Annual Review
Costs, Pricing, and Audits
Supplementary Materials

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Report to Congress on FY 2019 Activities Defense Contract Audit Agency

U.S. Department of Defense

March 31, 2020

DEFENSE CONTRACT AUDIT AGENCY
8725 JOHN J. KINGMAN ROAD, SUITE 2135
FT BELVOIR, VA 22060-6219

May 26, 2020

Congressional Defense Committees:

I am pleased to submit the Defense Contract Audit Agency's Fiscal Year 2019 annual Report to Congress, as required by 10 U.S.C. §2313a. This report highlights DCAA's audit performance, recommendations to improve the audit process, industry outreach activities, and key accomplishments.

As a result of DCAA audits, contract officials saved $3.7 billion in defense spending last year—significant savings that can be reinvested in our warfighters or returned to the Treasury. We examined nearly $365 billion in defense contractor costs, identified over $11.7 billion of audit exceptions across 2,984 audit reports, and supported Contracting Officers with other valuable products and services to help them ensure fair and reasonable contract prices.

In FY 2019, DCAA returned to performing the full range of audits in its portfolio and focused more effort on other audits such as business systems, Truth in Negotiation Act, Cost Accounting Standards, and labor and material reviews. We also successfully met the congressional requirement to complete incurred cost audits within one year of adequate submission as well as contracted with seven independent public accounting (IPA) firms to perform 101 incurred cost audits. Finally, we continued our outreach to our customers at DCMA and service-buying commands to educate them on the full range of audits and advisory services DCAA provides.

Our vision, *Every audit or service we deliver is on time, on point, and highly valued,* is demonstrated by our workforce every day. I am proud of our workforce and our ability to deliver outstanding audit products and services to the Department in FY 2019.

Respectfully,

Anita F. Bales
Director

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1. DEFENSE CONTRACT AUDIT AGENCY MISSION

DCAA provides audit and financial advisory services to DoD and other federal entities responsible for acquisition and contract administration. DCAA audits only contractors; it has no internal audit responsibilities in DoD. DCAA's role in the financial oversight of government contracts is critical to ensure DoD gets the best value for every dollar spent on defense contracting. DCAA operates under the authority, direction, and control of the Under Secretary of Defense (Comptroller)/Chief Financial Officer. Its work benefits our men and women in uniform and the American taxpayer.

The Agency's mission is to conduct contract audits and related financial advisory services. Contract audits are independent, professional reviews of financial representations made by defense contractors, and DCAA helps determine whether contract costs are allowable, allocable, and reasonable. DCAA conducts audits in accordance with Generally Accepted Government Auditing Standards (GAGAS), a set of standards that ensures audit conclusions are unbiased and well supported by evidence. The type and extent of DCAA's audit work varies based on the type of contract awarded, but its audit services are generally limited to acquisitions under Federal Acquisition Regulation Part 15 (Contracting by Negotiation). The extent of auditing performed is based on risk and materiality considerations.

DCAA provides recommendations to government officials on contractor cost assertions regarding specific products and services. DCAA auditors examine contractor accounts, records, and business systems to evaluate whether contractor business practices and procedures are in compliance with the Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), Cost Accounting Standards (CAS), and other applicable government laws and regulations. Its work supports contracting officials as they make procurement decisions. DCAA has no direct role in determining which companies are awarded defense contracts.

Government officials draw on DCAA audit findings throughout the acquisition process. With these recommendations, contracting officers are better able to negotiate prices and settle contracts for major weapons systems, services, and supplies. At the front end, DCAA's findings can directly impact the price that the government pays for contracted work. Even after a contract is underway, DCAA findings may address instances where the government overpaid contractors for work, uncover potential fraud or misuse of funds, and impact future contract prices by addressing inadequacies early on. Before the contracting officer can officially close out a flexibly priced contract, DCAA assesses whether the contractor's claims for final annual incurred costs during contract performance are allowable and reasonable according to applicable acquisition regulations and contract provisions. This final task in the contract audit process ensures that no excess costs were charged to the government.

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2. ORGANIZATIONAL STRUCTURE AND STAFFING

A. Organizational Structure. DCAA's organizational structure consists of four Corporate Audit Directorates organized by major contractors, three geographical regions primarily focused on other large, mid-sized, and small contractors, and a Field Detachment focused on classified work. DCAA has about 300 offices located throughout the United States, Europe, and the Middle East.

Headquarters is located at Fort Belvoir, Virginia. Principal elements are the Director, Deputy Director, General Counsel, Office of Inspector General, and the Assistant Directors for Operations, Policy and Plans, Integrity and Quality Assurance, and Human Capital and Resource Management.

Regional Offices/Field Detachment are located in Smyrna, Georgia; Irving, Texas; La Palma, California; and Reston, Virginia. Each region directs and administers the DCAA audit mission at locations near the contractor base. Each region is staffed with 600 to 800 employees and serves 2000 to 3000 contractors. The Field Detachment has 500 employees to serve 750 contractors.

Corporate Audit Directorates (CAD) are located in Lowell, Massachusetts (Raytheon, General Dynamics, BAE); McLean, Virginia (Northrop Grumman); Chicago, Illinois (Boeing, Honeywell); and Fort Worth, Texas (Lockheed Martin). Each CAD directs and administers the DCAA mission at its major defense contractors.

Branch Offices are strategically situated within the regions and are responsible for the majority of contract audit services within their assigned geographical areas. Branch offices often have smaller suboffices to ensure adequate audit coverage.

Resident offices are established at specific contractor locations of both regions and CADs where the audit workload justifies the assignment of a permanent staff of auditors and support staff. These offices allow auditors to work on location with the largest major industrial manufacturers that the government buys from, such as General Atomics, AECOM, and Pratt & Whitney.

DCAA liaison activities are conducted at DoD acquisition or contract administration offices to directly communicate and coordinate audit processes.

B. Staffing. DCAA has a professional workforce of about 4,500 employees. Roughly 96 percent of these employees have a bachelor's degree, 50 percent have a higher level degree, 22 percent are Certified Public Accountants (CPA), and 34 percent have a professional certification such as a Certified Fraud Examiner (CFE), Certified Information System Auditor (CISA) or Certified Defense Financial Manager (CDFM). About 89 percent of DCAA employees are auditors, and 11 percent are professional support staff in various fields including administrative support, human resources, financial management, information technology, and legal (Table 1).

Table 1 – DCAA Workforce and Education

Auditors	3,994	89%
Professional Support Staff	516	11%
Total Employees	**4,510**	**100%**
Bachelor's Degrees	4,347	96%
Advanced Degrees	2,250	50%
Certified Public Accountants	1,009	22%
Other Professional Certifications	1,524	34%

3. TYPES OF AUDITS

A. Forward Pricing. Forward pricing audits are generally completed before contract award where DCAA evaluates a contractor's estimate of how much it will cost the contractor to provide goods or services to the government. Accurate contract prices are the starting point for fair and reasonable prices throughout the acquisition process, because subsequent costs are often based on the initial estimated contract costs. Forward pricing includes demand work—proposal audits, forward pricing rates, and high-risk estimating system audits.

B. Incurred Cost. Incurred cost audits determine the accuracy of a contractor's annual allowable cost representations. When a contract price is not fixed, DCAA conducts an incurred cost audit after contract award to determine the accuracy of contractor cost representations. DCAA expresses an opinion as to whether such costs are allowable, reasonable, and allocable to the contract, based on government accounting and acquisition provisions. Audits allow the contracting officer to recover the questioned costs before the contract is officially closed out, which prevents excess payments by the government.

C. Special Audits. Special audits are largely conducted after contract award. Most of the reports in this category are issued in response to requests from contracting officers. These audits address circumstances where contracts are adjusted for changes or are partially or fully terminated before completion. These circumstances represent complex and high-risk audits where DCAA must carefully evaluate the cost of original contract work from the changed scope of work. Special audits are primarily claims and terminations.

D. Other Audits. Other audits can be requested by a contracting officer or initiated by DCAA. DCAA typically initiates this type of audit when there is potential for a high risk for misallocation or mischarging of costs. The audit effort in this category focuses on adequacy of the contractor's Cost Accounting Standards (CAS) Disclosure Statement, compliance with cost accounting standards, review of contractor business systems, and contractor compliance with the Truth in Negotiations (TIN) Act.

4. FY 2019 AUDIT PERFORMANCE

A. Overview. DCAA uses a risk-based approach to target its limited resources on the work that provides the most value. Using this approach, DCAA examined $365 billion in contract costs, identified over $11.7 billion in audit exceptions, reported $3.7 billion in net savings, and produced a return on investment of about $5.50 to $1. With the elimination of the incurred cost backlog, DCAA resumed performing its full portfolio of audits.

(1) Net Savings. In FY 2019, DCAA reported net savings of $3.7 billion, marking the ninth consecutive year that the Agency returned over $3 billion in savings to the government (Figure 1). The average net savings of the past five years is $3.4 billion, making FY 2019 an above average year.

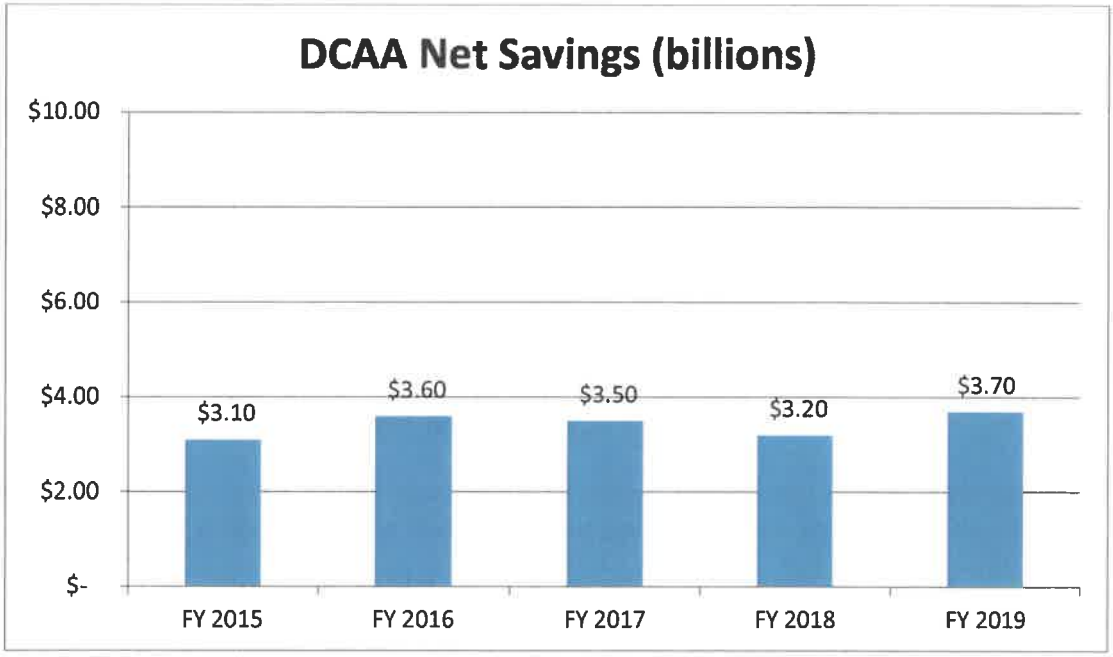

Figure 1 – DCAA Net Savings (in billions)

(2) **Return on Investment.** DCAA is conservative when reporting savings and return on investment (ROI), foregoing projections of potential or future savings and only reporting actual savings based on contract actions taken by government contracting officers. In FY 2019, the return on taxpayers' investment in DCAA was about $5.50 for each dollar invested, savings that DoD can reinvest in the warfighter if funds still available for obligation or return to the Treasury (Figure 2).

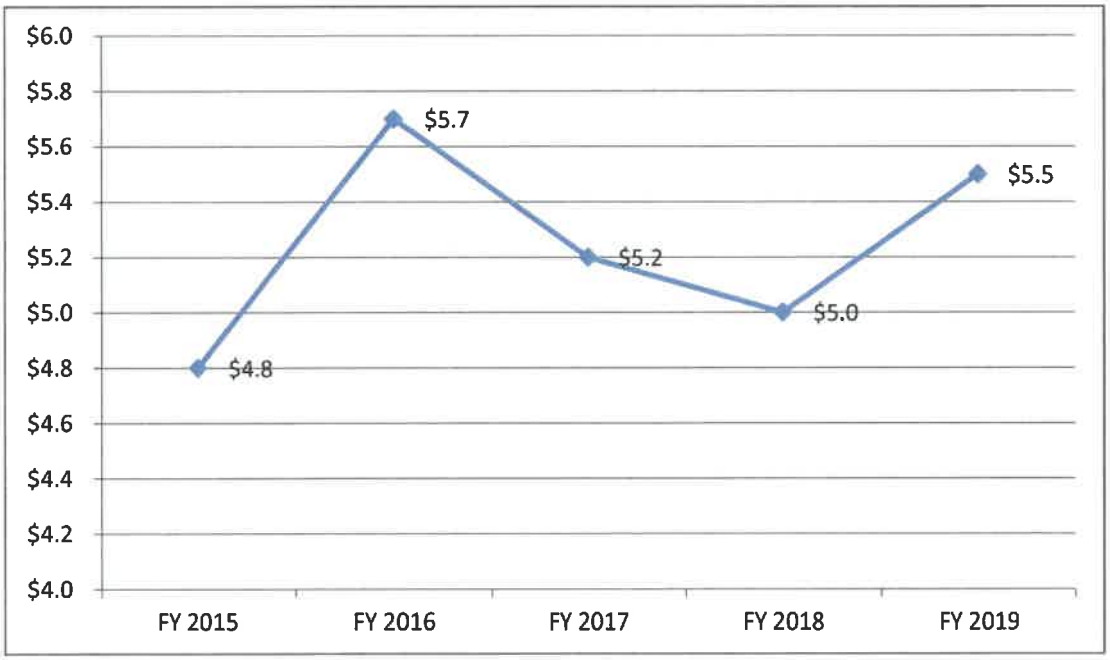

Figure 2 – DCAA Return on Investment

(3) **Aggregate cost of performing audits by audit type.** DCAA's cost of performing audits was calculated using annual funding and direct audit hours by audit type (Table 2).

Table 2 – Aggregate Cost of Performing Audits by Audit Type

Audit Type	Aggregate Annual Cost
Forward pricing	$120,051,000
Incurred Cost	$279,118,000
Special Audits	$45,505,000
Other Audits	$224,130,000
Total	$668,804,000

B. Questioned Cost Sustained. DCAA sustained $4.4 billion of $8.6 billion in questioned costs during FY 2019. Table 3 shows audit exceptions and sustention data. This data is calculated based on contracting officer negotiation decisions, not estimates or savings projections. Table 4 shows the return on investment by audit type based on net savings and cost of performing audits. Return on investment for Other Audits is low, as some audits in this category provide long-term value to the government without providing direct savings. For example, CAS and business systems audits determine contractor compliance with regulation, and audit findings result in contractor actions to bring their systems into compliance, thus assuring accuracy of cost data.

Table 3 – Sustention by Amount and Percentage of Audit Exceptions

Audit Type	Audit Exceptions	Exceptions Sustained	Percent Sustained
Forward Pricing	$5,212,428,000	$3,257,468,000	62.5%
Incurred Cost	$2,782,000,000	$820,984,000	29.5%
Special Audits	$469,086,000	$273,695,000	58.3%
Other Audits	$147,364,000	$42,894,000	29.1%
Total	$8,610,878,000	$4,395,041,000	51.0%

Table 4 – Ratio of Net Savings to the Cost of Audits by Type

	Net Savings	Aggregate Cost of Performing Audits based on Percentage of Direct Audit Hours	Return On Investment (Net Savings /Aggregate Cost)
Forward pricing	$2,664,558,000	$120,051,000	$22.2
Incurred Cost	$736,485,000	$279,118,000	$2.6
Special Audits	$240,535,000	$45,505,000	$5.3
Other Audits	$84,359,000	$224,130,000	$0.40*

* This figure is low as audits in this category provide long term value to the government without providing direct savings, e.g. CAS and business systems.

C. **Audit reports completed in FY 2019.** DCAA conducts thousands of audits each year that provide the basis for recommendations to the acquisition community. Each audit that DCAA completes, whether before or after contract award, supports government officials who negotiate prices and settle contracts for major weapons systems, services, and supplies. When conducting an audit, DCAA evaluates whether contractor business practices and procedures are in accordance with the FAR, DFARS, Cost Accounting Standards, and other applicable federal laws and regulations.

In FY 2019, DCAA issued 2,984 audit reports with over $11.7 billion in audit exceptions from $365 billion total dollars examined. (Table 5). In addition to issuing audit reports, DCAA reviews and closes thousands of assignments with low risk memos, which contain rate information allowing contracting officers to efficiently close contracts by setting rates. DCAA also supports contracting officers with advisory services that do not result in an audit; for example, DCAA provides negotiation support, independent financial opinion on specific elements of a contract, and assessment of compliance with specific acquisition regulations or contract terms.

Table 5 – FY 2019 Audit Reports Completed and Dollars Examined

Audit Type	Reports	Dollars Examined	Audit Exceptions
Forward Pricing	710	$118,928,981,000	$9,344,770,000
Incurred Cost	1,117	$239,707,515,000	$1,945,604,000
Special Audits	822	$6,501,643,000	$285,922,000
Other Audits	299	$35,842,000	$118,673,000
Total	2,948	$365,173,981,000	$11,694,969,000

D. Incurred Cost. A contractor is required to submit a certified report of its incurred costs for each year of contract performance under flexibly-priced contracts. After receiving an annual incurred cost submission, DCAA auditors have 60 days to review it to determine if the submission and supporting data are adequate and in accordance with the FAR. If the submission is not adequate, it is returned to the contractor for correction and resubmission. When a submission is adequate, DCAA has 12 months to complete the audit.

In our risk-based approach, we close incurred cost submissions in several ways. We conduct audits on high-risk submissions and a sample of low-risk submissions. For low-risk submissions not audited, we provide valuable assistance to contracting officers by issuing low-risk memos. Because DCAA has the authority to establish final indirect rates, contracting officers can avoid negotiations and go straight to closing out contracts using the rates established in these memos. In FY 2019, DCAA issued 1,117 reports and 4,930 low-risk memos (Table 6).

Table 6 – Incurred Cost Closed by Method and Dollars Examined

Incurred Cost Years Closed	Number	Dollar Value
Reports	1,117	$239,707,515,000
Memos	4,930	$45,215,443,000
Total	6,047	$284,922,958,000

The 2018 NDAA required DCAA to complete all incurred cost audits received after the NDAA enactment date (December 12, 2017) within 12 months of receipt of a contractor's adequate proposal. In FY 2019, DCAA completed 99% of incurred cost audits within the 12-month requirement (Figure 3).

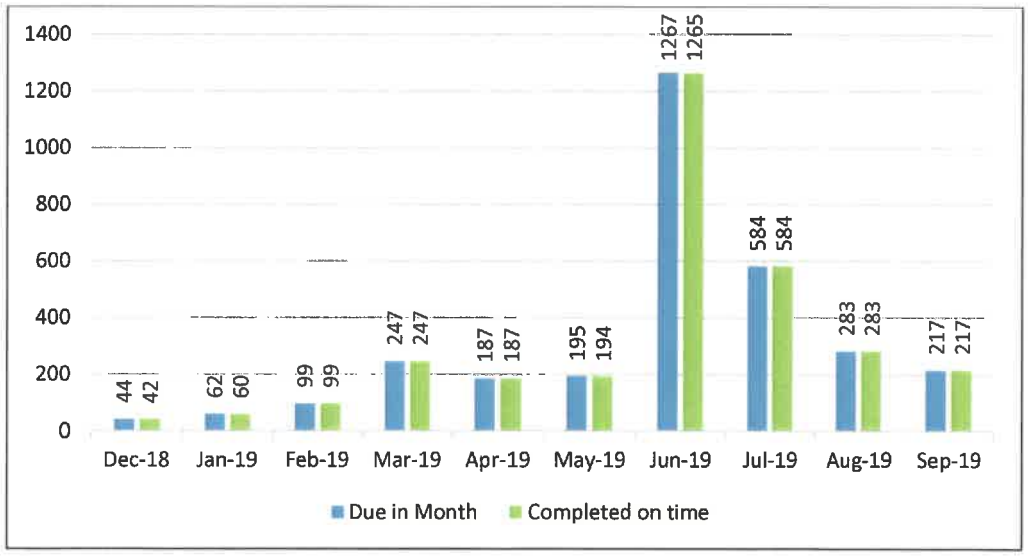

Figure 3 - Incurred Cost Assignments Subject to NDAA Requirements

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Incurred cost audits can be delayed for a variety of reasons. Under the 2018 NDAA guidelines, the DoD Comptroller can grant a waiver to the 12-month requirement. During FY 2019, 11 contractors were approved for waivers to the NDAA one-year requirement for a total of 19 qualified incurred cost submissions. Six of the 11 contractors were granted waivers due to cease and desist orders issued by the Department of Justice or the Defense Criminal Investigative Services agencies. The other five contractors requested and were granted waivers for various reasons, including office relocation, corporate merger, or adoption of new accounting system.

The chart below depicts incurred cost assignments pending longer than one year from the date of adequate submission (Table 7). This year, DCAA successfully completed a majority of pending audits, reducing the number from 1,844 in FY 2018 to 48 at the end of FY 2019. Of those currently pending, half are from reimbursable customers delayed due to customer funding and the rest are primarily on hold due to investigations.

Table 7 – Incurred Cost Pending Longer than One Year from Date of Adequate Submission

Year Submission Received	Number of Assignments	Estimated Dollar Value
2012	1	$ 1,600,000
2013	5	$ 2,847,068
2014	3	$ 85,312
2015	1	$ 125,283
2016	3	$ 334,979
2017	21	$ 1,638,456
2018	14	$3,440,985
Total	48	$10,072,083

Meeting Forward Pricing Agreed-to Dates. DCAA continues to focus on meeting agreed-to dates. At the beginning of FY 2019, we increased our goal from 80 to 85 percent, which we believe is an attainable number. In FY 2019, 84 percent were completed on time and another 7 percent were completed within one week of the requested due date (Figure 4). These positive results correlate with our customer feedback over the past four fiscal years, which indicates high satisfaction in each of our four measured areas (timeliness, accuracy, communication, and satisfaction).

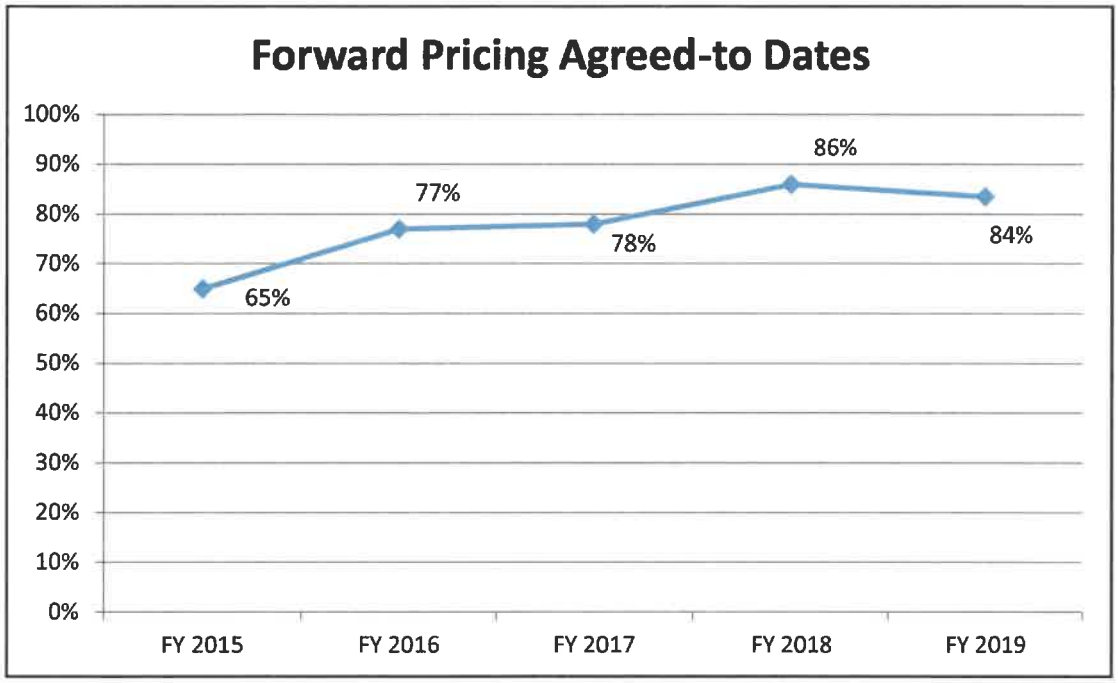

Figure 4 – Forward Pricing Agreed-to Dates Met (percentage)

We know the acquisition community relies on us to meet our agreed-to dates and help them keep the contract award process on track. We meet early with the contracting officer to come to a mutual agreement on a due date for the audit. Once we agree to this date, we do not change it, even when conditions change. If we don't expect to meet the date, we communicate with the command and make sure we provide data throughout the audit to minimize any impact on the acquisition cycle. DCAA's ongoing communication with DCMA, buying commands, and military departments executives has also played a significant role in eliminating duplication of effort, clarifying roles and responsibilities, and establishing realistic timelines. We meet regularly with these acquisition partners to explore root causes of issues and develop system-wide solutions to work effectively as a team.

E. **Prioritization of Audits.** DCAA's risk-based planning process helps ensure that audit resources are focused on the highest-payback areas to DoD, the warfighter, and the taxpayer. DCAA prioritizes the audits that pose greatest risk to the government, assessing the risk for different types of audit, as well as the risk factors within individual audits, regardless of type. Contracts considered "high-risk" typically involve significant costs, significant audit findings in the past, or circumstances that reduce the incentive to control costs, such as those inherent in cost-type contracts.

- Incurred Cost audits continue to be a priority to meet both the adequacy review (60 days) and completion (12 months) timelines. Working these audits closer to the year costs were incurred improves our ability to retrieve relevant records, ease contractor burden, encourage better compliance, and identify issues that may impact future audits. Additionally, timely completion of incurred cost audits facilitates contract closeout.

- Forward pricing audits net the highest rate of return and are time sensitive because to be of value they must be completed before contract negotiations. We have found that proactive and ongoing engagement with contracting officers, particularly before receiving the contractor's proposal, enables us to understand audit requirements early, plan for appropriate staffing, and meet contracting needs in a timely manner. Throughout FY 2019, DCAA continued to build on successful initiatives to engage with contracting officials at all levels, confirm that we are focusing on the highest risk contract actions, and ensure that we are providing the right audit services to meet their needs.

- Special audits represent time-sensitive requests for contract terminations or claims. DCAA prioritizes these audits in coordination with contracting officer needs.

- Other audits are a high priority when DCAA or the contracting officer identifies a high-risk area such as inadequate business systems. DCAA assigns priority to additional audits based on individual contract and audit risks to the government. This category includes post-award audits of compliance with the Truth in Negotiations (TIN) Act and CAS Disclosure statement audits. This also includes high-risk, time-sensitive labor and material reviews; contractor billings; provisional billing rates; pre- and post-payment reviews; and high-risk Accounting Systems, Estimating Systems, and Material Management and Accounting Systems (MMAS) audits.

F. **Length of time to complete audits**. The timeline for an audit is based on audit type, dollars involved, level of risk, and needs of the requester. As a result, DCAA does not have specific or mandatory time requirements for audit completion; instead, we assess what is necessary to conduct an audit that will meet professional audit standards and provide timely, valuable advice to contracting officials. DCAA works closely with contracting officers to set reasonable due dates based on the requirements of the audit and

the needs of the buying commands. Additionally, DCAA and contracting officers work as a team to set priorities, create milestone plans, and decide on agreed-to dates.

Forward Pricing. The time to complete a forward pricing audit is measured from the date DCAA receives the audit request or adequate proposal. The clock stops on the date we issue the audit report (Figure 5).

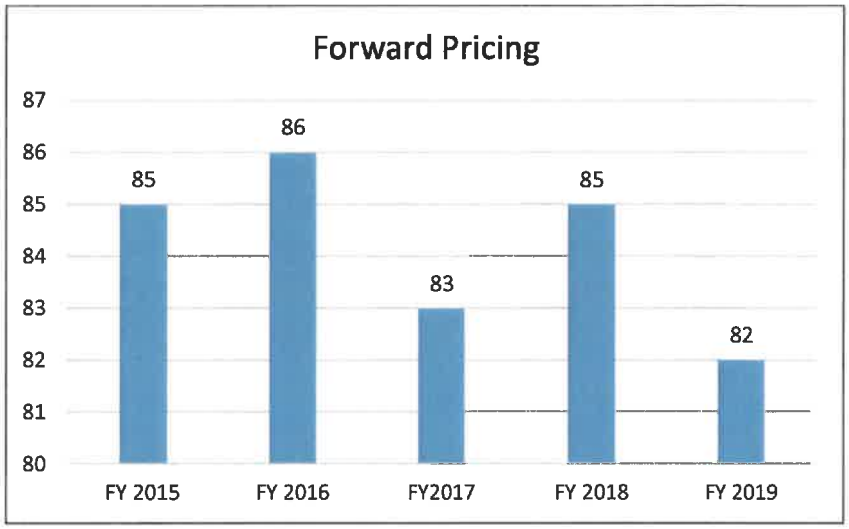

Figure 5 – Forward Pricing average elapsed days

Incurred Cost. The time to complete an incurred cost audit is measured from the date of the entrance conference to report issuance. This year incurred cost audits improved to 88 days (Figure 6).

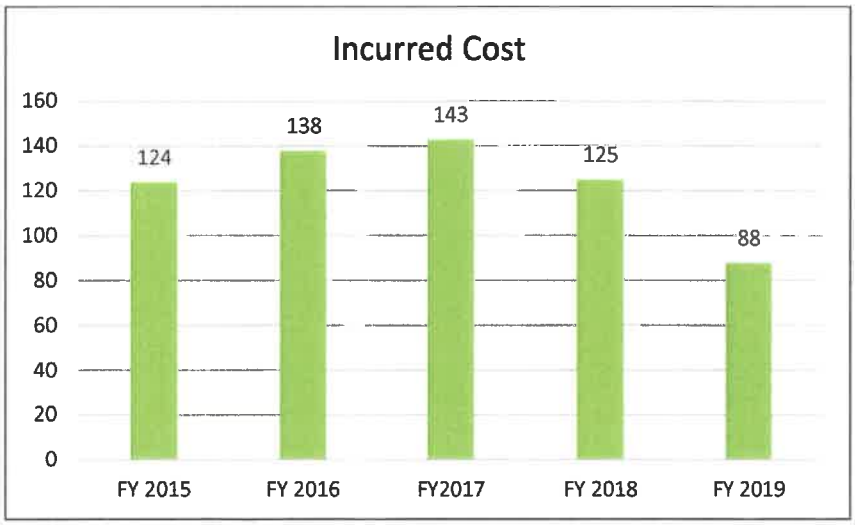

Figure 6 – Incurred Cost average elapsed days

Special Audits. The time to complete a special audit is measured from the date DCAA receives the audit request to the date we issue the audit report (Figure 7).

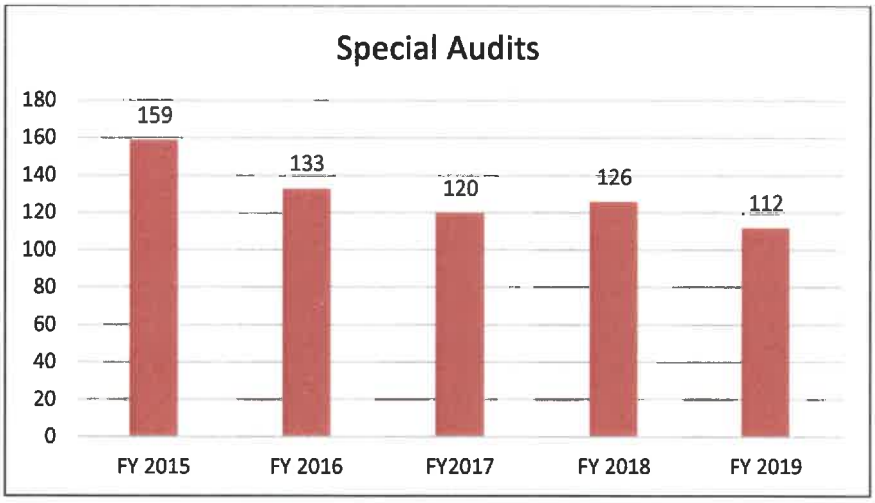

Figure 7 – Special Audits average elapsed days

Other Audits. The time to complete other audits is generally measured from the time audit work began to the date of the audit report issuance (Figure 8). Audits in this category are generally more complex taking more time to complete.

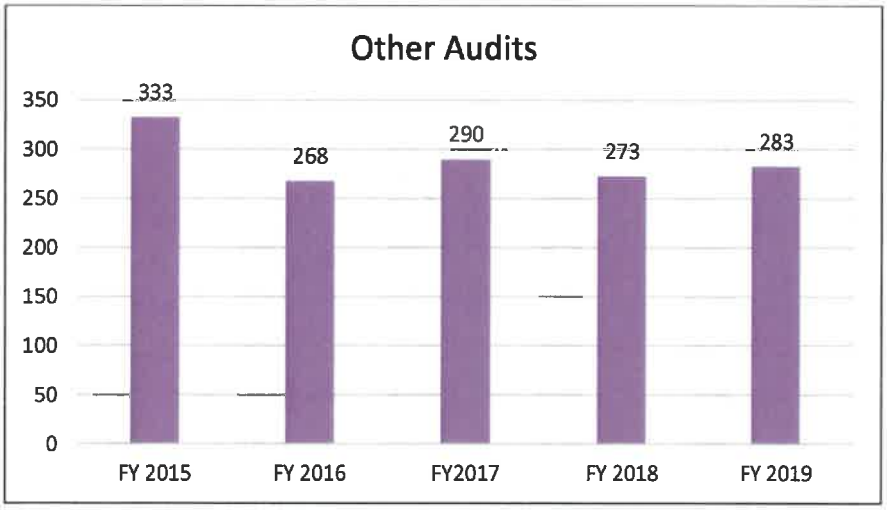

Figure 8 – Other Audits average elapsed days

G. Indirect Costs Incurred for Bid and Proposal and Research and Development. The following table summarizes the amount of incurred contractor Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs computed as a percentage of total contractor indirect costs (Table 8). This data only includes those contractors who detailed their IR&D and B&P costs on their FY 2018 incurred cost submission and does not represent indirect costs for all DoD contractors.

Table 8 – Total Indirect Costs for IR&D and B&P Incurred by Contractors in FY 2018

	Allowable Costs	Allowable Cost as Percentage of Total Indirect Costs
IR&D	$8,826,000,000	6.2%
B&P	$4,132,000,000	2.9%
Total IR&D and B&P	$12,958,000,000	9.1%

5. SUMMARY OF RECOMMENDED ACTIONS OR RESOURCES TO IMPROVE THE AUDIT PROCESS

Contract auditing is a critical part of the acquisition process, and DCAA's independent and objective audit and financial advisory services directly impact the value the government, taxpayer, and warfighter receive for contracted work. To ensure DCAA is providing the highest value to its acquisition stakeholders, we have identified opportunities and implemented improvements in our processes to enhance the value we bring to Defense acquisition.

DCAA has a solid relationship with Congress and looks forward to continuing this relationship. We have found that early engagement provides us the opportunity to assist Congress in its efforts to reform the acquisition process. In support of acquisition reform, this year DCAA continued to implement suggested recommendations of the Section 809 panel by addressing materiality thresholds for incurred cost audits and adjusting the parameters for risk-based sampling for incurred cost audits. The revisions to the materiality thresholds were included in guidance issued during FY 2019 and are applicable to audits started after October 1, 2019. DCAA finalized the revised sampling parameters in 2019 and began implementation on January 1, 2020. In 2019, DCAA addressed two important requirements from the FY 2018 NDAA: contracting with Independent Public Accounting (IPA) firms to conduct select incurred cost audits and completing DCAA incurred cost audits within one year of the receipt of the contractor's submission. DCAA contracted out 101 audits to IPA firms in FY 2019 and plans to do the same in FY 2020. In FY 2019, DCAA also renewed its focus on addressing Truth in Negotiations Act audits in response to renewed emphasis from Congress, and we enhanced our use of data analytics to increase both effectiveness and efficiency in the execution of audits. As further suggestions from the 809 panel and additional acquisition reforms are discussed, we appreciate the opportunity to continue our strong relationship with Congress by contributing our perspective on new initiatives.

In addition to initiatives focused on the effective and efficient execution of our audit mission, DCAA has used a variety of special hiring authorities and funding sources available to us to recruit, develop, and retain a high-performing workforce. We appreciate congressional support in these areas. DCAA relies on its staff to effectively perform its auditing mission. Sufficient staffing levels, along with proper training, are key to effectively and efficiently accomplishing that mission. DCAA has enhanced its recruiting efforts and relies heavily on a variety of special hiring authorities to recruit and bring new auditors on board. We participate in college-sponsored hiring events and collect resumes and transcripts for subsequent job offers using authorities for Direct Hire for Post-Secondary Students and Recent Graduates. At our hiring events, we use direct hire authorities to give qualified candidates on-the-spot job offers, and last year we hired 135 new employees with these authorities. We also take full advantage of the Pathways Internship Program to bring college students into DCAA offices. This internship program allows students who are prospective employees to directly experience the DCAA work environment and determine whether DCAA is a good career fit for them. The program also spreads awareness and knowledge of DCAA as an employer throughout colleges and universities via interns who are in school when they're not participating in their internship. In 2019, seven of our interns transitioned to full-time employees and we currently have 29 active interns in the Agency.

Also, as a service organization, training and development are essential to our workforce. As the largest federal audit organization, we conduct much of our training at our own Defense Contract Audit Institute in Atlanta, Georgia. Last year, we conducted approximately 500 classes in our audit and leadership academies while also graduating the first, and beginning the second, cohort of the Director's Development Program in Leadership. DCAA also uses DOD leadership development programs and OPM's Federal Executive Institute (FEI), as well as other competitive acquisition workforce development opportunities offered through the 4th Estate and Defense Acquisition University, where our auditors build their skills and interact with peers outside the Agency. This training and development is funded through our normal operating funds and Defense Acquisition Workforce Development Funds (DAWDF). Future funds will be critical to ensuring new hires and current employees receive the audit and leadership training to achieve mandated GAGAS, DoD Financial Management, and Defense Acquisition Workforce Improvement Act (DAWIA) certification requirements. DCAA truly values the additional resources available through the DAWDF.

6. OUTREACH ACTIONS TOWARD INDUSTRY

DCAA proactively engages with industry to clarify audit requirements, understand and address contractor concerns, and improve acquisition and audit processes. Following is a summary of those outreach actions.

A. **Adoption of Materiality Guidelines.** In July 2019, DCAA formally adopted the materiality guidelines set forth in DoD's Professional Practice Guide (PPG), which was jointly developed by DCAA, DCMA, and industry representatives. These guidelines help oversight professionals plan their work and provide the information contracting officers need to make reasonable business decisions. While the materiality standards are based on dollar values, what may be material to a particular business decision will be influenced by a variety of qualitative and quantitative considerations, recognizing that the contracting officer's role is to manage DoD's risk, rather than avoid it. The cost of DoD's oversight, including adverse effects on the timeliness of decision making, must be balanced with expected benefits of that oversight.

   DCAA's adoption of a quantified materiality threshold is intended to facilitate a consistent approach that helps an auditor determine the nature, timing, and extent of audit procedures on those cost elements and accounts that are significant, or material, to the audit opinion. To educate the workforce on how to apply the new materiality guidelines, DCAA developed a course for auditors to take prior to beginning an incurred cost audit. These materiality guidelines apply to all incurred cost audits started after July of 2019.

B. **Engagement with Industry Organizations.** DCAA engages regularly with industry groups to gain a better understanding of their issues and to improve the Agency's ability to address industry concerns. In FY 2018, DCAA established a recurring dialog with the Aerospace Industry Association (AIA). Meeting regularly with this group during FY 2019 has resulted in two tangible results – a joint draft of a FAR change proposal related to incurred cost submissions and a reprioritization of updates to DCAA's Selected Area of Cost Guidebook.

   The FAR change proposal addresses industry's concerns regarding documentation and schedules required for incurred cost submissions. Industry's viewpoint was that burdensome requirements were not always necessary for the audit. After gaining an understanding of the specific industry concerns, DCAA conferred with DCMA for additional input. After a series of collaborative meetings, DCAA, in coordination with industry and DCMA representatives, is preparing a FAR change proposal to address industry's concerns. Additionally, DCAA will make improvements to the incurred cost electronic (ICE) model to address those concerns within DCAA's purview.

   During these engagements, industry representatives also expressed their views about the DCAA's Selected Area of Cost Guidebook and the need to update specific chapters to increase clarity. DCAA listened to this concern and has reprioritized the order in which the guidebook chapters will be updated.

C. **Assisting with Other Transaction Agreements.** DCAA is working with the acquisition community to mitigate the risks inherent in the use of Other Transaction Agreements (OTA). As DOD continues efforts to streamline the acquisition process, the use of OTAs instead of traditional contracting vehicles has increased. OTAs allow DOD to access cutting edge commercial technology, leverage the private sector's investment in research and development, and promote the engagement of non-traditional and small business contractors. However, OTAs do carry certain inherent risks because they are exempt from numerous acquisition regulations. DCAA's risk mitigation efforts with the acquisition community are focused on ensuring cost reasonableness without hindering the speed that makes OTAs so valuable. While these efforts are still in their infancy, progress is being made.

For expenditure-based OTAs—those agreements where payments are based on amounts from the awardees' financial or cost records—DCAA worked with DMCA to develop a process to review and approve vouchers. DCAA modified the existing public voucher assessment tool with language applicable for OTA vouchers. This voucher review process has been shared across DCAA and DCMA to standardize the process and accelerate payments to contractors.

DCAA is also collaborating with the acquisition community to develop suggested wording for inclusion in OTAs that introduces important risk reducing concepts without hindering the flexibility and speed of OTAs. Finally, DCAA is continuing its efforts to collaborate with Service Buying Commands on ways DCAA can assist in other aspects of OTAs to reduce risk to the government.

7. SIGNIFICANT FY 2019 ACTIVITIES AND THEIR IMPACT

DCAA had many organizational accomplishments in FY 2019. Some of these are summarized below.

A. **Independent Public Accountants Contracted for Incurred Cost Audits.** The 2018 National Defense Authorization Act set forth the requirement to "acquire and maintain private sector capacity to meet current and future needs for the performance of incurred cost audits." To meet this requirement, DCAA contracted with seven different IPAs - small, medium, and large firms located nationwide - who completed 101 incurred cost audits.

   In determining which incurred cost submissions were suitable for audit by an IPA, DCAA applied several factors to its pool of submissions. DCAA determined those involving classified information were unsuitable, as were submissions from contractors where DCAA has an on-site presence, typically those from the largest defense contractors. DCAA's extensive experience with these contractors creates efficiencies based on the variety of ongoing audits. After applying these criteria, DCAA randomly selected 100 of the remaining submissions for audit by IPAs.

   During the conduct of the audits, DCAA contracting officer representatives coordinated between the IPAs, contractors, and DCAA's Field Audit Offices to facilitate communication, monitor status of ongoing audits, and resolve issues. All of the IPAs who performed these audits had some prior experience with incurred cost audits, which helped contractors and contracting officers adjust to working with these companies.

   Moving forward, IPAs will perform about the same number of audits in FY 2020 with planned increases for future years. DCAA is also conducting a survey of all parties involved in this initial round of audits to capture feedback to refine the process.

B. **Truth in Negotiation Act Audits.** DCAA has slowly increased its focus on Truth in Negotiation (TIN) Act audits since 2015 and, in FY 2019, completed 13 audits on $18 billion examined and found $88 million in potential defective pricing. TIN audits ensure cost and pricing data submitted by contractors is current, accurate, and complete. The TIN statute provides the government with a price reduction remedy if a contractor fails to comply and includes provisions for interest and penalties.

   TIN audits find cases where the contractor did not fully disclose information that impacted contract costs. This information may also impact other contracts with the same contractor and for that reason, DCAA auditors routinely share their findings. This knowledge helps contracting officers ask better questions, receive the best information in their negotiation, and helps other DCAA auditors conduct their audits more effectively and efficiently.

   In FY 2019, DCAA and Defense Pricing and Contracting (DPC) began working collaboratively to increase the knowledge of TIN audits across the acquisition team. DPC's focus is increasing the TIN knowledge of contracting officers as well as

encouraging and supporting them as they negotiate TIN findings, which is essential to returning money to the warfighter and taxpayer. DCAA's focus is on expanding the knowledge on TIN audits in our Field Audit Offices. To do this, DCAA developed a TIN course at our Audit Academy and, starting in FY 2020, our Field Audit Offices will conduct TIN audits along with our headquarters TIN team. These collaborative, proactive efforts are vital as DCAA will double the number of hours dedicated to these audits in FY 2020.

C. **Leveraging Technology to Improve the Audit Process.** As contractors have more electronic data and increasingly complex accounting systems, auditing continues to evolve. This constant evolution drives DCAA to upgrade its information technology systems and to leverage advances in technology during performance of audits.

In late 2018, DCAA moved from an in-house developed audit software package to a commercial off-the-shelf product. After approximately one year of use, this new software has increased efficiency throughout the audit process. The software operates seamlessly across team members allowing real time collaboration and eliminating previous manual processes required to share the work among the team. DCAA is fielding this software incrementally and is now in the second of four phases. Phase three will introduce one audit type as an "intelligent document" that will roll numbers forward within the working papers to the audit report. Additionally, these "intelligent documents" allow tagging of selected data fields that feed into our audit management system, which improves the accuracy of data used for decision making. Phase four, estimated to begin at the end of 2020, will see "intelligent documents" in all our audits.

DCAA is also capitalizing on advances in technology in performing audit procedures. One example is our expanded use of data analytics as a method of gathering audit evidence. Data analytics allows for the rapid testing of very large sets of data against specific audit criteria. For example, one FAO combined several excel files to create a file of 3.2 million rows representing $410 million in costs, which enabled analysis of 100 percent of the transactions against specific criteria. The ability to analyze 100 percent of the data provides better audit coverage and detailed transaction-level data when issues are identified. Advances in software technology also allowed DCAA to decommission 100 discrete, in-house-developed Excel and Word power tools. This was possible because Microsoft Excel and Word now include many of these functions right out of the box. Eliminating these 100 tools frees up IT personnel to work on other priority projects.

Our future initiatives include examining our other systems and, contingent on funding, we plan to replace our management software that integrates the data from our audit software packages. We also will continue to expand our use of data analytics as a normal part of the audit process.

8. OUTLOOK

DCAA is an integral member of the acquisition team and continues to deliver high quality audits and services that assist contracting officials negotiate fair and reasonable prices for goods and services.

In FY 2019 we expanded efforts to resume performing our entire audit portfolio and will continue to do so in FY 2020. As we continue this expansion, we will move away from complex, specialized audits performed by dedicated teams, like TIN and business systems, to performing these audits with our FAO staff. To do this, we will prioritize education of the workforce and sharing of lessons learned from the current teams.

It has been almost three years since our corporate realignment and much has changed in the contractor base. Some of the larger defense contractors have acquired or merged with others, which has impacted our workload distribution. This year, we will closely examine our workload, staffing, and office locations to determine if changes are necessary for efficiency and effectiveness.

Finally, we began updating our Agency's Strategic Plan and will finalize it in FY 2020. Agency leaders have worked diligently to assess the Agency and the current environment and I am confident our new goals and objectives will successfully guide us in the future.

I am proud of the DCAA workforce and their demonstrated professionalism. The outlook for the Agency is strong, and I look forward to a very productive FY 2020.

ACRONYMS

CAM	Contract Audit Manual
CAS	Cost Accounting Standards
DCAA	Defense Contract Audit Agency
DCAI	Defense Contract Audit Institute
DCMA	Defense Contract Management Agency
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
DoDIG	Department of Defense Inspector General
FAR	Federal Acquisition Regulation
GAO	Government Accountability Office
GAGAS	Generally Accepted Government Auditing Standards
NDAA	National Defense Authorization Act
NDIA	National Defense Industrial Association
OSBP	Office of Small Business Programs
OSD	Office of Secretary of Defense
PTAC	Procurement Technical Assistance Centers
SBA	Small Business Association

Defense Contract Audit Agency
8725 John J. Kingman Road
Fort Belvoir, VA 22060
(703) 767-3200
www.dcaa.mil

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION TO DISMISS DENIED: March 10, 2020

CBCA 6563, 6564

SRA INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

D. Joe Smith, Umer M. Chaudhry, and Eric K. Herendeen of Jenner & Block LLP, Washington, DC, counsel for Appellant.

Dennis J. Gallagher, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

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

LESTER, Board Judge.

In response to the complaints that respondent, the Department of State (DOS), filed in these now-consolidated appeals, appellant, SRA International, Inc. (SRA), filed a motion to dismiss the appeals with prejudice for lack of jurisdiction or, in the alternative, for failure to state a claim. Previously, the Board had directed DOS to file the initial complaints in these appeals, which involve two separate DOS contracting officer decisions asserting government claims, for efficiency purposes. In response to DOS's designation of the contracting officers' decisions as its complaints, SRA contends that the complaints are deficient and that these

appeals should be dismissed with prejudice. For the reasons set forth below, we deny SRA's motion.

Background

I. DOS's Factual Allegations

The following facts are taken from the allegations in the contracting officers' final decisions at issue in these appeals, which DOS has designated as its complaints, and documents referenced and/or incorporated into the decisions:

A. The Contracts At Issue

On December 13, 2011, DOS awarded SRA task order no. SAQMMA12F0156 (task order 0156), through which SRA was to provide services related to the enhancement and maintenance of the Worldwide Refugee Admissions Processing System (WRAPS). Subsequently, on August 17, 2012, DOS awarded contract no. SAQMMA12C0204 (contract 0204) to SRA for cyber security operations support services that SRA was to perform for the Bureau of Diplomatic Services. Both the task order and the contract are subject to incurred cost audits under the clause at Federal Acquisition Regulation (FAR) 52.215-2 (48 CFR 62.215-2 (2012)), titled "Audits and Records–Negotiation."

B. The Audit

On April 6, 2018, following a November 7, 2017, audit entrance conference, SRA received a formal notice from the Defense Contract Audit Agency (DCAA) about DCAA's plan to examine SRA's incurred cost proposals under both task order 0156 and contract 0204 for fiscal years 2012, 2013, 2014, and 2015. The formal notice indicated that DCAA expected to start its audit on April 20, 2018, and to issue a report on "approximately August 18, 2018."

DCAA issued its audit report on August 29, 2018. In that report, DCAA represented that "SRA was unable to provide sufficient appropriate evidence to support the claimed costs with regards to time and material (T&M) labor, direct material, subcontracts, other direct costs (ODCs) and indirect costs in accordance with FAR 31.201-2(d), "Determining Allowability." DCAA indicated that SRA, though having been given adequate time, "did not provide the requested documentation to support the audit procedures." DCAA also reported that it was "unable to complete the procedures for testing [SRA's] compliance with FAR 52.216-7(b)(1), Allowable Cost and Payment," because SRA was able to provide payment support only for ODCs and direct material transactions for FY 2014 and 2015. DCAA,

"[b]ased on the limited procedures performed," then "identified . . . noncompliances" for FY 2012, 2013, 2014, and 2015 "which warrant the attention of those charged with governance," including unsupported and/or FAR-noncompliant charges for T&M labor, direct materials, subcontracts, and ODCs, as well as an inability to reconcile particular costs claimed and billed in the fiscal years in question with amounts identified in project status reports for those years. DCAA calculated and identified the amount of questioned charges in each category for each of the fiscal years at issue, ultimately questioning a total of $29,184,741.62 in costs under task order 0156 and contract 0204.

C. The Contracting Officers' Final Decisions

On June 28, 2019, DOS, through two different contracting officers, issued final decisions asserting government claims against SRA seeking repayment of a total of $29,184,741.62 in disallowed costs, one decision under task order 0156 for $6,209,475.97 and one decision under contract 0204 for $22,975.267.66. In the decision relating to contract 0204, which essentially mirrors the decision relating to task order 0156 except for the dollar amounts being sought, the contracting officer identified the following facts:

> The [DCAA] completed a multi-year incurred cost audit of [SRA's] 2012-15 fiscal years on August 29, 2018 and issued Audit Report Numbers 09811-2012G10100001, 09811-2013G10100001, 09811-2014G10100001, and 0981-2015G10100001 in which DCAA identified $29,184,741.62 of [DOS] direct cost to be noncompliant with Federal Acquisition Regulation (FAR) 31.201-2(d) (See attached Audit Report). Of that total amount, $22,975,265.66 specifically pertains to [DOS] contract SAQMMA12C0204.
>
> The noncompliant cost[s] are the result of SRA failing to provide DCAA supporting documentation required to substantiate that claimed cost for subcontracts and other direct cost (ODCs) in SRA's incurred cost proposal were reasonable, allocable, and allowable. The lack of supporting documentation was so egregious that DCAA, after numerous requests for information (timeline detailed below), were forced to disclaim an audit opinion. Note, of the total $29,184,741.62 noncompliant cost detailed in DCAA's report, over 99.5% pertain to subcontractor cost with less than $140,000 pertaining to ODCs. Therefore, the following timeline and record retention guidelines pertain specifically to subcontractor cost. Similar retention guidelines and timeline apply to the ODCs but, for the sake of brevity, only the subcontract details are espoused upon further review.

Timeline of Information Requests by DCAA for Subcontract Support:

- October 17, 2017 – DCAA provides audit notification to SRA.
- November 7, 2017 – DCAA and SRA hold audit entrance conference.
- April 2, 2018 – Initial document request sent with a due date of April 23, 2018. No support provided.
- April 24, 2018 – DCAA follows up and SRA states they need more time to locate files and will try to provide by May 8, 2018. DCAA provides extension to May 8, 2018.
- May 8, 2018 – No support provided. DCAA agrees to one last extension until May 21, 2018.
- May 21, 2018 – No support provided. DCAA supervisor provides additional final extension until July 20, 2018.
- July 20, 2018 – No support was provided.
- August 29, 2018 – DCAA issues audit report with disclaimed opinion.

Appeal File Exhibit 9 at 1-2.

In the decision, the contracting officer discussed an in-person negotiation that DOS had conducted with representatives of SRA on June 28, 2019, after DCAA had provided DOS with the audit report, and acknowledged that, "[d]uring the negotiation meeting, SRA attempted to provide what it claimed to be the required supporting documentation it otherwise never submitted to DCAA." Exhibit 9 at 3. Nevertheless, the contracting officer opined that SRA's "action and the response copied above fail to comply with the [FAR]," going so far as to identify and highlight various sections of the FAR dealing with record retention that the contracting officer believed SRA had failed to satisfy. *Id.* at 3-4.

In addition, as indicated above, a copy of DCAA's August 29, 2018, audit report was referenced in and attached to each of the two contracting officers' final decisions.

II. Activity Before the Board

On July 18, 2019, SRA filed notices of appeal from the two contracting officers' decisions, which the Board docketed as CBCA 6563 and 6564.

In orders issued on July 29, 2019, the Board directed DOS to file the initial complaint on the government claims and, in each complaint, to "identify[] the bases for its repayment demand." Consistent with the Board's rules, though, the Board also indicated that DOS could designate the contracting officers' decisions or other documents as the complaint. On

August 23, 2019, DOS designated the June 28, 2019, contracting officers' decisions as its complaints, and the Board subsequently consolidated CBCA 6563 and 6564.

On September 20, 2019, SRA, in lieu of filing an answer, filed a motion seeking "to dismiss the Government's claims with prejudice for lack of jurisdiction and failure to state a claim upon which relief can be granted." Motion at 1. In its motion, to which SRA attached numerous emails as evidentiary exhibits, SRA asserted that, contrary to the representations in the contracting officers' decisions, SRA actually responded to DCAA's document requests between April and July 2018 and "communicated with DCAA regarding SRA's inability to provide certain requested documents, specifically because these documents were stored at an off site location," such that "SRA did not have immediate access to them." Motion at 3. SRA also alleged that, in August 2018, a DCAA supervisory auditor told SRA that DCAA was no longer accepting supporting documentation from SRA, but that, if SRA held its documentation, DCAA would accept it when SRA met with the DOS contracting officers for negotiation purposes. SRA alleges that it then attempted to provide supporting documentation to DOS at a June 25, 2019, negotiation, but that DOS refused to take it.

The parties have fully briefed SRA's motion.

Discussion

SRA's Jurisdictional Motion

SRA argues that the Board lacks subject matter jurisdiction to entertain the two government claims at issue in these appeals because the contracting officers' decisions fail to provide adequate notice as to the basis and amounts of DOS's claims.[1]

The Board derives its jurisdiction to consider contract disputes from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Pursuant to the CDA, we possess jurisdiction to consider a dispute over a government claim only if a contracting officer issues a final decision asserting the government claim and the contractor timely appeals it. *National*

[1] SRA asserts that, if we dismiss these appeals for lack of jurisdiction, we should dismiss them with prejudice. This we could not do. "A dismissal with prejudice effectively renders an adjudication on the merits." *Scott Aviation v. United States*, 953 F.2d 1377, 1378 (Fed. Cir. 1992). Without jurisdiction, we lack the ability to render a merits determination and therefore "cannot presume to dismiss the complaint," or the appeal, "with prejudice." *Id.* Any dismissal for lack of jurisdiction is, by necessity, without prejudice.

Fruit Product Co. v. Department of Agriculture, CBCA 2445, 12-1 BCA ¶ 34,979, at 171,932; *see* 41 U.S.C. § 7103(a)(3)-(4) (under the CDA, "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer" and "submitted within 6 years after the accrual of the claim"). Although the CDA does not define the term "claim," we look for guidance to the CDA's implementing regulation, the FAR, *see Magwood Services, Inc.*, CBCA 4975, 16-1 BCA ¶ 36,520, at 177,908 (2015), which defines a monetary "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain." FAR 2.101 (48 CFR 2.101 (2019)). On its face, each of the two contracting officers' decisions at issue here satisfies the FAR's definition of a "claim: each is in writing, identifies a specific amount of money that the contracting officer asserts SRA owes DOS, and demands that SRA pay DOS that amount.

SRA argues that more is required and that, to be valid, the decision asserting the government claim must also contain a "clear and unequivocal statement that gives . . . adequate notice of the basis and amount of the claim." Motion at 8 (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). Although most decisions discussing this "adequate notice" requirement address contractor claims submitted to the contracting officer, several tribunals have applied the same "adequate notice" requirement to government claims set forth in contracting officers' final decisions. *See, e.g.*, *Raytheon Co. v. United States*, 105 Fed. Cl. 236, 298 (2012) (applying "adequate notice" requirement to a government claim); *Johnson Controls World Services, Inc. v. United States*, 43 Fed. Cl. 589, 592 (1999) (same); *Volmar Construction, Inc. v. United States*, 32 Fed. Cl. 746, 752 (1995) (same); *L-3 Communications Integrated Systems, L.P.*, ASBCA 60713, et al., 17-1 BCA ¶ 36,865, at 179,625 (same); *Keany Square Associates Limited Partnership*, VABCA 3228, 91-1 BCA ¶ 23,371, at 117,252 (1990) (same). We agree that the "adequate notice" requirement applies equally to both contractor and government claims.

Nevertheless, SRA is seeking to impose an "adequate notice" standard upon government claims that is significantly higher and more burdensome than that typically applied to contractor claims. Here, SRA complains that each of the two contracting officers' decisions "essentially has one generic reference to the amount demanded, with no additional information regarding the Government's basis for the demand or a breakdown of the disallowed costs," which SRA views as insufficient to support a claim. Motion at 9. Contrary to SRA's description, though, both of the final decisions clearly indicate that DCAA conducted an incurred cost audit covering specific fiscal years, that SRA did not provide supporting documentation to justify its costs during the audit, and that the Government finds the amount of the unsupported and/or FAR-noncompliant costs that SRA must reimburse DOS to be $6,209,475.97 under task order 0156 and $22,975.267.66 under contract 0204.

For a *contractor* claim, "[t]he minimal amount of information sufficient to provide adequate notice is quite low." *L-3 Communications*, 17-1 BCA at 179,626. A valid contractor claim "need not include a detailed breakdown of costs" or "account[] for each cost component." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1565 (Fed. Cir. 1995). SRA has identified no reason for imposing a more demanding notice standard upon government claims than upon contractor claims or to demand cost breakdowns only in government claims. SRA's mere "desire for more information" is insufficient to strip the contracting officers' decisions of their jurisdictional effectiveness. *Id.*

Further, even if the language contained in the final decisions, in and of itself, was less than clear about the basis of DOS's claims, that would not defeat the claims' effectiveness for jurisdictional purposes. In such circumstances, we would look to correspondence surrounding and leading up to SRA's receipt of the Government's claims, coupled with the actual language in the contracting officers' decisions, to determine whether, in fact, SRA understood or should have understood the basis of those claims. *See, e.g.*, *K-Con Building Systems, Inc. v. United States*, 107 Fed. Cl. 571, 588-89 (2012); *Valco Construction Co.*, ASBCA 47909, et al., 96-2 BCA ¶ 28,344, at 141,552; *C.F. Electronics, Inc.*, ASBCA 44282, 93-3 BCA ¶ 25,971, at 129,153-54; *General Construction Co.*, ASBCA 39983, 91-1 BCA ¶ 23,314, at 116,917 (1990); *Marshall Construction, Ltd.*, ASBCA 37014, et al., 90-1 BCA ¶ 22,597, at 113,390. That type of determination is made on a case-by-case basis, depending on the specific situation at hand. *B.L.I. Construction Co.*, ASBCA 40857, et al., 92-2 BCA ¶ 24,963, at 124,394. Here, attached to, if not incorporated into, the two contracting officers' decisions was the DCAA audit report that formed the basis of the Government's claims. That audit report breaks down the total amount of questioned costs into categories and subcategories for each of the four fiscal years at issue. Certainly, SRA understands, or should understand, the basis of DOS's claims. SRA's argument that the audit report "fails to provide any clarity" regarding that basis, Motion at 9, ignores the information actually contained in the audit report.

Relying upon a decision of one of our sister boards, SRA further argues that the statement of claim in a contracting officer's decision must, but in this case fails to, "provide a basis for meaningful dialogue between the parties aimed toward settlement or negotiated resolution of the claim if possible, or for adequate identification of the issues to facilitate litigation should that be necessary." Motion at 10 (quoting *Blake Construction Co.*, ASBCA 34480, et al., 88-2 BCA ¶ 20,552, at 103,890). Yet, in its reply brief, SRA specifically states that it "is certainly aware of the costs questioned by DCAA and is ready to address these issues on their merits." Reply at 3 n.2. In such circumstances, we cannot understand SRA's position that the decisions here provide no basis for a meaningful dialogue. Further, the Court of Appeals for the Federal Circuit, in reversing a lower court decision that had relied in part upon *Blake Construction* in finding a lack of "adequate notice" in a claim, made clear

that a letter alleging a breach of specific contractual provisions and containing a demand for a specific amount in damages provides enough information to meet any "dialogue" requirements that the CDA and the FAR impose. *See Northrop Grumman Computing Systems, Inc. v. United States*, 709 F.3d 1107, 1112-13 (Fed. Cir. 2013) (reversing 99 Fed. Cl. 651 (2011)). To the extent that *Blake Construction* purports to impose higher or more burdensome notice requirements, it would conflict with Federal Circuit precedent, and we would not be bound by it.

SRA has no basis for contesting the jurisdictional validity of the two June 28, 2019, contracting officers' final decisions.[2]

SRA's Motion for Failure to State a Claim

SRA alternatively argues that we must dismiss these appeals because the two contracting officers' final decisions at issue fail to state a claim upon which the Board can grant relief.

DOS has elected to rely upon the final decisions as its complaints in these appeals. In a complaint, a party "must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *American Bankers Association v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019) (quoting *Acceptance Insurance Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 557 (2007))). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In reviewing a motion to dismiss for failure to state a claim, "we accept as true the complaint's well-pled factual allegations," though not its "asserted legal conclusions." *Id.*

[2] SRA also asserts that the "sum certain" dollar amounts that the DOS contracting officers identified in their decisions are slightly different than the total amounts that the DCAA questioned. Although SRA argues that this slight variation defeats the Board's jurisdiction, the contracting officers' decisions clearly demand payment in a "sum certain," satisfying the requirements of the CDA. *444 Brickell Partners, LLC v. General Services Administration*, CBCA 6199, et al., 19-1 BCA ¶ 37,271, at 181,363. We have found no court or board decision dismissing an appeal based upon a slight mathematical variation in the claim's stated "sum certain" and dollar amounts identified in prior communications. Any slight variations between the DCAA audit figure and the contracting officers' demands can be explored during discovery, but do not affect jurisdiction.

SRA interprets DOS's claims as being based upon the fact "that SRA failed to make certain documents available to DCAA during the audit period (approximately four months)." Motion at 11. According to SRA, DOS is complaining that SRA "violated FAR 4.703 and 52.215-2 by failing to make documents available during the audit period to DCAA." Motion at 12-13. SRA asserts that the FAR provisions, although they mandate that the contractor make its records available for audit, do not specify a length of time within which the contractor must respond to an inspection or audit notice and that, as a matter of law, four months' notice is too short. *Id.* at 13. SRA, relying upon evidentiary documents that it has attached to its motion, also alleges that, at the end of that four-month period, DCAA said that it was too late at that point to deliver documents, but represented that SRA would be allowed to do so when negotiations began. That representation, SRA says, turned out to be false.

We deny SRA's motion to dismiss for failure to state a claim for several reasons:

First, SRA's argument depends, in part, upon evidence (in the form of contemporaneous email communications) that SRA attached to its motion. SRA argues that the emails conflict with the DOS contracting officers' representations that SRA did not provide support for its incurred costs and reflect DCAA's instruction to SRA in mid-2018 to hold, rather than submit, documents. We cannot consider the submitted material on a motion to dismiss for failure to state a claim. "In general, a case can only be dismissed for failure to state a claim upon which relief may be granted when that conclusion can be reached by looking solely upon the pleadings." *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674, at 170,811. Although, in appropriate circumstances, we might also consider materials attached to or essentially incorporated into a complaint in considering such a motion, *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789, other outside materials, like the emails upon which SRA is relying, are not permissible. *See A to Z*, 11-1 BCA at 170,811. SRA cites nothing to support its representation that, because DOS has not challenged the outside documents' authenticity, they are admissible on a motion to dismiss for failure to state a claim.

Second, we disagree with SRA's interpretation of the timing requirements of the applicable FAR provisions. The contract clause at FAR 52.215-2, titled "Audit and Records–Negotiation," provides that the contracting officer or an authorized representative "shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or

indirectly in the performance of this contract"[3] and that the contractor shall make requested documents "available at its office at all reasonable times." 48 CFR 52.215-2(b), (f). According to DOS's complaints in these appeals, DCAA gave SRA four months to provide access to documents supporting SRA's incurred costs, but SRA did not provide any documents during that time. Although SRA argues that it is entitled to judgment as a matter of law because the FAR establishes no time limit within which a contractor must respond to an audit request, the FAR clause plainly grants DOS a contractual right to access SRA's documents "at all reasonable times." Accepting as true the factual allegations that DOS makes in its complaints, as we must, we reject SRA's assertion that DOS has not alleged "a facially plausible claim" that SRA failed to support its incurred costs. The evidence that SRA wishes to present challenging DOS's factual allegations is not properly before us on the type of motion that SRA has filed.

Third, even if we were to agree with SRA that the amount of time that DCAA and DOS gave SRA to provide access to SRA's cost support was unreasonable, that would not mean that SRA would suddenly be entitled to judgment as a matter of law. Although the contracting officers' decisions identify various FAR provisions that required SRA to preserve and make available documents to support SRA's incurred costs, the crux of DOS's repayment claim is that DOS has seen no support for $29,184,741.62 in costs for which SRA invoiced DOS and that DOS paid. DOS wants the unsupported and/or FAR-noncompliant costs back. If we find the amount of time that SRA was given to provide cost support unreasonable, and if SRA has actual support for questioned costs, SRA may attempt to present that support as evidence in this litigation.[4] Nevertheless, under its contracts, SRA is subject to incurred cost audits, and it does not get to retain all $29 million in questioned costs unless it provides appropriate cost support for them. To date, at least as alleged by DOS, SRA has never provided DOS or DCAA with such support. A finding that the DCAA or DOS should have given SRA more time to submit that support would mean only that SRA is not barred from submitting it now.

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[3] Similarly, FAR 4.703 provides that "contractors shall make available records . . . to satisfy contract negotiation, administration, and audit requirements of the contracting agencies" and shall maintain those records for specific periods of time. 48 CFR 4.703(a).

[4] We recognize that one of our predecessor boards held that "[a] litigant may not freely withhold records during audit and then produce them during a Board trial to support a claim for recompense." *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,323, *aff'd sub nom. Skinner v. TDC Management Corp.*, 975 F.2d 869 (Fed. Cir. 1992) (table). We do not decide here the extent to which, if SRA's failure to provide cost support access during the four-month DCAA audit period was not reasonable, SRA would still be entitled to provide that support as part of this litigation.

Fourth, SRA argues that the DOS decisions are internally contradictory and, as a result, fail to state a viable claim. In their decisions, the DOS contracting officers acknowledged that, during negotiations in June 2019, SRA attempted to provide what SRA claimed was at least some of the missing cost support documentation, but that DOS would not accept it. DOS asserts in its response that, because the CDA's statute of limitations was about to expire on its right to reclaim at least some of DOS's unsupported costs, DOS could no longer accept new material from SRA or recommence the audit.[5] Regardless of DOS's reasons for rejecting material presented in June 2019, the cited statements in the final decisions do not necessarily defeat DOS's claim. SRA cannot establish at this point in the litigation that the documents which it allegedly wanted to provide DOS in June 2019 actually provide full support for the questioned costs. Further proceedings will be necessary to determine the extent to which SRA has such support.

Decision

For the foregoing reasons, SRA's motion to dismiss is **DENIED**. SRA shall file its answers to DOS's complaints no later than March 24, 2020.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

[5] SRA complains that, if DOS "had actually been concerned about the CDA's statute of limitations, it could have asked [SRA] to enter into a tolling agreement." Reply at 6. SRA neither suggests that SRA ever brought up the idea of a tolling agreement before filing its reply brief nor identifies any authority requiring agencies to offer CDA tolling agreements to contractors. In any event, SRA's argument is irrelevant to its dispositive motion.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DynCorp International LLC	)	ASBCA No. 61950
	)	
Under Contract No. W52P1J-07-D-0007	)	

APPEARANCES FOR THE APPELLANT: Holly A. Roth, Esq.
William T. Kirkwood, Esq.
Elizabeth Leavy, Esq.
Reed Smith LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Arthur M. Taylor, Esq.
DCMA Chief Trial Attorney
Srikanti Schaffner, Esq.
Trial Attorney
Defense Contract Management Agency
Carson, CA

OPINION BY ADMINISTRATIVE JUDGE CLARKE

This case involves DynCorp International LLC's (DI) appeal of a Defense Contract Management Agency (DCMA) Contracting Officer's Final Decision implementing DCAA audits of cost reimbursement contracts and, in particular, the disallowance of severance payments made to DI's former CEO. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We deny DI's appeal. The parties have submitted the appeal for decision on the record, pursuant to our Board Rule 11, and only entitlement is before us.

FINDINGS OF FACT

(Each party relies exclusively on their joint Stipulation of Material Facts as their Proposed Finding of Facts. We adopt the parties' stipulated facts (stip.) and add additional facts as appropriate.)

1. Appellant is DynCorp International LLC (DI) (stip. ¶ 1).

2. Respondent is the Defense Contract Management Agency (DCMA) acting on behalf of those government agencies for which appellant performed cost type contracts during calendar year (CY) 2015 and CY2016 (stip. ¶ 2).

3. DI and the government are parties to numerous cost reimbursement contracts which are assigned for contract administration purposes to DCMA, including Contract No. W52P1J-07-D-0007 (Contract No. 0007) (stip. ¶ 3).

Severance Payments to DI CEO Mr. Gaffney

4. From August 25, 2010 to July 10, 2014, DI employed Steven F. Gaffney as its Chief Executive Officer (CEO). Mr. Gaffney's terms of employment with DI were subject to a 2010 Employment Agreement. Mr. Gaffney's employment with DI was terminated on July 10, 2014. In accordance with the 2010 Employment Agreement and 2014 Separation Agreement between Mr. Gaffney and DI, following Mr. Gaffney's termination, DI agreed to pay severance to Mr. Gaffney in the aggregated amount of $9.2 million (less applicable tax withholdings). The severance amount was calculated in accordance with the 2010 Employment Agreement, which stated that the severance payment would be "equal to two (2) times the sum of the Base Salary and Bonus at Target." (Stip. ¶ 4; R4, tab 5 at 2)[1]

5. As required by the 2010 Employment Agreement and 2014 Separation Agreement, DI made severance payments to Mr. Gaffney in 2014, 2015 and 2016 (stip. ¶ 5; R4, tab 5 at 2).

2015 & 2016 Incurred Cost Proposals

6. In accordance with Federal Acquisition Regulation (FAR) 52.216-7, ALLOWABLE COST AND PAYMENT, DI submitted its CY2015 incurred cost proposal (2015 ICP) to the DCMA on June 30, 2016, to establish DI's final indirect cost rates for January 1 through December 31, 2015. DI's 2015 ICP included costs DI incurred relative to DI's severance payments to Mr. Gaffney in DI's G&A expense pool. (Stip. ¶ 6; R4, tab 2)

7. On June 21, 2017, DI submitted its CY2016 incurred cost proposal (2016 ICP) to the DCMA to establish DI's final indirect cost rates for January 1 through December 31, 2016. DI's 2016 ICP included costs DI incurred relative to DI's severance payments to Mr. Gaffney in DI's G&A expense pool. (Stip. ¶ 7; R4, tab 3)

DCAA Audit Report

8. On June 26, 2018, the Defense Contract Audit Agency (DCAA) issued Audit Report Nos. 3181-2015D10100001 and 3181-2016D1010001 (the "Audit Reports") on DI's proposed amounts on unsettled flexibly priced contracts for CY2015 and CY2016 (stip. ¶ 8). In particular, and with respect to the instant appeal and DI's

[1] The page numbers we cite are PDF page numbers for ease of locating.

incurred costs relative to the severance payments at issue, the DCAA audit reports included the following:

> 5. Indirect Costs
>
> a. Summary of Conclusions:
>
> We questioned $7,812,098 ($4,745,431 + $3,066,667) of proposed indirect severance costs *based on FAR 31.201-3, Determining Reasonableness. . . .*

(R4, tab 4 at 19) (Emphasis added)

> 9. DCAA commented on severance pay:
>
> (1) Severance
>
> (Table omitted, *see* R4, tab 4 at 20)
>
> We observed a large amount of severance costs while performing data analytics on indirect costs. Subsequently, we found DI's former Chief Executive Officer (CEO), received severance of $4,983,333 in CY 2015 and $3,066,667 in CY 2016, totaling $8,050,000 for both years.
>
> We requested DI to provide support demonstrating these severance costs were allowable and reasonable. In response, DI provided the former CEO's employment agreement and separation agreement.
>
> • Employment Agreement. The employment agreement was effective August 25, 2010 for four years. The agreement stated if the employee was terminated by the company without cause or due to the company's non-renewal of the term he would be entitled to "*...a severance payment equal to two (2) times the sum of Base Salary and Bonus at Target, payable in twenty-four (24) equal monthly installments....*" The agreement also defined the annual base salary as $2,000,000 and the target bonus as 130 percent of base salary ($2,600,000).

• Separation Agreement. The separation agreement was effective July 10, 2014. The agreement stated the separation from DI would be treated as a termination without cause; therefore, the employee would be entitled to severance payments as defined in the employment agreement.

We reviewed employment agreements for other former CEOs at DI and CEOs of similar defense contractors and found the severance terms of twice a CEO's salary plus bonus to be reasonable in comparison.

(R4, tab 4 at 20-21) (Emphasis added)

10. DCAA commented on reasonableness:

Nevertheless, FAR 31.201-3(b) states in part: "What is reasonable depends upon a variety of considerations and circumstances, including --... (3) The contractor's responsibilities to the Government ...." In our opinion, the annual compensation used in the calculation should be subject to the limit discussed in FAR 31.205-6, Compensation. FAR 31.205-6(p)(1)(i) defines compensation as, in part: "...the total amount of wages, salary, bonuses ...." Although *the severance payments do not meet the definition of compensation*, the salary and bonus components of the severance calculations do meet this definition. Therefore, in our opinion, the FAR 31.205-6(p) limitation on allowability of compensation is an appropriate benchmark to determine reasonableness of the salary and bonus components. *Consequently, in our opinion, the salary and bonus portion of the severance payment calculation in excess of the limit in FAR 31.205-6(p)(1)(i) is unreasonable.*

To determine the maximum allowable severance, we doubled the FAR 31.205-6(p)(2)(i) *compensation limitation amount of $693,951 in effect when the employee was hired for this position (CY 2010).* We subtracted that amount from the total severance proposed and paid to determine the total unallowable severance amount of $7,812,098. Our calculation of this amount is shown in the table below.

Total Unallowable Indirect Severance former CEO

Description	Amount
Severance Proposed and Paid	
CY 2014	$1,150,000
CY 2015	4,983,333
CY 2016	3,066,667
Total Severance Proposed and Paid	$9,200,000
Less Maximum Allowable Severance *	1,387,902
Total Unallowable Severance	$7,812,098

* Maximum Allowable Severance = $693,951 x 2 [= $1,387,902]

(R4, tab 4 at 21) (Emphasis added)

11. DCAA's CY2014 audit did not challenge DI's severance costs:

> DI's CY 2014 severance costs of $1,150,000 were not included in the scope of this audit as our office examined and reported on those costs in DCAA Audit Report No. 031812013D10100001, dated January 2, 2018. *In that audit, we did not specifically examine severance costs.* Therefore, the costs were not questioned or a subject of discussion when the *CY 2014 ICP was negotiated and settled on March 2, 2018*. As a result, these costs have been recovered by DI in the CY 2014 ICP.
>
> We determined $237,902 as the remaining portion of the allowable severance costs, after consideration of the already recovered severance costs in CY 2014 of $1,150,000 ($1,387,902 - $1,150,000 = $237,902). We questioned the difference between the proposed and paid severance in CY 2015 and the allowable severance costs ($4,983,333 - $237,902 = $4,745,431). We questioned all of the proposed and paid severance costs in CY 2016 because the contractor recovered all of the allowable severance costs ($1,387,902) in CYs 2014 & 2015.
>
> Unallowable severance questioned by CY is shown in the table below.

DynCorp International LLC

Questioned CYs 2015 and 2016 Indirect Severance for Former CEO

	Severance Proposed and Paid	Questioned
CY 2014	$1,150,000	$
CY 2015	4,983,333	4,745,431
CY 2016	3,066,667	3,066,667
Total	$9,200,000	$7,812,098

(R4, tab 4 at 22) (Emphasis added)

12. DI disagreed with the DCAA audit:

d. Contractor's Reaction:

(1) Severance

DI did not concur with the questioned indirect severance. DI disagreed with our use of the FAR 31.205-6(p)(2)(i) compensation limitation in effect when the employee was hired (CY 2010). DI was confused by our inclusion of the severance amounts paid in CY 2014 to its former CEO in our calculations of unallowable severance. DI stated that severance pay is not subject to the compensation limits discussed in FAR 3l.205-6(p) and must be evaluated separately for reasonableness. DI disagreed that the questioned severance costs are unreasonable based on FAR 31.201-3. DI noted its Compensation Director and an executive compensation consulting firm both opined that DI was well within standard industry practices regarding the payment of these severance costs. Refer to Appendix 4 for the full text of the contractor's reaction to questioned indirect severance.

(R4, tab 4 at 26)

Statutory Cap

13. The statutory cap on compensation increased every year:

Statutory Cap	Fiscal Year	Costs Incurred After
$1,144,888	2014	Jan 1, 2014
$980,796	2013	Jan 1, 2013
$952,308	2012	Jan 1, 2012
$763,029	2011	Jan 1, 2011
$693,951	2010	Jan 1, 2010

https://www.whitehouse.gov/wp-content/uploads/2017/11/ContractorCompensationCapContractsAwardedBeforeJune24.pdf

14. On January 7, 2019, DCMA's Corporate Administrative Contracting Officer (CACO) John R. Branch issued a Contracting Officer's Final Decision (COFD), which disallowed $4,986,523 from DI's FY 2015 G&A Pool and $2,376,450 from DI's FY 2016 G&A Pool and unilaterally established DI's final indirect cost rates for CY2015 and CY2016 based, in part, on the disallowed severance costs incurred by DI (stip. ¶ 10).

15. As is pertinent to this appeal, the COFD advised DI that the CACO had determined that $6,029,210 of the severance DI paid to DI's former CEO for CY2015 and CY2016 is unallowable. In particular, the COFD advised DI that the amount CACO had determined to be unallowable was $3,951,448 in CY2015 and $2,077,762 in CY2016. (Stip. ¶ 11)

16. The COFD advised DI that the CACO's determination was based on the CACO's assertion that "[s]everance pay is compensation subject to the ceilings set forth in FAR 31.205-6(p) for each applicable calendar year" and that the severance amounts paid to DI's CEO for CY2015 and CY2016 that exceed the statutory compensation limits under FAR 31.205-6(p) are unallowable (stip. ¶ 12).

17. The COFD also stated that, in the alternative to severance pay being compensation subject to FAR 31.205-6(p), severance pay DI paid to its former CEO is a directly associated cost under FAR 31.201-6(d) to the extent that it would not have been incurred but for the underlying unallowable salary cost (stip. ¶ 13).

18. The COFD unilaterally adjusted for the disallowed executive severance pay and unilaterally established the final indirect rates for DI's fiscal years ended in December 31, 2015 and December 31, 2016 (stip. ¶ 14).

19. DI filed its notice of appeal of the COFD on January 22, 2019 (stip. ¶ 15).

20. DI filed its Complaint on February 25, 2019 and limited the scope of its appeal to the COFD's disallowance of DI's severance payments to DI's former CEO, Mr. Gaffney (stip. ¶ 16).

DECISION

Jurisdiction

The COFD involves both entitlement to reductions in severance pay and calculation of the deductions. In this appeal, however, the DI focuses on the right to a deduction, not the calculation of the deduction. We deny DI's appeal but only as to the government's right to deductions in severance pay, not the amounts of the deductions. Though, DI raises reasonable concerns in its claim over how the deductions were calculated by DCAA (and they appear to remain to be negotiated), that issue is not before us today.

Standard of Review

Both parties rely exclusively on the facts included in their joint stipulation. We agree that there are no disputed material facts. Therefore this appeal is appropriate for resolution on the record pursuant to our Rule 11 submitted without a hearing.[2]

We are presented with issues of contract/regulatory interpretation. Both parties agree that the FAR provisions involved should first and foremost be interpreted based on the "plain language" of the regulation (app. mot. at 7-8; gov't mot. at 2). We agree. *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (We enforce the "plain and ordinary" meaning of language that is clear and unambiguous.) We need not conduct an exhaustive analysis of the law of regulatory interpretation because this case is resolved on the "plain language" standard upon which the parties and the Board agree.

[2] The parties style their motions as "on the administrative record" not as motions for summary judgement or proceedings under Board Rule 11. In the end given the purely legal nature of the dispute before us and the stipulations of fact upon which the decision rests, the results of this appeal are no different than if we had treated the motions as motions for summary judgment instead of Rule 11 submissions.

Positions of the Parties

In its July 22, 2019 Motion, DI organizes its argument into six questions of law (app. mot. at 6-7). The highpoints of DI's argument are as follows: (1) DI states that "neither the audits conducted by the Defense Contract Audit Agency (DCAA) nor the COFD, determined that DI's severance payments made for CY2015 and CY2016 were unallowable under FAR 31.205-6(g) [Severance pay]" (app. mot. at 9-10). DI also points out that DCAA found that DI's severance pay was reasonable, "[i]n fact, the DCAA determined that DI's severance payments for CY2015 and CY2016 were 'reasonable'" (app. mot. at 10). (2) DI quotes the definition of compensation in FAR 31.205-6(p) and argues, "[t]his definition does not include the term 'severance pay,' nor does it reference FAR 31.205-6(g)" (app. mot. at 11). Therefore, DI argues that the government's characterization of severance pay as compensation was wrong. Based on all this DI urges the Board to conclude that severance pay, "does not fall within FAR 31.205-6(p)'s limitations on the allowability of 'compensation'" (app. mot. at 12). (3) Next DI argues that severance pay cannot be an unallowable "directly associated cost" under FAR 31.201-6(d) because the severance pay was allowable and, "because it was not incurred by DI as a result of, nor related to, any other cost DI incurred in CY2015 and CY2016" (app. mot. at 13). (4) In its Reply Brief DI reiterates that, "[i]n fact, DCAA also determined the severance payments to be reasonable" (app. reply br. at 3). (5) DI argues the government's argument that severance pay is somehow "salary" or "wages" "contradicts the plain language of FAR 31.205- 6(g) and the common meaning of its words" (app. reply br. at 4). DI dismisses the government's reliance on Armed Services Procurement Regulations (ASPR) cases and Black's Law Dictionary (app. reply br. at 5-6). DI argues that the Employee Compensation Cap cannot reasonably be interpreted to apply to severance payments (app. reply br. at 7). (6) Finally, DI reiterates its argument that severance payments are not "directly associated costs" because "these severance payments were neither incurred by DI as a result of, nor related to, any costs DI incurred that were subject to the Employee Compensation Cap's 2015 and 2016 ceilings" (app. reply br. at 8).

In its August 22, 2019 Cross-Motion and Opposition, DCMA first deals with the idea that severance pay is compensation. DCMA states that DI, "fails to cite any legal authority for its position that severance pay is not a type of 'wages' or 'salary.'" DCMA argues, "the notion that severance pay is a type of 'wages' or 'salary' is supported by the plain language of FAR 31.205-6(g)." DCMA focuses on the definition of severance pay in FAR 31.205-6(g), "[s]everance pay is a payment *in addition to regular salaries and wages* by contractors to workers whose employment is being involuntarily terminated." (Emphasis added by DCMA) (Gov't cross-mot. at 2) Citing Black's Law Dictionary's definitions of "regular," "salary" and "wages," DCMA argues, "[s]everance pay is clearly a reward or recompense for services performed, as the right to severance pay is earned only after performing personal services for the employer, and therefore falls within the definition of 'salary'" (gov't cross-mot. at 3).

DCMA relies heavily on its assertion "DynCorp asks the Board to ignore the word 'regular' in the definition of severance pay" which "alters the plain meaning of FAR 31.205-6(g)" to exclude severance pay from wages and salary. DCMA sums up with, "the plain meaning of FAR 31.205-6(g), after giving meaning to the word 'regular,' indicates that severance pay is a type of salary and wages, just not the usual or customary type of salary and wages." (*Id.*) DCMA points out that the ASPR, a precursor to the FAR, referred to severance pay as "dismissal wages" (gov't cross-mot. at 4). Next, DCMA argues, "the severance pay that DynCorp paid to its former Chief Executive Officer (CEO) is a directly associated cost under FAR 31.201-6(d) to the extent that it would not have been incurred but for the underlying overceiling salary cost" (gov't cross-mot. at 5). DCMA contends, "[t]he CACO determined that any compensation exceeding that cap is unallowable. . . . Therefore, the amount of severance pay associated with the unallowable compensation is also unallowable" (gov't cross-mot. at 6). In its Sur-Reply DCMA argues, "DynCorp may not circumvent FAR 31.205-6(p)'s compensation cap by drafting employment agreements that promise to pay severance costs that exceed the benchmark compensation amount" (gov't sur-reply at 2). DCMA reiterates its argument that the definition of "compensation for personal services" in FAR 31.001 when read with FAR 31.205-6(a) and FAR 31.205-6(g), supports the conclusion that severance payments are compensation (gov't sur-reply at 2). DCMA returns to its argument about the word "regular" stating, "[a]ppellant's interpretation of severance pay renders meaningless the word 'regular' in the definition" (gov't sur-reply at 3). DCMA argues the reference to "dismissal wages" in the ASPR is "entitled to deference because it provides additional evidence of the promulgator's intent, and demonstrates that the promulgators of the regulatory cap intended for severance costs to be subject to the cap" (gov't sur-reply at 4). Both parties suggest that Black's Law Dictionary supports their position. DCMA counters that "DynCorp's reliance on Black's Law Dictionary is irrelevant since severance pay is expressly defined under FAR 31.205-6(g)" (gov't sur-reply at 5). Concerning the matter of directly associated costs, DCMA argues, "[i]f Mr. Gaffney's FY 2014 base salary did not exceed the compensation cap, his annual severance pay would not have exceeded the compensation cap either" (gov't sur-reply at 7).

CEO Gaffney's Base Salary Exceeded the Statutory Cap Every Year

DI's employment agreement with CEO Gaffney, effective August 25, 2010 for four years, provided for a base salary of $2,000,000 and the target bonus of 130 percent of base salary ($2,600,000) (finding 9). The statutory cap on compensation for that four years ranged from $693,951 in 2010 to $1,144,888 in 2014 (finding 13). CEO Gaffney's base salary of $2,000,000 exceeded the statutory cap all four years.[3]

[3] The record does not include the audit reports for CY2010 through CY2014 so we do not know if DCAA disallowed DI's salary and bonus payments to CEO Gaffney that exceed the statutory cap as we would expect.

DCAA's Audit Comment that the "Severance Terms" were Reasonable Does not Refer to the Amounts

We now turn to DI's arguments as presented in its brief. Its first argument, that the DCAA considered the severance pay to be reasonable and payable, is based upon a misreading of the relevant language in DCAA's audit report. DCAA included the following finding in the audit report:

> We reviewed employment agreements for other former CEOs at DI and CEOs of similar defense contractors and found the severance terms of twice a CEO's salary plus bonus to be reasonable in comparison.

(Finding 9) DI interprets this to mean that the severance payment "amounts" are reasonable. We do not agree. DCAA simply found that "severance terms of twice a CEO's salary plus bonus to be reasonable." The word "terms" cannot reasonably be interpreted to refer to the dollar amount of the severance paid to former CEO Gaffney. We interpret the language as DCAA finding the mechanism of calculating the severance pay reasonable. DCAA did not find the $9,200,000 (finding 11) in severance payments to CEO Gaffney reasonable and made that clear in the audit, "We questioned $7,812,098 ($4,745,431 + $3,066,667) of proposed indirect severance costs based on FAR 31.201-3, Determining Reasonableness. . . ." (Finding 8)

Severance Payments are not Compensation

DI's next argument, that severance payments are not "compensation" under the FAR, fares better.

> We start with the FAR definition of compensation:
>
> **31.001 Definitions.**
>
> "Compensation for personal services" means all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor.

There is an additional definition of compensation in FAR 31.205-6(p):

> (p) *Limitation on allowability of compensation.*
>
> . . . .

> (1) *Definitions*. As used in this paragraph (p)-
>
> (i) "Compensation" means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (k) of this subsection), and employer contributions to defined contribution pension plans (see paragraphs (j)(4) and (q) of this subsection), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

From these definitions we understand that compensation (under the FAR cost allowability definition) is "for services rendered" for "the fiscal year" that are "recorded in the contractor's cost accounting records for the fiscal year." CEO Gaffney's severance payments cannot be for "services rendered" in fiscal years after his employment has been terminated. DCAA agrees with this interpretation, "[a]lthough the severance payments do not meet the definition of compensation . . . ." (Finding 10) We find DCMA's reliance on the word "regular" in FAR 31.205-6(g) and its argument that severance pay is a "type of salary and wages, just not the usual or customary type of salary and wages" unpersuasive. Severance pay is not compensation.

The Challenged Severance Payments are not Reasonable[4]

We start with the fact that DCAA questioned DI's severance costs based on reasonableness:

> We questioned $7,812,098 ($4,745,431 + $3,066,667) of proposed indirect severance costs *based on FAR 31.201-3, Determining Reasonableness*. . . .

(Finding 8) (Emphasis added) Also:

> Consequently, in our opinion, the salary and bonus portion of the severance payment calculation in excess of the limit in FAR 31.205-6(p)(1)(i) is *unreasonable*.

(Finding 10) (Emphasis added)

[4] We need not consider "directly associated cost" because our decision is based on reasonableness.

In order for a cost to be allowable it must meet certain requirements. FAR 31.201-2, DETERMINING ALLOWABILITY, lists the five requirements including reasonableness. We assess reasonableness under the guidance of FAR 31.201-3, DETERMINING REASONABLENESS, which provides:

> **31.201-3 Determining reasonableness.**
>
> (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 upon a variety of considerations and circumstances, including-
>
> (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;
>
> (2) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations;
>
> (3) *The contractor's responsibilities to the Government*, other customers, the owners of the business, employees, *and the public at large*; and
>
> (4) Any significant deviations from the contractor's established practices.

(Emphasis added) Focusing on FAR 31.201-3(a) we find that the DCAA audit constitutes an "initial review of the facts" that resulted in "a challenge of a specific cost by the contracting officer" that shifts the burden of proof to DI (findings 8, 14). Therefore, DI has the burden of proving that its severance payments are reasonable. We dealt with DI's primary argument for reasonableness when we rejected DI's

interpretation of DCAA's statement that it "found the severance terms of twice a CEO's salary plus bonus to be reasonable" to mean DCAA agreed the severance payment amounts were reasonable. As we explained above DCAA did not find that the dollar amounts of severance payments were reasonable.

FAR 31.205-6, COMPENSATION FOR PERSONAL SERVICES, subparagraph (p) Limitation on allowability of compensation, imposes statutory caps on compensation. In CY2010 the following limitation applied:

> (ii) Costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP), under 41 U.S.C. 1127 as in effect prior to June 24, 2014, are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16), as in effect prior to June 24, 2014).

FAR 31.205-6(p)(2). Similar cap language applies after June 24, 2014. FAR 31.205-6(p)(3)&(4). DCAA found that these caps did not apply to severance pay but did apply to DI's CEO's salary and bonus:

> Although the severance payments do not meet the definition of compensation, the salary and bonus components of the severance calculations do meet this definition. Therefore, in our opinion, the FAR 31.205-6(p) limitation on allowability of compensation is an appropriate benchmark to determine reasonableness of the salary and bonus components.

(Finding 10) We agree. DCAA relied on the "responsibilities to the Government" element of reasonableness:

> Nevertheless, FAR 31.201-3(b) states in part:
>
> "What is reasonable depends upon a variety of considerations and circumstances, including --... (3) The contractor's responsibilities to the Government ...." In our opinion, the annual compensation used in the calculation

> should be subject to the limit discussed in FAR 31.205-6, Compensation.

(Finding 10) We agree. The statutory caps establish "The contractor's responsibilities to the Government . . . and the public at large." That is the responsibility not to claim salary costs over the statutory limit.[5] These are two of the itemized "considerations and circumstances" in FAR 31.201-3 supporting reasonableness. The statutory cap ranged from $693,951 in 2010 to $1,144,888 in 2014. DI's CEO's base salary of $2,000,000 exceeded these caps every year of CEO Gaffney's employment. (Findings 13, 9) DI's severance payments were calculated as two times the sum of base salary and bonus (finding 9-10). Therefore, DI's severance payments were calculated in part using salary and bonus amounts that exceeded the statutory caps. We find that the portion of the severance payments derived from unallowable salary and bonus amounts above the statutory caps are likewise unallowable. This conclusion is just common sense, there is nothing magic about a severance pay calculation that converts unallowable salary into allowable severance payments. Interestingly, DCMA seems to have recognized this argument among the many arguments both parties made:

> DynCorp may not circumvent FAR 31.205-6(p)'s compensation cap by drafting employment agreements that promise to pay severance costs that exceed the benchmark compensation amount.

(Gov't sur-reply at 2) Bottom line: unallowable salary cost used in a severance pay calculation results in unallowable severance costs – unallowable in, unallowable out. We deny DI's appeal.

CONCLUSION

Based on the above we deny the appeal.

Dated: September 29, 2020

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

(Signatures continued)

[5] We use the word "claim" not "pay." DI is free to pay its CEO whatever it wants but just cannot ask the government to pay more than the cap.

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 Order of Dismissal of the Armed Services Board of Contract Appeals in ASBCA No. 61950, Appeal of DynCorp International LLC, rendered in conformance with the Board's Charter.

Dated: September 29, 2020

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.

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Northrop Grumman Corporation	)	ASBCA No. 61775
	)	
Under Contract No. FA8620-13-D-3014 *et al.*	)	

APPEARANCES FOR THE APPELLANT: James A. Tucker, Esq.
David A. Churchill, Esq.
Daniel E. Chudd, Esq.
Morrison & Foerster LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Arthur M. Taylor, Esq.
DCMA Chief Trial Attorney
Robert L. Duecaster, Esq.
Trial Attorney
Defense Contract Management Agency
Chantilly, VA

OPINION BY ADMINISTRATIVE JUDGE PROUTY

The appeal before us involves the application of the Cost Accounting Standards (CAS) to the "curtailment" of a pension plan, but it's not as abstruse as the uninitiated reader may fear. As will be explained in far more depth below, appellant, Northrop Grumman Corporation (NG), decided to freeze a particularly generous pension plan for senior management.[1] The costs of such pension plans are part of a company's overhead for purposes of cost-reimbursement contracts (of which NG had many), and when a pension plan is curtailed, the company must calculate the assets of the plan versus its obligations at the time the benefits were frozen. If the assets are greater than the present value of the obligations, it means the government "overpaid"[2] the overhead it previously paid the contractor and is entitled to a properly-proportionate refund. If the assets of the pension plan are calculated as less than the present value of its obligations (as happened here), the contractor's previously charged overhead costs are deemed to have been too low and the contractor is entitled to a proportionate payment from the government to

[1] By "freeze" we mean, ending further contributions to the plan and curtailing increased benefits based on such contributions. Persons entitled to the pension would still receive it upon retirement, but their payments would be based upon their years of service as of the date of the curtailment, rather than their years of services as of their retirement date.

[2] This "overpayment" is typically due to better than expected returns on investments or lower than expected costs.

remedy the situation. Thus, the means by which a contractor calculates both the value of the plan and its obligations are of keen interest to both the contractor and the government.

Here, the government objects to NG's calculations of both the value and the obligations of the pension plan. It objects to NG's calculation of the value of the plan because of the manner in which NG valued the future income of its assets, taking into account taxes on such income. It further objects to the actuarial mortality tables used by NG to determine the life expectancy of its pensioners and thus the plan's obligations: NG changed the mortality tables it used for the plan to ones more in its interest just as the plan was frozen. The government also objects to a one-time payment of tax liability by the plan incurred before curtailment, but paid afterwards.

Though we recognize why the government had its concerns, as will be described below, NG's approach accurately reflects the actual net value of the pension plan, such that any CAS non-compliance is not material, and we sustain the appeal in whole.

FINDINGS OF FACT

I. The Pension Plan and the Big Picture

The pension plan at issue in this appeal is known as the "OSERP," which stands for Officers Supplemental Executive Retirement Plan (Stip. ¶ 1[3]). NG adopted the OSERP on December 23, 2003 (Stip. ¶ 5). It is a "defined benefit pension plan," as defined by CAS 412-30(a)(10)[4], which means that the amount to be paid to pensioners or the basis for determining those benefits, is determined in advance (Stip. ¶ 6). It is also a "nonqualified pension plan," within the meaning of CAS 413-30(a)(18), which means that it does not qualify for preferential tax deferral under the tax code and implementing regulations by the Internal Revenue Service (IRS)[5] (Stip. ¶ 7). However, it is set up as a "Rabbi trust"[6] (so named after an IRS decision allowing the practice for a particular temple), which means that its assets may be attached by NG's creditors, but the pensioners need not pay

[3] The parties' joint stipulation of facts, dated August 29, 2019, may be found at tab 100 of appellant's supplemental Rule 4 file. We refer to it as "Stip. ¶__" throughout, for convenience.

[4] CAS provisions are published in 48 C.F.R. Part 9904, with the CAS provision being found in the decimal after the part number. Hence, for example, CAS 412-30(a)(10) is located at 48 C.F.R. § 9904.412-30(a)(10).

[5] The reason for this is that OSERP was limited to a very small number of highly compensated NG employees (tr. 1/43).

[6] The OSERP's assets are held by the trust (*see* Stip. ¶ 14), which was managed by the Evercore Trust Company (*see* app. supp. R4, tab 192 (amendment of trust agreement)), even if, as noted below, NG was responsible for its taxes. For simplicity, we will generally refer to OSERP assets, rather than trust assets throughout, unless it is necessary to make the distinction.

tax on the money set aside for their use until they actually begin collecting it (tr. 1/43-45). Of particular salience to this appeal, money earned by a Rabbi trust's investments is taxed as income to the company holding the trust (here, NG) (tr. 1/45-47).

Alas, the OSERP only lasted for approximately 11[7] years, with a "curtailment of benefits" effective on December 31, 2014 (Stip. ¶ 12). A curtailment of benefits, as defined by CAS 413-30(a)(7) is when the plan is "frozen" and no further benefits accrue to members except that the plan would allow vesting of unvested benefits based upon length of service and the plan would pay benefits otherwise already accrued (*Id.*).

During the period of the OSERP's existence, NG allocated its costs to numerous government contracts, all of which included the following standard Federal Acquisition Regulation (FAR) clauses that are material to the issue before us today: FAR 52.215-15, PENSION ADJUSTMENTS AND ASSET REVERSIONS; FAR 52.230-2, COST ACCOUNTING STANDARDS; and FAR 52.233-1, DISPUTES (Stip. ¶ 11). FAR 52.230-2(a), in turn, provides that the provisions of 48 C.F.R. Part 9903 (applying the CAS) are incorporated by reference into the contract.

Finally, the amount of the OSERP allocated to government contracts for which the CAS calculations apply is 81.93% (Stip. ¶ 46).

II. NG's Calculations After Curtailment

After curtailment was decided upon in 2014, NG began the process of calculating the OSERP's assets and liabilities so that the parties could properly determine what payment adjustments were required to make the plan's assets and liabilities equal pursuant to CAS 413. (*See* R4, tab 12 at G-284-86 (setting forth process NG undertook); tr. 1/63-93 (same)) These adjustments are basically to allow a one-time "settling up" of the OSERP accounts (tr. 1/41).[8]

The market value of the OSERP assets at the time of curtailment was determined by NG to be $91,964,173 – a figure that both parties agree was correctly calculated (Stip. ¶ 14). Subsequent to curtailment, NG made three other significant adjustments to

[7] We say 11 years and not 10 (given the December 23, 2003 date of the OSERP's creation), because NG computed the OSERP costs effective January 1, 2004 (Stip. ¶ 9). So far as we can tell, the difference in dates makes no material difference to this dispute.

[8] As will be seen below, there is some dispute between the parties of just what this "settling up" means. The government's position is that "settling up" refers to past costs. NG argues that it refers to setting assets and liabilities (including future costs) into balance.

its accounting of the OSERP's assets: one, a payment of $2,032,589 (as discounted)[9] made in late January 2015 to cover pension costs from the final quarter of 2014 (*see* Stip. ¶ 15); the second, an upward revision of NG's calculation of assets of $7,753,912 to account for duplicative retirement benefits accrued by employees who came to NG from another company (Stip. ¶ 16). The amount of this second adjustment is agreed by the parties to have been proper (*id.*). The third significant change to the assets was the trust's payment of $4,151,494 in Federal income taxes as reimbursement to NG for its payment of taxes on trust income during the OSERP's lifetime prior to curtailment (Stip. ¶ 24). Two other relatively small adjustments were made to account for minor administrative errors. It is enough to say that they are not material to the matters in dispute here and the parties agree that they were appropriate (Stip. ¶¶ 17-18).

In addition to the taxes actually paid by the trust after the OSERP's curtailment, which the government felt should not be considered (*see* gov't br. at 3-5), there were two other major bones of contention between the parties. First, with respect to calculating plan liabilities, NG used the "RP-2014" mortality table (published by the Society of Actuaries in 2014) to calculate the expected life expectancy of its pensioners to estimate how long it would need to pay the OSERP pensions. The RP-2014 table estimated longer lifespans for individuals than did the RP-2000 table (published in 2000) that NG had previously used for its annual calculations of the OSERP's liabilities.[10] (Stip. ¶¶ 26-27, 31) The difference in the OSERP's liability calculated by the two tables is approximately $10 million (Stip. ¶ 34), and the government believes NG should have stuck with the older table (Stip. ¶ 3).

The other major difference between the parties is the interest rate that NG used for calculating the future investment income on the OSERP's assets. NG estimated that its pre-tax rate of return on the OSERP's investments would be 6.15% annually. After deduction of the 35% top marginal tax rate then applicable to NG, this number was reduced to 4%. (Stip. ¶¶ 36-37, 43) The government did not object to the 6.15% estimated rate of return, but did object to NG's discounting it for taxes (Stip. ¶ 44).

Thus, using its numbers, NG calculated the market value of the OSERP's assets at the time of curtailment as $97,673,341 (Stip. ¶ 45 a.). NG calculated the OSERP's liabilities as $190,106,365 (Stip. ¶ 45 b.). The difference between the assets and liabilities were thus $92,433.024. Multiplied by the government's 81.93% share of

[9] The proper discount rate (in particular, whether it should take taxes into account) is a matter of dispute (*see* Stip. ¶¶ 15 a. - 15 c.), which will be discussed more at length later in this opinion.

[10] Because pension plan expenses are part of a company's overhead for calculation of its indirect costs (which the government is partially responsible for in certain contracts), they are submitted for review to the Defense Contract Audit Agency (DCAA) annually (tr. 1/54, 2/92 (NG's pension evaluation done in the beginning of the year and then placed into the incurred costs for the year)).

responsibility, this yields (according to NG) $75,730,377 owed by the government to NG to "true-up" the OSERP (Stip. ¶ 47).

III. The Government's View and the Contracting Officer's Decision

The government sees things somewhat differently than NG. Just before NG froze the OSERP, the government began expressing concerns about the manner in which it was taking account of taxes when it was calculating its investment income. For many years, as part of its indirect cost rate submittals, NG disclosed to DCAA that it was reducing its projected investment income by 35% on account of taxes that would be paid on such income. DCAA appeared to accept this without objection. (Tr. 1/90-91, 2/35-40, 45) On April 10, 2014, however, DCAA issued an audit report on one of these submissions, asserting that NG's calculation of a lower investment income to account for taxes was non-compliant with CAS 412 (R4, tab 10 at G-266). This audit report led to the issuance of a Notice of Potential Noncompliance to NG just a few days later, on April 15, 2014 (Stip. ¶ 40). On July 20, 2015, the government went from calling this a "potential" problem to issuing a Final Determination of Noncompliance (Stip. ¶ 41).

On June 26, 2017, NG submitted a certified claim to the contracting officer (CO) seeking payment of $74,065,364[11] for its benefit curtailment costs (R4, tab 12; Stip. ¶ 51). The CO denied the claim in a decision dated May 31, 2018 (R4, tab 22 at G-383-92; Stip. ¶ 52). Even with the disagreements noted above, the CO found that the government owed NG $28,059,146. Nevertheless, because (according to the CO) she did not have the authority to pay this money, she denied the claim in full. (R4, tab 22 at G-391)[12]

IV. A Deeper Dive On Information Material to the Dispute

A. The Mortality Tables

As noted above, in October 2014, just a few months before the curtailment of the OSERP,[13] NG changed the mortality tables it used for calculating the OSERP's payment obligations to the "RP-2014" table, created by the Society of Actuaries (the Society) (Stip. ¶¶ 30-31). NG had used the Society's "RP-2000" mortality table prior to this time (Stip. ¶ 26).

[11] NG reduced the amount it claimed by a little over a million dollars to credit certain pre-acquisition payments and certain pre-payment credits (R4, tab 12 at G-286).

[12] In our memory, we have never encountered a CO denying, in full, a claim that she determined to be partially owed to a contractor on the grounds of lack of authority. It is potentially problematic, to say the least, but we need not address it because we rule for NG in the end.

[13] Because of this timing, the change in tables was of no effect until after the curtailment date (Stip. ¶ 26 (RP-2000 used in all valuations prior to the curtailment date)).

The RP-2014 table, in fact, was first preliminarily published as an "exposure draft" in February 2014. This draft received significant attention in the actuarial community because it reflected that people were living longer, which is, of course, a very positive thing except that it increases the present value of future pension obligations. (Tr. 1/84) NG, in fact, initiated an internal project to determine the implications of the RP-2014 table for the company. By October 2014, in fact, NG made the decision that it would utilize the RP-2014 table for pension plans company-wide. (Tr. 1/85) Those other pension plans dwarf the size of the OSERP (*id.*), with the OSERP representing less than half of one percent of NG's total pension plan assets (*id.* at 96-97). NG's October decision to use the RP-2014 table company-wide was reflected in its December 31, 2014 10-K report to the Securities and Exchange Commission (app. supp. R4, tab 129 at A-533).[14]

Also in October 2014, the Society more formally published the RP-2014 table. With that table came a note from the Society's Retirement Plans Experience Committee, which stated that the table represented "the most current and complete benchmark[] of U.S. private pension plan mortality experience." (Stip. ¶ 29) The note further recommended the use of that table for measuring "private pension plan obligations, effective immediately" (Stip. ¶ 30). According to NG's expert, by the end of 2014, approximately 87% of the private pension plans that his office studied had adopted the RP-2014 table (tr. 1/86).

There was no evidence presented that NG adopted the RP-2014 for any reason relating to "gaming" the valuation of the OSERP. To the contrary, based upon the evidence before us, we conclude that NG's adoption of the RP-2014 mortality table for OSERP obligation calculations in October 2014 was part of a much larger company-wide move, consistent with the rest of industry, intended to utilize the most accurate information on life expectancy available, and not for any other reason.

B. Taxes Paid and Owing By NG for the Plan's Investment Income

Though NG, as an entity, paid taxes on the OSERP's investment income, prior to the date of the curtailment, NG did not separately keep track of the taxes that it paid on income on OSERP assets. Instead, it calculated the value of the assets by discounting them by the 35% marginal tax rate. (Stip. ¶¶ 19-21)

Consistent with its failure to keep track of the taxes paid for the OSERP's income, the OSERP trust never compensated NG for the taxes it paid on its behalf before curtailment (Stip. ¶ 22). This amount, it has been since estimated by NG, was the sum of $4,151,494. At some point after the curtailment, NG requested reimbursement of this

[14] According to this report, the change in assumptions was made as of "December 3 , 20 4" (sic.) (R4, tab 129 at A-533). The apparent extra blanks after the 3 and between the 20 and 4 appear to reflect a "1" that was left out in each instance. We find it more likely than not that, whatever date was intended, it was prior to January 1, 2015.

amount from the OSERP trust. This was the first such request NG ever made to the trust for this purpose. (Stip. ¶¶ 23-24) The terms of the trust, however, did not explicitly provide for such re-imbursement. Accordingly, the trustee requested that the trust agreement be amended to do so. (Stip. ¶ 24 a.) This amendment, explicitly providing for the trust to reimburse NG for income taxes paid on its assets, was effected on June 30, 2016 (Stip. ¶ 24 b.; *see also* app. supp. R4, tab 192). Already having waited more than 10 years for the tax reimbursement, NG was apparently satisfied to wait almost another full year, with the reimbursement of the full $4,151,494 estimated tax amount being made on June 7, 2017 (Stip. ¶ 24 c.). Apparently, no interest was paid to NG on this late reimbursement, which means that the late payment was to the OSERP's advantage in that the fund obtained an investment return on the money that it held onto, rather than immediately paying to NG (tr. 1/148).

The CAS and the FAR have some things to say about taxes. Generally, income taxes are not considered a cost that is reimbursable by the government in a cost reimbursement contract. FAR 31.205-41(b)(1). On the other hand, they are a reimbursable expense for retirement plans. Of interest in this dispute, though, the CAS explicitly provides that tax liability may not be used to recalculate rates of return even as it allows taxes as an expense. CAS 412-50(a)(5).[15]

C. Context From The Experts

As will be discussed more in the Decision portion below, we do not cede our obligation to interpret CAS provisions to expert witnesses. We did, however, without objection, permit testimony by experts from both parties to explain accounting concepts, the way Rabbi trusts work, the consequences of applying different accounting concepts to the circumstances presented here, and the calculations performed with respect to the OSERP. It was testimony from NG's expert that explained what a Rabbi trust is (*see* tr. 1/43-45); the industry-wide adoption of the RP-2014 table in late 2014 (tr. 1/84-88); the benefits to the OSERP (and the government) by NG's failure to seek compensation from the OSERP trust for its tax liabilities until after curtailment (tr. 1/148); and the practical differences between treating taxes as an administrative cost of the trust and using them to reduce the investment income rate (tr. 1/134-35). The government's actuarial expert testified that, if one were only interested in balancing assets and liabilities for actuarial purposes (as opposed to whatever the CAS might require), considering future taxes would be appropriate (tr. 2/82-83).

[15] Often the Board's practice is to include full recitations of applicable regulations in the "Facts" portions of our decisions because, after all, they act as contract provisions. We will spare the reader temporarily and recite them in the Decision section of this opinion, where it will be more convenient as we parse the provisions' meanings.

DECISION

I. Preliminary Matters:

A. The Government's Motion to Amend its Answer

Prior to the hearing, the government moved to amend its answer to add the affirmative defense of the statute of limitations. NG opposed this motion, essentially arguing that the amendment would be futile since the government's putative statute of limitations defense was meritless. At a status conference before the hearing, we discussed the matter with the parties. All agreed that the evidence would be largely the same whether or not the government motion to amend was granted. Thus, as a matter of judicial economy, we deferred ruling on the motion until after the hearing, since a grant or denial of the motion on grounds related to the merits of the defense would require a three-judge panel and it was best to avoid the delay that issuing such a decision would occasion. We directed the parties to present the same evidence that they would if the motion to amend were granted, and all understood. (*See* tr. 1/5-6 (summarizing decision))

As NG has pointed out in its reply brief, the government has presented no argument in support of the statute of limitations affirmative defense in its post-hearing brief, nor did it raise the issue in its brief opening statement during the hearing (tr. 1/16-25). Under the circumstances, we deem the affirmative defense waived.[16] Because the defense is waived, there is no point in amending the answer to add it, thus we deny the motion to amend the answer as moot.

B. The Proper Means of Interpreting the CAS and the Role of the Expert Witness in a CAS Case

Technically, the CAS are nothing more than government regulations, albeit those of a highly specialized variety. As such, a tribunal interpreting them applies the usual means of regulatory interpretation. Thus, as the Federal Circuit has stated, our "task is 'to ascertain the [CAS Board's] intended meaning when it promulgated the CAS.'" *Allegheny Teledyne, Inc. v. United States*, 316 F.3d 1366, 1373 (Fed. Cir. 2003) (quoting *Perry v. Martin Marietta Corp.*, 47 F.3d 1134, 1137 (Fed. Cir. 1995)). To that end, we start with the text of the CAS provisions at issue and consider "'any guidance that [the CAS Board] has published to aid in interpretation.'" *Id.* (quoting *Martin Marietta*, 52 F.3d at 1138). *See also Martin Marietta*, 47 F.3d at 1137-39 (considering preambles and illustrative examples published by the CAS Board accompanying the CAS).

[16] The CDA's statute of limitations is not a jurisdictional defense, *see Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014), and may thus be waived.

With that direction in mind, though we permitted expert testimony in this matter from both parties, without objection, it is important to note what their proper use is here. As the Federal Circuit explained in *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361 (Fed. Cir. 2003):

> [T]he interpretation of CAS . . . is an issue of law, not an issue of fact . . . . The views of the self-proclaimed CAS experts, including professors of economics and accounting, a former employee of the CAS Board, and a government contracts accounting consultant, as to the proper interpretation of those regulations is simply irrelevant to our interpretive task; such evidence should not be received, much less considered, by the Board on the interpretive issue. That interpretive issue is to be approached like other legal issues—based on briefing and argument by the affected parties.

315 F.3d at 1369 (footnote omitted); *see also Sikorsky*, 773 F.3d at 1323. Thus, when we interpret the CAS provisions at issue here, we do not take into account the experts' opinions of what they mean. That does not mean that the experts were unhelpful to our resolution of this appeal, for as described below, they can illuminate accounting concepts that aid us in avoiding interpretations that would be inconsistent or nonsensical.

II. The Burden of Proof is on the Government

This matter is straightforward: after a contractor has performed a curtailment calculation, the burden of proof is on the government to establish, with a preponderance of the evidence, that the contractor's calculations violated the CAS. This was most plainly stated in an analogous matter (a "segment closing"[17] rather than a curtailment) by the Court of Federal Claims in *Raytheon Co. v. United States*, 105 Fed. Cl. 236, 270 (2012). *Raytheon* (which is not binding upon us but we find to be persuasive authority) cited our own case of *General Dynamics Corp.*, ASBCA No. 56744, 11-2 BCA ¶ 34,787 at 171,214, for this proposition. *See* 105 Fed. Cl. at 270. Though *General Dynamics* was about the application of CAS 412 and the calculation of retirement plan forward pricing rates rather than a plan curtailment or segment closing, we, nevertheless, find the circumstances similar enough to the application of CAS 413 to come to the same conclusion (as did the Court of Federal Claims in *Raytheon*). Moreover, we have long held, in general terms, that the burden of proof is on the government to prove noncompliance with CAS. *E.g.*, *Ball Corp.*, ASBCA No. 49118, 00-1 BCA ¶ 30,864 at 152,357-58.

[17] A segment closing is where the contracts of a "segment" (which, in general terms, is a division or subdivision of a company reporting to its home office) are separated or closed off from their pension costs, such as when the division is sold to another company or shut down. *Allegheny Teledyne*, 316 F.3d at 1374.

The government does not dispute that it has the burden of proof.

III. The CAS Required a Best Estimate of the OSERP's Assets and Liabilities Upon its Curtailment so That it Would be Able to Meet its Future Obligations to its Pensioners.

A foundational key to the dispute here is just what determination must be made at the time of the curtailment of benefits event. The relevant portion of the CAS, CAS 413-50(c)(12), begins as follows:

> If a segment is closed, if there is a pension plan termination, or if there is a curtailment of benefits, the contractor shall determine the difference between the actuarial accrued liability for the segment and the market value of the assets allocated to the segment, irrespective of whether or not the pension plan is terminated. The difference between the market value of the assets and the actuarial accrued liability for the segment represents an adjustment of previously-determined pension costs.

CAS 413-50(c)(12).

Despite its seemingly black-and-white nature, the parties interpret the preceding paragraph differently in a way that appears subtle at first blush, but may make a difference in the outcome of this appeal. The government view is backward-looking: that the adjustment is designed to ensure that all previous pension funding had been done correctly and not to look forward to what the pension's expenses and assets might be in the future (*see* gov't br. at 9 ("The adjustment answers the questions, 'What would the Parties have calculated as the annual costs of the Plan, had they known what the Plan's true earnings and liabilities would have been up to and including December 31, 2014.")).[18] NG is of the view that the adjustment is intended to set up the pension (as best as can be estimated) for the remainder of its existence (app. br. at 23-24). In support of its view, NG cites the Court of Federal Claims case of *Raytheon*, *supra*, which (citing multiple cases), stated, "'the end goal pursued by both the government and the contractor is to settle-up and pay their fair shares to ensure that the pension plans at issue are fully-funded to meet the promises made to the employee-participants covered by the pension plans.'" (App. br. at 24 (quoting *Raytheon*, 105 Fed. Cl. at 240) The cases cited by the Court of Federal Claims in *Raytheon* are not as direct on this point as that opinion is, nevertheless, we find this short synthesis to have the virtue of making sense, for what other purpose is to be served if the balancing of liability and assets is not meant to set the

[18] To be fair to the government, it is looking backwards towards past estimates of future expenses, so it does not completely ignore the fact that the expenses lie in the future (*see* tr. 2/17-19).

pension plan up to cover the contractor's employees once it is closed? Of more legal consequence, when *Raytheon* was appealed to the Federal Circuit, our supervisory court agreed with the trial court's approach, re-iterating that "the goal of a segment closing adjustment is to determine the present value of the pension plan at the time of the segment's closing and to adjust the plan's value to ensure it is fully-funded to meet the promises made to the plan's participants." *Raytheon v. United States*, 747 F.3d 1341, 1346 (Fed. Cir. 2014).

The government's basis for challenging *Raytheon* (the government argument was about the Court of Federal Claims case, not the Federal Circuit opinion reviewing it because NG had not cited it in its opening brief, although this makes no difference to the argument) is that it is inapplicable, since that case involved a segment closing and not a plan curtailment as we address in today's appeal (*see* gov't br. at 13-14). This is not a particularly compelling argument: the procedures required by CAS 413-50(c)(12) apply to when "a segment is closed, if there is a pension plan termination, or if there is a curtailment of benefits," thus, the provision makes no distinction between how segment closings and curtailments of benefits are to be treated. CAS 413-50(c)(12).

We finally note that the CAS requires that the contractor use its best estimates when determining the values of a pension plan's assets and liabilities. The CAS Board's Prefatory Comments to the 1995 Revisions to CAS 412 and 413 (comments we may and should consider in interpreting the CAS as previously noted) included a response to a comment regarding a particular type of cost accounting. This response referred to "the requirement that actuarial assumptions be individual best-estimates of future long-term economic and demographic trends . . . ." Cost Accounting Standards for Composition, Measurement, Adjustment, and Allocation of Pension Costs, 60 Fed. Reg. 16,533, 16,539 (Mar. 30, 1995) (reproduced at app. supp. R4, Tab 101 at A-23). Consistent with these comments, CAS 412-40(b)(2) states directly that "[e]ach actuarial assumption used to measure pension cost shall be separately identified and shall represent the contractor's best estimates of anticipated experience under the plan, taking into account past experience and reasonable expectations." To be sure, the adjustment at issue here is being undertaken under the auspices of CAS 413, not 412, but we have previously applied the CAS 412-40(b)(2) "best estimates" requirement to CAS 413 adjustments, *see Gould, Inc.*, ASBCA No. 46759, 97-2 BCA ¶ 29,254 at 145,544-46, and see no reason to depart from this sensible approach. Using the best estimates, of course, is consistent with the notion of attempting to obtain the most accurate determination of the balance between assets and liabilities as the plan is curtailed.

IV. NG's Use of the RP-2014 Mortality Tables Was The Best Way to Estimate the OSERP's Liabilities and was Consistent With the CAS

As a simple matter of fact, the RP-2014 mortality tables provide superior data for determining the OSERP's liabilities than their predecessor, the RP-2000 tables. Indeed, the government's sole objection to the use of the RP-2014 tables was that NG had not

used them prior to the curtailment event and thus, in the government's view, they were not "consistent" with the earlier actuarial assumptions made in valuing the OSERP (gov't br. at 5-9). During the hearing for this appeal, the undersigned asked the government's actuarial expert, Mr. Richard Olness, whether he "would . . . have a problem with using [a hypothetical] RP-2013 table for the . . . curtailment event" had it been available and NG begun to use it the year before, to which Mr. Olness responded, "I think not." (Tr. 2/20) Thus, the question is whether, and under which circumstances, the CAS permit contractors to update their actuarial assumptions[19] in the plan curtailment calculation set forth in CAS 413.50(c)(12).

The CAS provision relied upon by the government to preclude the use of RP-2014 because it was not utilized in prior years is CAS 413-50(c)(12)(i) (*see* gov't br. at 5-6)[20] which provides in relevant part that, "[t]he actuarial assumptions employed [in determining actuarial liability] shall be consistent with the current and prior long term assumptions used in the measurement of pension costs." Thus, in the normal course of events, contractors are prohibited from revising their actuarial assumptions as part of the settling-up process. *See General Motors Corp. v. the United States*, 78 Fed. Cl. 336, 343 (2007).

However, we also note that the Prefatory Comments to the 1995 Revision of CAS 412 and 413 which was cited above to support the use of best estimates of future liability, quoted in larger part provides:

> Consistent with the requirement that actuarial assumptions be individual best-estimates of future long-term economic and demographic trends, this final rule requires that the assumptions used to determine the actuarial liability *be consistent with the assumptions that have been in use.* This is consistent with the fact that the pension plan is continuing even though the segment has closed or the earning of future benefits have been curtailed. *The [CAS] Board does not intend this rule to prevent contractors from using assumptions that have been revised based on a persuasive actuarial experience study* or a change in a plan's investment policy.

60 Fed. Reg. 16,533, 16,539 (reproduced at R4, tab 101 at A-23) (emphases added).

Although the government argues that these provisions specifically preclude the use of data in a curtailment calculation that has not been used in previous annual pension

[19] Contractors are required to disclose the actuarial assumptions used to measure pension cost. CAS 412.40(b)(2).

[20] The government's brief refers to CAS 413-50(a)(12)(i) rather than CAS 413-50(c)(12)(i) (emphasis added), but that was plainly a typographical error.

calculations, the situation here appears to be exactly the type of "persuasive actuarial experience study" contemplated by the CAS Board in its comments, and we do not perceive the CAS to be so inflexible as to require the use of prior assumptions that were replaced after the most recent CAS 412 disclosures.

We apply this regulatory construction to the facts here. By October 2014, before the OSERP's curtailment calculations began, NG made the corporate decision to use the RP-2014 tables. By virtue of this date alone, we could conclude that NG's "current" actuarial assumptions at the time of the curtailment were to use the RP-2014 tables. Moreover, as we concluded in our findings of fact, NG's move to the RP-2014 tables, as being part of a much larger decision, was made for the reason of using the most accurate tables and not as a subterfuge to increase calculated actuarial liability and obtain more money from the government.[21] We conclude then, that use of the RP-2014 tables was consistent with the CAS Board's guidance and was allowable.

V. NG's Consideration of the Effect of Income Taxes Upon the OSERP's Assets Was Not Consistent With The CAS, But Did Not Constitute A Material Violation Because Consideration of Taxes as an Expense Was Permissible and Leads to the Same Result

There are two issues before us involving the payment of income taxes by the OSERP. The first is whether the valuation of the OSERP's assets as of December 31, 2014 (the date of closure) should have included the more than $4 million that NG had paid on the trust's behalf but for which it had not yet sought reimbursement at the time of the curtailment. The second is whether, NG, by including the effects of taxes in its investment return calculations, materially violated the CAS. In each instance, we find that the government has not demonstrated a material violation.

[21] Had we found otherwise, it may have affected our finding that the change in these actuarial assumptions was based upon persuasive actuarial study or was NG's "best estimate." In *Gould*, for example, we held that a contractor's changing its mortality tables solely for purposes of taking advantage of its "last chance" to adjust its actuarial liability (to its benefit) in a segment closing was not in compliance with the CAS because it suggested that the contractor had different "best estimates" for purposes of CAS 412 and CAS 413. *See* 97-2 BCA ¶ 29,254 at 145,544-46; cf. *General Dynamics Corp. v. Panetta*, 714 F.3d 1375, 1379 (Fed. Cir. 2013) (contractor's attempts to change actuarial assumptions to take advantage of short term changes to its advantage rejected). Interestingly, the government neglected to cite to *Gould*, which appears to be the closest case on point for this issue, but the case is distinguishable from our case here in any event because by the time of the OSERP's curtailment, the RP-2014 standard was considered NG's "best estimate" across all of its pension plans.

A. The Adjustment to the OSERP's Liability for Taxes Already Owing to NG Was Allowable

There is no dispute between the parties that taxes on the earnings of a Rabbi trust "are a valid expense of the pension plan . . . ." *See* 60 Fed. Reg. 16,533, 16,538 (reproduced at app. supp. R4, tab 101 at A-22) (CAS Board's response to public comments regarding proposed 1995 changes to CAS 412 and 413). There is also no dispute (because the parties stipulated to it) that NG paid approximately $4,151,494 in taxes on behalf of the OSERP in the ten years of its existence prior to curtailment, but did not receive compensation for this until June 2017, some two and a half years after the curtailment event. To the government, this means that the expense had not been incurred as of the date of the curtailment and thus it must not be included in the calculation (gov't br. at 3-5).

While we agree that NG's relatively loose handling of the trust's obligations to compensate NG for incurred income taxes (as detailed in the government's brief) make this a closer call than it otherwise would be, we are persuaded as a matter of fact, especially given the parties' respective burdens of proof, that the tax obligation was a cost incurred prior to the curtailment event and should properly have been considered in adjusting the OSERP's valuation. We come to this conclusion for the simple reason that the undisputed evidence is that the trust owed this money to NG as noted in our findings of fact. To be sure, the terms of the trust (until amended more than a year after the curtailment) did not explicitly address its tax obligations to NG, but those terms did not explicitly hold otherwise, either. Since the trustee willingly made the change "to clarify" the trust's obligations, we found that it was an obligation of the trust to NG incurred at the time of the payment. Certainly, as a matter of its own self-interest, it would make no sense for NG to have intended to absorb these costs itself when, as a corporate cost, they would not be reimbursable by the government, *see* FAR 31.205-41(b)(1), but as a trust cost, the tax costs would be largely paid by the government (as properly allocated). Thus, we conclude that the taxes on the earnings of trust assets were always intended to be paid by NG but reimbursed by the trust and that the trust's payment to NG for them was appropriately accounted for by NG under CAS 413-50(c)(12).[22]

[22] As discussed in more detail below, CAS 412-50(a)(5) requires that the taxes be treated as an administrative expense of the plan and not as a reduction to the earnings assumption, which is how NG, in fact, accounted for the taxes. Thus, it appears that NG failed to record the taxes as an expense in the proper cost accounting period. While CAS 413-50(c)(12) permits the pension surplus or deficit to be recognized as a current period adjustment to previously determined pension cost, it is not clear that it permits the contractor to assign prior period costs, not previously charged to the government, to the current cost accounting period. This possible CAS non-compliance may be the origin of the government's assertion at the hearing that the CAS requires current period reimbursement by the trust for the taxes to be allowable (tr. 1/204-05). However, the government does not make this

B. Considering The Value of the Assets as to be Discounted by Future Taxes, Though Improper, Was Not Materially Different Than the Permissible Practice of Considering Taxes to be an Expense

The most difficult challenge for NG in this appeal is how to reconcile its actuarial approach of reducing its investment rate of return by taking account of taxes with the provision of the CAS that specifically precludes that practice. CAS 412-50(a)(5) is the relevant provision, which states in material part:

> Income taxes paid from the funding agency of a nonqualified defined-benefit pension plan on earnings or other asset appreciation of such funding agency shall be treated as an administrative expense of the fund and not as a reduction to the earnings assumption.

Thus, NG's approach appears to be explicitly forbidden by the CAS, a fact that does not miss the attention of the government, which argues that, in the CAS 413 final true-up, NG should not have used an investment return rate of 4%, but, instead, should have used the 6.15% before-taxes rate for estimating the value of OSERP assets (gov't br. at 12-13, 15). As far as taxes-as-costs goes, the government argues that the use of the word, "paid" (past tense) in the CAS provision cited above means that the CAS forbids projecting future taxes in the CAS 413 context (*see* gov't br. at 12) and appears to argue that we read this as meaning that NG can claim tax costs on the OSERP as it incurs them in the future (gov't br. at 13). For reasons to be discussed below, this would be extraordinary.

NG's response is, initially, not so compelling. In general, it urges us to view the government's reading of the CAS as "hyper-technical" (app. br. at 1, 27, 53) which, on its face, only means that it is correct. More persuasively, NG points us to FAR 30.602(c)(1), Materiality, which provides that the government should make no adjustment to the contract when there is no material cost difference due to the CAS violation. NG argues that calculating the investment return as discounted by the percentage of taxes applicable to them provides the same result as calculating the return and then factoring in the taxes as an administrative expense, meaning that the difference in numbers is immaterial and its violation of the CAS is of no moment. (App. br. at 37-38) As a demonstration of this materiality defense, NG points us to the fact that DCAA and the CO long recognized what it was doing and were satisfied that the OSERP was CAS compliant – at least until 2014 (app. br. at 37-39).

> argument in its post-hearing brief (gov't br. at 7-8), and consents to other non-current period adjustments to the pension balance that accrue to its favor. Thus, though we decline to go down this rabbit-hole today, this opinion should not be read as making a finding, one way or another, whether the government could successfully advance this argument in future appeals.

The government's acceptance of NG's pre-2014 OSERP projections does reflect that, as a matter of mathematics, the figures were the same, but it does not explain why the CAS (as interpreted by NG) would have made the distinction between making taxes an administrative expense as opposed to the more straightforward reduction in earning.[23] In short, if our interpretation of this CAS provision was that it made no difference, we would be presented with a regulatory interpretation that left portions of it "inoperative or superfluous, void or insignificant," an interpretation that is disfavored by the law. *See, e.g.*, *Baude v. United States*, 955 F.3d 1290, 1305 (Fed. Cir. 2020) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). We refer to this as "the nullity problem."

But, although the distinction between taxes as an expense and taxes as a reduction in earnings may be non-existent for purpose of CAS 413 adjustments, that is not the case in the matter of CAS 412, dealing primarily with annual pension costs, which is where the subject provision resides. NG argues that, in the case of annual pension costs, taxes as an expense would be realized the year in which they are paid, while a reduction in earnings would be reflected in the year of those earnings – one year earlier (app. br. 45-46; *see also* tr. 1/134-35 (response from NG's expert to question from the undersigned)). This one-year difference could have a material effect on the actual costs charged to the government if the taxes are not identical from year to year (and they would unlikely be). The government does not respond to this argument. Thus, we are satisfied that NG's construction of CAS 412-50(a)(5) in which there is no material difference between taxes-as-expenses and taxes reducing investment income for purposes of CAS 413 adjustments but there is a material difference for purposes of calculating annual expenses, is a satisfactory resolution of the nullity problem.

This leaves the government's remaining argument, that "taxes paid" must be past tense, and therefore they cannot be projected as an expense. This argument would be more persuasive if the past tense language in CAS 412-50(a)(5) were, instead, found in CAS 413-50(c)(12), the subsection governing segment closings and plan curtailments. To be sure, as noted above, we apply the CAS 412 standards to the CAS 413 calculations, but we cannot ignore the fact that CAS 412 was written for annual valuation of pension plan costs, while the governing CAS 413 provisions are aimed at making final adjustments to the pension plans for the rest of their foreseeable lives. Under those circumstances, relying on the tense of the verb "pay" for taxes as used in CAS 412 is far too slender a reed for the government's interpretation to rest upon.

[23] NG does not make the argument that the government's prior acceptance of its approach should act as a waiver of its compliance (*see* app. br. at 38 (disclaiming the argument)). That is wise, because we have held that, absent affirmative misconduct, the DCAA's prior allowance of improper indirect cost submissions does not act as such a waiver. *Tech. Sys., Inc.*, ASBCA No. 59577, 17-1 BCA ¶ 36,631 at 178,387.

Importantly, were we to read this section of the CAS as the government would have us, we would be presented with an untenable interpretation of CAS 413-50(c)(12). As we understand it, the government argues that, if NG encounters tax expenses on the OSERP in future years, those expenses would be "recovered" by NG "in the same way it recovers future administrative expenses of the Plan." (Gov't br. at 13) In other words, the government is arguing that administrative expenses (which include taxes) can be recovered by the contractor in the years following the CAS 413-50(c)(12) adjustment.[24] It is not clear just *how* that would occur, because we are aware of no CAS provision that permits the annual recouping of expenses on pensions allocable to segments in the years *after* they are closed or of pensions that have been curtailed *after* the curtailment, and the government has pointed us to no such provision. Moreover, such an adjustment would be contrary to the point of CAS 413-50(c)(12), which, as discussed above, is to "determine the present value of the pension plan at the time of the segment's closing and to adjust the plan's value to ensure it is fully-funded to meet the promises made to the plan's participants." *Raytheon*, 747 F.3d at 1346. The CAS 413-50(c)(12) process does not envision the contractor continuing to go to the well of the government as it incurs new expenses – for in the case of a segment closing, such a return would not be possible.

Indeed, the government's interpretation, which allows for annual recoupment of administrative costs after the segment closing or plan curtailment, is also contrary to the CAS's view of how to address future administrative expenses. As NG points out (app. reply br. at 16-17), CAS 413-30(a)(2)[25] includes the present value of *future* administrative expenses in its definition of actuarial accrued liability. And, of course, the CAS 413-50(c)(12) calculation is all about actuarial accrued liability (and the market value of plan assets). Thus, the CAS 413-50(c)(12) calculation includes future administrative expenses (of which taxes are a species), and they are not put off for some future reckoning.

Thus, we conclude that considering taxes in estimating the OSERP's actuarial accrued liability was not CAS-compliant, but that the result here, of calculating them as a discount to the interest rate applied to the plan's investments, was not material and generated an identical result, which we need not revisit.

[24] Surely, government counsel cannot intend to open the door to contractors seeking such expenses annually.

[25] Actually, NG's brief cites CAS 412-30(a)(2), which has an apparently identical definition of actuarial accrued liability. We believe the same definition's location in CAS 413 more persuasively advances NG's argument.

CONCLUSION

The appeal is sustained in whole. We understand that the government has already begun compensating NG for some of the funds that the CO acknowledged were due and owing to it. This appeal is remanded to the parties to calculate the amount currently due and owing from the government to NG.

Dated: October 7, 2020

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

I concur

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

I concur

DAVID D'ALESSANDRIS
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. 61775, Appeal of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

Dated: October 7, 2020

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Alloy Surfaces Company, Inc.	)	ASBCA No. 59625
	)	
Under Contract No. W15QKN-04-D-1002-0014	)	

APPEARANCES FOR THE APPELLANT: David Z. Bodenheimer, Esq.
Jason M. Crawford, Esq.
Jason C. Lynch, Esq.
Crowell & Moring LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Scott N. Flesch, Esq.
Army Chief Trial Attorney
Harry M. Parent III, Esq.
Robert B. Neill, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE WOODROW

This appeal involves a dispute as to the pricing of a delivery order (DO) for the manufacture of M211 infrared countermeasure decoy flares. Appellant Alloy Surfaces Company, Inc. (Alloy or appellant) held an Indefinite Quantity/Indefinite Delivery (IDIQ) contract with the United States Army (Army or government) for the procurement of M211 Infrared Countermeasure Decoys, which are fired from helicopters to avoid heat-seeking rounds. The Army awarded the contract in January 2004. In April 2006, the government requested a proposal for a substantial quantity of additional M211s to be procured under DO 0014 (DO 14).

During 2006, appellant was in the process of automating certain manufacturing processes and bringing two additional plants on-line. By early September 2006, Alloy completed DO 13, utilizing its automated manufacturing processes at its original plant.

Appellant submitted its proposal for DO 14 in April 2006. Its proposal did not contain any material and labor usage data related to DO 13; rather, it contained similar data from earlier jobs which were produced without the automated processes utilized in DO 13. In August 2006, the government and appellant began negotiations on the proposal which ultimately led to Modification No. P00025 and DO 14.

The government contends that it relied on defective material and usage rates when it negotiated the price for DO 14 and that it agreed to a higher price than it would have if it had access to the DO 13 data. On July 24, 2014, the contracting officer (CO) issued a Contracting Officer's Final Decision (COFD) asserting that

appellant provided defective cost or pricing data to the Army during the negotiation leading to the award of DO 14. The Army seeks $15,920,212 plus interest. This appeal followed. Both entitlement and quantum are before us.

We hold that job cost sheets prepared by Alloy during the production of DO 13 were management tools that contained both factual and judgmental information, but did not possess the requisite degree of certainty necessary for providing certified cost data to the government. In particular, at the time of price agreement on September 25, 2006, the reports were not sufficiently certain to be certified as "cost and pricing data" pursuant to the Truth in Negotiations Act, 10 U.S.C. § 2306a.

Finally, we hold that the Army fully was aware of the effect of automation on the pricing for the flares, but chose instead to rely on manufacturing data from earlier, non-automated jobs. As the Army acknowledged during its negotiations, the pricing of the non-automated jobs best reflected a compromise between the increased efficiency of automation and the inefficiency of increasing production. We conclude that having the data from DO 13 would not have shed light on the anticipated inefficiencies of qualifying new plants, installing new equipment, and hiring new workers, and, ultimately, would not have changed the price the government negotiated with Alloy. We sustain the appeal.

FINDINGS OF FACT

I. Prior Contract History

1. On July 7, 1999, the Army awarded Contract No. DAAE30-99-C-1084 (the 1999 contract) to Alloy for the production of a quantity of 6,800 M211 decoy flares (R4, tab 60 at 3; answer at 38).

2. The Army issued Modification No. P00041 under the 1999 contract with an effective date of March 28, 2003 (answer at 3). Modification No. P00041 is also known as Job No. 1516 (R4, tab 80 at 8; tr. 1/84-85).

3. In August 2005, Alloy completed delivery of 120,553 M211 decoy flares under Modification No. P00041 (Job 1516) (R4, tab 80 at 8).

II. The Base Contract

4. On January 23, 2004, the Army awarded Indefinite Quantity/Indefinite Delivery (IDIQ) Contract No. W15QKN-04-D-1002 (the 2004 contract) to Alloy for the procurement of 700,000 M211 Infrared Countermeasure Decoys (decoys, flares,

M211s, or M211 decoys), with a maximum value of $25,914,000 (R4, tab 1 at 3, 10, tab 74 at 5-6). Subsequent contract modifications progressively increased the maximum ceiling price to $200,548,507.00 (R4, tab 74 at 3).

5. Infrared countermeasure flares, or decoys, are devices used to protect helicopters from heat-seeking missiles. The M211 decoy consists of a metal case that's nominally an inch square and eight inches long, filled with between 2,500 and 3,000 thin metal foils that have a special coating on them that reacts in the air to perform their countermeasure work to decoy heat-seeking missiles. (Tr. 1/179).

6. The 2004 contract incorporated Federal Acquisition Regulation (FAR) clauses 52.215-10, PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (OCT 1997), and 52.215-11, PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA – MODIFICATIONS (OCT 1997) (R4, tab 1 at 35). According to FAR § 15.407-l(b)(l), "[t]he clauses give the Government the right to a price adjustment for defects in certified cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor." FAR § 15.407-1(b)(1).

A. Previous Delivery Orders for M211 Decoy Flares

7. Prior to the award of DO 14 at issue in this appeal, the Army issued other delivery orders to Alloy for M211 decoy flares under the 2004 contract (answer ¶ 8). These delivery orders included:

- Delivery Order 1 on February 5, 2004 (R4, tab 2).
- Delivery Order 6 on June 17, 2005 (R4, tab 25).
- Delivery Order 7 on October 10, 2005 (R4, tab 30).
- Delivery Order 8 on November 23, 2005 (R4, tab 34).
- Delivery Order 11 on January 26, 2006 (R4, tab 44).
- Delivery Order 13 on May 16, 2006 (R4, tab 52).

8. Alloy assigned job numbers relating to the work under both Modification No. P00041 (1999 contract) and the above delivery orders (2004 contract at issue):

Army Contract Reference	Alloy Job No.
Modification No. P00041	Job No. 1516
Delivery Order 1	Job No. 1528

Delivery Order 6	Job No. 1573-1 Job No. 1573-2
Delivery Order 7	Job No. 1596
Delivery Order 8	Job No. 1601
Delivery Order 11	Job No. 1611
Delivery Order 13	Job No. 1626

(Compl. ¶ 8)

9. Army CO Sandra LaBell signed and awarded DO Nos. 6, 7, 8, 11, and 13 (R4, tabs 25, 30, 34, 44, and 52).

10. The Army knew that DO Nos. 6, 7, 8, 11, and 13 had been produced in Plant 1. In its cost proposal for DO 14, Alloy stated that it would add substantial amounts of equipment, including expanding Plant 2, starting production at Plant 3, and hiring 234 new employees. (Tr. 1/178; R4, tab 50 at 3; app. supp. R4, tab 2; tr. 1/61-62)

1. Delivery Order 13 Introduces More Efficient Manufacturing Processes

11. On May 16, 2006, the government placed DO 13 against the contract (R4, tab 52).

12. DO 13 called for the fabrication, test, and delivery of 33,379 M211 decoys in two lots, with a portion to be used for lot testing (R4, tab 52 at 5, tab 96 at 7).

13. DO 13 was produced in Plant 1, but, unlike previous delivery orders, Alloy manufactured DO 13 using all-new automated processes (tr. 2/180; R4, tab 96 at 8-9). The Army was aware that DO 13 was produced in Plant 1 (tr. 3/45-46).

14. In particular, the manufacturing process for DO 13 included the use of auto-loaders, the one-step bake, and the auto epoxy processes. When combined, these processes produce efficiencies in labor usage and material usage. (R4, tab 96 at 8-9)

15. Pursuant to the Production Prove-Out Contract No. W15QKN-04-1002, the Army reviewed and approved each step of the automated production process used

to manufacture M211 decoys in Plant 1. (R4, tab 60 at 3; tr. 1/136; app. supp. R4, tabs 13-24).

2. Delivery Order 14 Required Substantial Production Ramp-Up

16. To increase the volume and rate of M211 production, the Army initiated two interrelated procurement actions. First, it negotiated Modification No. P00025 to raise the quantity ceiling and establish prices for issuing DO 14. Second, it supported a Production Prove-Out effort to increase Alloy's M211 production capacity and rate (R4, tab 60 at 3).

17. As explained in the Army's August 9, 2006 Business Clearance Memorandum, these procurement actions were necessary to support the increase in production quantity to support Operation Iraqi Freedom, and Operation Enduring Freedom, and the Global War on Terrorism (R4, tab 60 at 3).

18. DO 14 required the largest production ramp-up for delivering M211 decoy flares under either the 1999 contract or the 2004 Contract (answer at 43; tr. 1/63, 2/202-03).

19. At the time of the Army's request for a price proposal for DO 14, in April 2006, Alloy was producing M211 units against the IDIQ contract at a rate of 25,000 – 35,000 units per month, of which the referenced DO Nos. 6, 7, 8, 11, and 13 were included. The Army's request in April 2006 required Alloy to dramatically increase output, tripling Alloy's output to 80,000 units per month. (R4, tab 78 at 1; tr. 2/210-11)

20. Alloy explained, in its April 18, 2006 proposal, that "2006 is a major ramp-up year for ASC" and it was "ramping-up from 37,000 units/month to 80,000 units/month" (R4, tab 50 at 3). The Army's witnesses did not challenge this assertion (tr. 1/58, 2/70).

21. In order to meet the Army's increased demand for decoy flares, Alloy opened two additional plants for the manufacture of decoy flares, known as Plants 2 and 3 (tr. 4/10-11, 37). In total, Alloy would have three plants and approximately 240-250 employees involved in decoy flare production (tr. 4/37).

22. For the ramp-up for DO 14, Alloy advised the Army that it would need to "add substantial amounts of equipment and will be hiring 234 new employees, most of who will be working on this effort" (R4, tab 50 at 3).

23. The ramp-up effort was necessary in order to be able to produce at the levels needed for DO 14 within the time frames required by the Army (tr. 2/67, 103).

24. DO 14, when awarded, would use the same type of automated equipment used on DO 13 (R4, tab 96 at 2).

25. On March 30, 2006, Alloy's Chief Financial Officer (CFO), Larry D'Andrea, sent an email to the CO stating that: "the pricing for the M211s are extremely complex due to the manufacturing from 3 plants (two of which are new for M211s production) and due to incorporation of ramp-up assumptions" (app. supp. R4, tab 2).

26. According to Mike Mignogna, Alloy's Vice President of Operations, the ramp-up associated with DO 14 would require Alloy to obtain permitting and expand M211 operations to two new plants; pass first article testing; qualify and install new equipment; and hire and train new employees (tr. 4/64-66).

27. Before Alloy could use a new piece of equipment it had to be qualified: "[t]he Army required qualifications, which – on every piece of equipment, so we had to actually qualify, write a report, get the approval and, you know, it was a big process." (Tr. 4/66)

28. The Army knew that DO 14 would require new employees (R4, tab 50 at 3).

3. The Army Required Prior Notice and Approval before Adding New Equipment or Processes for M211 Production

29. Pursuant to the First Article Clause, Alloy was required to give prior notice and obtain Army approval before adding new equipment or processes for M211 production (app. supp. R4, tab 16 at 1; tr. 4/66).

30. During the DO 14 negotiations, the Army, including the CO, knew which automation equipment had been qualified and approved for M211 production (tr. 1/136; 2/102).

31. The Army understood that Alloy would be ramping-up from 37,000 units a month to 80,000 units a month, based upon their involvement in the Production Prove - Out Proposal and contract (tr. 1/58-59, 2/69-70).

32. As the person who signed off on the qualification reports for the M211 production equipment, CO LaBell was aware that Alloy would be adding substantial amounts of new equipment to Plant 2 and Plant 3 for this production proposal (tr. 1/59-60).

B. Negotiations for Delivery Order 14

1. Key Government Personnel and Technical Team's Role

33. Key individuals involved in the government's negotiation of DO 14 (R4, tabs 73-74), included Ms. LaBell, the procuring CO, and Mr. David M. Dreifus, engineer.

34. Ms. LaBell is an Associate Director at Army Contracting Command – Picatinny Arsenal, New Jersey. Ms. LaBell's 37-year career in acquisition at Picatinny includes approximately eight years as a CO; she was the CO at the time of the negotiation at issue in this appeal. (Tr. 1/21-23)

35. Ms. LaBell first became involved with appellant's contract in 2004, when she became a contracting officer and issued delivery orders against the original contract (tr. 1/25). She communicated with appellant's employees Larry D'Andrea and Karen Justman regarding those delivery orders (tr. 1/25).

36. Mr. Dreifus is an engineer currently employed by the Army's Armaments Research, Development and Engineering Center at Picatinny Arsenal in New Jersey (tr. 1/166-67).

37. Mr. Dreifus was involved in a number of roles on appellant's M211 infrared countermeasure decoy contract (tr. 1/171-72). Mr. Dreifus was involved in first article testing, lot acceptance testing, and qualification testing of appellant's production equipment as appellant did production ramp-up and production capability ramp-up (tr. 1/172).

38. Mr. Dreifus also was involved in supporting the contract negotiations resulting in Modification No. P00025 and DO 14 (tr. 2/20-21).

2. Alloy's April 2006 Price Proposal

39. On April 18, 2006, Alloy submitted its cost proposal, which identified the different materials needed for each unit of M211 production. Similarly, the proposal identified what types of labor operations would be required and how many hours (or fractions of an hour) would be needed for each M211 labor operation. (R4, tab 50 at 8-15; tr. 1/199)

40. In its April 18, 2006 proposal, Alloy explained that "2006 is a major ramp-up year for ASC" and it was "ramping-up from 37,000 units/month to 80,000

units/month[.]" Alloy further explained that it "will add substantial amounts of equipment and will be hiring 234 new employees, most of who will be working on this effort." (R4, tab 50 at 3)

41. The CO understood that Alloy would be ramping-up from 37,000 units a month to 80,000 units a month (tr. 1/58). She had this understanding based upon her oversight of the Production Prove-Out proposal and contract and her awareness of the status of the ramp-up operation (tr. 1/58, 2/70).

42. Alloy produced decoy flares for DO Nos. 6, 7, 8, 11, and 13 in Plant No. 1 (tr. 2/178, 3/52).

43. Alloy produced decoy flares for DO 14 in Plant Nos. 2 and 3, rather than Plant No. 1 (R4, tab 78 at 2; tr. 1/122).

44. Appellant's April 18, 2006 proposal incorporated a 10 percent factor for a negative learning curve, essentially asserting appellant's increased automation would, at least initially, yield diminished returns due to a need to hire and train personnel. That 10 percent negative learning curve factor came from appellant's Vice President of Operations, Mike Mignogna, working with his team. (Tr. 4/38, 90) The 10 percent learning curve factor took into consideration all the inefficiencies with new employees, new equipment, and new plants that would be needed for the contract (tr. 4/38).

45. CO LaBell "agreed that they [Alloy] would be hiring new employees to ramp-up." (Tr. 1/61-62) Mr. Dreifus understood that it was going to take a lot of new employees working on the M211 production to handle the ramp-up associated with DO 14 (tr. 2/72).

46. Both CO LaBell and Mr. Dreifus agreed that, in their experience, new employees are generally less efficient than existing employees (tr. 1/62, 2/73).

3. Army's Initial Technical Evaluation

47. Prior to negotiations, the Army contracting office asked Army engineers David Dreifus, Franki Fong, and Adrian Nitu-Solomon (the "technical team") to perform a technical evaluation of Alloy's April 18, 2006 cost proposal including the quantities of material, types of material, quantities of labor, and types of labor that Alloy had proposed (R4, tab 60; tr. 1/185-86, 193-94).

48. On May 17, 2006, the Army technical team submitted to CO LaBell its "Technical Evaluation to Cost Proposal Regarding Contract W15QKN-04-D-1002 for delivery quantities of 450k to 950k, Revision 1-2" (R4, tab 60 at 39; answer at 6).

49. Mr. Dreifus did much of the drafting of the technical evaluation memorandum, and agreed with technical evaluation findings set forth in the report (tr. 2/75).

50. Mr. Dreifus understood that CO LaBell and contract specialist, Ms. Robertson would be relying upon the Army's technical evaluation and he tried to make sure that the evaluation was done as well as he could (tr. 2/75-76).

51. In developing the technical evaluation, the Army technical team relied upon the following sources of information: (i) technical requirements; (ii) testing and inspection requirements; (iii) direct observation; (iv) production and delivery rates and schedules; (v) historical information about previously submitted proposals for M211 production; and (vi) engineering estimates (R4, tab 60 at 39; tr. 1/197-98, 2/76-77).

52. Within the initial technical evaluation, the Army technical team addressed all of the direct labor and direct material usage rates proposed by Alloy and evaluated whether the proposed rates were reasonable or unreasonable (R4, tab 60 at 41-49; tr. 1/199).

53. Where the technical team found a proposed rate unreasonable, the technical team took technical exception to the proposed rate, meaning that they disagreed with the rate Alloy had proposed (tr. 1/30-31; 1/199).

54. For labor usage, the Army developed its independent technical labor usage factor of 0.8062 hours per unit for a quantity range of 700,000-749,999 units (answer at 11; R4, tab 60 at 28; tr. 3/22-23). For a quantity of 750,000 flares, the Army developed an independent labor usage factor of 0.8064 hours/unit (R4, tab 60 at 28; tr. 3/23; app. supp. R4, tab 35). These estimates were based on the Army's own independent evaluation and judgment for producing M211 flares (answer at 11).

55. In its Initial Technical Evaluation, the Army prepared independent labor usage factors for all labor operations, including for the recoil, dry/bake, and slit/chop/load automated operations (R4, tab 60 at 30-31, 47-48).

4. Business Clearance Memorandum

56. On August 10, 2006, CO LaBell and Ms. Robertson, signed the Business Clearance Memorandum (BCM) for negotiating increased quantities of M211 decoy flares under the 2004 contract (R4, tab 60 at 2).

57. CO LaBell confirmed that the BCM used the same material and labor usage factors as those found in the Army's initial technical evaluation (R4, tab 60 at 6-9, 29-32, 41-42, 47-48;tr. 1/29-30).

58. The Army based its pre-negotiation positions upon labor and material usage factors reflected in the BCM and supported by the Army technical evaluation (R4, tab 60 at 6-9, 29-32, 41-42, 47-48; tr. 1/26-27).

59. For its pre-negotiation positions, the Army developed overall labor usage values based upon specific quantity ranges:

- 0.8062 labor hours for quantity range of 700,000 – 749,999 units.
- 0.8064 labor hours for quantity range of 750,000 – 799,999 units

(Answer at 11; tr. 1/153, 155; R4, tab 60 at 28)

60. For its pre-negotiation position, the Army prepared its labor usage estimate based upon its own independent evaluation and judgment (answer at 11).

5. Price Negotiations

61. Negotiations for Modification P00025 and DO 14 spanned the period of August 16 through September 25, 2006 (app. supp. R4, tab 6; answer at 7; R4, tab 71 at 3).

62. According to CO LaBell, everything discussed within the negotiation is captured in the Price Negotiation Memorandum (PNM) (R4, tab 71), which she drafted along with Ms. Robertson (tr. 1/32-33).

63. Additionally, the BCM, dated August 9, 2006, contains the government's pre-negotiation strategy and its initial technical evaluation (R4, tab 60).

64. On August 16, 2006, Ms. Robertson initiated negotiations by sending a letter to appellant and taking exception to appellant's proposed labor usage rates (app. supp. R4, tab 6; answer at 7).

65. That same day, Alloy responded by faxing a two-page breakdown of actual material and labor usage rates from two completed delivery orders, Alloy Job #1516 under the 1999 contract, which was completed in August 2005, and Alloy Job #1528 under the 2004 contract, which was completed in February 2006 (hereinafter referred to as Jobs 1516 and 1528) (app. supp. R4, tab 4). The August 16, 2006 fax set forth material usage data and labor usage data for Jobs 1516 and 1528, and included a weighted average of Jobs 1516 and 1528 for labor usage of 0.96444 hours/unit (app. supp. R4, tab 4).

66. Knowing that the learning curve involved some risk for appellant, Alloy built inefficiencies into its direct costs for its proposal (tr. 4/40).

67. On August 18, 2006, the Army took exception to Alloy's use of Jobs 1516 and 1528 as bases for proposed costs and identified specific labor operations where Alloy had gained greater efficiencies (app. supp. R4, tab 7; R4, tab 104). Specifically, the government argued that the labor usage rates should be lower due to increased process efficiency and improvements which had been introduced into the manufacturing process after the completion of DO 0001 (R4, tab 71 at 13).

68. The 10 percent negative learning curve became a point of discussion during negotiations. CO LaBell testified that Alloy's proposal originally contained a 10 percent risk factor, in addition to a higher proposed usage rate, and that during negotiations the parties agreed to remove the 10 percent risk factor in exchange for utilizing a weighted average of the job cost and data for Jobs 1516 and 1528 (tr. 1/159-160).

69. Mr. Dreifus participated in telephonic discussions with Alloy personnel during the negotiations. Mr. Dreifus testified that the parties discussed actual direct materials and labor usage rates for Alloy's M211 production in negotiations. (Tr. 2/25-26)

70. Mr. Dreifus testified that the government technical evaluators had concerns about the suitability of the actual usage rates that Alloy provided in negotiations because the government evaluators believed that the actuals for jobs 1516 and 1528 were not representative of the more automated state of Alloy's current production process (tr. 2/27-28).

71. On September 22, 2006, the Army technical team issued its final technical evaluation (R4, tab 69).

72. The PNM incorporated the Final Technical Evaluation's finding that "Some inefficiency may occur due to additional production rate ramp-up" (R4, tab 71 at 6-7, 13-17, tab 69 at 5-7, 14-19).

73. Regarding ramp-up inefficiency, the PNM stated: "The Government acknowledged that some inefficiency could occur due to additional production rate ramp-up" (R4, tab 71 at 13-16).

74. CO LaBell, who signed off on the PNM, testified:

> Q. When you signed off on the price negotiation memorandum, is it correct that you were signing off as the contracting officer representing the Government?
>
> A. Yes, I was. Yes.
>
> Q. When you signed off on the statement, the Government acknowledges that some inefficiency could occur due to additional production rate ramp-up, you were signing in your capacity as the contracting officer, correct?
>
> A. Yes.
>
> Q. You made this acknowledgement for at least four categories or material usage factors, steel, tantalum, liquid caustic, and aluminum, correct?
>
> A. Correct.
>
> Q. You also made this acknowledgement for every category of labor usage, except for test support, correct?
>
> A. Correct.

(Tr. 1/105-06; 1/116-17)

75. On September 25, 2006, the parties finalized their price negotiations for additional M211 flares (answer at 12).

76. The Army knew that its independent labor usage factors in its Initial Technical Evaluation were lower than what the Army negotiated for these factors.

M211 Labor Operations	Negotiated Labor Usage	Technical Evaluation Labor Usage
Recoil	0.04773	0.04314
Dry/Bake	0.14705	0.07874
Slit/Chop/Load	0.35000	0.22232

(R4, tab 71 at 14-15, tab 60 at 30-31; tr. 2/155-157)

77. Compared with the negotiated labor usage value (0.9704), the Army's known and disclosed labor usage value (0.73008) was about 24 percent lower than the negotiated value (tr. 3/66-69; app. supp. R4, tab 35).

6. The DO 13 Job Cost Report

78. In its COFD, the Army contended that Alloy had a duty to submit Work-in-Process (WIP) sheets during negotiations. Specifically, the Army contended that Alloy had a duty to provide the September 2006 job cost report for DO 13 to the Army during the price negotiations. (R4, tab 96 at 3-4, 9)

79. In the top left corner, the September 2006 job cost report for DO 13 (DO 13 WIP sheet) bore a date of September 24, 2006, which was a Sunday. This date identified the "month-end close date" or "cutoff period." (Tr. 4/22; app. supp. R4, tab 30) The Army does not contest that September 24, 2006 represented the cutoff date after which Alloy conducted a physical inventory count and reconciliation (tr. 3/60, 4/27-28; gov't br. at 29-30).

80. In the bottom right corner of the DO 13 WIP sheet, the date of Friday, September 29, 2006, appears (app. supp. R4, tab 30). This date is when the DO 13 WIP sheet became available to Alloy's management (tr. 4/22-23). Once the WIP sheet became available to Alloy's management, it was then verified through the reconciliation process (tr. 4/23). Appellant, typically closed its books on the last Sunday of the month (tr. 4/26; app. supp. R4, tab 30). Each month, appellant conducted a full reconciliation of its reports (tr. 4/26), to include a review of labor timesheets (tr. 4/27-28).

81. Mr. D'Andrea testified that the job cost reports show "standards as well as our actuals that are captured for the month and contract to date. It also gives an estimate to complete." (Tr. 4/21) He further explained that Alloy took significant steps to verify the data to the extent possible:

> Before we even close the books, we do an analysis, a summary of our results for the month. Then also we do a pro forma forecast to the end of the year in which you have to look at issues to complete your contracts, backlog, fills, forecasts, then what your profits are, and then attach [sic]. So, yes, we reviewed that."

(Tr. 4/25-26) According to Mr. D'Andrea, the whole purpose of the forecasts was to see if appellant was going to meet its budget, and sometimes to look ahead to the next fiscal year (tr. 4/26).

82. Alloy followed the practice of not furnishing WIP sheets because, prior to job completion and accounting reconciliation, the WIP report included judgmental information (tr. 4/14). At times, Mr. D'Andrea had seen substantial "variations" between the WIP data before doing reconciliation and after issuing the final report:

> I'd like to explain the WIP process and why WIP sheets are judgmental and aberrant. And at times, the WIP sheets when they're finalized could be very close to actuals. You don't have broad variations, but mostly we have seen larger variations and we got burnt and [sic] on many occasions.

(Tr. 4/15)

83. Mr. D'Andrea further explained why the WIP process involved judgment and variations, including the need to develop estimates for "equivalent units" prior to completing production and conducting the final inventory count (tr. 4/15-19; R4, tab 79 at 2, 11-14).

84. Mr. D'Andrea explained that considerable judgment was involved in allocating both labor and material to particular jobs. For example, several different types of metal are combined into a slurry which is used to manufacture M211 flares for the Air Force, Navy, and Army. The raw metals used in the slurry must be allocated to each job consistently. Similarly, labor hours must be allocated to separate jobs, even though individual workers are not charging their time to each separate job. The allocation is done by someone in the production department. The production department develops a usage rate for both material and labor, on a per unit basis, by dividing the allocated material and labor by the number of units produced. (Tr. 4/16-19)

85. WIP data for labor usage for different jobs exhibited significant volatility, showing variances of between 33 and 500 percent in labor usage for the same month on the same production line (R4, tab 81 at 5).

86. As the Alloy official responsible for signing the Certificate of Current Cost or Pricing Data, Mr. D'Andrea did not believe the WIP sheets to be sufficiently accurate to certify until after the job had been completed and the accounting data had been reconciled (tr. 4/18-19).

7. Whether the Army Requested the DO 13 Job Cost Report

87. CO LaBell testified that Alloy did not provide any material and labor usage rate data for DO 13 during the price negotiations for DO 14 (tr. 1/38-39). She stated that the government requested this data during negotiations (tr. 1/39), but Alloy stated that it would not disclose the data because it was WIP data, and a DD 250 had not been developed and submitted (tr. 1/40 (LaBell), 4/30 (D'Andrea).

88. During the course of Modification No. P00025 and DO 14 negotiations, the Army knew that Alloy had an established practice of not providing WIP sheets prior to completion of the job (app. supp. R4, tab 9, tab 12 at 4-5).

89. On direct examination, CO LaBell initially testified that the Army had requested WIP sheets for Delivery Order 13 during the negotiations for Modification No. P00025 and DO 14 (tr. 1/39). On cross examination, CO LaBell acknowledged that she never told Alloy that she needed the WIP sheets to award DO 14, nor that lack of WIP sheets would make the delivery order un-awardable (tr. 1/149). She also admitted that there was no written record for any Army request for WIP sheets (tr. 1/144), and, if a request had been made, it would have been in the contract files and documented in the PNM (tr. 1/144-45).

90. The PNM does not mention any Army request for data for DO Nos. 6, 7, 8, 11, or 13 (R4, tab 71).

C. Decision to Rely on Job 1516 and 1528 Data

91. Regarding the job cost spreadsheets at R4, tab 75 (tr. 1/43-49), CO LaBell testified the government did not have access to that data during negotiations and that "[t]his is the documentation we would have liked to have during negotiations." (Tr. 1/48)

92. CO LaBell acknowledged the government was under a time constraint to procure M211 decoys, explaining that there were two wars ongoing at the time and "time constraints just had to do with trying to get the flares to the soldiers." (Tr. 1/162)

93. When asked whether she had any options other than entering into the contract with the prices included in Mod. P00025, Ms. LaBell testified she could have awarded an undefinitized contract action (UCA), although she did not think that would have gained the government anything (tr. 1/49). She has issued UCAs many times, is familiar with the process, and has in the past obtained approval for such actions (tr. 1/150).

94. When asked about how DO 13 would have been used in negotiations, CO LaBell initially stated:

> It would have been a been a lower price to the Government, based on the information that we received from PO 41 and Delivery Order 1, it would have been a lower unit price.

(Tr. 1/44-45)

95. CO LaBell testified that Army Contracts would have referred the DO 13 data to the Army technical team, but did not say what the Army would have done:

> We would look at this, but we also would refer to technical. With this spreadsheet, it talks about the usage rate for the decoys, and then it talks about the actuals for the month. Then it also talks about the WIP, work in process. We would look at the various columns, and then we would discuss this with technical.

(Tr. 1/48; gov't br. at 32)

96. CO LaBell testified she signed Modification P00025 relying upon the certificate of current cost or pricing data, and on the assumption the government would be able to recover any defective pricing costs later:

> Q: You signed the Modification P00025 relying on upon the certificate current costs and pricing data, on the assumption that you would be able to recover any defective pricing cost later, correct?
>
> A: Correct.

(Tr. 1/151-52)

97. CO LaBell testified that the government used a weighted average as opposed to just the lower numbers on Job 1528 because the government "had to look at items and the experience that we experienced. For example, labor, as well as material, it depended on what we were experiencing at that time." (Tr. 1/160-61)

98. In 2006, soon after award of DO 14, CO LaBell was promoted out of her contracting officer position (tr. 1/51), and by 2012, CO LaBell was Associate Director at ACC Picatinny, and Ms. Heather Gandy had assumed the role of contracting officer on appellant's contract (tr. 1/443).

99. Mr. Dreifus testified that, "in the end there was a decision to go and use the actual 1516 and 1528 [data]. Because Alloy was unable or unwilling to provide any more recent and relevant information, despite our requests for it." (Tr. 2/31)

100. Mr. Dreifus testified that the government technical evaluators' concerns with the information that Alloy had provided are recorded in the final technical evaluation report.

101. For example, the government still took exception to the appellant's proposed usage rate for steel and believed that it should be lower and without any additional percentage. Mr. Dreifus stated in his hearing testimony that this was based on the appellant being more effective and efficient with new automated equipment. (Tr. 2/31-32)

102. Mr. Dreifus explained in his testimony that, in the end, the parties agreed not to incorporate appellant's proposed 10 percent negative learning curve. Instead, the parties decided to use the appellant's actuals from jobs 1516 and 1528 as the basis for the negotiated agreement (tr. 2/33-34, 4/38-40).

103. Mr. Dreifus explained that comments in the government's final technical evaluation that "some inefficiency may occur due to additional production rate ramp-up" were included in the technical evaluation report to try to capture statements by the appellant that it had concerns about production ramp-up (tr. 2/34-35).

104. Mr. Dreifus testified that the government did not attempt to quantify or to ask the appellant to quantify the inefficiency that may occur due to production rate ramp-up, because the appellant already had included a 10 percent negative learning curve as an attempt to account for the anticipated inefficiency, and because appellant already had a separate contract to compensate for its ramp-up activities (tr. 2/35-36).

105. For individual labor operations for Job 1528, the Army knew during negotiations that automation in Plant 1 had resulted in labor usage factors lower than those for Job 1528 disclosed in the August 16 fax. On August 18, 2006, the Army stated that "efficiencies" had already been gained over the "supplied actuals." (App. supp. R4, tab 7; tr. 1/86-91, 2/116-23)

106. For each labor operation for Job 1528 (except test support), the PNM and Final Technical Evaluation stated that labor usage would be lower than the actual usage hours under Job 1528 (R4, tab 71 at 13-17, tab 69 at 14-19).

107. On August 16, 2006, Alloy disclosed to the Army actual labor and material usage factors for Jobs 1528 and 1516 (app. supp. R4, tab 4). The PNM acknowledged receipt of this data: "Alloy submitted sheets which represented 'actuals'" for Jobs 1516 and 1528" (R4, tab 71 at 6-8, 13-16).

108. For individual labor operations for Job 1528, the Army knew during negotiations that automation in Plant 1 had resulted in labor usage factors lower than those for Job 1528 disclosed in the August 16 fax. On August 18, 2006, the Army stated that "efficiencies" had already been gained over the "supplied actuals." (App. supp. R4, tab 7; tr. 1/86-91, 2/116-23)

109. For each labor operation for Job 1528 (except test support), the PNM and Final Technical Evaluation stated that labor usage would be lower than the actual usage hours under Job 1528 (R4, tab 71 at 13-17 [labor usage "lower than that provided under DO 0001"], tab 69 at 14-19 [same]). The Army acknowledged that this meant that labor usage would be lower than the factors in the August 16, 2006 fax, due to increased process efficiency and improvement (tr. 1/109-111).

110. For material usage (steel, tantalum, liquid caustic, and aluminum), the PNM and Final Technical Evaluation stated that material usage would be lower than the actual usage hours under Job 1528 (R4, tab 71 at 6-8, tab 69 at 5-7). Mr. Dreifus stated that this meant that material usage would be lower than the factors in the August 16, 2006 fax (tr. 1/100, 2/126-127).

111. Mr. Dreifus testified that, although he provided a technical recommendation, the CO decided to use a weighted average of actual usage rates per decoy from the appellant's Jobs 1516 and 1528 data (tr. 2/36-37).

112. The Army technical team disagreed with the Army decision "made by someone else" within the Army to use the weighted average of Jobs 1516 and 1528:

> Q. So when you say a decision was made, you're saying that the decision was not made by you, Franki Fong, or Adrian Nitu- Solomon to use the weighted average. That decision was made by someone else, is that right?
>
> A. Yes. We had concerns about using those as predictors for the future.

(Tr. 2/113)

113. However, Mr. Dreifus did not explain how the Army technical team would have used the DO 13 data (tr. 2/121, 127).

D. Certification of Cost or Pricing Data and Award of DO 14

114. By letter dated September 26, 2006, Mr. D'Andrea, Alloy's CFO, certified that the cost or pricing data submitted for DO 14 was, to the best of his knowledge and belief, "accurate, complete, and current as of Monday September 25, 2006" (R4, tab 72).

115. On September 27, 2006, the Army awarded DO 14 to appellant in the amount of $57,037,602 for the procurement of 700,000 M211 decoys (R4, tab 74).

116. On Friday, September 29, 2006, the September job cost report for DO 13 was available to appellant's management. Mr. D'Andrea, who was responsible for negotiations on appellant's behalf, also was responsible for providing the monthly report to appellant's management. (Tr. 4/25)

117. Within the DO 13 labor usage data for August and September 2006, the only change in actual hours per unit across the two months was that "production support" increased from 0.0006 hours per unit in August 2006 to 0.0007 hours per unit in September 2006 (R4, tab 75 at 1-2). This corresponds to the 4.5 actual hours of labor for production support noted on the September 2006 report (R4, tab 75 at 2).

III. DCAA Audit

118. On June 21, 2011, DCAA initiated fact-finding for a post-award defective pricing audit relating to Modification No. P00025 and DO 14 (answer at 40; R4, tabs 76-77).

119. By letter dated July 1, 2011, Alloy responded to DCAA's inquiry and denied defective pricing (R4, tab 78).

120. In September 2011, DCAA issued a draft post-award audit report asserting defective pricing relating to DO 14 (answer at 14-15).

121. On October 18, 2011, Alloy submitted a written response to the DCAA draft audit and disputed the defective pricing allegations (R4, tab 79).

122. On February 10, 2012, DCAA issued its final audit report alleging defective pricing relating to DO 14 (R4, tab 80).

123. On March 12, 2012, Alloy submitted a supplemental response to DCAA's audit and again denied defective pricing (R4, tab 81).

124. On August 8, 2012, the Army issued its Pre-Negotiation Objective and alleged defective pricing based upon DCAA's audit report issued in February 2012 (R4, tab 82).

125. On November 26, 2012, Alloy first received DCAA's February 2012 audit report (R4, tabs 84-85).

126. On July 22, 2013, the Army revised its defective pricing position, relying solely upon DO 13, rather than the DCAA audit position (that used DO Nos. 6, 7, 8, 11, and 13) (R4, tab 88).

IV. CO's Final Decision Asserting Government Defective Pricing Claim

127. On July 24, 2014, after reviewing the DCAA Audit Report, Ms. Gandy issued a COFD asserting defective pricing and demanding a repayment of $15,920,212, plus interest (R4, tab 96).

128. The COFD sought a price adjustment of $15,920,212, more than the $12,572,283 price-adjustment recommended in the DCAA audit. The COFD explained that the Army did not disagree with the DCAA's findings, but calculated its own price adjustment based solely on data from DO 13 (R4, tab 96 at 2). DCAA, in contrast, used a weighted average of five delivery orders to calculate its recommended price adjustment. DCAA subsequently concurred with the Army's approach, reasoning that the Army's approach "incorporates the effect of all efficiencies gained just prior to the award of DO 14." (R4, tab 91 at 1)

129. The COFD asserted that the overstated material cost per decoy was calculated to be $1.16 for materials (steel, tantalum, liquid caustic, and aluminum); and the overstated labor hour usage per decoy was calculated to be .36, which is .97 hours negotiated less .61 post award audit computed, utilizing the DO 13 actual data (R4, tab 96 at 9-10).

DECISION

I. Standard of Review for Defective Pricing Claims

The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, requires contractors who must submit cost or pricing data "to certify that, to the best of . . . [their] knowledge and belief, the cost or pricing data submitted was accurate, complete and current." 10 U.S.C. § 2306a(a)(2). In addition, TINA requires that any contractual arrangement under which such certification is required "shall contain a provision that the price of the contract . . . shall be adjusted to exclude any significant amount by which it may be determined . . . that such price was increased because the contractor . . . submitted defective cost or pricing data.... 10 U.S.C. § 2306a(e)(1)(A)-(B). In other words, the government will be awarded a contract price adjustment when the government proves that a contractor furnished defective cost or pricing data and "the [g]overnment relied on the overstated costs to its detriment." *Singer Co., Librascope Div. v. United States*, 576 F.2d 905, 914 (Ct. Cl. 1978).

The government has the burden of proof in a defective pricing claim. As a general matter, this entails proving three elements by a preponderance of the evidence. First, the government must establish that the information at issue is "cost or pricing

data" within the meaning of TINA. Second, the government must show that the cost or pricing data was either not disclosed or not meaningfully disclosed to a proper government representative. Third, it must demonstrate detrimental reliance on the defective data. *United States v. United Technologies Corp.*, 51 F. Supp. 167 (1999) (discussing three elements and burden of proof); *also Wynne v. United Technologies Corp.*, 463 F.3d 1261, 1264 (Fed. Cir. 2006) (discussing detrimental reliance). In that regard, it is aided by a presumption that the non-disclosure of data resulted in an overstatement of the price of the contract. *Sylvania Elec. Prods., Inc. v. United States*, 479 F.2d 1342, 1349 (Ct. Cl. 1973). If that presumption of causation is rebutted, however, the government only can prevail "upon proof that it relied upon the defective data to its detriment in agreeing to the contract price." *Wynne*, 463 F.3d at 1263. *See Lockheed Martin Aeronautics Co.*, ASBCA No. 56547, 13 BCA ¶ 35,220 at 172,815 (holding that presumption is rebuttable and not a substitute for specific proof establishing the amount of such damages).

II. The 2006 Job Cost Reports for DO 13 Are Not "Cost or Pricing Data" Pursuant to TINA

Pursuant to TINA, the term "cost or pricing data" means "all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived." 10 U.S.C. § 2306a(h)(1).

The government contends that the June 2006 and August 2006 monthly job cost reports from DO 13 constitute "cost or pricing data" as that term is defined in TINA and its implementing regulations (gov't br. at 45-49). According to the government, Alloy's internal job cost reports contain verifiable factual data related to prior produced lots and some elements of estimation, such as estimated material usage rates which Alloy contends could not be finalized until the end of an entire production run (gov't br. at 45). The government relies on *Texas Instruments, Inc.*, ASBCA No. 23678, 87-3 BCA ¶ 20,195, for the proposition that the job cost reports, including both narrative and statistical data, constitutes "cost or pricing data" pursuant to TINA. Specifically, *Texas Instruments* held that the data contained in similar job cost reports were "facts which could reasonably be expected to contribute to sound estimates of future costs and were, therefore, cost or pricing data." *Texas Instruments*, 87-3 BCA ¶ 20,195 at 102,277-78.

Alloy disputes this conclusion, contending that the data from DO 13 was "work in process" (WIP) data and the Army knew that it was Alloy's practice to not provide WIP data prior to completion of a job (app. br. at 66; findings 82, 88). Alloy did not

disclose its WIP data, because, prior to job completion and accounting reconciliation, the WIP reports included a significant amount of judgmental information relating to the accuracy of the data (findings 82-84; app. br. at 67). According to Alloy's CFO, Mr. D'Andrea, there previously have been substantial variations between the WIP reports and final reports. According to him, generating the WIP reports requires significant judgment, including the need to develop estimates for "equivalent units" prior to completing production and conducting the final inventory count (finding 84).

Mr. D'Andrea elaborated on this point during his hearing testimony, explaining that considerable judgment was involved in allocating both labor and material to particular jobs. For example, several different types of metal are combined into a slurry which is used to manufacture M211 flares for the Air Force, Navy, and Army. The raw metals used in the slurry must be allocated to each job consistently. In the same way, labor hours must be allocated to separate jobs, even though individual workers are not charging their time to each separate job. The allocation is done by someone in the production department. (Finding 84) Ultimately, as the Alloy official responsible for signing the Certificate of Current Cost or Pricing Data, Mr. D'Andrea did not believe the WIP sheets to be sufficiently accurate to certify until after the job had been completed and the accounting data had been reconciled (finding 86).

There is no dispute that the job cost reports from DO 13 contained factual data as well as estimated labor and material usage rates (finding 81). The government contends that the estimates of labor and material usage rates were accurate, based on a comparison of August and September 2006 job cost reports from DO 13 Lot 2 (gov't br. at 30-31). In August 2006, production was nearly complete on DO 13 Lot 2. By September, production was complete. The only difference between the reports was 4.5 hours of labor for packaging, a difference of only 0.0001 labor hours in the estimated labor usage rate, with no changes from the estimated to actual labor hours recorded for Alloy's manufacturing process steps. According to the government, this makes the job cost reports sufficiently accurate to constitute "cost or pricing data" pursuant to TINA. (Gov't br. at 31, 38)

Despite the relative accuracy of the estimates in the September and October 2006 job cost reports, we cannot conclude that the reports are "cost and pricing" data as that term is defined in TINA. While it may be true that the WIP data in the reports were substantially close to the actual data from the DO 13 Lot 2 production, the relative accuracy was due to the fact that the reports were generated near the end of the production run. It makes sense that the estimates of "equivalent units" in the reports would become more accurate toward the end of a production run, when actual production figures are close to being final. Although the estimates in the job cost reports may become more accurate as the end of a production run approaches, it is

impossible to point to a time along the continuum where the estimates become accurate enough to possess the requisite degree of certainty necessary for providing certified cost and data to the government.

Moreover, WIP data from other jobs that were in production at the time of negotiations demonstrate the unreliability of the WIP data (finding 85). Alloy's estimates of "equivalent units" – from which labor and material usage factors are derived – are based on subjective judgments about how many actual units will be produced at the end of the production run. These judgments cannot be verified until the end of the production run. (Finding 82) That the WIP data from DO 13 turned out to be reasonably close to the actual data from the completed job does not change the fact that the job cost reports were based on estimates of "equivalent units," and not on the actual number of complete units produced.

The estimated "equivalent units" found in the job cost reports are a fundamental part of the reports. Specifically, they are the denominator of the fraction used to calculate both labor and material usage factors. (Findings 83-84) Unlike the reports in *Texas Instruments*, which included verifiable factual data alongside estimates, Alloy's job cost reports set forth usage factors that are *calculated* using estimates. Thus, Alloy's job cost reports are fundamentally different from the reports in *Texas Instruments*.

We find this case to be more similar to *Aerojet Ordnance Tennessee*, ASBCA No. 36089, 95-2 BCA ¶ 27,922 at 139,444-45 (no reliance on internal operating controls certifying proposals to the government). WIP sheets, like the Internal Operating Controls (IOC) reports in *Aerojet*, are management tools based on an individual manager's judgment, not a cost accounting process relying on precision. In *Aerojet*, we concluded that, although the data in IOC reports may be accurate for management purposes and may even be close to accounting reports, the IOC reports do not possess the requisite degree of certainty necessary for providing certified cost and data to the government. *Id.*[*] By the same token, Alloy's WIP sheets are management tools and do not possess the requisite degree of certainty necessary for providing certified cost and data to the government.

[*] We acknowledge that the Board's discussion of IOC in *Aerojet* is *dicta*, because the Board ultimately based its holding on the conclusion that the government did not demonstrate that the parties would have relied on the IOC reports in negotiating the price. However, we agree with the analysis in *Aerojet*.

III. The WIP Sheets for DO 13 Were Not Finalized Until After the Parties Agreed to the Price for DO 14

We next analyze whether there was effective disclosure of the 2006 job cost reports to the government during the price negotiations. We conclude that the raw data from DO 13 were available by the end of price negotiations for DO 14, but that the data were not in a form that Alloy reasonably could certify as "cost and pricing data" pursuant to TINA.

The disclosure obligation is satisfied if the contractor clearly advised the government personnel who participated in the contract negotiations of the relevant cost or pricing data. *Texas Instruments.*, 87-3 BCA ¶ 20,195 at 102,266 (citing *Sylvania Elec. Prods., Inc.*, ASBCA No. 13622, 70-2 BCA ¶ 8387, *aff'd*, 479 F.2d 1342 (Ct. Cl. 1973)). Alternatively, the disclosure obligation can be satisfied if the government personnel possessed actual knowledge of the relevant cost or pricing data. *Texas Instruments*, 87-3 BCA ¶ 20,195 at 102,266 (citing *Muncie Gear Works, Inc.*, ASBCA No. 18184, 75-1 BCA ¶ 11,380 and *Norris Industries, Inc*., ASBCA No. 15442, 74-1 BCA ¶ 10,482).

Here, the government contends that appellant had access to the data contained in the September 2006 report prior to the price agreement, but did not finalize the report until afterwards (gov't br. at 49-50). Citing *Aerojet Solid Propulsion Co.*, ASBCA Nos. 44568, 46057, 00-1 BCA ¶ 30,855 at 152,326, the government asks us to infer that Mr. D'Andrea, as the person who was responsible both for finalizing the September WIP report and for negotiating the price for DO 14, possessed knowledge of relevant cost and pricing data and withheld that data from the government during price negotiations. *See also Arral Indus., Inc.*, ASBCA Nos. 41493, 41494, 96-1 BCA ¶ 28,030 at 139,945 (data is reasonably available, and subject to disclosure, if contractor's personnel at a management level are aware of its existence) (citing *Aerojet-General Corp.*, ASBCA No. 12264, 69-1 BCA ¶ 7,664 at 35,583, *modified on recon.*, 70-1 BCA ¶ 8,140)).

In response, Alloy acknowledges that it made a business decision not to produce its WIP reports from DO 13 (finding 82). It further contends – and the Army admits – that the Army was aware of Alloy's policy of not furnishing WIP sheets (finding 88). Nonetheless, Alloy contends that it was not obligated to disclose the September 2006 job cost report, because that report was not finalized until after the parties reached agreement on the price of DO 14 (app. br. at 79-80).

Alloy's normal practice is to establish a "cutoff date" for assembling data for each WIP sheet. After this date, Alloy takes a final physical inventory, reviews labor

timesheets, and reconciles the work-in-process data with the actual number of units produced and labor hours logged. Alloy then finalizes the job cost report for the delivery order. In this situation, the cutoff date was Sunday, September 24, 2006, and Alloy's management completed its reconciliation and finalized the report on Friday, September 29, 2006 (finding 116). The Army does not contest this timeline, and there is nothing in the documentary evidence or hearing testimony suggesting that the job cost report could have been finalized more quickly, or that Alloy's management delayed reconciling the report while DO 14 price negotiations were ongoing.

We agree that Alloy possessed *some* of the relevant data from DO 13 in sufficient time to disclose it to the government's negotiators. However, as we discussed in connection with the WIP reports from DO 13, at the time of price agreement on September 25, 2006, the information in the WIP reports did not possess the necessary degree of certainty to certify the reports as "cost and pricing data" pursuant to TINA.

IV. Reliance

We turn next to the question of the government's reliance. To prove that it relied on inaccurate or noncurrent cost or pricing data, the government is aided in meeting its burden by a rebuttable presumption that a "natural and probable consequence" of the nondisclosure was an increase in the contract price. *Sylvania*, 479 F.2d at 1349. The appellant must then show that the defective data was not relied upon or that the undisclosed data would not have been relied upon even if there had been a complete disclosure. *Id*.; *see Aerojet Ordnance Tennessee*, 95-2 BCA ¶ 27,922 at 139,436. The government, nevertheless, retains the ultimate burden of showing a causal connection between the undisclosed or defective data and an overstated contract price. *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1403-04 (Fed. Cir. 1986); *Grumman Aerospace Corp.*, ASBCA No. 27476, 86-3 BCA ¶ 19,091 at 96,494.

In this appeal, the government is entitled to a presumption that Alloy's failure to disclose the DO 13 data resulted in an overstatement of the price of DO 14. Alloy, in turn, must overcome the presumption of reliance by demonstrating that the government did not rely on the DO 13 data, or that having the data from DO 13 would not have changed the price.

As we set forth in more detail below, we conclude that the Army has not met its burden of demonstrating that having the final job cost report from DO 13 would have changed its decision to rely on the weighted average of the data from Jobs 1516 and 1528. The Army used the data from Jobs 1516 and 1528 in setting the price for DO 14 with full knowledge of other data showing greater efficiency, because the Army

believed that the weighted average of the data from Jobs 1516 and 1528 best represented the likely performance of Plants 2 and 3 as they ramped up to meet the production rate necessary for DO 14. Moreover, the Army's rejection of Alloy's proposed 10 percent inefficiency adjustment reflected the Army's conclusion that some degree of ramp-up inefficiency already was captured in Alloy's price proposal. (Findings 68, 104).

DO 14, when awarded, would use the same type of automated equipment used on DO 13 (finding 24). Prudent buyers and sellers would reasonably expect the labor usage efficiency realized from DO 13 to significantly affect price negotiations in future orders. However, DO 14 would require Alloy to bring online two new manufacturing plants, including hiring and training new employees to operate the newly automated equipment (findings 22, 24). It is reasonable to conclude that starting up manufacturing at two new plants would create inefficiencies. It also is reasonable to conclude that the Army was aware of both the efficiencies of automation, and the inefficiencies of ramping-up production. Given these competing factors, the Army chose to rely on actual data from the previous delivery order.

A. The Parties' Contentions

Alloy contends that the Army had knowledge of at least three sets of labor usage factors lower than the weighted average usage hours it agreed to in its price negotiation (app. br. at 109). Alloy further contends that the Army knew that the negotiated usage factors were higher than most recent usage factors from Plant 1 (app. br. at 110).

In addition, the Army prepared its own independent government cost estimate and relied, in part, on it to establish Alloy's proposed prices as being fair and reasonable (app. br. at 97). Reliance on an independent government cost estimate rebuts reliance on allegedly defective price data. *Luzon Stevedoring Corp*., ASBCA No. 14851, 71-1 BCA ¶ 8745 at 40,607.

According to Alloy, these facts undercut the Army's argument that it relied on the data from Jobs 1516 and 1528 to its detriment. Alloy contends that the Army accepted the Jobs 1516 and 1528 data, even though it was aware of other data showing greater efficiency, because the Army believed that the weighted average of the data from Jobs 1516 and 1528 best represented the likely performance of Plants 2 and 3 as they ramped up to meet the production rate necessary for DO 14. In support, Alloy points to multiple identical statements in the Final Technical Evaluation (and incorporated into the PNM) stating that the Army "acknowledged some inefficiency

could occur due to additional production rate ramp-up." (App. br. at 119-125; findings 72-74, 102, 104)

There are two ways to understand the sentences in the PNM. The first interpretation, as Alloy suggests, is to conclude that the Army was aware that the actual data was not representative, but accepted it as the best available indication of how the production rate ramp-up would affect prices going forward. Alternatively, the Army responds that it included the statement in the PNM in order to capture *Alloy's* stated concerns about ramp-up, not the Army's own judgment about ramp-up inefficiency. (Finding 103)

We believe Alloy's understanding of the statement is correct. The statement in the PNM means exactly what it says: that the Army agreed to the price in part because of the inefficiency that could occur due to additional production rate ramp-up. Indeed, the notion that ramp-up inefficiency was a factor in the Army's pricing deliberations is consistent with the documentary evidence and hearing testimony.

B. The Army Has Not Demonstrated That Having the DO 13 Data Would Have Changed the Negotiated Price

In order to prove reliance, the Army must provide specific information about *how* it would have used the DO 13 data in negotiations. The Army cannot rely on speculation about how it would have used the data or how having the data would have affected negotiations. *McDonnell Douglas Helicopter Sys.*, ASBCA No. 50447 *et al.*, 00-2 BCA ¶ 31,082 at 153,465 (rejecting testimony of government witnesses that disclosure would have reduced price as conclusory and nonspecific); *Rosemount, Inc.*, ASBCA No. 37520, 95-2 BCA ¶ 27,770 at 138,456 (government offered no evidence or testimony as to how disclosure of data would have affected negotiations).

Here, the Army has not demonstrated that having the DO 13 data would have changed the negotiated price. The Army was aware of the effect of automation on labor and material usage factors, based on its oversight of the production prove-out of the automation machinery at Plant 1. (Findings 31, 67, 101) Indeed, this knowledge was the basis of the technical team's questioning of the Job 1516 and 1528 prices (findings 68, 98). Having the DO 13 data, therefore, merely would have reinforced the technical team's conclusions about the effect of automation. The Army's knowledge of the effect of automation undermines the causal connection between the allegedly undisclosed data and an overstated contract price. *See McDonnell Douglas Helicopter Sys.*, 00-2 BCA ¶ 31,082 at 153,469 (holding that government possessed knowledge of a lower price sufficiently close in time to facilitate negotiation of a lower price than that agreed to by the Army).

Moreover, because the DO 13 data was from Plant 1, the data would not have shed any light on the inefficiencies associated with starting and ramping-up production at the two new manufacturing plants. Although the Army could quantify the projected efficiency resulting from the increased use of automation, it was forced to speculate about the effect of ramping-up production at two new plants. Indeed, the fundamental problem with the government's position is that the DO 13 data sheds no light on the actual effect of ramp-up inefficiency on manufacturing in Plants 2 and 3.

The government does not dispute that it was aware of lower usage data from prior orders, but contended it did not rely on this data in its negotiations. Ultimately, the government was aware that the data from Jobs 1516 and 1528 was not the best – both because it did not reflect the latest automation and because it did not reflect the effects of rapidly ramping-up production – but it decided that the weighted average of the Jobs 1516 and 1528 data was the best it could do under the circumstances. Thus, the Army concluded that the weighted average of the Jobs 1516 and 1528 data represented the best compromise between automation efficiency and ramp-up inefficiency. (Findings 99, 102, 111)

An additional factor undercutting the Army's reliance was its awareness during negotiations that Alloy had failed first article testing (FAT) during the production prove-out of Plant 2. Because the Army knew that Alloy was having difficulty demonstrating that Plant 2 was ready for full-scale production, it was reasonable for the Army to believe that there would be some inefficiency associated with the assumption of full-scale manufacturing at the new plants. This knowledge was consistent with the Army's decision to adopt pricing that attempted to balance automation efficiency with the inefficiency of increased production.

Additionally, the evidence does not conclusively demonstrate that the government specifically asked Alloy to produce the data from DO 13 during price negotiations. We cannot conclude that the government was harmed by not having the DO 13 data, when it cannot demonstrate that it asked for the DO 13 data during negotiations. Although CO LaBell testified on direct examination that the Army had requested WIP sheets for DO 13 during the negotiations, on cross examination, CO LaBell acknowledged that she never told Alloy that she needed the DO 13 WIP sheets to award DO 14, nor is there any written record of an Army request for the DO 13 WIP sheets. (Finding 89)

Although CO LaBell said that the DO 13 data would have resulted in a lower price, her testimony during the hearing was non-specific (findings 93-97). According to the Army, having the DO 13 data "would have impacted the [CO's] willingness to agree to higher usage rates based on ramp-up inefficiencies[.]" (Reply br. at 4) This

argument is based on speculation. During the hearing testimony, none of the Army's witnesses provided any specific examples of how it would have used the DO 13 data, or specifically how the information would have changed the prices it agreed to during negotiations (findings 93-97, 111-113). The government fails adequately to answer the question of whether negotiators would have acted differently if they had been in possession of the undisclosed DO 13 job reports. Accordingly, we conclude that the Army has not proven that the price would have changed if it had DO 13 data in its possession during price negotiations.

C. Defective Pricing Clause is Not a Vehicle for Repricing a Contract Deemed to be Unreasonably Priced

As we have held in *Luzon Stevedoring Corp.*, 71-1 BCA ¶ 8745 at 40,604, the defective pricing clause is not a vehicle for repricing a contract which is deemed unreasonably high-priced. The clause does not provide a procedure for re-pricing a contract after award. *Id.*

That is precisely what the CO did here, as she admitted, stating that she agreed to a price in the absence of the DO 13 data, believing she could recoup any difference with a defective pricing claim after the fact:

> Q: You signed the Modification PO 25 relying on upon the certificate current costs and pricing data, on the assumption that you would be able to recover any defective pricing cost later, correct?
>
> A: Correct.

(Finding 96)

We conclude that the government has failed to meet its burden of proving that having the data from DO 13 during negotiations would have changed the pricing for DO 14.

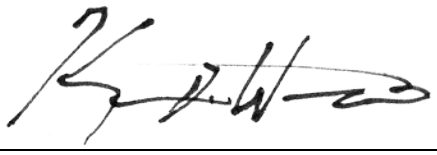
V. Damages

Because we have concluded that the government is not entitled to a contract price adjustment, we need not reach the issue of quantum.

CONCLUSION

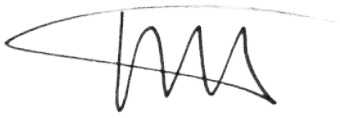
For these reasons, the appeal is sustained.

Dated: April 9, 2020



KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



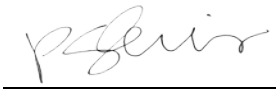
RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 59625, Appeal of Alloy Surfaces Company, Inc., rendered in conformance with the Board's Charter.

Dated: April 9, 2020



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