCA No. 59385, filed June 29, 2018.

The government also argues that statements it has made in its answer are not binding upon it for purposes of this motion, claiming that Board Rule 7(c) does not permit KBR to rely upon "averments" in an answer as evidence that certain facts are undisputed (gov't statement of gen. issue ¶ 3). The contention is rejected. The averments are binding judicial admissions. *Griffin Servs., Inc.*, ASBCA Nos. 54246, 54247, 04-2 BCA ¶ 32,710 at 161,822.

8. The first annex of the contract's Performance Work Statement contained an item entitled "Technical Proposal Certification." It stated:

> The Contractor warrants that its proposal . . . including . . . proposed approaches, staffing, methodology, or work plans, will meet the performance objectives set forth in this contract . . . . The Contractor is not excused from meeting such performance objectives in the event such proposal proves inadequate as conceived or executed to meet such performance objectives. The Contractor understands that it bears all of the cost and performance risk associated with adopting acceptable additional (and/or alternative) means or methods of meeting the performance objective.

(R4, tab 2 at 176)

9. The first annex also included an item entitled "Partnering Philosophy." It provided:

> The Navy views its contractors as partners and not just abstract service providers. The Navy wants its contractors to succeed because partners' success drives the Navy's successful mission completion. Within the bounds of acquisition policy, the Navy intends to work to find solutions that will be beneficial to both the Government and its partners.

(R4, tab 2 at 175) The second annex, pertaining to management and administration, contained more discussion about partnering, requiring cohesive partnering between the government, KBR, and subcontractors to achieve quality services (app. supp. R4, tab 3 at 115). KBR's proposal also stated that partnering is a tool for developing long term relationships to support project success (app. supp. R4, tab 76 at 1095). Finally, among other things, a partnering charter dated July 24, 2013, repeated the commitment to work toward success, consider the camp's best interests, address and solve problems, maintain trust, open and honest communications, a "win-win" relationship, seek integration, and maintain a culture of understanding and collaboration (gov't mot., ex. 85 at 87446).

I. The Djiboutian Government Supported Labor Strike

10. In May of 2013, KBR executed a subcontract with its labor broker to provide host country nationals for the contract (gov't mot., exs. 16-18). By mid-June 2013, KBR was aware that its broker had failed to retain the necessary workforce to

staff the camp (R4, tab 11; gov't mot., ex. 32). Between June 16 and 18, 2013, KBR's labor broker informed it that host country employees who had worked under the previous contractor's broker had attacked its office, demanding that they be paid their prior wage rates. The broker later reported that none of the former employees signed their employment contracts. (App. supp. R4, tab 21)

11. Between June and July of 2013, and with the Navy's knowledge, host country nationals engaged in a strike upon KBR (compl. and am. answer ¶ 23). Djiboutian government officials expressed support for the strike to KBR, noting the number of people who would be unemployed by KBR's staff reductions. Djibouti's Minister of Labor stated that KBR must hire 1,037 employees at the wages paid by the prior contractor. (App. supp. R4, tabs 23-24, 26, 29 at 726, 30, 38; gov't mot., ex. 64) In meetings with the Navy and U.S. Embassy, Djiboutian ministers declared it preferable to close the camp than leave 500 people unemployed (gov't mot., ex. 64).

12. On June 28, 2013, KBR notified the contracting officer (CO) that the Djiboutian government had deliberately interfered with its contract, causing the strike. KBR claimed the Djiboutian interference entitled it to schedule relief and compensation for its costs attempting to resolve the matter. (R4, tab 11) The CO's July 3 response stated that KBR's proposal represented that it understood the region's challenges, elaborated about how it would man the work, and that it was fully versed in Djiboutian labor requirements. She asserted that KBR could end the dispute at any time. She reiterated that KBR was responsible for performing the contract. (R4, tab 12)

13. In a July 9, 2013 meeting with KBR, NAVFAC acquisition officials repeated that KBR's labor issues in Djibouti were for KBR to solve. However, on July 10, the Commander of NAVFAC Atlantic informed KBR that the matter was being briefed at the level of the Secretary of the Navy and the Office of the Secretary of Defense (OSD). (Gov't mot., ex. 58) In the June and July time frame, the African Affairs section of OSD held interagency meetings with the Department of State about the strike (gov't mot., ex. 55). Also, U.S. Naval Forces Europe and Africa desired to engage with the Department of State to resolve the matter (gov't mot., ex. 59). A July 27 attempt by a DOD official to convince Djibouti to suspend the strike failed. He was told that the only solution was to rehire all of the former employees at the camp (gov't prop. finding ¶ 85; gov't mot., ex. 65). OSD's Director of Defense Procurement decided to obtain funding for additional labor on the contract in the interest of national security, stating an intent to direct NAVFAC to hire 1,037 local nationals through the existing contract (gov't mot., ex. 66).

14. On August 1, 2013, the Chief of Staff of the United States Africa Command (AFRICOM, the combatant command supported by the camp) issued a memorandum to NAVFAC stressing the importance of Camp Lemonnier. Declaring that Djibouti had established a socioeconomic policy requiring no reductions in the

retention of local nationals, he required the employment of 1037 Djiboutians on the contract. He requested that NAVFAC take all necessary actions to ensure compliance with Djibouti's policy. (R4, tab 14; app. mot., ex. 3 at 172)

15. On August 2, 2013, KBR and the government modified the contract to require a staff of 1,037 Djiboutians at the same skill level and pay rate established under the predecessor contract. KBR was to use a labor broker approved by the Djiboutian government. The parties agreed to $14,242,049 in additional payment. (R4, tabs 5-6) Neither party suggests that the strike continued.

II. The Djiboutian Restrictions Upon Third Country Nationals

16. In March of 2013, the Navy notified U.S. personnel and contractors that Djiboutian officials were requiring them to purchase visas for entry into the country, in contravention of the Access Agreement. It provided procedures to follow for reimbursement in case that continued. (App. supp. R4, tab 11) In April, the Navy forwarded to Djibouti two lists of KBR employees that were entitled to entry into the country without visas in accordance with the Access Agreement (app. supp. R4, tab 12). There is no evidence it was successful.

17. On July 9, 2013, KBR notified the Navy that seven TCNs were denied entry into Djibouti (app. supp. R4, tab 32). The Embassy, Navy and OSD acknowledged that denial of entry to TCNs or imposition of visa requirements violated the Access Agreement (compl. and answer ¶ 38; app. mot., ex. 2 at ex. 1, ex. 3 at exs. 24, 29).[3] The Embassy suggested that KBR draft an authorization letter for each worker to be signed by the Navy, but the Navy declined to do so (compl. and answer ¶¶ 38-39). Subsequently, the CO informed KBR that any issues regarding Djibouti's compliance with the Access Agreement were between that government and the Department of State. She said KBR was responsible for meeting its performance requirements. (App. supp. R4, tab 36)

18. The Djiboutian government's restrictions continued, with TCNs barred from entry and then deported. These actions forced KBR to suspend travel for new hires as well as the departure or return of existing employees on rest and relaxation and travel for family emergencies. Djiboutian officials told KBR that the Access Agreement was void. At various times they required KBR to submit lists of TCNs for approval. They also required the purchase of work permits and the acquisition of visas. (Compl. and am. answer ¶¶ 48, 50; R4, tab 16 at 353; app. supp. R4, tabs 40-43, 46-48, 54-55, 60-61, 65, 67-68, 72; app. mot., ex. 3 at ex. 24, ex. 4 at ex. 12, ex. 10 at ex. 17)

[3] These exhibits to the motion have internal exhibits.

19. Though the CO disclaimed responsibility to address the TCN issue, KBR was free to meet with the Djiboutian government. Other U.S. Government officials (including National Security staff, senior Navy personnel, OSD, and the United States Ambassador to Djibouti) focused upon the matter and engaged with KBR and Djibouti about solving it. (App. prop. finding and gov't resp. ¶ 70; app. mot., ex. 8; gov't mot., exs. 75-76, 87; app. supp. R4, tab 44 at 773) Thus, Djibouti's Minister of Labor explained in a meeting attended by U.S. military officials and the Ambassador that his government required lists of TCNs because it would only permit the entry of those possessing skills not available among local nationals. He also said that local nationals should be trained to perform the work of TCNs. (App. mot., ex. 8) In a meeting with Djibouti's foreign minister, also attended by military personnel that included the Navy's camp commander, the Ambassador discussed the stalemate arising from the TCN embargo, described its impairment upon camp operations, and sought the return to unrestricted TCN access in accordance with the Access Agreement. The foreign minister rejected that appeal, saying for political reasons Djibouti would not return to the previous entry regime for TCNs. He re-emphasized that under the new policy Djibouti would only allow in TCNs possessing skills unavailable in Djibouti. (App. mot., ex. 10 at ex. 17) Both the U.S. Embassy and the Navy chose not to participate in Djibouti's process for choosing which TCNs to permit in the country because it was inconsistent with the Access Agreement and placed the Navy in the position of picking winners and losers among contractors (app. mot., ex. 2 at ex.18 at 19880).

20. As the United States Embassy, coordinating with officials of the Department of Defense and the Navy (through a working group), engaged with Djibouti to resolve its violation of the Access Agreement, it considered a possible grand bargain that would achieve long-term stability associated with a series of short-term fixes (app. mot., ex. 3 at ex. 24 at 00479). The Navy recognized that what it had previously viewed as a KBR/Djibouti issue was a U.S Government/Djibouti matter (app. mot., ex. 4 at ex. 14 at 9260). OSD and the Navy understood that continuation of the embargo was adversely affecting Navy operations and finances (app. mot., ex. 3 at ex. 29 at 650, ex. 4 at ex. 19). Indeed, NAVFAC pressed AFRICOM (and by association the Department of State) to pursue a grand strategy that would lead to Djibouti's renewed adherence to the Access Agreement (app. mot., ex. 9 at 31442).

21. In January of 2014, Djibouti transmitted a diplomatic note to the U.S. Embassy, offering to permit access by TCNs for an interim period during which Djibouti and the United States would discuss the reinforcement of their partnership. However, it sought identifying information about the TCNs ahead of time so that they could obtain visas. (App. mot., ex. 2 at ex. 19) The embassy considered the visa proposal inconsistent with the Access Agreement (app. mot., ex. 4 at ex. 23). The responsive diplomatic note from the United States reminded Djibouti that visas were not required under the Access Agreement. It agreed in general to provide information about TCNs ahead of their arrival in recognition

of Djibouti's interest in verifying the TCN's identities, but stressed that visas should not be required and any entry verification must be free of cost to the United States. It sought Djibouti's agreement to these terms, noting that an initial list of TCNs was ready for delivery. (App. mot., ex. 12)

22. By February of 2014, KBR reported to the State Department that 200 employees had not been able to leave on R and R, or otherwise depart the work site for fear of not being able to return to their jobs. In addition, replacements for key personnel that resigned from the project could not enter the country. (App. supp. R4, tab 48)

23. On May 1, 2014, the United States executed an "Arrangement in Implementation of the" Access Agreement with Djibouti. This arrangement reset the countries' relationship by clarifying facility access rights. (App. supp. R4, tab 15) It committed Djibouti to "ensure that all United States contractor employees have unimpeded access to and use of those facilities and areas to which the United States has authorized them access." It obligated the United States "to require that its contractors provide information on their employees thirty . . . days in advance of their respective arrival . . . or as practicable." The requirement would "not affect the authorization, pursuant to the Access Agreement, for . . . contractor employees . . . to enter Djibouti" unless Djibouti barred the person on the basis of national security. (*Id.* at 646) There is no evidence the TCN restrictions continued after the new arrangement was executed.

III. Requests for Equitable Adjustment and Claims

24. On February 11, 2014, KBR resubmitted four Requests for Equitable Adjustment (REAs) that had been previously denied by the government, and added one more, packaging all of them as a new, single REA. The new REA sought $2,430,226.57 in costs incurred by KBR, and invoice deductions applied to it, due to the local national labor strike and Djibouti's refusal to allow TCNs into the country. (R4, tab 20) The CO denied the request on February 25 (R4, tab 21). On March 13, KBR submitted a certified claim to the CO for the amount sought in the REA, which was denied on May 27 (R4, tabs 22-23). KBR appealed that decision and it was docketed as ASBCA No. 59385.

25. On August 1, 2014, KBR submitted another REA to the CO for $519,021 in costs incurred obtaining work permits and visas required by Djibouti for its TCNs. That request was denied on September 24. On October 1, KBR submitted a certified claim for the requested amount to the CO, which was denied on December 10 (ASBCA No. 59744 (59744) R4, tabs 1-4). KBR's appeal from that decision was docketed as ASBCA No. 59744.

IV. The Complaints

26. The two appeals have been consolidated. We refer to the complaint in ASBCA No. 59385.

27. Counts I and IV generally claim breach of contract, and more specifically breach of the contract's implied duty of good faith and fair dealing. Count III contends that the government's refusal to relieve KBR of its contractual obligations, combined with its failure to assist KBR with the strike and embargo, constitutes a constructive change. Count V argues that KBR and the government were mutually mistaken about whether Djibouti would honor the Access Agreement. Count VI suggests the government knew that the Djiboutian government would adversely react to its plan to reduce staffing from the level used on the prior contract, leading to a strike and disregard of the Access Agreement. The government allegedly breached its duty to disclose this superior knowledge, causing KBR to incur unjustified costs. Count II alleges that Djibouti's promise in the Access Agreement to permit unimpeded contractor access to Camp Lemonnier conferred a benefit upon KBR, making it an intended third-party beneficiary of the Access Agreement. It claims the government's failure to enforce the agreement for KBR's benefit after Djibouti breached it is in turn a breach by the government.

DECISION

KBR seeks partial summary judgment on entitlement. The government moves to dismiss Count II for lack of jurisdiction and also seeks summary judgment upon all counts.

I. The Board's Lack of Jurisdiction To Entertain Count II's Third Party Beneficiary Claim

Before addressing the merits of summary judgment we first consider our jurisdiction to entertain Count II. As noted, KBR contends in Count II that it is a third party beneficiary of the Access Agreement. It argues that Djibouti's support for the strike and imposition of the embargo violated the promise it made in that agreement (compl. ¶ 116). KBR contends that the U.S. Government then failed to honor the Access Agreement by not invoking its provision for dispute resolution through governmental consultation with Djibouti (compl. ¶ 118-19). KBR claims the government's failure to enforce the Access Agreement through the disputes mechanism interfered with KBR's enjoyment of the benefit conferred upon it, causing KBR to incur costs arising from the strike and embargo (compl. ¶ 119).

The Board's jurisdiction typically arises from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09. *Latifi Shagiwall Constr. Co.*, ASBCA No. 58872, 15-1 BCA

¶ 35,937 at 175,633. The CDA is a waiver of sovereign immunity that must be strictly construed. *Winter v. Floorpro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009); *see also Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (observing that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed") (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). It is true that the substantive law of contracts recognizes a right of third-party beneficiaries to sue for breach of an agreement to which they are not parties when they show it was for their direct benefit. *See Pac. Gas and Elec. Co. v. United States*, 838 F.3d 1341, 1361-62 (Fed. Cir. 2016), *cert. dismissed*, 138 S. Ct. 2647 (2018). However, such actions do not fall within the scope of the CDA's waiver of sovereign immunity applicable to this Board. Here, only a contractor may bring an appeal on a contract. 41 U.S.C. § 7104(a). And a contractor is limited to a party to a government contract other than the government. 41 U.S.C. § 7101(7). KBR is not a party to the Access Agreement and therefore cannot bring an action here premised upon its terms. Its alleged status as an intended third-party beneficiary does not exempt it from this requirement. *Winter v. Floorpro*, 570 F.3d at 1369-72.

In an effort to avoid the limitations upon the Board's jurisdiction, KBR stresses that the claimant in *Floorpro* was a subcontractor seeking to enforce a government prime contract, while KBR is the prime contractor with the government on the support contract (app. mot at 20-21). But what matters is that KBR is not a party to the Access Agreement. Unlike other counts of the complaint that are premised upon KBR's contract with the Navy, Count II alleges that the Access Agreement bestows third party benefits upon KBR that have been impaired by the government's failure to enforce it. The alleged claims of third-party beneficiaries to contracts are not cognizable here under the CDA.

KBR's briefs attempt to retreat from the complaint's allegations, denying that Count II "is . . . seeking to enforce any contractual rights set forth in the Access Agreement" (app. mot. at 21). It suggests the count merely contends that "the Navy breached its [c]ontract with KBR by failing to partner with KBR to address the violations of the Access Agreement that robbed KBR of the 'benefit of the bargain' of its Contract" (*id.*). Thus, it suggests that Count II is really alleging that the prime contract promised KBR that the government would enforce the Access Agreement for its benefit. However, KBR then inconsistently repeats that it is an intended third-party beneficiary of the Access Agreement (*id.*). Count II does not accuse the Navy of "failing to partner" under its contract with the Navy. That is essentially the allegation of the other counts. Count II says the Navy's alleged refusal to engage the Djiboutian government under the Access Agreement's disputes mechanism denied KBR the benefit granted to it by the Access Agreement (compl. ¶ 118). Count II is a third-party beneficiary claim upon the Access Agreement which KBR may not pursue in this forum.

Even if the Board could otherwise entertain third-party beneficiary contract claims, the Access Agreement is not the type of contract subject to the Board's jurisdiction. The CDA's waiver of sovereign immunity only encompasses contracts made by an executive agency for the procurement of property other than real property; services; construction, alteration, repair, or maintenance of real property; or the disposal of personal property. 41 U.S.C. § 7102(a); *see Lee's Ford Dock, Inc. v. Sec. of the Army*, 865 F.3d 1361, 1366-67 (Fed. Cir. 2017). The Access Agreement was just that, an international agreement between the U.S. government and another nation granting the government and its contractors access to Camp Lemonnier and other facilities. It was not a procurement by an executive agency or a disposal of property.

For these reasons, Count II is dismissed for lack of jurisdiction.[4]

II. The Cross Motions For Summary Judgment Upon The Remaining Counts

The parties cross move for summary judgment upon each of the remaining counts. Summary judgment should be granted if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56(a). In applying this standard, we must draw all justifiable inferences in the non-movant's favor. However, a non-movant seeking to defeat the suggestion that there are no genuine issues of material fact may not rest upon its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). Furthermore, after an opportunity for discovery, summary judgment must be entered upon motion against a party "who fails to make a showing sufficient to

[4] Even if KBR could pursue a third-party beneficiary claim based upon the Access Agreement, its claim is against the wrong party. KBR contends that it is a beneficiary of Djibouti's promise to permit it unimpeded access to Camp Lemonnier, which Djibouti violated by supporting the strike and imposing the embargo. Under these allegations it is Djibouti that breached the Access Agreement, not the government. At most under this claim, the government declined to enforce Djibouti's promises in the Access Agreement. That is not a breach of contract by the government. *See Sullivan v. United States*, 625 F.3d 1378, 1380-81 (Fed. Cir. 2010).

Finally as observed both in the Statement of Facts and below, in fact the U.S. government did diplomatically consult with Djibouti about its violation of the Access Agreement, which was its only recourse, achieving the May 1, 2014 arrangement that essentially eliminated Djibouti's restrictions on TCNs (SOF ¶¶ 19-20, 23).

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

A. The Djiboutian Supported Labor Strike

1. KBR's Breach of Contract Theories

First, we consider whether either of KBR's breach theories contained in Counts I and IV entitle it to recover as a result of the strike. In general, "[a] breach of contract claim requires two components: (1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty." *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014). Among every contract's terms is a covenant of good faith and fair dealing imposing a "duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)), *cert. denied*, 140 S. Ct. 1106 (2020). Any non-performance of an expressed contractual duty, as well as a failure to fulfill the covenant of good faith and fair dealing, is a breach. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (citing RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981)).

a. Count IV's General Breach Claim

Count IV's general breach claim contends that the Navy's failure to take remedial action to address the strike was a breach (compl. ¶¶ 136-37; app. mot. at 28). However, the Navy did address the strike, funding a contract modification approximately one month after it started that required KBR to hire the 1,037 people demanded by the Djiboutian government, rather than the approximately 500 planned by KBR (SOF ¶ 15). By seeking the costs it allegedly incurred before the Navy modified the contract, KBR complains that the Navy did not act fast enough (tr. 18-20). KBR has not shown why that is so and the contract language dictates otherwise.

The contract made KBR, not the government, responsible for furnishing the labor necessary for performance. KBR's proposal stressed to the government its understanding of the challenges and staffing requirements, its prior partnerships with the Djiboutian government, and its awareness of the impact of local hiring upon the Djiboutian economy. These statements indicated that it could and would navigate the terrain necessary to retain its desired number of local workers through a subcontractor labor broker. (SOF ¶ 5) Inherent in that responsibility was fulfilling host nation governmental conditions to hiring. Prior to award, KBR knew Djibouti officials were concerned about wages (SOF ¶ 7). Nothing in the contract required the government to

perform any function related to the acquisition of labor, such as preventing or stopping Djiboutian labor strikes against KBR arising from reduced hiring and wages. Nor did the government warrant that KBR's desired number of local nationals would be available free of any strike, or without Djiboutian government involvement. *See Oman-Fischbach Int'l* (*JV*) *v. Pirie*, 276 F.3d 1380, 1383-84 (2002) (explaining that a warranty is an assurance by one party to an agreement of the existence of a fact that the other party may rely upon) (citing *Dale Constr. Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). Unless the U.S. government assumed the risk of a Djiboutian government supported labor strike against KBR in unmistakable terms, it is not liable for those third party acts. *Id.* at 1385; *see also Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1364 (Fed. Cir. 2016) (addressing Pakistan's closure of its border with Afghanistan, delaying the appellant's delivery of materials, and holding "the U.S. government is not responsible for the sovereign acts of a foreign nation"). There were no such risk shifting terms in this contract.

Contrary to KBR's suggestion, neither *J.E. McAmis, Inc.*, ASBCA No. 54455 *et al.*, 10-2 BCA ¶ 34,607, nor *Swinerton & Belvoir*, ASBCA No. 24022, 81-1 BCA ¶ 15,156, dictate a different outcome. *McAmis* considered *Oman-Fischbach* distinguishable when it found the government breached an implied warranty that haul routes would be free from restriction by a county government. In this case, the government did not unmistakably guarantee that KBR would be immunized from the effects of a third party labor strike. Here, *Oman-Fischbach* is indistinguishable. *Accord ECC Int'l Constructors, LLC*, ASBCA No. 59138, 19-1 BCA ¶ 37,252. Similarly, *Swinerton* found the government liable when its sovereign act delayed clearances for the entry of aliens into Guam beyond the 90-day time period stated in the contract. The Board held that the government contractually assumed the risk of its sovereign act. *See generally Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992) (noting that the sovereign acts doctrine does not prevent the government from affirmatively assuming responsibility for particular sovereign acts). Here, the government did not assume comparable liability for the acts of third parties.[5]

[5] KBR also cites *Yates-Desbuild Joint Venture v. Dep't of State*, CBCA No. 3350 *et al.*, 17-1 BCA ¶ 36,870. KBR says this non-binding decision of a sister board stands for the proposition that the government bears responsibility for costs caused by the interference of a third-party sovereign. KBR omits a pin cite to the portion of this 71-page opinion that supposedly supports that assertion. Without mining the ruling in detail for KBR, our review does not reveal support for the broad contention that the government is strictly responsible for the acts of other countries. Such a conclusion would be inconsistent with the court of appeals decisions cited above. We would not agree with it if it did hold as KBR suggests.

KBR primarily relies upon the contract's "Partnering Philosophy" provision to support its suggestion that the government did not do enough to satisfy its promises. There, the contract states:

> The Navy views its contractors as partners and not just abstract service providers. The Navy wants its contractors to succeed because partners' success drives the Navy's successful mission completion. Within the bounds of acquisition policy, the Navy intends to work to find solutions that will be beneficial to both the Government and its partners.

(SOF ¶ 9) To a minor degree, the contract's second annex flushed out the scope of partnering by requiring it to be cohesive to achieve quality services (*id.*). These aspirational declarations of a desire or goal for the "success" of both the Navy and its partners, and an intent to find abstract solutions "beneficial to all" within the bounds of an undefined "acquisition policy," are too amorphous to provide any basis to identify concrete obligations. They fail to establish a standard for what must be accomplished to find beneficial solutions or dictate consequences for noncompliance. The provision is not connected to any mandatory performance duties, but is merely precatory.[6] *See Muller v. Gov't Printing Office*, 809 F.3d 1375, 1380-81 (Fed. Cir. 2016) (concluding that contract language stating the parties will proceed expeditiously is precatory and not obligatory, favoring such a conclusion when the words only identify a general goal and trigger no consequences for noncompliance); *see also Telzrow v. United States*, 127 Fed. Cl. 115, 123 (2016) (holding language expressing a government intent to permit a landowner the opportunity to participate in restoration and management is precatory not obligatory); *Woodmere Acad. v. Steinberg*, 363 N.E.2d 1169, 1173 (N.Y. 1977) (finding a representation that a school will "wisely" manage its affairs is precatory in the absence of bad faith because its vagueness and subjective nature drains it of practical meaning). It does not constitute a contractual promise subject to a claim of breach.

Even if the contract's partnering language could be construed to impose some clear contractual requirement upon the Navy, KBR fails to tie it to an obligation to more timely remedy a labor strike against KBR. It is too much of a stretch to read a Navy statement of desire that its partner succeed, and intention to work to find beneficial solutions to problems, into an affirmative responsibility to intercede with, prevent or end a labor strike within some unstated time period that was simply faster than what occurred. KBR does not define exactly what actions the government should

[6] The July 24, 2013, partnering charter between the parties was similarly aspirational (SOF ¶ 9).

have taken to satisfy that purported obligation or how they flow from the partnering language (tr. 16, 18-19). Nor is the logic of that contention otherwise apparent.

b. Count I's Good Faith and Fair Dealing Claim

Count I's invocation of the duty of good faith and fair dealing serves KBR no better than its express breach claim. KBR's contentions about the breadth of the government's obligations to comply with the duty of good faith vary. At one point it stridently insists that, "given the importance of the Contract, the Navy had a duty under the contract to do everything in its sovereign power to take the reasonable steps that would enable KBR to perform the Contract and to prevent another sovereign nation from obstructing KBR's performance" (compl. ¶ 106; app. mot. at 18). At other times its motion is less extreme, accusing the government (similar to its express breach claim) of doing nothing to help KBR with the strike (app. mot. at 10).

The duty of good faith and fair dealing prohibits "interference with or failure to cooperate in the other party's performance." *Labatte v. United States*, 899 F.3d 1373, 1379 (Fed. Cir. 2018) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981)). Breach of the covenant of good faith and fair dealing does not require the violation of an express term of the contract, but the claim "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Laturner v. United States*, 933 F.3d 1354, 1365 n.8 (Fed. Cir. 2019) (quoting *Dobyns*, 915 F.3d at 739). "[A] specific promise must be undermined for the implied duty to be violated." *Dobyns*, 915 F.3d at 739. The duty "must be 'keyed to the obligations and opportunities established in the contract' so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract." *Id.* (quoting *Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014)).

As previously observed, the Navy did indeed assist with the strike's resolution by funding KBR's retention of more labor at the previous pay rates (SOF ¶ 15). So, as before, the real question presented is whether the duty of good faith and fair dealing required it to either prevent the strike or act more quickly to somehow remedy it. But the government made no commitment from which such a duty arises.[7] *See Bell/Heery*, 739 F.3d at 1335 (explaining that the implied duty of good faith and fair dealing does

[7] Moreover, it would have to be quite a contract promise that would be undermined by the government's failure to do everything in its sovereign power to prevent another nation from obstructing KBR's preferred method of performance. That the government, among many different possibilities, obligated itself to close the base, impose economic sanctions, sever diplomatic relations, or even launch a military strike to assure KBR's access to Djiboutian labor free of a strike is, to say the least, pretty incredible.

not form new contract terms). Instead, the contract made KBR responsible for procuring labor for itself through a subcontractor labor broker. The government assumed no responsibility to accomplish that task, compel the Djiboutian government to ensure labor was available on KBR's desired terms, or that it cease supporting the strike. The duty of good faith and fair dealing did not enlarge its obligations. *Id.* (holding that a third-party government's interference with contract performance is not a reappropriation of the contract's benefits by the U.S. government that could constitute breach of the duty of good faith and fair dealing); *see also Olympus Corp. v. United States*, 98 F.3d 1314, 1318 (Fed. Cir. 1996) ("While interference by the government with a contractor's access to the work site may constitute a breach of the government's duty to cooperate, the government is not responsible for third-party actions such as labor strikes that delay a contractor's performance, absent a specific contractual provision"). This fixed-price contract placed the risk upon KBR respecting the market prices of its inputs, including labor. *See Lakeshore Eng'g Servs.*, 748 F.3d at 1349.

KBR's emphasis upon the reasons the Navy was initially reluctant to intercede fails to reveal any basis for drawing a different conclusion. KBR says the Navy refused to assist it because it did not wish to establish a bad precedent. It is hardly surprising that the Navy disfavored signaling that a contractor such as KBR could expect relief from the risks it contractually assumed. Thus, the internal report of a Navy admiral that KBR relies upon considered labor disputes to be between KBR and Djibouti. It observed that KBR was no novice navigating Djibouti's political and labor impediments and that KBR should be held to its performance obligations. To do otherwise would establish an undesirable precedent. (App. mot., ex. 2 at ex. 7) KBR also contends the Navy should be faulted for its internal resistance (which eventually it abandoned) to the expenditure of its own funds to resolve KBR's labor problems. KBR makes much of the fact that the CO neither reviewed nor authorized a KBR proposed solution to the dispute with Djibouti that KBR shared with the Embassy (am. answer ¶ 29). But KBR does not explain why the Navy was required to provide that review and approval, why KBR needed the review, or how the absence of it impaired KBR's outreach to the embassy or whatever efforts it might have been making to resolve the matter with Djibouti. None of these observations evidences interference with KBR's performance or that the Navy undermined its own promises.

KBR also relies once again upon the contract's partnering language to supply the express promise that it claims was undermined by the CO's initial reaction to the strike. As already noted, the partnering language is precatory, not obligatory. Even if it was something more, the CO's initial refusal to affirmatively intercede with Djibouti about the strike did not reappropriate any of the benefits of a mere representation that the Navy desired its partner's success and that it intended to work to find solutions to problems. *See Dobyns*, 915 F.3d at 739-40 (relying upon the court's holding in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828-29 (Fed. Cir. 2010),

that "interference with the plaintiff's ability to harvest timber did not breach the implied duty in part because the government 'did not reappropriate any 'benefit' guaranteed by the contracts, since the contracts contained no guarantee' of uninterrupted performance"). The partnering language did not suggest that the Navy was assuming a duty to alter the behavior of third parties toward KBR. *See id.* at 740-41 (holding that to infer an implied duty "without a tether to the contract terms, would fundamentally alter the balance of risks and benefits associated with the . . . agreement and cannot be the basis of a claim for breach of the implied duty of good faith and fair dealing"). Moreover, though there is no basis for imposing a duty upon the Navy to resolve the strike, the Navy did so within approximately one month of the strike's commencement by executing the contract modification that funded more local nationals. KBR has simply not convinced us that these events constitute a breach of good faith and fair dealing.

Contrary to KBR's suggestion, *North American Landscaping, Construction and Dredge, Co.*, ASBCA No. 60235 *et al.*, 18-1 BCA ¶ 37,116 at 180,652-54, does not categorically hold that failure to successfully "partner" with a contractor is a breach of the duty of good faith. There, only one judge concluded that the government had breached the duty, and he hardly relied solely upon a belief that the government failed to fulfill a pledge to partner. Anyway, that one judge's opinion that the government breached the duty is not the Board's precedent because the other two participating members of the panel disagreed with him. 18-1 BCA ¶ 37,116 at 180,658. Only pronouncements explicitly adopted by three of the Board members participating in the appeal are precedential.[8] *See King Aerospace, Inc.*, ASBCA No. 60933, 19-1 BCA ¶ 37,316 at 181,500.

KBR also contends that, in response to the strike, the Navy unjustifiably threatened it with a termination for default, implying that is also a breach of the duty of good faith and fair dealing. Though the record shows the idea was raised in an internal Navy discussion, KBR presents no evidence that the government threatened KBR with termination for default (app. mot., ex. 4 at 30425).[9]

[8] This policy is distinct from appeals that might be decided by the Board's Senior Deciding Group, which would be governed by a majority.

[9] KBR also relies upon a "White Paper" submitted to the Navy by its own counsel, alleging "the Navy has implied that KBR's inability to fully staff the Contract could be grounds for issuing a cure notice or show cause letter" (R4, tab 13 at 263). Counsel's unsworn statement does not provide or describe the alleged communication from which he claims to have drawn this inference, or its source, and does not claim it is based upon personal knowledge (tr. 54-57). *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (Counsel's unsworn statements are not evidence); *see also* FED. R. CIV. P. 56(c)(4) (requiring that an affidavit or declaration used to support or oppose a

KBR additionally attempts to bolster its implied duty claim by proffering evidence that the Navy did not disclose prior to award that there had been an earlier "labor dispute" involving a Djibouti base support contract (app. prop. finding and gov't resp. ¶¶ 32, 39).[10] The government cannot breach the covenant of good faith and fair dealing before the contract is formed. *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012).

In a variation of its third-party beneficiary claim, KBR also contends that the government was obligated under the implied duty to consult with Djibouti to remedy the strike under the Access Agreement's disputes mechanism. But the government made no representations in KBR's contract about how it might administer the Access Agreement. Nor did Djibouti promise in the Access Agreement that labor would be available for U.S. contractors on the terms they dictated, free of any strikes. Given these factors, there was no basis for KBR to expect such action. Moreover, KBR has not produced any evidence that consultation under the disputes mechanism would have resolved the strike any sooner. In fact, the government did ask Djibouti officials to suspend the strike and was told that only KBR's retention of all of the former employees who worked on the base would end it (SOF ¶ 13). Thus, the government halted the strike within approximately one month of its beginning by providing additional funding to hire all the workers Djibouti demanded, not through further discussions.

Accordingly, the government is entitled to summary judgment as a matter of law upon the breach claims arising from the strike as alleged in Counts I and IV.

2. Count III's Constructive Change Claim

In addition to its breach claims, Count III of KBR's complaint contends that the government's expectation that KBR continue to perform the contract's requirements during the strike against it, along with its failure to assist KBR with its labor problems, constituted a constructive change to the contract.

"[T]he contracting officer may . . . *constructively* change the contract, 'either due to an informal order from, or through the fault of, the government.'" *Zafer Taahhut Insaat ve Ticaret A.S*, 833 F.3d at 1361 (quoting *NavCom Def. Elecs., Inc. v. England,*

> motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated). Even if considered, counsel's statement does not reflect an actual threat of default.

[10] KBR returns to this argument in support of its superior knowledge allegation in Count VI.

53 Fed. App'x 897, 900 (Fed. Cir. 2002)) (emphasis in original). Typically, demonstrating a constructive change requires the contractor to "show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government." *Bell/Heery*, 739 F.3d at 1335. KBR suggests that the inclusion of its proposal's staffing plan into the contract, with its mix of "expat," TCN and host nationals, established a particular manner and method of performance that it could rely upon. Expecting KBR to perform when it could not employ that mix of personnel was beyond the contract requirements and constituted a change.

The contract did not promise KBR that it need only perform if it could retain labor on its desired terms. KBR has not presented any evidence that the government expressly, impliedly, or otherwise required it to perform tasks beyond the contract's requirements. Also, the contract did not excuse KBR from meeting its performance objectives "in the event [its] proposal prove[d] inadequate as conceived or executed" (SOF ¶ 8). The government was not responsible for Djibouti's labor demands upon KBR so it is not at fault for a change to KBR's performance costs arising from them. *See Zafer Taahhut Insaat ve Ticaret A.S*, 833 F.3d at 1364 (rejecting the suggestion that another country's interference with performance could constitute a constructive change).

The government is entitled to summary judgment upon Count III's constructive change claim arising from the strike.

3. KBR's Mutual Mistake Claim

Count V contends that the parties committed a mutual mistake. If proven, a mutual mistake of fact might entitle a claimant to reformation of a contract. *See Atlas Corp. v. United States*, 895 F.2d 745, 749-50 (Fed. Cir. 1990). KBR does not explain how the contract should be reformed. Presumably, it seeks reformation that would impose the costs of the strike upon the government.

The following must be proven by clear and convincing evidence to obtain reformation based upon mutual mistake: (1) the parties were mistaken in their belief regarding a fact; (2) the mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; (4) the contract did not put the risk of the mistake on the party seeking reformation. *Nat'l. Austl. Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006).

KBR summarizes its mutual mistake argument by maintaining the parties mistakenly believed that Djibouti would comply with the terms of the Access Agreement. However, KBR's specific contentions about the strike are vague and seem to focus less upon the Access Agreement, which does not protect contractors from a

local strike, and more upon the fact that its staffing plan was incorporated into the contract and the Navy was unconcerned about a strike. From this, it claims an underlying assumption of the contract about which the parties were mistaken was that KBR would be able to use local nationals to perform.

KBR has not presented evidence that it was barred outright from using local labor; the record only shows that Djibouti supported a strike arising from KBR's decision to retain less people at less pay than were employed by the prior incumbent (SOF ¶ 11). Even if KBR is suggesting that the parties mistakenly believed that it would be permitted to retain local workers on its desired terms, such a contention would still fail to qualify under the mutual mistake doctrine. KBR is not premising its mistake claim upon an erroneous belief by the parties about a fact existing at the time of contracting, but upon their alleged prediction about the future availability of local labor during performance. Assumptions about future facts cannot establish a mutual mistake claim. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994) ("A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined [under the doctrine of mutual mistake of fact]") (citing RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981); *c.f.* RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. b ("[M]istakes as to market conditions . . . do not justify avoidance under the rules governing mistake"). KBR failed to explain why this precedent is not fatal to its argument (tr. 71).

Additionally, the record lacks any evidence that a basic assumption underlying the contract was that KBR could dictate the terms of its retention of labor. Certainly, Djibouti did not make such a guarantee in the Access Agreement. Nor is there anything to suggest that NAVFAC awarded the contract assuming that KBR possessed unfettered economic power over local labor. Furthermore, the record shows that KBR knew prior to award about the risk of strikes if its bid was too low (SOF ¶ 7). KBR also concedes that it is a sophisticated contractor that "expect[ed] to encounter labor issues . . . particularly where it proposed to reduce wages or staffing levels used by the incumbent contractor." It also recognizes that it was for "KBR . . . to work with laborers to obtain a mutually beneficial solution." (App. reply at 33) KBR's awareness of the potential for labor difficulties, combined with the fact that its bargain with NAVFAC was not premised upon the absence of labor strife, renders reformation due to mutual mistake inappropriate. *McNamara Constr. of Manitoba, Ltd. v. United States*, 509 F.2d 1166 (Ct. Cl. 1975). Ultimately, KBR assumed responsibility for acquiring labor for performance and the risks associated with its price. *See Patty Precision Prods. Co.*, ASBCA No. 24458, 83-1 BCA ¶ 16,261 at 80,815-16 (finding no mutual mistake when the risk of having an adequate workforce remained with the contractor).

Accordingly, the government is entitled to summary judgment upon Count V's mutual mistake claim arising from the strike.

4. KBR's Superior Knowledge Claim

Count VI of the complaint seeks recovery resulting from the strike under the theory that the government breached a duty to disclose superior knowledge. "The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Scott Timber*, 692 F.3d at 1373 (quoting *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000)). KBR complains that the Navy knew of the "possibility" or "risk" of a labor strike but failed to inform it of that prior to award. One of the elements of a superior knowledge claim is that the contractor undertook performance without vital knowledge of a fact affecting performance cost or duration. *Id.*

Here, KBR does not allege that it lacked knowledge of the "fact" of a strike prior to award. There was no strike at that time. Instead, it contends the government failed to inform it of the "possibility" of one. KBR has not shown that a superior knowledge claim can be premised upon the contractor's alleged ignorance of a possibility. Indeed, case law indicates the opposite. *See Northrup Grumman Corp. v. United States*, 47 Fed. Cl. 20, 90 (2000) (concluding that judgments or predictions are not facts subject to a superior knowledge claim).

Even if KBR's superior knowledge claim could be cognizable, it neither alleges nor provides any evidence that it lacked knowledge of the possibility of a strike. Instead, the record shows that KBR knew that a strike was possible depending upon its bid (SOF ¶ 7). Again, KBR admits that it is a sophisticated contractor. It previously performed a similar contract in Djibouti, stressed its experience working in the local labor market in its proposal for this fixed-price contract, and assumed responsibility for obtaining labor for the work (SOF ¶ 5). This is not a situation where the government failed to disclose otherwise unavailable information regarding some novel matter.

B. The Djiboutian Restrictions Upon Third Country Nationals

KBR's claims arising from Djibouti's TCN restrictions are based upon virtually the same legal theories as the strike and KBR's breach theories are rejected for similar reasons. The government made no promise or warranty in its contract with KBR that Djibouti would comply with the Access Agreement and freely permit TCNs into the country. The parties' inclusion of KBR's staffing plan into the contract, which contemplated the use of TCNs, did not transform the plan into a government promise or warranty that KBR could implement it without interference by Djibouti. The government's precatory declaration that it desired both its own and KBR's success, and expression of an intent to find beneficial solutions within the bounds of an

acquisition policy, do not evidence an obligation to make Djibouti (a sovereign nation) comply with the Access Agreement.

KBR complains about the Navy's decision at the outset of the embargo not to send authorization letters for each TCN to Djibouti (SOF ¶ 17). But it fails to show why the Navy was required by the contract to perform that task and we cannot identify such an obligation. Furthermore, though the embassy suggested that KBR ask the Navy for those letters, KBR has failed to present any evidence that such communications would have ended the embargo.

KBR refers to some internal Navy communications reflecting unhappiness with a vaguely described training proposal KBR says it submitted to Djibouti. KBR does not suggest those concerns led to the Navy prohibiting the submission, nor does it present evidence of its nature or significance. Notably, there is no evidence the proposal made a difference with Djibouti.

KBR's specific complaints ignore the fact that the government did indeed act to address the embargo through the Access Agreement mechanism. Although the CO disclaimed contractual responsibility for Djibouti's TCN restrictions (and KBR has not shown that to be incorrect), the government as a whole, with the involvement of the Navy and through the leadership of the United States Ambassador, consulted with Djibouti and secured its renewed cooperation for the benefit of all its contractors, leading to the May 1, 2014 "Arrangement in Implementation of the" Access Agreement. There, Djibouti essentially recommitted to permitting contractor employees access to the country and the camp. (SOF ¶¶ 19-21, 23) There is no evidence that the embargo persisted afterward. KBR criticizes these negotiations, objecting to a government strategy it believes was designed to address both the government's interests in its Djibouti military base and those of all of its contractors, instead of KBR's affairs alone. Logically, those concerns are intertwined. Regardless, KBR fails to cite any authority demonstrating the government was required to conduct international relations for KBR's sole benefit to the exclusion of all other matters. *See generally Zafer Taahhut Insaat ve Ticaret*, 833 F.3d 1364-65 (explaining U.S. Government negotiations with other nations are typically sovereign acts that are beyond claims of contractual obstruction when not specifically directed toward nullifying contract rights). The totality of the government's efforts and achievements belie the suggestion that the government undermined any specific contractual promise or failed to cooperate in breach of the contract's implied duty of good faith and fair dealing.

Similarly, Djibouti's refusal to permit TCNs into the country does not constitute a constructive change by the government. Djibouti's TCN restrictions did not arise from any government acts, the contract did not promise KBR that it would be able to employ TCNs in the numbers it wished, and the government did not order performance beyond the contract's requirements. Again, interference by a foreign government is not a constructive change. KBR's mutual mistake claim regarding Djibouti's refusal

to let in TCNs is meritless for the same reason as it is for the strike; KBR does not premise it upon existing facts but upon an alleged prediction about whether Djibouti would permit entry of TCNs in the future. Finally, nothing in the record shows the government possessed superior knowledge prior to contract award that Djibouti would not comply with the contractor access provisions of the Access Agreement.

CONCLUSION

Count II of the appeals is dismissed for lack of jurisdiction. KBR's partial motion for summary judgment on the remainder of the counts is denied and the government's motion for summary judgment is granted. The appeals are denied.

Dated: May 15, 2020

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 59385, 59744, Appeals of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated: May 15, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals

In the United States Court of Federal Claims

No. 17-1763C

(Filed: May 22, 2020)

**********	)	
THE TOLLIVER GROUP, INC.,	)	
	)	Motion for reconsideration; jurisdiction
Plaintiff**,**	)	over contractor's claim for partial
	)	reimbursement of legal fees incurred in
v.	)	successful defense of *qui tam* suit
	)	
UNITED STATES,	)	
	)	
Defendant.	)	
	)	
**********		

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OPINION AND ORDER

LETTOW, Senior Judge.

Pending before the court is a motion by defendant ("the government") for reconsideration of this court's decision that plaintiff, The Tolliver Group, Inc. ("Tolliver"), properly has invoked the court's jurisdiction and is entitled to equitable reimbursement of part of its costs in its successful defense of a *qui tam* suit. *See* Def.'s Mot. for Recons. ("Def.'s Mot.") at 3, ECF No. 54 (seeking reconsideration of *Tolliver Grp., Inc. v. United States*, 146 Fed. Cl. 475 (2020)). The government also challenges certain facts upon which the court relied in rendering its decision. *Id.* at 4. Tolliver has responded that it had specifically requested an equitable adjustment from the contracting officer, for the precise amount it sought from the court, based on the same operative facts. Pl.'s Resp. to Def.'s Mot. ("Pl.'s Resp.") at 4-5, ECF No. 56 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003); *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)).

Because there is no divergence between Tolliver's claim to the contracting officer and that submitted to the court, the government's motion for reconsideration is DENIED. The court has jurisdiction over Tolliver's claim. And, the government's disagreement with certain facts underpinning the court's decision is equally unavailing. The pertinent facts were drawn directly from the federal district court's ruling in favor of Tolliver in the *qui tam* action and thus are *res judicata* in the equitable reimbursement case before the court.

BACKGROUND

Tolliver succeeded to a contract with the United States Army for production of a series of technical manuals. The Army needed manuals that would provide military vehicle field users with current parts information and updated procedures for provisioning, maintaining, and overhauling its Hydrema 910 Mine Clearing Vehicle. *See* Joint Stip. ¶¶ 5-6.[1] A task order, Task Order 10, was awarded to DRS Technical Services, Inc. on August 26, 2011, Joint Stip. ¶ 1, as a fixed-price, level-of-effort contract requiring the contractor to develop and deliver technical manuals for the Army's mine clearing vehicle, Joint Stip. ¶¶ 4-5. It required the contractor to submit a series of preliminary technical manuals for review by several entities within the Army. Joint. Stip. ¶¶ 8-9. Once the Army had completed review and revision of the preliminary technical manuals, the contractor was to provide final versions incorporating any edits or revisions. Joint Stip. ¶ 10. To avoid having to engage in having the contractor reverse engineer the mine clearing vehicle, the contract's Performance Work Statement ("PWS") required the Army to provide a technical data package with engineering drawings from the manufacturer of the vehicle. *See* Joint Stip. ¶¶ 11-12. Nonetheless, the Army never obtained, and thus never provided, the technical data package from the manufacturer. Joint Stip. ¶¶ 13-14. Even though the technical data package had not been, and could not be, provided to the contractor as Task Order 10 required, the Army directed the work to proceed. *See* Joint Stip. ¶ 15.

Upon Tolliver's assumption of the Task Order 10 contract, it undertook to perform without the technical data package. Joint Stip. ¶ 14. After Tolliver had worked on the contract for approximately seven months, the Army issued Modification 8, an amendment to the contract that removed the government's obligation to provide the technical data package. Joint Stip. ¶¶ 17-18. In addition, Modification 8 prospectively converted Task Order 10 from a firm-fixed-price, level-of-effort contract to a firm-fixed-price contract at over a four and one-half fold increase in cost. *See* Joint Stip. ¶ 18.

The failure to provide the technical data package supplied the basis for the *qui tam* action. On April 15, 2014, Robert Searle filed an action against Tolliver under the False Claims Act, 31 U.S.C. §§ 3729-31, in the United States District Court for the Eastern District of Virginia, styled *United States of America ex rel. Robert C. Searle v. DRS Technical Services, et al.*, No. 1:14-cv-00402. Joint Stip. ¶ 19. Mr. Searle asserted that Tolliver violated the False Claims Act while performing Task Order 10 during the period before Modification 8 became effective by

[1]The stipulations number 27 and will be cited as "Joint Stip." followed by paragraph number. *See* ECF No. 38.

certifying compliance with the technical data package despite having never received that package, *see United States ex rel. Searle v. DRS Tech. Servs.*, No. 1:14-cv-00402, 2015 WL 6691973, at *1 (E.D. Va. Nov. 2, 2015). The government declined to intervene or to move to dismiss the relator's case, and Tolliver successfully defended the litigation. The district court dismissed the complaint, concluding that it lacked merit because "[the Army] intended to provide [Tolliver] with [the technical data package] for use in developing the manuals, it did not do so, it knew that it did not do so, and still instructed [Tolliver] to proceed with performance." *Searle*, 2015 WL 6691973, at *1. Thereafter, the United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of the suit, *United States ex rel. Searle v. DRS Tech. Servs.*, 680 Fed. Appx. 163 (4th Cir. 2017).

After the affirmance of the dismissal of the *qui tam* suit, Tolliver submitted a claim to the contracting officer under the Contract Disputes Act, 41 U.S.C. §§ 7101-09, for an equitable adjustment, seeking reimbursement of $195,889.87 for allowable legal fees incurred in defending the suit, Joint Stip. ¶ 25. The requested amount represented 80% of the $244,862.22 in attorneys' fees that Tolliver said it had incurred in its successful defense of the False Claims Act suit. Joint Stip. ¶ 26. The contracting officer denied the claim in full on September 8, 2017, Joint Stip. ¶ 27, concluding it was precluded by the fixed-price nature of the contract in the absence of a contract clause providing otherwise.

Tolliver then brought its claim before this court. After preliminary proceedings involving an effort by the government to dismiss Tolliver's Second Amended Complaint, *see Tolliver Grp., Inc. v. United States*, 140 Fed. Cl. 520 (2018), the court entertained cross-motions for summary judgment filed by the parties based on extensive stipulations. On January 22, 2020, the court ruled that equitable reimbursement for the defense costs was appropriate because the *qui tam* suit was based on Tolliver's Army-mandated efforts to perform in the absence of the technical data package. *See Tolliver*, 146 Fed. Cl. at 482. Predicated on the parties' stipulations and the findings of the district court as affirmed by the Fourth Circuit, this court concluded that Tolliver was entitled to equitable reimbursement for part of its costs in successfully defending that suit. *Id.* (citing *United States v. Spearin*, 248 U.S. 132 (1918), *Franklin Pavkov Constr. Co. v. Roche*, 279 F.3d 989, 994-95 (Fed. Cir. 2002), and *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1289 (Fed. Cir. 2000)).

STANDARDS FOR DECISION

Final judgment has not been entered, pending consideration of the amount of defense costs expended by Tolliver. *See Tolliver*, 146 Fed. Cl. at 486. The case thus remains interlocutory, and Rule 54(b) of the Rules of the Court of Federal Claims ("RCFC") applies. Under that rule, "any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." RCFC 54(b); *see Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48 (1943) (A court has power "at any time prior to entry of its final judgment . . . to reconsider any portion of its decision and reopen any part of the case."); *John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 88 (1922) ("If [an order is] interlocutory, the court at any time before final decree may modify or rescind it."). The rule reflects the precept that "[a]t an interlocutory stage,

the common law provides that the court has power to reconsider its prior decision on any ground consonant with application of the law of the case doctrine." *Wolfchild v. United States*, 68 Fed. Cl. 779, 785 (2005). In such circumstances, "the strict rules governing motions to amend and alter final judgments under Rule 59 do not apply." *Pacific Gas & Elec. Co. v. United States*, 114 Fed. Cl. 146, 148 (2013) (internal quotations and citations omitted).[2]

In effect, the court "may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice." *Biery v. United States*, 818 F.3d 704, 711 (Fed. Cir. 2016) (internal quotations and citations omitted). The court must consider the motion with care, mindful that a motion to reconsider "is [not] intended to give an unhappy litigant an additional chance to sway the court." *Weaver-Bailey Contractors, Inc. v. United States*, 20 Cl. Ct. 158, 158 (1990) (citation omitted).

ANALYSIS

For simplicity, the court will first address the government's factual contentions and then focus on the symmetry, *vel non*, of Tolliver's claim to the contracting officer and that brought before the court.

A. The Government's Factual Contentions

Factually, the government avers that "the [c]ourt stated that the agency's failure to provide the technical data package prevented Tolliver from performing under the contract." Def.'s Mot. at 4. That averment is wrong. The court did not so state. Instead, "the court conclude[d] that the contract could not be performed *as specified in the original Performance Work Statement* (PWS), engendering changed conditions of performance as reflected in an agreed modification to the contract." *Id.* (quoting *Tolliver*, 146 Fed. Cl. at 479) (emphasis added). As one can readily see, the government's averment as to what the court stated does not match what the court actually found. The court did not say the contract could not be performed in the absence of the technical data package with engineering drawings; rather, as the court put it, "[t]he Army['s] . . . inability to produce the technical data package would generate considerable additional work for Tolliver in the form of reverse engineering." *Tolliver*, 146 Fed. Cl. at 483-84. And that all-too-evident fact led the Army to introduce Modification 8, which increased the price by a factor of four and one-half times.[3] In short, the government misstates a basic premise of the court's ruling.

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[2]The government's motion for reconsideration errs insofar as it relies on RCFC 59(a)(1), which applies to motions to alter or amend final judgments.

[3]The government's motion undercuts its position by observing that "[i]t is undisputed here that Tolliver capably performed under the contract and the specifications did not frustrate performance or make Tolliver's performance impossible." Def.'s Mot. at 11. Failure to provide

The government relies on various statements by Tolliver made in connection with the district court's proceeding. But the district court well understood what the circumstances were. The contracting officer's representative had provided a declaration to the district court, which the court adopted as a factual matter, contradicting the government's current position. As the district court commented, "[t]he declaration confirms that while the government indicated that it intended to provide the contractors with a T[echnical] D[ata] P[ackage] for use in developing the manuals, it did not do so, it knew that it did not do so, and still instructed the contractors to proceed with performance." *United States ex rel. Searle*, 2015 WL 6691973, at *1. This court drew upon the district court's emphasis regarding the centrality of these facts to the relator's suit. As the district court had said, "the government was aware of [the absence of the technical data package], and even directed [Tolliver to proceed without the technical data package], the very issues about which [the relator] complains." *Id.* at *10 (quoted by *Tolliver*, 146 Fed. Cl. at 454).[4] In sum, the only error is one of the government's devising; the district court and this court were on all fours with each other.[5]

B. The Government's Jurisdictional Objection

Jurisdictionally, the government argues that there is a mismatch between Tolliver's claim to the contracting officer and that presented to the court, *see* Def.'s Mot. at 8-10, and that the equitable reimbursement claim based on breach of the implied warranty addressed in *Spearin* is circumscribed by *Hercules v. United States*, 516 U.S. 417 (1996), to bar Tolliver from any recovery, *see id.* at 11-12.

1. Claim symmetry.

Beyond question, "[a]n action brought before the Court of Federal Claims under the [Contract Disputes Act] must be based on the same claim previously presented to and denied by the contracting officer." *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014). Tolliver's claim in both forums was one for equitable adjustment.[6] The key point then becomes

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the technical data package made Tolliver's performance considerably more difficult, but Tolliver never complained that its performance was impossible.

[4]As the court previously observed, "a district court's findings of fact in a *qui tam* action are *res judicata* against the government." *Tolliver*, 146 Fed. Cl. 483 n.10 (citing *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1329 (Fed. Cir. 2010)).

[5]Notably the government "previously agreed that one of the relator's primary arguments in the *qui tam* action related to the relator's misunderstanding of Tolliver's certification as it relates to the technical data package." Def.'s Mot. at 8 n.5.

[6]*See* Def.'s Mot. for Summary Judgment, ECF No. 42, App. at A71 ("The Tolliver Group. Inc. ('TTGI') hereby requests an *equitable adjustment* and payment from the United States Army, Army Contracting Command – Warren ("Army") in the amount of $195,889.78 for

whether the claims "arise from the same operative facts [and] claim essentially the same relief." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003).

The government argues that Tolliver neither cited *Spearin* to the contracting officer nor did it refer explicitly to a breach of the implied warranty that if the contractual specifications were met, performance would have been satisfactory. *See* Def.'s Mot. at 9-10. The first of these postulates is true, but the second is not. Tolliver did not cite *Spearin* in its equitable reimbursement claim to the contracting officer, but its submission to that officer emphasized the failure by the government to provide the technical data package and the resulting direct. relationship to the *qui tam* action. See Def.'s Mot. for Summary Judgment, App. at A71-72.[7] There is no question that the government failed to supply the information it had specified in the Performance Work Statement, and, similarly, it is beyond dispute that the omission was the crux of the *qui tam* suit.

2. The government's reliance upon Hercules.

The government lastly argues that Tolliver's claim for fees and expenses should be dismissed based on the Supreme Court's decision in *Hercules, Inc. v. United States*, 516 U.S. 417, 424-25 (1996). *See* Def.'s Mot. at 11. Specifically, the government contends that *Hercules* limits *Spearin* to application regarding "capability of performance." *Id.*

The government brushes aside the fact that a *qui tam* case is *not* a third-party claim. *See* Def.'s Mot. at 11. In actuality, it is a claim by, or on behalf of, the government. *See Tolliver*, 146 Fed. Cl. at 486 (citing *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Kriendler & Kriendler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992); *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990)). At any point before the district court or the Fourth Circuit, the government could have stepped in as the real party in interest. Moreover, suits such as the one before the district court focus on the contracting party's performance. The declaration to the district court by the contracting officer's representative showed as much in addressing Tolliver's actual performance under the contract.

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allowable legal fees associated with defending itself against the False Claims Act action in *United States of America, [e]x [r]el Robert C. Searle v. DRS Technical Services, et al*.").

[7]In fact, in its claim to the contracting officer, Tolliver cited only one legal precedent, *see* Def.'s Mot. for Summary Judgment, App. at A71-72, and the case cited, *Flour Hanford, Inc. v. United States*, 66 Fed. Cl. 230 (2005), relates generically to equitable reimbursement. *See* Def.'s Mot. for Summary Judgment, App. at 71. Besides not citing *Spearin*, Tolliver did not cite leading precedents in the Federal Circuit, including *Franklin Pavkov Constr. Co.*, 279 F.3d at 994-95, and *Essex Electro Eng'rs*, 224 F.3d at 1289, and *Tobin Quarries, Inc. v. United States*, 84 F. Supp. 1021, 1023 (Ct. Cl. 1949).

See supra, at 5. As the court's prior decision explained, *Hercules* does not bar Tolliver in the circumstance at hand.

CONCLUSION

The government's motion for reconsideration is DENIED.

On or before June 10, 2020, the government shall file any objections it may have to the reasonableness of the amount of Tolliver's claimed attorneys' fees. Tolliver shall file its response on or before June 22, 2020.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

United States Court of Appeals for the Federal Circuit

THE BOEING COMPANY,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2019-2148

Appeal from the United States Court of Federal Claims in No. 1:17-cv-01969-PEC, Judge Patricia E. Campbell-Smith.

Decided: August 10, 2020

MICHAEL W. KIRK, Cooper & Kirk, PLLC, Washington, DC, argued for plaintiff-appellant. Also represented by CHARLES J. COOPER, JOHN DAVID OHLENDORF; SUZETTE DERREVERE, The Boeing Company, Arlington, VA; SETH LOCKE, Perkins Coie, LLP, Washington, DC.

ERIN MURDOCK-PARK, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by ETHAN P. DAVIS, ELIZABETH MARIE HOSFORD, ROBERT EDWARD KIRSCHMAN, JR.

Before MOORE, TARANTO, and CHEN, *Circuit Judges*.

TARANTO, *Circuit Judge*.

From 1992 to 2015, the Boeing Company entered into numerous contracts with the United States Department of Defense, among them the contract at issue in this case. In 2011, Boeing permissibly changed multiple cost accounting practices simultaneously; some of the changes raised costs to the government, whereas others lowered costs to the government. In late 2016, the Defense Contract Management Agency, invoking Federal Acquisition Regulation (FAR) 30.606, 48 C.F.R. § 30.606, determined the amount of the cost-increasing changes for the present contract and demanded that Boeing pay the government that amount plus interest. Boeing began doing so.

In 2017, Boeing filed an action in the Court of Federal Claims to seek recovery of the amounts thus paid, asserting that the government, in following FAR 30.606, committed a breach of contract and effected an illegal exaction. Boeing's core argument, applicable to both claims, is that, although FAR 30.606 undisputedly required the Defense Department to act as it did, that regulation is unlawful—principally because it is contrary to 41 U.S.C. § 1503(b) (and also for procedural reasons). According to Boeing, that provision of the Cost Accounting Standards (CAS) statute, which is incorporated into the contract at issue, requires that simultaneously adopted cost-increasing and cost-lowering changes in accounting practices be considered as a group, with the cost reductions offsetting the cost increases. Boeing argues that, by following FAR 30.606's command to disregard the cost-lowering changes and bill Boeing for the cost-increasing changes alone, the government unlawfully charged it too much.

The trial court held that Boeing had waived its breach of contract claim by failing to object to FAR 30.606 before entering into the relevant contracts. *Boeing Co. v. United*

States, 143 Fed. Cl. 298, 307–15 (2019). The trial court also determined that it lacked jurisdiction to consider Boeing's illegal exaction claim because the claim was not based on a "money-mandating" statute. *Id.* at 303–07. We now reverse and remand, concluding that the trial court misapplied the doctrine of waiver and misinterpreted the jurisdictional standard for illegal exaction claims.

I

A

The federal government has long entered into contracts under which amounts it pays to contractors are based on the contractors' costs in performing the contracts. *See*, *e.g.*, *Lockheed Aircraft Corp. v. United States*, 375 F.2d 786 (Ct. Cl. 1967). In an effort to regularize cost-accounting practices relevant to such contracts, the Office of Federal Procurement Policy Act Amendments of 1988 (the CAS Act) established the CAS Board within the Office of Federal Procurement Policy. Pub. L. 100-679, § 5, 102 Stat. 4055, 4058–63 (1988) (originally codified at 41 U.S.C. § 422, but now codified at 41 U.S.C. §§ 1501–06). The CAS Act gave the Board "exclusive authority to prescribe, amend, and rescind cost accounting standards." 41 U.S.C. § 1502(a)(1). Standards promulgated by the Board are "mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the Federal Government in excess of the amount set forth in section 2306a(a)(1)(A)(i) of title 10," which refers to contracts worth more than $2 million. *Id.*, § 1502(b)(1)(B); *see* 10 U.S.C. § 2306a(a)(1)(A)(i).

The CAS Act directed the Board to establish regulations "requir[ing] contractors and subcontractors as a condition of contracting with the Federal Government to . . . agree to a contract price adjustment, with interest, for any

increased costs paid to the contractor or subcontractor by the Federal Government because of a change in the contractor's or subcontractor's cost accounting practices." 41 U.S.C. § 1502(f). In accordance with that mandate, the Board promulgated FAR 9903.201-4, which requires contracting officers to insert, in each CAS-covered contract, a clause that "requires the contractor to comply with all CAS specified in [48 C.F.R. pt. 9904]." 48 C.F.R. § 9903.201-4(a)(2). The required clause states that "the provisions of [part] 9903 are incorporated herein by reference" and that a contractor shall "[c]omply with all CAS, including any modifications and interpretations indicated thereto contained in part 9904" as of certain times and "any CAS (or modifications to CAS) which hereafter become applicable to a contract." 48 C.F.R. § 9903.201-4 (clause sections (a)(1) and (a)(3)). As relevant here, the clause also requires the contractor, upon making a "change to a cost accounting practice," to "negotiate an equitable adjustment . . . ." *Id.* (clause section (a)(4)(iii)). Notably for purposes of this case, another regulation, FAR 52.230-2, provides for insertion of a clause that incorporates 48 C.F.R. part 9903 by reference and that otherwise is the same for present purposes as the clause set out in FAR 9903.201-4. *See* 48 C.F.R. § 52.230-2.

An additional regulation, FAR 52.230-6, entitled "Administration of Cost Accounting Standards," establishes a framework for determining the amount of an equitable adjustment; as relevant here, it requires that every CAS contract contain a detailed clause addressed to that topic. 48 C.F.R. § 52.230-6. Each relevant agency must appoint a "Cognizant Federal Agency Official" (CFAO), *i.e.*, a contracting officer responsible for implementing CAS provisions that govern the agency's contracts. 48 C.F.R. § 52.230-6 (clause section (a)). In that role, the designated contracting officer coordinates the agency's response to changes in cost accounting practices.

A contractor must "[s]ubmit to the CFAO a description of any cost accounting practice change . . . and any written statement that the cost impact of the change is immaterial." *Id.*, § 52.230-6 (clause section (b)). As relevant here, upon determining that a change complies with the CAS but is "undesirable," the contracting officer must classify the change as "unilateral" and inform the contractor that "the Government will pay no aggregate increased costs." *Id.* (clause section (a)). The contracting officer may request that the contractor submit a "general dollar magnitude (GDM) proposal" calculating the "cost impact" of the changes. *See id.* (clause section (c)(1)) (GDM proposal must be "in accordance with paragraph (d) or (g) of this clause"); *id.* (clause section (d)(1)) ("[T]he GDM proposal shall . . . [c]alculate the cost impact in accordance with paragraph (f) of this clause."). For a unilateral change, the proposal must include an estimate of the "increased cost to the Government in the aggregate." *Id.* (clause section (f)(2)(iv)).

At the heart of this case is one further regulation, FAR 30.606, entitled "Resolving cost impacts." 48 C.F.R. § 30.606. Although FAR 52.230-6 and its required contract clause do not refer to FAR 30.606, it is undisputed that, in deciding how to deal with the cost impacts of changes, "the Government was required to follow FAR 30.606 when administering the Contract." U.S. Br. at 45 (citing 41 U.S.C. § 1121(c)(1)); *id.* ("FAR 30.606 is mandatory"); *id.* at 50 ("We do not dispute that FAR 30.606 could not be waived, nor that contracting officers are precluded from granting such a waiver."). FAR 30.606 gives the contracting officer discretion to "adjust[] a single contract, several but not all contracts, all contracts, or any other suitable method." 48 C.F.R. § 30.606(a)(2). But the regulation limits that discretion in a respect central to the dispute in this case. It instructs the contracting officer not to "combine the cost impacts of . . . . [o]ne or more unilateral changes" "unless all of the cost impacts are increased costs to the government." *Id.*, § 30.606(a)(3)(ii)(A). As is undisputed, that

provision bars offsetting increases in costs from some changes with reductions in costs from others.

Under FAR 52.230-6, if the contracting officer determines that the unilateral, undesirable changes have caused an "aggregate increased cost," the contractor must "[r]epay the Government" an amount equal to the aggregate increased cost. *Id.*, § 52.230-6 (clause section (k)(2)). Any disagreement over repayment, the CAS statute declares, "will constitute a dispute under chapter 71 of this title," *i.e.*, a dispute under the Contract Disputes Act. 41 U.S.C. § 1503(a); *see id.*, §§ 7101–09.

B

From 1992 to 2015, Boeing, through its Fixed Wing Accounting Business Unit segment of its Defense, Space & Security division, entered into numerous contracts with the federal government. The contract at issue here is Contract No. N00019-09-C-0019 (the C19 contract), based on a solicitation issued by the Naval Air Systems Command and awarded in late 2008 to McDonnell Douglas Corporation, which was by then part of Boeing and has been treated by the parties as within Fixed Wing's aegis. J.A. 404. The award recites an "amount" of roughly $67 million and states that the contract would be administered, on the government's side, by the Defense Contract Management Agency. *Id.* It is undisputed before us that the contract is governed by CAS. The contract incorporates various clauses either by reference or by full text. J.A. 1013–23; J.A. 405. The clauses set out in FAR 52.230-2 and 52.230-6 are among those incorporated; FAR 30.606 is not. J.A. 1013–23; J.A. 405.

In October 2010, Boeing informed the Defense Contract Management Agency's designated contracting officer that Fixed Wing was planning to implement simultaneously, on January 1, 2011, several changes to its cost accounting practices. The contracting officer deemed eight of those changes to be undesirable "unilateral changes," designated

the C19 contract as representative, and asked Boeing to submit a general magnitude dollar proposal. In its proposal, Boeing estimated that two changes—GT-2011-06 and GT-2011-07—would increase the government's costs by $888,000 ($940,007 after factoring in Boeing's profits). But Boeing estimated that two other changes—GT-2011-04 and GT-2011-05—would save the government $2,284,000. Because the net effect of the changes was to save the government $1,396,000 ($1,489,000 after factoring in Boeing's profits), Boeing duly contended that it need not make any payment because there was no "aggregate increased cost." FAR 52.230-6(k)(2).

On December 21, 2016, a Divisional Administrative Contracting Officer (DACO) of the Defense Contract Management Agency determined, in a "Final Decision," that Boeing owed the government $1,064,773. J.A. 67. She drew that conclusion by limiting her calculation to the "[t]wo of the eight changes . . . [that] materially . . . increase costs to the Government," disregarding the other, cost-saving changes. J.A. 68. She ruled that Boeing had to pay the government $940,007, plus interest of $124,776 (through December 2016). *Id.*; *see also* J.A. 64–65 (denying reconsideration). To fulfill that obligation, Boeing began paying the government $8,900 per month. J.A. 55.

C

On December 18, 2017, Boeing filed an action in the Court of Federal Claims under the Contract Disputes Act. *See* 41 U.S.C. § 7104(b) ("[I]n lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims."). Boeing alleged that the government breached the C19 contract, with its CAS-compliance clause, by failing to "negotiate an equitable adjustment," FAR 9903.201-4, in accordance with the CAS statute. In particular, Boeing renewed its argument that FAR 30.606, which forbids the

offsetting of cost increases and cost reductions from simultaneous changes in cost accounting practices, is unlawful, including because it is counter to the CAS statute's general rule that "[t]he Federal Government may not recover costs greater than the aggregate increased cost to the Federal Government," 41 U.S.C. § 1503(b). *See* J.A. 57; *see also* J.A. 58 (arguing that FAR 30.606 was promulgated without "adequate notice and comment"). Alternatively, Boeing alleged, the government's "demand for payment," "in direct violation of 41 U.S.C. § 1503(b)," was an "illegal exaction." J.A. 60.

Boeing filed a motion for judgment on the pleadings. The government opposed Boeing's motion and filed its own cross-motions to dismiss (as to the illegal exaction claim) and for summary judgment (as to the contract claim). The trial court granted the government's motions.

The government's argument on the contract claim was that, by failing to challenge the legality of FAR 30.606 before entering into the C19 contract, Boeing had waived its breach of contract claim that depended on challenging FAR 30.606 as unlawful. The trial court agreed, characterizing the asserted conflict between FAR 30.606 and the CAS statute as a "patent ambiguity in [Boeing's] contract with the government." *Boeing*, 143 Fed. Cl. at 309. The court ruled that "[b]ecause Boeing did not seek clarification, before award, of the conflict it saw between the CAS statute, the CAS clause and FAR 30.606, its contract claims are foreclosed as a matter of law." *Id.* at 310.

The government's argument on the illegal exaction claim was that jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), was lacking because the CAS Act, on which the allegation of illegality rested, is not a money-mandating statute. The trial court agreed. Relying on *Norman v. United States*, 429 F.3d 1081 (Fed. Cir. 2005), the court stated that Boeing was required to "show that 41 U.S.C. § 1503(b) is money-mandating to establish jurisdiction for

its illegal exaction claim." *Boeing*, 143 Fed. Cl. at 304. The court concluded that Boeing had not done so and, therefore, "the illegal exaction claim . . . must be dismissed for lack of subject matter jurisdiction." *Id.* at 307.

Boeing timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3). We review the Court of Federal Claims' legal conclusions de novo and its factual findings for clear error. *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1340 (Fed. Cir. 2018).

II

Boeing contends that the trial court incorrectly ruled that Boeing waived its challenge to the lawfulness of FAR 30.606. We agree. Although Boeing advances several rationales for the inapplicability of waiver, we need not go beyond the following. A pre-award objection by Boeing to the Defense Department would have been futile, as the government concededly could not lawfully have declared FAR 30.606 inapplicable in entering into the contract. Our precedents do not require, to avoid waiver, that the contractor have pursued judicial avenues of relief before the award. To the extent that the government even urges adoption of such a requirement here, it has provided no sound basis for doing so in this case: it has not identified a judicial avenue through which a ruling on the merits of the objection was assuredly available. We therefore reverse the trial court's waiver ruling.

A

The basis for waiver adopted by the trial court and defended by the government is what the government labels, on the first page of its brief to this court, "the *Blue & Gold* waiver rule," referring to this court's decision in *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007). U.S. Br. at 1. In *Blue & Gold*, which involved a bid protest, we drew on precedents involving certain contract ambiguities and concluded: "a party who has the

opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." *Blue & Gold*, 492 F.3d at 1313; *see COMINT Systems Corp. v. United States*, 700 F.3d 1377, 1382 (Fed. Cir. 2012) (extending *Blue & Gold* to "situations in which the protesting party had the opportunity to challenge a solicitation before the award and failed to do so"). More generally, we have ruled that a waiver exists in certain circumstances where contract terms contain a "patent" ambiguity or defect, including an obvious omission, inconsistency, or discrepancy of significance, and the contractor or bidder who later challenges those contract terms in court had not properly raised the problem to the agency during the contract-formation process. *See Inserso Corporation v. United States*, 961 F.3d 1343, 1349–52 (Fed. Cir. 2020); *K-Con, Inc. v. Sec'y of Army*, 908 F.3d 719, 721–22 (Fed. Cir. 2018); *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1312 (Fed. Cir. 2016); *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004); *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 n.2 (Fed. Cir. 2000).

Boeing argues against applicability of that doctrine to this case on several grounds. It argues, for example, that there was no *contract* defect or ambiguity because, whereas the contract includes certain clauses requiring compliance with the CAS statute, it does not include a clause requiring compliance with FAR 30.606. *See supra* p. 6; Boeing Br. at 31–36. Boeing also contends that the doctrine is inapplicable where a challenge rests on a statute that is protective of the contractor and not primarily of the government, an exception that applies, Boeing says, to 41 U.S.C. § 1503(b). Boeing Br. at 46–52. We need not and do not reach either of those contentions. Instead, we address Boeing's primary contention, Boeing Br. at 21–31, 37–45, and conclude that there was no waiver here because the government has not shown that Boeing bypassed an avenue of relief on the

merits from the agency—indeed, has not even shown that Boeing bypassed a judicial forum that would adjudicate its contention on the merits.

As already noted, the government here concedes that, when entering into the contract at issue, its adherence to FAR 30.606 was "mandatory," "FAR 30.606 could not be waived," and "contracting officers are precluded from granting such a waiver." U.S. Br. at 45, 50. In other words, it is undisputed that, if Boeing had objected to FAR 30.606 during the negotiations to enter into the contract, the agency would have had to reject the objection. The agency could not lawfully have given Boeing the relief of rejecting application of FAR 30.606 to the contract. *See* Oral Arg. at 13:20–14:25 (government counsel stating that FAR 30.606 is "not something that the contracting officer has discretion" to apply or not to apply).

Under our cases, as the government seems to acknowledge at one point, it is what Boeing said or did not say *to the agency* before entering into the contract that matters for purposes of the waiver doctrine. *See* U.S. Br. at 51 ("Whether Boeing could have challenged FAR 30.606 in another forum through an APA action or through a pre-award bid protest is irrelevant to whether Boeing improperly stayed silent—before signing the Contract—on the purported conflict between the regulation and the CAS."). The government has not pointed to any precedent of this court under the contract waiver doctrine in which we have found waiver, or declared waiver to be available, despite the inability of the agency itself to grant the relief that the party later sought in court. None of this court's precedents on which the government relies in addressing Boeing's primary contention about contract waiver involved such a circumstance; the government does not argue otherwise.[1]

[1] In the portions of its brief directed to the Boeing argument we are addressing, the government cites *K-Con*,

The same is true of additional cases of ours on which the trial court relied in the corresponding portions of its opinion.[2]

Notably, we emphasized the significance of the availability of agency relief in one of the cases principally relied on by the government and the trial court, *American Telephone & Telegraph Co. v. United States* (*AT&T II*), 307 F.3d 1374 (Fed. Cir. 2002). There, we held that AT&T had waived its challenge to the fixed-price nature of a $34.5 million contract. *Id.* at 1376. AT&T sought to reform the contract, invoking a regulation that, supporting AT&T's position in court, directed agencies not to enter fixed-price contracts greater than $10 million. *Id.* We noted that the agency, in negotiating the contract, readily could have adopted the form of contract AT&T later sought in court. *Id.* at 1376, 1379. We concluded that "the proper time for AT&T to have raised the issues that it now

supra; *Per Aarsleff*, *supra*; *Blue & Gold*, *supra*; *E.L. Hamm*, *supra*; *American Telephone & Telegraph Co. v. United States*, 307 F.3d 1374 (Fed. Cir. 2002) (*AT&T II*); *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375 (Fed. Cir. 2000); *Whittaker Elec. Sys. v. Dalton*, 124 F.3d 1443 (Fed. Cir. 1997); *United Int'l Investigative Servs. v. United States*, 109 F.3d 734 (Fed. Cir. 1997); *Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); and *Space Corp. v. United States*, 470 F.2d 536 (Ct. Cl. 1972). *See* U.S. Br. at 23, 31–33, 36, 41–43, 52.

[2] In those portions of its opinion, the trial court cited, besides some of the cases cited *supra* n.1, *Triax Pac., Inc. v. West*, 130 F.3d 1469 (Fed. Cir. 1997); *Statistica, Inc. v. Christopher*, 102 F.3d 1577 (Fed. Cir. 1996); *Interwest Constr. v. Brown*, 29 F.3d 611 (Fed. Cir. 1994); *Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982); and *E. Walters & Co. v. United States*, 576 F.2d 362 (Ct. Cl. 1978). *See Boeing*, 143 Fed. Cl. at 309–10, 313–14.

presents was at the time of the contract negotiation, *when effective remedy was available*." *Id.* at 1381 (emphasis added).[3]

Even more notably, where the agency, during contracting, could not have accepted the objection later raised by the plaintiff in court, we have rejected a government argument for waiver precisely because of the disability. In *GHS Health Maintenance Organization, Inc. v. United States* (*GHS II*), we determined that a contractor had not waived its challenge to a regulation. 536 F.3d 1293, 1295 (Fed. Cir. 2008). Noting that the contract contained the language of the regulation, the government argued that the contractor had consented to the regulation, and thereby waived its challenge, by signing the contract. *Id.* at 1306. We rejected this argument as "frivolous" on the simple ground that the regulation "was non-negotiable." *Id.*

[3] In *Blue & Gold*, we held that Blue & Gold, a losing bidder, waived the contention that the agency was required to include in the solicitation a requirement of compliance with an employee-pay statute, because Blue & Gold did not make that objection to the agency during the bidding process. In so ruling, we discussed an agency regulation relevant to whether Blue & Gold should have been aware of a general agency practice, but we did not suggest that the regulation barred the agency from including in the solicitation the requirement Blue & Gold later urged in court. Indeed, we noted that, after the award was made (to a rival bidder), the Park Service agreed to apply the statute to the contract, 492 F.3d at 1316, with no apparent change in the regulation. Blue & Gold, for its part, made no contrary contention; in fact, it stated that the regulation "nowhere mentions the" statute "or clearly states" that the contract at issue was outside the statute. Reply Br. of Appellant at 8, *Blue & Gold*, 492 F.3d 1308 (Fed. Cir. 2007) (No. 06-5064), 2006 WL 3243586.

GHS II cannot be disregarded as too abbreviated in its analysis, which is clear and to the point. It also is consistent with all the relevant precedent identified to us or of which we are aware. It reflects the contract waiver doctrine's origin in the policy of ensuring that two negotiating parties (whether private or governmental) do what *they* are able to do to clear up patent ambiguities or defects before formation, thus helping to reduce future litigation and allowing expeditious contract formation. *See Blue & Gold*, 492 F.3d at 1313–15. In addition, with *Blue & Gold* having itself looked to "analogous" doctrines, *id.* at 1314, we note that *GHS II* aligns with the familiar "futility" exception to related requirements for preserving a challenge by first presenting the matter to an agency. *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000); *McCarthy v. Madigan*, 503 U.S. 140, 147–48 (1992); *Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928).

Under our case law, we conclude, there was no waiver.

B

GHS II does not specifically discuss whether waiver could be found where, though relief from the agency was not available, a contractor or bidder bypassed, during the contract-formation process, an opportunity for a *judicial* ruling on the merits of the objection later asserted in court. It is not clear, however, whether the government is contending that bypassing a judicial avenue of relief is a ground for waiver, generally or in this case. *Compare* U.S. Br. at 51 ("Whether Boeing could have challenged FAR 30.606 in another forum through an APA action or through a pre-award bid protest is irrelevant to whether Boeing improperly stayed silent—before signing the Contract—on the purported conflict between the regulation and the CAS.") *with id.* at 36 n.12 ("Boeing had the choice to protest the terms of the solicitation—including a challenge to FAR 30.606—or to raise its challenge in an [APA]

claim.") and Oral Arg. at 14:25–18:45 (government urging that Boeing should have sought judicial relief before entering into contract). Accordingly, we explain here only why the government's argument along these lines falls short of justifying any expansion of the waiver doctrine to support a waiver in this case.

We do not decide whether failure to pursue a judicial remedy could ever support a determination of waiver in the contract context. We decide merely that we will not create such a new basis for waiver where the government has not identified a judicial forum in which the plaintiff would clearly have been entitled, during the contract-formation process, to obtain a ruling on the merits of the objection it has raised in its later contract case. This conclusion reflects the general principle that forfeiture involves a "failure to make timely assertion of the right *before a tribunal having jurisdiction to determine it*." *Yakus v. United States*, 321 U.S. 414, 444 (1944) (emphasis added); *see United States v. Olano*, 507 U.S. 725, 731 (1993) (reiterating *Yakus* statement of forfeiture principle).

The government mentions just two possible paths Boeing might have taken in court during contract formation: an action under the APA, 5 U.S.C. §§ 702, 704, and a bid protest action, 28 U.S.C. § 1491(b)(1). U.S. Br. 36 n.12, 51. But the government never asserts, let alone establishes, that Boeing would have been entitled to a ruling on the merits of its challenge to FAR 30.606 had it pursued either of those paths in 2008, when the contract at issue was negotiated. There are evident reasons to doubt any such entitlement, but the government has not meaningfully addressed such obstacles, saying no more than that it was up to Boeing to try to secure judicial relief. That response is inadequate for the government to meet its burden to establish a waiver through failure to seek judicial relief here, even if we assume (without deciding) that such a failure could support a contract-waiver holding in other situations.

Without being comprehensive, we briefly identify some of the apparent obstacles, which are related to each other.

The CAS statute expressly provides that judicial resolution of disputes over "contract price adjustment[s]" shall take place under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–09. 41 U.S.C. § 1502(a). That description fits Boeing's challenge: Boeing and the government disagree about the proper contract price adjustment to reflect Boeing's post-contract-formation 2011 changes in its cost accounting practices. The government accepts that a pre-formation action would be outside the CDA. *See* U.S. Br. 52–53 (stating that "to raise a CDA claim Boeing must first *have* a contract") (citing 41 U.S.C. § 7102(a)). Yet the government has not explained how the statutory routing of the particular dispute in this matter to the CDA leaves open an alternative, non-CDA, pre-formation route of judicial relief. *Cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (ruling that a "detailed structure for reviewing violations" of a statutory provision or regulation precluded a "pre-enforcement challenge"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74–75 (1996) (statutory scheme precludes *Ex parte Young* action); *Schweiker v. Chilicky*, 487 U.S. 412, 422–23 (1988) (statutory scheme precludes *Bivens* action).

The CAS statute specifically addresses the APA. In 41 U.S.C. § 1502(g), the statute declares that "[f]unctions exercised under this chapter are not subject to sections 551, 553 to 559, and 701 to 706 of title 5," thereby excluding coverage under the APA's judicial review provisions, codified at 5 U.S.C. §§ 701–706. The government has not explained how a pre-formation APA action to contest the lawfulness of FAR 30.606 as to a contract price adjustment would fall outside that statutory exclusion of APA coverage.

As to the bid protest statute, this court has ruled that a "matter of contract administration . . . can only be

challenged under the Contract Disputes Act," not in a pre-award bid protest. *Coast Prof'l, Inc. v. United States, Fin. Mgmt. Sys., Inc.*, 828 F.3d 1349, 1355 (Fed. Cir. 2016). Boeing's challenge appears on its face to involve a matter of contract administration: it objects to the government following FAR 30.606 to determine the amount of a price adjustment when Boeing chose to adopt changes in cost accounting practices during the performance of the contract. The government has not explained why this particular dispute could have been brought to court under the bid protest statute before the contract was formed, rather than under the CDA if and when FAR 30.606 was applied in a way adverse to Boeing during contract performance.[4]

Indeed, there is reason to doubt that any pre-formation challenge to FAR 30.606 would have been ripe for judicial review, under either of the two statutory provisions the government mentions. A claim is "not ripe for judicial review when it is contingent upon future events that may or may not occur." *Systems Application & Techs., Inc. v. United States*, 691 F.3d 1374, 1383 (Fed. Cir. 2012) (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)). Ripeness typically turns on (1) "the fitness

[4] We recently held that the Court of Federal Claims had jurisdiction under the bid protest statute, 28 U.S.C. § 1491(b)(1), to hear a plaintiff's challenge to a clear government position about a requirement that would likely make the plaintiff ineligible to compete for likely future government procurements for which it was likely to submit bids. *Acetris Health, LLC v. United States*, 949 F.3d 719, 727–28 (Fed. Cir. 2020); *id.* at 727 ("Acetris has standing because the government has taken a definitive position as to the interpretation of [statutory and regulatory provisions] that would exclude Acetris from future procurements for other products on which it is a likely bidder."). The government has not shown that *Acetris* applies here.

of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration," *Abbott Labs. v. Gardner,* 387 U.S. 136, 149 (1967), with the first factor focused on "whether the challenged conduct constitutes a final agency action," *Systems Application*, 691 F.3d at 1384. The government has not shown how Boeing could reliably have met the ripeness standard in 2008, well before it made the 2011 changes in its cost accounting practices and before the Defense Department made a decision under FAR 30.606 that would concretely harm Boeing, which depended on the particular changes.

In short, the government has not sufficiently explained how and where Boeing could have sought pre-award judicial review of FAR 30.606. At least in this circumstance, we see no basis for departing from our consistent precedent limiting the contract waiver doctrine to an objection that the agency itself could have resolved favorably to the objector if the objection had merit. We therefore hold that the trial court erred in ruling that Boeing waived its challenge.

III

Boeing also contends that the trial court, in ruling that it lacked jurisdiction over the "illegal exaction" claim, mistakenly required that the asserted basis of illegality be a "money-mandating" statute. We agree with Boeing.

A

Case law involving the Tucker Act, 28 U.S.C. § 1491(a), has long distinguished three types of claims against the federal government: contractual claims, illegal-exaction claims, and money-mandating-statute claims. Our predecessor court made this distinction in *Eastport S.S. Corp. v. United States*, stating that "the non-contractual claims we consider under Section 1491 can be divided into two somewhat overlapping classes—those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those

demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." 372 F.2d 1002, 1007 (Ct. Cl. 1967) (en banc). The Supreme Court endorsed that formulation in *United States v. Testan*, 424 U.S. 392, 400 (1976). Since then, we have repeated that the "underlying monetary claims are of three types." *See Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996).

"One way an illegal exaction occurs," we have stated, "is when the 'plaintiff has paid money over to the Government . . . and seeks return of all or part of that sum' that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Virgin Islands Port Authority v. United States*, 922 F.3d 1328, 1333 (Fed. Cir. 2019) (quoting *Eastport S.S.*, 372 F.2d at 1007). Allegations of subject matter jurisdiction, to suffice, must satisfy a relatively low standard—must exceed a threshold that "has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (internal quotations omitted). Thus, to establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation.

Under this standard, Boeing has established jurisdiction for its illegal exaction claim. Boeing alleged that the government "demanded that Boeing pay it . . . $940,007" to cover the "increased costs caused by two of the changes," that the government "also demanded $124,766 in compound interest," and that Boeing had already "paid $71,276 to the Government." J.A. 55. And Boeing alleged that the government's "demand for payment of $1,064,773

[$940,007 plus $124,766] is . . . in direct violation of 41 U.S.C. § 1503(b), which requires that the Government 'may not recover costs greater than the aggregate increased cost to the Federal Government.'" J.A. 60. In short, Boeing alleged that the government has demanded and taken Boeing's money in violation of a statute. Whatever its ultimate merits, this allegation suffices for jurisdiction to adjudicate the illegal exaction claim.

In reaching a contrary conclusion, the trial court relied on our decision in *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). There, we stated that "[t]o invoke Tucker Act jurisdiction over an illegal exaction claim, a claimant must demonstrate that the statute or provision causing the exaction itself provides, either expressly or by 'necessary implication,' that 'the remedy for its violation entails a return of money unlawfully exacted.'" *Id.* (quoting *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000)). According to the trial court, that statement requires Boeing to "show that 41 U.S.C. § 1503(b) is money-mandating to establish jurisdiction for its illegal exaction claim." *Boeing*, 143 Fed. Cl. at 304.

The trial court read more into the *Norman* statement than is proper given the otherwise-clear law, from *Eastport S.S.* through *Testan* through later cases of this court, applying the requirement of a "money-mandating" statute only to claims for money damages for government action different from recovery of money paid over to the United States under an illegal exaction. *See Ontario Power*, 369 F.3d at 1301. Although *Norman* did not involve a claim based on money paid over to the government, it used the phrase "illegal exaction" to refer to a government act delineating certain land as wetlands and to the plaintiff's own expenditure of money for fees and services in conjunction with that delineation. *Norman*, 429 F.3d at 1094–95. The court's statement thus was not addressing an illegal exaction of the sort Boeing alleges—which refers only to the amounts Boeing has already paid over to the government

based on the government's allegedly illegal application of FAR 30.606. Boeing's claim falls under the *Eastport S.S.* category for which the "money-mandating" standard need not be met.[5]

We have, since *Norman*, assumed jurisdiction over statutory illegal exaction claims with no regard for whether the statutes were "money-mandating." *See*, *e.g.*, *American Airlines, Inc. v. United States*, 551 F.3d 1294, 1296 (Fed. Cir. 2008); *Lummi Tribe v. United States*, 870 F.3d 1313, 1317–19 (Fed. Cir. 2017); *Virgin Islands Port Auth.*, 922 F.3d at 1333–34. Thus, we will not interpret *Norman* as having erased the distinction between the two types of claims. *See also National Veterans Legal Services Program v. United States*, Nos. 2019-1081, -1083, at 10–14 (Fed. Cir. Aug. 6, 2020).[6]

[5] The *Norman* opinion cites *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), but that decision does not even use the phrase "illegal exaction," much less modify *Eastport S.S.* In *Cyprus Amax* we held that the Export Clause of the Constitution authorized money damages for an illegal tax; the issue of recovery of an illegal exaction in the absence of such a money-mandating provision was not presented. *Id.* at 1373–76.

[6] The recent case of *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), did not involve a government exaction of money that the plaintiff was seeking to recover, but a claim for damages based on a violation of a statutory obligation to pay. The Supreme Court did not discuss the "illegal exaction" branch of Tucker Act jurisdiction described in *Eastport S.S.* and *Testan*. *See Maine Community*, 140 S. Ct. at 1327–31.

IV

For the foregoing reasons, we reverse the judgment of the Court of Federal Claims. We remand for proceedings consistent with this opinion.

Costs awarded to appellant.

REVERSED AND REMANDED

United States Court of Appeals for the Federal Circuit

PARSONS EVERGREENE, LLC,
Appellant

v.

SECRETARY OF THE AIR FORCE,
Cross-Appellant

2019-1931, 2019-1975

Appeals from the Armed Services Board of Contract Appeals in Nos. 58634, 61784, Administrative Judge J. Reid Prouty, Administrative Judge Craig S. Clarke, Administrative Judge Richard Shackleford.

Decided: August 7, 2020

CAMERON HAMRICK, Miles & Stockbridge PC, Washington, DC, argued for appellant. Also represented by RAYMOND MONROE.

ROBERT R. KIEPURA, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for cross-appellant. Also represented by ETHAN P. DAVIS, STEVEN JOHN GILLINGHAM, ROBERT EDWARD KIRSCHMAN, JR.; LORI R. SHAPIRO, Office of General Counsel, United States General Services Administration, Washington, DC.

Before DYK, CLEVENGER, and HUGHES, *Circuit Judges*.

DYK, *Circuit Judge*.

Parsons Evergreene, LLC ("Parsons") appeals from two decisions by the Armed Services Board of Contract Appeals ("Board"). The Board granted in part and denied in part Parsons' claims for equitable adjustment on a contract for the design and construction of two buildings at McGuire Air Force Base. The government cross-appeals, contending that the Board lacked jurisdiction; that we lack jurisdiction in part; and, on the merits, that the Board erroneously required it to disprove the reasonableness of Parsons' claimed costs. We affirm in part, reverse in part, dismiss in part, and remand.

BACKGROUND

On December 12, 2003, the government awarded Parsons a $2.1 billion indefinite-delivery, indefinite-quantity contract ("Contract") for planning and construction work.[1] The work was to be described in subsequent task orders. On July 13, 2005, the government issued a $34 million task order ("Task Order") under the Contract to complete an existing, concept-level design and construct two facilities, known as the Temporary Lodging Facility and the Visiting Quarters, at the McGuire Air Force Base in New Jersey. The Temporary Lodging Facility was to be a 50-unit transitional housing facility for use by military and civilian personnel. The Visiting Quarters was to be a 175-unit facility similar to a hotel with individual rooms and private bathrooms. Design and construction were completed, and the

[1] The contract was originally awarded to Parsons Infrastructure and Technology Group Inc. The contract was transferred to Parsons via novation on September 7, 2004.

U.S. Department of the Air Force ("Air Force") accepted the completed facilities for "beneficial use" on September 11, 2008. J.A. 96.

On June 29, 2012, Parsons submitted a claim to the Air Force seeking approximately $34 million in additional costs that Parsons allegedly incurred in the design and construction process. The contracting officer issued a final decision on March 27, 2013 almost entirely denying Parsons' claim, which Parsons appealed to the Board under the Contract Disputes Act ("CDA"). In separate decisions in ASBCA Nos. 58634 and 61784, the Board denied in part and sustained in part Parsons' claim, awarding Parsons about $10.5 million plus interest.

Parsons appeals. The government cross-appeals, contending that the Board lacked jurisdiction; that we lack jurisdiction in ASBCA No. 61784; and that on the merits the Board erroneously required it to disprove the reasonableness of Parsons' claimed costs. We review the Board's legal conclusions de novo and its factfinding for substantial evidence. 41 U.S.C. § 7107(b).

DISCUSSION

I

At the outset, we must resolve a jurisdictional challenge. The government contends that the Board lacked CDA jurisdiction over this case. We disagree.

The CDA provides a process for dispute resolution of certain contract claims against the government. As relevant here, the CDA applies to contracts "made by an executive agency" for "the procurement of services" or "the procurement of construction . . . of real property." 41 U.S.C. § 7102(a)(1), (3). Claims by contractors are first submitted to a contracting officer, who issues a decision on the claim. 41 U.S.C. § 7103(a)(1), (d). The contractor may appeal the contracting officer's decision to a Board of

Contract Appeals. *Id.* § 7104(a). The Board's decision may, in turn, be appealed to this court. *Id.* § 7107(a)(1).

A

The government first contends that the Board lacked jurisdiction under the so-called "NAFI doctrine." The Board concluded that it had jurisdiction because the NAFI doctrine had been abrogated by this court's decision in *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011) (en banc).

Beginning in the late 1960s, our predecessor court held in a line of cases that neither the Court of Federal Claims ("Claims Court") nor the Boards of Contract Appeals had jurisdiction over contract disputes with nonappropriated fund instrumentalities ("NAFIs"). *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966). "A 'nonappropriated fund instrumentality' is one which does not receive its monies by congressional appropriation." *United States v. Hopkins*, 427 U.S. 123, 125 n.2 (1976). As relevant to Board jurisdiction, these cases construed the phrase "executive agency" in the CDA to exclude contracts made by NAFIs. *See, e.g.*, *Furash & Co. v. United States*, 252 F.3d 1336, 1343 (Fed. Cir. 2001); *Strand Hunt Const., Inc. v. West*, 111 F.3d 142 (Fed. Cir. 1997) (unpublished table decision). As to Claims Court jurisdiction, these cases construe the Tucker Act's authorization of suits against "the United States" to exclude NAFIs. *See* 28 U.S.C. § 1491(a)(1); *Kyer*, 369 F.2d at 719 .

In 2011, in our en banc decision in *Slattery*, we held that the Claims Court had Tucker Act jurisdiction over a dispute between a contractor and the Federal Deposit Insurance Corporation ("FIDC"), even though the FDIC was a NAFI. 635 F.3d at 1310, 1314. In so holding, we abrogated the NAFI doctrine for Tucker Act claims. *Id.* at 1321. We have not yet decided whether *Slattery* also abrogated the NAFI doctrine for CDA disputes appealed to a Board of

Contract Appeals. We expressly reserved that the question in one later case. *See Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed. Cir. 2012).

The government asserts that the Board lacked CDA jurisdiction under the NAFI doctrine. It points out that the Board found that the Task Order was made by the Air Force Services Agency ("AFSVA"), a NAFI. We need not decide the current status of the NAFI doctrine as applied to the Boards of Contract Appeals because, even under pre-*Slattery* precedent, the dispute here would not be barred. Contrary to the Board's finding, the contract is not a NAFI contract.

The contracting documents show that the Task Order was made by the Air Force and not by the AFSVA. The Contract on which the Task Order is based was "Issued By" the "Air Force Materiel Command" ("AFMC"), a part of the Air Force that the government admits is not a NAFI, and was to be "Administered By" the "Department of the Air Force." J.A. 733. The request for proposal ("RFP") that led to the Task Order uses "Department of the Air Force" letterhead and states that "[t]he USAF intends to issue a competitive [Task Order]." J.A. 4823 (emphasis added). The Task Order, like the Contract, was "Issued By" the "Air Force Materiel Command" and "Administered By" the "Department of The Air Force." J.A. 798. The contracting officer who signed the Task Order was from the AFMC. The government has not identified any mention of the AFSVA or any other NAFI in either the Contract or the Task Order.

The contractual terms further support the conclusion that this was not a NAFI contract. Air Force Manual 64-302, which "provid[es] guidance and procedures for Air Force NAF contracting," states that "when FAR clauses are used in NAFI contracts, the contracting officer will delete references to 'Government' and substitute 'NAFI.'" Department of the Air Force, Manual 64-302, Nonappropriated

Fund (NAF) Contracting Procedures, at 1, 15 (Nov. 3, 2000), http://afpubs.hq.af.mil. Yet the Contract includes many FAR clauses referring to "Government" and no references to the contracting entity's being a "NAFI."

The government contends that the Task Order is a NAFI contract because the Air Force did not and could not have lawfully funded it with appropriations. The government points out that the funds used for the Task Order were "non-appropriated funds." Cross-Appellant's Reply 4 (citing J.A. 804). The government contends that "a military department must make a specific request to Congress for funding for a specified building project, and Congress must grant funding authority for that project, in order for a military department to be allowed to expend appropriated funds for a military construction project." *Id.* at 11.[2]

[2] For this proposition, the government relies on 10 U.S.C. § 2802(a), which provides that "the Secretaries of the military departments may carry out such military construction projects . . . as are authorized by law." *See also* 10 U.S.C. § 114(a) ("No funds may be appropriated . . . to or for the use of any armed force or obligated or expended for . . . military construction . . . unless funds therefor have been specifically authorized by law."); G. James Herrera, Cong. Rsch. Serv., R44710, Military Construction: Authorities, Process, and Frequently Asked Questions 2 (2019) ("In practical application of [sections 2802 and 114], Congress has required project-by-project authorization and appropriation for military construction projects.").

The government also cites to the 2005 National Defense Authorization Act, Pub. L. 108–375, 118 Stat. 1811, 2108–11 (2004) ("Authorization Act"). The Authorization Act listed and provided appropriations for construction at dozens of Air Force bases, but did not authorize construction at McGuire Air Force Base, where the Visiting

Congress did not provide the Air Force with the required authorization here, the government asserts, so the Task Order must have been a NAFI contract.

Even assuming *arguendo* that the Air Force could not have used appropriated funds for the Task Order, the government's argument fails. The government relies on *Hopkins* and *Furash* to suggest that a contract paid from nonappropriated funds is a NAFI contract. Despite some language in prior cases suggesting that the NAFI exclusion turns on the "activity" at issue, the exclusion did not depend on whether the contract itself was to be funded with appropriations. *See United States v. Gen. Elec.*, 727 F.2d 1567, 1570 (Fed. Cir. 1984). Instead, the nature of the contracting entity governed: namely, whether the contract was "made by" a NAFI. And an agency is only a NAFI where there is "a clear expression by Congress that it intended to separate the agency from general federal revenues." *Furash*, 252 F.3d at 1339.

Thus, our predecessor held that a contract made by the Agency for International Development ("AID") did not implicate the NAFI doctrine—even though the program implemented by the contract was to be run without appropriated funds—because AID (as a whole) received appropriated funds. *McCarthy v. United States*, 670 F.2d 996, 1002 (Ct. Cl. 1982). The court explained that "the nonappropriated funds exclusion is limited to instances when, by law, appropriated funds not only are not used to fund the agency, but could not be." *Id.*; *see also L'Enfant Plaza Props., Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (explaining that, to implicate the NAFI doctrine, "there must be a clear expression by Congress that the agency was to be separated from general federal

Quarters and Temporary Lodging Facility were built. *See* Authorization Act §§ 2301–02.

revenues"). Here, there is no question that the Air Force "has authority to use appropriated funds if and to the extent appropriated, and that is sufficient to avoid the non-appropriated funds exclusion." *See McCarthy*, 670 F.2d at 1002.[3]

The Task Order was made by the Air Force, and not the AFSVA. The NAFI doctrine, even if it survives under the CDA, is inapplicable.

B

The government argues alternatively that the CDA is limited to contracts for "the procurement of services" or "the procurement of construction . . . of real property," and the contract here does not qualify. Cross-Appellant's Br. 29–30 (citing 41 U.S.C. § 7102(a)). The contract here was for the design and construction of two buildings, the Temporary Lodging Facility and the Visiting Quarters. The Task Order falls neatly within the CDA's "procurement" language.

The government nevertheless contends that this was not a "procurement," relying principally on 31 U.S.C. § 6303. Section 6303 provides that:

> An executive agency shall use a procurement contract . . . when—(1) the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government; or (2) the agency decides in a specific

[3] Our decision in *General Electric* supports this conclusion. There, as here, the fact that the governmental counterparty to the contract was the Air Force was sufficient to place the dispute outside the NAFI doctrine. 727 F.2d at 1570.

> instance that the use of a procurement contract is appropriate.

The government asserts that the buildings at issue here were built for the purpose of "support[ing] the morale, welfare, and recreation of the service member[s] or other guests," which the government contends is "a distinct purpose from that of the Air Force, whose primary function is national defense." Cross-Appellant's Br. 36. Thus, to the government, the Task Order is not "for the direct benefit or use of the United States Government," under the meaning of 31 U.S.C. § 6303.

The government's argument lacks merit. Section 6303 is not part of a statutory definition of CDA jurisdiction. It is in a separate title of the United States Code. It does not control the interpretation of the term "procurement" as used in the CDA. In any event, the government's position that a project supporting the morale and welfare of servicemembers is not for the "direct benefit" of the government is at odds with the Supreme Court's holding in *Standard Oil Co. of California v. Johnson*, 316 U.S. 481 (1942), which held that military post exchanges were "essential for the performance of governmental functions." *Id.* at 485. The government's position is also inconsistent with the Secretary of the Air Force's responsibility for "the morale and welfare of [Air Force] personnel." 10 U.S.C. § 9013(b)(9). Finally, section 6303 does not require that procurement contracts be for the "direct benefit or use" of the government. It states that agencies "shall use" procurement contracts in certain circumstances, but does not otherwise foreclose their use. Section 6303 contemplates procurement contracts even when not for the government's direct benefit so long as "the agency decides" that a procurement contract "is appropriate." The Task Order is a "procurement" contract under the CDA.

The government's reliance on *G.E. Boggs & Assocs., Inc. v. Roskens*, 969 F.2d 1023 (Fed. Cir. 1992), and *New Era Construction v. United States*, 890 F.2d 1152 (Fed Cir. 1989), is similarly unavailing. In each of those cases, we held the contractual dispute to be not subject to the CDA. But *G.E. Boggs* and *New Era*, unlike this case, involved contracts with entities—the Syrian Arab Republic and the Sac and Fox Tribe of Missouri, respectively—that were not executive agencies. *G.E. Boggs*, 969 F.2d at 1024; *New Era*, 890 F.2d at 1153.

We conclude that the Board had CDA jurisdiction.

II

We next consider the timeliness of Parsons' appeal from ASBCA No. 61784 as it relates to our own jurisdiction. Parsons contends that the Board erred in denying recovery for costs Parsons allegedly incurred as a result of delays caused by a payroll review by the Air Force to determine Parson's compliance with the Davis-Bacon Act. The Act requires federal construction contractors to pay laborers and mechanics at least the prevailing wage for their work. 40 U.S.C. § 3142(a). Under FAR § 22.406–8, the government was authorized to ensure Davis-Bacon Act compliance by "[c]onduct[ing] labor standards investigations when available information indicates such action is warranted." Parsons asserts that it is entitled to compensation because the Air Force unreasonably delayed initiating and conducting such a review. We do not reach the merits of Parsons' payroll claim because we lack jurisdiction to consider it.

The procedural history of Parsons' payroll claim is as follows. On June 29, 2012, Parsons submitted the claims at issue here to the contracting officer, including its payroll claim. The contracting officer denied recovery and, on April 22, 2013, Parsons appealed to the Board. Parsons' appeal was initially docketed as ASBCA No. 58634. Litigation continued and, on September 5, 2018, the Board

issued its decisions on the merits of Parsons' claims, including the payroll claim. For all claims except the payroll claim, the Board issued its decision in the original case, ASBCA No. 58634. For the payroll claim, "[f]or reasons of judicial efficiency and clarity," the Board issued a separate opinion under a new appeal number, ASBCA No. 61784. J.A. 1 n.1. Parsons received the Board's decisions on September 10, 2018. On October 10, 2018, Parsons moved for reconsideration of the Board's decision on several claims in ASBCA No. 58634. Parsons did not seek reconsideration of the payroll claim in ASBCA No. 61784. The Board issued its decision denying Parsons' reconsideration request in ASBCA No. 58634 on January 23, 2019, which Parsons received on January 28, 2019. Parsons appealed the Board's decisions on its claims, including the payroll claim, to this court on May 23, 2019.

Parsons' appeal of its payroll claim was not timely filed. The statute governing appeals from the Board to this court provides that "a contractor may appeal the decision [of an agency board] within 120 days from the date the contractor receives a copy of the decision." 41 U.S.C. § 7107(a)(1)(A). The 120-day appeal period runs from contractor's receipt of the Board's decision on reconsideration, if reconsideration is sought. Although Parsons sought reconsideration of the Board's decision in ASBCA No. 58634 (and its appeal in that case is timely), Parsons did not seek reconsideration in ASBCA No. 61784. Parsons' appeal in ASBCA No. 61784 was filed 255 days after it received a copy of the final decision in that action. The 120-day deadline was not tolled by the request for reconsideration in ASBCA No. 58634. Therefore, we lack jurisdiction to review the Board's decision in ASBCA No. 61784. *See Placeway Const. Corp. v. United States*, 713 F.2d 726, 728 (Fed. Cir. 1983) (dismissing for lack of jurisdiction an appeal from the Board filed after the 120-day deadline).

We dismiss Parsons' appeal as to its payroll claim.

III

We turn to the merits of Parsons' appeal in ASBCA No. 58634. Parsons argues that the Board erred in denying recovery on Parsons' claim that it was not required to apply wall coatings from Duroplex-Triarch Industries and Plexture-Triarch Industries (collectively, "Triarch") to the Visiting Quarters. Triarch is not "paint" in the conventional sense, though it is a paint-like substance.

The Board rejected Parsons' theory that it was required to apply Sherwin-Williams instead of Triarch, holding that Parsons was required to apply Triarch. The Board found dispositive the terms of Request for Proposal No. FA8903-05-R-8234 ("RFP"), on which the Task Order was based. The RFP "required 'Duroplex – Triarch Industries' and 'Plexture – Triarch Industries' for interior paints." J.A. 132 (quoting RFP § 09911). Parsons does not now challenge the determination that it was required to apply Triarch.

The Board, however, introduced a new theory of liability, finding the government liable for Parsons' costs in applying Sherwin Williams paint due to the Air Force's "indecision on what wall coating it wanted, causing [Parsons] to start applying Sherwin Williams paint in the [Visiting Quarters]." J.A. 132. But because Parsons did not argue this theory before the Board and did not quantify its cost in using Sherwin Williams, the Board denied Parsons recovery. On appeal, Parsons argues that the Board erred in denying Parsons recovery under the Board's theory. We disagree.

A required element of a claim for equitable adjustment is proof of damages. The contractor has the "obligation . . . to provide a basis for making a reasonably correct approximation of the damages" for which the government is liable. *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 969 (Ct. Cl. 1965). It was Parsons' burden to prove its

damages, i.e., the costs incurred in applying Sherwin Williams paint. The Board did not err in concluding that Parsons did not meet its burden.

Parsons contends that the record at the time of the Board decision included sufficient evidence to calculate Parsons' cost in using Sherwin Williams. But Parsons failed to include an alternative argument concerning the Air Force's erroneous direction to apply Sherwin Williams in the Visiting Quarters, and did not identify its costs in doing so. Nothing in *Southwest Electronics & Manufacturing Corporation v. United States*, 655 F.2d 1078 (Ct. Cl. 1981), or any other authority cited by Parsons suggests that the Board was required to scour the tens of thousands of pages of record evidence in this case, without any guidance, to determine the amount of an award.[4]

Parsons also asserts that the Board erred by failing "to seek the parties' input as to whether the record supported recovery under the Board's new theory prior to deciding the issue." Appellant's Br. 34. "The [Administrative Procedure Act] does not require the Board to alert a [claimant] that it may find the asserted theory," or any other theory that the

[4] In *Southwest Electronics*, the Board overturned the contracting officer's award, on the basis that the contractor did not establish the exact amount of its damages. 655 F.2d at 1088. In reinstating the contracting officer's award, our predecessor reasoned that the contractor "[did] supply some evidence of the damages for which [the government] is liable, and the contracting officer's award is a reasonable approximation of the damages which [the contractor] has proven." *Id.* Here, by contrast, there is nothing to indicate that the contracting officer awarded Parsons the cost of using Sherwin Williams, nor did Parsons provide the Board with evidence from which "a reasonable approximation" of that cost could be determined. *See id.*

claimant could have argued, "lacking in evidence before it actually does so in [an opinion]. Nor is a [claimant] entitled to a pre-decision opportunity to disagree with the Board's assessment of its arguments." *Fanduel, Inc. v. Interactive Games LLC*, No. 2019-1393, 2020 WL 4342681 (Fed. Cir. July 29, 2020). While Parsons directed the Board to this evidence on reconsideration, this was simply too late. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (a motion for reconsideration "may not be used to . . . present evidence that could have been raised prior to the entry of judgment").

IV

We next turn to Parsons' contention that the Board erred in denying Parsons recovery for the added cost of using the "Baker design" rather than the "structural-brick" design for the Visiting Quarters.

The Board held that under the contract Parsons was entitled to use a structural-brick design to construct the Visiting Quarters. The Board also found that the government improperly denied Parsons the use of the structural brick design, and instead required Parsons to use what was called the "Baker design." The structural-brick design used a single wall made of closure face brick. The Baker design used two walls: a first wall of concrete masonry units and a second wall of brick veneer. After the award, the government directed Parsons to use the Baker design and to modify the original Baker design to address problems of progressive collapse,[5] a design choice that made construction more expensive.

[5] Progressive collapse is a phenomenon that occurs when certain structural members of a building are damaged and weight is transferred to other members that

Parsons sought an equitable adjustment for the increased design and construction costs of the Baker design over that of the structural-brick design. The Board awarded Parsons a lesser amount for added construction costs: "the additional cost . . . required to make the Baker . . . design resist progressive collapse." J.A. 120–21. The Board awarded Parsons $722,176 in design costs.

The Board erred in not also awarding the full amount of Parsons' additional construction costs for using the Baker design over the structural-brick design. The amount of an award for an equitable adjustment is "the difference between the reasonable cost of performing without the change . . . and the reasonable cost of performing with the change." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1244 (10th Cir. 1999) (quoting *Celesco Indus., Inc.*, ASBCA No. 22251, 79–1 B.C.A. (CCH) ¶ 13,604, at 66,683 (1978)). Here, the "cost of performing without the change" is the cost of construction using structural brick. The "cost of performing with the change" is the actual cost of construction (i.e., the cost of using the modified double-wall design). Parsons was entitled to the difference between these two amounts.

We reverse the Board's denial of recovery to Parsons for its claim to construction costs. On remand, the Board must award Parsons the difference between its cost in constructing the Baker design compared to the cost Parsons would have incurred in constructing the structural brick design.

V

We turn finally to the government's cross-appeal challenging the Board's reasonable-costs analysis.

cannot handle the additional weight. As a result, the building collapses.

The government contends that the Board erroneously shifted the burden as to reasonableness to the government, when the burden should have been on Parsons to prove reasonableness. The government points to Judge Clarke's opinion for the Board, which concluded that Parsons' costs were reasonable in part because the Air Force's did not provide "specific, individualized challenges to each of Parsons' claimed costs." Cross-Appellant's Br. 38. The government contends that this improperly saddled the government with the burden of proof. But Administrative Judge Clarke's analysis on this issue was expressly disclaimed by the other two panel judges in a concurring opinion written by Administrative Judge Shackleford and joined by Administrative Judge Prouty. Thus, Judge Shackleford's opinion, not Judge Clarke's opinion, is the Board's controlling opinion on the reasonable-costs issue.

The government does not contend that Judge Shackleford's opinion commits the same purported burden-shifting error as Judge Clarke's opinion. Instead, the government asserts that Judge Shackleford's opinion is "so devoid of any analysis that it cannot be plausibly reviewed for legal sufficiency on appeal." Cross-Appellant's Br. 44. We disagree. Judge Shackleford clearly stated the governing law and its application to this case. The government has not shown error in the Board's reasonable-costs analysis.

The government's challenge also fails because it has articulated no prejudice resulting from of the Board's purported error. "[T]he party that 'seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943)); *see also SolarWorld Ams., Inc v. United States*, No. 2019-1591, 2020 WL 3443470, at *4–*5 (Fed. Cir. June 24, 2020) (rejecting an appellant's challenge to a purportedly unlawful agency action because the appellant did not establish that the action was prejudicial).

Here, the government has not explained which, if any, of the costs awarded to Parsons would have been affected by the Board's purported error or how they would have been affected. We conclude that the Board's purported errors, if any, were harmless.

We affirm the Board's conclusion that Parsons' costs awarded by the Board were reasonable.

CONCLUSION

We conclude that the Board had CDA jurisdiction over ASBCA No. 58634. We dismiss Parsons' appeal as to its claim for costs associated with its payroll review (ASBCA No. 61784) as untimely. We affirm the Board's decision declining to award Parsons its costs in using Triarch wall coatings. We reverse the Board's decision declining to award Parsons its full costs in constructing the Baker design over the costs of the structural-brick design. We affirm the Board's conclusion that Parsons' claimed costs were reasonable. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED

COSTS

No costs.

United States Court of Appeals for the Federal Circuit

ELECTRIC BOAT CORPORATION,
Appellant

v.

SECRETARY OF THE NAVY,
Appellee

2019-1621

Appeal from the Armed Services Board of Contract Appeals in No. 58672, Administrative Judge David D'Alessandris, Administrative Judge J. Reid Prouty, Administrative Judge Richard Shackleford.

Decided: May 19, 2020

IAN GERSHENGORN, Jenner & Block LLP, Washington, DC, argued for appellant. Also represented by MATTHEW S. HELLMAN, D. JOE SMITH.

WILLIAM JAMES GRIMALDI, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by JOSEPH H. HUNT, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; ALANA M. SITTERLY, RUSSELL SHULTIS, Naval Litigation Office, United States Department of the Navy, Washington, DC.

Before LOURIE, MOORE, and CHEN, *Circuit Judges*.

MOORE, *Circuit Judge*.

Electric Boat Corporation appeals from the Armed Services Board of Contract Appeals' grant of partial summary judgment to the United States Department of the Navy, holding that Electric Boat's Contract Dispute Act (CDA) claim is barred by the statute of limitations. Because the Board correctly held that Electric Boat's claim is barred by the statute of limitations, we affirm.

BACKGROUND

On August 14, 2003, Electric Boat and the Navy entered into a contract (the Contract) for the construction of up to six separate *Virginia*-class nuclear-powered submarines (SSNs), SSN 778 through SSN 783.[1] The Contract established a target price for each submarine, comprising the sum of the target cost and the target profit. *See* J.A. 84 (SSN 783). Electric Boat was entitled to periodic progress payments proportional to Electric Boat's overall construction progress. J.A. 271–79 (Clause H-29). The Navy was required to fully compensate Electric Boat under the Contract until Electric Boat's invoiced costs exceeded

[1] The Contract between Electric Boat and the Navy funded full construction of only the first submarine, SSN 778. Pursuant to Clause H-17 of the Contract, the remaining five submarines were funded on an installment basis and the parties' obligations under the Contract were entirely contingent on the future availability of funds. J.A. 238–39. The Navy modified the Contract in January 2004, transitioning the contract to a multi-year procurement contract for the remaining five submarines. J.A. 396. Clause H-20 of the modified contract maintained the installment funding and contingency provisions of Clause H-17.

construction progress at the target price, less certain adjustments. *Id.*

The Contract incorporates by reference the standard Changes Clause under 48 C.F.R. §§ 52.243-1, -2. J.A. 335, 344. The Changes Clause requires that the Navy's Contracting Officer "make an equitable adjustment in the contract price, the delivery schedule, or both" in the event that the Contracting Officer makes a change to the contract that "causes an increase or decrease in the cost of, or the time required for, performance." 48 C.F.R. § 52.243-1(b). The Contract also includes a "Change-of-Law Clause," which provides for a price adjustment in the event that compliance with a new federal law, or a change to existing federal laws or regulations, directly increases or decreases Electric Boat's costs of performance. J.A. 279–81 (Clause H-30). The Change-of-Law Clause specifies that no cost adjustments shall be made thereunder for the first two years after the effective date of the Contract (i.e., until August 15, 2005). J.A. 280. After two years, adjustments shall only be made if a qualifying change of law increases Electric Boat's costs of performance "in excess of $125,000 per ship." J.A. 281 (Clause H-30(c)).

The Change-of-Law Clause requires that Electric Boat promptly notify the Navy's Contracting Officer of a qualifying enactment or change in federal law. J.A. 281 (Clause H-30(d)). Section (e) of the Change-of-Law Clause further provides that requests for price adjustments thereunder be made in accordance with the procedures set forth in Clause H-9, entitled "Documentations of Requests for Equitable Adjustment." J.A. 281 (Clause H-30(e)). Clause H-9 sets forth uniform procedures for submitting requests for equitable adjustments under all articles of the Contract, including the standard Changes Clause. J.A. 228.

On September 15, 2004, OSHA issued a new federal regulation entitled *Fire Protection in Shipyard Employment* (the OSHA Regulation). *See* 69 Fed. Reg. 55,668

(Sept. 15, 2004) (codified at 29 C.F.R. § 1915.501 *et seq.*). The OSHA Regulation, which became effective on December 14, 2004, required companies to post a fire watch if certain conditions are present during "hot work" in shipyard employment. *See id.*; 29 C.F.R. § 1915.504(b). On February 24, 2005, Electric Boat submitted a Notification of Change to the Navy. J.A. 453–57. The Notification stated that "Electric Boat anticipates that compliance with [the OSHA Regulation] will result in an increase in the cost of performance [under the Contract] in excess of $125,000 per ship." J.A. 453.

On June 27, 2007, Electric Boat submitted a cost proposal to the Navy, seeking price adjustments across all six submarines. J.A. 459–69. In October 2008, the Navy countered, challenging Electric Boat's calculations of certain costs. J.A. 554–57. In April 2009, Electric Boat submitted a revised cost proposal to the Navy. J.A. 559–67. On May 2, 2011, the Contracting Officer of the Navy issued a memorandum decision formally denying Electric Boat "entitlement to an adjustment of the contract price." J.A. 705–10. The memorandum stated that Electric Boat's cost proposals had "inadequate support" and that there were "discrepancies between [Electric Boat's] proposal and the Government's review of various documents related to the OSHA change." J.A. 708. The memorandum further stated that if Electric Boat decided to further pursue an adjustment related to the OSHA Regulation, "it should seek adjustment pursuant to [regulations governing] 'Requests for Equitable Adjustment'" by June 3, 2011. *Id.*

On December 19, 2012, Electric Boat filed a certified claim with the Navy, seeking a price adjustment for increased costs it allegedly incurred in complying with the OSHA Regulation. J.A. 711–12. On February 27, 2013, the government issued a Contracting Officer's Final Decision denying Electric Boat's claim. J.A. 713–30. Electric Boat appealed the Contracting Officer's Final Decision to the Board. The Navy moved for summary judgment that

Electric Boat's claim was barred by the statute of limitations. Electric Boat filed a cross-motion for summary judgment that its claim was timely filed.

On December 10, 2018, the Board granted-in-part the Navy's motion for summary judgment and dismissed Electric Boat's complaint.[2] J.A. 17. The Board determined that Electric Boat knew of its claim no later than February 2005, when Electric Boat submitted its Notification of Change to the Navy. J.A. 10. The Board further held that Electric Boat "suffered some injury not later than August 15, 2005, the date two years after the effective date of the [C]ontract when [the Change-of-Law Clause] would first provide the right to a price adjustment." J.A. 10. Because Electric Boat's Claim was not filed until December 2012, more than six years after the August 2005 accrual date, the Board held that Electric Boat's claim was untimely. J.A. 17. Electric Boat appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10).

DISCUSSION

We review the Board's grant of summary judgment *de novo*. *Gates v. Raytheon Co.*, 584 F.3d 1062, 1067 (Fed. Cir. 2009). Interpretation of a government contract is question of law, which we also review *de novo*. *See Forman v. United States*, 329 F.3d 837, 841 (Fed. Cir. 2003). Though not binding on the Court, we give the Board's legal conclusions careful consideration in view of the Board's considerable experience in construing government contracts. *See Gates*, 584 F.3d at 1067.

[2] The Board denied the Navy's motion for summary judgment as it pertained to Electric Boat's claim for costs incurred by Electric Boat's subcontractor, Huntington Ingalls, Inc. J.A. 17–18. The Navy has not challenged this aspect of the Board's decision on appeal.

I.

A CDA claim "shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). Whether and when a claim has accrued is determined according to the Federal Acquisition Regulation (FAR), the language of the contract, and the facts of the particular case. *Kellogg Brown & Root Servs., Inc. v. Murphy*, 823 F.3d 622, 626 (Fed. Cir. 2016). The FAR defines claim accrual as "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." *See* 48 CFR § 33.201. Although "monetary damages need not have been incurred," "[f]or liability to be fixed, some injury must have occurred." *Id.* We conclude the Board correctly determined that Electric Boat's claim accrued more than six years before Electric Boat submitted its claim and that Electric Boat's claim is therefore barred by the statute of limitations.

The plain language of the Contract compels our conclusion. It provides that:

> (b) If, at any time after the effective date of this contract, a New Federal Law is enacted or a change is made to a Currently Applicable Federal Law or a New Federal Law or regulations thereunder promulgated by Federal authorities, and compliance with such new law or change directly results in an increase or decrease in the Contractor's cost of performance of this contract, the contract price(s) shall be adjusted . . . . No such adjustment shall be made for contract costs incurred or projected to be incurred during the two (2) year period after the effective date of this contract.

J.A. 280 (Clause H-30(b)). Electric Boat's injury under the Contract was the enactment of the OSHA Regulation, the compliance with which Electric Boat contends directly increased its costs of performance by more than $125,000 per

submarine. *See* J.A. 453. Because the OSHA Regulation became effective in December 2004, the Navy's liability for a price adjustment became fixed under the Contract on August 15, 2005, when Clause H-30 first provides a right to a price adjustment. *See* J.A. 280. The Board correctly determined that the Navy's liability was fixed, and therefore Electric Boat's claim accrued, on August 15, 2005, more than six years before Electric Boat filed its claim. *See* 48 C.F.R. § 33.201.

Electric Boat contends that its claim for costs did not accrue until May 2, 2011 when the Navy's Contracting Officer denied its request for a price adjustment. It argues that it was not injured under the Contract until it received notice of the Navy's intent to not adjust the contract price. Citing our decision in *Kellogg Brown*, Electric Boat argues that the Board therefore erroneously determined that the procedures required by the Change-of-Law Clause did not delay accrual of Electric Boat's claims. We do not agree.

Although "the limitations period does not begin to run if a claim cannot be filed because mandatory pre-claim procedures have not been completed," the contract here did not require that Electric Boat undertake any such procedures. *See Kellogg Brown*, 823 F.3d at 628. In *Kellogg Brown*, the Army required that the contractor resolve disputed costs with the subcontractor before filing a claim for reimbursement. *Id.* We held that the contractor's claim therefore did not accrue until the contractor resolved cost disputes with the subcontractor as required by the contract. *Id.* at 628–29. The Contract here, however, expressly states that requests for price adjustments under the Change-of-Law Clause "shall be made in accordance with the procedures of the requirement entitled 'DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT.'" J.A. 281 (Clause H-30(e)). The Contract therefore required that Electric Boat follow the standard equitable adjustment procedures set forth in Clause H-9 of the Contract. *See* J.A. 228, J.A. 334. Although the Change-of-Law Clause

required Electric Boat to "promptly notify" the Navy of a qualifying change in law, Electric Boat was not required to await a unilateral Navy price adjustment prior to filing a claim. *See* J.A. 281. Indeed, Electric Boat's injury under Clause H-30 of the contract was the enactment of the OSHA Regulation, not the Navy's refusal to adjust the price.[3] That the Navy did not formally refuse to adjust the price until May 2, 2011 therefore does not excuse Electric Boat's failure to timely file a claim in compliance with the CDA and the plain language of the Contract. *See* J.A. 228; *see also* J.A. 334 (incorporating by reference the FAR's standard Disputes Clause).

II.

Electric Boat argues two alternative theories of partial timeliness. First, Electric Boat contends that its claim is timely as to five of the six submarines, SSN 779 through SSN 783, because Electric Boat's costs for these submarines did not exceed the target price until after December 19, 2006 (the Critical Date). Because its claims did not exceed the target price, Electric Boat argues that it was being fully compensated and therefore had no claim for equitable adjustment for these submarines until after the Critical Date. Electric Boat's contention is unavailing.

[3] Electric Boat's complaint alleged two counts of relief: one count for an entitlement to a price adjustment and the other count for breach of contract arising from the Navy's May 2, 2011 denial of Electric Boat's request for adjustment. J.A. 75. Electric Boat waived any argument of timeliness under common law breach of contract principles by failing to argue before the Board that its injury arose from the Navy's alleged breach of contract on May 2, 2011. *See* J.A. 14 (identifying Electric Boat's alleged first date of actual injury as December 15, 2006).

Electric Boat was not required to incur actual costs for each submarine before filing a claim for equitable adjustment under the Contract. Instead, when Electric Boat's claim accrued in August 2005, Electric Boat had six years to file a claim for an equitable adjustment to the contractual price terms, including the target cost for each submarine. *See* J.A. 280. That the Navy made progress payments to Electric Boat as required by Clause H-29 of the Contract does not excuse Electric Boat's untimeliness as to any of the six submarines. *See* J.A. 271–79 (Clause H-29). The Navy's payment of scheduled progress payments does not amount to agreement that Electric Boat is entitled to increased actual costs. There was an express provision under the contract for seeking such increased costs—equitable adjustment.

Second, Electric Boat contends that its claims are timely as to the last two submarines, SSN 782 and SSN 783, because the Navy did not authorize funds for Electric Boat to begin construction on the final two ships until December 28, 2006 and January 10, 2008, respectively. Because Clause H-20 of the Contract made Electric Boat's performance contingent upon funding, Electric Boat argues it could not have known the "sum certain" of additional costs that it would incur for these submarines until after the Critical Date. This contention is also unavailing.

Clause H-20 of the Contract merely provides that Electric Boat's expenditure for each fiscal year is contingent on the appropriation of funds. J.A. 245. It establishes that Electric Boat was not authorized to make expenditures or incur obligations in excess of the amounts that the Contracting Officer had specified as available for performance. J.A. 245. Clause H-20 does not, however, make Congressional appropriation a condition precedent for seeking a price adjustment for each submarine. Thus, while Electric Boat was precluded from incurring actual costs in the hull construction of the final two submarines until funding had been approved, it was not precluded from filing a claim for

adjusted target costs for these two submarines under Clause H-30.[4] We therefore reject Electric Boat's second theory of partial timeliness, which runs counter to the plain language of the Contract and would needlessly delay the filing of claims for equitable price adjustments.

CONCLUSION

We have considered Electric Boat's remaining arguments and find them unpersuasive. For the foregoing reasons, we conclude that the Board correctly determined that the statute of limitations barred Electric Boat's claim and therefore affirm the Board's decision.

AFFIRMED

No Costs.

[4] The Board rejected Electric Boat's argument that its claim did not accrue until June 2007, when it allegedly had the information necessary to assert its claim. J.A. 13. The Board determined that the accrual of Electric Boat's claim was not suspended between August 2005 and June 2007, while Electric Boat gathered the information it deemed necessary to calculate its projected costs. J.A. 13. Because Electric Boat does not challenge this determination on appeal, it has waived any argument that its claim did not accrue until it could calculate the "sum certain" of its incurred costs.