Annual Review 2022
Costs, Pricing, and Audits
Supplementary Materials

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ARMED SERVICES BOARD OF CONTRACT APPEALS

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OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a government claim arising from the difference between the billing rates of appellant, Cellular Materials International, Inc. (CMI), and final rates established by the contracting officer (CO). The parties have cross moved for summary judgment. The Board grants the government's motion and denies appellant's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The following facts are undisputed or uncontroverted.

This appeal arises from five contracts performed by CMI, including the above-referenced representative contract awarded by the Defense Advanced Research Projects Agency on April 28, 2010 (the Contract). The Contract provided for payment of cost plus a fixed fee in the estimated total amount of $4,428,863 and included, among other clauses, Federal Acquisition Regulation (FAR) FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002). (R4, tab 1 at 2, 23)[1]

[1] When citing the Rule 4 file, we reference the .pdf page number for the digital version of that document.

Pursuant to the requirements of this clause, CMI submitted final indirect cost proposals for fiscal years 2010 – 2014 ((gov't statement of undisputed material facts (GSUMF) ¶¶ 6-9 (citing gov't mot. at exs. G-2 to G-6)). Initially, the Defense Contract Audit Agency (DCAA) informed CMI that its proposals were low risk and would not be audited (GSUMF ¶ 16; R4, tab 9 at 6). But after receiving this notice, CMI revised its 2010-2014 proposals to add $425,000 ($85,000 per year) in general and administrative (G&A) costs for a consultant, Mr. Haydn Wadley (*id.*; GSUMF ¶ 10). In addition to his purported work as a consultant, Mr. Wadley was CMI's largest shareholder, owning up to about 39% of the shares during this period[2] (GSUMF ¶¶ 4, 10, 16; gov't mot. at ex. G-1).

DCAA thereafter performed an audit and issued a report questioning all $425,000 in consultant costs. DCAA stated that the "contractor was not able to provide invoices or other support to include sufficient detail as to the time expended and nature of the actual services provided by the consultant." It also stated that Mr. Wadley had not been paid for some of the services. (GSUMF ¶ 14 (citing R4, tab 8 at 6))

On August 22, 2017, the CO issued a final decision unilaterally establishing final indirect cost rates and asserting a demand for payment of $511,119, which included the $425,000 for Mr. Wadley (R4, tab 9). The CO concluded that "CMI has not provided sufficient evidence of the nature and scope of the service furnished such that incurrence, allowability, [and] allocability of these costs can be determined ..." (R4, tab 9 at 7).

After CMI filed a timely appeal, it produced to the government various documents, including 31 canceled checks, that resulted in the government agreeing that CMI had made $219,583.23 in payments to Mr. Wadley and that these payments were allowable costs. The parties were also able to resolve the portion of the dispute that did not relate to Mr. Wadley, which amounted to an additional $86,119. (GSUMF ¶¶ 16 n.5; compl. ¶¶ 6-8)

The amount that remains in dispute is $205,416.57 (GSUMF ¶ 22; compl. ¶ 7). In support of this amount, CMI has provided the government 27 promissory notes executed each month from October 2012 to December 2014 in which CMI promised to pay Mr. Wadley the amount of $7,083.33, for a total amount of $191,249.91. The notes do not provide for interim payments or contain a date for repayment, other than to state that they are payable five days after demand (R4, tab 6; GSUMF ¶¶ 21- 22). As an explanation, Les Gonda, President and Chief Executive Officer of CMI, and Mr. Wadley, in a joint affidavit, state that Mr. Wadley did this "due to his belief in the future potential of CMI" (R4, tab 10). Mr. Wadley has not demanded payment (GSUMF ¶ 20).

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[2] The contracting officer's final decision also states that Mr. Wadley was Chairman of CMI's Board of Directors (R4, tab 9 at 7).

CMI also represented to the government that it issued checks to Mr. Wadley totaling $14,166.66 in December 2011 and September 2012 that remain uncashed (GSUMF ¶ 22; R4, tab 5 at 1).

While the parties largely agree on the facts, they disagree as to the conclusions that should be drawn from CMI's production of the unpaid promissory notes. CMI has not responded to the government's contentions with respect to the uncashed checks and we consider this issue to have been abandoned.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (citing FRCP 56(c)). When considering a motion for summary judgment, the Board's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Id.* at 249. Conclusory statements and mere denials are not sufficient to ward off summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). The fact that both parties have moved for summary judgment does not mean that the Board must grant judgment as a matter of law for one side or the other. Rather, the Board must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration. *Id.* at 1391.

FAR 52.216-7 (DEC 2002) provides:

> (b) Reimbursing costs.
>
> (1) For the purpose of reimbursing allowable costs..., the term costs includes only—
>
> (i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;
>
> (ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs *incurred, but not necessarily paid*, for—
>
> ***

> (F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts...

(Emphasis added) In sum, at the interim billing stage, FAR 52.216-7(b)(1) provides, among other things, that allowable costs are costs that have been paid, as well as costs that have been incurred but not paid and not delinquent.

The contractor is required to submit a final indirect cost rate proposal. FAR 52.216-7(d)(2)(i). The rates it proposes "shall be based on the Contractor's *actual cost experience* for that period." FAR 52.216-7(d)(2)(ii) (emphasis added). The government contends that "actual cost experience" is synonymous with "actually paid" and because CMI has not made any payments on the promissory notes, these costs are not allowable (gov't br. at 12-13).

FAR 31.001[3] provides that "actual costs means... amounts determined on the basis of costs incurred, as distinguished from forecasted costs..." The FAR does not provide further guidance as to when a cost may be considered to have been incurred and when it is merely forecasted.

The U.S. Court of Appeals for the Federal Circuit has considered when costs are incurred, albeit not in the context of a dispute involving FAR 52.216-7. In *SUFI Network Services, Inc. v. United States*, 785 F.3d 585 (Fed. Cir. 2015), the court considered a lawsuit seeking recovery of attorney fees after the contractor prevailed on claims at the Board. The dispute required the court to interpret a contingency fee agreement between the contractor and its attorneys to determine when attorney fees were incurred for purposes of calculating interest on those fees. *Id.* at 592-93. The fee agreement provided that the attorneys were entitled to their fees only after recovery from the government. The Federal Circuit cited Black's Law Dictionary to define incur as meaning "to suffer 'a liability or expense.'" *Id.* at 593 (citing Black's Law Dictionary (7th ed. 1999)). The court held that because the contingency - recovery from the government - had not occurred when the attorneys performed their work, then the contractor suffered no liability or cost and the costs were not incurred at that time. *Id.*

In *McCulloch v. Secretary of Health and Human Services*, 923 F.3d 998 (Fed. Cir. 2019), the court considered the meaning of costs "incurred in any proceeding on [a Vaccine Act] petition." *Id.* at 1002 (citing 42 U.S.C. § 300aa-15(e)(1)). In the underlying proceeding in that case, the parties agreed on the amounts to be paid and the

[3] FAR 52.216-7(a)(1) provides that the government will make payments to the contractor in amounts determined by the contracting officer to be allowable under FAR subpart 31.2. Definitions applicable to FAR part 31 are set forth in FAR 31.001.

trial court issued a judgment of the merits. Subsequently, a special master awarded amounts to cover the future costs of a guardianship that had to be established under Florida law as a condition of receiving the payments required by the merits judgment. *Id.* at 999. These costs included various tasks and fees, such as an annual premium on a bond. Relying on Black's Law Dictionary, the court held that:

> [i]n ordinary usage, ... to 'incur' expenses means to pay *or become liable for* them. In one common usage, a person becomes liable for yet-to-arise expenses at the time of undertaking an obligation to pay those expenses if and when they arise. *See Liability*, Black's Law Dictionary (10th ed. 2014) (defining liability as the state "of being legally obligated or accountable," through civil or criminal penalties).

Id. at 1003 (citation omitted). The Federal Circuit held that future guardianship expenses that were not yet due were, nevertheless, incurred because their payment was a precondition for continued receipt of compensation granted in the judgment. *Id.* at 1003.

The *McCulloch* court cited an earlier Federal Circuit opinion that reached a somewhat different conclusion. In *Black v. Secretary of Health & Human Services*, 93 F.3d 781, 785-86 (Fed. Cir. 1996), the court considered a case where the plaintiffs contended that they "faced the near-certain prospect" of suffering future expenses for which they would be entitled to payment under the Vaccine Act. *Id.* at 785. The court held that "[i]n ordinary usage. . . to 'incur' expenses means to pay or become liable for them; the term does not refer to any and all expenses that may ultimately be traceable to a particular event." *Id.* As an example, the court stated that a patient released from the hospital after treatment of a broken leg would have incurred the hospital expenses to that point but would not have incurred expenses for subsequent rehabilitation treatment. *Id.* at 785-86.

In *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776 (1999), *aff'd* 249 F.3d 1337 (Fed. Cir. 2001), the Court of Federal Claims considered the meaning of actual costs in the context of fraud counterclaims filed by the government. In that case, the contractor represented that its claim was based on actual costs. The court found, however, that the claim was based on purchase orders to subcontractors so that it sought, for example, payment for materials that the contractor never received and for which it never received invoices. *Id.* at 785. Relying on the FAR 31.001 definition of "actual costs" discussed above, the court held that a cost is incurred "when a person becomes legally bound to pay." *Id.* at 801. The court recognized that at some future date the contractor might become liable for some of the unbilled costs, but rejected the contention that such a future cost could be considered an actual cost. *Id.* at 803.

These decisions illustrate the fact intensive nature of determining when costs are incurred. Collectively, they demonstrate that a future expense must be more than merely likely or probable to be an incurred cost. In *McCulloch*, the Federal Circuit held that the plaintiffs had surmounted this test because they had demonstrated that liability had "attached" by virtue of the Court of Federal Claims judgment. *McCulloch*, 923 F.3d at 1002-03.

It is undisputed that more than nine years after execution of the first note, Mr. Wadley has not demanded payment, and that the notes require Mr. Wadley to make a demand before payment is due. Even if the Board were to assume that there is a "near-certain future prospect" that Mr. Wadley will demand payment, he has refrained from doing so. CMI's liability to pay has not attached because Mr. Wadley has not taken the action necessary to trigger CMI's obligation. Or, to use the Court of Federal Claims' formulation, CMI is not legally bound to pay until Mr. Wadley demands payment. Accordingly, for purposes of FAR 31.001 and 52.216-7(d)(2)(ii), the Board holds that the consulting costs at issue are not incurred costs but are best described as "forecasted costs." Thus, the contracting officer correctly determined that these costs are not allowable.

CONCLUSION

The government's motion for summary judgment is granted. Appellant's motion for summary judgment is denied. Accordingly, the remaining disputed portion of the appeal is denied.

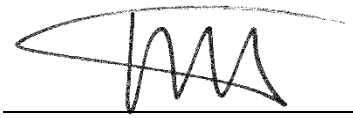
Dated: December 27, 2021

Michael N. O'Connell

MICHAEL N. O'CONNELL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61408, Appeal of Cellular Materials International, Inc., rendered in conformance with the Board's Charter.

Dated: December 28, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
L3 Technologies, Inc.	)	ASBCA Nos. 61811, 61813, 61814
	)	
Under Contract Nos. FA8620-06-G-4002 *et al*.	)	

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MAJORITY[1] OPINION BY ADMINISTRATIVE JUDGE PROUTY

These three appeals, submitted by appellant, L3 Technologies, Inc. (L3), involve government claims challenging both indirect and direct costs paid to L3 on several government contracts for certain years. As the litigation progressed, the government apparently thought better of its claims and withdrew them *in toto* and represented it would make no further claims on the contract years in question. Consequently, the government has moved for dismissal of these appeals on mootness grounds. L3 opposes, seeking either summary judgment in its favor or that we deny the motion to dismiss and keep the appeals live so that it can obtain a victory that, it believes, would preclude its suffering similar government claims in other contract years. On the facts before us, we grant the government's motion and dismiss these appeals as moot. L3's motion for summary judgment is denied.

[1] These appeals were originally considered by a five-judge division of the Board, including Judge Kinner, who passed away while the matter was still under deliberation. Because three of the remaining four judges concurred in this opinion, there was no need to appoint a fifth judge to the division. Under the Board's internal rules, this decision is precedential.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

For the purposes of deciding the motions before us, we need not delve too deeply into the merits of the underlying appeals, but need to understand their scope and the limits of what they may accomplish.

I. What the Appeals are About

The first of these appeals, No. 61811, challenges a Contracting Officer's Final Decision (COFD) dated June 28, 2018, seeking repayment of $10,692,605 by L3 for certain "other direct costs" and overhead that had been included in L3's final indirect cost rate proposals[2] for the fiscal years 2011, 2012, 2013, and 2014. *See* compl. ¶ 8.[3] The COFD followed a group of audit reports (one for each contract year)[4] by the Defense Contract Audit Agency (DCAA), all issued on September 27, 2017, questioning $14,337,524 of these already-paid costs (*id.* ¶ 9). These audit reports all utilized some degree of statistical sampling of particular costs (*e.g.*, individual instances of premium air travel that the auditor felt were not justified), with results extrapolated across the board for that cost (*id.* ¶¶ 12, 15, 20, 22; app. opp'n at 7-8, 10-11[5]).

Appeal No. 61813 is an appeal of a far more modest government claim. There, the June 29, 2018 COFD demanded the payment of $6,002 based upon a February 14, 2018 DCAA audit report that questioned the use of premium airfare for two L3 employees for the years 2012-2015 (*see* R4, tab 4 at G000274, G000344-49).

And Appeal No. 61814 is another, even smaller, government claim, resting upon a different COFD, though also issued on June 29, 2018, seeking $2,542 in premium airfare incurred by an L3 employee in 2011. It rested upon the same February 14, 2018 DCAA audit report that informed the COFD in Appeal No. 61813 (*see* R4, tab 4 at G000274, G000352-58).

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[2] For an explanation of how indirect cost rate proposals work, we refer the reader to *Tech. Sys., Inc.*, ASBCA No. 59577, 17-1 BCA ¶ 36,631.

[3] The only appeal for which a complaint was submitted (and it was submitted by the government) is Appeal No. 61811.

[4] These were numbered 9511-2011G10100001, 9511-2012G10100001, 9511-2013G10100001, and 9511-2014G10100002 (compl. ¶ 9).

[5] With the exception of its objection to certain language it deemed inflammatory and some characterizations of the evidence, the government agrees with the facts presented in L3's brief in opposition to its motion to dismiss. *See* gov't reply at 2-3. Thus, much of the procedural history that we set forth here comes from L3's brief since both parties agree that it is accurate.

II. The Present Litigation and the Government's Unequivocal Withdrawal of its COFDs

These three appeals (all submitted to the Board the same day) were immediately consolidated. L3 then requested that the Board order the government to file the complaint in Appeal No. 61811, which we directed and the government accomplished.[6] The government's complaint in Appeal No. 61811 seeks no declaratory or injunctive relief, but merely explains the basis of its claim and demands payment consistent with the COFD for the years covered by it. *See* compl. Discovery followed.

Ultimately, as admitted in a February 28, 2020 email from government counsel to L3's attorney, the government decided that it could not defend these appeals. *See* app. opp'n, ex. 2. Thus, in a letter to L3's Chief Financial Officer dated February 28, 2020, the cognizant administrative contracting officer wrote:

> I hereby unequivocally withdraw the Contracting Officer's Final Decisions ("COFDs") and demands for payment dated 28 June 2018 (ASBCA No. 61811), signed by Gladys Broyles, 29 June 2018 (ASBCA No. 60813) signed by Cheryl L. Clark, and 29 June 2018 (ASBCA No. 60814), signed by Jennings L. Summers that have been appealed to the ASBCA and assigned the respective docket numbers. A motion for dismissal of those appeals will be filed by the assigned trial attorney. The Government does not intend to re-assert the costs at issue in those disputes.

(Gov't mot., ex. 1) L3 makes no assertion that these COFDs may be re-imposed nor that the government will re-assert its challenge to the costs at issue in those disputes. We find, as a matter of fact, that the withdrawal of these claims is unequivocal.

III. Other Litigation Involving L3's Contracts and DCAA Audits

As we will explain more below (and as noted in Judge Clarke's dissent), L3 opposes the government's request to dismiss these appeals because it contends it has been here before. Many times. And without resolution. The dissenting opinion discusses this at length and, although we come to a different conclusion regarding the legal consequences, we agree that L3 has been to the Board quite often in recent years as a consequence of COFDs stemming from incurred cost audits and that none of these

[6] The government opposed L3's motion to require it to file a complaint, stating in its November 9, 2018 opposition, *inter alia*, that, L3 "is fully aware of the issues in these appeals . . . . The disallowances are the results of an ongoing dispute that has existed for several years and which is the subject of several other disputes before the Board." *See* app. opp'n at 12.

appeals has led to a decision on the merits.[7] This happened for appeals of audits of years 2006, 2007, 2008, 2009, and 2010. (App. opp'n at 4-10) Moreover, some of these prior appeals involved audits which utilized statistical sampling as in the audit that is the basis of Appeal No. 61811. *See, e.g.*, app. opp'n at 6-7 (referring to the use of decrement for audit of 2009 direct costs). Appeal Nos. 62123, 62267, and 62268, brought by L3 challenging the disallowance of other incurred costs by the government resting in part on similar statistical extrapolation, remain pending before the Board, but stayed pending the outcome of the present appeals. (App. opp'n 13-14)

DECISION

As will be discussed below, the government's withdrawal of the COFDs moots these appeals, which are premised upon them since there is simply no additional, legally cognizable relief that this Board can afford L3. Moreover, neither exception to the mootness doctrine asserted by L3 – voluntary cessation and capable of repetition yet evading review – is applicable here.

I. The Mootness Doctrine: Generally, a Case is Moot When an Adjudicatory Body May No Longer Provide Relief.

In the past, we have had no compunction against dismissing, as moot, appeals in cases analogous to this one, where the CO has withdrawn COFDs asserting government claims on incurred costs. In *Combat Support Associates*, ASBCA Nos. 58945, 58946, 16-1 BCA ¶ 36,288, a case involving incurred cost audits and government claims disallowing costs already paid, we dismissed the appeal on government motion after the government claims were withdrawn, writing:

> Where a contracting officer unequivocally rescinds a government claim and the final decision asserting that claim, with no evidence that the action was taken in bad faith, there is no longer any claim before the Board to adjudicate, and the appeal is dismissed. *KAMP Systems, Inc.*, ASBCA No. 54253, 09-2 BCA ¶ 34,196 at 168,995. In such circumstances, the government's voluntary action moots the appeal, *cf. Teddy's Cool Treats*, ASBCA No. 58384, 14-1 BCA ¶ 35,601 at 174,410 (dismissing appeal as moot where government changed default termination to a notice termination), leaving the Board without jurisdiction to entertain the appeal further.

[7] In a significant number of these appeals, however, the matters were settled with the consent of L3 and not over its objections. *See* app. opp'n at 4 (appeal of COFD for 2006 costs settled by parties shortly before hearing), app. opp'n at 5 (appeal of COFDs for 2007 costs settled by parties), app. opp'n at 7 (appeal of COFDs for some 2009 costs settled by parties), app. opp'n at 9-10 (appeal of COFDs for other 2009 costs and 2010 costs settled by parties).

See Lasmer Indus., Inc., ASBCA No. 56411, 10-2 BCA ¶ 34,491 at 170,123.

16-1 BCA ¶ 36,288 at 176,974; *see also Advanced Powder Solutions*, ASBCA No. 61818, 19-1 BCA ¶ 37,425, aff'd 831 Fed. Appx. 501 (Fed. Cir. 2020) (dismissing appeal because, without claim, the Board had no jurisdiction).

We ruled similarly in *Quimba Software, Inc.*, ASBCA No. 59197, 19-1 BCA ¶ 37,350, rejecting Quimba's complaints that the government had wrongfully compelled it to expend resources defending against a claim that had no basis, (allegedly) being brought after the expiration of the statute of limitations. *See Quimba Software*, 19-1 BCA at 181,613. Indeed, L3, itself, had a previous set of its appeals of government incurred cost claims dismissed over its objection upon the government's withdrawal of the COFD's in question.[8] *See L-3 Communications Integrated Sys., L.P.*, ASBCA Nos. 60431, 60432, 16-1 BCA ¶ 36,362.

The basis for such mootness dismissals is the constitutional requirement for a case or controversy.[9] "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). As the Federal Circuit summarized in *Ferring B.V. v. Watson Labs., Inc.-Fla.*, 764 F.3d 1382 (Fed. Cir. 2014), "[a] case becomes moot when interim relief or events have eradicated the effects of a defendant's act or omission, and there is no reasonable expectation that the alleged violation will recur." 764 F.3d at 1391 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)); *see also Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 939 (Fed. Cir. 2007) ("When, during the course of litigation, it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should generally be dismissed.").

It should be clear that this "legally cognizable interest" in the outcome is tied not merely to the conduct being challenged by the lawsuit, but the relief or remedy available through continued litigation. The Supreme Court recognized this in *Powell v. McCormack* when discussing one of its earlier opinions holding a matter moot: "[The earlier case] stands . . . for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." 395 U.S. at 499. Put another way, even if a litigant remains harmed by the actions of the other party after that party has

[8] This was one of the sets of appeals of which L3 complains above.

[9] L3 argues that, to the extent that these decisions rested upon the notion that withdrawal of the COFD's divested the Board of jurisdiction by the fact that there was no longer a COFD to appeal, they were contrary to Board precedent holding that withdrawal of COFDs does not divest the Board of jurisdiction. *See* app. opp'n at 26-30. We rest our opinion here upon the mootness doctrine, which is centered upon the case-or-controversy requirement, not the lack of a COFD to appeal.

changed its behavior to remove the basis of the pending suit, if the court is no longer able to provide a remedy to that remaining harm, the case is moot. As the Supreme Court noted in *Spencer v. Kemna*, a case remains viable only if "throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). The implications of this straightforward explanation of the law, it will be seen, are significant.

II. On Their Faces, These Appeals Are Moot

Simply speaking, the COFDs appealed here no longer exist – they have been withdrawn. Moreover, the government has unequivocally stated that it will never again challenge the incurred price proposals for the contract years at issue. Therefore, seemingly, there is no relief we may grant and the appeals should be dismissed. This is very much like the circumstances we saw in *Combat Support Associates*, *Quimba*, and the previous 2016 *L3* decision. Thus, if there weren't more to it, we could comfortably grant the government's motion based upon our precedent.

III. The Voluntary Cessation Doctrine Is Inapplicable Here Because The Harm Being Appealed Is Unlikely To Recur

But there is somewhat more to it: L3 argues that the two exceptions to the mootness doctrine preclude dismissal. The first of these, "voluntary cessation," is where L3 makes its primary argument. *See* app. opp'n at 21-32. L3 quotes the Supreme Court as holding that, "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' '[I]f it did, the courts would be compelled to leave "[t]he defendant … free to return to his old ways.'" (App. opp'n at 18; citing to *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (internal citations omitted) However, as L3 rightly concedes, it is not that voluntary cessation could *never* support a dismissal for mootness, just that the party seeking dismissal must also demonstrate that the objected to actions will not recur. Hence, in *County of Los Angeles*, the Supreme Court explained that the voluntary cessation doctrine would not apply if: "it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" 440 U.S. at 631 (citations omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (though the burden is "heavy," a case may be dismissed as moot if the defendant can demonstrate that there is "no reasonable expectation that the wrong will be repeated.").

The motion here turns on the question of what "wrong" is at issue. The government argues that the wrong at issue is delimited by the COFDs being appealed: the government's rejection of cost submissions for particular contract years, which the government asserts it will never again reject. No argument is made by L3 that these will

ever return. If the government is correct (and it is), the voluntary cessation doctrine does not apply because there is no reasonable expectation that the wrong will be repeated.

L3 appears to see the wrong(s) that may be repeated as the government's challenges to L3's corporate travel policy and its use of its statistical means of challenging its incurred cost submissions. *See, e.g.*, app. opp'n at 20. If those were the wrongs that these appeals could legally eliminate, we would agree that the voluntary cessation doctrine might require our denial of the government's motion. They aren't.

These appeals do NOT seek a declaratory judgment or injunctive relief finding L3's corporate travel policy appropriate or preventing the statistical sampling methodology which L3 finds so objectionable.[10] Thus, if we refused to dismiss the appeals, and if L3 were to obtain a complete legal victory on the merits, the remedy that L3 would obtain would be no more than it is already getting by the withdrawal of the COFDs: it would no longer be obliged to repay the government the costs set forth in the three withdrawn COFDs. L3 and the dissent appear to be laboring under the mistaken notion that winning on the merits here would, *per se*, decide the propriety of L3's travel policies once and for all and prevent the future use of DCAA's statistical sampling and extrapolation methodologies in other audits, but there is no basis for such a belief. After all, entitlement to a decision on an appeal is not the same thing as entitlement to binding precedent, generalized beyond the years of a particular dispute, upon the issues of interest to a particular party.[11] To be sure, a victory on the merits would be satisfying to L3 and present a rhetorical cudgel to use against DCAA in the future – perhaps even to persuasive effect – but the only thing certain that it would do for L3 would be to provide relief for the years at issue and that is already being given.[12] That is why we have placed so much emphasis on the "legally cognizable relief" part of the mootness definitions, for it defines the arena in which the mootness analysis and, necessarily, its exceptions apply. The 10th Circuit Court of Appeals came to a similar conclusion in *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884 (10th Cir. 2008), a case in which the plaintiffs fought a motion to dismiss on mootness grounds by arguing that the court was presented with a case of both voluntary cessation, and

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[10] Given the fact that, at L3's demand, the government filed the complaint here, this is hardly surprising. But even if L3 had filed the complaint, itself, we are not so certain that its appeal of the government's claims would have entitled it to seek such relief – a matter which we need not address as it remains hypothetical, just as the possibility of a claim seeking a contractual interpretation finding L3's travel policies to be appropriate or barring the use of DCAA's statistical modeling would be.

[11] To state the obvious, the law provides a way for a litigant to get that binding precedent: declaratory or injunctive relief. If a party wants it, it must explicitly seek it, rather than hoping to obtain it as an incidental consequence of its monetary claims.

[12] Moreover, if "case or controversy" has any meaning at all, merely symbolic wins, with no formal legal consequence, no matter how helpful to a party, are not what courts are for. *See, e.g., Massachusetts v. E.P.A.*, 549 U.S. 497, 547 (2007) (Roberts, CJ, dissenting).

"capable of repetition yet evading review" (which we address below). The Court of Appeals held that, for purposes of mootness determination, it was proper to "rely on the claims and requests for relief in the Complaint" and not the broader issues that the plaintiffs later wished to address. 545 F.3d at 892-93. Such are the circumstances here.

IV. The Dismissed Appeals Are Not an Injury Capable of Repetition, Yet Evading Review

If the voluntary cessation doctrine may be thought of as preventing one of the interested parties from pulling the rug out from under the other, "capable of repetition, yet evading review" is the circumstance where the very nature of the alleged wrong precludes judicial review because its duration is too short, but the controversy is expected to return. It was first enunciated in *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911), and has been part of jurisprudence ever since, recently discussed in a procurement context by the Supreme Court in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). As summed up in *Kingdomware*:

> [T]his Court's precedents recognize an exception to the mootness doctrine for a controversy that is "'capable of repetition, yet evading review.'" *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). That exception applies "only in exceptional situations," where (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration," and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Ibid.* (internal quotation marks omitted; brackets in original).

136 S. Ct. 1976. But this is not the kind of case for which this exception applies. First, nominally, there would be ample time for the matter to be reviewed by the Board or the Court of Federal Clams. Cost allowability determinations, like the ones at issue here, are not the type of actions that end after a given period time; rather, they have no expiration date and are simply about who is entitled to a certain amount of money.

Moreover, L3 obtained its full remedy: full review was, in fact, available and the only reason that a judicial decision wasn't issued was because it was not necessary.

To the extent that L3 attempts to argue that the government's actions are what made the duration too short to afford review (*see* app. opp'n at 32-33), thus placing this matter into the capable of repetition yet evading review rubric, it has made the logical fallacy known as a category error. For under this approach, all instances of voluntary cessation would fall within the capable of repetition yet evading review classification and there would be no point in the separate analysis. It is more consistent with the legal paradigm of mootness exceptions to review the government's actions here under the voluntary cessation umbrella. Moreover, as discussed above, the unavailability of a

legally cognizable remedy deprives us of a case or controversy, leaving no basis to apply the second exception, even if it were otherwise proper to do so.

CONCLUSION

Because these appeals are moot, they are dismissed. This action makes L3's motion for summary judgment, itself, moot, since we no longer possess jurisdiction over these appeals, and we deny it as such.

Dated: March 1, 2021

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

ELIZABETH WITWER
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent (see separate opinion)

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

DISSENTING OPINION BY ADMINISTRATIVE JUDGE CLARKE

I respectfully dissent because I believe the mootness exception applies. The majority decision subjects L3 (and other contractors) to the unfortunate chain of events discussed below until DCAA and DCMA resolve whatever their differences are. I wrote the original decision with which my colleagues disagree. I have attached my original decision as my dissent.[13]

In these appeals of government claims, the contracting officer unequivocally withdrew the supporting final decisions stating the claims would not be asserted again rendering the appeals moot. I find that the final decisions are moot. For the first time, the Board should allow a moot case to proceed based on the exception to mootness doctrine. After resolving the mootness matter, I interpret FAR 31.201-3, Determining reasonableness, to properly allocate the burden of proof. Finally, I would deny L3's motion, which I deem to be a motion for summary judgment, because of material disputed facts concerning allowability of L3's costs. The Board has jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-9.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

Relevant FAR Clauses

1. Two FAR clauses[14] play an important role in the Defense Contract Audit Agency (DCAA) Audits:

> FAR 31.201-2, Determining allowability.
>
> (a) A cost is allowable only when the cost complies with all of the following requirements:
>
> (1) Reasonableness.
>
> (2) Allocability.
>
> (3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.
>
> (4) Terms of the contract.

[13] I attempted to resolve the change from "we" to "I" in adapting my decision to a dissent but may not have been totally successful.

[14] I do not list FAR 31.201-4, Allocability, because there is no disagreement over the fact these costs are allocable to L3's contracts.

(5) Any limitations set forth in this subpart.

And:

FAR 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.

DCAA Audit Methodology[15]

2. The method DCAA uses to conduct its audits depends on the volume of cost data. In a few situations the volume of cost data may be small enough that DCAA can

[15] I readily admit that the audit reports, expert reports and briefs do not afford a complete understanding of DCAA's procedures to include Dollar Unit Sampling (DUS),

conduct a 100% audit. In most situations the data is voluminous making 100% audit impossible. In these situations DCAA must use statistical analysis to perform its audits and reach its conclusions. DCAA has an in-house developed statistical tool called "EZ-Quant" that it uses to select a sample based on DCAA's size criteria and then conducts a 100% audit of the sample to determine the questioned costs in the sample. DCAA then "extrapolates" the questioned costs in the sample to the remaining costs to arrive at its conclusions on total unallowable costs (app. opp'n at 10-11, 15-16, 24)[16]. At times DCAA will question the accuracy EZ-Quant results and resort to a sample based on auditor judgmental selection (app. opp'n at 11). DCAA discusses its methodology in its opposition, here is an example:

> DCAA auditor Cynitra Kennard, under the supervision of Mr. North, audited L3's shelter differential costs for 2011-2014, and selected a sample of transactions using EZ-Quant. Ms. Kennard testified that she used EZ-Quant again to audit shelter differential costs for 2015-2016. Kennard Dep. at 28:12-18. The 2015-2016 audit report confirms that DCAA used statistical sampling methodology to select a sample and extrapolate questioned costs. Ex. 25 at 55. For 2017, Ms. Kennard likewise used EZ-Quant and statistical sampling to extrapolate questioned costs for L3's off-site living allowances. *Id*. at 26:20-22; Ex. 26 at 43-44. Ms. Kennard also testified that she used EZ-Quant to select the sample transactions from the shelter differential account for the 2018 ICP audit, which is ongoing. Kennard Dep. at 26:3-17.

(App. opp'n at 16)

The DCAA Audits

3. These claims were audited by DCAA resulting in Audit Reports for L3's Mission Integration Division (MID), dated September 27, 2017, and Platform Integration Division (PID), dated February 14, 2018. The audit report for MID are 9511-2011G10100001, 9511-2012G10100001, 9511-2013G10100001 and 9511-2014G10100002 for L3's fiscal years 2011 to 2014 (R4, tab 2). The audit report for PID are 9511-2011W10100001, 9511-2012W10100001, 9511-2013W10100001 for L3's fiscal years 2011 to 2013 (R4, tab 3).

4. In the audit reports for MID, DCAA questioned the following costs:

Physical Unit Sampling (PUS), and judgmental selection, but I have sufficient detail required for our decision.

[16] I rely on L3's Statement of Facts because DCMA generally agrees with L3's facts except for certain characterizations (gov't resp. at 2-3).

- $56,285 of the contractor's claimed CFY 2011-2014 Indirect Labor costs.
- $5,539,395 of the contractor's claimed CFY 2011-2014 Outside Services costs.
- $4,359,465 of the contractor's claimed CFY 2011-2014 Employee Relocation costs.
- $67,153 of the contractor's claimed CFY 2011-2014 Settlement to Cost Center costs.
- $178,270 of the contractor's claimed CFY 2011-2014 Indirect Travel Airfare costs.
- $137,975 of the contractor's claimed CFY 2011 L3 Corporate Allocation costs.
- $288,719 of CFY 2014 Corporate Home Office Allocation costs.
- $791,170 of the contractor's claimed CFY 2011 Home Office Allocation costs.
- $14,337,524 of the contractor's claimed Direct Costs. Exhibit C identifies the questioned amounts by account.

(R4, tab 2 at 4) DCAA provided additional detail in Exhibit A (Indirect costs), Schedule A-07 (R4, tab 2 at 20-45), and Exhibit C (Direct costs), Schedule C-05 (R4, tab 2 at 80-100). At the end of the audit DCAA offered to provide more information, "Due to the voluminous nature of the calculations related to these questioned costs, additional information will be provided upon request" (R4, tab 2 at 100).

5. In the audit reports for PID, DCAA questioned the following costs:

- $297,177 ($267,113 + $30,064) of the contractor's claimed CFYs 20112013 Indirect Travel – Airfare costs.
- $128,246 of the contractor's claimed CFYs 2011-2013 Bonus Costs which are included in the claimed Fringe Expenses.
- $37,511 of the contractor's claimed CFY 2011 Workers Compensation Fringe Costs.
- $82,429 of the contractor's claimed Direct Costs.

(R4, tab 3 at 6) DCAA provided supporting detail in Exhibit A, indirect costs 2011-2013 (*id*. at 12); Schedule A-01, air travel and marketing, G&A and engineering for 2011 (*id.* at 16-18); Schedule A-02, engineering air travel for 2011 (*id.* at 21); Schedule A-03, fringe for 2011 (*id.* at 22-25); Schedule A-04, G&A air travel for 2012 (*id.* at 26); Schedule A-05, engineering air travel for 2012 (*id*. at 27); Schedule A-06, fringe for 2012 (*id*. at 28); Schedule A-07, G&A air travel for 2013 (*id.* at 29); Schedule A-08, engineering airfare for 2013 (*id.* at 30); Schedule A-09, fringe air travel for 2013 (*id.* at 31); Exhibit B, penalties for 2011 to 2013 (*id.* at 32-44); and Exhibit C, direct costs air travel for 2011 to 2013 (*id*. at 45-47).

DCMA Contracting Officer Final Decisions[17]

6. According to the Board's docketing notice (R4, tab 4 at 1) the following ASBCA Nos. are associated with the following government claims:

ASBCA No.	Claim
61810	Government claim for $347,915
61811	Government claim for $10,692,605
61812	Government claim for $572,318
61813	Government claim for $6,002
61814	Government claim for $2,542

ASBCA No. 61810 was settled and dismissed with prejudice. ASBCA No. 61812 was dismissed without prejudice for lack of jurisdiction leaving ASBCA Nos. 61811, 61813 and 61814 active in this appeal.

7. On June 28, 2018, Ms. Gladys Broyles, Defense Contract Management Agency (DCMA) Administrative Contracting Officer (ACO), issued a Contracting Officer's Final Decision (COFD) demanding payment of $10,692,605 based on DCAA Audit Report Nos. 9511-2011G10100001, 9511-2012G10100001, 9511-2013G10100001, 9511-2014G10100002, dated September 27, 2017 (R4, tab 4 at 28). Based on the docketing notice this COFD relates to ASBCA No. 61811. ACO Broyles broke down her decision into six unallowable direct cost amounts:

ODC Travel Air	$1,335,924
ODC Hotel	$443,368
ODC Meals	$210,771
ODC Shelter Differential	$7,602,056
ODC Other	$1,100,486
G&A	$1,722,601

[17] At this point it is difficult, but also unnecessary, to trace the dollar amounts in the audits directly to the amounts in the final decisions.

(R4, tab 4 at 30-31) ACO Broyles provided the rational for her finding in six notes associated with each of the six amounts disallowed (*id.* at 31-40). ACO Broyles repeatedly relied on FAR 31.201-3(a) to place the burden to prove challenged costs are reasonable on L3 (*id.* at 31-38).

8. On June 29, 2018, ACO Cheryl Clark issued a COFD demanding payment of $6,002 based on DCAA Audit Report No. 9511-2011W10100001 (R4, tab 4 at 71). Based on the docketing notice this COFD relates to ASBCA No. 61813. ACO Clark explained the $6,002 as follows, "This pertains to contract number FA8620-10-G-3023-1118 regarding the travel expenses of Frank Franklin and Mark Cross from January 1, 2012 to January 12, 2015 outlined in document numbers 19003022785 and 1900303999" (*id.*). ACO Clark further explained, "Under FAR 31.201-3(a) if the contracting officer challenges the specific costs . . . 'the burden of proof shall be upon the contractor to establish that such cost is reasonable.' As a result, in order to establish reasonableness, L3 PIO has the burden of justifying the need for premium airfare under FAR 3 l-205-46(b) to include FAR 3 l.205(46)(a)(7)" (*id.* at 73).

9. On June 29, 2018, ACO Jennings L. Summers issued a COFD demanding payment of $2,542 based on DCAA Audit Report No. 9511-2011W10100001 (R4, tab 4 at 79). Based on the docketing notice this COFD relates to ASBCA No. 61814. ACO Summers explained that the disallowed amount related to air travel by Mr. Bays. ACO Summers further explained, "Given the above, under FAR 31.201-3(a), I cannot find that a reasonably prudent person would incur the cost of business class airfare for air travel of three hours. The return coach airfare trip supports my position. As a result, under 31.201-3(a) the burden of proof is on L3 to establish reasonableness fell to L3" (*Id.* at 81).

L3 Appeals

10. L3 appealed the COFDs to the Board (app. opp'n at 11 ¶ 22).

DCMA Withdraws the COFDs and Moves for Dismissal

11. On February 28, 2020 DCMA ACO Charles A. McGlothen withdrew the COFDs:

> I hereby unequivocally withdraw the Contracting Officer's Final Decisions ("COFDs") and demands for payment dated 28 June 2018 (ASBCA No. 61811), signed by Gladys Broyles, 29 June 2018 (ASBCA No.60813) signed by Cheryl L. Clark, and 29 June 2018 (ASBCA No.60814), signed by Jennings L. Summers that have been appealed to the ASBCA and assigned the respective docket numbers. A motion for dismissal of those appeals will be filed by the assigned trial attorney. The Government does not intend to re-assert the costs at issue in those disputes.

(Gov't mot., ex. 1) DCMA filed a Motion to Dismiss on the same day, February 28, 2020 (gov't mot.).

Other Audit Disputes

12. In its opposition to DCMA's motion to dismiss, L3 summarizes similar audit disputes between L3 and DCAA/DCMA from 2006 through 2018. These disputes all followed a similar path: DCAA conducts Audits challenging costs, DCMA issues COFDs implementing the DCAA Audits and demanding repayment of the challenged costs, L3 appeals the COFDs to the Board and DCMA either withdraws the COFDs or the parties settle for a nuisance amount resulting in dismissal of the appeals with prejudice (app. opp'n ¶¶ 3-5 (2006), 6-8 (2007), 9-12 (2008), 13-15 (2009) and 16-19 (2010). The disputes involved in this decision followed a similar path but remain unresolved (app. opp'n ¶¶ 20-22 (CYs 2011 to 2014)). There are several similar appeals that have been stayed pending resolution of the appeals in ASBCA Nos. 61811, 61813 and 61814 (app. opp'n ¶¶ 27-28, 33 (CYs 2011 to 2016)).

13. In its opposition, L3 makes the point that this cycle of DCAA Audit using statistical analysis and extrapolation, DCMA COFDs, appeal and withdrawal of the COFDs is seen from 1006 through 2018:

> As described above, DCMA ACOs have issued COFDs disallowing L3's airfare costs year after year since 2006 and then subsequently withdrew the claims or settled for nuisance amounts. This dispute has continued with DCAA's 2015-2016 and 2017 audit reports.

(App. opp'n at 16) And:

> However, it is clear that DCAA continues to question the same types of costs for the same reasons, and DCAA also continues to use the same purported statistical sampling methods.

(App. opp'n at 15) And:

> During those depositions, several of the auditors who were involved in subsequent audits of ICPs (*i.e.*, the 2015, 2016, 2017, and 2018 ICPs) admitted that DCAA employed statistical sampling to extrapolate and question costs in those subsequent audits.

(App. opp'n at 15) And:

> As of the date of this filing, DCMA has not issued a COFD sustaining the costs questioned in those reports. However, it is clear that DCAA continues to question the same types of costs for the same reasons, and DCAA also continues to use the same purported statistical sampling methods.

(App. opp'n at 15)

Expert Witnesses

14. Each party employed an expert and submitted an expert report. Neither party objected to the expert status of the other party's expert, therefore, I find both witnesses qualify as experts in statistical analysis.

15. L3's expert is Mr. Lynford Graham. In his expert report Mr. Graham explains that he was hired by L3 "to comment on the applications of statistical sampling in the Defense Contract Audit Agency (DCAA) claims of questioned costs as stated in the 2 audit reports at issue in the appeals of L3 Technologies, Inc. (L3), ASBCA Nos. 61810, 61811, 61813, 61814" (app. opp'n, ex. 22 at 4-5). Mr. Graham concludes that DCAA's methods using Dollar Unit Sampling (DUS), Physical Unit Sampling (PUS), DCAA's sample size selection, and DCAA's "EZ-Quant" software used by the DCAA to apply statistical techniques all result in unreliable results (*id.* at 5-6). Specifically, DCAA's methods and software used "for the purpose of estimating questioned costs are not supportable" (*id.* at 6). Attached to Mr. Graham's report is Appendix A: Summary of Sampling Applications in L3 Technology Audits (*id.* at 46). The table indicates that sampling was used for six out of eight costs. By way of explanation I look at employee relocation costs. According to the table, DUS sampling was used on a "population" of $7,822,914 using a sample of 89 resulting in disallowing $4,359,456[18] (*id.*).

16. DCMA's expert is Mr. Ali Arab.[19] In his rebuttal report Mr. Arab starts out by distinguishing DCAA audits, "The audits performed by DCAA are significantly different than financial audits. The purpose of an incurred cost audit (the subject of the L3 ASBCA cases) is to provide an opinion on the contractor's certified assertion that the incurred cost submission does not contain unallowable costs" (app. opp'n, ex. 23 at 6). He further explained:

> My report is focused on DCAA's sampling program as used in the L3 audits. It is important to note that DCAA questioned a total of $26.2 million; of which $5.6 million (21.4 percent) was based on statistical sampling projections.

[18] The table is not completely self-explanatory and the numbers may be a little off because the table is a bit illegible but it serves its purpose for this decision.

[19] DCMA produced Mr. Arab's expert rebuttal report but expressed its intention not enter it into evidence (gov't resp. at 22).

> The remaining $20.6 million is based on methods outside of the use of statistical sampling.

(*Id.* at 7) Mr. Arab found that the sample sizes used by DCAA were based on 80% not 90% confidence level and were therefore smaller than DCAA desired. DCAA's use of DUS sample size planning procedure also contributed to a small sample size (*id.* at 8). He explained that when DCAA used statistical samples to calculate questioned costs, the DCAA audit reports present the point estimate as the most likely amount of the true questioned costs in the audit universe under review (*id.* at 11-12). Mr. Arab conducted an in-depth review of EZ-Quant and did not identify any issues or concerns (*id.* at 15).

17. Mr. Arab explained that Audit Report No. 09511-2011G10100001, dated September 27, 2017, used statistical sampling for 21.8 percent of the total questioned costs while the remaining questioned costs were from reviewing individual transitions using judgmental selection (*id.* at 15-16). None of the questioned costs in Audit Report No. 09511-2011W10100001, dated February 14, 2018, resulted from projections of statistical samples. All costs questioned were from review of each transaction using judgmental selection. (*Id.* at 16) Mr. Arab also attached a table at the end of his expert report presenting DCAA's methods of arriving at its questioned coasts (*id.* at 22).

DCAA TOP Note

18. On January 17, 2020, DCAA, apparently relying on Mr. Arab's findings, issued a "TOP Note" that changed the sample size for Dollar Unit Sampling:

> Dollar Unit Sampling (DUS): DCAA's sampling program is intended to use a two-sided limit at the 90 percent confidence level. However, our evaluation determined that the AICP A Table we have used to determine minimum sample sizes is 'based on a one-sided confidence limit. Consequently, the sample sizes correspond to a two-sided limit at the 80 percent confidence level; not the two-sided limit at the 90 percent confidence level we had instructed.
>
> Using a lower confidence level results in sample sizes that are smaller than desired which impacts the confidence we have in the point estimate. As a result, our sample sizes will increase. To address this issue, when performing a DUS sample, please use the chart below to determine minimum sample sizes. (Chart omitted).

(App. opp'n, ex. 24 at 2) DCAA also changed the sample size for Physical Unit Sampling:

> Physical Unit Sampling (PUS): Prior to this Top Note, DCAA used the DUS sample size planning procedure for a physical unit sample. We determined this methodology is not justifiable as the underlying theory for these two methods are quite different. Consequently, the sample sizes determined for PUS using this approach may potentially be smaller than required for a statistically valid sample. To address this issue, when performing a PUS sample, please use the EZ Quant sample sizer to determine the appropriate sample size. The Table is no longer valid for PUS. Enclosure 1 provides details on how to use the EZ Quant Sample Sizer.

(*Id.* at 3)

DECISION

Procedural Background

After L3 appealed DCMA's COFDs (SOF ¶ 10), ACO Charles A. McGlothen issued a February 28, 2020 letter "unequivocally" withdrawing COFDs for Appeal Nos. 61811, 61813 and 61814. The ACO stated, "The Government does not intend to re-assert the costs at issue in those disputes" (SOF ¶ 11). Also on February 28, 2020, DCMA filed with the Board a Motion to Dismiss ASBCA Nos. 61811, 61813 and 61814 as moot (*id.*).

Rather than accepting dismissal, L3 chose to fight. On March 4, 2020 L3 filed its Opposition to Government's Motion to Dismiss and Cross-Motion for a Decision Sustaining the Appeals (app. opp'n). On April 16, 2020 DCMA filed its Response to Appellant's Opposition and Cross-Motion arguing that the appeals were moot (gov't resp.). On May 18, 2020, L3 filed its Reply in Support of its Opposition to the Government's Motion to Dismiss and Cross-Motion for a Decision Sustaining the Appeals (app. reply). I view L3's Cross-Motion for a Decision Sustaining the Appeals as a Motion for Summary Judgment.

The details of above procedural posture is a little confusing. However, the "big picture" is that first I must decide if the appeals are moot and if so, does the mootness exception apply? If the exception applies, I address L3'cross motion that I deem a Motion for Summary Judgment. As explained below, I find the appeals are moot but the mootness exception applies and I deny L3's motion. Therefore, L3 may continue to pursue its appeals and (1) challenge DCAA's statistical audit procedures and extrapolation of costs found to be unallowable and (2) prove the reasonableness of the alleged unallowable costs.

Positions of the Parties

DCMA believes that the appeals should be dismissed as moot based on the unequivocal withdrawal of the final decisions and promise not to reassert the claims (gov't mot. at 1). DCMA opposes L3's argument that the appeal remains "live" because there is no possibility that DCMA will reassert the claim (gov't resp. at 2, 4, 15, 20, 23).

L3 sums up what it wants as follows:

> More importantly, the appeals are not moot because the issues presented in the appeals remain live: L3 seeks a decision on the merits to resolve the issues presented in these appeals—the continuing dispute over the correct interpretation of various FAR sections related to L3's incurred costs and DCAA's use of purported "statistical" sampling to extrapolate questioned costs—which remain live despite the withdrawal of the COFDs.

(App. opp'n at 24) L3 argues that DCAA's statistical sampling and "extrapolation" of questioned costs is flawed. L3 argues, "EZ-Quant is DCAA's fundamentally flawed statistical sampling software application" (app. opp'n. at 16).

Next L3 raises the issue of the correct interpretation of various FAR sections related to L3's incurred costs. Central to L3's position is the allocation of burden of proof. L3 contends that since these are government claims, DCMA has the burden of proof. L3 reasons that since DCMA abandoned its claims, L3 is entitled to judgment on the merits due to DCMA's failure to prove its case.

ASBCA Nos. 61811, 61813 and 61814 are Moot

The Board has many decisions dismissing appeals as moot. One of the latest is *Quimba Software, Inc.*, ASBCA No. 59197, 19-1 BCA ¶ 37350:

> In seeking dismissal of the appeal on the ground of mootness, the government argues that the ACO granted all the relief that Quimba sought by voluntarily rescinding the demand for repayment of indirect costs paid through provisional billing rates and stating that it does not intend to issue another decision disallowing the same costs (gov't mot. at 3-5; *see* statement 7).
>
> Quimba opposes the dismissal. Quimba's main argument is that, while the final audit report was issued in 2008, the government waited until December 2013, after expiration of

> the Contract Disputes Act statute of limitations, 41 U.S.C. §7103(a)(4)(A), to issue the final decision.
>
> . . . .
>
> We reject Quimba's argument and dismiss the appeal as moot.

(*Id.* at 181,613) In *Beechcraft Defense Co.*, ASBCA No. 61550, 18-1 BCA ¶ 37,069 we wrote:

> Where a contracting officer unequivocally rescinds a final decision asserting a government claim, there is no longer any claim before the Board to adjudicate, and the Board has dismissed the appeal as moot. *URS Federal Support Services, Inc*., ASBCA No. 60364, 17-1 BCA ¶36,587 at 178,204; *Combat Support Associates*, ASBCA Nos. 58945, 58946, 16-1 BCA ¶36,288 at 176,973. Accordingly, the appeal is dismissed as moot.

(*Id.* at 180,431) I find that DCMA's February 28, 2020 "unequivocal" withdrawal of COFDs in ASBCA Nos. 61811, 61813 and 61814 and promise not to "re-assert the costs at issue in those disputes" (SOF ¶ 11) renders these appeals moot.

The Exception to Mootness[20]

At the risk of stating the obvious, this repetitive cycle of DCAA Audits challenging costs, DCMA COFDs demanding repayment of the challenged costs, L3's ASBCA appeals and DCMA's dismissals without reaching the merits is untenable (SOF ¶¶ 12-13).[21] The root cause of why DCMA first adopts DCAA's audit results and then abandons the audits after an appeal is filed is unclear.

[20] The majority seems to focus on "voluntary cessation" not the mootness exception.

[21] This situation is apparently not limited to L3. *Quimba Software, Inc.*, ASBCA No. 59197, 19-1 BCA ¶ 37350; *Advanced Powder Solutions, Inc.*, ASBCA No. 61818, 19-1 BCA ¶ 37425; *Northrop Grumman Corp.*, ASBCA No. 61771, 2019 WL 5089236; *Northrop Grumman Corp.*, ASBCA No. 61345, 2019 WL 4908683; *L3 Communications Integrated Systems, L.P.*, ASBCA No. 60431, 16-1 BCA ¶ 36362; *Sygnetics, Inc.*, ASBCA No. 60357, 18-1 BCA ¶ 37160; *Flightsafety International Inc.*, ASBCA No. 60415, 2018 WL 7200012; *Combat Support Associates*, ASBCA No. 58945, 16-1 BCA ¶ 36288; *Beechcraft Defense Co.*, ASBCA No. 61550, 18-1 BCA ¶ 37069; *York International Corp.-York Navy Systems*, ASBCA No. 60561, 2016 WL 3565932; *Autonomous Solutions, Inc.*, ASBCA No. 59131, 2014 WL 518988.

I start with the Supreme Court's discussion of the exception to mootness in *Weinstein v. Bradford*, 96 S.Ct. 347 (1975). In *Weinstein v. Bradford* the Supreme Court did not apply the exception to mootness doctrine but did discuss it in the process of reaching its decision:

> In *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), we reviewed in some detail the historical developments of the mootness doctrine in this Court. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911), was the first case to enunciate the "capable of repetition, yet evading review" branch of the law of mootness. There it was held that because of the short duration of the Interstate Commerce Commission order challenged, it was virtually impossible to litigate the validity of the order prior to its expiration. Because of this fact, and the additional fact that the same party would in all probability be subject to the same kind of order in the future, review was allowed even though the order in question had expired by its own terms.
>
> *Sosna* decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

(*Id.* 348-49)

I found no ASBCA decisions applying this exception to mootness, but I did find one decision acknowledging its existence. In *Combat Support Associates,* ASBCA No. 58945, 16-1 BCA ¶ 36288 we stated:

> We disagree with CSA that we are confronted with a dispute that is "capable of repetition, yet evading review." A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Humane Society of the United States* v. *Clinton*, 236 F.3d 1320, 1331 (Fed. Cir. 2001). However, a claim is not moot if that action is capable of repetition, yet evading review. *Id*. To qualify for this exception, the challenged action must meet two conditions. *Id*. First, the action must in its duration be too short to be fully litigated prior to its cessation or expiration. *Id*. Second, there must be a reasonable likelihood

> that the party will again suffer the injury that gave rise to the suit. *Id*.

(*Id*. at 176,974) I conclude from *Combat Support Associates* that there is no impediment to the Board's reliance on the mootness exception in the right circumstances. If there was ever the "right circumstance," this is it.

DCMA's Position

DCMA opposes the application of the "exception" to mootness as follows:

> There is no unlawful activity or wrongful behavior. Second, the exception applies when the wrongful behavior is capable of repetition. While it is clear that the Government will continue to determine the allowability of airfare costs in future incurred cost submissions for both L3 and other contractors and may continue to utilize statistical sampling in estimating the amount of those unallowable costs, the Government's future practice will not affect L3's entitlement to the costs originally questioned in the Government claims at issue in these appeals.[22]

(Gov't resp. at 6-7) I disagree with DCMA's inference that the mootness exception requires "unlawful activity or wrongful behavior" or that DCMA's "future practice will not affect L3's entitlement to the costs originally questioned." The cases highlighted below do not involve unlawful activity or wrongful behavior. DCMA's arguments against the mootness exception are unpersuasive.

Examples Where the Exception Applied

L3 cited a number of Supreme Court and Federal Circuit cases and I selected three, in addition to *Weinstein v. Bradford* (*Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911)), to help us understand the exception. In *Kingdomware Technologies v. United States*, 136 S.Ct. 1969 (2016) a veteran-owned small business brought a 2012 bid protest claim seeking declaratory and injunctive relief against Department of Veterans Affairs (VA) alleging that the Department failed to comply with the statutory Rule of Two generally requiring the Department to set aside contracts for veteran-owned small businesses. By 2014 the contracts in question had been fully completed and the cases were moot. After reciting the elements of the mootness exception discussed above in *Weinstein v. Bradford* (*Southern Pacific Terminal Co.*), the Supreme Court in *Kingdomware* held the exception applied:

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[22] This may be true, but every time a contractor must go through this audit, final decision, appeal, dismissal fiasco it must incur litigation costs the government does not reimburse. Settlement is even worse because the contractor is required to pay.

> Here, no live controversy in the ordinary sense remains because no court is now capable of granting the relief petitioner seeks. When Kingdomware filed this suit four years ago, it sought a permanent injunction and declaratory relief with respect to a particular procurement. The services at issue in that procurement were completed in May 2013. And the two earlier procurements, which Kingdomware had also protested, were complete in September 2012. See decl. of Corydon Ford Heard III ¶¶ 6–8. As a result, no court can enjoin further performance of those services or solicit new bids for the performance of those services. And declaratory relief would have no effect here with respect to the present procurements because the services have already been rendered.
>
> . . . .
>
> That exception applies to these short-term contracts. First, the procurements were fully performed in less than two years after they were awarded. We have previously held that a period of two years is too short to complete judicial review of the lawfulness of the procurement. See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 514–516, 31 S.Ct. 279, 55 L.Ed. 310 (1911). Second, it is reasonable to expect that the Department will refuse to apply the Rule of Two in a future procurement for the kind of services provided by Kingdomware. If Kingdomware's interpretation of § 8127(d) is correct, then the Department must use restricted competition rather than procure on the open market. And Kingdomware, which has been awarded many previous contracts, has shown a reasonable likelihood that it would be awarded a future contract if its interpretation of § 8127(d) prevails. See decl. of Corydon Ford Heard III ¶¶ 11–15 (explaining that the company continues to bid on similar contracts). Thus, we have jurisdiction because the same legal issue in this case is likely to recur in future controversies between the same parties in circumstances where the period of contract performance is too short to allow full judicial review before performance is complete. Our interpretation of § 8127(d)'s requirements in this case will govern the Department's future contracting

(*Id.* at 1975-76) In *Humane Society v. Clinton*, 236 F.3d 1320 (Fed. Cir.), wildlife and animal protection organizations sued the President and

Secretary of Commerce seeking to compel them to renew action against Italy under High Seas Driftnet Fisheries Enforcement Act. At the time of the Federal Circuit's decision Italy had stopped widespread driftnet fishing and the case was technically moot. However, the Federal circuit held that the exception to mootness applied because a claim is not moot if that action is capable of repetition, yet evading review:

> In a memorandum date-stamped April 28, 1997, concerning "Procedural steps under the High Seas Driftnet Fisheries Enforcement Act," government attorneys recognized that the Driftnet Act did not explicitly address the situation if Italy was to continue or resume large-scale driftnet fishing after the Secretary's certification that driftnet fishing had ceased. The memorandum stated that it was possible to read the Act to require a new identification of Italy under § 1826a(b)(1)(B) and a second round of consultations under § 1826a(b)(2) before the Secretary could prohibit the importation of fish products from Italy. The memorandum also noted that such a process would appear to be incompatible with the purpose of the statute and could result in an annual cycle of agreements that appear to be adequate on paper but prove to be ineffectual in practice.
>
> We can assume that, if a plaintiff was to challenge the Secretary's certification that a nation had ceased driftnet fishing and brought forth adequate evidence of persistent proscribed driftnet fishing, the Secretary would likely identify that nation again. Because of that re-identification, the challenge to the Secretary's prior certification would almost always be moot under the Government's theory. Thus, the question of the propriety of the Secretary's certification would escape judicial review. Even the Government's attorneys recognized that an ineffectual cycle of repetitious events could occur. We conclude that the purpose of the Act is better effectuated by holding that the question, whether the Secretary's certification that a nation has ceased driftnet fishing is in accord with law, is not rendered moot by a later re-listing or re-identification of that nation.

(*Id.* 1331-32) In *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) a nonprofit ideological advocacy corporation sued Federal Election Commission (FEC), seeking declaration that "electioneering communications" provisions of Bipartisan Campaign Reform Act (BCRA) violated First Amendment. Supreme Court ruled the dispute was not mooted by passing of the election cycle:

As the District Court concluded, however, these cases fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. (Citations omitted). The exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." (Citations omitted). Both circumstances are present here.

As the District Court found, it would be "entirely unreasonable ... to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads" during the BCRA blackout periods. (Citation omitted) The FEC contends that the 2–year window between elections provides ample time for parties to litigate their rights before each BCRA blackout period. But groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period. In these cases, WRTL had no way of knowing well in advance that it would want to run ads on judicial filibusters during the BCRA blackout period. In any event, despite BCRA's command that the cases be expedited "to the greatest possible extent," § 403(a)(4), 116 Stat. 113, note following (Citation omitted), *two* BCRA blackout periods have come and gone during the pendency of this action. "[A] decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively." (Citations omitted)

3 The second prong of the "capable of repetition" exception requires a " 'reasonable expectation' " or a " 'demonstrated probability' " that "the same controversy will recur involving the same complaining party." (Citation omitted) Our cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it "will again be subjected to the alleged illegality," (citation omitted) or "will be subject to the threat of prosecution" under the challenged law (citations omited). The FEC argues that in order to prove likely recurrence of the same controversy, WRTL must establish that it will run ads in the future sharing all "the characteristics that the district court deemed legally relevant." Brief for Appellant FEC 23.

> The FEC asks for too much. We have recognized that the " 'capable of repetition, yet evading review' doctrine, in the context of election cases, is appropriate when there are 'as applied' challenges as well as in the more typical case involving only facial attacks." (Citation omitted) Requiring repetition of every "legally relevant" characteristic of an as-applied challenge—down to the last detail—would effectively overrule this statement by making this exception unavailable for virtually all as-applied challenges. History repeats itself, but not at the level of specificity demanded by the FEC. Here, WRTL credibly claimed that it planned on running " 'materially similar' " future targeted broadcast ads mentioning a candidate within the blackout period, (citation omitted) and there is no reason to believe that the FEC will "refrain from prosecuting violations" of BCRA, (citation omitted). Under the circumstances, particularly where WRTL sought another preliminary injunction based on an ad it planned to run during the 2006 blackout period, (citation omitted) we hold that there exists a reasonable expectation that the same controversy involving the same party will recur. We have jurisdiction to decide these cases.

(*Id.* at 462-64)

Each of these cases apply the elements needed to establish the "capable of repetition, yet evading review" doctrine which are (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 96 S.Ct. 347, 348-349. I studied the Supreme Court's and Federal Circuit's application of the exception to mootness in these four situations. *Southern Pacific Terminal (*cited in *Weinstein v. Bradford*) is the first case in which the Supreme Court applied the mootness exception because of "the short duration of the Interstate Commerce Commission order challenged, it was virtually impossible to litigate the validity of the order prior to its expiration." In *Kingdomware Technologies* it was the short terms of the contracts meaning they were complete before the courts could resolve the case; in *Humane Society* it was the "Secretary's certification that a nation has ceased driftnet fishing"; in *Wisconsin Right to Life* it was the short duration of BCRA [Bipartisan Campaign Reform Act] blackout periods. I want to highlight a significant difference between these cases and L3's situation. In the cases cited above the "short duration" element of the exception was satisfied by something outside the control of government entity arguing that the case was moot and the exception did not apply. Just the opposite in L3's case. It was DCMA that withdrew the final decisions cutting short the appeals. It was DCMA that set up the "capable of repetition, yet evading review" situation. DCMA withdraws the COFDs to moot the appeals and then argues that the exception does not apply. This is unfair and makes for an even more compelling reason

to apply the exception. As the Federal Circuit wrote in *Humane Society*, finding the case moot would lead to an "ineffectual cycle of repetitious events. . . ." The same is true in L3, dismissal of these appeals as moot perpetuates the "ineffectual cycle" already seen between 2006 and 2018 of DCAA audits finding unallowable costs prompting DCMA final decisions demanding repayment, L3 appealing to the ASBCA and ultimately DCMA abandoning the DCAA audits leaving L3 without resolution of its defenses. I conclude from the above that the first element of the mootness exception, "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" is satisfied.

The record establishes that L3 has endured this cycle of audit, final decision, appeal and dismissal for at least twelve years with no end in sight (SOF ¶¶ 12-13). Therefore, the second element of the mootness exception "a reasonable expectation that the same complaining party would be subjected to the same action again" is satisfied.

The Mootness Exception Applies in ASBCA Nos. 61811, 61813 and 61814

I would apply the mootness exception and this case would continue. L3 is entitled to present its arguments to the Board. DCAA/DCMA are likewise entitled to defend the audits. This does not mean that L3 will prevail, it just gives L3 a chance to make its case. I move on to L3's motion for summary judgment.

Legal Standard for Summary Judgment

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citations omitted). In the course of the Board's evaluation of a motion for summary judgment, our role is not "'to weigh the evidence and determine the truth of the matter,' but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial." *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). A material fact is one which may make a difference in the outcome of the case. *Liberty Lobby*, 477 U.S. at 249. The opposing party must assert facts sufficient to show a dispute as to a material fact of an element of the argument for reformation or breach. *New Iraq Ahd Co.*, ASBCA No. 59304, 15-1 BCA ¶ 35,849 at 175,291-92 (citing *Mingus*, 812 F.2d at 1390-91) ("To ward off summary judgment, the non-moving party must do more than make mere allegations; it must assert facts sufficient to show a dispute of material fact."); *see Lee's Ford Dock. Inc.*, ASBCA No. 59041. 16-1 BCA ¶ 36.298 at 177,010.

L3's Articulation of the Burden of Proof

L3 discusses burden of proof several times:

> A decision sustaining these appeals is appropriate in accordance with Board Rule 17 (or in the alternative, Board Rule 7(c)) and binding precedent of the Board because the Government has plainly indicated an intention not to continue the defense of the appeals and has failed to meet its burden of proving the costs disallowed by the COFDs are unallowable.

(App. opp'n at 3) L3 repeats this argument later in its opposition:

> A decision sustaining these appeals is appropriate in accordance with Board Rule 17, or in the alternative Board Rule 7(c), and binding precedent of the Board because the Government has plainly indicated an intention not to continue the prosecution or defense of the appeals and has not met its burden of proving the costs disallowed in the COFDs are unallowable.

(*Id.* at 34) And:

> The facts in these appeals are analogous to those in *Centron*. The Government has essentially conceded that it cannot—or at least has no intent of trying to—meet its burden of proving the Government's cost disallowance claims asserted in the COFDs.

(*Id.* at 35) And:

> To the extent the Board considers a default judgment sustaining the appeals a "sanction" under Rule 16—rather than the natural result of failing to defend the appeals or meet the Government's burden of proving the cost disallowance claims asserted in the COFDs—it is one that is "necessary to the just and expeditious conduct of the appeal" under Rule 16 and an entirely "appropriate action" under Rule 17.

(*Id.* at 36)

FAR 31.201-3, Allocates the Burden of Proof to L3

It is true that these are government claims and the government bears an initial burden but that burden is not as claimed by L3. As I explain below the government's

burden is to challenge specific costs claimed by the contractor. In their briefs, neither L3 nor DCMA consider FAR 31.201-3, Determining reasonableness and how it operates to place the burden of proof on L3. Our interpretation is consistent with that of DCMA's COFDs (SOF ¶¶ 7-9).

FAR Part 31, Contract Cost Principles and Procedures, defines what costs are and are not allowable providing the standards applied by DCAA in its audits (SOF ¶¶ 4-5) and DCMA in its final decisions (SOF ¶¶ 7-9). As explained in *Boeing North American, Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002), this Board is also obligated to follow FAR Part 31:

> Although a cost may be allocable to a contract, the cost is not necessarily allowable. We have agreed with the general proposition that "costs may be assignable and allocable under CAS, but not allowable under [FAR]." *United States v. Boeing Co.*, 802 F.2d 1390, 1394 (Fed.Cir.1986). [Footnote omitted] And the FAR makes clear that "[w]hile the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to [FAR] Part 31 and applicable agency supplements." FAR § 31.201–1(b) (2001).

(*Id.* at 1280)

FAR 31.201-2, Determining allowability lists five elements required to determine if a cost is allowable (SOF ¶ 1). One of the five elements is reasonableness defined by FAR 31.201-3 Determining reasonableness, which includes the following language in FAR 31.201-3(a):

> 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.*

(SOF ¶ 1) (Emphasis added)

When interpreting a procurement regulation, "we seek an interpretation consistent with the plain terms provided; it is not our prerogative to insert additional words or phrases to alter an otherwise plain and clear meaning." *Raytheon Company*, ASBCA No. 57576 *et al.*, 15-1 BCA ¶36,043 at 176,050. The language to be interpreted, quoted and italicized above, is, "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." This language is unambiguous and has only one reasonable interpretation. It requires two actions by the government: (1) it must perform an "initial review of the facts," and (2) that review results in a "challenge" to "specific cost[s]" by a contracting officer or contracting officer's representative. If the government meets this initial burden, "the burden of proof shall be upon the contractor to establish that such cost is reasonable." DCMA employed this interpretation in its COFDs (SOF ¶¶ 7-9).

We interpreted FAR 31.201-3(a) in *Kellogg Brown & Root*, ASBCA, No. 58081, 17-1 BCA ¶ 36,595, where we recognized that contesting reasonableness "is significant because it shifts the burden of proof" to the contractor (*id*. at 178,240). We went on to hold that a general (blanket) assertion that all costs are unreasonable is insufficient to require the contractor to do more to prove reasonableness (*id*. at 178,250). I do not have such a blanket objection before me in these appeals. We have DCAA audits that challenge specific costs identified as unallowable and DCMA COFDs demanding repayment of those unallowable costs (SOF ¶¶ 7-9).

In *North American Landscaping, Construction and Dredge, Co.* (NALCO) ASBCA No. 60235, 18-1 BCA ¶ 37116 a separate concurring decision included the following footnote No. 29:

> The Federal Acquisition Regulation (FAR) has, on other occasions, permitted a CO's suspicions to trigger a requirement that a contractor provide more substantiation for certain costs. For example, in FAR 31.201-3, *all that is necessary to impose upon a contractor the burden of proof of demonstrating a particular cost to be reasonable is the CO's "challenge" of that cost after "an initial review of the facts."* FAR 31.201-3(a). Like the DFARS clause we have discussed above, this FAR provision does not go into detail about what is sufficient for the CO to bring such a challenge.

NALCO, 18-1 BCA ¶ 37116 at 180,659 n.29 (emphasis added). This footnote, although dicta, presents the interpretation of FAR 31.201-3(a) I followed in this case.

In *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37137, the trial judge employed the same interpretation of FAR 31.201-3(a) I discussed above that was applied in *Kellogg Brown & Root*, 17-1 BCA ¶ 36,595. *Parsons*, 18-1 BCA ¶ 37137 at 180,790. A concurring opinion took issue with the trial judge's conclusion that a blanket challenge to costs that failed to challenge specific costs was insufficient to require the contractor to do more to prove reasonableness. The concurring opinion concluded, "There was no requirement nor need to follow FAR 31.201 to evaluate this claim and thus, we concur in the result but not the analysis" *Parsons*, 18-1 BCA ¶ 37137 at 180,821. Again, I am not faced with such a blanket challenge in this case.

In *BAE Systems San Francisco Ship Repair*, ASBCA No. 58809, 14-1 BCA ¶ 35642, citing the Federal Circuit, we held that where the government has challenged specific costs, the contractor has the burden of proof to prove the costs it claims are reasonable:

> Interpreting FAR 31.201 -3(a), the Federal Circuit recently affirmed that the contractor has the burden of proof, unaided by a presumption of reasonableness, to establish that the costs it incurred were reasonable. *Kellogg Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1363 (Fed. Cir. 2013) ("It seems that KBR seeks a presumption that it is entitled to reimbursement simply because it incurred facilities costs. It is not."). This Board has long so held. *See Northrop Worldwide Aircraft Services, Inc.*, ASBCA Nos. 45216, 45877, 98-1 BCA ¶ 29,654 at 146,934 (citing *Northrop Worldwide Aircraft Services, Inc.*, ASBCA No. 47442, 97-1 BCA ¶ 28,885).

(*Id.* at 174,534)

L3's repeated contention that the government has the burden to prove the costs challenged by DCAA and DCMA are unallowable is simply wrong. DCAA's audits and DCMA's COFDs satisfy the government's initial burden to conduct an initial review and contracting officer challenge of specific costs. Accordingly, pursuant to FAR 31.201-3(a), "the burden of proof shall be upon the contractor [L3] to establish that such cost is reasonable" (SOF ¶ 1).

Disputed Material Facts Exist

Thus far I have spent all of my time on the mootness exception and interpreting FAR 31.201-3(a) as it relates to the burden of proof. Such interpretation is a question of law. *States Roofing Corp. v. Winter*, 587 F.3d 1364 at 1368 (Fed. Cir. 2009). Questions of law are susceptible of resolution by summary judgment. *Dixie Construction Company, Inc.*, ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,917. Although I resolved the interpretation / burden of proof questions of law issues, I cannot resolve L3's motion. Placing the burden of proof of allowability on L3 just clears the way for the parties to litigate the underlying factual matters in view of the proper allocation of burden of proof. DCAA and DCMA contend that the audit challenged costs are unallowable. L3 contends that the statistical analysis used in the DCAA audits is flawed[23] and the audit challenged costs are allowable. Whether costs are allowable is a question of fact. *Martin Marietta*

[23] I note that DCMA's expert, Mr. Arab, identified an error in DCAA's statistical analysis (sample size) that DCAA agreed with and implemented a change (SOF ¶¶ 16-18). I do not know if that cured the problem complained of by L3 or not, but L3 is entitled to proceed.

Corp., ASBCA No. 15313, 71-1 BCA ¶ 8644 (Disputes as to whether certain kinds of incurred costs (e.g. interest, donations, independent R&D, etc.) are allowable under the contract are disputes concerning a question of fact arising under the contract provisions . . . .). Accordingly, I have disputed material facts that cannot be resolved by summary judgment.

L3 is not Entitled to Summary Judgment that its Challenged Costs are Allowable

Because the question of allowability of discrete costs involves disputed material facts, I would deny L3's motion and allow the litigation to proceed.

CONCLUSION

Based on the above, I would deny DCMA's motion to dismiss for mootness and L3's motion asking the Board to decide that its challenged costs are allowable. I would allow the appeals to proceed.

Dated: March 1, 2021

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61811, 61813, 61814, Appeals of L3 Technologies, Inc., rendered in conformance with the Board's Charter.

Dated: March 2, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Northrop Grumman Corporation	)	ASBCA No. 62165
	)	
Under Contract No. F33657-01-C-4600	)	

APPEARANCES FOR THE APPELLANT: Thomas A. Lemmer, Esq.
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OPINION BY ADMINISTRATIVE JUDGE STINSON ON APPELLANT'S PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION

Pending before the Board is a partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike, filed by appellant Northrop Grumman Corporation (NGC). Previously, NGC and respondent, the Defense Contract Management Agency (DCMA), filed cross-motions for partial summary judgment on a government claim regarding the disallowance of appellant's pension costs pursuant to Federal Acquisition Regulation (FAR) 31.201-6, Accounting for Unallowable Costs.[1] The government's cross-motion for partial summary judgment and opposition to appellant's partial motion for summary judgment includes the argument that NGC's pension costs are unallowable as unreasonable costs pursuant to FAR 31.201-3 (gov't cross-mot. at 7-8). According to appellant, the Board lacks jurisdiction to consider the government's reasonableness challenge based upon FAR 31.201-3, because that issue was not first addressed in a final decision and "has never been part of the cost disallowance at issue in this appeal" (app. mot. dis. at 1). NGC requests that the Board dismiss the government's FAR 31.201-3 reasonableness challenge for lack of jurisdiction and strike any reference to that argument from the government's briefing. In the alternative, NGC requests that the

[1] By Order dated February 11, 2021, the Board granted appellant's motion to stay proceedings on the parties' cross-motions for partial summary judgment, pending resolution of appellant's partial motion to dismiss.

Board strike the government's FAR 31.201-3 reasonableness challenge because of its alleged prejudicial effect on NGC in this litigation. (App. mot. dis. at 16) For the reasons stated below, we deny NGC's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In Fiscal Year (FY) 2012, NGC performed flexibly-priced contracts which contained FAR 52.216-7, Allowable Cost and Payment (JSUMF ¶ 1).[2] NGC's Incurred Cost Submission (ICS) for FY 2012, dated June 27, 2013, included pension costs incurred pursuant to certain NGC nonqualified defined-benefit pension plans, which for government contract purposes, accounted for such costs on a pay-as-you-go basis (JSUMF ¶¶ 2-4, 7).

2. Certain pension plan participants who received pension benefits in FY 2012 earned compensation during their working years in excess of the limitation or cap set forth in FAR 31.205-6(p). NGC included as a compensation factor in its Retirement Benefit Formulas, amounts in excess of the applicable FAR 31.205-6(p) limitation in a given year, as part of participants' earned salary and bonus. (JSUMF ¶ 15)

3. On June 7, 2019, Elizabeth Imhoff, DCMA's corporate administrative contracting officer (CACO), issued a final decision disallowing certain of NGC's pension costs contained in its 2012 ICS (JSUMF ¶¶ 16-17; R4, tab 6).

4. The government's disallowance was based upon the premise that the pension costs were unallowable pursuant to FAR 31.201-6 as "directly associated costs" of unallowable compensation costs as specified in the limitation on allowability of compensation set forth in FAR 31.205-6(p). The final decision stated that some plan participants who received a benefit in FY 2012, earned compensation in excess of the applicable FAR 31.205-6(p) limitation during their working years that was not excluded

[2] "JSUMF" refers to the parties' October 9, 2020, Joint Stipulation of Undisputed Material Facts submitted in support of the parties' cross-motions for partial summary judgment; "app. mot." refers to appellant's November 6, 2020, motion for partial summary judgment; "gov't cross-mot." refers to the government's December 21, 2020, opposition to appellant's motion for partial summary judgment and cross-motion for partial summary judgment; "app. mot. dis." refers to appellant's January 19, 2021, partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike; "gov't resp." refers to the government's March 9, 2021, response to appellant's motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike; "app. reply" refers to appellant's March 16, 2021, reply brief; "gov't sur-reply" refers to the government's March 22, 2021, sur-reply; and "app. sur-sur-reply" refers to appellant's April 12, 2021, sur-sur-reply.

from the Retirement Benefit Formulas' compensation factor. Accordingly, the government determined that the portion of the benefit related to the compensation in excess of the limitation was an unallowable, directly-associated cost, pursuant to FAR 31.201-6. (JSUMF ¶ 18)

5. The final decision cited FAR 31.201-6, FAR 31.205-6(p) and FAR 52.216-7 as the basis for disallowing the pension costs (JSUMF ¶ 20). Although the final decision did not include a specific citation to the allowability provision found at FAR 31.201-2 (R4, tab 6), the parties stipulate that the CACO's allowability determination for the pension costs was made pursuant to FAR 31.201-2(a)(5), which provides that an allowable cost must not be subject to "[a]ny limitations set forth in this subpart" (JSUMF ¶ 20); 48 C.F.R. § 31.201–2(a)(5).

6. The final decision did not disallow pension costs pursuant to FAR 31.201-3, FAR 31.205-6(b), or FAR 31.205-6(j) (JSUMF ¶¶ 19, 21).

7. By email dated September 3, 2019, appellant filed its notice of appeal.

8. On November 6, 2020, appellant filed a motion for partial summary judgment on Counts I and II of its complaint (app. mot. at 1). Count I sought declaratory relief that appellant's pension costs are allowable pursuant to statute and FAR 31.205-6(p) (compl. Count I). Count II sought declaratory relief that appellant's pension costs are not directly associated costs subject to FAR 31.201-6 (compl. Count II). Appellant's motion does not address Count III of appellant's complaint, which alleges that the government's disallowance of pension costs is overstated. Count IV, alleging accord and satisfaction bars the government's disallowance of post-retirement benefits and environmental remediation costs, was dismissed by Order dated February 19, 2020.

9. On December 21, 2020, the government filed its opposition to appellant's motion for partial summary judgment, and cross-motion for partial summary judgment. The government argued that the methodology used by appellant to calculate its pension benefits, the "Retirement Benefit Formulas," resulted in unallowable costs because the calculation "includes the plan participant's actual compensation earned during relevant working years and does not exclude compensation that was in excess of the FAR 31.205-6(p) cap in effect at the time the plan participant earned the compensation" (gov't cross-mot. at 2). The government also argued that "[t]he challenged pension costs are unreasonable because the Retirement Benefit Formulas do not exclude compensation in excess of the FAR 31.205-6(p) cap applicable to the years in which the plan participant earned the compensation" (gov't cross-mot. at 7).

10. On January 19, 2021, appellant filed its partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike, alleging that the Board lacked jurisdiction to consider the government's argument "that the pension costs in question

also are unallowable as 'unreasonable' costs under FAR § 31.201-3," and alleging that "[a] cost disallowance under FAR § 31.201-3 is materially different than one under FAR § 31.201-6(a)" (app. mot. dis. at 1). Appellant also filed a motion requesting a stay of proceedings pending resolution of its January 19, 2021, motion. By Order dated February 11, 2021, the Board stayed proceedings pending resolution of appellant's partial motion to dismiss.

DECISION

I. Burden of Proof

As proponent of the Board's jurisdiction, DCMA bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *The Boeing Co.*, ASBCA No. 58660, 15-1 BCA ¶ 35,828 at 179,190. Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09, our jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

II. The Government's Final Decision on its Unilateral Rate Determination is a Government Claim Which We Review *De Novo*

This appeal involves a unilateral rate determination, which is considered a government claim. *Parsons Gov't Servs., Inc.*, ASBCA No. 62113, 20-1 BCA ¶ 37,586 at 182,508 (citing FAR 52.216-7(d)(4) ("Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause")). The CDA provides that "[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." 41 U.S.C. § 7103(a)(3). It is well established "that the linchpin for appealing claims under the Contract Disputes Act is the contracting officer's 'decision.'" *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 177, 645 F.2d 966, 967 (1981). This is true for all further proceedings on "a claim relating to a contract: either by a contractor against the Government or by the Government against a contractor." *Boeing Co.*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 at 110,594; *Chandler Mfg. and Supply*, ASBCA Nos. 27030, 27031, 82–2 BCA ¶ 15,997 at 79,312 (linchpin for appealing CDA claim and for this Board's jurisdiction is contracting officer's decision, which "is equally applicable to claims the Government is pursuing against a contractor").

It likewise is well-established that our review of a contracting officer's final decision is *de novo* and either party may raise legal theories not previously raised with the contracting officer. 41 U.S.C. §7104(b)(4) (action brought before the Board proceeds *de novo*); *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 20-1 BCA

¶ 37,618 at 182,635 ("we review COs' [contracting officers'] decisions *de novo* and the government is not compelled to limit its arguments to the CO's"); *Kellogg Brown & Root Servs., Inc*., ASBCA No. 58081, 17-1 BCA ¶ 36,595 at 178,240 (government "is not limited in defending its case to the logic asserted in the contracting officer's final decision" because "the Board considers the action *de novo*"); *Astronautics Corp. of America*, ASBCA No. 48190, 97-1 BCA ¶ 28,978 at 144,319 (in "*de novo* proceedings, either party may raise legal theories that were not raised previously").

III. Contentions of the Parties

The parties agree that the CACO's final decision contained no discussion of FAR 31.201-3, or the reasonableness of the pension costs in dispute (SOF ¶ 6). Rather, the final decision addressed whether the pension costs were unallowable pursuant to FAR 31.201-6 as "directly associated costs" of unallowable compensation costs, as defined in FAR 31.205-6(p) (SOF ¶¶ 4-5). It also is undisputed that the government first challenged the reasonableness of appellant's pension costs pursuant to FAR 31.201-2 and FAR 31.201-3 in its opposition and cross-motion for partial summary judgment (gov't cross-mot. at 7-8).

Appellant questions our jurisdiction to consider the government's reasonableness challenge because the CACO's final decision "does not include a government claim that the Pension Costs are unallowable under FAR § 31.201-3" and that "[t]he absence of this claim" deprives us of jurisdiction to address that issue in this appeal (app. mot. dis. at 4). Appellant states that, "for the first time in the government's cross-motion for partial summary judgment and opposition to Northrop Grumman's motion for summary judgment, DCMA trial counsel asserts that the Pension Costs are 'unreasonable' under FAR § 31.201-3 and unallowable, even if they are not unallowable under FAR § 31.201-6" (app. mot. dis. at 3 (citing gov't cross-mot. at 3, 7–12)). According to appellant, the Board "has no jurisdiction over DCMA trial counsel's FAR § 31.201-3 disallowance" (app. mot. dis. at 1). In the alternative, appellant requests that we exercise our "discretion and deny the government's attempt to add this disallowance now to this appeal" (*id*.).[3]

The government responds that its reasonableness challenge is based upon the same rationale and legal theory (gov't resp. 5-6, 9), and "there is a single Government claim because there is no material difference in the facts or the analysis required to

[3] NGC alleges that DCMA "trial counsel disallowed, for the first time in its response and cross-motion for summary judgment, the disputed pension cost under FAR § 31.201-3" (app. reply at 1). However, DCMA counsel did not "disallow" the disputed costs, rather, counsel for DCMA raised the issue as a legal challenge to appellant's claimed-entitlement to those costs (gov't cross-mot. at 7).

determine allowability under either FAR 31.201-2, -3 or FAR 31.201-6(a)" (gov't resp. at 3). The government also argues that the plain language of FAR 31.201-3 does not preclude the government raising a reasonableness challenge at this stage of the litigation because the FAR provision "does not specify when the Government must raise its reasonableness challenge (*i.e.*, prior to litigation), nor does it detail what is sufficient for the Government to bring such a challenge" (gov't resp. 11, 13). According to the government, "[a]t issue *is the same challenged costs; the same challenged methodology; and the same rationale* for disallowance whether per FAR 31.201-6(a) or FAR 31.201-2" and "disallowance of the challenged pension costs is directly related to the same unallowable, over-the-cap compensation included in the Retirement Benefit Formula – whether disallowed as an unreasonable cost or as unallowable directly associated costs" (gov't resp. at 3-4) (emphasis in original).

IV. We Have Jurisdiction to Consider the Government's Reasonableness Challenge

A. Standard for Determining What Constitutes a New Claim

Appellant argues that "if the remedies sought, the operative facts, or the legal grounds for the new basis are materially different from the claim set forth in the COFD [contracting officer's final decision], then the Board lacks jurisdiction over the new basis" (app. mot. dis. at 6). In support of its position, appellant cites the Court of Appeals for the Federal Circuit's decision in *K-Con Bldg. Sys., Inc. v. United States*, for the proposition that the Board lacks jurisdiction where "the government asserts a new basis for government recovery only after the filing of an appeal by a contractor when the new basis and the claim in the existing COFD 'either request different remedies (whether monetary or non-monetary) or assert grounds that are materially different from each other factually or legally'" (app. mot. dis. at 6) (quoting 778 F.3d 1000, 1005 (Fed. Cir. 2015), citing *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). [4]

[4] *K-Con* involved a contractor claim. The government notes that although appellant relies upon *K-Con* as support for its jurisdictional argument concerning the government claim here, NGC's motion also argues "that cases involving contractor claims are inapposite to determining the Board's jurisdiction over Government claims" (gov't sur-reply at 5 n.1 (citing app. mot. at 12-13 n.10)). In response, appellant states that the Board, in *AeroVironment, Inc.*, ASBCA Nos. 58598, 58599 16-1 BCA ¶ 36,337, "followed the reasoning in *K-Con* and found that it did not have jurisdiction to resolve the merits of a government cost disallowance claim" (app. sur-sur-reply at 2 n.2). Yet, in challenging the government's reliance upon *Sarro & Assocs. v. United States*, 152 Fed. Cl. 44 (2021), and *Cline Constr. Co.*, ASBCA No. 28600, 84-3 BCA ¶ 17,594, appellant once again argues these decisions "are inapposite to the Board's

On this issue, the Court in *K-Con* explained that "merely adding factual details or legal argumentation does not create a different claim, but presenting a materially different factual or legal theory (*e.g.*, breach of contract for not constructing a building on time versus breach of contract for constructing with the wrong materials) does create a different claim." *K-Con*, 778 F.3d at 1006, citing *Santa Fe, Eng'rs, Inc. v. United States*, 818 F.2d 856, 858-60 (Fed. Cir. 1987). The Court noted also, that it has "not treated the different-remedies component as imposing so rigid a standard as to preclude all litigation adjustments in amounts 'based upon matters developed in litigation.'" *K-Con*, 778 F.3d at 1006, quoting *Tecom, Inc. v. United States*, 732 F.2d 935, 937–38 (Fed. Cir. 1984).

In *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365-66 (Fed. Cir. 2003), the Federal Circuit treated two claims as the same for jurisdictional purposes, even though the contractor claim submitted to the contracting officer, and the claim raised in litigation, presented "slightly different legal theories." In *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369-70 (Fed. Cir. 2017) (citing *K-Con*), the Federal Circuit held that the Board lacked jurisdiction to consider a contractor claim for knowing misrepresentation by nondisclosure when the contractor had presented to the contracting officer a claim for reformation based on mutual mistake and frustration of purpose. The Court observed that "[m]aterially different claims 'will necessitate a focus on a different or unrelated set of operative facts.'" *Lee's Ford*, 865 F.3d at 1369, quoting *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) (to determine whether an issue constitutes new or separate claim "the court must assess whether or not the claims are based on a common or related set of operative facts"); (*see Blanchard's Contracting*, *LLC*, ASBCA No. 62508, 21-1 BCA ¶ 37,807 at 183,599 (discussing Federal Circuit decisions examining what constitutes a new claim). More recently, in *Kiewit Infrastructure West Co. v. United States*, the Federal Circuit stated, albeit dicta, "[a]s we have previously made clear, two claims may be considered the 'same' for CDA jurisdictional purposes if 'they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.'" 972 F.3d 1322, 1328 (Fed. Cir. 2020), quoting *Scott Timber*, 333 F.3d at 1365.

The government's reasonableness challenge does not seek a different remedy, i.e., the government here demands return of the same alleged overpayments it made in NGC's interim billings due to inclusion of alleged unallowable pension costs in NGC's final indirect cost proposals for fiscal year FY 2012 (R4, tab 6). Accordingly, the issue presented in this appeal is whether the government's reasonableness challenge asserts

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jurisdiction in this appeal as each relates to contractor claims" (app. sur-sur-reply at 4 n.5).

"grounds that are materially different . . . factually or legally" than the claim already encompassed in the CACO's final decision. *K-Con*, 778 F.3d at 1005.[5]

B. The Government's Reasonableness Challenge does not Assert Grounds that are Materially Different Either Factually or Legally from the Claim Addressed in the CACO's Final Decision

Appellant argues that the government's reasonableness challenge presents an entirely new claim that the Board lacks jurisdiction to consider (app. mot. at 10). According to appellant, the legal standard regarding the government's allowability challenge is "whether the Pension Costs were 'generated solely as a result of incurring [compensation in excess of the compensation limitation established by FAR 31.205-6(p)], and would not have been incurred had the [compensation in excess of the compensation limitation established by FAR 31.205-6(p)] not been incurred'" (app. mot. dis. at 11 (citing FAR 31.201-6) (block statements in original)). Appellant suggests that the legal standard regarding the government's reasonableness challenge is "whether the Pension Costs 'nature and amount . . . exceed that which would be incurred by a prudent person in the conduct of competitive business'" (app. mot. dis. at 11 (citing FAR 31.201-3(a)). According to appellant, "[t]his determination 'depends upon a variety of considerations and circumstances . . . .'" (app. mot. dis. at 11 (citing FAR § 31.201-3(b)). Missing from appellant's recitation of its understanding of the applicable legal standard is the recognition that the government's reasonableness challenge also centers upon the government's contention that appellant's methodology improperly includes as a factor compensation in excess of the FAR 31.205-6(p) cap.

Both of the government's challenges to appellant's pension costs can be summarized as follows:

[5] Citing *NI Indus., Inc*., ASBCA No. 34943, 92-1 BCA ¶ 24,631, DCMA suggests that the Board should consider the gravamen of the government's claim, and the breadth of its legal theory, in deciding whether the reasonableness challenge constitutes a new claim (gov't resp. at 5-6, 9-10). Appellant challenges the efficacy of that decision as support for the government's position, noting that *NI Industries* predates the Federal Circuit's decision in *K-Con* (app. reply at 6). According to appellant, *K-Con* identified a different standard for deciding what constitutes a new claim. The government disagrees and challenges appellant's assertion that *K-Con* "undermines the applicability of the Board's decisions regarding jurisdiction prior to 2015" (gov't sur-reply at 5-6). Because we find that the government's reasonableness challenge is not materially different, factually or legally, from the claim addressed in the CACO's final decision, and thereby satisfies the standard set forth in *K-Con*, we need not wade through the legal quagmire proffered by the parties on this issue in their respective briefs.

- Inclusion of compensation in excess of the FAR 31.205-6(p) cap as a factor in appellant's methodology to determine pension costs rendered appellant's costs unallowable because it violated FAR 31.201-6(a) as a directly-associated cost.
- Inclusion of compensation in excess of the FAR 31.205-6(p) cap as a factor in appellant's methodology to determine pension costs rendered appellant's costs unreasonable because it violated FAR 31.201-3(b), specifically NGC's responsibilities to the Government and the public at large by including those costs as a factor.

Both challenges require the Board to determine whether it was improper for appellant to include compensation in excess of FAR 31.205-6(p) as a factor in appellant's methodology to determine pension costs, either because it violated FAR 31.201-6(a) as a directly-associated cost, or because it violated FAR 31.201-3(b) as contrary to NGC's responsibilities to the government and the public at large (by including as a factor compensation in excess of FAR 31.205-6(p)). The cost is unallowable if it violated FAR 31.201-6(a) as a directly associated cost or is unreasonable if it violated FAR 31.201-3(b) as contrary to NGC's responsibilities to the government and the public at large. Both determinations turn on the propriety of including compensation in excess of FAR 31.205-6(p) as a factor in appellant's pension costs methodology.

The reasonableness of appellant's costs is thus closely tied to the government's challenge based upon unallowability. The additional legal argument that the costs are unreasonable because they are contrary to NGC's responsibilities to the government and the public at large is not so materially different as to constitute a new claim. It is an additional legal argument as to why the specific methodology utilized by appellant allegedly was improper. In this regard, the government's FAR 31.201-3 reasonableness challenge and FAR 31.205-6(p) allowability challenge do not "assert grounds that are materially different," *K-Con,* 778 F.3d at 1005. Rather, they "arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Kiewit*, 972 F.3d at 1328, quoting *Scott Timber*, 333 F.3d at 1365.

Appellant admits that the parties' JSUMF already contains facts material to a FAR 31.201-3 cost disallowance (app. mot. dis. at 13). Appellant argues, however, that missing from the JSUMF is "the singular most material fact" regarding a FAR 31.201-3 cost disallowance, i.e., the "'initial review of the facts [that] results in a challenge of a specific cost by the contracting officer or the contracting officer's representative,' regarding the cost's reasonableness" (app. mot. dis. at 12-13). We discuss below in section IV. C., the import of an initial review of the facts and whether it represents an obstacle fatal to the government's position in the context of this appeal.

Appellant also suggests that the following facts are relevant to the issue of reasonableness, specifically, "(a) what are competitive market requirements regarding the amount of pension benefits; (b) why paying executives the pension benefits the market demands is consistent with the government's interests; and (c) the relevance of government cost allowability requirements to the amount of pension benefits that the commercial market demands" (app. mot. dis. at 13-14). These additional "facts" all bear on the appropriateness of appellant including in its Retirement Benefit Formulas compensation in excess of the FAR cap, an issue already placed squarely before the Board by virtue of the CACO's decision on allowability. Again, whether NGC has upheld its responsibility to the government and the public at large by claiming salary costs over the statutory limit does not assert grounds that are materially different from the government's unallowability challenge and, instead, asserts merely a differing legal theory.

C. The Contracting Officer's Initial Review of the Facts

To be allowable, a cost must (1) be reasonable, (2) be allocable, (3) comply with Cost Accounting Standards (CAS) or generally-accepted accounting principles and practices, (4) comply with contract terms, and (5) comply with any limitations set forth in FAR subpart 31.2. 48 C.F.R. § 31.201-2(a).[6] Pursuant to paragraph (a) of FAR 31.201-3, Determining reasonableness, "[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." 48 C.F.R. § 31.201-3(a). There is no presumption of reasonableness "attached to the incurrence of costs by a contractor," and "[i]f 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." *Id.*

Appellant argues that because the CACO did not make an "initial review of the facts" regarding the *reasonableness* of appellant's costs, as reflected in the final decision, we lack jurisdiction to consider the government's reasonableness challenge now (app. mot. dis. at 13). On this issue, the government argues that "[t]he plain language of FAR 31.201-3 does not specify when the Government must raise its reasonableness challenge (*i.e.*, prior to litigation), nor does it detail what is sufficient for the Government to bring such a challenge; there must merely be a 'challenge of a specific cost'" (gov't resp. at 13). According to the government, the CACO and the

[6] As noted by the Federal Circuit, "allowable costs must conform to any of the specific limitations set forth in 48 C.F.R. §§ 31.201–205." *Information. Sys. & Networks Corp. v. United States*, 437 F.3d 1173, 1175 (Fed. Cir. 2006). "Many of these limitations are enumerated in 48 C.F.R. § 31.205 and include rules for determining the allowability of forty-seven different types of costs." *Id.*

Defense Contract Audit Agency (DCAA) "did challenge 'a specific cost' – both challenged the allowability of Northrop Grumman's pension costs that are directly associated with unallowable compensation" (*id*.). Although, after the government's initial review of the facts, the issue of whether pension costs were unreasonable was not specifically addressed by the CACO, the government is correct that the specific pension costs were challenged by the CACO (R4, tab 6 at G-000185).

We addressed the significance of government's "initial review of facts" and the subsequent determination regarding reasonableness of specific costs in *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137, aff'd in part, rev'd in part, remanded, *Parsons Evergreene, LLC v. Secretary of Air Force*, 968 F.3d 1359 (Fed. Cir. 2020). *Parsons* involved a contractor's claims for equitable adjustments to an indefinite-delivery, indefinite-quantity contract with the Department of the Air Force. Administrative Judge Clarke issued the opinion of the Board, with Administrative Judge Shackleford and Administrative Judge Prouty concurring in the result. Judge Clarke's opinion stated that FAR 31.201-3(a) "requires two actions by the government: (1) it must perform an 'initial review of the facts,' and (2) that review results in a 'challenge' to 'specific costs.'" Judge Clarke's opinion held that although an audit conducted by DCAA satisfied the requirement for an initial review of the facts, the government failed to satisfy FAR 31.201-3(a) because "[n]either DCAA nor the AF challenged the reasonableness of any 'specific costs' in the claims." *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,790.

In a separate opinion authored by Judge Shackleford concurring in the result, and joined in by Judge Prouty, the Board disagreed with Judge Clarke's reasoning, taking "great issue with that portion of the damages analysis" leading up to Judge Clarke's conclusion that appellant had "satisfied its burden to prove its claimed costs were reasonable when the government challenged all costs but failed to challenge the reasonableness of any specific cost in the claim, stating 'Such a blanket challenge to all costs is insufficient to satisfy FAR 31.201-3(a).'" *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,821 (A.J. Shackleford opinion concurring in result). Judge Shackleford stated that "[t]his finding has no place in our analysis of the damages, as the reasonableness of the amounts is appellant's burden to show, unaided by the government's failure to challenge the reasonableness of specific costs." *Id*. Judge Shackleford noted that "[o]nce a CO's final decision is appealed to this Board, the parties start with a clean slate and the contractor bears the burden of proving liability and damages *de novo*." *Id*., citing *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994).

On appeal, the government alleged "that the Board erroneously shifted the burden as to reasonableness to the government, when the burden should have been on Parsons to prove reasonableness." *Parsons Evergreene*, 968 F.3d at 1369-70. The Federal Circuit held that "Judge Clarke's analysis on this issue was expressly disclaimed by the other two panel judges in a concurring opinion," and that "Judge Shackleford's opinion, not

Judge Clarke's opinion, is the Board's controlling opinion on the reasonable-costs issue." *Parsons Evergreene*, 968 F.3d at 1370.

In this appeal, the CACO challenged the specific pension costs, in contrast to the government in *Parsons Evergreene*, which challenged all claimed incurred costs based upon a flawed technical analysis found wanting by the Board. In both appeals, however, the government did not specifically challenge the reasonableness of the costs until the claims were on appeal. *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,789-790 ("In its audit, DCAA did not challenge the reasonableness of any specific costs. DCAA generally questioned all costs based on the AF's flawed technical review basically finding no entitlement"). Pursuant to our decision in *Parsons Evergreene*, and the Federal Circuit's affirmance of Judge Shackleford's concurring opinion on the issue of reasonableness, we find that the government's failure here to expressly address the issue of reasonableness of the specific costs in its final decision is not a bar to our jurisdiction to consider that issue in this appeal.

Our decision in *BAE Sys. San Francisco Ship Repair*, ASBCA No. 58810, 14-1 BCA ¶ 35,667, likewise supports such a finding. In that appeal, the contracting officer issued a final decision challenging claimed costs, but did not assert reasonableness as a basis pursuant to FAR 31.201-3(a). The contractor argued that the contracting officer's "challenge of costs 'should precede an audit, so the auditor can help to resolve it'" and that once "DCAA has audited, including an evaluation of reasonableness, it is far too late for Government trial attorneys to spring a FAR § 31.201-3 challenge.'" *BAE*, 14-1 BCA ¶ 35,667 at 174,589. We rejected that argument, stating "[w]e do not interpret FAR 31.201-3 to require the [contracting officer] to challenge a contractor's claimed costs before initiating an audit." Noting that the contracting officer's decision "challenged all but $351,244.12 of BAE's $903,973.00 claim," we held that, based upon the contracting officer's challenge, "FAR 31.201-3 assigned to the contractor the burden of proof that the costs claimed are reasonable." *Id*., see also *SRI Int'l*, ASBCA No. 56353, 11-1 BCA ¶ 34,694 at 170,867 (Board considered issue of reasonableness after rejecting government challenge to allowability pursuant to FAR 31.205-20, even though DCAA chose "not to look into the reasonableness of clamed costs" in an incurred cost audit).

Appellant argues that the government's reasonableness challenge is a materially different claim because appellant would bear the burden of proving the reasonableness of its costs (app. mot. dis. at 11). The government responds that FAR 31.201-3 does not specify when the government must raise reasonableness or what specifically is required to raise such a challenge; there merely must be a "challenge of a specific cost by the contracting officer or the contracting officer's representative," which then places the burden of proof "on the contractor to establish that such cost is reasonable" because a cost cannot be allowable if it is not reasonable (gov't resp. at 13).

As we have found, the government's reasonableness challenge is not materially different from the claim discussed in the final decision. There is no presumption of reasonableness, and appellant has the burden of establishing the reasonableness of its costs. 48 C.F.R. § 31.201-3(a). The fact that appellant has the burden of proof - imposed upon it by the FAR - does not somehow cause the government's reasonableness challenge to be materially different from the claim addressed by the CACO.

D. Our Decision in *AeroVironment* is not Dispositive

Appellant argues that our decision in *AeroVironment* is dispositive on the issue of whether the government's reasonableness challenge is materially different from the government's unallowability determination upon which the final decision was based (app. mot. dis. at 6-9). In *AeroVironment*, after the conclusion of mediation, appellant filed a motion to dismiss as moot two pending appeals of government claims, one disallowing costs in excess of a FAR cap and the other assessing penalties. *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,176. In opposing dismissal, the government sought to amend its answers in both appeals to clarify the scope of the claims asserted in the final decisions. *Id*. Appellant challenged the government's motion to amend, arguing that we lacked jurisdiction to consider the proposed amendments because they constituted new claims beyond those asserted in the final decisions. *Id*. at 177,177. We agreed, and granted appellant's motion to dismiss the appeals as moot because the appeals either had been settled or paid in full. *Id.* at 177,181-82.

We also denied the government's motion to amend, finding that the proposed amendments concerned new government claims which sought to add different bases for challenging the allowability of the appellant's executive pay compensation. During mediation, the government trial attorney (GTA) had proposed "a different methodology that materially change[d] quantum, as well as the essential nature of the operative facts forming the factual predicate of the original claims." *Id*. at 177,180. We noted that "[t]he monetary relief sought by the GTA increases substantially that originally claimed, and greatly escalates the stakes involved in the litigation." We also noted that the proposed methodology was "based on a new method of determining the cap and is not a factor or element that is either subsumed within or inherent in the CO's decisions." *Id*. In determining that the proposed methodology represented a new claim, we found that "[a] simple arithmetic problem would be transformed by the proposed amendments into a full-scale controversy challenging the correctness of the parties' prior conduct and practice in computing the cap," and that "the amendment would convert material factual areas of agreement and methodology . . . into areas of disagreement." *Id*. at 177,179. That, of course, is not the situation presented in this appeal. Unlike *AeroVironment*, both "claims" here concern complementary challenges to the same methodology utilized by NGC to determine its pension costs. Both "claims" seek the same remedy – return of improperly-paid pension costs - presumably in the same amount.

In its responsive brief, the government summarized several factual distinctions between this appeal, and *AeroVironment*, stating that "the Government sought to amend its answer to the appellant's complaint to encompass a *different methodology* (proration) to determine *a different amount* of unallowable executive compensation (subject to further penalty) upon *a different rationale* (whether proration of the compensation cap is required between two calendar years for a contractor that reports on a fiscal year basis)" (gov't resp. at 14 (emphasis in original) (citing *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,175-76)).

In its reply brief, appellant suggests that the government's "attempt" to distinguish *AeroVironment* "misses the mark" (app. reply at 5). However, appellant offers no explanation or support for its assertion. Instead, appellant summarily declares that "[t]he Board's analysis in *AeroVironment* . . . is the precedent applicable to this appeal, and this precedent establishes that DCMA trial counsel's FAR § 31.201-3 disallowance is materially different from the disallowance under FAR § 31.201-6(a) and is a separate claim" (app. reply at 6). NGC's summary declaration is insufficient to refute the government's argument regarding the factual and legal distinctions between the two appeals. Given the disparate issues presented in both appeals, appellant's reliance upon *AeroVironment* simply does not tally in its favor.

Also of import to the Board in *AeroVironment*, was that the contracting officer "exercised her independent judgment and asserted the claims in a manner that was consistent with conclusions of the audit report," contrary to the methodology espoused by the GTA, which, if adopted, "effectively would reverse the CO's exercise of her judgment and independent discretion." *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,181. We noted that both the contracting officer and the DCAA auditor "implicitly considered and rejected the interpretation now espoused by" the GTA, which we characterized as "a new and fundamentally different interpretation of the executive compensation limitations that underlay the CO [contracting officer] decisions and assessments." *Id.* at 177,179.

In contrast, the government's reasonableness challenge here in no way infringes upon the CACO's independent judgment or the exercise of her discretion. As discussed above, reasonableness is one of the factors determinative of allowability. According to the government, because the pension costs are allegedly derived from unallowable compensation pursuant to FAR 31.205-6(p), they are unreasonable (gov't cross-mot. at 7-8). The government's reasonableness challenge in no way conflicts with, or is at odds with, the CACO's final decision.

E. Our Decision in *DynCorp* has Application Here

The government relies upon our recent decision in *DynCorp Int'l LLC*, ASBCA No. 61950, 20-1 BCA ¶ 37,703, both in its opposition to appellant's motion for partial summary judgment and cross-motion for partial summary judgment (gov't cross-mot. at 9-10), and in its opposition to appellant's partial motion to dismiss (gov't resp. at 6-8). *DynCorp* concerned the disallowance of severance payments made to a contractor's former chief executive officer. The contracting officer's final decision disallowed those costs, finding that the severance pay was compensation subject to the ceilings set forth in FAR 31.205-6(p) and that the severance amounts paid in excess of the statutory compensation limits under FAR 31.205-6(p) are unallowable. In the alternative, the contracting officer found that the severance paid was unallowable as 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. *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040. Although DCAA's audit report stated that the costs were unreasonable, the final decision neither mentioned, nor was it based upon, the reasonableness or unreasonableness of those costs pursuant to FAR 31.201-3. The Board, in denying that portion of the appeal, however, based its decision upon a finding that the challenged severance payments were not reasonable. *DynCorp*, 20-1 BCA ¶ 37,703 at 183,042.

The government properly notes that the final decision in *DynCorp* "disallowed the costs as either compensation itself in excess of the FAR cap or, alternatively, as a directly associated cost of unallowable compensation; the final decision did not cite reasonableness as a basis for the disallowance" (gov't resp. at 8 (citing *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040)). As to the alternative argument regarding the directly-associated cost of unallowable compensation, the Board noted it "need not consider 'directly associated cost' because our decision is based on reasonableness." *DynCorp*, 20-1 BCA ¶ 37,703 at 183,044 n.4.

In its motion to dismiss, appellant argues that *Dyncorp* actually "supports the Board's lack of jurisdiction in this appeal over DCMA trial counsel's disallowance under FAR § 31.201-3" because "[i]n *DynCorp*, the Board found it significant that DCAA challenged the reasonableness of the severance costs in the audit report, such that the 'initial review of the facts' did result in 'a challenge of a specific cost by the contracting officer that shifts the burden of proof'" (app. mot. dis. at 13 n.12). However, appellant's motion to dismiss is based, not upon what DCAA may or may not have considered, as possibly reflected in its audit report, but upon what the CACO addressed in her final decision (app. mot. dis. at 4, 6, 9).[7] Indeed, appellant's motion is premised upon its argument that "[t]he Relevant COFD does not include a government claim that the Pension Costs are unallowable under FAR § 31.201-3" (app. mot. dis. at 4).

[7] Appellant states that neither DCAA nor the CACO "challenged cost reasonableness after the initial review of the facts" (app. mot. dis. at 13 n.12).

In *DynCorp*, the Board noted that DCAA found the pension costs at issue unreasonable. However, that does not equate to a finding that, had DCAA not made that determination in *DynCorp*, we would have lacked jurisdiction to consider the government's reasonableness challenge in that appeal. The CDA assigns to the contracting officer, not DCAA auditors, the authority to decide claims, as it is contracting officer's "prerogative to accept all or part of a contractor's claim or reject the claim entirely." *BAE*, 14-1 BCA ¶ 35,667 at 174,589.

Appellant does not argue that *DynCorp* was wrongly decided. As noted above, NGC took the position in its motion to dismiss that *DynCorp* supports its jurisdictional argument (app. mot. dis. at 13 n.12). In its reply brief, however, NGC argues that we should ignore the import of our decision in *DynCorp* because, according to appellant, "the Board assumed jurisdiction without discussion and, thus, DCMA cannot rely on the decision to support its jurisdictional argument" (app. reply at 5-6, citing *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents")).[8] Appellant opines that "the *DynCorp* Board likely assumed jurisdiction because DCAA expressly challenged the reasonableness of the severance costs at issue in that appeal and then, in litigating the appeal, the contractor introduced the issue of DCAA's reasonableness assessment in its argument in support of judgment on the administrative record" (app. reply at 5-6).

We reject appellant's attempt to avoid the import of our precedent through mere conjecture as to its validity. Indeed, our decision did not "assume" jurisdiction. Rather, we found that "[w]e have jurisdiction pursuant to the Contract Disputes Act of 1978."

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[8] Appellant also cites an unpublished decision of the Court of Federal Claims, *PSEG Nuclear, LLC v. United States*, No. 01-551C, 2005 WL 6112637, at *7 (Fed. Cl. Apr. 22, 2005) (*see* app. sur-sur-reply at 4-5), for the proposition that "[w]hen a court . . . does not address the question of jurisdiction, the court's decision is not binding on the jurisdictional issue." Appellant's reliance upon this decision is questionable at best. In addition to the non-precedential status of *PSEG Nuclear* as an unpublished decision, *see Hanlon v. Sec'y of Health and Human Servs.*, 40 Fed. Cl. 625, 630 (1998), we note that published decisions of the Court of Federal Claims are likewise neither binding upon this tribunal, nor are they even binding in other matters pending before the Court of Federal Claims. *C.R. Pittman Constr. Co., Inc.*, ASBCA No. 57387 *et al.*, 15-1 BCA ¶ 35,881 at 175,427 n.6 (Court of Federal Claims decisions are not binding precedent for the ASBCA); *Zaccari v. United States*, 142 Fed. Cl. 456, 462 n.6 (2019) ("Decisions of the United States Court of Federal Claims do not bind the court in this matter but may provide persuasive authority").

Dyncorp, 20-1 BCA ¶ 37,703 at 183,037. Under the heading "Jurisdiction," we stated that the final decision "involves both entitlement to reductions in severance pay and calculation of the deductions," although appellant focused "on the right to a deduction, not the calculation of the deduction." *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040. We denied appellant's appeal, "but only as to the government's right to deductions in severance pay, not the amounts of the deductions" because, although appellant raised "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." *Id*. This is not a situation where questions of jurisdiction "merely lurk in the record." The Board determined that it had jurisdiction to consider the appeal.

Moreover, additional Board precedent establishes our jurisdiction to consider the government's reasonableness challenge in line with our decision in *DynCorp*.[9] In *Kellogg Brown & Root Servs., Inc*., 17-1 BCA ¶ 36,595 at 178,240, we considered a contractor's claim on behalf of its subcontractors for additional costs. With regard to one subcontractor, BMS-CAT, the contracting officer's final decision found that the requested costs did not comply with contract, subcontract, and FAR provisions. At trial, and in post-trial briefing, the government "asserted that each of the costs also should be disallowed on the basis of reasonableness pursuant to FAR 31.201-3," noting that [t]his change in emphasis is significant because it shifts the burden of proof to" the contractor. *Id.*

We recognized that "[t]he government has the burden of proof in establishing that a cost is unallowable by operation of a specific contract provision or regulation," and the government "is not limited in defending its case to the logic asserted in the contracting officer's final decision" because "the Board considers the action de novo." *Id*. Concerning the government's cost-reasonableness challenge to the contractor's invoiced amounts, we stated that FAR 31.201-3(a) "explicitly provides that when a review of the facts 'results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable,'" and that "[t]he Federal Circuit has interpreted this provision as providing the 'reviewing officer or court considerable flexibility in assessing the reasonableness of costs.'" *Id*., citing *Kellogg, Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013).

In its reply brief, appellant suggests that because the government does not argue that the CACO's final decision relied upon "FAR § 31.201-3 as a basis to disallow the disputed pension costs" and "does not contend that the contracting officer issued a second COFD that disallows the disputed pension cost under FAR § 31.201-3," the government, "therefore, confirms that the Board lacks jurisdiction to reach the merits of

[9] Additional Board precedent establishing our jurisdiction here likewise is discussed in section IV. C. of this decision.

this new disallowance" (app. reply at 2). However, on appeal, we do not lack jurisdiction to consider a legal argument simply because the contracting officer did not address that argument in the final decision. As discussed above, our jurisdiction allows us to consider a new legal argument presented by a party if the argument is not materially different from the dispute presented in the contracting officer's final decision. We find that we have jurisdiction to consider the government's reasonableness challenge here because it is not materially different, either factually or legally, from the claim set forth in the CACO's final decision.

V. NGC has not Demonstrated Undue Delay or Undue Prejudice by Introduction of the Government's Reasonableness Challenge at this Stage of the Litigation

In the alternative, NGC requests that we strike the government's reasonableness challenge from its opposition and cross-motion for summary judgment because "[t]he government has not moved to amend its answer to assert this new disallowance, but instead asserted a new disallowance in its summary judgment briefing" (app. mot. dis. at 14). Board Rule 6(b) requires the government's answer to admit or deny the allegations of the complaint and "set forth simple, concise, and direct statements of the Government's defenses to each claim asserted by the appellant, including any affirmative defenses."[10] Appellant correctly notes that the government did not "assert this new disallowance," i.e., its reasonableness challenge, in its answer (app. mot. dis. at 14).

Appellant cites Board Rule 6(d) in support of its motion to strike (*id.*). Although Rule 6(d) provides that the Board "may order a party to make a more definite statement of the complaint or answer, or to reply to an answer" and "may permit either party to amend its pleading upon conditions fair to both parties," it likewise provides that "[w]hen issues within the proper scope of the appeal, but not raised by the pleadings, are tried . . . by permission of the Board, they shall be treated in all respects as if they had been raised therein," and that "motions to amend the pleadings to conform to the proof may be entered, but are not required."

Our Board Rules "do not specifically address motions to strike, and we are guided by the Federal Rules of Civil Procedure." *Fru-Con Const. Corp*., ASBCA Nos. 53544, 53794, 03-2 BCA ¶ 32,275 at 159,673, citing *Nero and Associates, Inc*., ASBCA No. 30369, 86-1 BCA ¶ 18,579. Pursuant to Fed. R. Civ. P. 12(f), a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or

[10] The government's reasonableness challenge is not properly categorized as an affirmative defense to the government's own claim. *Supreme Foodservice GmbH*, 20-1 BCA ¶ 37,618 at 182,627 ("an affirmative defense is just that, a defense, not an offensive weapon").

scandalous matter."[11] A tribunal "has considerable discretion in deciding such a motion," which generally is "disfavored, though, and have often been denied even when literally correct where there has been no showing of prejudicial harm to the moving party." *ASCT Grp., Inc*., ASBCA No. 61955, 20-1 BCA ¶ 37,540 at 182,289, citing *Godfredson v. JBC Legal Grp., P.C.*, 387 F. Supp. 2d 543, 547-48 (E.D.N.C. 2005).

Appellant argues that "[t]he Board may refuse to grant leave to amend a pleading if there exists undue delay, bad faith or dilatory actions, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice" (app. mot. dis. at 14-15 (citing *Pub. Warehousing Co., K.S.C.*, ASBCA No. 58088, 16-1 BCA ¶ 36,555 at 178,044) (leave to amend pleading should be freely given in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed")). Appellant raises two of these grounds, undue delay and undue prejudice, in support of its motion (app. mot. dis. at 15-16).

Our decision in *DynCorp*, upon which the government relies in support of its reasonableness challenge (gov't cross-mot. at 9), was issued on September 29, 2020, just ten days before the parties filed their Joint Stipulation of Undisputed Material Facts (JSUMF at 9). There is little room to argue undue delay in the government's first raising *DynCorp*, and its legal reasoning, in its December 21, 2020, opposition and cross-motion for partial summary judgment as it did, given that our decision in *DynCorp* was then recently-issued, and the government believed it to be precedent applicable to this appeal. *Advanced Eng'g & Planning Corp*., ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,935 at 163,127 ("[W]e are bound by our precedent."); *PCA Health Plans of Tex., Inc.*, ASBCA No. 48711, 98-2 BCA ¶ 29,900 at 148,014 ("[A] decision by the Board is deemed binding precedent in another appeal unless the decision is reversed or otherwise modified by the Board's Senior Deciding Group or the court of appeals.")

Perhaps the government could have amended its answer at some point soon after issuance of our decision in *DynCorp* and addressed the issue pursuant to Rule 6(d) as a "direct statement" of the government's defense to an allegation asserted by the appellant in its complaint. Perhaps the government could have raised the issue during discussions when the parties were contemplating their respective cross-motions for summary judgment. Regardless of whether the government could have, or should have, raised the issue earlier, appellant has not demonstrated undue delay that would warrant striking the

[11] Although appellant does not cite Fed. R. Civ. P. 12(f) as support for its motion to strike, we note that appellant's motion would be considered timely pursuant to that rule, having been filed prior to "responding to the pleading," i.e., the government's December 21, 2020, response in opposition and cross-motion for partial summary judgment, which contains the allegations appellant requests be stricken.

government's reasonableness challenge. To the extent appellant's argument is directed at the presumption that the government should have sought leave to amend its answer (app. mot. dis. at 14), the details of the government's reasonableness challenge are now set forth in its opposition and cross-motion for partial summary judgment, and, accordingly, "the cat is out of the bag." Indeed, our rules require only notice pleading, "to put the opposing party on notice that a particular defense is asserted so that the opposing party may 'proceed to conduct discovery regarding the affirmative [or other] defense.'" *Niking Corp.*, ASBCA No. 60731, 17-1 BCA ¶ 36,639 at 178,450, quoting *The Boeing Co*., ASBCA No. 54853, 12-1 BCA ¶ 35,054 at 172,197-98.[12]

Appellant argues that the government's actions have resulted in "unfair surprise to Northrop Grumman" (app. reply at 7). However, appellant admits that, "[i]f the Board were to deny this motion [to dismiss], then Northrop Grumman will expend the effort to gather relevant material facts and brief the merits of the government's improper disallowance of the Pension Costs under FAR § 31.201-3" (app. mot. dis. at 4 n.5).[13] The current posture of this litigation provides NGC the opportunity to gather any relevant facts needed through discovery and to brief the issue on its merits. *ABB Enter. Software, Inc*., ASBCA No. 60314, 17-1 BCA ¶ 36,586 at 178,202 (amendment of answer allowed where no deadline set for close of discovery "and introduction of an affirmative defense at this stage will not hinder their ability to pursue further written discovery or subsequent depositions"). With regard to discovery, as noted in their September 28, 2020, Joint Motion to Amend Schedule, the parties "agreed to postpone discovery and file cross-motions for summary judgment on entitlement in this appeal." In addition, although the parties have filed initial cross-motions for partial summary judgment, additional briefing on those motions remains to be completed. Moreover, even after conclusion of cross-motions, there remains issues raised in Count III of appellant's complaint which the parties have yet to address (SOF ¶ 8).

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[12] Rule 6(d) also provides that "[i]f evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided however, that the objecting party may be granted an opportunity to meet such evidence."

[13] Appellant already has determined the issues it believes require additional research to respond to the government's reasonableness challenge, specifically, "(a) FAR § 31.201-3 case law; (b) FAR § 31.201-3 regulatory history, including the underlying policy of the language in FAR § 31.201-3 that DCMA trial counsel focuses on in the government cross-motion and opposition (i.e., 'considerations and circumstances, including . . . the contractor's responsibilities to the Government . . . and the public at large' (Gov't Mot. at 3) [gov't cross-mot.]); and (c) the difference between the purpose of FAR § 31.201-3 and other cost principles in FAR Subpart 31.2" (app. mot. dis. at 12).

Any alleged prejudice to appellant because the government first raised its reasonableness challenge during cross-motions for partial summary judgment is lessened also by the Board's February 11, 2021, Order, granting appellant's motion to stay proceedings on the parties' cross-motions for partial summary judgment pending a decision on appellant's partial motion to dismiss for lack of jurisdiction. The Board granted appellant's motion to stay on the grounds that resolving first the jurisdictional issue raised by appellant would promote the efficient administration of justice.[14] With the issuance of this decision, the parties now are able to decide whether discovery concerning the government's reasonableness challenge is necessary, and ultimately whether to continue with the cross-motions for partial summary judgment that currently are stayed.

VI. Additional Discovery

The government suggests that its reasonableness challenge to NGC's Retirement Benefit Formulas methodology can be decided on the current record, without utilizing the factors set forth in FAR 31.201-3(b) (gov't sur-reply at 3). This is because the government "does not challenge the reasonableness of the pension costs because of the amount of those costs. Rather, the Government contends the methodology Northrop Grumman used to calculate those costs was unreasonable." (Gov't resp. at 4) According to the government "[t]he Board need not consider additional facts based upon the Government's narrow reasonableness allegation that the Retirement Benefit Formula methodology itself is unreasonable[,] because of its direct relationship to, and resulting generation of, unallowable compensation" (gov't resp. at 6).

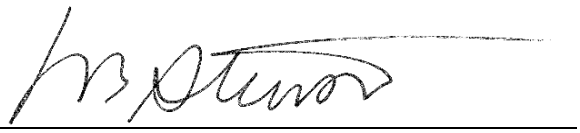
Appellant responds, stating, "the argument that one fact, under DCMA trial counsel's theory of the FAR § 31.201-3 disallowance, is the end-all-be-all of the reasonableness of the disputed pension cost conflicts directly with the plain language of FAR § 31.201-3," which, according to appellant, "requires the assessment of multiple factual 'considerations and circumstances' when determining cost reasonableness" (app. reply at 3). Whether the "one fact" identified by the government is sufficient to establish the propriety or impropriety of the government's disallowance (gov't sur-reply at 4) goes to the merits of the appeal. Prior to proceeding with additional briefing on the parties' partial motions for summary judgment, we believe it is appropriate to allow appellant the opportunity to determine what discovery, if any, is necessary on the issue of reasonableness, and what additional documents or evidence, if any, are necessary to supplement the Rule 4 file.

[14] At page 14 of its motion, appellant likewise cites Board Rule 7(a), which provides, in part, that "[t]he Board may entertain and rule upon motions and may defer ruling as appropriate. The Board will rule on motions so as to secure, to the fullest extent practicable, the informal, expeditious, and inexpensive resolution of appeals." Our decision here is in keeping with Rule 7(a).

CONCLUSION

We have jurisdiction to consider the government's reasonableness challenge to NGC's pension costs. We have carefully considered appellant's remaining arguments and are not persuaded by them. NGC's partial motion to dismiss or, in the alternative, motion to strike, is denied. The parties are ORDERED to confer and file a joint report with the Board within 45 days of receipt of this decision, setting forth the status of this appeal. The joint status report should include proposed deadlines for (1) any additional discovery, and (2) continued briefing of the parties' cross-motions for summary judgment, including any necessary supplemental briefing.

Dated: August 4, 2021



DAVID B. STINSON
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. 62165, Appeal of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

Dated: August 5, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Ology Bioservices, Inc.	)	ASBCA No. 62633
	)	
Under Contract No. W911QY-13-C-0010 *et al.*	)	
	)	

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Trial Attorney
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Chantilly, VA

OPINION BY ADMINISTRATIVE JUDGE O'CONNELL
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This appeal involves a penalty for expressly unallowable costs, namely, executive compensation costs above the threshold established by the Office of Federal Procurement Policy (OFPP). The parties have cross-moved for summary judgment. The Board grants appellant's motion and denies the government's cross-motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following facts are undisputed for purposes of the motions.

Between 2011 and 2013, appellant, Ology Bioservices, Inc. (Ology) entered into four cost reimbursement contracts with the government, including the contract referenced above. A Defense Contract Management Agency (DCMA) contracting officer (CO) was responsible for negotiating and establishing Ology's final indirect cost rates for the contracts. (Appellant's statement of undisputed facts (ASUMF) ¶¶ 3-4; Government statement of genuine issues of material fact (GSMF) ¶¶ 3-4; R4, tab 8).

The contracts included FAR 52.242-3, PENALTIES FOR UNALLOWABLE COSTS (MAY 2001), which provides for the assessment of a penalty for costs submitted by the contractor in its proposal that are "expressly unallowable under cost principle in the FAR . . . ." (FAR 52.242-3(d); ASUMF ¶¶ 5, 20; R4, tab 1 at G-000099). The contracts also included FAR 52.242-4, CERTIFICATION OF FINAL INDIRECT COSTS (JAN 1997), which requires a senior official of the contractor to certify, among other things, that the final indirect cost rates do not include any costs that are expressly unallowable under applicable cost principles of the FAR (ASUMF ¶ 5; R4, tab 1 at G-000099; FAR 52.242-4(c)(2)).

The dispute involves compensation to Ology's chief executive officer (CEO). More specifically, it involves his salary, bonuses and stock option awards valued at $2,730,686. Most of this amount stems from stock option awards valued at $2,253,986 (GSMF ¶¶ 32-41; R4, tab 2 at G-0000160).

The contract referenced above included FAR 52.216-7, ALLOWABLE COST AND PAYMENT (JUN 2011) (R4, tab 1 at G-000102-03). This clause required Ology to submit its final indirect cost rate proposal within six months after the end of its fiscal year, which for Ology was the calendar year. FAR 52.216-7(d)(2). Ology complied with the clause by submitting its FY 2013 proposal on June 30, 2014. After addressing issues identified by the Defense Contract Audit Agency (DCAA), it submitted a revised proposal on December 18, 2014 (ASUMF ¶¶ 6, 22-23; GSMF ¶¶ 6, 22-23).

After a DCAA audit and a lengthy negotiation period between the parties (ASUMF ¶¶ 25-30; GSMF ¶¶ 25-30), the CO issued a final decision on May 13, 2020. Based on an FY 2013 cap for executive compensation of $980,796, the CO determined that Ology had exceeded the cap and included expressly unallowable costs of $1,749,890[1] for its CEO in its indirect cost rate proposal. The CO found that $979,938 of this amount was allocated to covered contracts and assessed Ology a penalty in this amount. In addition, she demanded interest that brought the total government claim to $1,109,160 (ASUMF ¶¶ 1, 26, 31; GSMF ¶¶ 1, 26, 31).

DECISION

I. *Summary Judgment Standards*

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When considering a motion for summary judgment, the Board must determine whether there is a genuine issue for

[1] $2,730,686 - $980,796 = $1,749,890

trial. *Id.* at 249. The mere fact that the parties have cross-moved for summary judgment does not require us to grant one of the motions; each must be independently assessed on its own merit. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001) (citing *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1364 (Fed. Cir. 2001)).

II. *Relevant Statutes and Regulations Concerning Executive Compensation Costs*

As stated above, the contracts included FAR 52.242-3, PENALTIES FOR UNALLOWABLE COSTS (MAY 2011), and FAR 52.242-4, CERTIFICATION OF FINAL INDIRECT COSTS (JAN 1997). These clauses implement statutory and regulatory requirements.

At all times relevant to this dispute, 10 U.S.C. § 2324 provided that:

> If the head of the agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in [the FAR] that defines the allowability of specific selected costs, the head of the agency shall assess a penalty against the contractor. . .

10 U.S.C. § 2324(b)(1); *Raytheon Co. v. Sec'y of Def.*, 940 F.3d 1310, 1312 (Fed. Cir. 2019).

FAR 31.001 defines an "[e]xpressly unallowable cost" as "a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable." "The government bears the burden of proving that costs are expressly unallowable and that a penalty assessment was warranted." *Raytheon*, 940 F.3d at 1311.

Title 10, Section 2324, identifies specific costs that are unallowable. In 2013, the statute prohibited the reimbursement of employee compensation costs above a benchmark (or cap) established by the Administrator of the OFPP pursuant to 41 U.S.C. § 1127. 10 U.S.C. § 2324(e)(1)(P). Compensation is defined as "the total amount of wages, salary, bonuses, and deferred compensation for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in an employer's cost accounting records for the fiscal year." 41 U.S.C. § 1127(a)(3).

OFPP published the cap in the Federal Register. The caps most relevant to this appeal are those for FY 2012 and FY 2013. OFPP published the cap for FY 2012 on December 4, 2013, in the amount of $952,308. OFPP provided that this "amount applies to limit the costs of compensation for contractor employees that are reimbursed

by the Government to the contractor for costs incurred on all contracts, after January 1, 2012 and in subsequent contractor FYs, unless and until revised by OFPP." Determination of Benchmark Compensation Amount for Certain Executives and Employees, 78 Fed. Reg. 72,930 (Dec. 4, 2013) (emphasis added). This was the most recent cap when Ology submitted its revised indirect cost rate proposal on December 18, 2014.

OFPP subsequently published a FY 2013 cap of $980,796, but did not do so until March 15, 2016. The cap applied to costs incurred from January 1 to December 31, 2013. Determination of Statutory Formula Benchmark Compensation Amount for Certain Executives and Contractor Employees, 81 Fed. Reg. 13,833 (Mar. 15, 2016). The government has not provided any explanation as to why there was such a delay in establishing the FY 2013 cap.

III. *The Government Cannot Apply the FY 2012 Cap to FY 2013*

A. *Issues Pending Before the Board*

Before the Board addresses what we believe is the very narrow issue before us, we identify what is *not* before us.

First, Ology does not dispute that executive compensation costs above the FY 2013 threshold are unallowable (app. reply br. at 16, 20). Thus, the government will not have to reimburse Ology for amounts above the cap. Ology challenges only the penalty.

Second, as described above, the FY 2012 cap was $952,308. Ology does not (and could not) argue that it had a good faith belief that the cap would rise nearly 200% when it paid compensation to its CEO of more than $2.7 million in 2013.

Third, on the government side, DCMA does not contend that changes in executive compensations costs were *de minimis*, making it reasonable for OFPP to leave the FY 2012 cap in place until March 2016. Quite the opposite, when OFPP set the FY 2012 cap it complained about rapidly escalating compensation costs and observed that the cap had increased by 55% from FY 2008 to FY 2012. 78 Fed. Reg. at 72,931.

Finally, DCMA does not defend the CO's position that she could assess a penalty based on a cap that was not promulgated until almost 15 months after Ology submitted its revised final proposal. Rather, it contends that the FY 2012 cap remained binding in December 2014 when Ology submitted its revised final proposal. (Gov't motion at 16-21; gov't reply at 6-7).

Ology contends that this deprives the Board of jurisdiction because the government is now pursuing a new claim. The Board may not consider claims not presented to the CO. *Lee's Ford Dock, Inc. v. Sec'y of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017). "A claim is new when it 'presents a materially different factual or legal theory' of relief." *Id.* (quoting *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)). However, the Federal Circuit has held that a contractor in litigation may pursue a claim posing "slightly different legal theories." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003). In *Scott Timber*, the contractor in its claim challenged the authority of the Forest Service to suspend its contracts and the reasonableness and duration of those suspensions. At the Court of Federal Claims, it added: 1) contentions that a particular contract clause contained a warranty; 2) objections to the agency's preparation and administration of the contract; and 3) claims for reimbursement provided under contract terms. The Federal Circuit held that this was permissible because the claims pursued in court were based on the same operative facts and continued to seek consequential damages for an alleged breach of contract. *Id.* at 1365-66.

The Board holds that we possess jurisdiction to consider the government's contentions based on the FY 2012 cap. The claim presented in this appeal is based on the same operative facts concerning the CEO pay, the same contract clauses, and the same legal theory involving a penalty for expressly unallowable executive pay established by OFPP under 10 U.S.C. § 2324 and 41 U.S.C. § 1127. While it is true that the government has shifted from an FY 2013 to an FY 2012 cap argument, this is permitted because it has stayed within the same umbrella of facts and legal theories upon which the CO based her decision. *Scott Timber*, 333 F.3d at 1365-66.

B. *The FY 2012 Cap Cannot Be Applied to FY 2013 Costs*

Having thus defined the dispute, the issue before the Board is simply whether DCMA can assess a penalty against Ology by applying the FY 2012 cap to Ology's FY 2013 proposal. We hold that it cannot.

Returning to 10 U.S.C. § 2324, in 2013 this statute provided in relevant part:

> (e) Specific costs not allowable.—
>
> (1) The following costs are not allowable under a covered contract: . . .
>
> (P) Costs of compensation . . . to the extent that such compensation exceeds the benchmark compensation amount determined applicable <u>for the fiscal year</u> by the

> Administrator for Federal Procurement Policy under section 1127 of title 41 . . . .

(Emphasis added).

Title 41, Section 1127, in turn, provided:

> (a) Definitions.--In this section:
>
> (1) Benchmark compensation amount.--The term "benchmark compensation amount", for a fiscal year, is the median amount of the compensation provided for all senior executives of all benchmark corporations for the most recent year for which data is available at the time the determination under subsection (b) is made.
>
> (2) Benchmark corporation.--The term "benchmark corporation", with respect to a fiscal year, means a publicly-owned United States corporation that has annual sales in excess of $50,000,000 for the fiscal year.
>
> . . .
>
> (b) Determining benchmark compensation amount.--For purposes of . . . section 2324(e)(1)(P) of title 10, the Administrator shall review commercially available surveys of executive compensation and, on the basis of the results of the review, determine a benchmark compensation amount to apply for each fiscal year. In making determinations under this subsection, the Administrator shall consult with the Director of the Defense Contract Audit Agency and other officials of executive agencies . . .

(Emphasis added).[2]

[2] The statute also defined "fiscal year" to mean the contractor fiscal year, 41 U.S.C. § 1127(a)(4) but Ology used the calendar year for its fiscal year and OFPP effectively used a calendar year system. For the FY 2012 cap, OFPP stated that the cap applied to "costs incurred on all contracts, after January 1, 2012 . . ." 78 Fed. Reg. 72,930.

OFPP understood the direction in Section 1127(b) to set a cap "for each fiscal year" as a direction to revise the cap on an annual basis. From 1998[3] to 2010, OFPP established the cap sometime between February and May of the year in question, so that it was in place by the time Ology would have had to certify its proposal (*see* app. reply br. at 14-15 (listing dates); gov't reply br. at 12-13). For example, on April 15, 2010, OFPP set the FY 2010 cap at $693,951. Determination of Benchmark Compensation Amount for Certain Executives, 75 Fed. Reg. 19,661 (Apr. 15, 2010). But in the years that followed, the date that OFPP set the cap grew later and later. OFPP set the FY 2011 cap on April 23, 2012, Determination of Benchmark Compensation Amount for Certain Executives, 77 Fed. Reg. 24,226 (Apr. 23, 2012), and, as described above, it set the FY 2012 cap of $952,308 on December 4, 2013, 78 Fed. Reg. 72,930, and the FY 2013 cap of $980,796 (as well as the FY 2014 cap of $1,144,888) on March 15, 2016, 81 Fed. Reg. 13,833.

While the date on which OFPP set the cap grew later, it continued to recognize that it must reset the cap each year. OFPP stated when setting the FY 2012 cap that it was "compelled by statute to raise the cap for another year. . ." 78 Fed. Reg. 72,930. OFPP further stated that it had "no flexibility to depart from the statutory requirement that the cap be adjusted annually based on the application of the statutorily-mandated formula." *Id.* at 72,931 (emphasis added).

The Board agrees that Section 1127 required OFPP to set a new cap each year. Congress communicated this through the directives to set a cap "for each fiscal year" and to base it upon "the most recent year for which data [of executive compensation at specified publicly held corporations] is available. . ." 41 U.S.C. § 1127 (a)(1), (b). Congress reinforced the message that this should be done annually by using the plural: "[i]n making determinations under this subsection, the Administrator shall consult with the Director of the Defense Contract Audit Agency. . ." *Id.* at § 1127(b) (emphasis added).

Neither the statute nor any FAR provision specified a date by which OFPP must establish the cap. While it is reasonable to infer that Congress granted OFPP some leeway as to when it would set the cap, we do not believe that Congress intended OFPP to have unlimited time to update the cap or for the government to apply an outdated cap for years on end. We draw this conclusion based on the statutory goals and existing regulatory requirements. The statute evinces a congressional intent that contractors performing cost reimbursable contracts be allowed to recover compensation costs up to (but not more than) the median of executive compensation at benchmark corporations, based on "the most recent year for which

[3] Section 808 of the 1998 National Defense Authorization Act for Fiscal Year 1998 established a cap on the "[c]osts of compensation of senior executives of contractors for a fiscal year. . ." Pub. L. No. 105-85, § 808.

data is available. . ." 41 U.S.C. § 1127(a)(1). To carry out this congressional objective, the cap would have to be kept relatively up to date, at least in an environment where executive compensation was escalating so rapidly.

Further, the government imposed on the contractor an obligation under the Allowable Cost and Payment clause to submit its final indirect rate cost proposal within six months of the end of its fiscal year, FAR 52.216-7(d)(2). The government required the contractor to certify at that time that the proposal did not include any expressly unallowable costs, FAR 52.242-4(c). To submit the proposal and make this certification, the contractor would have to know the cap for that year.

The government contends that OFPP met its statutory obligation because it stated that the 2012 cap would apply "after January 1, 2012 and in subsequent contractor FYs, unless and until revised by OFPP." 78 Fed. Reg. 72,930 (emphasis added). The Board disagrees. For the reasons stated above, the statute required OFPP to update the cap annually, and OFPP understood this because it revised the cap for each fiscal year.

While it is true that OFPP eventually met the statutory directive to establish an FY 2013 cap, it did so long after it would provide guidance to contractors, at least those who complied with their contracts by submitting timely indirect cost rate proposals. Applying the FY 2012 cap to 2013 compensation would have the odd effect of placing contractors who complied with their deadlines in a worse position than a contractor who waited until after the March 15, 2016 issuance of the FY 2013 cap to submit its proposal. The Board believes that Congress expected more of OFPP than a technical compliance with the statutory directive that was too late to be helpful.

OFPP stated when it set the FY 2013 cap that it was "applicable to compensation costs incurred on all covered contracts during the period of January 1, 2013 through December 31, 2013 for the contractor's fiscal year." 81 Fed. Reg. at 13,834. This dispute involves FY 2013 compensation and the FY 2013 would be the cap that applies, not the FY 2012 cap. The FY 2013 cap did not exist when Ology certified its FY 2013 indirect cost rate proposal and the government has, in any event, abandoned the argument that the FY 2013 cap could be applied retroactively to Ology's FY 2013 proposal.

Accordingly, there is no issue that requires a hearing. The government cannot carry its burden of demonstrating that Ology included expressly unallowable costs in its FY 2013 proposal and that a penalty was warranted. Ology is entitled to summary judgment that its FY 2013 executive compensation costs were not expressly unallowable at the time it certified its final indirect cost rate proposal because the FY 2012 cap was no longer applicable. The government's cross motion is denied.

CONCLUSION

For the foregoing reasons, Ology's motion for summary judgment is granted. The government's cross motion is denied.

Dated: May 20, 2021

MICHAEL N. O'CONNELL
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. 62633, Appeal of Ology Bioservices, Inc., rendered in conformance with the Board's Charter.

Dated: May 20, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -		)	
		)	
Raytheon Company and Raytheon Missile Systems		)	ASBCA Nos. 59435, 59436, 59437 59438, 60056, 60057 60058, 60059, 60060 60061
		)	
		)	
Under Contract Nos.	W15P7T-07-C-P207	)	
	W31P4Q-07-C-0159	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Raytheon Company (Raytheon) and its Raytheon Missile Systems (RMS) business segment[1] have appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, from Defense Contract Management Agency (DCMA) contracting officers' final decisions (COFDs) asserting government claims. DCMA seeks payment of allegedly unallowable and expressly unallowable costs that Raytheon included in its final indirect cost proposals for 2007 and 2008, and penalties regarding some of the costs. These timely appeals were

[1] A segment is one of two or more business units or divisions that report directly to a home office. *See* CAS 403-30(4), 48 C.F.R. § 9904.403-30 (4). As reported to the Board on September 24, 2020, on April 3, 2020 United Technologies Corporation (UTC) consummated a merger with Raytheon Company. As a result, Raytheon Company, formerly a publicly traded corporation, became a wholly owned subsidiary of UTC and UTC changed its name to Raytheon Technologies Corporation. In this decision we refer to Raytheon Company as structured in the 2007-2008 period at issue. For convenience, unless otherwise indicated, we use "Raytheon" when referring to both Raytheon and RMS in their capacity as appellants.

consolidated for disposition. The Board conducted a two-week hearing, covering entitlement and quantum, in Boston, Massachusetts. The parties filed over 560 pages of post-hearing briefing.

GENERAL FINDINGS OF FACT

Background, Audits, COFDs, and Appeals

1. Raytheon, headquartered in Waltham, Massachusetts, is a global technology company specializing in defense, security, and civil markets. Raytheon and its business segments collectively had more than 70,000 employees in 2007 and 2008. RMS, a wholly owned business segment, is headquartered in Tucson, Arizona. It manufactures defensive and offensive weapons for air, land, sea, and space. In 2007 and 2008, it had about 12,000 employees. (App. undisputed[2] proposed findings of fact (AUPFF)[3] ¶¶ 1-2)

2. Each year, in connection with the determination of its indirect rates, Raytheon and its businesses submit final indirect cost proposals to the government (*see* tr. 3/10). These appeals pertain to the following proposals: (a) Raytheon Company's contractor fiscal year (which, for the company is its calendar year (CY) (tr. 3/10)) 2007 certified final indirect cost proposal, submitted on June 23, 2008, including $2.34 billion of indirect corporate office costs (app. supp. R4, tab 208 at 3032, 3317); (b) Raytheon Company's 2008 certified final indirect cost proposal, submitted on June 23, 2009, including $2.45 billion of indirect corporate office costs (app. supp. R4, tab 331 at 5096, 5297); (c) RMS' 2007 certified final indirect cost proposal, submitted (as revised) on October 27, 2010 (app. supp. R4, tab 260 at 4117); and (d) RMS' 2008 certified final indirect cost proposal, submitted (as revised) on October 22, 2010 (app. supp. R4, tab 350 at 5872). A high level company officer certified that the costs included in each proposal were allowable in accordance with the cost principles in the Federal Acquisition Regulation (FAR) and its supplements and that the proposal did not include any costs that were expressly unallowable under the FAR's applicable cost principles or its supplements (*see*, e.g., app. supp. R4, tab 331 at 5297).

3. As discussed below, two groups within Raytheon's Corporate Office worked together to prepare the 2007 and 2008 corporate proposals: Corporate Government Accounting (CGA) and Corporate Administration and Services (A&S), which prepared various schedules for the proposals. (*See*, *e.g.*, tr. 6/252, 8/8-9) CGA and RMS have training in preparing the proposals. RMS follows CGA's written guidelines; it has work and desk instructions for each schedule; and it conducts testing and internal audits. It has a "very rigorous review process" (tr. 3/12), described by Rachel Garcia, Senior Manager of Government Accounting and Internal Controls Excellence at RMS, whose office is responsible for preparing RMS' incurred cost proposal. (Tr. 2/264-265, 3/9-13)

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[2] If a proposed fact is not undisputed, it will be entitled "APFF."

[3] The proposed findings of facts are found in the corresponding parties' post-hearing briefs, and reference the applicable paragraph numbers.

4. The Defense Contract Audit Agency (DCAA) audited the proposals (app. supp. R4, tab 208 (Corporate Audit Report for 2007); tab 260 (RMS Audit Report for FY 2007); tab 331 (Corporate Audit Report for 2008); and tab 350 (RMS Audit Report for 2008)). DCAA opined that some included costs were unallowable and others were expressly unallowable and subject to "level one" penalties under FAR 42.709(a)(1). (*See*, *e.g.*, app. supp. R4, tab 208 at 3183-88 (lobbying-related costs)). Based upon Raytheon's inclusion of allegedly unallowable costs in its proposals, DCAA also issued two audit reports alleging that Raytheon had not complied with Cost Accounting Standard (CAS) 405, 48 C.F.R. § 9904.405, Accounting for Unallowable Costs, for 2007 and 2008 (app. supp. R4, tab 215 (CAS 405 Audit Report for 2007) and tab 344 (CAS 405 Audit Report for 2008)). DCMA's corporate administrative CO (CACO), Thomas Forbush, and the divisional administrative CO (DACO) for RMS, Jack Bradley, largely based the following COFDs at issue upon the six audit reports (app. supp. R4, tabs 276-277, 279, 281, 283, 356-358, 363-365). We describe them here, and address them further below, as pertinent to the instant appeals.

5. The CACO's June 20, 2014 COFD (Corporate COFD for 2007) asserted a $10,468,740 government claim for disallowed costs, penalties and interest, due to Raytheon's inclusion of allegedly unallowable and expressly unallowable costs in its CY 2007 incurred cost proposal, and denied its request for a waiver of penalties under FAR 42.709-5(c). It cited the captioned flexibly-priced contract and Contract No. W31P4Q-07-C-0159 as representative contracts. (App. supp. R4, tab 279 at 4556-58) The CACO found that certain Corporate Development compensation costs were expressly unallowable under FAR 31.205-27, ORGANIZATION COSTS (APR 1988). Raytheon's Government Relations compensation costs were expressly unallowable under FAR 31.205-22, LOBBYING AND POLITICAL ACTIVITY COSTS (OCT 1997); and bonus, incentive compensation, and restricted stock costs for employees alleged to have engaged in expressly unallowable activities were expressly unallowable. (*Id*. at 4563-66, 4568) Raytheon's appeal from this COFD is docketed as ASBCA No. 59435.

6. The CACO issued a second COFD, dated June 20, 2014 (CAS 405 COFD for 2007), asserting a $7,469,506 government claim in total. The portion on appeal is the government's $1,870,428 claim for noncompliance with CAS 405 and FAR 31.201-6, ACCOUNTING FOR UNALLOWABLE COSTS (NOV 2005), due to Raytheon's inclusion of allegedly expressly unallowable Government Relations costs in its 2007 incurred cost proposal, and a $307,776 government claim for noncompliance with CAS 405, due to Raytheon's inclusion of allegedly expressly unallowable Corporate Development costs in that proposal. The COFD also claimed, and Raytheon challenged, that bonus and restricted stock costs for employees alleged to have engaged in expressly unallowable activities were expressly unallowable. The CAS 405 COFD for 2007 cited the captioned contract as a flexibly-priced contract affected by the alleged CAS noncompliance, and Contract No. N00019-07-C-0093 as a representative firm-fixed-price

contract so affected. (App. supp. R4, tab 281 at 4573, 4575, 4579-81) Raytheon's appeal from this COFD is docketed as ASBCA No. 59436.

7. On June 22, 2015, the CACO issued a COFD (Corporate COFD for 2008) asserting a $1,154,383 government claim, including penalties and interest, due to Raytheon's inclusion of allegedly unallowable and certain expressly unallowable costs in its final indirect cost rate proposal for CY 2008 and denying Raytheon's request for a waiver of penalties. The CACO cited allegedly expressly unallowable Corporate Development, Government Relations, and bonus and incentive compensation costs. He also cited what Raytheon refers to as "Recruitment Reminder" item costs (APFF ¶ 10) and DCMA refers to as "Souvenir 'Reminder Item' Advertising" costs (gov't reply br. at 4 (chart)), said to be unallowable under FAR 31.205-1, PUBLIC RELATIONS AND ADVERTISING COSTS (AUG 2003).[4] The COFD named representative Contract No. W15P7T-08-C-P203. (App. supp. R4, tab 364 at 5954-56, 5961) Raytheon's appeal from this COFD is docketed as ASBCA No. 60056.

8. On June 22, 2015, the CACO also issued a COFD pertaining specifically to airfare (Corporate Airfare COFD for 2008) asserting a $760,861[5] government claim due to Raytheon's inclusion of airfare costs in its final indirect cost proposal for CY 2008 that were allegedly unallowable under FAR 31.205-46, TRAVEL COSTS (OCT 2003). He cited Contract No. W15P7T-08-C-P203 as a representative contract. (App. supp. R4, tab 363 at 5946-48) Raytheon's appeal from this COFD is docketed as ASBCA No. 60057.[6]

9. On June 22, 2015, the CACO also issued a COFD asserting a $2,030,636 government claim under CAS 405 and FAR 31.201-6 (CAS 405 COFD for 2008). He found $981,822 in Government Relations costs to be expressly unallowable under FAR 31.205-22 and $831,797 in Corporate Development costs to be expressly unallowable under FAR 31.205-27. He cited flexibly-priced Contract No. W15P7T-08-C-P203 and firm fixed-price Contract No. W15P7T-07-C-M204 as representative contracts affected by the alleged CAS noncompliance. (App. supp. R4, tab 365 at 5966, 5968-69; AUPFF ¶¶ 9, 12) Raytheon's appeal from this COFD is docketed as ASBCA No. 60058.

10. On June 12, 2014, the DACO issued a COFD (RMS COFD for 2007) concluding, among other things, that substantial portions of RMS' costs for airfare, outside legal patent, and employee recruiting were unallowable under FAR 31.205-46, TRAVEL COSTS (OCT 2003); FAR 31.205-30, PATENT COSTS (JUL 2005); and FAR

[4] This regulation has been updated since the 2007-2008 period at issue.

[5] The parties settled part of DCMA's airfare cost claims. The Board docketed the settled portion as ASBCA Nos. 61136, 61137, 61138, and 61139 and dismissed those appeals with prejudice on May 24, 2017, pursuant to the settlement agreement. The portion still in dispute amounts to $76,556 (*see* finding 14).

[6] Numerous appeals from government claims relating to corporate airfare costs have been stayed pending the outcome of the instant appeals.

31.205-34, RECRUITMENT COSTS (JUL 2005), respectively. The DACO also alleged a lack of documentation under paragraph (d) of FAR 31.201-2, DETERMINING ALLOWABILITY (MAY 2004). Although the COFD did not name a representative contract, it was based upon the RMS Audit Report for 2007, which lists affected contracts. (App. supp. R4, tab 260 at 4098, tab 277; ex. G-10; AUPFF ¶¶ 13-14) Raytheon's and RMS' appeal from this COFD is docketed as ASBCA No. 59437.

11. The DACO issued another COFD on June 12, 2014 (RMS Penalties COFD for 2007), asserting a $94,905 government claim for penalties, due to Raytheon's inclusion of various allegedly expressly unallowable costs, totaling $135,763, in its incurred cost proposal for FY 2007. The DACO denied Raytheon's request for a penalty waiver. (App. supp. R4, tab 276 at 4535-36, 4538; AUPFF ¶ 15) Although the COFD did not name a representative contract, it was based upon the RMS Audit Report for 2007, which lists affected contracts (app. supp. R4, tab 260 at 4098). Raytheon's appeal from this COFD is docketed as ASBCA No. 59438.

12. For 2008, the DACO issued a COFD on June 11, 2015, disallowing RMS' indirect airfare costs. He did not make a payment demand because the amount of costs claimed to be unallowable, plus an amount Raytheon had agreed to remove from its claim for other indirect costs, was less than the amount being withheld from current approved billing rates for 2008. (App. supp. R4, tab 358; AUPPF ¶ 16) Raytheon's appeal from this COFD is docketed as ASBCA No. 60059.

13. On June 11, 2015, the DACO also issued two COFDs disallowing RMS' direct airfare costs that had been included in its billings under two named contracts and demanding payment of $167,427 and $17,274, respectively (RMS Direct Airfare COFDs for 2008) (app. supp. R4, tabs 356-57; AUPFF ¶ 17). Raytheon's appeals from these COFDs are docketed as ASBCA Nos. 60060 and 60061.

14. A summary of the costs remaining in dispute in these appeals follows. The chart was submitted by Raytheon (APFF ¶ 18). Government disagreements or comments are highlighted (gov't reply br. at 4).

Business	Cost Type	Years	Disputed Amount	COFD Basis for Disallowance
Corporate	Travel (airfare)	2008	$76,556	31.205-46, Travel costs.
RMS	Indirect Travel (airfare)	2007 2008	$815,036 $978,429	31.201-2(d) (supporting documentation). 31.205-46, Travel costs.
RMS	Direct Travel (airfare)	2008	$184,701	31.205-46, Travel costs.
Corporate	Corporate Development	2007 2008	$307,776 **(Gov't $862,010)** $868,322 **(Gov't $831,797)**	31.205-27, Organization costs. Expressly unallowable
Corporate	Government Relations	2007 2008	$1,870,428 $1,065,481[7]	31.205-22, Lobbying and political activity costs. Expressly unallowable.
RMS	Outside Legal Patent	2007	$120,600	31.201-2(d) (supporting documentation). 31.205-30, Patent costs.
RMS	Engineering Labor Overhead	2007	$96,701	31.205-30, Patent costs. Expressly unallowable.
RMS	Recruiting Travel	2007	$51,436	31.201-2(d) (supporting documentation). 31.205-34, Recruitment costs.
Corporate	Restricted Stock, Incentive Compensation, Bonus	2007 2008	$1,242,895 $125,280	FAR 31.205-22, Lobbying & political activity costs; FAR 31.205-27, Organization costs; FAR 41.205-47, Costs related to legal and other proceedings. Expressly unallowable.
Corporate	Recruitment Reminder Items **or Souvenir Advertising costs.**	2008	$17,780	31.205-1, Public relations and advertising costs. 31.205-27,
Corporate	CAS 405 Noncompliance	2007 2008	$2,178,204 $1,813,619	Organization costs. 31.205-22, Lobbying and political activity. Expressly unallowable.

[7] Per DCMA, of the $1,065,481, $981,822 is expressly unallowable and $83,659 is unallowable (*see* app. supp. R4, tab 364 at 5955, 5962; gov't reply br. at 4 n.3).

Statutory and Regulatory Provisions Applicable to All or Several of the Subject Appeals

15. Among others addressed separately below, the following statutory, FAR and CAS provisions are pertinent:

> FAR 31.201-2, DETERMINING ALLOWABILITY (MAY 2004), provides in part:
>
> (a) A cost is allowable only when the cost complies with all of the following requirements:
>
> (1) Reasonableness.
>
> (2) Allocability.
>
> (3) Standards promulgated by the CAS Board, if applicable, generally accepted accounting principles and practices appropriate to the circumstances.
>
> (4) Terms of the contract.
>
> (5) Any limitations set forth in this subpart.
>
> . . . .
>
> (d) A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The [CO] may disallow all or part of a claimed cost that is inadequately supported.
>
> FAR 31.201-3, DETERMINING REASONABLENESS (JUL 1987), provides in part:
>
> (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.… 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 [CO] or the [CO'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.

FAR 52.216-7, ALLOWABLE COST AND PAYMENT (DEC 2002), incorporated into the cost contracts at issue,[8] provides in part that:

(a) Invoicing.

(1) The Government will make payments to the Contractor when requested as work progresses … in amounts determined to be allowable by the [CO] in accordance with [FAR] subpart 31.2 in effect on the date of this contract and the terms of the contract.

…

(d) Final indirect cost rates.

(1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the [FAR] in effect for the period covered by the indirect cost rate proposal.

Title 10 U.S.C. § 2324, Allowable costs under defense contracts, provides:

[8] *See, e.g.*, ASBCA Nos. 60056-61, R4, tab 2 at 158.

(a) **Indirect Cost That Violates a FAR Cost Principle.-**

The head of an agency shall require that a covered contract provide that if the contractor submits to the agency a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the [FAR] or applicable agency supplement to the [FAR], the cost shall be disallowed.

(b) **Penalty for Violation of cost principle.-**

(1) If the head of the agency determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (a) that defines the allowability of specific selected costs, the head of the agency shall assess a penalty against the contractor in an amount equal to-

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on provisions in the [FAR]) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the head of the agency determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the head of the agency shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

> (c) **Waiver of Penalty**. --The [FAR] shall provide for a penalty under subsection (b) to be waived in the case of a contractor's proposal for settlement of indirect costs when-
>
> . . . .
>
> (1) The contractor demonstrates, to the [CO's] satisfaction, that--
>
> (A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and
>
> (B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

FAR 42.709, SCOPE (NOV 2016), and its subsections implement the statutory penalty and waiver provisions as does FAR 52.242-3, PENALTIES FOR UNALLOWABLE COSTS (MAR 2001).

CAS 405-40, Fundamental Requirement, states in part that:

> (a) Costs expressly unallowable or mutually agreed to be unallowable, including costs mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract.

48 C.F.R. § 9904.405-40(a).

FAR 31.201-6 reflects CAS 405's requirements and provides, in part:

> (a) Costs that are expressly unallowable or mutually agreed to be unallowable, including mutually agreed to be unallowable directly associated costs, shall be identified and excluded from any billing, claim, or proposal applicable to a Government contract. A directly associated cost is any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred. When

an unallowable cost is incurred, its directly associated costs are also unallowable.

ASBCA NO. 59435 -- GOVERNMENT RELATIONS COSTS

FINDINGS OF FACT CONCERNING GOVERNMENT RELATIONS COSTS

16. The following statutory and regulatory provisions apply to lobbying:

Title 31 U.S.C. § 1352, Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions, provides in part:

> (a)(1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with any Federal action described in paragraph (2) of this subsection [including the awarding of any Federal contract].

Title 10 U.S.C. § 2324(e), Specific Costs Not Allowable, provides in part:[9]

> (1) The following costs are not allowable under a covered contract:
>
> . . . .
>
> (B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress, a State legislature, or a legislative body of a political subdivision of a State.

FAR 31.201-6(c)(1), ACCOUNTING FOR UNALLOWABLE COSTS (NOV 2005), provides that "The practices for accounting for and presentation of unallowable costs must be those described in 48 CFR 9904.405, Accounting for Unallowable Costs [CAS 405]."

[9] *See also* Title 10 U.S.C. § 2249, Prohibition on Use of Funds for Documenting Economic or Employment Impact of Certain Acquisition Programs, and DOD FAR Supplement (DFARS) 231.205-22, Legislative Lobbying Costs, which implements that statute and makes such costs unallowable.

FAR 31.201-6(e)(2), ACCOUNTING FOR UNALLOWABLE COSTS (NOV 2005), provides:

> Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with subparagraph (e)(1) above (except when such salary expenses are, themselves, unallowable). The time spent in proscribed activities should be compared to total time spent on company activities to determine if the costs are material. Time spent by employees outside the normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during periods outside normal working hours as to indicate that such activities are a part of the employee's regular duties.

FAR 31.205-22, LOBBYING AND POLITICAL ACTIVITY COSTS (OCT 1997), provides in part:

> (a) Costs associated with the following activities are unallowable:
>
> (1) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;
>
> (2) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee [PAC], or other organization established for the purpose of influencing the outcomes of elections;
>
> (3) Any attempt to influence
>
> (i) the introduction of Federal, state, or local legislation, or
>
> (ii) the enactment or modification of any pending Federal, state, or local legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in

similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

(4) Any attempt to influence

(i) the introduction of Federal, state, or local legislation, or

(ii) the enactment or modification of any pending Federal, state, or local legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign;

(5) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities; or

(6) Costs incurred in attempting to improperly influence..., either directly or indirectly, an employee or officer of the Executive branch of the Federal Government to give consideration to or act regarding a regulatory or contract matter.

FAR 31.205-22(b) excepts certain activities from paragraph (a)'s coverage, e.g. "providing technical and factual . . . information on a topic directly related to performance of a contract . . . in response to a documented request" from a member of Congress, or any activity specifically authorized by statute to be undertaken with contract funds.

FAR 31.205-22(c) provides:

> When a contractor seeks reimbursement for indirect costs, total lobbying costs shall be separately identified in the indirect cost rate proposal, and thereafter treated as other unallowable activity costs.

FAR 31.205-22(d) provides:

> Contractors shall maintain adequate records to demonstrate that the certification of costs as being allowable or unallowable (see 42.703-2) [requirement for certification of indirect costs] pursuant to this subsection complies with the requirements of this subsection.

CAS 405-40(e), Fundamental Requirement, 48 C.F.R. § 9904.405-40(e) provides:

> All unallowable costs covered by paragraphs (a) through (d) of this subsection shall be subject to the same cost accounting principles governing cost allocability as allowable costs. In circumstances where these unallowable costs normally would be part of a regular indirect-cost allocation base or bases, they shall remain in such base or bases. Where a directly associated cost is part of a category of costs normally included in an indirect-cost pool that will be allocated over a base containing the unallowable cost with which it is associated, such a directly associated cost shall be retained in the indirect-cost pool and be allocated through the regular allocation process.

Raytheon's Government Relations Department Activities

17. At all relevant times, Raytheon maintained an office in Arlington, Virginia, known as the Washington Office or Washington Area Office (*see, e.g*., tr. 5/23). In 2007 and 2008 the office included a Government Relations Department, among others. Costs associated with Government Relations were collected in cost center 90206. The Department's name has changed from time to time (e.g., "Congressional Relations;" "Legislative Affairs;" or "Legislative Operations") but the cost center designation has remained the same. We use "Government Relations" for convenience. (*See* Rule 4, tabs 121, 169; app. supp. R4, tab 208 at 3184; tr. 5/19, 176, 6/85, 10/105; AUPFF ¶ 19) Government Relations serves as Raytheon's primary interface with the United States Congress (gov't undisputed proposed finding of fact (GUPFF) ¶ 35 (first sentence only)).

18. In 2007 and 2008 Government Relations had approximately 20-22 employees, of whom approximately 12-13 were federal government relations specialists, managers or directors; two were responsible for state and local government relations; two were responsible for PAC activities; and the remainder were administrative specialists. In its 2008 annual Lobbying Report to Congress, Raytheon identified up to 13 individuals who

had acted as lobbyists[10] in given areas (usually fewer per area). (R4, tab 169; tr. 5/24, 10/171; AUPFF ¶¶ 20-21 (excluding n.8))

19. Raytheon's General Policies and Procedures, No. 23-3045-110, "IDENTIFYING AND REPORTING LOBBYING ACTIVITY COSTS," effective December 13, 1984 and continuing through 2007 and 2008 (Lobbying Policy), covered how Government Relations employees were to log their time to comply with FAR 31.205-22 and exclude unallowable lobbying costs (app. supp. R4, tab 1; tr. 5/283-84, 9/284-85). The Lobbying Policy provided in part:

> 5.1 Unallowable Costs
>
> 5.1.1 Lobbying Activity Costs—These activities include:
>
> a. Attempts to influence the outcomes of any Federal, state, or local election, referendum, initiative, or similar procedure, through in kind or cash contributions, endorsements, publicity, or similar activities;
>
> b. Establishing, administering, contributing to, or paying the expenses of a political party, campaign, [PAC], or other organization established for the purpose of influencing the outcomes of elections;
>
> c. Any attempt to influence (1) the introduction of Federal or state legislation, or (2) the enactment or modification of any pending Federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;
>
> d. Any attempt to influence (1) the introduction of Federal or state legislation, or (2) the enactment or modification of any pending Federal or state legislation by preparing, distributing, or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass

[10] Raytheon objects to the term "lobbyist" in some cases, stating that it has no such job title. We use the term for convenience, without making any substantive determination on the question of lobbying costs, unless we so state.

demonstration, march, rally, fund raising drive, lobbying campaign, or letter writing or telephone campaign; or

e. Legislative liaison activities only when carried on in support of or in knowing preparation for an effort to engage in unallowable activities. Thus, only those legislative liaison activities which, from their timing and subject matter, can reasonably be inferred to have had a clearly foreseeable link with later lobbying fall within the "knowing preparation" standard of this section.

5.1.2 Associated Lobbying Activity Costs

a. The lobbying activity costs defined above include the applicable portions of salaries of employees and fees of individuals or firms engaged in lobbying activity on behalf of Raytheon (whether or not such employees or firms are registered as lobbyists under any applicable law).

b. Also unallowable are costs that are "directly associated" with lobbying activity costs, as defined in Section 5.1.1 above. A "directly associated" cost as defined by the [CAS] Board (CASB) is a "cost which is generated solely as the result of the incurrence of the (unallowable lobbying cost) and which would not have been incurred had the (unallowable lobbying cost) not been incurred." . . . .

5.2 Allowable Costs

5.2.1 Non-Lobbying Activity Costs—These activities include:

a. Providing a technical and factual presentation of information, on or off Raytheon premises, on a topic directly related to the performance of a contract through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statement for the record at a regularly scheduled hearing) made by the recipient member, legislative

body or subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for transportation, lodging or meals are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.

b. All legislative liaison activities not in support of unallowable lobbying activity costs as defined in Section 5.1 above. Allowable legislative liaison includes gathering information or legislation, analyzing the [e]ffect of legislation, and attending legislative sessions or hearings and reporting on the subject matter of such legislative sessions or hearings.

. . . .

6. PROCEDURE

. . . .

NOTE: The applicable portion of employees' salaries is withdrawn through the overhead rate submission . . .

b. In addition to the above reporting requirement, employees who spend more than 25% of their compensated hours during the month on lobbying activity are also required by Government regulation to maintain time logs, calendars, or similar records documenting all of their lobbying activity.

NOTE: Time spent on lobby activity after the scheduled working day is not reported.

. . . .

6.2.2 Raytheon is required to maintain "adequate records" to support a required certification in its annual indirect cost rate proposal that Raytheon has properly segregated and not claimed for reimbursement the cost of any unallowable lobbying activity.

(App. supp. R4, tab 1 at 1-4)[11]

20. Raytheon's Company Policy No. 6-RP, "Overhead and G&A Rates for Accounting and Provisional Billing Purposes (Excluding Unallowable Costs)," effective June 26, 2002, identifies lobbying costs as expressly unallowable (R4, tab 112 at ¶ 6.2).

21. In 2007 and 2008 Raytheon's CGA, particularly James Pflaumer, Manager of Government Accounting, promulgated "Guidelines - Accounting for Selected Costs In Accordance With FAR Part 31" (Unallowable Guidelines), which addressed lobbying, among other costs (app. supp. R4, tab 48 at 797-98, tab 101 at 1587; tr. 3/9-10, 5/298, 6/19). Two of the testifying lobbyists did not recall seeing the Unallowable Guidelines prior to this litigation (tr. 7/9 (Robert Neal), 10/149 (Joseph Zummo)). PAC Manager Courtney Watson was fully aware of the Lobbying Policy and the Unallowable Guidelines, which were available to all of the lobbyists. The Unallowable Guidelines were subordinate to the Lobbying Policy. (Tr. 5/177, 220-21, 6/19, 27)

22. Ms. Watson found the distinction between allowable and unallowable costs to be fairly clear. In her experience Government Accounting took accurate time reporting very seriously. These considerations led to the development of the Lobbying Tool (below). (Tr. 5/217-21)

23. In addition to in-house training, the Government Relations department was trained by outside counsel concerning what were allowable and unallowable costs, for purposes of recording time accurately. The training, which was at least annual, included compliance with the FAR's lobbying provisions. (Tr. 5/218-19, 7/24, 45-46) By email dated January 4, 2008 to the Government Relations personnel and others, Robert Shanks, Raytheon's corporate counsel, sent "Additional Guidance: New Lobbying and Ethics Reform Act" (R4, tab 151 at 71755-56; tr. 7/23-24). The document gave statistical order numbers and charge numbers for purposes of charging lobbying costs and described lobbying as follows:

> Direct lobbying is the communication of Raytheon's view to a federal, state or local legislator or a staff member or any other government employee who may help develop legislation. Even if there is no pending legislation, you would be engaged in lobbying if you asked a legislator or covered Executive Official to take an action that would require legislation, such

[11] The only material difference between the Lobbying Policy's recital of unallowable lobbying costs and those contained at FAR 31.205-22(a) is that the Policy did not include a counterpart to FAR 31.205-22(a)(6), concerning illegal attempts to improperly influence an Executive Branch employee or officer. Raytheon maintains, without challenge, that these prohibitions are addressed elsewhere in its policies and are not in dispute in these appeals. (App. br. at 18, n.9)

> as funding an agency or program. PLEASE NOTE: Lobbying includes preparation time for "white papers" and other written or oral lobbying activities, as well as time spent supporting the PAC.

(R4, tab 151 at 71762) The Government Relations team had worked with Raytheon's Business Development, Finance and Legal Teams to prepare these "basic instructions" (tr. 7/27-28). In addition to providing charge instructions to Raytheon's various businesses, Raytheon had separate training for them concerning the definitions of lobbying (tr. 7/28-30).

24. In 2007 and 2008 Raytheon withdrew unallowable costs from its Government Relations cost center 90206 through A&S, which was responsible for preparing the Corporate incurred cost submissions. Donna Ferrero, a Consulting Budget Analyst, was responsible for collecting costs from cost center 90206, ensuring that the unallowable portion was withdrawn, and calculating the cost disallowance factor (below). She had no written instructions on how to complete the lobbying withdrawal calculation but had consulted with her predecessor and supervisor on the matter and, based upon her several years' experience, she knew what was required. (Tr. 6/252-54; AUPFFs 48-49) Ms. Ferraro was making mathematical calculations, not evaluating the substance or purpose of the time reported (tr. 6/260-61, 267). Ms. Watson noted that "the onus [was] on each individual employee" to enter his or her time accurately (tr. 5/209-10).

25. During the relevant time periods Raytheon's paper time sheets for its Washington Office defined "Lobbying" as follows:

> Lobbying is defined by the Lobbying Disclosure Act (LDA) as any oral or written communication (including e-mail) to an executive or legislative branch official with regard to the formulation, modification, or adoption of federal legislation, a federal rule, regulation, Executive Order, or any other program, policy, or position of the U.S. Government. Exclusions include written responses to requests for information, testimony before a committee and administrative requests.

(R4, tab 127 at 144664) This definition was to provide guidance regarding lobbying activities but there was no specific training on how to fill out the time sheets (tr. 5/229).

26. Congressional "[LDA] Guidance," effective January 1, 2008, revised February 15, 2013, states that the LDA "does not contain any special record keeping provisions" but, for an organization employing in-house lobbyists, it "requires a good faith estimate of the total expenses of its lobbying activities" (R4, tab 229 at 14; tr. 5/38-40).

27. In addition to the LDA's definition of lobbying, at least Messrs. Neal, Zummo, and Woody Lee were also familiar with the FAR definition of lobbying and used the concepts embodied in each in recording unallowable time (tr. 7/17, 9/287-88, 10/135).

28. During 2007 and all relevant times, Raytheon instructed its Government Relations personnel to exclude from their monthly time-sheet reports any time spent on unallowable lobbying activities on a weekend, holiday, or before 8 AM or after 5 PM. Raytheon never withdraws time for unallowable lobbying activities occurring during those periods on the ground that its Government Relations employees are salaried and charged indirectly; they are paid based upon a 40-hour work week; and including time outside of that period would result in an overstatement of the withdrawal amount. Raytheon maintains, and the government has not rebutted, that there was no cost to it or to the government for work outside normal business hours.[12] (R4, tab 103 at 65-68; tr. 5/52, 235-37, 240-44, 6/276-77, 9/288-89; *see similarly* tr. 10/138-40; GUPFF ¶ 53 as restated in APFF ¶ 53)

29. Accounting for labor costs as a function of time paid, rather than time worked, is one common industry method. Raytheon asserts that it is required to use that method under CAS 401, 48 C.F.R. § 9904.401, Consistency in Estimating, Accumulating and Reporting Costs, because that is its disclosed accounting practice and the one it uses in bidding. (Tr. 1/199-200, 2/59, 6/109-10) We find that Raytheon appropriately excluded work from its lobbying cost reporting for which there was no cost to the government.

30. For the most part, other than some identification of weekends, travel, paid time off, holidays or leave, Raytheon's paper time sheets are not detailed. Their purpose is to report time spent on unallowable activities only. Normally, they identify the hours spent on lobbying for a given day, not the specific activities. They also do not report the nature of any alleged non-lobbying activities. (R4, tabs 127-32, 134-35, 137, 139, 141-42; tr. 9/286, 349, *see* tr. 5/93 (Raytheon did not provide the auditors with detailed logs of employees' work activities), *but see* finding 60 (auditors did not ask for such materials)). A few of the time sheets describe at least some of the reporting individual's activities (*see, e.g.*, R4, tabs 133, 136, 138, 140).

31. In 2008, Raytheon transitioned from paper time sheets to an online Lobbying Compliance Tool (Lobbying Tool), in response to the Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, 121 Stat. 735 (Sept. 14, 2007), and to new procurement laws in several states. From January 1, 2008 until March 31, 2008, before Raytheon implemented the Lobbying Tool, its lobbyists used internal "statistical orders" to track their lobbying hours. Like the time sheets, the orders did not describe specific

[12] Raytheon's cost accounting does not allocate costs to the night and weekend work. However, logically, the expectation of regular night and weekend work would be factored into the salary paid to the lobbyists. The government did not introduce testimony on this point, so we accept Raytheon's testimony that the government was not charged for the night and weekend work.

activities. (*See* R4, tabs 151, 177 at 2, tab 214 at 1-2, tab 217 at spreadsheet attachment; tr. 5/55-56, 202-03, 217-18; GUPFF ¶¶ 56-58 as restated in APFF 43, GUPFF ¶ 60).

32. Raytheon implemented the Lobbying Tool in April 2008. It allowed its lobbyists to log on to Raytheon's internal intranet in order to report their lobbying hours monthly (*see* R4, tabs 190, 193; GUPFF ¶ 61). The Lobbying Tool accounted separately for LDA lobbying activities and those that were unallowable under FAR 31.205-22. For example, PAC activities are not lobbying for purposes of the LDA but are unallowable under the FAR. The Lobbying Tool tracked total lobbying hours per employee, including for the LDA, the Internal Revenue Service, and FAR compliance. As of the audit (below), each employee who lobbied prepared a one-page monthly time log showing the total number of hours that the employee engaged in disallowed lobbying or PAC efforts each day. At the end of every month, the employee entered the hours spent on lobbying-related activities into the Lobbying Tool. The time logs were then consolidated and formed the basis for Raytheon's voluntary cost withdrawal for lobbying activities. The unallowable lobbying withdrawal percentage was calculated by dividing the total hours spent on lobbying activity by the total annual hours worked. (App. supp. R4, tab 208 at 3185-87; tr. 5/61, 211-14)

33. As with the predecessor paper time sheets, under the Lobbying Tool lobbyists were not to record more than 8 hours a day or enter any weekend or holiday lobbying (tr. 5/243-44, 280-81, 10/139-40; GUPFF ¶ 63). The tool did not provide information regarding the nature of Raytheon's lobbyists' activities (R4, tab 215 at attachment; tr. 6/294-95; GUPFF ¶ 65).

34. For all relevant times, Raytheon relied upon the lobbying time reported by its Government Relations lobbyists to determine its unallowable lobbying activity costs under FAR 31.205-22, which it referred to as its "lobbying withdrawal calculation." Raytheon's A&S Budgets Group, in particular analyst Ferrero, was responsible for the calculation as part of the preparation of Raytheon Corporate's annual indirect cost proposals, including for FYs 2007 and 2008. Ms. Ferrero did not know the process by which Raytheon's lobbyists recorded their time. (R4, tab 103 at 62-64 (app. resp. to interrog. No. 24); tabs 160, 184; tr. 6/252-61; GUPFF ¶¶ 66-67)

35. For the lobbying cost withdrawal calculation, Raytheon established a ratio of unallowable hours worked by the Government Relations employees to their total hours worked. The ratio's numerator was the total number of unallowable hours reported by the lobbyists. The denominator was the total number of work hours available during a given year to the employees who reported unallowable hours, based upon a 40-hour work week less vacation and holidays. Dividing the numerator by the denominator yielded a percentage—the lobbying disallowance factor. Raytheon applied this factor to what it deemed to be Government Relations' recoverable expenses (including the salary and fringe benefits paid to its lobbyists and their administrative staff) to determine the costs associated with unallowable lobbying activities under FAR 31.205-22. (R4, tab 103 at 62-64 (app. resp. to interrog. No. 24); tabs 160, 184, 710 ¶ 69; tr. 6/255-60

(disallowance factor applied to labor, salary, and some other general ledger accounts); GUPFF ¶¶ 68-69)

36. For Raytheon Corporate's 2007 and 2008 incurred cost proposals, Ms. Ferrero calculated the disallowance factors at 53.3% and 50%, respectively, resulting in withdrawals of $2,466,654.88 and $2,558,450.79 (R4, tabs 160-61, 184 at tab entitled "cc902906 Withdrawal," tab 185; tr. 6/255-60, 318-23, 333; GUPFF ¶¶ 70-73).

37. By the time of the 2007 and 2008 withdrawals, Ms. Ferrero had enhanced the process to avoid some past inadvertent errors. She personally reviewed every Government Relations time sheet submitted in 2007; ensured that employees who joined or left the cost center received a prorated allocation for purposes of the withdrawal factor; confirmed that the list of employees for each year's withdrawal was correct; and confirmed her draft analysis with the Corporate A&S Finance Manager embedded in the Washington Office. Her supervisor, Charles Vilandre, also exercised closer supervision over the withdrawal process than he had previously. (Tr. 6/312-313, 315-16, 319-21, 333-34) Two State and Local Government Relations specialists did not prepare paper timesheets in 2007. They were not required to do so under the LDA. However, with Ms. Watson's assistance, Ms. Ferrero made reasonable efforts to ascertain and report their unallowable lobbying time. (R4, tabs 157-59; tr. 5/245-48, 6/283-87)

DCAA's Corporate Audit for 2007 and Corporate COFD for FY 2007

38. In 2008, Catherine Grindlay (now Quinn, as we refer to her) of DCAA began the initial Corporate Audit of Government Relations cost center 90206 for 2007. Along with two others from DCAA, Ms. Quinn interviewed Government Relations employees during one visit in December 2008 regarding CY 2007 lobbying costs, as reflected in typewritten interview summaries, which were not sworn transcripts. (R4, tab 218; tr. 8/236-38, 241-42) The purpose of her interviews was to determine if the amount of unallowable lobbying costs Raytheon recorded coincided with the employees' stated job roles and activities (app. supp. R4, tab 208 at 3184-86). The employees interviewed, in 2008 and later, were not given copies of DCAA's interview notes for review (tr. 5/142, 151, 8/241, 9/308)

39. On November 3, 2008, Michael Logsdon, a Raytheon manager of the Government Relations cost center and the Washington Area Office's point of contact with DCAA (tr. 6/51, 8/233)[13], responded to an inquiry from Ms. Quinn concerning lobbying costs. He noted that, in 2006, DCAA had conducted a comprehensive review of Raytheon's "processes to review, collect and withdraw" lobbying and directly associated lobbying costs at its Washington Office. He represented that there were no deficiencies noted regarding those costs and Raytheon's fundamental identification of the costs was unquestioned. (Ex. A-18 at 6681)

[13] Mr. Logsdon's name was misspelled as "Loxton" in the hearing transcript (*see, e.g.*, app. supp. R4, tab 148 at 002081).

40. A draft report, later superseded (below), was sent to Raytheon on July 14, 2009. It recommended changing Raytheon's total disallowance factor from 53.3% to 65.9%. The change was made by adjusting the withdrawal percentages for four Government Relations employees. For Douglas Baragar (employee ID 1019110), Ms. Quinn reported that, in his interview, he stated that he spent 65-70% of his time on unallowable lobbying activities. However, he had withdrawn 42% of his time for 2007. The auditors raised his withdrawal percentage from 42% to 65%. For William "Woody" Lee (employee ID 09033), the auditors raised his withdrawal percentage from 13% to 85% on the ground that he was the only lobbyist covering Raytheon's civil programs. For William Lynn (employee ID 1030582), the auditors raised his withdrawal percentage from 12% to 85%[14] and for Ms. Watson (employee ID 105056),[15] they raised the percentage from 67% to 100%. DCAA was concerned that the Government Relations employees were not capturing time spent preparing for lobbying, although, as reflected in Ms. Quinn's interview notes, the employees she questioned responded that they classified such time as unallowable. (R4, tab 218 at 6790, 6798, 6805, 6812, 6814-15, 6819, 6827; app. supp. R4, tab 126 at 1929, tab 148 at 2083-85; tr. 5/88-90, 8/244-47, 250-51, 255-56; ex. A-18 at 6679-80; APFF ¶ 77) Essentially, DCAA viewed some of Government Relations' activities as related to lobbying and expressly unallowable and Raytheon viewed them as allowable (tr. 5/129).

41. Four members or alumni of Government Relations, all of whom were there in 2007/2008, testified at the hearing (Ms. Watson and Messrs. Neal, Lee, and Zummo). Ms. Watson, who was a credible witness, joined Government Relations in 2005 as the PAC Manager (tr. 5/177). She was responsible for ensuring that Raytheon's PAC, or "RAYPAC," complied with all federal election campaign laws. She raised funds from eligible employees for the PAC and distributed them to candidates who supported Raytheon's views (tr. 5/192; APFF ¶ 21 (undisputed portion)). Ms. Watson worked outside her normal 8:30 AM – 5:30 PM workday about 10% of the time. She considered the functions she attended outside her normal work hours to be part of her regular work duties. She recorded her activities on a daily log, notes on her desk calendar and Lotus notes. She archived her emails. She was not a registered lobbyist as of the hearing and was not in 2007. It was not part of her duties to pursue "earmarks" or directed appropriations in 2007. She spent 1-2 hours per week engaged in internal discussions on lobbying strategies. She classified the meeting time regarding lobbying as nonrecoverable as well as time spent at meals with other contractors that were also attended by members of Congress or Congressional staff. She attended political fundraising events both during and outside normal work hours and accounted for her time. In 2007, Ms. Watson reported that the Legislative Operations team hosted 24 events and attended 654 fundraisers. She considered all of her time administering Raytheon's PAC to be unallowable. She deemed her role in lobbying compliance, internal efforts to support business development,

[14] Mr. Lynn's and employee Judith Pauletich's costs are no longer at issue (tr. 5/35).

[15] The audit report mistakenly identified Ms. Watson as employee ID 1050586, rather than 105056 (*see* R4, tab 145 at 1, app. supp. R4, tab 148 at 2084).

training, staff meetings, and the like to be allowable costs and opined that responding to requests and giving hearing testimony were Government Relations' activities that were not lobbying. She was a salaried employee paid based upon a 40-hour work week and recorded lobbying and political events as unallowable up to her normal business hours. Ms. Watson estimated that she spent 65% to 70% of her time a year on PAC lobbying activities. (R4, tab 145 at 2; tab 218 at 6803-07; tr. 5/196, 201-02, 206, 235, 237, 239, 243, 260-61). Ms. Watson was confident that she had captured all of her unallowable time in 2007 and 2008 (tr. 5/285).

42. Mr. Neal, a credible witness, joined Government Relations in January 2007 as a Senior Manager. During 2007 and 2008 he was the chief interface between RMS and the legislative branch of government. (Tr. 7/6, 44; APFF ¶ 22 (undisputed portion)) He was a registered lobbyist as of the hearing and in 2007 (R4, tab 218 at 6787). On some days in 2007 and 2008, Mr. Neal worked over eight hours on lobbying activities. Outside of normal business hours he might attend early morning or late evening meetings, PAC meetings, PAC events with members of Congress, breakfasts, lunches, and dinners. In 2007 and 2008, on occasion he would attend morning fundraisers, work a full day, then attend fundraisers at night (tr. 7/22). Mr. Neal recorded his activities on a daily log, notes on his desk calendar, and Lotus notes calendar, which was usually "pretty detailed" (tr.7/11). He archived his emails (R4, tab 218 at 6787). He considered the functions he attended before 8 AM and after 5 PM to be part of his regular work duties. He opined that business development activity, learning about programs, reading trade/industry press, clerical activity, responding to requests from Congressional staffers, and explaining the nature of program funding that had been provided in a fiscal funding bill, were allowable costs. He considered time spent providing facts was allowable, but if the time were colored in any way by an attempt to influence, it was not allowable. He classified time spent at meals with other contractors that were also attended by members of Congress or their staff as lobbying or political time. Mr. Neal evaluated whether an activity was lobbying on a case by case basis. The time he spent on lobbying activities varied, with less time spent when Congress was in recess. He deemed his annual lobbying percentage to be 60%-70%. (*Id*. at 6793; tr. 7/37, 80-81, 86, *see also* tr. 7/41)

43. Mr. Neal "didn't estimate" his time; he entered his time as appropriate on a daily basis, applying a "conservative bias on each day" as to what was unallowable (tr. 7/13). Mr. Neal logged "mixed purpose" activities as lobbying (tr. 7/52). He collected and submitted his time at the end of the month (tr. 7/11-12). Mr. Neal credibly vouched for the accuracy of his recorded unallowable lobbying time on his 2007 time sheets (app. supp. R4, tab 69; tr. 7/70, 77-78).

44. Mr. Lee, a credible witness, joined Raytheon as a Government Relations Manager in 1995, after a career in the United States Coast Guard, and was promoted to Senior Manager of Government Relations. He was responsible for Civil Programs until his retirement in 2014. (Tr. 9/276-78, 281-82, 317; APFF ¶ 23) (undisputed portion)) Mr. Lee spent less than 3% of his time working on obtaining earmarks for Raytheon. He classified that work, and internal discussions on lobbying activities, as non-recoverable

lobbying costs. The amount of time he spent on the internal discussions varied depending upon the time of year, with February to April as the busiest. Mr. Lee was a registered federal lobbyist, because he spent, or might spend at a given time, more than 20% of his time in lobbying activities, although he described his allowable activities as "much greater" (tr. 9/307). He travelled infrequently overnight to attend events also attended by Executive or Legislative Branch officials or lobbying firms. He designated those costs as non-recoverable unless a member of Congress or staffer had requested the visit. Mr. Lee opined that information gathering (reading reports, papers, learning programs and the status of matters, professional development and internal staff meetings that did not involve lobbying) generated allowable costs. Unallowable activities included attempts to influence. Mr. Lee advised DCAA auditor Quinn that he normally worked about 8 hours per day, but he attended fundraisers and Hill events both during the regular work day and after hours. The fundraisers were typically outside regular hours and were sometimes on weekends. This was an expected part of the job in Government Relations and part of his regular work duties. In 2007, Mr. Lee attended 119 political fundraisers and 44 local non-fundraising events. In 2008, he attended 103 political fundraisers and 34 non-fundraising events. No matter how many hours he worked on unallowable activities, he would report only 8 hours per day on the ground that he was an exempt salaried employee. He recorded his work activities on Palm Calendar software and on his time sheets, daily or close thereto. The purpose of the time sheets was to record time spent on unallowable activities only. Mr. Lee credibly estimated that he spent 20%-30% of his time annually on lobbying. (R4, tab 143 at 9518, tab 175 at 9587, tab 218 at 6816-22; tr. 9/286-88, 291-92, 315-16, 328, 335, 337-38, 349)

45. Joseph Zummo, a credible witness, was Director of Government Relations as of the hearing. He joined Government Relations as a Senior Manager in 2005, after serving as an aviator in the United States Navy. During 2007 and 2008, he was the Senior Manager principally responsible for programmatic and policy issues of interest to Raytheon. He was a registered lobbyist as of the hearing and in FY 2007. When interviewed by Ms. Quinn in 2008, Mr. Zummo reported that he usually worked about 10 hours a day. Outside his normal work day, and sometimes during his normal work hours, he attended trade association events and political fundraisers. He accounted for his time and considered his activities before 8 AM and after 5 PM to be part of his regular work duties. His primary duties for Raytheon were as a lobbyist and working on policy. Part of his duties in 2007 was to pursue earmarks or directed appropriations, but he spent very little time on this. He reported that time as non-recoverable. Mr. Zummo often engaged in internal discussions within his department on lobbying strategies. He classified this time, or some of it, as non-recoverable. Mr. Zummo attended meetings with other contractors that were also attended by members of Congress or Congressional staff. He classified his time as recoverable or not, depending upon the meeting's purpose. About 15 times a year Mr. Zummo traveled for Congressional staff site visits or fundraising in districts or states. He reported that time as non-recoverable lobbying. He attended fundraising events for the Raytheon PAC. He opined that his internal meetings and data gathering activities resulted in allowable costs. Mr. Zummo opined that, during

2007-08, an active period for him, he was "probably incredibly conservative" and "erred on the side of reporting most of [his activity]" as unallowable (tr. 10/115). If there were "any room for interpretation," Mr. Zummo recorded his activity as unallowable (tr. 10/134). He recorded his activities on a daily log, notes on his desk calendar, and Lotus notes. He archived his emails. Mr. Zummo credibly estimated that he spent 90% of his time performing lobbying activities on a yearly basis. (R4, tab 218 at 6823-29; tr. 10/103, 105, 107, 138-39; APFF ¶ 24 (undisputed portion))

46. Messrs. Neal, Lee, and Zummo had similar views that unallowable lobbying constituted attempts to influence legislation; preparing to influence legislation; attempts to influence elections and preparing to do so; and political activity, such as fund raisers or grass roots political activity or preparing to do either; or organizing or participating in PAC-related activities and preparing to do so (tr. 7/17, 52, 9/283-84, 10/114).

47. Government Relations personnel engaged in some allowable non-lobbying activity. Whether an activity was lobbying or non-lobbying could be "situational dependent" (tr. 10/162, 164) (Zummo) or dependent upon the purpose and evaluated on a case-by-case basis (tr. 7/53, 57-58) (Neal). For example, Mr. Zummo considered internal strategy sessions concerning Congressional outreach to be lobbying, which he reported as such (tr. 10/162). His description of non-lobbying activity, which he opined was compliant with the LDA and the FAR, was "anything that's not advocating or trying to influence legislation . . ." (tr. 10/114). Some examples were planning and administrative matters; human resources issues; conferences; external and internal matters that had nothing to do with trying to influence legislation; interpreting existing law for Raytheon headquarters or business divisions; budget analysis after a statute had been enacted; and examining international issues (tr. 10/160-63). Mr. Zummo used his judgment, training, and understanding of the LDA, FAR and Internal Revenue Code in classifying his time (tr. 10/132-33). The views of other testifying Government Relations personnel were similar. For example, Mr. Neal considered lobbying to depend upon whether he was attempting to influence legislation or preparing to influence legislation, "broadly speaking," engaging with a member of Congress, or organizing or participating in PAC-related activities. (Tr. 7/17) Ms. Watson described lobbying activities as attempts to influence (tr. 5/261).

48. A few more examples, from the testifying Government Relations personnel, of what they consider to be non-lobbying activities, include attending legislative hearings and gathering information for Raytheon's senior leadership, without attempting to influence the legislators (tr. 7/53-54); monitoring public sources for information that might affect Raytheon's programs and policies (tr. 9/293, 10/114); responding to Congressional oversight inquiries that did not involve attempts to influence legislation (tr. 9/295-96, 10/164-65); budget analysis after a statute has been enacted (tr. 10/163); and training and lobbying compliance activities, staff administrative meetings, ethics matters, internal efforts to support business development, diversity, health and safety, and human resources work (tr. 5/202, 9/313-14, 10/160).

49. While DCAA's initial audit report recommended changing Raytheon's total disallowance factor from 53.3% to 65.9% (finding 40), during her testimony Ms. Quinn disavowed that report (tr. 8/311). Her focus during her testimony was upon the lack of records of any Congressional requests to Raytheon for information (e.g., tr. 8/273, 285, 287, 312, 314).

50. By memorandum dated December 30, 2010, DCAA Raytheon Corporate requested an assist audit from DCAA's Mount Vernon Branch Office, which specialized in audits of defense contractors' lobbying costs (app. supp. R4, tab 172 at 2562; tr. 5/9-10). Although the initial audit report had not questioned all of cost center 90206's costs, even before they requested the assist audit the DCAA Raytheon Corporate auditors now planned to question the entire cost center 90206. That was their "strategy." (Tr. 8/245, 286-87) The audit request stated that Raytheon did not keep records of Congressional requests and did not obtain requests in writing. The auditors questioned all of cost center 90206's costs due to an alleged lack of adequate records. They deemed the employees in question to be lobbyists and stated that Raytheon "cannot justify the lobbyists[,] time was allowable" (app. supp. R4, tab 172 at 2563). They speculated that employees other than those interviewed might have assisted lobbyists with the creation of white papers or with technical information; many of those employees had trouble remembering their activities during FY 2007; and, because they did not normally take part in lobbying activities, they might not have known how to record their time. (*Id*. at 2562-63) We have not been directed to any evidence to support this speculation.

51. On December 17, 2009, Mr. Logsdon responded to an inquiry from Ms. Quinn concerning records of Congressional requests as follows:

> I did discuss this with John Barnes [16] and Doug Hughes in Legislative Operations. They told me that it is very rare to receive written requests for information. Requests for information are overwhelmingly received via telephone call, or when in meetings with a staffer. They may get the occasional e-mail, but formally documented requests are extremely rare, and therefore not separately tracked. John and Doug also said that the time that they or their staff would spend in responding to these requests would be recorded as lobbying time in our tool, and therefore not claimed, because while the staffer may be asking for factual data, in most instances we would use the request to make our case, which would cross over to lobbying activity.

(App. supp. R4, tab 165 at 2472)

[16] In 2008 John Barnes was Vice President of Legislative Operations. Doug Hughes was Program Integrator. (R4, tab 169; tr. 5/185, 187)

52. Ms. Quinn based her ultimate conclusion that all of cost center 90206's costs should be disallowed on the fact that she did not find documentation "either way" on whether the costs were allowable or not (tr. 8/267, 276, 278), or claimed or not (tr. 8/290).

53. As of January 2012, Nathaniel Yesner supervised the Branch Office audit team (tr. 5/9-12). The Branch Office made an effort to "sell" its services internally to DCAA and to solicit assist audit requests, deeming the audit of lobbying costs to be a "unique area," unlike verifying numbers on a page (tr. 5/12, 120; *see* R4, tab 191).

54. The Branch Office auditors did not rely upon the interviews DCAA had already conducted; they wanted to perform an independent review (tr. 5/109-10). Out of the 20 members of Government Relations, the assist auditors interviewed Messrs. Lee, Neal and Zummo, Ms. Watson, Caroline Cooper and Carla Zeppieri in February, April and May 2012, several years after the indirect cost proposals in question. They also reviewed the work product of lobbying consultants hired by Raytheon.[17] (R4, tab 211 at A (2/5); tr. 5/159-60)

55. Mr. Yesner's June 6, 2012 Audit Summary for FY 2007 stated that this field work confirmed that 90-100% of the employees' time was spent on lobbying efforts and supported DCAA Raytheon Corporate's decision to question 100% of cost center 90206. The largest discrepancy between the percentage of costs withdrawn by Raytheon for cost center 90206 and the audit-determined unallowable percentage applied to Mr. Lee's costs, where the auditors determined that 13% was withdrawn but 100% should have been withdrawn. The next largest discrepancy applied to Mr. Neal's costs, where the auditors determined that 54% was withdrawn but 100% should have been withdrawn. The auditors also concluded that 100% of Mr. Zummo's costs should have been withdrawn, rather than the 85% that was withdrawn. The other alleged discrepancies were Ms. Cooper, for whom Raytheon withdrew 82%, but the auditors determined that there was an over-withdrawal and only 65% should have been withdrawn; Ms. Watson, where the auditors determined that 67% was withdrawn but 91% should have been withdrawn; and Ms. Zeppieri, where the auditors determined that 86% was withdrawn but 90% should have been withdrawn. The auditors averaged the percentage of lobbying costs that Raytheon withdrew at 64% and those that allegedly were unallowable at 91%. (R4, tab 211 at A (1/5) – (2/5))

56. The Branch Office auditors questioned 100% of the costs of Raytheon's "State and Local" Government Relations employees and of its office assistants without interviewing them (tr. 5/161-62). The auditors concluded that 100% of Government Relations' 2007 costs, allegedly representing direct lobbying and lobbying-related effort, was expressly unallowable under FAR 31.205-22 (tr. 5/22-23).

57. Mr. Yesner confirmed that Government Relations employees were good about recording direct lobbying activities as unallowable and that Raytheon appropriately

[17] However, consultants are not at issue in these appeals (tr. 10/176).

accounted for its PAC costs (tr. 5/121). He also acknowledged that the employees he interviewed in 2012 (Watson, Zeppieri, and Zummo) reasonably accounted for their time (tr. 5/152-54, 168), but he further stated that "[w]e don't really know, to be honest with you, the accuracy of the direct lobbying time . . ." (Tr. 5/168) The auditors speculated that the employees might not be tracking research, preparation, strategy and other time spent in what DCAA considered to be lobbying-related activities or preparation for direct lobbying (tr. 5/121-22, 168, 8/255-56). However, auditor Quinn acknowledged that nothing in her notes gave her concern that Raytheon's employees were not withdrawing pre-lobbying or lobbying preparation costs (tr. 8/268) and we have not been directed to any evidence to support this speculation.

58. DCAA held a March 19, 2013 exit conference with Mr. Vilandre, Senior Manager of A&S. DCCA received Raytheon's response to its draft audit report on April 3, 2013. Raytheon disputed that the questioned costs –then all of its submitted costs for cost center 90206 -- were unallowable. Raytheon alleged that, other than the time entered in the Lobbying Tool, Government Relations employees were not required to track their time because they charged it as indirect costs. Moreover, their time not entered into the Lobbying Tool was spent on allowable non-lobbying activities such as research and analysis of legislation's impact; monitoring and reporting to Raytheon's management upon current trends and issues; business development, such as internal staff meetings and events; professional development; and office administration. Raytheon contended that DCAA had arbitrarily and incorrectly concluded that, under FAR 31.205-22(b)(1), the only allowable activity would be related to documented requests for white papers. Raytheon asserted that its Lobbying Tool captured its unallowable lobbying activities and fully complied with FAR 31.201-2(d). Raytheon also pointed out that the 2012 interviews were 5 years after the 2007 year in question whereas the Lobbying Tool entries were contemporaneous with the reported lobbying activities. (App. supp. R4, tab 208 at 3186-87)

59. DCAA replied in its October 25, 2013 Corporate Audit Report for FY 2007 that, through interviews, the auditors had determined that Raytheon's lobbyists spent 90 to 100 percent of their time on lobbying-related activities, directly or indirectly, which was much more than Raytheon had reflected in its lobbying analysis. The auditors considered that the only lobbying-related costs that were allowable were those that satisfied FAR 31.205-22(b)'s requirement for "documented requests" from Congress and the like for information regarding contract performance and Raytheon maintained that such requests were seldom formally documented and were usually made by email or telephone. Because Raytheon could not provide documented requests, DCAA concluded that the costs DCAA deemed to be lobbying-related were expressly unallowable under FAR 31.205-22. Of the adjusted claimed cost center 90206 costs, the auditors reported that $1,870,428 were expressly unallowable and subject to a level one penalty. (App. supp. R4, tab 208 at 3029, 3184-85, 3188)

60. Auditor Quinn acknowledged that, during her audit for 2007, she did not ask to review any of the materials (calendars, notes, emails, etc.) that each of the employees

interviewed cited in support of his or her work activities (tr. 8/264-68). Similarly, the assist auditors did not ask the Raytheon interviewees for their calendars (tr. 5/151).[18]

61. Based upon DCAA's audit report, the CACO found in his June 20, 2014 Corporate COFD for 2007 that, among other disallowed costs (*see* finding 5), Raytheon had included $1,870,428 in its proposal for salary and labor costs paid to its Government Relations lobbyists that were expressly unallowable lobbying costs under FAR 31.205-22 and subject to penalties and CAS 405 damages (app. supp. R4, tab 279 at 4556, 4566; tr. 7/258-59; ex. G-5; GPFF ¶ 19) (undisputed portion)). On the same day, the CACO issued the 2007 CAS 405 COFD, finding that Raytheon's submission of alleged expressly unallowable lobbying and political activity costs in the amount of $1,972,355, among other disallowed costs, violated CAS 405. The CACO cited Raytheon's failure to supply documented requests from Congress in support of allowable lobbying activity as a basis for his decision. (App. supp. R4, tab 281 at 4573, 4579-80) Raytheon's appeals ensued as reported above (findings 5-6).

DCAA's Corporate Audit Report for 2008 and Corporate COFD for 2008

62. For 2008, the auditors interviewed five registered lobbyists and the PAC manager out of 20 Congressional Relations Office employees. The auditors used their "judgmental selection" in determining who they would interview. (App. supp. R4, tab 331 at 5214; tr. 5/159-60)

63. Although they did not interview all employees, the auditors checked whatever facts they might have had concerning each employee (tr. 5/161). The auditors reviewed Raytheon's LDA filings for 2008, including those made by its consultants; consultant invoices and agreements; Raytheon's voluntary withdrawals of cost center 90206 costs; executive biographies; organization charts and employee listings and distribution data; and performance goals and appraisals. DCAA found that Raytheon had determined that an average of 50% of its Congressional relations employees' time was unallowable and had therefore withdrawn 50% of the cost center 90206 costs. (R4, tab 184 at first tab, entitled "7.15"; app. supp. R4, tab 331 at 5213-15; tr. 5/102-03, 6/259)

64. For 2008, Raytheon included what it characterized as the unallowable lobbying time of its Government Relations administrative staff in its lobbying withdrawal

[18] DCMA points out that, in 2012, when DCAA asked Raytheon for its 2007 calendars in connection with Raytheon's acquisition and divestiture (A&D) costs (below), Raytheon claimed that the calendars in practicality were likely no longer retained, were not records under the FAR, and were not used to support Raytheon's claimed costs (R4, tab 298 at 147551-52). The calendar question is not material to our decision. DCAA did not ask for calendars, etc. in connection with its lobbying cost audits and Raytheon has relied upon other evidence, such as time sheets, its lobbying tool, and credible witness testimony.

calculation, which the government contends mathematically reduced its disallowance factor (*see* R4, tab 184 at first tab, entitled "7.15"; tr. 6/302-07; GPFF ¶ 92).

65. On December 19, 2014, DCAA issued its Corporate Audit Report for 2008 (app. supp. R4, tab 331). The auditors questioned $1,187,981 in claimed employee compensation costs of the Government Relations cost center based upon FAR 31.205-22 and FAR 31.201-6 (*id*. at 5097, 5099, 5215). Of the questioned amount, $985,144 was said to be subject to a level one penalty (*id*. at 5211). The auditors analyzed the above interviews and documents to develop "estimated percentages of each employee's time spent on unallowable effort in 2008" (*id*. at 5214).

66. The government also relies upon an internal Raytheon online article dated January 31, 2005 (R4, tab 115; tr. 6/50; ex. A-7). The article profiles Chris Lombardi, then manager of Government Relations. It reports that "[the] job necessitates most of the team [spend] one-half to two-thirds of their days canvassing Capitol Hill" (R4, tab 115 at 15414) and that Mr. Lombardi discussed attempts to influence the outcome of legislation, among other things (*id*. at 15413-15). DCAA reported in a 2006 work paper that, during a DCAA interview, Mr. Lombardi stated that he had taken "poetic liberties" for the article (ex A-7). Mr. Neal described the article as a public relations "puff piece" and that, while he sometimes worked one-half to two thirds of his time on Capitol Hill, to characterize it as a daily occurrence was "broadly overstated" (tr. 7/68). Mr. Lombardi was not called to testify. We find that the accuracy of the 2005 hearsay article has been undermined and, in any event, the article is not probative of the amount of unallowable lobbying hours spent by Government Relations personnel in CYs 2007 and 2008.

67. The auditors questioned 100 percent of the time of 17 employees, including employees they did not interview (app. supp. R4, tab 331 at 5215; tr. 5/161-62).

68. DCAA's 2008 audit of Government Relations followed materially the same plan as for 2007 and, with minor exceptions, DCAA questioned nearly the entire cost center costs as expressly unallowable. Raytheon alleged, *inter alia*, that DCAA had misinterpreted FAR 31.205-22. (App. supp. R4, tab 331 at 5216; AUPFF ¶ 94)

69. On June 22, 2015, the CACO issued his Corporate COFD for 2008. He largely adopted DCAA's recommendations and concluded that Raytheon had included $1,065,481 in its proposal for salary and labor costs paid to its Government Relations lobbyists and administrative staff for performing and supporting unallowable lobbying activities, of which $981,822 was for expressly unallowable salary expenses paid to Raytheon's lobbyists (app. supp. R4, tab 364 at 5954, 5961; GPFF ¶ 20 (undisputed portion), APFF ¶ 96 (undisputed portion)). The same day, the CACO issued the 2008 CAS 405 COFD, finding that Raytheon's submission of expressly unallowable lobbying and political activity costs, among other allegedly expressly unallowable costs, violated CAS 405. The CACO cited Raytheon's failure to supply documented requests from Congress in support of allowable lobbying activity as a basis for his decision. (App. supp. R4, tab 365 at 5966, 5969) Raytheon's appeals ensued as set forth above (findings 7, 9).

70. The government contends that Raytheon's withdrawal of unallowable lobbying costs has "dramatically increased" since 2001, both in terms of the "gross" percentage it withdraws from its entire Government Relations office and the "lobbying disallowance factor" it applies to the "recoverable expenses" of that cost center (gov't br. at 62; *see* exs. G-1 – G-4; GPFF ¶¶ 145-50). The government alleges that this is a "troubling indictment" of Raytheon's lobbying withdrawal practices through 2015 and supports a conclusion that it under withdrew in 2007 and 2008 (gov't br. at 62).

71. John G. Panetta, Sr., Raytheon's senior director of government accounting, disagrees with the government's position. He demonstrated that, from 2007 forward the amount of costs Raytheon withdrew remained about $4 to $5 million – closer to $4 million in recent years – while the gross cost amount has been substantially reduced, thereby mathematically affecting the gross withdrawal percentage and the lobbying disallowance factor. (Tr. 1/110, 10/193; exs. G-1, -2) Mr. Panetta noted that the source of the cost center costs, and the nature of the withdrawal, have changed significantly over the years. Consultant costs in particular were substantially reduced, from the 2007-2008 period in dispute to 2015. However, the lobbying work remained and internal Raytheon personnel had to absorb the workload. Also, Government Relations' headcount dropped from about 20 in 2007 to 12 at the end of 2015. Thus, Raytheon's personnel are engaged in more unallowable activity per person today than they were previously. Raytheon was not reporting more unallowable lobbying activity; it was reporting the same. (App. supp. R4, tabs 126, 142; tr. 10/194, 202-04; exs. A-22, -23). We find the government's position concerning cost reporting in years other than 2007 and 2008, in dispute, to be unpersuasive in view of Mr. Panetta's credible, persuasive testimony to the contrary.

DISCUSSION OF GOVERNMENT RELATIONS COSTS

I. The Parties' Contentions[19]

A. The Government's Contentions

DCMA alleges that Raytheon has claimed lobbying costs that are expressly unallowable and that Raytheon has not provided any meaningful support for its assertion that they are allowable. DCMA contends that job descriptions, performance appraisals, organizational goals, and the 2005 internal article profiling a former manager of Government Relations (finding 66), demonstrate that the overwhelming majority of time spent by that department is on unallowable lobbying (gov't br. at 48-52).

[19] Here, and with regard to the cost issues below, we discuss the parties' principal contentions. We have considered all of their arguments, whether or not we address them. We have considered and reject the government's argument that the Board erred in not admitting certain documents into evidence at the hearing.

DCMA further contends that Raytheon's lobbying estimates[20] and withdrawal calculations are severely flawed, in part because it inappropriately relied upon the LDA for guidance; its lobbyists were not trained on FAR Part 31 or on Raytheon's lobbying policies; and because there are flaws in Raytheon's withdrawal calculations, which wrongly diluted its lobbying withdrawal factor. The alleged flaws are that there was no oversight regarding the accuracy of lobbyists' estimations of their unallowable lobbying time; the lobbyists were instructed not to include weekend, holiday, or any time outside of normal business hours in their estimates; there were various estimation or calculation errors, including pertaining to Raytheon's State lobbyists; and Raytheon wrongly included the lobbying hours of its administrative staff, and of an employee who worked only half of his time for Government Relations.

B. Raytheon's Contentions

Raytheon denies all of DCMA's allegations and relies upon its contemporaneous time documentation and first-hand witness testimony. It contends that DCMA's criticisms of its process for withdrawing unallowable lobbying costs from its cost proposals are unfounded. Raytheon identifies the key costs at issue as pertaining to alleged "pre-lobbying" or "preparation for lobbying" activities. It asserts that its unrefuted time records and testimony establish that it excluded these activities as unallowable. (App. br. at 146) Raytheon also contests DCAA's conclusion that Raytheon claimed costs for time spent responding to Congressional requests but did not document the requests.

Raytheon concludes that, should the Board nonetheless determine that the questioned costs are unallowable lobbying costs, DCMA has not met its burden to prove that they are expressly unallowable and subject to penalties.

DCMA replies that Raytheon is required by regulation to establish its entitlement to costs. That is, FAR 31.201-2(d) requires contractors to maintain records, including supporting documentation, adequate to demonstrate that claimed costs have been incurred and that they comply with applicable cost principles in FAR subpart 31.2, and the CO may disallow all or part of a claimed cost that is inadequately supported (*see* finding 15). Thus, according to DCMA, Raytheon has the burden to provide adequate records for all of its costs (gov't br. at 6).

Moreover, according to DCMA, regarding lobbying costs in particular, FAR 31.205-22(d) requires that a contractor maintain adequate records to demonstrate that its certification of lobbying costs as being allowable or unallowable complies with FAR 31.205-22 (*see* finding 15). DCMA contends that this shifts the burden to Raytheon "to establish entitlement to its Lobbying costs" (gov't br. at 7).

[20] DCMA uses the term "estimate" or the like, to which Raytheon objects. Witnesses for both parties used the term. The Board deems some estimation to be common when assessing time spent. In any case, the issue is immaterial to our decision.

Raytheon responds that, in the 2007 and 2008 Corporate Audit reports, DCAA did not question the salary and labor costs of Government Relations personnel on the basis of FAR 31.201-2(d), nor did the CACO in the 2007 and 2008 Corporate COFDs (app. br. at 107 (disputing portion of GPFFs 19-20)). Raytheon alleges that DCMA's attempt to shift the burden to Raytheon to establish that the "lobbying costs" are supported by documentation and are allowable fails. Raytheon asserts that, first, the costs at issue are not lobbying costs and, in any case, the fact that claimed costs must be supported is a general principle governing all costs and does not shift the specific burden of proof regarding lobbying costs from the government to Raytheon.

I. DCMA Has The Burden to Prove That Raytheon Submitted Expressly Unallowable Costs

We addressed the government's burden to prove that costs are expressly unallowable, and subject to penalty in *Raytheon Company*, ASBCA No. 57743 *et al.*, 17-1 BCA ¶ 36,724 (*Raytheon I*), *recon. denied*, 18-1 BCA ¶ 37,129, *aff'd*, *Raytheon Co. v. Sec. of Defense*, 940 F.3d 1310 (Fed. Cir. 2019) [21]:

> The government acknowledges that the CO's decision that a cost is expressly unallowable and subject to penalty is subject to the Board's *de novo* review under the CDA . . . . *See* 41 U.S.C. § 7103(e); *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994) (en banc); that it bears the burden to prove that costs are expressly unallowable; and that "the bar is high" . . . . The government also bears the burden of proof that a penalty assessment was warranted.
>
> In *General Dynamics Corp.*, ASBCA No. 49372, 02-2 BCA ¶ 31,888 at 157,570, *rev'd in part on other grounds*, *Rumsfeld v. General Dynamics Corp.*, 365 F.3d 1380 (Fed. Cir. 2004), the Board described the government's burden to show that costs are expressly unallowable and subject to penalty:
>
> > The FAR and CAS definitions of "expressly unallowable" point to the need to examine the particular principle involved in light of the surrounding circumstances. Moreover, since Congress adopted the "expressly unallowable" standard to make it clear that a penalty should not be assessed where there were reasonable differences of opinion about the allowability

[21] Raytheon appealed to the Federal Circuit from that part of the Board's decision in *Raytheon I* concerning lobbying cost issues. This was the only part of the Board's decision that was appealed. The government did not appeal from the Board's decision on corporate development costs.

> of costs, we think *the Government must show that it was unreasonable under all the circumstances for a person in the contractor's position to conclude that the costs were allowable.* The scope of the inquiry will vary with the clarity and complexity of the particular cost principle and the circumstances involved. [Emphasis added]

Raytheon I, 17-1 BCA ¶ 36,724 at 178,845 (citations to government's brief in *Raytheon I* omitted).

DCMA acknowledges that it generally has the burden to prove its claims that costs at issue are unallowable under a regulation and that they are "expressly unallowable" as defined by the CAS and the FAR (gov't br. at 6). It notes, however, that the Board has previously pointed out that:

> If a cost is allocable to a contract and is reasonable, the government normally has the burden to prove that it is unallowable due to a contract provision, statute or regulation, *Lockheed Martin Western Development Laboratories*, ASBCA No. 51452, 02-1 BCA ¶ 31,803 at 157,102. However, a given regulation may require the contractor to establish entitlement to costs.

Fiber Materials, Inc., ASBCA No. 53616, 07-1 BCA ¶ 33,563 at 166,252.[22]

Auditor Yesner described auditing lobbying costs as a "unique area" (finding 53). Indeed, the Government Relations lobbying cost issues do not lend themselves to resolution with certainty. In any case, we concur with Raytheon that DCMA has not justified shifting the burden of proof to the contractor. Thus, DCMA bears the burden to prove that the costs in question are unallowable lobbying costs.

I. <u>DCMA Has Not Met its Burden to Prove that the Government Relations Costs at Issue Are Unallowable Lobbying Costs and Thus Has Also Not Met its Burden to Prove that Raytheon Violated CAS 405 Regarding Those Costs.</u>

Raytheon contends that DCMA has not met its burden to prove that the Government Relations costs that Raytheon did not withdraw from its cost proposals in 2007 and 2008 were unallowable lobbying costs under FAR 31.205-22. Raytheon asserts that it appropriately withdrew its lobbying costs from its cost proposals; the costs at issue are not lobbying costs; and DCMA has not established that they are. Raytheon maintains that, in contrast to DCAA's speculation, Raytheon kept contemporaneous records of the

[22] *See Thomas Associates, Inc.*, ASBCA No. 57126, 11-2 BCA ¶ 34,858 at 171,477 for clarification of the $10,000 penalty threshold addressed in *Fiber Materials*.

time it spent on lobbying, including time sheet reporting in 2007; its lobbying tool in 2008; and calendars, notes, and the like, which DCAA did not ask to see. This was corroborated by the credible hearing testimony of current and former members of Government Relations. (*See* findings 31-32, 41-45)

DCMA alleges that Raytheon's personnel were not adequately trained in the FAR's lobbying reporting requirements. The evidence is to the contrary. Raytheon, *inter alia*, provided in-house and outside counsel training, at least annually, and published its "Lobbying Policy" and "Unallowable Guidelines. (Findings 19-21, 23)

Regarding the amount of unallowable lobbying hours reported by Raytheon, FAR 31.201-6(e)(2) provides that time spent by employees outside normal working hours should not be considered except when it is evident that an employee engages so frequently in company activities during those extra hours as to indicate that the activities are a part of the employee's regular duties (*see* finding 16). Raytheon's lobbyists worked early mornings, late nights, and weekends from time to time on what all of the testifying witnesses considered to be a regular part of their work duties (findings 41-42, 44-45).

Since lobbying responsibilities were a regular part of the work duties, FAR 31.201-6(e), ACCOUNTING FOR UNALLOWABLE COSTS (NOV 2005), provides that these activities should be considered in determining materiality of the activities. However, that FAR subsection only applies to determining whether the costs were material. It does not instruct how the unallowable costs should be calculated. The FAR provides that "[t]he practices for accounting for and presentation of unallowable costs must be those described in 48 CFR 9904.405, Accounting for Unallowable Costs." FAR 31.201-6(c)(1) (finding 16). CAS 405, in turn, provides that unallowable costs "shall be subject to the same cost accounting principles governing cost allocability as allowable costs." CAS 405-40(e) (finding 16).

Here, Raytheon's Lobbying Policy provides that "[t]ime spent on lobby activity after the scheduled working day is not reported" and the Policy's record-keeping requirements apply to "employees who spend more than 25% of their *compensated* hours during the month on lobbying activity" (finding 19) (emphasis added). Accounting for labor costs as a function of time paid, rather than time worked, is a common industry method. Raytheon asserts that it is required to use that method under CAS 401, Consistency in Estimating, Accumulating and Reporting Costs, because that is its disclosed accounting practice and the one it uses in bidding. (Finding 29) Thus, we find that Raytheon's method of removing the unallowable costs was proper, based on its disclosed accounting practice.

Raytheon instructed its employees not to report lobbying time in excess of "normal" work hours because they were salaried employees who are charged indirectly; they are paid based upon a 40-hour work week; and including time outside of that period would result in an overstatement of the lobbying withdrawal amount. There was no cost to Raytheon or the government for work outside normal business hours. (Finding 28) We

have found that Raytheon appropriately calculated its lobbying costs consistent with its disclosed accounting practice and that there was no additional cost to the government, under this accounting (finding 29).

Like DCAA, DCMA focuses upon an alleged lack of documented requests from Congress for information, which, under FAR 31.202-22 (b), would be an exception to FAR 31.202-22(a)'s unallowable lobbying activities (findings 16, 49-50, 59, 61, 69). However, Raytheon asserts that, because it is not claiming lobbying activity costs, it is not relying upon any exception to unallowable lobbying activities. It also points out that formal documented requests from Congress are "extremely rare," with most communication being in person or by telephone, with an occasional email (finding 51).

Mr. Neal opined that responding to requests from Congressional staffers and providing facts were allowable, but if the time were colored in any way by an attempt to influence, it was not allowable (finding 42). This is consistent with Raytheon's representation to DCAA that it's normal practice was not to claim the costs of responding to Congressional inquiries because presenting facts could "cross over" into lobbying (finding 51). Like Mr. Zummo (finding 45), Mr. Neal evaluated his time on a case by case basis, with a conservative bias towards unallowability, if there were any question. He recorded his activities on a daily log, and on a "pretty detailed" Lotus notes calendar, and he archived his emails (finding 42), as did Ms. Watson (finding 41). Mr. Lee recorded his work on Palm Calendar software and on his time sheets (unallowable activities only), daily or close thereto (finding 44).

The auditors questioned 100% of the costs of Raytheon's "State and Local" Government Relations employees and of its office assistants without interviewing them. The auditors concluded that 100% of Government Relations' 2007 costs, allegedly representing direct lobbying and lobbying-related effort, was expressly unallowable under FAR 31.205-22. (Finding 56) Nonetheless, Mr. Yesner confirmed that Government Relations employees were good about recording direct lobbying activities as unallowable and that Raytheon appropriately accounted for its PAC costs. He also acknowledged that the employees he interviewed in 2012 reasonably accounted for their time. (Finding 57)

In contrast, Mr. Yesner also stated that the auditors did not really know the accuracy of the direct lobbying time. They speculated that employees might not be tracking time spent in what DCAA considered to be lobbying-related activities or preparation for direct lobbying, although Raytheon's Lobbying Policy described legislative liaison activities as unallowable costs "when carried on in support of or in knowing preparation for an effort to engage in unallowable activities" (finding 19). Moreover, as reflected in auditor Quinn's interview notes, the employees she questioned responded that they classified such time as unallowable. She acknowledged that nothing in her notes gave her concern that Raytheon's employees were not withdrawing pre-lobbying or lobbying preparation costs. (Finding 57) The auditors also speculated that employees other than those interviewed might have assisted lobbyists with the creation of white papers or with technical information; many of those employees had

trouble remembering their activities during FY 2007; and, because they did not normally take part in lobbying activities, they might not have known how to record their time. We have found no support for either of these speculations. (Findings 50, 57)

The initial audit report had not questioned all of cost center 90206's costs. However, Ms. Quinn disavowed that report. (Finding 49) Even before they requested the assist audit, DCAA's Corporate auditors developed a "strategy" to question the entire cost center 90206 (finding 50). Ms. Quinn based her ultimate conclusion that all of cost center 90206's costs should be disallowed on the fact that she did not find documentation "either way" on whether the costs were allowable or not, or claimed or not (finding 52). Her conclusion, as self-described, is unsupportable and underscores the fact that DCMA has not met its burden of proof.

DCAA changed its audit position, apparently as of 2006 (finding 39), but at least from 2009 through 2012, getting successively further away from the CY 2007 and 2008 years in question, and each time increasing the lobbying cost disallowance factor (e.g., findings 38, 40, 54-55). DCAA's and DCMA's conclusions are undermined by contradictory evidence, general beliefs rather than specific proof, and speculation.

We conclude that DCMA has not met its burden to prove that Raytheon's costs in question are unallowable lobbying costs. Therefore, it also has not met its burden to prove that Raytheon did not comply with CAS 405 with regard to those costs.

DECISION

ASBCA Nos. 59435, 59436, 60056 and 60058**,** to the extent that they cover alleged unallowable lobbying costs, are sustained.

ASBCA Nos. 59435, 59436, 60056 -- CORPORATE DEVELOPMENT COSTS

FINDINGS OF FACT CONCERNING CORPORATE DEVELOPMENT COSTS

72. The following regulations are pertinent to the parties' dispute over corporate development costs:

> FAR 31.205-12, ECONOMIC PLANNING COSTS (OCT 2003), provides in part:
>
> Economic planning costs are the costs of general long-range management planning that is concerned with the future overall development of the contractor's business and that may take into account the eventual possibility of economic dislocations or fundamental alterations in those markets in which the contractor currently does business. Economic planning costs are allowable. Economic planning costs do not include

organization or reorganization costs covered by 31.205-27. See 31.205-38 for market planning costs other than economic planning costs.

FAR 31.205-27, ORGANIZATION COSTS (APR 1988), provides in part that:

(a) Except as provided in paragraph (b) of this subsection, expenditures in connection with-

(1) planning or executing the organization or reorganization of the corporate structure of a business, including mergers and acquisitions,

(2) . . . .

(3) raising capital (net worth plus long-term liabilities), are unallowable. Such expenditures include but are not limited to incorporation fees and costs of attorneys, accountants, brokers, promoters and organizers, management consultants and investment counselors, whether or not employees of the contractor. Unallowable reorganization costs include the cost of any change in the contractor's financial structure, excluding administrative costs of short-term borrowings for working capital, resulting in alterations in the rights and interests of security holders, whether or not additional capital is raised.

(b) The cost of activities primarily intended to provide compensation will not be considered organizational costs subject to this subsection, but will be governed by 31.205-6. These activities include acquiring stock for-

(1) executive bonuses,

(2) employee savings plans, and

(3) employee stock ownership plans.

FAR 31.205-38, SELLING COSTS (AUG 2003), provides in part:

(a) "Selling" is a generic term encompassing all efforts to market the contractor's products or services, some of

> which are covered specifically in other subsections of 31.205. The cost of selling efforts other than those addressed in this cost principle are unallowable.
>
> (b) Selling activity includes the following broad categories:
>
> . . . .
>
> (4) Market planning. Market planning involves market research and analysis and general management planning concerned with development of the contractor's business. Long-range market planning costs are subject to the allowability provisions of 31.205-12. Other market planning costs are allowable.

Raytheon's Corporate Development Office

73. At all times relevant to these appeals, Raytheon maintained an office at its corporate headquarters which we refer to as "Corporate Development." At some point that office split from "Strategic Planning," also referred to as "Corporate Strategic Development Group" or "Strategic Business Development." (*See* app. supp. R4, tab 208 at 3195, tab 331 at 5224; tr. 1/185-86, 3/215-16, 255) In 2007 and 2008 Corporate Development, identified as cost center 90043, had seven or eight employees, six of whom were focused upon strategic business transactions and acquisition and divestiture (A&D) or merger activities, and one or two of whom were administrative assistants (*see* app. supp. R4, tab 208 at 3195-97, tab 331 at 5221, 5228).

74. As we found in *Raytheon I* regarding Corporate Development's status as of Raytheon's 2004 incurred cost submission:

> Raytheon's Corporate Development department was responsible for working with its business units in strategic development and growth opportunities, including strategic analysis of a business' capabilities to market its products and services to the government and function in government work. Where there were gaps in business' capabilities, Corporate Development would work with them to determine the right ways to fill the gaps, either through, *inter alia*, internal investment, research and development, licensing of intellectual property (IP), partnerships or acquisitions. This process was known as "gap analysis." Working with Raytheon's businesses on M&A and divestitures was not Corporate Development's primary role but was part of its work to find strategic growth initiatives.

Raytheon I at 178,840 (finding 68) (citations to record omitted).

75. The testimony in the instant appeals, concerning the calendar year 2007 and 2008 incurred cost submissions, which was credible, was to the same effect (*e.g* tr. 8/47-48 (Corporate Development's role is to work with Raytheon's businesses with their strategic development plans); tr. 7/127 ("understanding what [the businesses are] trying to do ultimately to ensure mission success and then looking for opportunities, whether they be acquisitions, divestitures, partnerships, teaming agreements, joint ventures, IP licensing, to help execute that mission"); tr. 3/223 (Corporate Development does full spectrum of A&D activities); tr. 7/128 (gap is distance between current capabilities and customer requirements); tr. 3/249 (gaps are market based, technically based and/or customer based); tr. 3/257 (strategic GAP analysis is assessment undertaken principally by business unit, but it includes Corporate Strategy and Corporate Development); tr. 3/259 (gap analysis includes pursuit of multiple avenues); tr. 3/273 (Corporate Development expected to drive the gap process); tr. 4/239, 269-70, 277-78, 299-300, tr. 7/100-01, 104-05 (all activities have an eye toward A&D, but there is a lot of activity prior to the ultimate decision, including market analysis and gap analysis); tr. 4/239, 262, 270, 277-78, 295, tr. 7/128-29, tr. 8/48-49 (gap analysis; methods to fill gap); tr. 4/240, 242 (not uncommon that Corporate Development would change paths along the way)).

76. Corporate Development made proposals for acquisitions or divestitures to the Acquisition Council which, in 2007 and 2008, consisted of senior Raytheon leaders, including the Chief Executive Officer, Chief Financial Officer, General Counsel and Vice President of Corporate Development (tr. 3/227, 8/53-54). Raytheon declared its intentions regarding potential acquisitions and divestitures through the Acquisition Council (tr. 8/57). Corporate Development did not know which route Raytheon was going to follow until after the Acquisition Council made its decision (tr. 3/261, 8/56). Occasionally, even after an Acquisition Council decision, Raytheon would change course based upon information developed during the acquisition or divestiture process (tr. 3/265, 4/297, 300-01).

Raytheon's Guidelines and Policies Regarding Organization Costs

77. Raytheon's FAR Part 31 Guidelines, as of August 31, 2004, Revision No. 2, provided concerning Acquisition, Merger, Divestiture and Other "Organization" Costs:

> Unallowable acquisition costs commence with the submission of an indicative offer. Unallowable divestiture costs commence when the decision to "go to market" with the offering materials is made. Commencement of unallowable merger costs should be discussed with business segment or Corporate Counsel. These unallowable costs end at the completion of the final balance sheet adjustment for the

> transaction. The unallowable cost categorizations are applicable to both Business and Corporate personnel.

(R4, tab 106 at 2109, 2116)

78. Raytheon's FAR Part 31 Guidelines further state that the following Acquisition, Merger, Divestiture and Other "Organization" Costs are to be claimed:

> A general review of other companies as part of marketing strategy or strategic planning activities (e.g. economic planning) including preliminary discussions and advice about the advisability of [M&A] prior to identification of a specific opportunity. This also includes technical review, review of structure, facilities and modes of operation.

(R4, tab 106 at 2117)

79. Raytheon's November 2, 2004 Company Policy No. 121-RP, "Mergers and Acquisitions" (2004 M&A policy), "[e]stablishes the guidelines and responsibilities for activities concerning [M&A]" (R4, tab 256 at ¶ 2.1). It provides that "[a]ll activities concerning [M&A] by any Business, including opportunities presented by a third party, must be coordinated with Corporate Development. . ." (*Id*. at ¶ 5.1). It further states:

> Prior to receipt of Corporate approval to proceed with a transaction, all communication by a Business with an acquisition candidate concerning its interest in a transaction must be coordinated with Corporate Development. Communications with third parties, such as investment bankers, venture capitalists or other financing sources, related to an acquisition opportunity or transaction must also be coordinated in advance with Corporate Development. . . . Corporate Development is responsible for issuance and execution of any engagement letter entered into with investment bankers . . . .

(*Id*. at ¶ 5.4)

80. The 2004 M&A policy also provides:

> Relating to costs associated with [M&A], all Businesses must establish and maintain adequate internal controls necessary to ensure compliance with applicable [FAR] and [CAS] Board rules and regulations. Organizational costs associated with [M&A] are generally unallowable. Unallowable acquisition costs commence with the submission of an indicative offer.

> These unallowable costs for [M&A] end at the completion of the final balance sheet adjustment for the transaction.

(*Id*. at ¶ 5.7)

81. Effective December 23, 2004, Raytheon issued Company Policy No. 126-RP, Divestitures (2004 Divestiture Policy) (R4, tab 257). The 2004 Divestiture Policy contained similar provisions to those quoted above from the 2004 M&A policy (*see id*. at ¶¶ 2.1, 5.1, 5.4), including that "[o]rganizational costs associated with divestitures are generally unallowable" (*id*. at ¶ 5.7).

Corporate Development's Time-Keeping Practices

82. Dr. Charles Mueller, "Director III" of Corporate Development during the relevant time periods (tr. 3/216), described Raytheon's "bright line" rule, articulated above. At the point, on the acquisition side, when Raytheon submitted a non-binding indicative offer (NBIO), or on the divestiture side, when it made the decision to go to market, the company switched from recording costs as allowable to recording them as unallowable. (Tr. 3/227-28, 261-64) Even if Raytheon changed course after the Acquisition Council's initial decision about an NBIO or going to market, Corporate Development employees continued to withdraw their time as unallowable because the reconsideration "was after the bright line moment" (tr. 3/265).

83. In formulating its "bright line" rule Raytheon officials took into consideration the economic planning, organization, and selling cost principles, FAR 31.205-12, -27, and -38 (tr. 6/24-25).

84. Kathy Giovannini, a consulting budget analyst in the corporate A&S office, with many years' experience, collects Corporate Development's time withdrawal information (tr. 3/269-70, 6/337-39, 351). When the employees reported their time in days, she converted each day to eight hours, which is "a normal work day for exempt employees" at Raytheon (tr. 6/351). The time collecting process is similar to that described above for Government Relations employees. The following are a few examples of senior employee timekeeping.

85. At one point, Corporate Development employees submitted their unallowable time, after the "bright line," annually, but later changed to quarterly reporting. Dr. Mueller relied upon his memory in submitting his time, past the "bright line," to his administrative assistant, who kept a calendar for his benefit. His time was not hard to track because his projects were serial and he typically worked only one project at a time. The work, particularly divestitures, was focused and demanding and could last many months. He was a professional and worked significant hours, whatever it took to accomplish the job. In 2007, Dr. Mueller withdrew 97% of his time as unallowable. In 2008, he withdrew 83%. (R4, tab 268 at 9682, tab 279, 284; app. supp. R4, tabs 79, 110; tr. 3/230-33, 267, 269-70, 272, 277-78, 6/389, 391; *see* app. br. at 48, n.26)

86. Thomas O'Rourke was a director of Corporate Development during the relevant time period (tr. 4/236). As a professional, he worked the hours needed. They varied from project to project and with the status of a project at a given point. (Tr. 4/279) Mr. O'Rourke followed Raytheon's "bright line" guidance in submitting his time (tr. 4/283, 303). His office used calendars, notes and meeting information to submit their time (tr. 4/293-94). For the time he submitted in 2007, he aggregated all the efforts throughout the year by project, including source information, calendar invitations for meetings, email correspondence, and handwritten notes. He recorded 226 days for acquisition work in 2007, approximately 98-99% of his time, and no days for divestitures. That was a very busy year for acquisitions, with about 23 projects submitted to the Acquisition Council. In 2008, following the same documentation process, he recorded about 65% of his time on acquisitions and none for divestitures. (App. supp. R4, tabs 80, 111; tr. 4/303-07, 315)

87. Yiannis Rexinis was a consulting financial analyst in Corporate Development, starting in May 2007 and continuing throughout the relevant time period. All of his activities were acquisition related; he never worked on divestitures. (Tr. 7/89, 125, 129-30) He understood and followed the "bright line" rule in recording his time (e.g., tr. 7/130-32). In recording his time Mr. Rexinis used, e.g., Lotus Notes, a calendar, email functions, notes and call logs (tr. 7/113). In 2007 he withdrew approximately 76% of his time as unallowable and in 2008 he withdrew about 68%. Mr. Rexinis recalled allowable activities in 2007-2008 as including his work on Raytheon's strategic dialog process. He stands by the accuracy of his time records. (R4, tab 289; app. supp. R4, tab 81; tr.-7/135--40)

88. In tracking his time, Paul Bailey, Director of Corporate Development, follows the "bright line" rule, which he was involved in formulating (R4, tab 105; tr. 8/46, 52-55, 57-58). Mr. Bailey's time varies considerably. In 2007, he withdrew 59% of his time as unallowable and in 2008, 64 % (app. supp. R4, tabs 77, 109; tr. 8/62-64). He does not start collecting and submitting his time until the bright line has passed (tr. 8/70). On a quarterly basis he checks his calendar, his project notebooks, his project files, documents that were created, presentations, and Excel spreadsheets and calculates how much time he spent after the NBIO and go to market dates (tr. 8/61, 87, 110).

89. The withdrawal percentages for the Corporate Development cost center's six employees, including non-salary costs and salary costs for support personnel, were 53.4% in 2007 and 48.8% in 2008 (R4, tab 102 at 57-58 (response to interrogatory No. 20), tab 302 (unallowable cost percentages derived from percentage of allowable costs)).

90. In July 2012, a DCAA auditor asked Raytheon's Mr. Vilandre for the 2007 calendars of three Raytheon employees, acknowledging that, "I know this may be a far stretch (as this is about five years ago)" (R4, tab 298 at 147553). Mr. Vilandre responded to another DCAA auditor, with a copy to the requesting auditor and to Raytheon's Mr. Panetta:

> I am not clear as to why at this point DCAA is asking for this information. For example, Raytheon withdrew the cost associated with 1,880 hours of Thomas O'Rourke's cost for [A&D] activity in 2007. According to the view that DCAA has taken with regard to lobbying activities, that is essentially all of the time that an average employee would normally work during the year, considering holidays and paid time off. Further, DCAA has indicated to me on more than one occasion that it intends to question the entire claimed cost in cost center 90043, in which Mr. O'Rourke resides. So why would it be necessary to review his calendar?
>
> [Explanation of withdrawals for the other two Raytheon employees]
>
> Finally, as a practical matter, I would not expect employees to retain their calendars for five years. I know I no longer have my own 2007 calendar. We have provided DCAA with the documentation we received from the corporate functions to support the withdrawn costs, and DCAA has interviewed these employees. I am unclear on the benefit of requesting these employees to search for and produce these calendars. What are your thoughts?

(R4, tab 298 at 147552) As referred to above, Mr. Panetta added: "employee calendars are not 'records' as would be defined in the FAR. They are not in any way used to support our claimed costs" (R4, tab 298 at 147551).

Corporate Audit Report for 2007, COFDs and Appeals

91. The Corporate Audit report for 2007, dated October 15, 2013, questioned $903,817 of Corporate Development's costs, citing FAR 31.201-2, DETERMINING ALLOWABILITY (MAY 2004), and 31.205-27, ORGANIZATION COSTS (APR 1988). Except for several adjustments for cost categories subject to different audits, DCAA alleged that all costs within Corporate Development cost center 90043 were expressly unallowable. This was a significant departure from prior years' audits. After other adjustments for alleged calculation errors for related costs outside Corporate Development's cost center, the questioned amount was $862,010, said by DCAA to be subject to a "level one" penalty. (App. supp. R4, tab 208 at 3194-99, tab 331 at 5224-25; AUPFF ¶¶ 131-132)

92. Raytheon submitted to DCMA an "initial response," dated November 22, 2013, to the Corporate Audit Report for 2007, addressing all disputed issues, including Corporate Development A&D issues (app. supp. R4, tab 217). Incurred cost negotiations

followed in the spring of 2014 (*see* app. supp. R4, tab 266; tr. 8/11). A DCMA price cost analyst, who assisted in the negotiations (tr. 8/11, 113-15), recorded a potential settlement in the following email to DCAA:

> After reviewing the additional documentation Raytheon provided, showing all different phases and activities of the Corporate Development employees, a portion of the cost seem [sic] to be economic planning. The phases which we deem to be economic planning are the stages where Raytheon has yet to identify a target to acquire or divest. In order to amicably resolve this matter we have agreed to split the cost, not to include the credit of $82,153. In addition we are putting together a partial settlement, A&D will be included in it, that states this is not precedent setting.

(App. supp. R4, tab 265 at 4185) DCMA had misunderstood that Raytheon had agreed to accept a 50-50 split of the disputed A&D costs and the parties did not settle this issue (app. supp. R4, tab 353 at 5890-91; tr. 7/293-94, 8/23, 129-30).

93. The June 20, 2014 Corporate COFD for 2007, the June 20, 2014 CAS 405 COFD for 2007, and the ensuing appeals are described above (findings 5-6). The former COFD adopted the findings in the Corporate Audit Report for 2007, except for the $862,010 recommended amount to be recovered by the government, and concluded that $307,776 in what the parties agree are Corporate Development salary costs were expressly unallowable and subject to penalty and it denied Raytheon's request for a penalty waiver (app. supp. R4, tab 208 at 3194-95, tab 279 at 4558, 4566; AUPFF ¶ 144). The latter COFD declared that the submission of those costs violated CAS 405 (app. supp. R4, tab 281; AUPFF ¶ 144).

94. The $307,776 demanded in the Corporate COFD had the effect of reducing DCAA's $862,010 recommended recovery by $554,234 (app. supp. R4, tab 285 at 4630-31). There was no difference between these costs and those penalized as expressly unallowable (tr. 8/33). At the hearing the CACO attributed the reduced demand to a mistake. He testified that he had not been involved in the negotiations but had understood that there had been a settlement. (Tr. 7/282-87) However, his COFD states that "[t]he undersigned conducted joint fact-finding with Raytheon and determined that of the amount questioned by DCAA [$862,010], this amount [$307,776] constituted unallowable organization costs" (app. supp. R4, tab 281 at 4580). Prior to the hearing, the government purported to increase its claim back to the $862,010 questioned by DCAA (gov't br. at 12, n.4).

Corporate Audit Report for 2008, COFDs and Appeals

95. DCAA's audit of Corporate Development's costs for 2008 began in April 2014 (tr. 6/205-06). Anthony Vegelante,[23] the senior auditor who conducted the audit (tr. 6/127, 130) recommended in his April 30, 2014 work paper, before DCAA had interviewed Raytheon employees regarding 2008, that DCAA should continue to question 100% of A&D cost center 90043's activities because they were predominantly unallowable. He asserted at the hearing that he had nonetheless maintained an open mind. (Tr. 6/227, 242; ex. A-15 at B-05 (2/8))

96. DCAA interviewed the six cost center 90043 employees who had voluntary cost withdrawals from Raytheon's 2008 Corporate Incurred Cost submission concerning, among other things, the percentage of their time spent on A&D activities or non-A&D activities (R4, tabs 309-14 at questions and answers Nos. 10, 12): Mr. Bailey, Ms. Brezinsky, and Messrs. Josh Burack, Mueller, O'Rourke, and Rexinis (R4, tab 308). According to Mr. Vegelante's interview notes, Mr. Bailey responded that he spent "a lot" of time on non-A&D activities but that it varied "quite a bit" annually from 75% to 25%. The time he spent on A&D activities was also "quite variable and ranged from 25% to 75% depending upon the year. (R4, tab 309 at 3) Ms. Brezinski responded that it depended. She currently spent 30% of her time on non-A&D activities but in 2008 she spent 100% of her time on non-A&D activities. (R4, tab 310 at 3) Mr. Burack responded that none of his activities were non-A&D and all were "transaction activities or related" (R4, tab 311 at 2-3). Mr. Mueller responded that "very little" of his time was spent on non-A&D activities; the time spent on A&D activities was "quite variable;" and "all his time is allowable or unallowable A&D" (R4, tab 312 at 3). Mr. O'Rourke responded that 10% of his activities were non-A&D and 90% were A&D (R4, tab 313 at 3). Mr. Rexinis responded that none of his time was spent on non-A&D activities and 100% was A&D (R4, tab 314 at 3).

97. Auditor Vegelante did not define to the interviewees what he meant by "A&D activities." He did not know whether they interpreted it to mean all A&D activities or just those that occurred after the "bright lines" had been crossed. (Tr. 6/243-46)

98. Mr. Vegelante concluded that Raytheon's practices, policies and procedures and other guidance were consistent in that "they do not consider [A&D] activities before a specific A&D project is approved (NBIO/go to market decision) to be unallowable and do not track those hours/costs." He stated that "[t]his interpretation directly contradicts our interpretation of the FAR . . ." (Tr. 6/208; ex. A-14 at 1/3; *see also* ex. A-15 at 1/8)

99. Mr. Vegelante agreed with Raytheon's counsel that the basic issue between the parties was that they had different interpretations of the interaction among various FAR cost principles, such as economic planning costs under FAR 31.205-12 and

[23] The hearing transcript misspelled Mr. Vegelante's name as "Begelante" (*see, e.g.*, tr. 6/3).

organization costs under FAR 31.205-27 (tr. 6/ 218-19). Raytheon viewed activities in the A&D cycles prior to the "bright line" to be allowable economic planning and market planning costs whereas DCAA deemed them to be directly associated with unallowable costs per FAR 31.201-6 (tr. 6/221; ex. A-15 at 1/8). However, Mr. Vegelante stated that DCAA did not question those costs on the ground that they were "directly associated" with unallowable costs but because the activities were themselves unallowable (tr. 6/222).

100. The 2008 Corporate Audit Report, dated December 19, 2014, questioned all salary costs from Corporate Development's cost center, amounting to $831,707, as expressly unallowable under FAR 31.205-27, 31.201-6 and 31.201-2. It concluded that a level one penalty applied. (App. supp. R4, tab 331 at 5219-20; UAPFF ¶ 136)

101. The June 22, 2015 Corporate COFD for 2008, and the ensuing appeals are described above (findings 7, 9). The former COFD adopted DCAA's recommendations, found all $831,797 in Corporate Development employee salary costs claimed by Raytheon to be expressly unallowable and subject to penalty, and denied Raytheon's waiver request (app. supp. R4, tab 364 at 5954, 5957, 5961; UAPFF ¶ 148). The latter COFD declared that the submission of those costs violated CAS 405 (app. supp. R4, tab 365; UAPFF ¶ 148).

DISCUSSION OF CORPORATE DEVELOPMENT COSTS

I. The Parties' Contentions

A. The Government's Contentions

DCMA contends that Raytheon violated FAR 31.205-27, ORGANIZATIONAL COSTS (APR 1988), by charging the government for expressly unallowable A&D labor and salary costs such that the government is entitled to penalties, interest and CAS 405 damages. The government seeks, through the dates of the applicable COFDs, $1,601,141.20 for 2007 and $1,380,549.72 for 2008. (Gov't br. at 86)

DCMA first asserts that Raytheon's published policies confirm that it recognizes that its A&D costs are expressly unallowable organizational costs under FAR 31.205-27. Secondly, DCMA alleges that Raytheon failed to support its A&D cost withdrawals from its incurred cost submissions. DCMA also disputes the accuracy of Raytheon's time sheets, characterizing them as general approximations of the time worked after the "bright lines" (submission of indicative offer/decision to go to market) had been crossed, sometimes recorded up to a year after the work had occurred. DCMA asserts "that Raytheon has violated its responsibilities under FAR 31.201-2(d)" (gov't br. at 89), which requires a contractor to maintain records, including supporting documentation, adequate to demonstrate that claimed costs have been incurred and that they comply with applicable cost principles.

DCMA also alleges that Raytheon's calculation of its unallowable A&D costs is based upon a "deeply distorted reading of FAR 31.205-27" and "fundamentally wrong 'bright line' rules" (gov't br. at 89 (emphasis in original omitted). DCMA contends that "Corporate Development plans for [A&D]," not for long-term strategy; and it "does not perform any meaningful long-term economic planning under FAR 31.205-12," nor "long-range market planning under FAR 31.205-38(b)(4)" (gov't br. at 94, 96). DCMA asserts that Raytheon's application of its "bright line" rules is contrary to *Raytheon I* and *Dynalectron Corp*., ASBCA No. 20240, 77-2 BCA ¶ 12,835. It contends that those decisions stood for the proposition that, with respect to the disallowance of organization costs, FAR 31.205-27 (formerly Armed Services Procurement Regulation (ASPR) 15-205.23, as discussed in *Dynalectron*) did not distinguish between costs associated with unconsummated acquisitions and those associated with consummated acquisitions. Rather, the FAR stricture applied to all activities associated with the "planning" of acquisitions or divestitures. (Gov't br. at 93)

DCMA further contends that Raytheon made several mistakes in its withdrawal of expressly unallowable A&D costs and that contemporaneous records demonstrate that Corporate Development performs significant amounts of unrecorded expressly unallowable activities.

B. Raytheon's Contentions

Raytheon responds that DCMA has not met its burden to prove that Raytheon's Corporate Development costs are unallowable, expressly unallowable or subject to penalties. Raytheon asserts that its "bright line" rules accurately reflect the relationship among FAR 31.205-12, -27 and -38(b)(4), in accordance with *Raytheon I*, and it posits that all "planning" is not unallowable, pointing to allowable economic or market planning (app. br. at 154-55). Raytheon also alleges that DCMA misreads *Dynalectron*, *Raytheon I*, and Raytheon's policies and procedures. Raytheon represents that, if it changed paths after a "bright line" was crossed, it "appropriately withdrew those post-threshold costs as unallowable, unconsummated organizational activities" (app. br. at 156). Raytheon also disclaims that it made the mistakes in its cost withdrawal process cited by DCMA.

Regarding damages, Raytheon asserts that DCMA has not presented any specific evidence of quantum damages. The contractor also contends that, due to judicial admission and lack of jurisdiction, the Board cannot consider DCMA's post-2007 Corporate COFD claim that 100% of Corporate Development's 2007 costs are expressly unallowable. The COFD had claimed that about 35% of those costs, or $307,776, were expressly unallowable and had reinstated 65% as allowable. However, close to the hearing, DCMA increased its claim by 189%, to $862,010, which was all of cost center 90043's costs (*see* findings 91, 94). Raytheon contends that this increase is barred by the doctrine of judicial admission, because DCMA admitted in its Answer to the Complaint that only $307,776 was in dispute. Raytheon also contends that the greatly increased claim was, in fact, a new claim, not covered by any COFD, resulting in the alleged jurisdictional impediment.

Raytheon summarizes that the disputed Corporate Development costs are allowable and, even if they are not, they are not expressly unallowable and subject to penalties. Moreover, even if they were subject to penalties, DCMA has not met its burden to prove the amount of the penalties. It also it has not met its burden to prove that Raytheon violated CAS 405 regarding the Corporate Development costs.

I. DCMA Has Not Met Its Burden To Prove That The Disputed Corporate Development Costs Are Unallowable Organization Costs And Thus Has Also Not Met Its Burden To Prove That Raytheon Violated CAS 405 Regarding Those Costs.

First, DCMA's claim that Raytheon's published policies confirm that it recognizes that its A&D costs are expressly unallowable organizational costs under FAR 31.205-27, is groundless, as evidenced by this litigation. Secondly, DCMA has not challenged the reasonableness or allocability of the corporate development costs in question.

In fact, the government acknowledges that the key issue is whether the disputed corporate development costs are unallowable organization costs under FAR 31.205-27 or allowable economic or market planning costs under FAR 31.205-12. Raytheon views activities prior to crossing the "bright lines" to generate allowable costs whereas the government deems them to be unallowable.

Contrary to DCMA's stance, Raytheon's "bright line" practice does not run afoul of *Dynalectron* or *Raytheon I*. *Dynalectron*, which focused upon a regulatory change concerning the costs of unconsummated acquisitions, did not address the interplay among the regulations that are now FAR 31.205-27, FAR 31.205-12 and FAR 31.205-38. In *Raytheon I*, in deciding that the costs at issue were allowable economic and market planning costs and not expressly unallowable organization costs subject to penalty, the Board reasoned:

> Under FAR 31.205-12 costs of "generalized long-range management planning that is concerned with the future overall development of the contractor's business" are allowable but the regulation excludes organization and reorganization costs covered by FAR 31.205-27 . . . . FAR 31.205-38 states that market planning involves market research and analysis and generalized management planning concerned with the contractor's business development; the allowability of long-range market planning costs is controlled by FAR 31.205-12; and other market planning costs are allowable to the extent that they are reasonable and not in excess of certain limitations . . . . FAR 31.205-27 provides in relevant part that "expenditures in connection with" planning "the organization or reorganization" of a business' corporate structure,

> "including mergers and acquisitions," are unallowable . . . . The regulation does not clearly limit its coverage to costs of targeting a specific merger or acquisition. Although it mentions "the" organization or reorganization of a business, in the singular, it also refers to costs in connection with mergers and acquisitions broadly, in the plural, not to "a" merger and acquisition.
>
> Thus, the distinction between allowable economic planning costs under FAR 31.205-12 and unallowable organization costs under FAR 31.205-27 is unclear. The regulations themselves do not draw a defined line between the two. However, reading the regulations together, including with FAR 31.205-38, the intent appears to be that costs in connection with actually planning the organization or reorganization of a business, such as by a specific merger or acquisition, are unallowable whereas generalized long-range management planning costs are allowable. A learned treatise, in discussing the interplay between organization costs under FAR 31.205-27 and economic planning costs under FAR 31.205-12, supports this analysis:
>
> > [C]are should be taken to distinguish between the costs of planning an organizational change, the costs of which are unallowable, and the costs of generalized long range planning. Under FAR 31.205-12, Economic Planning Costs, the costs of surveying various business opportunities, making demographic and economic studies, and evaluating potential markets or firms for mergers or acquisitions would be allowable. Conversely, once a target has been identified, the costs of planning or executing organizational changes would be unallowable.
>
> (Ex. A-21 (John Cibinic, Jr. & Ralph C. Nash Jr., Cost-Reimbursement Contracting at 943 (3d ed. 2004))

Raytheon I, 17-1 BCA ¶ 36,724 at 178,852.

In sum, Raytheon's "bright-line" policy represents a reasonable reading of the FAR provisions governing organization, economic planning, market planning and selling costs and, applying the *General Dynamics* standard, it was not unreasonable for Raytheon to treat the costs at issue as allowable. Moreover, although Raytheon and the government would benefit from Raytheon's application of more uniform, timely and descriptive

time-keeping procedures,[24] DCMA has not carried its burden to prove by a preponderance of the evidence that the amount of unallowable hours withdrawn by Raytheon's personnel, which is supported by documentation[25] and credible witness testimony (*see*, e.g., findings 41-45, 57-58, 60), from its CY 2007 and 2008 incurred cost proposals was inaccurate, nor that any of the included Corporate Development costs were unallowable, let alone expressly unallowable and subject to penalties. Thus, DCMA has also not met its burden to prove that Raytheon violated CAS 405 regarding those costs.

Therefore, we need not consider whether DCMA's increase in its claim that about 35% of Corporate Development's 2007 costs were expressly unallowable to 100% were expressly unallowable was tantamount to a new claim that the Board lacks jurisdiction to entertain, or whether the doctrine of judicial admission applies.

DECISION

ASBCA Nos. 59435, 59436, and 60056, to the extent that they cover alleged unallowable Corporate Development costs, are sustained.

ASBCA NO. 59438 -- ENGINEERING LABOR OVERHEAD/PATENT COSTS [26]

FINDINGS OF FACT CONCERNING ENGINEERING LABOR OVERHEAD/PATENT COSTS

102. The following regulation is pertinent to the parties' disputes over RMS' invention disclosure costs and patent legal costs (below):

> FAR 31.205-30, PATENT COSTS.
>
> (a) The following patent costs are allowable to the extent that they are incurred as requirements of a Government contract (but see 31.205-33 [Professional and consultant service costs]):
>
> (1) Costs of preparing invention disclosures, reports, and other documents.
>
> (2) Costs for searching the art to the extent necessary to make the invention disclosures.

[24] The same is true of Government Relations' time-keeping methods.

[25] We do not disclaim the value of diaries, calendars, log books, Lotus Notes, etc. as time keeping records.

[26] DCMA refers to the costs at issue as "patent" costs. Raytheon denies that they are patent costs and refers to them as "engineering labor overhead" costs (e.g., app. br. at 187-88). We use various cost terms as appropriate.

(3) *Other costs in connection with the filing and prosecution of a United States patent application* where title or royalty-free license is to be conveyed to the Government.

(b) General counseling services *relating to patent matters*, such as advice on patent laws, regulations, clauses, and employee agreements, are allowable (but see 31.205-33).

(c) Other than those for general counseling services, patent costs not required by the contract are unallowable. (See also 31.205-37. [Royalties and other costs for use of patents])

(Emphasis added)

103. The parties agree that the costs at issue are not "general counseling services" as set forth in FAR 31.205-30(b) (GPFF ¶ 256; app. br. at 128).

104. Raytheon's Policy on "Intellectual Property" was reissued effective January 2, 1990 (1990 IP Policy) (R4, tab 353 at 9477). It remained in effect until July 26, 2013, when it was superseded (R4, tab 366 at § 1.1; tr. 3/100; GUPFF ¶ 259).

105. The 1990 IP Policy provided in part:

1. PURPOSE

The intellectual property of the Company requires certain controls and documentation to:

1.1 Protect such intellectual property from disclosure and/or use that is not in the best interest of the Company.

. . . .

5. DEFINITIONS

. . . .

5.2 Invention Disclosure -- A complete written description of the invention. The information to be provided is spelled out on the face of the Record of Invention, Form 10-5876, and the written description together with the

> Record of Invention form is essential to constitute a complete Invention Disclosure.

(R4, tab 353 at 9477-78)

106. The 1990 IP Policy's Exhibit A, "Types of Intellectual Property," stated that "Raytheon's research and development programs should result in a flow of invention disclosures to the Patent Counsel" (R4, tab 353, § 2.2 at 9480) and that "[a] patent is the principal mechanism for protecting rights in an invention or discovery" (R4, tab 353, § 3.1 at 9481).

107. Effective September 3, 2004, Raytheon issued "Invention Disclosure" Policy No. 13-RP (2004 Invention Disclosure policy), which was in effect in 2007 and remained in effect until June 9, 2009. (R4, tabs 354, 363; tr. 9/15; *see* GUPFF ¶ 263) The policy's "Purpose" was:

> 1.1 To document the Company policy with respect to inventions and software improvements and to provide incentives for the creation of certain intellectual property rights in the form of technical inventions which may or may not be patentable or which may qualify for protection as a trade secret.
>
> 2.2 To assure that a subject invention is reported as required and defined by a Government contract.
>
> 2.3 To stimulate continued growth by providing recognition of employees who conceive significant technological advances.

(R4, tab 354 at 9463)

108. Section 4.2 of the 2004 Invention Disclosure Policy defines a "subject invention" as "[a]n invention first conceived or reduced to practice in the course of or under a U.S. Government contract, and under which the Government has certain rights. The rights usually take the form of a non-exclusive royalty-free license to use the invention for Government purposes." (R4, tab 354 at 9463)

109. Under the 2004 Invention Disclosure policy, when a "new invention" is conceived, RMS engineers must prepare an invention disclosure report, which in 2007 was submitted through Raytheon's Intellectual Property Center's (RIPC) website (tr. 9/12-14; *see* tr. 9/37-38).

110. Invention Disclosures are submitted on Raytheon Form 10-5876 (R4, tab 353 ¶ 5.2 at 9478; app. supp. R4, tab 33 ¶ 4.3 at 253-54, tab 390). There is no separate patent

disclosure form (tr. 9/88). Form 10-5876 requires the inventor to describe the invention technically and to explain how it is new (app. supp. R4, tab 389; tr. 9/29-30). It also requires identification of the labor charge code applicable to the time the inventor spent conceiving of or reducing the invention to practice. If the invention was discovered separately from government contract work, the inventor must identify the charge code for the company-funded program or overhead. If the work was performed under a government contract, the invention disclosure reports the contract number and the applicable FAR and Defense Federal Acquisition Regulation Supplement (DFARS) patent rights clauses. (App. supp. R4, tab 85 at 1300, tab 86 at 1325, 1331, tab 87 at 1342, 1346; tr. 9/48-49, 53-56, 59-60; APFF ¶ 242)

111. According to the 2004 Invention Disclosure Policy, new Invention Disclosures were to be submitted to the "Patent Evaluation Committees," which had the "primary function of evaluating inventions" (R4, tab 354 § 5.4; *see also* § 4.4 ("Patent Evaluation Committee – A decision-making body . . . which, as a primary function, reviews and evaluates the technical and economic (business) merits of an invention and determines whether patent, trade secret or other types of protection or courses of action should be pursued;" GUPFF ¶ 264) RMS did not have a Patent Evaluation Committee. For all relevant times, the Business Unit Invention Review Committee (BUIRC) assumed those responsibilities. (R4, tab 354 § 7.6; tr. 9/20, 89-90; GUPFF ¶ 265)

112. The 2004 Invention Disclosure Policy was not limited to patents but applied to all intellectual property (tr. 9/15-16). Under that policy, Raytheon issued "Invention Disclosure Instructions" and an "Invention Disclosure Questionnaire And Detailed Description" (R4, tabs 355-56). The instructions called for the employee/inventor to "fill in the Business, Business Unit, and Site to which the invention pertains" stating that "[t]his will allow [Raytheon Corporate's Intellectual Process & Licensing Office (IP&L)] to determine which Intellectual Property Attorney, Patent Engineer, and Patent Evaluation Committee will process the disclosure" (R4, tab 355 at 1092).

113. The questionnaire provided that the inventor was to prepare the Invention Disclosure Form and to send one copy to the Regional Patent Engineer. After review, comments and signatures, including by the manager of the program office or business area "most likely to benefit from protection (via patent or trade secret)" of the invention, the executed copy of the disclosure form was also to be sent to the Regional Patent Engineer. (R4, tab 356 at 1095)

114. Sherry Botos is RMS' "Patent Engineer" (tr. 9/15). Among her primary responsibilities is to "[f]acilitate the preparation, submission and critical review of invention disclosures" (R4, tab 361 at 265969-70; tr. 9/74). She helps inventors get through RMS' invention review committee, which reviews invention disclosures for all types of intellectual property protection (tr. 9/15-16, 77).

115. During the relevant period, the inventor's manager and the Program Management Office reviewed the invention disclosure. The initial reviews primarily

assessed whether it was technically feasible to protect the specific invention. If approved, the invention disclosure was submitted to the Patent Engineer and docketed in the internal Raytheon Intellectual Property Docketing tool (RIPD) to track key dates and actions. The BUIRC then evaluated the technical and economic merits of the invention disclosure to determine whether Raytheon should file for a patent or treat the intellectual property as a trade secret, innovation award, or a different type of intellectual property. If the BUIRC decided not to seek a patent, the invention was not disclosed to the public and remained confidential. If the BUIRC decided to seek a patent, the invention disclosure was "rated to file" (tr. 9/93) and submitted to IP&L. It was at this decision point that RMS deemed the associated costs to be patent costs. IP&L reviewed the invention disclosure and submitted it to Raytheon's external legal counsel, who prepared and submitted a patent application to the United States Patent and Trademark Office (PTO). In 2010, the RIPC and RIPD were consolidated and invention disclosures were submitted through an "IP Track" tool, which can run automated reports of data from prior years and was used by Raytheon at the hearing, without objection, to reflect 2007 data. (App. supp. R4, tab 373; tr. 9/12-14, 18-22, 24-25, 28, 91-93)

116. RMS does not consider the costs to discover new inventions, of preparing and submitting invention disclosures, of a manager's review of invention disclosure forms, or of BUIRC's review to be patent costs (tr. 9/14, 17-19, 24, 76, 86). Regarding the BUIRC in particular, Raytheon does not consider its review and other costs to be patent costs because "there's no patent at that stage" (tr. 9/24). The rationale is that, at the time an invention disclosure is being prepared and reviewed, RMS does not know whether a patentable invention is involved (tr. 9/82-83).

117. Prior to a decision to seek a patent for an invention, the labor costs for the preparation and internal review, including by BUIRC, of invention disclosures are collected in RMS' engineering labor overhead pool. RMS considers them to be allowable labor costs, even if the invention is ultimately deemed to be patentable. The costs are built into RMS' indirect cost rates and charged to the government. (App. br. at 130 (resp. to GPFF ¶ 269); tr. 9/82-83, 86)

118. RMS considers the costs of filing a patent application and prosecuting the patent to be patent costs. It segregates the patent costs as allowable, if they pertain to "subject inventions" or, if not, the costs are deemed to be unallowable. (Tr. 9/25-26)

119. In 2007, 149 invention disclosures were prepared and submitted internally by RMS engineers. BUIRC ultimately approved 110 of these invention disclosures as "patent worthy" and patent applications were filed with the PTO. Of the 149 invention disclosures, 26 were "subject inventions." (App. supp. R4, tab 373; tr. 9/37-38, 85-86; app. br. at 128, 130-31 (unrebutted resp. to GPFF ¶¶ 256, 271 (undisputed portion)))

120. DCMA contends that "if and when a patent is pursued, the invention disclosure itself is literally submitted as part of the application," citing Rule 4, tabs 354-56 (gov't br. at 105-06; GPFF ¶ 268). The Board did not locate support for the contention in

the cited documents. Raytheon has not denied it but it responds that "there is no evidentiary support" for it (app. br. at 130 (addressing GPFF ¶ 268)). Thus, this matter remains unclear.

121. DCAA noted in its March 18, 2014 RMS Audit Report for 2007, regarding patent costs, that it considered "all effort incurred by RMS employees to prepare, review, and approve/disapprove invention disclosures *for patent applications* to be patent costs" subject to the strictures of FAR 31.205-30 (app. supp. R4, tab 260 at 4042) (emphasis added). Therefore, all such efforts not specifically required by a government contract were expressly unallowable costs. DCAA described RMS' position as: "the costs incurred to prepare, review, and submit an [i]nvention [d]isclosure, which may or may not result in a patent filing, [are] allowable and allocable indirect expenses claimed as part of the engineering overhead pool" (*id*.). RMS' Senior Manager of Government Accounting, Ms. Garcia, confirmed that this was RMS' stance (tr. 2/274).

122. DCAA based its cost evaluation upon information RMS provided (tr. 3/90-92). DCAA reported that, in response to its request for documentation of actual labor costs and directly associated costs incurred for invention disclosure and patent efforts, RMS advised that the costs were not segregated. It provided estimates, upon which DCAA based its questioned amount of $96,701 in "engineering labor costs claimed in the engineering overhead pool for RMS *patent activities* not required by contract." DCAA speculated that the actual costs incurred could be "substantially more." (App. supp. R4, tab 260 at 4043) (emphasis added) DCAA concluded that RMS had violated CAS 405 by failing to identify adequately and exclude the expressly unallowable patent costs.

123. RMS responded that DCAA had misinterpreted its invention disclosure practice and that its Record of Invention form, as described in its 1990 IP Policy concerning invention disclosures, was used to document and catalog an invention regardless of whether it was subsequently submitted for patent approval or protected as intellectual property in some other manner. RMS asserted that DCAA had questioned costs based upon terminology identifying a general procedure and that those costs were allowable business expenses unrelated to patent filings. DCAA replied that, unlike RMS' practice, FAR 31.205-30 did not exclude costs of invention disclosures not submitted for patent approval, or protected as intellectual property in some other way, from its unallowable cost restrictions. (App. supp. R4, tab 260 at 4044)

124. DCAA changed its position from the time the audit of RMS' 2007 costs began at the end of 2008 until the audit concluded, after a long hiatus, in or about December 2013, with the audit report issuing in March 2014 (app. supp. R4, tab 260; tr. 3/16-17; *see* APFF ¶¶ 249-50). Due to a lack of employee recall and of specific time recording requirements, the auditors initially found "insufficient audit evidence upon which [to] question any related labor costs" (app. supp. R4, tab 180 at 2698).

125. The DACO's June 12, 2014 RMS Penalties COFD for 2007 was based in large part upon DCAA's RMS Audit Report for 2007. He cited $96,701 in "engineering labor overhead costs," *i.e.* "costs to prepare, review, and approve/disapprove invention disclosures *for patent applications*" as expressly unallowable under FAR 31.205-30 and subject to a level one penalty (app. supp. R4, tab 276 at 4536) (emphasis added). He stated that the costs were incurred in connection with invention disclosures for patent applications, not due to a contract requirement, and that, contrary to RMS' contention, FAR 31.205-30 did not base cost allowability on whether the costs lead to a patent filing (*id*.). DCMA withheld the questioned engineering labor overhead costs (tr. 3/28-30).

126. DCMA based its calculation of disallowed costs upon information provided by RMS, which did not provide documentation pertaining to invention disclosures related to government contract requirements until shortly before the DACO issued his final decision. By that time he had statute of limitations concerns and apparently did not consider the documentation. (Tr. 4/195)

127. Raytheon states that DCAA auditors who examined alleged patent-related activities at another Raytheon business segment, known as Intelligence and Information Systems (IIS), did not question the inventors' labor costs because they determined they were not patent expenses and the inventors charged their time spent on inventions to Independent Research and Development. DCAA also did not question the labor costs for IIS' invention review committee members' time because their time spent on meetings was charged to overhead, not patent expense. (App. supp. R4, tab 187 at 2792-94; *see* APFF ¶ 248) DCMA does not dispute that the IIS review occurred but alleges that there is a lack of evidence concerning what was "clearly a superficial review" by DCAA of IIS' patent costs, which, in any case, are not at issue here and are irrelevant (gov't reply at 50-51, citing APFF ¶¶ 247-51).

128. The government alleges that "RMS Has Acknowledged That Such Patent/Invention Disclosure Costs Are Expressly Unallowable" (gov't br. at 106). DCMA contends that a DCAA audit covering FY 2006 examined the same type of patent/invention disclosure costs at issue here, used the same methodology, and determined that they were expressly unallowable. The 2007 audit report states that: "Using the contractor's estimates, we calculated the number of disclosures not related to Government contracts, an estimate of the number of hours required to create and file the disclosures, and the number of hours required to administer the BUIRC" (app. supp. R4, tab 260 at 4042). However, contemporaneously, the contractor expressed its disagreement with DCAA and the CACO's final decision assessing a penalty. It asserted that DCAA had "incorrectly conflated the preparation of invention disclosures with the preparation of patent applications" (app. br. at 131, discussing GPFF ¶ 272), but it did not appeal the decision and paid the invention disclosure costs at issue. (R4, tab 362 at 112290-93, tab 364 at 2, tab 365; tr. 3/25-26, 28-29, 92-93, 95-96) Raytheon states that it paid the costs not because it acknowledged that they were unallowable but "in order to facilitate negotiations, and settle costs in avoidance of litigation" (tr. 3/29; *see* app. br. at 131, discussing GPFF ¶ 272).

129. Raytheon disagrees that DCAA used the same methodology in 2006 and 2007 to calculate RMS' allegedly unallowable patent costs. Raytheon states, and the record supports, that, for 2006, DCAA segregated the disclosures required by government contracts from its calculation of unallowable patent costs (R4, tab 362 at 112291-92; app. br. at 131). Raytheon contends that, although the RMS Audit Report for FY 2007 states that the auditors calculated the number of disclosures not related to government contracts, an audit work paper contradicts this. It lists all 149 invention disclosures submitted on RMS' invention disclosure forms, without reduction for work performed pursuant to a government contract. (*See* app. supp. R4, tab 373; tr. 9/37-38) DCMA replies that Raytheon has not confirmed that any of the disputed costs were incurred as requirements of a government contract (gov't reply at 67, addressing GPFF ¶¶ 256, 272)

130. DCMA also cites to deposition and hearing testimony by Ms. Garcia allegedly admitting that FAR 31.205-30 means that invention disclosure costs not required by a government contract are expressly unallowable (tr. 2/284-87). Raytheon replies that the government relies upon excerpts of testimony taken out of context and ignores that the balance of Ms. Garcia's testimony, which was that the costs at issue are allowable. She also distinguished RMS' view of patent costs and DCMA's position. (App. br. at 131-32, addressing GPFF ¶ 273 and citing tr. 2/270, 273-75, 286, 3/22) Ms. Garcia's testimony is not entirely clear, but we find no admission by her that the invention disclosure costs at issue are unallowable. In any case, the interpretation of FAR 31.205-30 is the province of the Board.

131. Based upon the foregoing, it appears, but is unclear, that the $96,701 disallowed amount includes costs for, or related to, invention disclosures, including managers' and BUIRC's reviews (*see* tr. 3/91), with regard to which RMS ultimately sought patents, and invention disclosures and related costs for which it did not seek patents.

132. The Board docketed Raytheon's and RMS' appeal from the penalties COFD as ASBCA No. 59438.

DISCUSSION OF ENGINEERING LABOR OVERHEAD/PATENT COSTS

I. The Parties' Contentions

A. The Government's Contentions

DCMA principally asserts that FAR 31.205-30(a) and (c) expressly make all patent costs unallowable except for general counseling services and costs incurred as requirements of a government contract (gov't br. at 107). DCMA contends that the FAR expressly defines unallowable "[p]atent costs" to include the "[c]osts of preparing invention disclosures, reports, and other documents." (*Id*. (emphasis in original omitted)) Therefore, according to DCMA, it is absolutely clear that the costs of preparing invention

disclosures that are not a government contract requirement are expressly unallowable. DCMA claims that the FAR specifically defines "preparation" of "invention disclosures" "as an initial but essential step in the [p]atent application process (whether or not a patent is ultimately submitted, rejected, or obtained)" (*id*.). At the hearing government counsel stated that "the FAR specifically names that certain patent costs are unallowable" (tr. 2/278).

DCMA asserts that RMS' costs to prepare and review invention disclosure forms "associated with its patent application process" that were not specifically required by a government contract are expressly unallowable and subject to penalties that the DACO was not required to waive (gov't br. at 110). DCMA further contends that Raytheon's own invention disclosure policies, and its past payment of penalties regarding invention disclosure costs, reflect the legitimacy of DCMA's position.

B. Raytheon's Contentions

Raytheon responds that the threshold issue is whether FAR 31.205-30 "is specific to costs for patents, or whether it applies to a broader category of costs relating to inventions and intellectual property generally" (app. br. at 187). Raytheon advocates the former interpretation, based upon the FAR's "plain meaning" (*id*.) and asserts that DCMA's interpretation is unreasonably broad.

Raytheon alleges that DCMA "cannot show that the preparation, review, and evaluation of Form 10-5876 and new inventions are patent costs," stating that RMS' invention disclosures were prepared for all types of inventions whether or not they were patentable; many times they were not patented; and, "in all cases, the activities occurred before RMS decided whether or not it would seek a patent on the invention" (app. br. at 189). Raytheon posits that the fact that a preliminary activity might in the future result in unallowable costs is not dispositive, citing *Raytheon I* at 178,851 regarding a mergers and acquisitions (M&A) database. Raytheon adds that, even if it went through its patent submission review process and applied for a patent, if it did not receive one, there was no patent and thus no unallowable patent costs under FAR 31.205-30.

Raytheon continues that the only reasonable interpretation of FAR 31.205-30(a)(1) is that it refers to those disclosures required by government contracts, "*i.e.* the requirement to disclose subject inventions to the [CO] set forth in the FAR and DFARS patent rights clauses . . ." (app. br. at 190) (citations to DFARS omitted). Raytheon contends that, at a minimum, even under the government's FAR interpretation, a portion of the disallowed costs are allowable, *i.e.*, the costs of 26 disclosures, including BUIRC review, because they were required by government contracts.

Raytheon further contends that, if the Board determines that any of RMS' 2007 engineering costs for preparation of invention disclosures and evaluation of inventions are unallowable, the government nonetheless has not met its burden to prove that they are expressly unallowable under FAR 31.205-30 and subject to penalties. Raytheon alleges

that the FAR does not "specifically name and state" that the costs of the activities at issue are unallowable, citing *Raytheon I* at 176,050, and even if it did, DCMA has not established that it was unreasonable under all of the circumstances for RMS to believe the costs were allowable. (App. br. at 190-91) Raytheon contends that RMS reasonably believed the costs were not covered by FAR 31.205-30 because they related to activities prior to any determination to seek a patent. Often no patent was sought. Raytheon alleges that, given the regulation's "gray area," RMS reasonably drew an "unallowable" line regarding non-subject contracts at the point the BUIRC determined that a patent application should be filed. (App. br. at 192) Raytheon notes that DCAA considered the same sort of costs to be allowable in its audit of IIS and initially in auditing the costs at issue. Therefore, the costs cannot be expressly unallowable. At worst, there is a reasonable difference of opinion.

Alternatively, Raytheon alleges that, should the Board determine that the costs were expressly unallowable, the DACO was required to waive penalties and his determination not to do so was arbitrary and capricious and in contravention of FAR 42.709-5(c)(1)-(2) (app. br. at 193).

II. FAR 31.205-30

DCAA considered "all effort incurred by RMS employees to prepare, review, and approve/disapprove invention disclosures *for patent applications* to be patent costs" subject to FAR 31.205-30 (finding 121) (emphasis added). DCAA based its questioned amount of $96,701 in "engineering labor costs claimed in the engineering overhead pool for RMS *patent activities* not required by contract" (finding 122) (emphasis added). Following suit, the DACO's June 12, 2014 RMS Penalties COFD for 2007 cited "engineering labor overhead costs," *i.e.* "costs to prepare, review, and approve/disapprove invention disclosures *for patent applications*" as expressly unallowable under FAR 31.205-30 (finding 125) (emphasis added).

DCMA based its calculation of disallowed costs upon information provided by RMS, which did not provide documentation pertaining to invention disclosures related to government contract requirements until shortly before the DACO issued his final decision. By that time he had statute of limitations concerns and apparently did not consider the documentation. (Findings 122, 126)

Raytheon contends that DCAA did not limit its disallowances to patent costs that were not required by a government contract, but rather excluded all of RMS' invention disclosure and review costs, even if they were incurred pursuant to a government contract requirement or no patents were involved. The crux of appellant's argument is that the disallowed costs were not for patent activities or patent applications but were general engineering and overhead costs of invention disclosures and review that might or might not result in patent applications. When there ultimately was no decision to pursue a patent, there were no patent costs. (Findings 115-118)

Both parties misconstrue FAR 31.205-30. Paragraph (a) provides that certain "patent costs" are "allowable to the extent that they are incurred as requirements of a Government contract." Subparagraph (a)(1) lists the costs of "preparing invention disclosures" as among the allowable "patent costs" under the stated circumstances. Subparagraph (b) states that general counseling services relating to patent matters are allowable, but the parties agree that such services are not at issue (finding 103). Paragraph (c) provides that, other than patent costs for general counseling services, patent costs not required by a government contract are unallowable.

The government misreads FAR 31.205-30 to apply more broadly than it does, and it adds language to the regulation that is not there. The regulation certainly does not specifically define "preparation" of "invention disclosures" "as an initial but essential step in the [p]atent application process (whether or not a patent is ultimately submitted, rejected, or obtained) (*see* finding 102). Moreover, it does not state that all invention disclosures are patent costs, regardless of whether patents are involved. Indeed, some of RMS' invention disclosures are associated with forms of intellectual property other than patents, or with RMS' recognition of invention efforts that did not lead to patent applications (*see*, *e.g.*, findings 107, 112, 114-15, 118, 121, 123). It is not clear whether such costs are among the costs at issue.

On the other hand, Raytheon also misreads FAR 31.205-30. RMS does not consider the costs to discover new inventions, of preparing and submitting invention disclosures, of a manager's review of invention disclosure forms, or of BUIRC's review to be patent costs, on the ground that there is not yet any patent and RMS does not know whether there will be one. RMS defines patent costs to be those occurring after the BUIRC decides to pursue a patent. (Findings 115-118)

Raytheon likens RMS' invention disclosure costs to M&A data base consultant costs at issue in *Raytheon I*. Raytheon compares RMS' invention disclosure activities to what they describe as the preliminary data base activities in *Raytheon I* that might or might not have resulted in unallowable organization costs. (App. br. at 189) *Raytheon I*, in part, involved the interplay among FAR 31.205-12, Economic planning costs, FAR 31.205-27, Organization costs, and FAR 31.205-38, Market planning costs. The Board stated that, reading the regulations together, "the intent appears to be that costs in connection with actually planning the organization or reorganization of a business, such as by a specific merger or acquisition, are unallowable whereas generalized long-range management planning costs are allowable." *Raytheon I* at 178,852. The Board noted that the database was intended to be used both for general planning and specific M&A purposes when ultimately configured. However, Raytheon terminated the design and build of the M&A application, which was never completed or used in connection with any M&A target. The Board held that the disputed costs were allowable economic and market planning costs. *Id*. The Board's decision in *Raytheon I* concerning consultant costs to design and build an M&A database, and the interplay of three regulations, is not apt here.

Raytheon's interpretation of FAR 31.205-30 is unreasonable. Under its interpretation, patent-related invention disclosure costs would never be unallowable, even if no government contract requirement were involved, and the FAR's reference to allowable patent invention disclosure costs would be superfluous.

The reasonable interpretation of FAR 31.205-30 is that, when patents are involved, the costs of the associated invention disclosure and review are patent costs. They are allowable if incurred due to government contract requirements. Otherwise, they are not allowable. There is no exception for costs incurred during the invention disclosure preparation and review process prior to the decision to pursue a patent. If patents are not involved, the invention disclosure and related costs are allowable.

In 2007, RMS engineers prepared 149 invention disclosures and submitted them internally. BUIRC ultimately approved 110 of them as "patent worthy" and patent applications were filed with the PTO. Of the 149 invention disclosures, 26 were "subject inventions." (Finding 119) It appears that the $96,701 disallowed amount at issue improperly includes costs for subject inventions and might include costs for non-patent invention disclosures and review that are allowable. The Board cannot determine from the record what the proper amount of unallowable costs should be. This is a failure of proof by the government leading us to sustain the appeal.[27]

DECISION

ASBCA No. 59438 is sustained.

ASBCA NO. 59437 – OUSIDE PATENT LEGAL COSTS

FINDINGS OF FACT CONCERNING OUTSIDE PATENT LEGAL COSTS

133. The following FAR and CAS provisions are relevant to the parties' dispute concerning outside patent legal costs:

> FAR 31.201-4, DETERMINING ALLOCABILITY (APR 1984), provides in part:
>
> A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received

[27] In any case, if the government could have established the proper amount of unallowable costs, its various treatments of FAR 31.205-30 (*see* findings 124, 127), including its overly broad interpretation in this appeal, would have undermined its contention that the invention disclosure and review costs at issue were "expressly unallowable" under FAR 42.709-1(a)(1). The government's demand for a level one penalty was unwarranted.

or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

FAR 31.202, DIRECT COSTS (MAY 2004), provides in part:

(a) No final cost objective shall have allocated to it as a direct cost any cost, if other costs incurred for the same purpose in like circumstances have been included in any indirect cost pool to be allocated to that or any other final cost objective. Direct costs of the contract shall be charged directly to the contract. All costs specifically identified with other final cost objectives of the contractor are direct costs of those cost objectives and are not to be charged to the contract directly or indirectly.

(b) For reasons of practicality, the contractor may treat any direct cost of a minor dollar amount as an indirect cost if the accounting treatment—

(1) Is consistently applied to all final cost objectives; and

(2) Produces substantially the same results as treating the cost as a direct cost.

FAR 31.203, INDIRECT COSTS (MAY 2004), provides in part:

(a) For contracts subject to full CAS coverage, allocation of indirect costs shall be based on the applicable provisions. For all other contracts, the applicable CAS provisions in paragraphs (b) through (h) of this section apply.

(b) After direct costs have been determined and charged directly to the contract or other work, indirect costs are those remaining to be allocated to intermediate or two or more final cost objectives. No final cost objective shall have allocated to it as an indirect cost any cost, if other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that or any other final cost objective.

(c) The contractor shall accumulate indirect costs by logical cost groupings with due consideration of the reasons for incurring such costs. The contractor shall determine each grouping so as to permit use of an allocation base that is common to all cost objectives to which the grouping is to be allocated. The base selected shall allocate the grouping on the basis of the benefits accruing to intermediate and final cost objectives. When substantially the same results can be achieved through less precise methods, the number and composition of cost groupings should be governed by practical considerations and should not unduly complicate the allocation.

(d) Once an appropriate base for allocating indirect costs has been accepted, the contractor shall not fragment the base by removing individual elements. All items properly includable in an indirect cost base shall bear a pro rata share of indirect costs irrespective of their acceptance as Government contract costs. For example, when a cost input base is used for the allocation of G&A costs, the contractor shall include in the base all items that would properly be part of the cost input base, whether allowable or unallowable, and these items shall bear their pro rata share of G&A costs.

CAS 402-20, Purpose, states that:

The purpose of this standard is to require that each type of cost is allocated only once and on only one basis to any contract or other cost objective. The criteria for determining the allocation of costs to a product, contract, or other cost objective should be the same for all similar objectives. Adherence to these cost accounting concepts is necessary to guard against the overcharging of some cost objectives and to prevent double counting. Double counting occurs most

> commonly when cost items are allocated directly to a cost objective without eliminating like cost items from indirect cost pools which are allocated to that cost objective.

48 CFR § 9904.402-20.

CAS 402-30, Definitions, states under subsection (a) that:

> (1) Allocate means to assign an item of cost, or a group of items of cost, to one or more cost objectives. This term includes both direct assignment of cost and the reassignment of a share from an indirect cost pool.
>
> ….
>
> (3) Direct cost means any cost which is identified specifically with a particular final cost objective. Direct costs are not limited to items which are incorporated in the end product as material or labor. Costs identified specifically with a contract are direct costs of that contract. All costs identified specifically with other final cost objectives of the contractor are direct costs of those objectives.
>
> ….
>
> (5) Indirect cost means any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective.

48 CFR § 9904.402-30 (a).

CAS 402-40, Fundamental Requirement, provides in part that:

> All costs incurred for the same purpose, in like circumstances, are either direct costs only or indirect costs only with respect to final cost objectives.

48 CFR § 9904.402-40.

134. Raytheon withdraws the "vast majority" of patent costs it pays to its external counsel to prepare and submit patent applications, but it charges the government the costs associated with the preparation of its patent application if it considers the patent to be a "subject invention" conceived of as a requirement of a government contract under

FAR 31.205-30. These costs are charged to the government as indirect costs and are not charged directly to the contract. (GUPFF ¶ 270)

135. The $120,600 costs at issue are for outside counsel to prepare patent applications and related filings for subject inventions. The questioned costs constitute 100% of RMS' claimed outside legal costs relating to patents for 2007. Raytheon and RMS fist claimed that the costs were for general counseling services related to patent matters, which the parties now agree is not the case (finding 103). Raytheon ultimately alleged that they were incurred in connection with subject inventions. (App. supp. R4, tab 260 at 4071-73; tr. 2/293-94, 3/41-43, 4/196-97; AUPFF ¶ 252)

136. RMS collected all outside legal costs, including patent-related costs, in its G&A expense pool (tr. 2/294-95). Raytheon contends that this practice was in accordance with RMS' 2007 CAS disclosure statement and CAS 402, Consistency in Allocating Costs Incurred for the Same Purpose (APFF ¶ 253). The costs were then segregated as allowable and were claimed, or as unallowable, and were not claimed, as follows: When inventors discovered a new invention in performing a government contract, Raytheon tracked the subject invention as it proceeded through the invention disclosure process. The outside legal invoices for patent applications and maintenance were segregated as either allowable or unallowable legal costs by Raytheon's corporate legal department. Raytheon coded the invoices as allowable only if the patent activities involved a subject invention and were conducted as part of a government contract requirement. RMS received those costs from Raytheon corporate as a legal allowable "stat order." Raytheon's corporate legal department coded the invoices as unallowable if they related to an invention that was not a subject invention. In 2007, RMS incurred approximately $2.5 million in unallowable outside legal costs relating to patents, which RMS withdrew from its incurred cost proposal. (Tr. 3/41-44; APFF ¶ 253) (undisputed portion) Raytheon alleges, without contradiction, that this amounts to a 95% withdrawal by RMS (APFF ¶ 253).

137. DCMA does not dispute the general process described by Raytheon but contends that "it is false that such a process is specifically identified in Raytheon's CAS disclosure statement" (gov't reply br. at 51-52 (resp. to APFF ¶ 253)). The disclosure statement is not of record. However, DACO Bradley testified credibly that the patent legal cost process was not noted in the disclosure statement (tr. 4/200). On the other hand, Ms. Garcia testified credibly that, while the disclosure statement did not mention patent legal costs in particular, it referred to all legal costs, to be collected in the G&A pool and charged indirectly (tr. 2/295).

138. Shortly prior to the COFD at issue, Raytheon provided a sample of the questioned invoices to DCAA, along with the associated government contracts and invention disclosures referencing the contracts (app. supp. R4, tab 274; tr. 3/68-69). RMS also provided a spreadsheet (ex. A-20) concerning the questioned invoices that tied them to the particular government contract involved. (R4, tab 357; app. supp. R4, tab 85 at 1300, tab 86 at 1325, tab 274 at 4531, tab 305; tr. 3/46-54, 4/195, 9/27-28, 34-36)

Ms. Botos testified credibly to the accuracy of the spreadsheet. She had verified the underlying documents. (Tr. 9/34, 36) DCMA did not rebut her testimony or refute the contents of Exhibit A-20. Ms. Garcia also researched the $120,600 costs at issue and found that they were for outside patent legal work required by contract (tr. 2/293-94). DCMA did not rebut her credible testimony.

139. As we found above, DACO Bradley assessed that, in order to issue a timely COFD, and not exceed the CDA's six-year statute of limitations, he and DCAA did not have time to review RMS' documentation (tr. 3/187-88, 4/195; finding 126).

140. DACO Bradley's June 12, 2014 2007 RMS COFD questioned $120,600 in "Legal Allowable (Patent Legal Costs)" on the ground that they were identified with patent disclosures that were not required by a government contract and therefore were unallowable (app. supp. R4, tab 277 at 4544). The COFD stated that the costs were unallowable per FAR 31.201-2 and FAR 31.205-30 as directly associated costs of patent disclosures. The DACO concluded that RMS had not provided sufficient documentation to demonstrate that the patent legal costs were allowable in that they were either incurred as a government contract requirement or were for general counseling services related to patent matters. (*Id*.) DCMA did not withhold the questioned costs because RMS' decrements to its billing rates had covered those costs (tr. 3/30-31, 37-40).

141. DCMA has not rebutted Raytheon's representation, and we so find, that:

> . . . RMS's Government contracts contain patent rights clauses obligating RMS to pursue patents of subject inventions to which they take title and to grant the Government a license for Government purpose rights . . . . [T]he costs at issue were incurred as requirements of Government contracts.

(APFF ¶ 257) RMS submitted supporting documentation to the government, albeit late in the process. Accordingly, and due to Ms. Botos' and Ms. Garcia's unrebutted credible testimony, we find that the costs at issue were incurred due to government contract requirements. (*See* R4, tab 357; tr. 2/293-94, 9/27-28; ex. A-20; finding 138)

142. DCMA also has not rebutted Raytheon's representation, and we so find, that, in accordance with CAS 402, RMS has consistently classified all of its outside legal costs as indirect expenses. This includes the legal costs for subject inventions, which benefit the government contract under which they were discovered and benefit Raytheon as a whole because it owns the patent. (*See* tr. 2/294-95; app. br. at 100-101 (APFF ¶ 253), 196)

143. Raytheon and RMS' appeal from this COFD was docketed as ASBCA No. 59437 and consolidated with ASBCA Nos. 59435, 59436, and 59438.

DISCUSSION OF OUTSIDE PATENT LEGAL COSTS

I. The Parties' Contentions

A. The Government's Contentions

We dispense with some of the parties' contentions because we have addressed them above. Of the remaining allegations, DCMA contends that FAR 31.205-30(a) requires that, in order to qualify as direct costs of government contracts, Raytheon must prove that they are "literal line item requirements" of the contracts (gov't reply at 87). Additionally, even if Raytheon were able to demonstrate that the outside patent legal costs were required by government contracts, the costs should have been charged directly to the government contract involved, in accordance with FAR 31.201-2(a)(2), FAR 31. 201-4, and CAS 402. They were not and are therefore unallowable. (*Id*.)

B. Raytheon's Contentions

Raytheon alleges that the costs at issue are expressly allowable because each of the disallowed invoices was associated with a subject invention developed under a government contract. Raytheon asserts that RMS met its obligation under FAR 31.201-2(d) to maintain documentation supporting the allowability of its patent legal costs but the government chose to ignore the submitted documentation due to its statute of limitation concerns (app. br. at 194). Raytheon further asserts that DCMA has not met its burden to show that the costs are unallowable under FAR 31.205-30, which does not limit its allowability provisions to direct costs. It adds that, under the government's "line item" contention, "other than contracts for the purpose of acquiring patent application filing services, it is difficult to fathom what costs would be allowable . . . ." (App. br. at 195)

Regarding allocability, Raytheon urges, and we have found, that, in accordance with CAS 402, RMS has consistently classified all of its legal costs as indirect expenses. This includes the legal costs for subject inventions, which benefit not just the government contract under which they were discovered but benefit Raytheon as a whole because it owns the patent. Therefore, the outside legal patent costs in question are properly allocable as indirect costs. (Finding 142; app. br. at 196)

II. RMS' Outside Legal Patent Costs Are Allowable and Allocable As Indirect Costs

The FAR governs cost allowability. When the CAS applies, as here, if there is any conflict between the CAS and the FAR, the CAS governs allocability. *See Raytheon Co. v. United States*, 747 F.3d 1341, 1350 (Fed. Cir. 2014), *United States v. Boeing Co*., 802 F.2d 1390, 1394-95 (Fed.Cir.1986).

The outside patent legal costs at issue are allowable. They were incurred due to government contract requirements (finding 141). FAR 31.205-30 does not specify that

there be a "line item" link to a government contract. Indeed, it is established that the regulation applies to indirect patent costs as well as direct patent costs. *Rocket Research Co.*, ASBCA No. 24972, 81-2 BCA ¶ 15,307 at 2 ("Nothing in the history of [a predecessor to FAR 31.205-30] or in the literal language of the clause, as promulgated, warrants a distinction between direct and indirect patent costs.")

Concerning allocability, in this case there is no conflict between the FAR's provisions regarding indirect costs and those of the CAS. FAR 31.203(a), similarly to CAS 402-30(a)(5), provides that an indirect cost is one identified with two or more final cost objectives. Under FAR 31.203(b), indirect costs are to be accumulated by logical cost groupings. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives. (Finding 133) As Raytheon points out, RMS' patent legal costs at issue benefit both the government contracts under which they were incurred and Raytheon, because it owns the patents (finding 142).

Raytheon and RMS' consistent practice has been to charge outside legal costs indirectly (finding 136). This satisfies CAS 402. "CAS 402 gives the contractor considerable freedom in the classification of particular costs, so long as the contractor maintains consistency in making that determination. *See* CAS 402-20." *ATK Thiokol, Inc. v. United States*, 598 F.3d 1329, 1332 (Fed. Cir. 2010) (independent research and development (IR&D) costs were properly charged as indirect costs despite government's contention that, under FAR IR&D regulation, they should have been charged directly because they were required for contract performance).

We conclude that Raytheon and RMS' regular disclosed practice of charging outside legal costs as indirect costs meets CAS 402's consistency requirements and was proper under the circumstances of this appeal. All of the outside legal patent costs at issue are allowable and allocable as indirect costs.

DECISION

ASBCA No. 59437 is sustained to the extent that it covers outside legal patent costs. The remainder of the disputes covered in ASBCA No. 59437 are addressed below.

ASBCA Nos. 59437, 60057, 60059-60 -- AIRFARE COSTS (CORPORATE AND RMS)

FINDINGS OF FACT CONCERNING AIRFARE COSTS (CORPORATE AND RMS)

FAR 31.205-46, Travel Costs—DCAA Interpretation Conflicts With DCMA and Raytheon Interpretation

144. From April 9, 1986, until January 10, 2010, and at all times relevant to the contracts and costs at issue in these appeals, FAR 31.205-46, TRAVEL COSTS, governed

the allowability of airfare costs (*see* GPFF ¶ 275, APFF ¶ 150). FAR 31.205-46 provided in part[28]

> (a) Costs for transportation, lodging, meals, and incidental expenses.
>
> (1) Costs incurred by contractor personnel on official company business are allowable, subject to the limitations contained in this subsection.
>
> . . . .
>
> (4) Subparagraphs (a)(2) and (a)(3) of this subsection [pertaining to the Federal Travel Regulations (FTR) and Joint Travel Regulations (JTR)] do not incorporate the regulations cited in subdivisions (a)(2)(i), (ii), and (iii) of this subsection in their entirety. Only the maximum per diem rates, the definitions of lodging, meals, and incidental expenses, and the regulatory coverage dealing with special or unusual situations are incorporated herein.
>
> (b) Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the above standard airfare to be allowable, the applicable condition(s) set forth in this paragraph must be documented and justified.

(App. supp. R4, tab 158 at 2197-98)

[28] The parties agree that FAR 31.205-46 was amended, effective October 31, 2003, to renumber the paragraphs and make certain changes to other sections of the cost principle. As part of this amendment, the relevant text was moved from paragraph (d) to paragraph (b). No change was made to the quoted paragraph as part of the October 2003 amendment or at any other time prior to January 2010. (Gov't br. at 120, n.46; app. br. at 58, n.37) For ease, we refer to FAR 31.205-46(b) unless otherwise indicated.

145. Effective January 11, 201, FAR 31.205-46(b) was amended to state:

> (b) Airfare costs in excess of the lowest *priced* airfare *available to the contractor* during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the above airfare to be allowable, the applicable condition(s) set forth above must be documented and justified.

(R4, tab 459 at 11152) (emphasis added to reflect changes) As noted above, before amendment, the provision read: "(b) (Airfare costs in excess of the lowest *customary standard, coach, or equivalent airfare offered* during normal business hours are unallowable . . . ." (emphasis added to reflect language before changes).

146. FAR 31.205-46(b) implements 10 U.S.C. § 2324(e)(1)(J), which makes unallowable "Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare" (Defense Procurement Improvement Act of 1985, title IX, National Defense Authorization Act Fiscal Year 1986, Pub. L. 99-145, § 911, 99 Stat. 583 (Nov. 8, 1985); AUPFF ¶ 151, supplemented by gov't at gov't reply br. at 34).

147. In 2001, a dispute arose between Raytheon and the government regarding the interpretation of the phrase "lowest customary standard, coach, or equivalent airfare offered during normal business hours." DCAA questioned RMS' use of standard coach fares offered to the general public to determine the allowability of premium airfare costs, and argued that it should instead use Raytheon's negotiated discount agreements with certain airlines. Local DCAA personnel at RMS elevated the issue to DCAA Headquarters. (Tr. 7/185, 10/56-57; AUPFF ¶ 152)

148. By email of December 11, 2001 to Terry Murphy, Raytheon's Assistant Controller for Government Accounting, Daniel Dowd, Acting Defense Corporate Executive (DCE)[29] detailed his understanding of Raytheon's excess airfare withdrawal methodology and DCAA's objection thereto as follows:

[29] DCMA has not disputed Raytheon's statement that "[a]t the time, the 'Defense Corporate Executive' was a function within DCMA serving – with respect to the five largest defense contractors – the same role as what is currently the CACO" (app. br. at 59, n.38).

> Raytheon has AMEX record the lowest customary standard coach fare on all quotes and invoices where higher class airfare is utilized …. The Company then treats as unallowable costs the difference between the actual higher class fare utilized and the standard coach rate.
>
> It is DCAA's opinion that the unallowable amount should be the actual higher class fare utilized less the negotiated reduced coach airfare.

(App. supp. R4, tab 8 at 51; AUPFF ¶ 153)

149. By April 10, 2002 email to Mr. Dowd, Glen Gulden of DCMA headquarters, said to be its representative to the DAR Council (APFF ¶ 154), stated:

> My review of the historical files found when the language "lowest customary standard, coach or equivalent airfare offered during normal business hours" was incorporated into the cost principle the meaning was: the lowest fare class regularly offered during normal business hours. The Committee report goes on to say that they do not recommend that the standard be the lowest fare available. The record does not address your specific situation (company discounts). The Committee wanted a generic definition.
>
> I discussed your issue with the cost, pricing and finance part of OSD [Office of the Secretary of Defense] and they felt we would be held to the words in the FAR which would support the company's position. After reviewing the files I would have to agree with the OSD position if we were faced with making a decision about going to court.

(App. supp. R4, tab 10) On August 20, 2002, Mr. Dowd forwarded Mr. Gulden's email to DCAA Resident Auditor Seay Anne Sheley, identifying Mr. Gulden as "our expert on FAR principle issues" (*id.*).

150. On November 20, 2002, DCAA Headquarters issued "Audit Guidance on the Application of FAR 31.205-46 (d), Airfare Costs in Excess of the Lowest Customary Standard" (DCAA's November 2002 memorandum) (app. supp. R4, tab 11 at 60). DCAA took the position:

> FAR 31.205-46(d) disallows cost of airfare in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours available to the contractor. The lowest customary standard airfares available to Raytheon for

> certain city pairs are those negotiated with American Express Travel (AMEX). Any airfare costs in excess of the AMEX negotiated standard coach airfare should be questioned.

(*Id*.) The memorandum elaborated, among other things, that:

> Raytheon Corporate uses standard coach airfare that is available to the public (street fare) as their baseline for calculating excess unallowable airfare. DCAA uses the customary airfare that is available to Raytheon as the baseline for calculating excess unallowable airfare.
>
> . . . .
>
> The FAR clause for "customary standard" is specific to the contractor.

(*Id*.) The memorandum likened the airfare regulation to the discount provisions of FAR 31.205-26, MATERIAL COSTS (app. supp. R4, tab 11 at 61). DCAA sent a copy of the memorandum to Raytheon (*id*. at 58).

151. By January 27, 2003 email to Resident Auditor Sheley, DCE John McGrath responded to DCAA's November 20, 2002 memorandum as follows:

> DCMA Headquarters disagrees with the guidance in the attached DCAA memorandum. Based on their review of the available documents and conversations with OSD personnel, the agency believes that using a different standard to determine unallowable excess airfare costs than cited in FAR 31.205-46(d) (lowest customary standard, coach, or equivalent airfare offered during normal business hours) would not be sustainable if Raytheon disputed this cost question before the ASBCA or other court. There is nothing in the record to indicate defense contractors are to negotiate airfare rates with carriers and that the negotiated rates are the customary rates to be used for determining the unallowable amount. Accordingly, I can't support or sustain DCAA's audit position.
>
> I want to inform you also that I surveyed the other DCMA [DCEs] regarding this issue and all those responding concurred with the position taken by DCMA Headquarters.
>
> At my request, Raytheon Corporate Office provided information on Domestic Travel costs in CY 2001. It showed

> that 98.5 percent of flights taken were Coach Class, 1.4 percent of flights taken were First Class, and 0.1 percent of flights taken were Business Class. Further, the majority of those using First Class or Business Class were pre-approved for preferred seating. Therefore, the excess airfare costs would be allowable. The foregoing indicates that the total potential cost question using DCAA's suggested method would be relatively small.
>
> While I understand and appreciate the arguments raised by DCAA to support its position, the relatively immaterial travel amounts involved and the guidance from my Headquarters leads me to conclude that I can't support DCAA at this time. If, however, future audits determine that more Raytheon employees are flying other than standard coach and the amount of money has become material, I will reconsider my position.
>
> Based on the foregoing, I would have to agree with my Headquarters that we would be held to the words in the FAR 31.205-46(d) standard (lowest customary standard, coach, or equivalent airfare offered during normal business hours) which would support the company's position.

(App. supp. R4, tab 15 at 76 (January 2003 McGrath memorandum))

152. Mr. McGrath understood that the baseline Raytheon was using was a coach fare available to the general public and that the OSD and Mr. Gulden agreed with Raytheon's position (tr. 9/226-27). Mr. McGrath believed that Raytheon's position was the correct reading of the FAR (tr. 9/237).

153. Although the January 2003 McGrath memorandum mentioned domestic air travel, all of Raytheon's premium air fare travel, whether claimed or not, is an exceptional circumstance, amounting to 4-5 percent of its flights (tr. 2/35).

154. Mr. McGrath sent a copy of his memorandum to Raytheon's Assistant Controller for Government Accounting, Mr. Murphy (app. supp. R4, tab 15 at 77), who understood it to mean that "DCMA headquarters agreed with Raytheon's position, that the language of standard coach airfare in [the] FAR was what was to be used, and that they could not sustain [DCAA's] position of using negotiated rates" (tr. 10/61-62). It was not Mr. Murphy's understanding that DCMA headquarters had based its opinion on cost immateriality. Mr. McGrath never conveyed that to him. (Tr. 10/62-63)

155. After DCAA's November 2002 memorandum, the issue of "Excess Airfare Withdrawal Methodology" had been added as an "open item" discussion topic during

periodic "open items" meetings held among DCMA, DCAA, and Raytheon Corporate Government Accounting (*see* app. supp. R4, tab 12 at 65, tab 13 at 68, tab 14 at 72; tr. 10/58-60). After the January 2003 McGrath Memorandum, the excess airfare withdrawal item was removed from the agendas for the "open items" meetings, which meant to Mr. McGrath and Mr. Murphy that the issue had been resolved and was closed (*see* app. supp. R4, tab 16; tr. 9/239, 10/63-64).

156. The government admits that Mr. McGrath was acting within the scope of his authority as the CACO for Raytheon when he issued his January 2003 memorandum (app. supp. R4, tab 195 at 2911-12 (gov't resp. to interrog. No. 12); tr. 7/189).

157. In May 2007, as part of its audit of 2003 airfare costs, DCAA recommended that "the DCE consider requiring Raytheon to factor any negotiated airfare discounts into its policies and procedures relative to calculating unallowable amounts when premium airfares are purchased" (app. supp. R4, tab 93 at 1470-71; tr. 8/124). In response, DCMA Corporate contract specialist Roger Christianson, spoke to then-DCE Daniel Dowd (Mr. McGrath having retired). They determined that they had to follow the January 2003 McGrath memorandum and it was re-affirmed. The government then continued to apply what it described as a "walk-up coach fare" as the standard for allowability under FAR 31.205-46(b). (App. supp. R4, tab 97 at 1519; tr. 8/178)

158. For its audit of 2004 airfare costs, also undertaken in 2007, DCAA used a standard coach or equivalent coach fare as the baseline for allowability under FAR 31.205-46(b) (app. supp. R4, tab 102 at 1634, 1639; tr. 8/180-81).[30]

Revised Language of FAR 31.205-46(b)

159. On August 10, 2006, DCAA submitted a proposal to the DAR Council "to clarify" the travel cost principle (R4, tab 431). David Johnson, Regional Director for DCAA's Eastern Region, was the proposal's primary drafter (tr. 7/154, 158). On October 19, 2006, the Acquisition Finance Team (AFT) met to discuss the proposal. Mr. Johnson attended. His November 6, 2006 Memorandum for Record reported that "[t]he Team majority did not concur with DCAA's proposal and will recommend that the Case be closed with no further actions." (App. supp. R4, tab 56 at 903-04, 906). The memorandum elaborated in part:

> It was quite clear from the beginning that DCAA' s proposal was not well received by many of the representatives on the Team. The OSD representative, Chris Werner, essentially set the tone for the majority by taking the position that the existing language in the FAR is consistent with statutory language at 10 USC 2324(e)(1)[J] and 41 USC 256(e)(1)[J]),

[30] As noted elsewhere, the record does not clearly identify "coach" fare, which is described in various ways.

> which states "Costs for travel by commercial aircraft which exceed the amount of the **standard commercial fare**" are unallowable. The majority strongly believe that the current standard provides a reasonable baseline for allowable costs and any amounts less than this standard represent a savings to the Government, regardless as to whether those reduced fares are for first or business class accommodations. The majority also seemed to buy into the rationale that DCAA's recommendation would remove the contractors' incentive to negotiate reduced fares and might ultimately lead them to no longer pursue discounted fares, and eventually eliminate any cost savings that the Government is currently realizing.

(*Id*. at 904-05) (emphasis in original)

160. The AFT's draft majority report provided in part as follows:

> The [AFT] notes that FAR 31.205-46(b) implements the statutory limitation on allowable contractor airfare costs found at 10 U.S.C. 2324(e)(1)(J) and 41 U.S.C. 256(e)(1)(J). These provisions state that the "costs for travel by commercial aircraft which exceed the amount of the standard commercial fare" are not allowable on flexibly priced Government contracts. *Clearly, the statutory words "standard commercial fare" anticipate a ticket price that is available to the general public. Against this background, the [AFT] is convinced that the most reasonable interpretation of FAR 31.205-46(b) is that it also refers to the lowest standard or coach fare available to the general public. Nothing in the past Cost Principles Committee and Contract Administration Committee reports cited by DCAA alters this conclusion. Fundamentally, we believe that contractors should be able to rely on the most logical, plain English meaning of the cost principles.*
>
> . . . .
>
> It is also important to note that only the actual expenses incurred by a contractor are allowable on Government contracts. This means that the Government will actually save money in any case where a contractor has taken the initiative to negotiate airfares for its employees that are below the lowest standard or coach fare available to the general public. And even if the contractor has negotiated a higher level of seating at the lowest standard or coach fare available to the general public, the Government is not harmed. In all cases, we

> will only allow the actual airfare costs incurred by the contractor up to, but not exceeding, the lowest standard or coach fare available to the general public.
>
> . . . .
>
> DCAA's proposal would actually remove a contractor's incentive to negotiate airfares for its employees that are below the lowest standard or coach fare available to the general public, thereby eliminating any cost savings the Government may now enjoy as the direct result of such a contractor initiative.

(App. supp. R4, tab 55 at 901 (headings omitted)) (emphasis added) The draft majority report concluded that the current standard was sound public policy and that "the lowest standard or coach fare available to the general public represents a relatively objective, commercially based, 'bright line' test of cost reasonableness that adequately protects the taxpayers from reimbursing premium fares for higher levels of seating" (*id*. at 902).

161. Mr. Johnson prepared DCAA's draft minority report (tr. 7/193-94), which stated, among other things, that the majority's position allowed contractor employees to travel by first or business class at the taxpayer's expense, which DCAA "adamantly" opposed (R4, tab 433 at 12424). The report stated that the "current rule" was "ambiguous and inconsistently applied" and that it benefited larger contractors, which could negotiate airline discounts (*id*. at 12425). It was also inconsistent with other FAR cost principles that generally require contractors to pass discounts and rebates back to the government, such as FAR 31.205-26 (*id.* at 12425-26). The draft minority report stated that its interpretation of the travel cost principle "promotes a reasonable policy that would hold up to public scrutiny" and, even if the majority disagreed, "the current rule is ambiguous and needs to be clarified or restated to ensure consistent and equitable treatment among all contractors" (*id*. at 12427).

162. According to Mr. Johnson, "the majority of the focus of the other team members was … on the materiality of the issue we brought to the table" (tr. 7/169). Their view was that "this was just not a material issue" because the dollar amounts being questioned were not "significantly material (tr. 7/169-70). However, neither Mr. Johnson's Memorandum for Record, nor the draft majority report, nor Mr. Johnson's draft minority report, mentioned any materiality issue (app. supp. R4, tabs 55-56; R4, tab 433).

163. DCAA persisted and brought the travel cost principle issue to the Office of Defense Procurement and Acquisition Policy (DPAP). Mr. Johnson's November 16, 2006 Memorandum for Record of a November 13, 2006 meeting he and a colleague had with DPAP representatives states in part:

> While DPAP does not concur with our interpretation of the existing language, (nor do they wish to take a position regarding the proper interpretation of the current language), they have conceded that the language is ambiguous. Therefore, DPAP will recommend that the [AFT] draft a notice of proposed rule making to be issued in the Federal Register to obtain input with supporting rationale from the public on what the policy on airfare costs should be.
>
> . . . .
>
> During the meeting, Mr. Capitano made it clear that DPAP is not agreeing with our interpretation of the current FAR language, nor did he express DPAP's interpretation of the current language. He believes that the subject FAR case deals with whether and how the FAR language should be revised (prospectively), not what the current language means (retrospectively).

(App. supp. R4, tab 58 at 913)

164. On December 20, 2007, the DAR Council and the Civilian Agency Acquisition Council (the Councils) published a proposed rule to "amend the [FAR] to change the travel cost principle to ensure a consistent application of the limitation on allowable contractor airfare costs" (app. supp. R4, tab 104 at 1679).

165. In October 2008, after receiving public comment on both sides of the issue (app. supp. R4, tab 164 at 2415-18), the AFT recommended:

> (1) Changing the Travel Cost Principle to the "***lowest fare available to the contractor.***" The rationale being that it is not prudent to allow the costs of the lowest fares available to the general public when contractors have obtained lower fares as a result of direct negotiation. (2) Omit the term "standard" from the description of the classes of allowable airfares, since that term doesn't describe the actual classes of airline service. (3) Omit the term "coach or equivalent", given that in today's environment, these fares may not be the lowest available to contractors. (4) Publishing these changes as a final rule to change the travel cost principle to ensure a consistent application of the limitation on allowable contractor airfare costs.

(App. supp. R4, tab 164 at 2297)

166. On December 10, 2009, the Councils published the final rule "to change the travel cost principle" (app. supp. R4, tab 163 at 2236). As noted above, the Councils changed the allowability restriction from "Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours" to "Airfare costs in excess of the lowest priced airfare available to the contractor during normal business hours" (*id*. at 2238). The effective date was January 11, 2010 (*id*. at 2236), after award of the representative contracts and incurred costs at issue in these appeals.

167. Raytheon revised its Travel Policy, effective July 1, 2010, to reflect the change to the FAR (app. supp. R4, tab 168 at 2484; tr. 2/26-28).

168. On May 25, 2012, CACO Dowd issued a COFD challenging, among other things, Raytheon's use of a public coach airfare as the baseline for unallowable airfare costs in CY 2005 and assessing penalties.[31]

Raytheon's Application of Exceptions in FAR 31.205-46(b)

169. Meanwhile, in 2003, a second FAR 31.205-46(b) issue arose regarding Raytheon's implementation through its Travel Policy of the exceptions in the regulation that permitted costs in excess of standard, coach fare in certain circumstances. That is:

> [W]hen such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the above standard airfare to be allowable, the applicable condition(s) set forth in this paragraph must be documented and justified.

170. Exhibit A, "Employee Guidelines for Company Travel Policy," ¶ 2.4.6 of the Raytheon Travel Policy in effect on April 28, 2003, stated:

> Employees traveling on trans-oceanic flights should use coach class when possible. However, upgrading from coach to business class is authorized on trans-oceanic flights when:

[31] The Board docketed Raytheon's appeal from this COFD as ASBCA No. 58212. The Board denied the parties' cross motions for partial summary judgment (while granting an unopposed summary judgment motion by appellant on one issue). *Raytheon Co.*, ASBCA No. 58212, 15-1 BCA ¶ 35,999 (*Raytheon 58212*). The Board then stayed the appeal pending the outcome of the subject appeals.

a. The total scheduled flight time from origin to destination is more than 10 hours;

b. The most direct routing is used (circuitous routing to achieve the 10 hour requirement is not permitted) and;

c. There is no overnight layover en-route.

(App. supp. R4, tab 17 at 81, 84)

171. The criteria for business class travel on oceanic flights were included in Raytheon's Travel Policy to meet FAR 31.205-46(b)'s requirements regarding allowability of airfare in excess of standard, coach fare, if the costs were claimed (tr. 1/42, 88, 2/32, 9/100). Mr. Panetta opined that Raytheon's Travel Policy "entrance criteria" for allowability, itineraries, and expense information in its WebTE satisfied the FAR's requirement for documentation and justification of airfare in excess of standard, coach (tr. 2/34 -35). WebTE is a highly customized expense reporting and reimbursement system developed by Raytheon. A credit card company provides data sets of travel expenses, such as airline tickets, that an employee assembles into an expense report, codes, and incorporates into the system. Itineraries sometimes go into the system. (Tr. 2/9, 9/118)

172. Raytheon considered Exhibit A to its Travel Policy to provide guidelines, not requirements. An employee's manager had the discretion to approve business class travel even if the policy criteria were not met. The employee would be reimbursed his or her actual expenses, but that travel would be charged to an unallowable account. This is true whether an employee is traveling in support of a government contract or a commercial contract. If for a government contract, the government would only be billed for standard coach fare. The key control is manager approval. (Tr. 1/81, 85, 94, 99, 2/31-32, 9/100-02, 160, 10/65-66)

173. By letter of September 25, 2003 to Mr. Murphy, DCE McGrath forwarded an August 22, 2003 DCAA audit report that questioned two potential non-compliances with FAR 31.205-46 (app. supp. R4, tab 18 at 87, 91). The report stated that none of the FAR exceptions indicated that "flight time alone can be the decisive factor for upgrading air travel accommodations from standard coach air fare. The FAR also does not make an exception for senior executives to travel first class" (*id*. at 91).[32]

174. In late 2003 to early 2004, DCMA and Raytheon corresponded concerning Raytheon's Travel Policy and its compliance with FAR 31.205-46. Much of the focus was upon Raytheon's use of more than 10-hours' flight time as a criterion for allowing airfare in excess of standard, coach. (App. supp. R4, tabs 20-21, 23) Raytheon noted, *inter alia*, that, prior to consolidation with the "new" Raytheon, its legacy companies

[32] It appears that only Raytheon's president is authorized to fly first class (tr. 1/57-58).

had long-standing policies and practices that allowed employees to upgrade to business class on transoceanic flights under certain conditions, including flight time of greater than 10 hours ("old" Raytheon), 8 hours (E-Systems), and 6 hours (Hughes) (R4, tab 23 at 138).

175. By letter to Mr. Murphy of January 27, 2004 (2004 McGrath letter), DCE McGrath compared Raytheon's Travel Policy with the criteria that federal employees must meet when traveling on official business to TDY sites outside of the United States (app. supp. R4, tab 24). He highlighted ¶ C2204A(8) of the FTR as follows:

> The travel is between authorized origin and destination points (one of which is in the USA) and the scheduled flight time (including airport stopovers and plane changes) is in excess of 14 hours. A traveler is disqualified from using business class accommodations at Government expense if (a) a "stopover" en route is an overnight stay, (b) a rest stop en route [is] authorized, or (c) an overnight rest period occurs at the TDY location before beginning work. Business-class accommodations must only be used when exceptional circumstances warrant. Approval authorities must consider each request for business-class individually and carefully balance good stewardship of [scarce] resources with the immediacy of mission requirements.

(*Id*. at 140) Regarding the 10-hour criterion, DCE McGrath wrote in part:

> I understand that 10 hours of flight time or waiting at airports for connecting flights can be viewed as unreasonable by reasonable people. I also understand that flight time does not represent the true amount of time a traveler spends in travel status. There is time spent traveling from an employee's residence to the airport and from the airport to the work site or returning to their residence. I also appreciate the fact that being able to rest better or sleep on a long flight before reporting to work improves efficiency and productivity. Further, that traveling overnight and not incurring additional hotel or meal expenses can benefit the Government. For these reasons, I will not disagree with a DCMA-Raytheon [CO's] or Defense Corporate Analyst's decision to view business-class airfare as allowable and reimbursable expenses if:
>
> 1. Travel primarily takes place during non-customary business hours i.e., flights take place in the late afternoon, evening or night/early morning and it is required. The reason(s) why the employee must travel

during unreasonable hours must be clearly presented on the employee's expense account or other document that is subject to review/audit by the Government.

2. Raytheon employees report directly to their TDY or permanent duly station (PDS) after arrival at their destination airport, i.e., no rest periods en route or at the TDY /PDS site before reporting to work.

3. Flight time, not an employee's departure from their residence and travel time to a TDY site (and the reverse when returning home), must exceed 10 hours in duration. And, flight time is defined as the scheduled flight time between departure and arrival airports (including airport stopovers and plane changes).

While this decision does not meet your request to use the Raytheon Travel Policy to justify and document that flight time of over 10 hours meets the FAR definition for requiring travel during unreasonable hours, it does allow the reimbursement of business-class airfare by the Government if this exception to the FAR is justified and documented. But, in no way should Raytheon view my decision as justification for an employee to travel on a trans-oceanic flight primarily during normal business hours that allows the employee sufficient time to consume a meal and get sufficient rest and/or sleep in a hotel or other such facility before reporting to work.

(*Id*. at 141) Mr. Panetta described the letter as a "very important document" which "[laid] out the accord between Raytheon and DCMA under which DCMA would not question the [business class airfare] cost as being unallowable" (tr. 1/136).

176. DCE/CACO McGrath had the authority to determine whether Raytheon was compliant with the FAR and the CAS (tr. 9/196). The government admits that he was acting within the scope of his responsibilities when he issued the 2004 McGrath letter (app. supp. R4, tab 195 at 2911-12 (response to interrogatory No. 12)).

177. Effective July 12, 2004, Raytheon revised its Travel Policy concerning business class travel on transoceanic flights based upon the 2004 McGrath letter (app. supp. R4, tab 27 at 230; tr.1/140, 2/37-38). The revised Exhibit A, Employee Guidelines for Company Travel Policy, ¶ 2.4.6, included the following four criteria:

Employees traveling on trans-oceanic flights should use coach class when possible. However, upgrading from coach to business class is authorized on trans-oceanic flights when:

a. The total scheduled flight time from origin to destination is more than 10 hours;

b. The flight is overnight, and no flight is available during normal business hours that satisfies the traveler's business requirements;

c. The most direct routing is used (circuitous routing to achieve the 10 hour requirement is not permitted) and;

d. There is no significant rest period upon arrival at the destination, nor is there a rest stop enroute.

(App. supp. R4, tab 27at 233)

178. In an internal July 30, 2004 DCAA email, copied to Mr. McGrath, Resident Auditor Sheley opined that:

> I think FAR is sufficiently vague and that Raytheon's policy does not contradict FAR and it seems in some ways to be even more restrictive (the "and" versus "or" on the exceptions as we've discussed earlier).

(App. supp. R4, tab 31 at 245-46)

179. By letter to Mr. Murphy dated August 18, 2004, DCE McGrath wrote that he had reviewed Raytheon's revised policy and found that it complied with FAR 31.205-46 (app. supp. R4, tab 29; tr. 10/78-79).

180. Raytheon relied upon DCE McGrath's approval because he was the cognizant federal agency official for determining Raytheon's compliance with the CAS, the acceptability of its business systems, and the allowability of costs. He provided guidance and oversight to the other COs assigned to cover Raytheon, through whom final indirect rates and billing rates were established. (Tr. 2/38-39, tr. 10/79)

181. In February 2007, Raytheon combined its policy for business travel, meetings, and entertainment expenses with its policy for company travel (app. supp. R4, tab 92 at 1403). The combined policy maintained the same four criteria for treating premium airfare in excess of standard, coach fare as allowable, but it added the following definition and note to the "no significant rest period" criterion:

> (4) There is no significant rest period upon arrival at the destination, nor is there a rest stop enroute. Significant

> rest period is defined as a hotel stay prior to reporting to work.
>
> Note: If the traveler arrives before noon on a week day, it is assumed that they are going to work that same day and there is no significant rest period. Conversely, if arrival is after noon, OR on a weekend, it will be assumed there was a rest period, and the difference between the premium class airfare and the coach comparison airfare provided by Raytheon's designated travel agency, will be processed as unallowable airfare. If that is not a valid assumption, comments should be included in the "Comments" section of the Expense Statement. The comments should explain the nature of the work that was performed before a significant rest period.

(*Id*. at 1409) The note was added to remove subjectivity in expense processing and to ensure consistency (tr. 9/105).

182. In an April 28, 2008 revision to its travel policy, among other things, Raytheon changed the fourth criterion in Exhibit A, ¶ 2.1.5.b. (4) to read "Upon arrival at their destination the traveler performed work prior to an overnight rest period" (app. supp. R4, tab 128 at 1938, 1944). The changes were due to Raytheon's implementation of an "airfare wizard" in its WebTE travel system to require an employee to answer directly if he or she met the criteria instead of Raytheon's Finance Shared Services (FSS) processors making an assumption from the traveler's itinerary based upon the time the employee arrived in-country (tr. 9/97, 112-13, 118). Travelers could still override the guidelines with approval from their manager (tr. 9/109-10, 113-14).

183. By letter to Mr. Panetta dated October 26, 2010, stated to be "effective immediately," then-CACO Dowd rescinded the 2004 McGrath letter, stating that it had created "significant confusion" among COs (app. supp. R4, tab 169 at 1). He elaborated that Raytheon's Travel Policy was not consistent with the FAR on the grounds that neither flight duration nor work performance upon arrival were FAR 31.205-46(b) exceptions; the policy could not justify airfare costs exceeding the lowest priced airfare available to the contractor; and it did not require employees to document and justify when airfare other than the lowest price available was used (*id*.).

184. By letter to Mr. Dowd of December 20, 2010, Mr. Panetta disagreed with his October 26, 2010 letter and asked that he rescind it. Mr. Panetta stated in part:

> The genesis of the McGrath memo was to address the ambiguity in the regulations with respect to allowability of costs where there was excessively prolonged travel and travel during unreasonable hours. The McGrath memo introduced a criterion which facilitated a mutually acceptable basis for

> determining allowability of these costs. In accepting this determination RTN and DCMA effectively settled long standing discussions on this grey area within the regulations. RTN believed this was working well in that costs were agreeably classified and thereby resulting in no disputes in this area adding to our collective efficiency.
>
> Your rescission of this memo, in the Company's view, may actually add confusion to our process where none existed in the past (rather than clearing up the confusion that you referenced). Portions of the Raytheon Company policy on travel are based on this memo, which in our view is more restrictive than the current FAR language. By agreeing to this determination back in 2004 the Company agreed to higher unallowable costs than is required by the FAR cost principle governing this element of cost.

(App. supp. R4, tab 171 at 2560) Mr. Panetta did not receive a response (tr. 2/40-41).

185. On September 22, 2011, Raytheon revised its travel policy and removed the requirement that, as a condition of flying business class, upon arrival at the traveler's destination he or she must perform work prior to an overnight rest period (R4, tab 466 at 2290-91) (work requirement removed from ¶ 2.1.5.(b)(4)).

186. On October 26, 2012, DCAA issued a draft Statement of Condition and Recommendation (SOCAR) alleging that Raytheon was noncompliant with DFARS 252.242-7006, Accounting System Administration, because its Travel Policy was noncompliant with FAR 31.205-46. On April 23, 2013, DCAA issued two Forms 1, Notice of Costs Suspended and/or Disapproved, contending that certain premium airfare costs charged directly to two RMS contracts were unallowable. Mr. Panetta responded by letter to DACO Jack Bradley dated May 15, 2013. (R4, tab 476; tr. 2/44-45; AUPPF ¶ 196) He stated that DCAA's position "extends well beyond the plain meaning" of the FAR (R4, tab 476 at 1) and gave Raytheon's reasons for disagreeing with DCAA.

187. On March 29, 2013, DCAA issued an audit report finding that RMS' estimating controls from 2009 through 2011 were deficient concerning its treatment of premium airfare. DCAA recommended that it revise its policies, procedures and standard practices relating to estimating international travel to reflect that only the lowest available fare be proposed in accordance with FAR 31.205-46(b). (R4, tab 474 at 51, 54)

188. By letter of October 2, 2013 to then-CACO Jeffry Holt, on the allowability of premium class airfare, Mr. Panetta focused upon the FAR 31.205-46(b) exception "not reasonably adequate for the physical or medical needs of the traveler." He stated that this was the company's primary basis for allowing premium class airfare. He correlated it with other exceptions and compared Raytheon's policy favorably with the FTR for

military personnel and the JTR for DoD civilians (now merged and called the "JTR"). He asserted that Raytheon's Travel Policy, its travel agent's documentation, and its WebTE expense system documented and justified how each trip met the requisite criteria. Mr. Panetta stressed that imposing a "significant deficiency" determination regarding Raytheon's estimating system regarding premium class airfare was unwarranted. He emphasized Raytheon's willingness to compromise. (R4, tab 487)

189. To resolve DCAA's threatened disapproval of its estimating system, Raytheon revised its Travel Policy, effective February 24, 2014 (R4, tab 493, *see also* tabs 490-492; tr. 1/44, 100-02, 2/54-56). The revised policy required a more stringent approval process, including director-level pre-approval for business class travel and approval of the expense report and reimbursement to the employee. The biggest change was to include a "meaningful work upon arrival" criterion. If the employee did not complete meaningful work, he or she would still be reimbursed for business travel but Raytheon would not charge the government for those costs. (R4, tab 493 at 152597 (Ex. A, ¶ 2.1.5.b.(2)); tr. 1/45, 104, 2/56-57). After the changes were made, DCMA approved the estimating system (tr. 1/105, 109).

190. After a five-year audit of Raytheon's accounting system, on January 29, 2015, DCAA issued an audit report questioning how Raytheon accounted for allowable and unallowable costs. DCAA found a significant deficiency in Raytheon's accounting system due to its treatment of premium class airfare. (R4, tab 500; *see also* R4, tab 499 (response to SOCAR); tr. 2/57-58)

191. During the relevant period, FSS processed the company's travel and expense (T&E) statements. The processors were responsible for ensuring that the costs complied with policy and were classified correctly as allowable or not based upon the FAR, and for withdrawing any unallowable costs. They were provided with written guidance and training materials, including hardcopy manuals, desktop procedures, and unallowable cost guidelines. (App. supp. R4, tabs 42, 44-45, 101; tr. 9/115-18, 124-26) AMEX was Raytheon's travel agent until it transitioned to BCD Travel beginning in July 2007 (tr. 9/360). The agents within those companies were dedicated solely to the Raytheon account and received substantial, on-going, training regarding its travel policies (tr. 9/368-71, 377; AUPFF ¶ 211).

192. FSS processors used "checkpoints" to review any T&E statement that included premium airfare. Raytheon's baseline for determining allowable costs was a standard coach fare. (*See* app. supp. R4, tab 44; tr. 9/98, 132) For example, "Checkpoint #1, Is Coach Fare Higher?" was to compare the premium airfare to a standard coach fare (app. supp. R4, tab 44 at 596). According to Jamie Humbarger, Raytheon's Travel Accounting Manager (tr. 9/95), if the standard coach fare were higher than the premium fare, there were no unallowable costs and no need to proceed (tr. 9/132). If the claimed airfare exceeded the standard coach fare, the processor moved on to the next checkpoint and reviewed each leg of the trip to ensure that it complied with Raytheon's Travel Policy. For round trips, only one way had to meet the criteria. It was Ms. Humbarger's

understanding that, during the relevant period, this was the most cost-effective way to purchase a ticket. (Tr. 9/135-36)

193. During 2007 and 2008, Raytheon was party to a series of agreements with various airlines pursuant to which certain flights qualified for negotiated discounts. The agreements applied corporate wide, including to RMS travelers. (App. supp. R4, tabs 37, 40-41, 47, 94-95, 99, 103, 114-16, 118, 125, 130, 136; tr. 9/359-61; APFF ¶ 212 (undisputed portion)) During the relevant period and as of the hearing, Jeanine Davis was manager of all of Raytheon's global travel. She negotiated all of the travel agreements and managed Raytheon's relationships with those suppliers (tr. 9/359). Each contract was "very different" and, within the contracts, the discount rates varied per market and per class of service or fare basis (tr. 9/382). Raytheon's discounted premium airfare was often less than a coach fare. The discounts could be significant, including, *inter alia*, 40%, or 37%. (Tr. 1/125; 10/33, 35-36; *see* GPFF ¶ 298)

194. Although both parties contend that FAR 31.205-46 was clear prior to the 2010 amendment, they dispute the meaning of "standard, coach fare." The government contends that the "Y" fare (economy, i.e. coach *see* tr. 9/391) is the "'highest priced coach fare' available on a given flight at the time of purchase," one that is interchangeable and refundable, citing, *inter alia*, testimony by Ms. Davis agreeing with the government's characterization (gov't rely at 42 regarding APFF ¶ 214; tr. 10/8). Ms. Humbarger described standard coach fare as the "fare available to the general public" and opined that it was not necessarily the highest coach fare charged, depending upon the circumstances and timing of booking (tr. 9/153-54). Ms. Humbarger and Ms. Davis disagreed with the government's description of the "standard coach fare" as the "walk-up fare" one would pay for a ticket on a flight departing the same day (tr. 9/133, 374-75). Rather, Ms. Humbarger described it as the "standard coach fare at the time of the ticketing or the time the reservation was made, whether it be two weeks in advance or two months in advance" (tr. 9/133).

195. Raytheon's third-party travel agency printed on the itineraries what Raytheon contends to be the standard coach fare at the time of booking. The record suggests that Raytheon used the "Y" fare or full-fare coach as the "standard, coach fare;" however, the record is not entirely clear on this point.[33] Occasionally, the fare designation was not included on the itinerary, such as when the employee did not use the preferred travel agent. Then, Raytheon's processors used Semi-Automatic Business Research Environment (SABRE), a licensed software used by travel agents to book air travel, to determine the standard, coach fare. SABRE did not provide historical data on airfare prices so the processors tried to replicate the booking as closely as possible. The SABRE analysis was performed shortly after the trip. (Tr. 9/132, 142-43; AUPFF ¶ 213)

[33] Airline booking codes differ between airlines and can change over time. We take judicial notice of the fact that there are typically refundable airfares available to the public at a lower price than the full-fare "Y" booking code. *See also* (App. supp. R4, tab 45 at 619, 624; tr. 9/127, 130, 388-89)

2008 Corporate Airfare Audit

196. On December 19, 2014, DCAA issued its Corporate Audit Report for 2008. Auditor Benjamin Blodgett conducted the 2008 Corporate travel, including airfare, portion of the audit. (App. supp. R4, tab 331 at 5094, 5255-69; tr. 2/168, 207) As is relevant to the ensuing COFD, DCAA questioned three categories of airfare costs: "Premium Airfare," "Excess Over Lowest Cost," and "Excess Over Airline Agreement" (app. supp. R4, tab 331 at 5256; R4, tab 517; tr. 2/207-08).

197. In the "Premium Airfare" category, DCAA questioned all airfare with a seat class greater than coach. It did not consider any FAR 31.205-46(b) exceptions. It did not agree with Raytheon's Travel Policy, or the checklist used by FSS processors to document that an employee went right to work upon arrival at the employee's destination, based upon an alleged lack of documentation. Also, DCAA disagreed with the assumption that an employee who qualified for premium airfare on an outgoing flight also qualified on the return. (App. supp. R4, tab 331 at 5256; tr. 2/169-71)

198. Rather than use the standard coach fare printed on a traveler's itinerary, DCAA derived its own audit-determined lowest, discounted coach airfare as the lowest airfare allegedly available to Raytheon (tr. 2/178-79, 214). On the ground that an average cost could not be determined for international flights, DCAA calculated a "current day price using a percentage ratio comparing premium airfare … to coach airfare" (app. supp. R4, tab 331 at 5262-63). DCAA applied the ratio to the premium airfare to calculate what it considered to be a reasonable amount for coach fare (*id*.). The ratio was calculated in 2014 to disallow costs incurred in 2008 (tr. 2/214). In calculating the ratio, DCAA did not try to match the time of year or number of days in advance that the actual ticket was purchased. Instead, it used a period of six weeks in advance of the date when it was performing its Internet search, regardless of the month in which the flight actually occurred. (Tr. 2/216-17) For domestic legs of international flights, DCAA used the lowest airfare in the Department of Transportation's Consumer Airfare Reports for 2008, which list certain average fares (app. supp. R4, tabs 232-33; tr. 2/212).

199. Raytheon cites to examples of DCAA's calculation of the ratio in a manner that did not account for the traveler's actual destinations. Auditor Blodgett agreed. (*See* R4, tab 552, items identified at APFF ¶ 221; tr. 2/218-47; app. br. 88-90) The government disagrees with Raytheon's characterization of DCAA Corporate's position and calculations (gov't reply br. at 44-45, responding to APFF ¶¶ 218-22, citing GPFF ¶¶ 301-03, 475-80).

200. Raytheon asserts that DCAA applied the 2010 version of FAR 31.205-46(b) to Raytheon's 2008 airfare costs. Auditor Blodgett agreed. (App. supp. R4, tab 331 at 5261; tr. 2/177-78; APFF ¶ 220). On the other hand, the government states, without specific citation or elaboration, that "all" of DCAA's conclusions and calculations regarding the 2008 Corporate airfare "are principally based upon the 2008 version of

FAR 31.205-46(b)" (gov't reply br. at 44). It is unclear whether the government is relying upon its own interpretation of the 2008 FAR provision.

201. Mr. Blodgett believed his method of determining quantum was reasonable:

> Because we were just trying to determine -- when we were doing the audit, we were just trying to determine a reasonable amount. We understand these are negotiations, so we were just trying to give the government some kind of platform to, kind of, base where they should start at.

(Tr. 2/250)

202. Referring to the audit, on June 22, 2015, CACO Forbush issued the Corporate Airfare COFD for 2008, asserting a government claim against Raytheon due to its inclusion of airfare costs in its final indirect cost proposal for CY 2008 that were allegedly unallowable under FAR 31.205-46 (app. supp. R4, tab 363 at 5946-48, 5951). The disallowed costs were in two categories: "Inadequate Premium to Coach Airfare Withdrawal" and "Premium Class Airfare" (*id*. at 5947). However, DCAA had not questioned the former category (*see* R4, tab 517). The costs that the CACO assigned to that category were actually the costs questioned by DCAA in its "Excess Over Lowest Cost" and "Excess Over Airline Agreement" categories. CACO Forbush had mistakenly assumed that DCAA had questioned only costs for premium airfare when virtually all of the questioned costs in those two categories were for coach class airfare. The government is no longer pursuing the costs questioned by DCAA in the "Excess Over Lowest Costs" and "Excess Over Airline Agreement" categories. (*See* tr. 2/210-11, 247; APFF ¶ 218 (undisputed portion))

203. As set forth above (finding 8), the Board docketed Raytheon's appeal from the Corporate Airfare COFD for 2008 as ASBCA No. 60057.

2007 and 2008 RMS Airfare Audits

204. DACO Bradley, who did not conduct the 2007 or 2008 RMS airfare audits, was the only witness presented by the government to explain them (AUPFF ¶ 224).

205. As with the 2008 Corporate audit, for both the 2007 and 2008 RMS audits, DCAA questioned all premium airfare that it sampled (app. supp. R4, tab 260 at 4050-54, tab 350 at 5783-89, 5799-805, 5849-54, 5857-61), and it determined that Raytheon's Travel Policy did not comply with FAR 31.205-46(b) (app. supp. R4, tab 350 at 5765). However, the auditors who performed the RMS audits used a different method to determine the allowable coach airfare baseline. Although, when the itineraries were available, DACO Bradley acknowledged that "usually the standard coach was on there" (tr. 4/56), for both years, the auditors declined to use the coach fare printed on the itinerary. They concluded that the actual airfare was not on the itinerary or WebTE or

elsewhere. For 2007, DCAA searched the Internet for flights departing two days after the date DCAA conducted its review, in 2014. For 2008, the auditors searched for flights one week thereafter. (App. supp. R4, tab 260 at 4052, tab 350 at 5785; tr. 3/168, 172)

206. DCAA's method of deriving 2007 and 2008 airfare costs did not account for various factors that could affect airfare price, for example, fluctuations due to season, trip duration, day and time of travel, or the fact that six or seven years had passed. In each case, DCAA selected the lowest priced coach fare that could be found through an Internet search. Because the testing occurred years after the flights, DCAA applied Global Insight inflation rates to decrement (or, rarely, increase) the selected airfares to a purported 2007/2008 amount. (*See* tr. 4/60, 171-72, 175-77, 181-82, 184-85)

207. DCAA reduced its derived baseline airfare by applying its computation of an average percentage discount purportedly available to RMS regardless of whether the particular flight qualified for a discount, and if so, how much (tr. 4/60-61, 67-69). DACO Bradley explained that:

> So Raytheon, on the itinerary, did identify the standard walk-up coach airfare, but again, we did not consider that coach airfare to be applicable. We think Raytheon, if they were going to determine the unallowable amount, should use the airfare that was available to Raytheon.
>
> So a standard walk-up coach airfare might be $5,000. But Raytheon might get a $2,000 airfare. Because they get big discounts from them. Plus, the walk-up fare is, again, you go up to the counter and buy the ticket, anybody can go buy it.

(Tr. 3/172-73)

208. Thus, as with the Corporate Audit for 2008, DCAA in effect applied the 2010 version of FAR 31.205-46(b), which was in accord with its interpretation of the predecessor version at issue, to RMS' 2007 and 2008 costs.

209. Both parties offered detailed examples of sample flights to show differences between airfares charged and DCAA's audit-determined fares, with the government aiming to show that Raytheon overcharged and Raytheon aiming to show that the audit-determined coach fares were significantly less than the actual coach fares and discounted coach fares that Raytheon actually paid (e.g., GPFF ¶¶ 475-480; APFF ¶ 231). In view of our disposition of this appeal, we need not make any findings concerning these competing contentions.

210. DACO Bradley's COFDs for FYs 2005 and 2006 did not disallow any premium airfare costs for RMS employee travel. He stated that those issues had been resolved at the corporate level. (Tr. 4/25-26, 150-53)

211. As noted above, on June 12, 2014, DACO Bradley issued his RMS COFD for 2007 (finding 10). He found $1,579,454 in claimed travel costs to be unallowable, citing the categories, as relevant, of "Foreign Airfare," "Statistical Sample," "Domestic Travel," "Per Diem," "Unsupported," and "Unallocable" (app. supp. R4, tab 277 at 4543-44). He found certain foreign airfare to be unallowable "since the employee flew business class instead of utilizing the lowest available airfare as required by FAR 31.205-46(b)" (*id*. at 4544.). On the other hand, DACO Bradley found some of the airfare questioned by DCAA to be allowable coach fares (tr. 4/225-26).

212. DACO Bradley stated that RMS had violated its own Travel Policy with regard to documentation requirements as well as the FAR. He quoted the 2007 version of FAR 31.205-46(b), but he nonetheless concluded that the business class travel was not justified because "Raytheon has not adequately documented an exception to the criteria contained in FAR 31.205-46(b) for allowance of airfare in excess of the lowest available airfare available to the contractor during normal business hours" (app. supp. R4, tab 277 at 4545). Thus, like DCAA, the DACO applied his interpretation of the 2007 FAR, which reflected the language of the 2010 version.

213. After the COFD, for the 2007 costs at issue, and various sample itineraries, RMS gave the government a 2007 "credit card lookup" report, a tool provided by the AMEX travel agency for looking up the details of a ticket, including class of service (app. supp. R4, tab 317; tr. 9/128-31). Although DCAA and DACO Bradley considered the report, they found it to be unreliable in validating the class of airfare that was flown and the DACO declined to use it (tr. 4/121-22, 133, 226-27). Raytheon contends that this means that coach flights shown in the report are still mistakenly part of the government's cost disallowance (APFF ¶ 234). The government counters that appellant's contention lacks documentary support and that the credit card look-up report information is not pertinent in any event because the DACO was only considering it as part of settlement negotiations (tr. 4/121; gov't reply br. at 48). There is insufficient evidence of record for the Board to make specific findings on the substance and applicability of the credit card look-up report(s).

214. Raytheon and RMS' appeal from the RMS COFD for 2007, with regard to travel costs, is part of ASBCA No. 59437.

215. On June 11, 2015, DACO Bradley issued a COFD disallowing RMS' 2008 indirect travel costs for premium airfare as noncompliant with FAR 31.205-46(b) and with FAR 31.201-2(d)'s documentation requirements. Raytheon's appeal from this COFD is docketed as ASBCA No. 60059 (finding 12).

216. Also on June 11, 2015 DACO Bradley issued two COFDs disallowing RMS' 2008 direct airfare costs that had been included in its billings under two contracts. He again referred to the company's alleged failure to comply with FAR 31.205-46(b), FAR 31.201-2(d), and its own Travel Policy. He again, in effect, applied the 2010 version

of FAR 31.205-46(b) by calling for use of the lowest airfare available to the contractor. (App. supp. R4, tabs 356-57) Raytheon's appeals from these COFDs are docketed as ASBCA Nos. 60060 and 60061, respectively (finding 13).

217. Except as noted above, DACO Bradley's 2007 and 2008 RMS COFDs largely incorporated DCAA's findings with respect to questioned airfare (app. supp. R4, tabs 277, 356-358). However, of the amounts disallowed by these COFDs, the government is no longer pursuing disallowed costs based upon projections from DCAA's purported use of "statistical sampling," or disallowed costs for "per diem," "unsupported," or "unallocable" (ex. G-7; AUPFF ¶ 223).

218. In reaching his decisions, DACO Bradley did not agree with or feel bound by DCE McGrath's August 18, 2004 determination that Raytheon's Travel Policy, which applied to the entire corporation, complied with FAR 31.205-46(b) (app. supp. R4, tab 29; tr. 4/19-20, 22-23).

219. Upon consideration of the above record concerning Raytheon's Travel Policy during the 2007-2008 time period, including the contemporaneous interpretations of FAR 31.205-46(b) by DCE/CACO McGrath, DCMA's Mr. Gulden, DCAA resident auditor Sheley, and DoD personnel, we find that the government has failed to prove its contention that the policy did not comply with the regulation.

DISCUSSION OF AIRFARE COSTS

I. The Parties' Contentions

A. The Government's Contentions

1. Raytheon Has Not Satisfied FAR 31.205-46(b)'s Prerequisites for Allowing Costs of Premium Airfare

The following summarizes the government's principle contentions. First, the government characterizes the cost allowability questions at hand as:

> Whether Raytheon's Travel Policy justifies business-class airfare under FAR 31.205-46(b) --- and the determination of the appropriate "baseline" to apply under the FAR if it does not --- are both questions of regulatory interpretation. In this light, the Board must answer these questions based on the plain language of the regulation, as well as its purpose and regulatory history.

(Gov't br. at 170)

Specifically, the government contends that Raytheon allows its international travelers to upgrade to business class as a general rule, notwithstanding FAR 31.205-46(b)'s strict criteria. Therefore, it has failed to satisfy its obligation, addressed in *Data-Design Laboratories*, ASBCA No. 27535, 85-3 BCA ¶ 18,400, to demonstrate, on a case by case basis, that the FAR's exceptions apply. The government adds that, under an ASPR predecessor to the current FAR 31.205-46(b), Raytheon had to show that flying coach class "caused" one of the FAR's exceptions and the current FAR is similar. (Gov't br. at 170)

Citing legislative history, the government contends that the promulgators of FAR 31.205-46(b) intended that contractors be allowed premium class air travel under the circumstances described in the FTR/JTR. Because Raytheon's implementation of the "physical needs exception" in its Travel Policy is in effect a "rubber stamp" (gov't br. at 173) and compares unfavorably with the FTR/JTR, it must be categorically rejected. (Gov't br. at 173-175)

The government alleges that Raytheon's Travel Policy does not satisfy FAR 31.205-46(b)'s criteria; Raytheon does not meet its own standards; and Raytheon does not meet the "actual work" requirement set forth by CACO McGrath in 2004 (gov't br. at 177-81).

The government asserts that the Board should construe FAR 31.205-46(b), as in effect from 1986 until January 2010, "to limit the allowable airfare for unauthorized premium flights to the actual coach fare available to Raytheon, including any and all applicable discounts available to Raytheon through its airline agreements" (gov't br. at 189). The government contends that this reading "is compelled by, and is consistent with, the plain language of the regulation" (*id*.). However, the government again refers to regulatory history for support (*id*.).

The government alleges that its interpretation of FAR 31.205-46(b) is consistent with FAR 31.201-5, CREDITS (AUG 2007), which provides that:

> The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or by cash refund.

The government contends that, in the circumstances at hand, Raytheon is foregoing available discounts when it believes the government is covering the difference, a "perverse result" in direct contradiction of FAR 31.201-5 (gov't br. at 192).

The government asserts that, in contrast to its reasonable interpretation pursuant to the plain language of FAR 31.205-46(b), Raytheon's interpretation is unreasonable. It makes no economic sense and frustrates the regulation's purpose by allowing Raytheon to charge the government more for an "unauthorized" premium flight than the coach fare

Raytheon would have paid if its employee took the coach flight authorized by its Travel Policy and FAR 31.205-46(b)'s criteria. (Gov't br. at 193)

The government alleges that Raytheon cannot rely upon the views of CACO McGrath and DCMA DAR Council representative Gulden, which favored Raytheon's interpretation of FAR 31.205-46(b) (gov't br. at 193-94). The government contends that such "extrinsic evidence cannot trump the plain language of the cost principle" and is irrelevant to the Board's determination (gov't br. at 194). The government also claims that CACO McGrath's position was based upon misleading information from Raytheon that the costs at issue were immaterial in amount (*id.* at 194-95).

If the Board is not persuaded that FAR 31.205-46(b)'s language is plain, the government again contends that legislative history supports its interpretation; it asserts that Raytheon's interpretation is unreasonable and leads to absurd results; and the 2010 amendments to the FAR "were simple clarifications of existing requirements, not impermissible 'retroactive changes'" (gov't br. at 199).

2. Raytheon's Disallowed Airfare Costs Were Unreasonable

The government contends that Raytheon's alleged purchase of premium airfare in situations that FAR 31.205-46(b) did not contemplate, simply because it was cheaper than the highest-priced coach fare, was unreasonable. The government continues that "Raytheon believes that it has found a way to pass along all or a portion of these **indisputably unqualified** premium fares to the Government, by reading a loophole into FAR 31.205-46(b)." (Gov't br. at 182) (emphasis in original)

The government alleges that, when a premium airfare was less than the full, highest priced, "street" coach airfare, Raytheon did not bother to determine whether traveling premium class met the requirements of Raytheon's Travel Policy or of FAR 31.205-46(b) and it charged the government with the premium fare regardless of whether the actual coach fare available to it was substantially less than the highest-priced "Y" fare. Thus, the government was subsidizing Raytheon's premium travel. (Gov't br. at 183-186) The government argues:

> Raytheon's practice of submitting airfare costs to the Government in excess of those airfare costs that were actually available, and contractually obligated, to Raytheon (costs which Raytheon's own policies instructed Raytheon to incur) is unreasonable as a matter of law.

(Gov't br. at 186)

B. Raytheon's Contentions

1. The Government has not Met its Burden to Prove that the Disputed Airfare Costs are Unallowable Under FAR 31.205-46(b)

Raytheon contends that, for many reasons, the government has not met its burden to prove that the disputed airfare costs are unallowable under FAR 31.205-46(b). The following are its principal arguments:

Raytheon alleges that "the [g]overnment fundamentally misconstrues the travel cost principle" (app. br. at 162). By its plain language, FAR 31.205-46(b) does not make premium class travel unallowable. Rather, it imposes an allowability limitation on "[a]irfare costs in excess of lowest customary standard, coach, or equivalent airfare offered during normal business hours" (*id.*). Indeed, FAR 31.205-46(a)(1) states that costs "incurred by contractor personnel on official company business are ***allowable***" subject to stated limitations (*id*.). One such limitation is in FAR 31.205-46(b) but, as long as airfare costs do not exceed the "lowest customary standard, coach, or equivalent airfare offered during normal business hours," they are not unallowable under FAR 31.205-46 and the exceptions are irrelevant (*id*.). Raytheon distinguishes the Board's *Data-Design Laboratories* decision relied upon by the government and the regulation and statute involved therein (*id*. at 163).

Raytheon asserts that the pre-2010 version of FAR 31.205-46(b), which refers to the "lowest customary standard, coach, or equivalent airfare offered during normal business hours," is unambiguous (app. br. at 164). It plainly means a coach fare available to the general public -- not the negotiated coach fare available only to Raytheon. This is consistent with the underlying statute, 10 U.S.C. § 2324(e)(1)(J), which refers to "standard commercial fare" (app. br. at 165). Therefore, the baseline for cost allowability was the standard coach fare available to the general public (*id*.).

Raytheon alleges that, because the pre-2010 regulation is clear, it is inappropriate to refer to its regulatory history (app. br. at 166). It adds that, in any case, the government improperly relies upon unpublished committee and subcommittee reports and irrelevant history (*id*.). Further, the government has misreported or misconstrued the legislative history, which actually favors Raytheon's interpretation of the regulation (*id*. at 166-67).

Raytheon further assert that the government's airfare claims are based upon an impermissible, retroactive application of the 2010 changes to FAR 31.205-46(b) to the 2007 and 2008 costs at issue and, contrary to the government's contention, the changes were substantive, not merely clarifications (app. br. at 168).

Next, Raytheon contends that its Travel Policy complies with FAR 31.205-46(b). It alleges that the policy's business class travel criteria satisfies the regulation's conditions (app. br. at 171). Raytheon alleges, *inter alia*, that the government is

incorrect that the regulation's "unreasonable hours" exception "applies only when coach-class accommodations ***cause*** the unreasonable hours and only business-class seats are available on flights during more reasonable hours" (app. br. at 173) (citation omitted) (emphasis in original). Further, the government misinterprets the regulation's "physical needs" exception and relies upon inapplicable FTR/JTR restrictions, contrary to FAR 31.205-46(a)(4) (finding 144), which limits the FTR/JTR's applicability (*id*.).

Raytheon alleges that its Travel Policy and WebTE supporting documentation satisfy FAR 31.205-46(b)'s requirement for documentation and justification of the applicable conditions for premium travel (app. br. at 176). The Travel Policy contains the requisite criteria and airfare in excess of standard coach requires approval from an employee's manager, which is documented in the WebTE travel expense system (*id*). That system includes the employee's expense statement, trip purpose, business class criteria compliance and the FSS processor's notes. Regardless, contrary to the government's contention, there is no requirement in FAR 31.205-46(b) for documentation and justification on a case by case basis. Raytheon distinguishes *Data-Design Laboratories* as involving a different regulation and stricter requirements for first class airfare. (App. br. at 177-78)

Raytheon contends that:

> [T]here is no requirement -- in FAR 31.205-46(b), Raytheon's Travel Policy, the 2004 McGrath Letter, or even the Government travel regulations – to perform work upon arrival as a condition for allowability for costs in excess of the standard coach fare. Most importantly, nowhere in FAR 31.205-46(b) is there any mention of work.

(App. br. at 178)

Raytheon asserts that, regardless of the foregoing, the government is bound by DCE McGrath's approval of Raytheon's interpretation of the allowability limitation in FAR 31.205-46(b) and of Raytheon's Travel Policy, citing, *inter alia*, *MPR Associates, Inc.*, ASBCA No. 54689, 05-2 BCA ¶ 33,115 (app. br. at 180).

2. Raytheon's Airfare Costs Were Reasonable

Raytheon contends that its airfare costs were reasonable as defined in FAR 31.201-3. Its interpretation and implementation of FAR 31.205-46(b) was reasonable and allowing business class travel on transoceanic flights that met Raytheon's Travel Policy criteria and/or the employee's manager had approved was consistent with standard industry practice. Raytheon implemented the Travel Policy the same way for both commercial and government contracts. The airfare costs did not exceed those that a prudent person would incur in the conduct of competitive business.

Moreover, so long as Raytheon's discounted premium fares were less than the standard coach fare, the government realized a cost savings. (App. br. at 182-86)

Under Raytheon's interpretation of the pre-2010 version of FAR 31.205-46(b), the "lowest customary standard, coach, or equivalent airfare offered during normal business hours," meant the standard coach fare available to the general public (app. br. at 182). Raytheon asserts that the reasonableness of its interpretation is evident by the fact that, except for DCAA, the government's own representatives so interpreted the regulation contemporaneously. Raytheon states that "[i]t was only **after** FAR 31.205-46 changed in 2010 -- to make unallowable (subject to the previous exceptions) airfare costs 'in excess of the **lowest priced airfare available to the contractor**' **--** that DCMA determined that Raytheon's previously-approved practice was no longer compliant with FAR 31.205-46." (App. br. at 183-84)

Raytheon contends that its interpretation and implementation of the conditions for allowing airfare costs in excess of standard coach fare were also reasonable. In fact, it revised its Travel Policy criteria for transoceanic business class airfare to resolve a disagreement with DCAA, and DCE McGrath approved the revised policy and determined that it complied with FAR 31.205-46(b). (App. br. at 184)

3. The Government has not Met its Burden to Prove the Amount of any Unallowable or Unreasonable Airfare Costs

Raytheon asserts that, for the three audits at issue -- Raytheon Corporate (2008 costs) and RMS (2007 and 2008 costs) -- DCAA questioned all premium airfare costs reviewed, regardless of whether they exceeded the standard coach fare (app. br. at 186). This was erroneous because premium airfare costs that do not exceed the standard coach fare are allowable under FAR 31.205-46(a) and are not subject to the cost allowability limitation in FAR 31.205-46(b) (*id.*).

Moreover, according to Raytheon, it did not have discounts on every flight, but DCAA did not determine which, if any, discounts applied (app. br. at 186). Instead, for the RMS audits, DCAA applied an average discount and, for the Raytheon Corporate audit, it misapplied an assumed discount and ratio against an inappropriate, inapplicable coach fare (app. br. at 186-87).

Raytheon states that the government did not present any testimony by the DCAA auditors who performed the RMS audits and instead relied upon audit work papers that are not self-explanatory and DACO Bradley did not explain (app. br. at 187).

C. The Parties' Replies

The parties' replies reiterate or augment their prior contentions. To mention just a few of their points, the government delves into legislative history to support its arguments (gov't reply br. at 92-95). It contends that, in *Raytheon 58212*, the Board already found

FAR 31.205-46(b) to be ambiguous and that the government's interpretation was reasonable (gov't reply br. at 68). It also alleges that DCAA's quantum analysis was reasonable and sufficient for the Board to make a fair and reasonable approximation of damages (gov't reply br. at 46-47).

Raytheon replies that the plain language of both the governing statute and FAR 31.205-46(b) make it clear that the benchmark for unallowable costs is the standard coach fare available to the general public (app. reply br. at 30). While the regulation does not use the term "general public," "the words 'customary,' 'standard,' and 'offered' are all consistent with a public fare and inconsistent with a contractor-specific fare" (app. reply br. at 33). The Board is not to attempt to discern regulatory intent when the regulation is clear on its face (*id*.). Raytheon also asserts that, in *Raytheon 58212*, the Board did not find the regulation to be ambiguous (*id*. at 34). Rather, there were no determinations of ambiguity, of the reasonableness of each party's interpretation, or whether extrinsic evidence could be examined. Raytheon adds that, if the Board were to deem that legislative history is relevant, it supports Raytheon's interpretation. (*Id*. at 34-35)

Raytheon stresses that, under FAR 31.205-46(b), airfare costs are unallowable only to the extent that they exceed the "lowest customary standard, coach, or equivalent airfare offered during normal business hours," *i.e.*, the publicly available coach fare. "[B]ecause Raytheon never charged the Government more than the publicly available coach fare, it did not exceed the ceiling of subsection (b) and the costs are generally allowable pursuant to subsection (a)." (App. reply br. at 38)

Thus, the Board need not address the government's criticisms of Raytheon's Travel Policy because there are no excess costs to disallow (app. reply br. at 38). If the Policy were relevant, it complied with FAR 31.205-46(b) and the government is bound by its prior, contemporaneous, reasonable, authorized determination that it did so (*id*. at 40-41).

II. The Government Misreads the Pre-2010 Version of FAR 31.205-46(b)

The parties agree that the version of FAR 31.205-46(b) in effect from April 9, 1986 until January 10, 2010, and at all times relevant to the costs at issue, is the version that governs these appeals (*see* GPFF ¶ 275, APFF ¶ 150). Indeed, "[t]he regulations applicable to a contract are those in effect at the time the contract was executed." *Boeing Co*., ASBCA Nos. 57549, 57563, 13 BCA ¶ 35,427 at 173,786 (citation omitted); *see also* finding 15 (the Allowable Cost and Payment clause incorporated into the contracts at issue). The parties disagree about the proper interpretation of the regulation.

We are to "construe a regulation in the same manner as we construe a statute, by ascertaining its plain meaning." *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346-47 (Fed. Cir. 2005) (citations omitted). We must look at a regulation's "plain language and consider the terms in accordance with their common meaning." *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997) (citations omitted).

The disputed phrase in the pre-2010 version of FAR 31.205-46(b) is: "Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable [with exceptions]." Both parties first contend that the language is plain, despite their subsequent excursions into regulatory history. When a regulation's language is plain, "[i]t is well-settled that a tribunal is not to resort to the history of the drafting of a regulation . . . in construing an unambiguous regulation," except in rare circumstances, not present here. *SWR, Inc*., ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 174,227, n.3.

Raytheon persuasively presents dictionary definitions of "customary," "standard," and "offered" in support of their common meaning and Raytheon's contention that they are all consistent with a public fare and inconsistent with a contractor-specific fare (app. br. at 164, app. reply br. at 30, 32-33). In connection with the governing statute, 10 U.S.C. § 2324(e)(1)(J), which makes "[c]osts for travel by commercial aircraft which exceed the amount of the *standard commercial fare*" unallowable (emphasis added), Raytheon cites to the FAR definition of "commercial item," which associates "commercial" with the "general public." *See* FAR 2.101. The government counters that, in accordance with the promulgators' intent, the regulation's plain language "must be read as applicable to the coach airfare actually available to a contractor" (gov't reply br. at 90). It relies upon the word "lowest" in the regulation as allegedly modifying not only "customary standard" but also the words "coach" and "equivalent" airfare (*id*. at 91).

Raytheon replies that "lowest" applies only to the words that immediately follow it -- "customary standard." Raytheon notes that even if "lowest" referred to "customary standard," "coach" and "equivalent" airfare, this does not resolve whether the terms apply to the lowest fare available to the general public or to each individual contractor. Raytheon points out that, if the promulgators had intended the interpretation of FAR 31.205-46(b) advanced by the government, they could have so drafted the regulation, as they did in the current version and with other subsections of pre-2010 FAR 31.205-46, which directly referred to contractor-specific costs (app. reply br. at 31 (citing FAR 31.205-46(a)(1) ("Costs incurred by contractor personnel . . . "), FAR 31.205-46(c)(2) ("The costs of travel by contractor-owned, -leased, or –chartered aircraft . . . "), and FAR 31.205-46(d) ("Costs of contractor-owned or leased automobiles . . .")).

In any case, as noted, we examine regulatory intent only if a regulation is ambiguous. We evaluate alleged ambiguity in a regulation similarly to our consideration of an alleged ambiguity in a contract provision. *See BAE Systems Information & Electronic Systems Integration, Inc*., ASBCA No. 44832, 03-1 BCA ¶ 32,193 at 159,116. As with a contract, for a regulation to be ambiguous, each party's interpretation must be reasonable. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). The government states that, in *Raytheon 58212*, the Board found that the government's interpretation of the pre-2010 version of FAR 31.205-46(b) was reasonable and the regulation was ambiguous. However, in *Raytheon 58212* there was no determination of reasonableness or of ambiguity. Rather, the Board concluded that it was presented with a

question of fact as to the reasonableness of each party's interpretation of FAR 31.205-46(b) and that there could be "no determination on a motion for partial summary judgment of ambiguity and no determination as to whether extrinsic evidence may be examined in resolving the meaning of the disputed language . . . ." *Raytheon 58212*, 15-1 BCA ¶ 35,999 at 175,864.

In fact, while Raytheon's interpretation of the pre-2010 version of FAR 31.205-46(b) as referring to a standard coach fare available to the general public is reasonable, the government's interpretation is not reasonable. As noted, the governing statute makes commercial aircraft travel costs that exceed the "standard commercial fare" unallowable. It does not refer to any negotiated airfare available to a particular contractor. Similarly, the pre-2010 implementing regulation, FAR 31.205-46(b), refers to the "lowest customary standard, coach, or equivalent airfare." The government's contention that "[t]his plain language must be read as applicable to the coach airfare actually available to a contractor" (gov't reply br. at 90) is simply incorrect no matter how much the government strains to read that language into the regulation. Moreover, contemporaneously, DCE McGrath and other DCMA officials agreed with Raytheon's reading of the regulation's plain language, despite DCAA's disagreement (findings 149, 151-52, 154, 157, 159-60).

Contrary to the government's stance, its revision of the regulation in 2010 was not a mere clarification, it was a change. If that change were made to apply to the 2007 and 2008 costs in question, it would be an impermissible retroactive change. "Retroactivity is not favored in the law." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). "The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. It is deeply rooted in this Court's jurisprudence . . ." *Landgraf v. USI Film Products*, 511 U.S. 244, 245 (1994).

In sum, 10 U.S.C. § 2324(e)(1)(J), makes airfare costs unallowable if they exceed "the standard commercial fare." The statute does not mention contractor-specific airfare. The pre-2010 FAR 31.205-46(b) implementing regulation does not mention contractor-specific airfare, and there are no words in the regulation that support the government's interpretation, unlike with Raytheon's interpretation. Thus, DCAA's use of Raytheon's discounted airfares as baselines to measure allegedly unallowable costs, rather than standard commercial coach fares, was incorrect.

III. The Government has not Proved that Raytheon's Travel Policy Did Not Comply with FAR 31.205-46(b); the Policy was Reasonable

Under FAR 31.201-2 (a)(1), to be allowable, a cost must be reasonable. The government alleges that Raytheon's Travel Policy during the relevant time periods did not comply with FAR 31.205-46(b)'s exceptions for allowing premium travel and Raytheon's premium airfare costs were unreasonable. Here, when there are no costs above FAR 31.205-46(b)'s allowable threshold, there is no need to evaluate the regulation's

exceptions. In any case, the government has not met its burden to show that Raytheon's Travel Policy did not comply with the regulation (*see*, e.g., findings 172, 219; app. reply br. at 40).

The government cites to *Data-Design Labs*, 85-3 BCA ¶ 18,400, for the proposition that Raytheon had to document the circumstances justifying premium air travel on a case by case basis (gov't br. at 170-72; gov't reply br. at 96-97). As Raytheon points out, *Data-Design* involved a different statute, different regulation, first class airfare, and is otherwise distinguishable. Regardless, even if Raytheon were required to document and justify business class upgrades for tickets that did not exceed the standard coach fare (which we do not find), it did so (*see*, e.g., findings 171, 182, 188, 191-92; app. br. at 171-78). In particular, Raytheon's Travel Policy documented and justified premium airfare under FAR 31.205-46(b)'s exceptions for "travel during unreasonable hours" and "not reasonably adequate for the physical or medical needs of the traveler." Raytheon also reasonably applied a criterion of "no significant rest period" upon arrival. The regulation itself did not state that a traveler must perform work upon arrival. (*See* findings 144, 172-75, 184; app. reply br. at 40, n.26)

Contemporaneously, DCE McGrath endorsed Raytheon's interpretation of FAR 31.205-46(b) and determined that its Travel Policy complied with the regulation. He acted within the scope of his authority in so doing. (Findings 149, 151-52, 156) This binds DCMA and underscores the reasonableness of Raytheon's interpretation and implementation of the cost principle. *MPR Associates, Inc.*, ASBCA No. 54689, 05-2 BCA ¶ 33,115 at 164,112.

IV. Because Raytheon Did Not Charge the Government More Than FAR 31.205-46(b)'s Cost Allowability Cap, There Are No Unallowable Excess Costs

Under FAR 31.205-46 "[c]osts incurred by contractor personnel on official company business are allowable," subject to certain limitations, including those in FAR 31.205-46(b) regarding premium airfare. However, we agree with Raytheon that, by its plain language, the pre-2010 version of FAR 31.205-46(b) does not make premium class travel unallowable *per se*. Rather, it imposes an allowability limitation upon airfare costs that exceed the "lowest customary standard, coach, or equivalent airfare offered during normal business hours," which Raytheon reasonably interprets as a baseline of standard coach fare available to the general public. Therefore, as long as airfare costs do not exceed that limitation, they are not unallowable under FAR 31.205-46. (App. br. at 162) Raytheon represents, without rebuttal, that it "never charged the [g]overnment more than the publicly available coach fare" (app. reply br. at 38) and "there are no costs above the subsection (b) threshold" (*id*. and *see* finding 172).

The Board's quantum decision regarding another cost regulation, FAR 31.205-6(o) (Postretirement benefits other than pensions (PRB)) is apt. There, the Board concluded that "the government suffered no damages" and that the cost disallowance in question was

improper. *Northrop Grumman Corp*., ASBCA No. 60190, 17-1 BCA ¶ 36,800 at 179,365, *reaffirmed*, 18-1 BCA ¶ 36,947, *aff'd, Secretary of Defense v. Northrop Grumman*, 942 F.3d 1134 (Fed. Cir. 2019). The Board stated: "We consider that FAR 31.205-6(o), properly construed, establishes a cost allowability 'ceiling,' and focuses on whether the contractor *overcharged* the government for PRB costs in its relevant cost-related submissions." *Northrop Grumman Corp*., 17-1 BCA ¶ 36,800 at 179,371 (emphasis in original). The Board concluded that "[t]here is no *excess* to disallow." *Id*. at 179,372 (emphasis in original). In reaffirming its decision, the Board explained that "[t]he gravamen of this dispute has always been whether the government was damaged, i.e., in the words, of FAR 31.201-2(c) whether the contractor claimed (or the government paid) any disallowable 'excess' PRB costs as a consequence of appellant's noncompliance. The ultimate overriding fact is that the government did not pay any 'excess.' It cannot overcome that basic fact …" *Northrop Grumman Corp*.,18-1 BCA ¶ 36,947 at 180,043-44.

The same is true in the appeal before us. Raytheon did not claim any airfare costs in excess of the standard coach fare available to the general public[34] and there is no evidence that it charged the government for any costs that it did not incur. We cannot determine on this record whether Raytheon incurred costs in excess of FAR 31.205-46(b)'s "**lowest** customary standard, coach, or equivalent airfare offered during normal business hours" (emphasis added), which neither party illuminates. In any case, the government has not met its burden to prove that it suffered any damages.

Accordingly, the Board need not address Raytheon's challenges to DCAA's calculations of allegedly unallowable premium airfare and Raytheon's assertion that the government did not meet its burden to prove quantum.

DECISION

ASBCA No. 59437, to the extent that it pertains to airfare, and ASBCA Nos. 60057, 60059, 60060, and 60061 are sustained.

[34] The record before us contains non-contemporaneous Raytheon-specific fares estimated by DCAA, and a "standard fare" reported by Raytheon's travel agent, that is apparently the full-fare "Y" booking code. On this record, we accept the "standard fare" as the "lowest customary standard, coach" fare. However, we explicitly limit our holding to the record before us, and do not interpret the FAR as providing that the "Y" fare is the "lowest standard, coach fare."

ASBCA NO. 59437 – RMS' 2007 RECRUITING TRAVEL COSTS

FINDINGS OF FACT CONCERNING RMS' 2007 RECRUITING TRAVEL COSTS

220. FAR 31.205-34, RECRUITMENT COSTS (MAY 1999), quoted more fully below, provides in paragraph (a), subject to inapplicable exceptions, that certain costs are allowable, including "[t]ravel costs of applicants for interviews." FAR 31.205-34(a)(5).

221. The 2007 RMS Audit Report originally questioned $199,715 of RMS' claimed recruiting costs. As set forth below, RMS agreed to withdraw $103,312 of the questioned costs, which pertained to spouses or guests, leaving $96,402 at issue. (Tr. 2/298, 3/74, 197-201; *see* gov't. br. at 113) During incurred cost negotiations, RMS provided additional supporting information concerning certain of its recruiting costs, which DCAA accepted, leaving about $51,000 ultimately at issue (R4, tabs 602-06; tr. 2/299-300; 3/198-99, 205-08).

222. DACO Bradley's June 12, 2014 2007 RMS COFD disallowed $50,434 in airfare costs claimed for interviewees traveling to RMS' Tucson, Arizona headquarters as unallowable under FAR 31.201-2 for lack of supporting documentation, and $1,002 as excessive and unreasonable on the ground that the costs pertained to duplicate tickets. The DACO stated that the information RMS supplied did not show that interviews were actually completed or establish that the costs were for interviewees and not for their guests. (App. supp. R4, tab 277 at 4543, 4546-47)[35] As noted, RMS' appeal from this COFD was docketed as ASBCA No. 59437.

223. The hiring events at issue typically brought in hundreds of applicants for interviews, which occurred at RMS or local hotels. RMS paid for the applicants' travel costs, including flights and hotels. As DACO Bradley acknowledged, RMS provided documentation to show that the costs were incurred and paid. (Tr. 4/203) For the first part of 2007, RMS also paid the travel costs for certain interviewees to bring a guest. RMS reimbursed these costs as part of its recruiting efforts for certain positions because accepting a job at RMS often meant relocating the applicant's family. RMS ultimately voluntarily withdrew the travel costs for guests from its 2007 incurred cost proposal. (App. supp. R4, tab 256 at 3967, tab 260 at 4040; tr. 3/55-56, 74, 198; AUPFF ¶ 259)

224. RMS provided documentation to support its 2007 recruiting travel costs, including: interview and hiring event schedules; applicant travel expense statements; screen shots from its Human Resources (HR) system, "RAYCATS," showing that the individuals applied for positions at RMS and submitted resumes; other RAYCATS tracking records; HR expense reimbursement records; relocation documents; medical clearance documents; background application documents; American Express statements

[35] Although the decision also cited FAR 31.205-33, PROFESSIONAL AND CONSULTANT SERVICE COSTS (AUG 2003), it did not address that regulation.

itemizing the applicants' air fare charges; and hotel invoices itemizing the applicants' hotel charges. (App. supp. R4, tab 83 at 1169-1215, tab 84, tab 256 at 3967, tab 260 at 4040; tr. 3/56-59, 62, 79)

225. DCAA nevertheless concluded, with a few exceptions, that there was insufficient support to establish that the individuals whose costs were in question actually participated in an interview and that "interview panels" were completed, making the costs unreasonable in DCAA's view (app. supp. R4, tab 260 at 4041; tr. 4/204, 208). For example, DCAA questioned, and the COFD disallowed, airfare costs for four interviewees (app. supp. R4, tab 375 at 6322-24). They flew to Tucson around June 19, 2007 for a hiring event held by RMS at the Westin La Paloma hotel. The supporting documentation submitted to DCAA showed that they had submitted their resumes and stayed at the hotel. (App. supp. R4, tab 84 at 1241, 1243-44, 1246, 1279, 1281, 1295, 1297; tr. 3/ 59-61, 63-66) The government wanted an initialed "Travel Interview Reimbursement Form," submitted by some of the interviewees (*see*, e.g., R4, tabs 603-604 at 109620; app. supp. R4, tab 84 at 1240, 1286; tr. 3/57). Otherwise, the government did not accept that the individual was brought in by RMS for an interview. However, submission of this form was an exception to the regular practice. (*See* tr. 3/76-77)

226. Of the $1,002 in recruiting travel costs questioned as excessive in the 2007 RMS COFD (finding 222), DCAA later accepted $673 pertaining to one interviewee, leaving only $329 in airfare costs for one interviewee in question. DCAA was concerned that the individual was an interviewee and a spouse and sought reimbursement in both capacities. (Tr. 3/203-04) In its response to DCAA's draft audit report, RMS noted that one individual had expensed two trips, one trip as a spouse and a second trip as an interviewee (app. supp. R4, tab 260 at 4040).

227. As noted, RMS ultimately agreed to withdraw costs for spouses and guests. If the challenged $329 refers to the referenced interviewee as a spouse, and it was not withdrawn, the amount is not material, and the parties are to agree to an adjustment in the government's favor as they deem to be the most practical.

DISCUSSION OF RMS' 2007 RECRUITING TRAVEL COSTS

I. The Parties' Contentions

A. The Government's Contentions

DCMA alleges that claimed travel costs related to RMS' recruiting are unallowable because "(1) RMS failed to provide adequate support showing potential employees actually were interviewees for a position – as opposed to spouses or guests ($51,107), and (2) several 'duplicate' airline tickets were identified for the same prospective employee ($329)" (gov't br. at 112-13).

B. Raytheon's Contentions

Raytheon contends that the questioned costs are expressly allowable under FAR 31.205-34(a)(5), which states that recruiting costs are allowable and does not specify any particular type of documentation in support of claimed costs. Raytheon asserts that it provided ample documentation and that there is no basis in the FAR for the government's requiring documentation signed by the interviewee to prove that an interview occurred. The government is merely speculating that the interviews never took place or that the costs were for guests, regardless of the fact that RMS voluntarily withdrew guest costs. In any case, RMS incurred the guest costs as part of its efforts to encourage applicants to relocate their families to Tucson and FAR 31.205-34 does not make such costs unallowable. (App. br. at 196-98)

C. The Government Failed to Satisfy its Burden of Proof

We conclude that the government has not met its burden to prove that the recruiting costs challenged in the 2007 RMS COFD are unallowable. Any spouse-related costs for the one referenced interviewee are immaterial and can be reimbursed to the government, as the parties see fit, in accordance with RMS' voluntary agreement to withdraw such costs (finding 227).

DECISION

With the exception of any spouse-related costs mentioned above, ASBCA No. 59437, to the extent that it pertains to RMS' recruiting travel costs, is sustained.

ASBCA NOS. 59435, 59436, 60056 - BONUS, INCENTIVE COMPENSATION, AND RESTRICTED STOCK COSTS

FINDINGS OF FACT REGARDING RAYTHEON'S BONUS, INCENTIVE COMPENSATION, AND RESTRICTED STOCK COSTS

228. CACO Forbush's Corporate COFD for 2007 included a claim that bonus, incentive compensation, and restricted stock costs for employees alleged to have engaged in expressly unallowable activities, such as lobbying and corporate development, were themselves expressly unallowable. The CACO found that $681,044 in restricted stock costs were unallowable under FAR 31.205-22, LOBBYING AND POLITICAL ACTIVITY COSTS (*see* finding 16); FAR 31.205-27, ORGANIZATION COSTS (see finding 27); and FAR 31.205-47, COSTS RELATED TO LEGAL AND OTHER PROCEEDINGS. For the most part, the COFD identified the legal proceedings, which did not appear to include anything relevant to any of the appeals at issue in this decision as a whole. (App. supp. R4, tab 279 at 4556, 4563, 4566-67) Indeed, none of the appeals have been described as involving any legal or other proceedings covered by FAR 31.205-47. Neither party discussed that regulation or its alleged relevance. Accordingly, we do not

consider it here or below. As noted, the Board docketed Raytheon's appeal from this COFD as ASBCA No. 59435.

229. CACO Forbush's CAS 405 COFD for 2007 claimed, among other things, that bonus and restricted stock costs for employees alleged to have engaged in expressly unallowable activities were expressly unallowable. He found $570,035 in bonus costs to be expressly unallowable under FAR 31.205-22, FAR 31.205-27, and FAR 31.205-47, and $683,891 in restricted stock costs to be expressly unallowable under those regulations and under FAR 31.205-1, ADVERTISING COSTS. (App. supp. R4, tab 281 at 4573, 4575, 4580-81)[36] As noted, the Board docketed Raytheon's appeal from this COFD as ASBCA No. 59436.

230. CACO Forbush's Corporate COFD for 2008 concluded that $125,280 in incentive compensation costs paid to Raytheon's "Strategic Business Development" employees were expressly unallowable under FAR 31.205-27. He stated that: "[t]hese costs include the applicable employee bonus and incentive compensation for their time spent performing unallowable [A&D] activities. As you know, these determinations relate to matters currently being litigated as part of ASBCA Nos. 57576 et al." (App. supp. R4, tab 364 at 5961). As noted, the Board docketed Raytheon's appeal from this COFD as ASBCA No. 60056. The CACO's 2008 CAS 405 COFD, issued the same day as his Corporate COFD for 2008, did not mention bonus, restricted stock or incentive compensation costs (app. supp. R4, tab 365).

231. The parties resolved some of the matters in dispute. They agree that, for 2007, bonus, restricted stock, incentive compensation costs in the amount of $1,242,895 remain at issue and, for 2008, incentive compensation costs in the amount of $125,280 remain in dispute. (Tr. 7/249, 251-52; *see* finding 14; gov't br. at 115; app. br. at 161 (total of $1,368,175 in dispute)).

DISCUSSION OF RAYTHEON'S BONUS, INCENTIVE COMPENSATION, AND RESTRICTED STOCK COSTS

I. The Parties' Contentions

A. The Government's Contentions

The government contends that the Board's decision in *Raytheon Co.*, ASBCA No. 57576 *et al.*, 15-1 BCA ¶ 36,043 (CAS 405 decision), is controlling (gov't br. at 116). There the Board held that bonus, incentive compensation, and restricted stock awards paid to Raytheon employees performing unallowable activities under FAR 31.205-47 were

[36] The COFD appears to be inconsistent concerning the bonus and restricted stock amounts stated to be expressly unallowable (*see* above compared to chart at app. supp. R4, tab 281 at 4575), but this is immaterial in view of their settlement of some of the issues (finding 231) and of our decision, below.

expressly unallowable and that the same categories of payments to employees performing unallowable activities under FAR 31.205-22 and FAR 31.205-27 were unallowable. 15-1 BCA ¶ 36,042 at 176,052.

B. Appellant's Contentions

Raytheon contends that that the government has failed to meet its burden to prove that Raytheon owes it $1,368,175 in allegedly unallowable bonus, incentive compensation, and restricted stock awards. It asserts that the evidence of record is paltry and insufficient to prove the government's claim. (App. br. at 161-62)

The Board's Resolution

The circumstances of these appeals differ significantly from those of the CAS 405 decision. Unlike in that decision, we have not found any claimed costs to be unallowable under FAR 31.205-22, FAR 31.205-27, or FAR 31.205-47. Thus, the employees in question were not performing unallowable activities and any bonus, incentive compensation or restricted stock payments associated with their allowable activities are not expressly unallowable or unallowable.

DECISION

We sustain ASBCA Nos. 59435, 59436, and 60056, to the extent they cover bonus, incentive compensation and restricted stock awards.

ASBCA NO. 60056—"SOUVENIR" OR "REMINDER ITEMS" COSTS

FINDINGS OF FACT REGARDING "SOUVENIR" OR "REMINDER ITEMS" COSTS

232. The following statute and regulations are pertinent:

Title 10 U.S.C. § 2324 (e)(1) provides that certain specific costs are "not allowable," including, under subsection (H), "Costs of advertising designed to promote the contractor or its products," and, under subsection (I), "Costs of promotional items and memorabilia, including models, gifts, and souvenirs."

FAR 31.205-1, PUBLIC RELATIONS AND ADVERTISING COSTS (AUG 2003), provides in part[37]:

> (a) "Public relations" means all functions and activities dedicated to-

[37] This FAR provision has changed but we include the one in effect during the period at issue.

(1) *Maintaining, protecting, and enhancing the image of a concern* or its products; or

(2) *Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public.* The term public relations includes activities associated with areas such as advertising, customer relations, etc.

(b) Advertising means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) . . . . . *Advertising media include but are not limited to conventions, exhibits, free goods, samples . . . .*

. . . .

(d) The *only allowable advertising costs are those that are* --

. . . .

(2) Costs of activities to promote sales of products normally sold to the U.S. Government, including trade shows . . . are allowable . . . . However, such costs do not include the costs of memorabilia (e.g. models, gifts and souvenirs)…

(3) *Allowable in accordance with 31.205-34*.

(e) Allowable public relations costs include the following:

. . . . [list of various activities]

(f) *Unallowable public relations and advertising costs include* the following:

. . . . [list of various activities]

(5) *Costs of promotional material*, motion pictures, videotapes, brochures, *handouts*, magazines, and other media that are *designed to call favorable attention to the contractor and its activities.*

(6) Costs of *souvenirs*, models, *imprinted clothing*, buttons, *and other mementos* provided to customers or the public.

(Emphasis added)

FAR 31.205-34, RECRUITMENT COSTS (MAY 1999), provides in part:

(a) Subject to paragraph (b) of this subsection, the following costs are allowable:

(1) Costs of help-wanted advertising.

(2) Costs of operating an employment office needed to secure and maintain an adequate labor force.

(3) Costs of operating an aptitude and educational testing program.

(4) Travel costs of employees engaged in recruiting personnel.

(5) Travel costs of applicants for interviews.

(6) Costs for employment agencies, not in excess of standard commercial rates.

(b) *Help-wanted advertising costs are unallowable if the advertising-*

(1) *Does not describe specific positions or classes of positions*; or

(2) Includes material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities.

(Emphasis added)

233. Under the category "Recruitment Reminder Items" (RRI) CACO Forbush's 2008 Corporate COFD disallowed $17,780 in costs on the ground that they "related to items given away by Raytheon as souvenirs" and "constitute[d] unallowable promotional costs under FAR 31.205-1" (app. supp. R4, tab 364 at 5961).

234. The costs at issue are 15% of Raytheon's RRI costs incurred for 2008. The costs apparently include purchase costs and the costs of handling and displaying the items. (*See*, e.g., R4, tab 646) Raytheon voluntarily withdrew 85% of the costs consistent with negotiated resolutions reached with DCMA in prior years, including for 2007, even though, in Raytheon's view, the costs were allowable (*see, e.g*., app. supp. R4, tab 32 at 251; tr. 8/35).

235. No resolution was reached for 2008. DCAA considered the 2008 costs in question to be expressly unallowable but, although he thought so too, CACO Forbush did not so claim in view of a June 17, 2013 letter to Raytheon from predecessor CACO Holt, entitled "Contracting Officer Determination on Allowability -- Public Relations and Advertising Costs-(FAR 31.205-1)," which stated that DCMA would consider such costs to be expressly unallowable beginning with Raytheon's CY 2009. (R4, tab 646; app. supp. R4, tab 331 at 5201-02; app. supp. R4, tab 364 at 5961; tr. 7/256-57, 360-62, 8/35-37)

236. The RRIs are items such as mouse pads, pens, pencils, coffee mugs, and possibly T-shirts, that bear Raytheon's logo, with at least some, if not all, showing its website, which, if accessed, would enable checking for available jobs (app. supp. R4, tab 331 at 5201; tr. 2/71-72, 8/33-34). Raytheon hands the items out at collegiate job fairs to "kids that come up to the booth as a way to get them aware of the Raytheon name" (tr. 8/33). At these and other events, Raytheon tries to solicit young engineering students to replenish the company's acquisition workforce. The items are not handed out to the general public outside of the job fairs. (App. supp. R4, tab 331 at 5201; tr. 2/71-72, 75, 8/34) However, there is no evidence that the physical items themselves describe specific positions or classes of positions or that they are unique to students or recruits. Mr. Michael Downing, Raytheon's Senior Manager of Government Accounting at the Corporate office, agreed that the RRIs could be characterized as souvenirs, reminder items, giveaways and mementos (tr. 8/6, 44).

237. As noted, the Board docketed Raytheon's appeal from the 2008 Corporate COFD as ASBCA No. 60056.

DISCUSSION OF "SOUVENIR" OR "REMINDER ITEMS" COSTS

I. The Parties' Contentions

A. The Government's Contentions

The government alleges that Raytheon's voluntary withdrawal of 85% of its RRI costs was a "tacit acknowledgment that these costs are unallowable" (gov't br. at 117). It also alleges that the CACO "determined that the remaining 15% of souvenir costs charged to the Government by Raytheon were expressly unallowable pursuant to FAR 31.205-1 (Public Relations & Advertising Costs)" (*id*.).

The government contends that the costs at issue are for souvenirs or mementos that "fit squarely into the unallowable costs specified in FAR 31.205-1" (gov't br. at 118). It alleges that "[t]he souvenirs are provided to the public or a segment of the public (the attendees of various college fairs and other symposiums), and the purpose of those souvenirs is dedicated to maintaining favorable relations within the definition of public relations" (*id*.). Thus, the cost principle makes both the souvenirs and the related handling activities expressly unallowable (*id.*).

The government asserts that Raytheon's mementos, souvenirs and giveaways are not allowable recruitment costs under FAR 31.205-34, which makes specific costs allowable but not costs of souvenirs for college students, which it does not address. In contrast, FAR 31.205-1 expressly makes souvenirs or mementos for the public or segment of the public and the activities to distribute them unallowable. The government states that "it is also obvious that [the RRI] are literally '**designed to call favorable attention'** to Raytheon in order to attract people to its website." (Gov't br. at 119)[38] The government also relies upon 10 U.S.C. § 2324(e)(1)(H) and (I), quoted in part above (finding 232).

The government concludes that "the Board should find that Raytheon's souvenir reminder items are expressly unallowable" (gov't br. at 120).

B. Appellant's Contentions

Raytheon asserts that the government has not met its burden to prove that the RRI costs at issue are unallowable (app. br. at 198). Raytheon contends that the costs are recruitment costs, which FAR 31.205-34 makes allowable, and that the regulation does not limit the types of allowable costs to those it enumerates (*id.*). Raytheon also alleges that the costs are "fairly 'costs of help-wanted advertising' made allowable by subsection (a)(1)" of FAR 31.205-34 (app. reply br. at 51). On the other hand, Raytheon alleges that the RRIs are neither for public relations nor advertising as defined in FAR 31.205-1 (app. br. at 198; app. reply br. at 50). Rather, their purpose is to encourage candidates to apply for positions at Raytheon and to remind them of Raytheon's recruiting website (app. br. at 198). Further, according to Raytheon, "RRIs are not meant to enhance the image of Raytheon to the public or a segment of the public, and they do not promote the sale of Raytheon's products" (app. br. at 198-99).

Finally, Raytheon notes that CACO Forbush did not find the costs in question to be expressly unallowable or impose penalties (app. br. at 199, n.72). Raytheon asserts that,

[38] The government also alleges that a prior, unappealed COFD involving FAR 31.205-1(f)(5) and (6) pursuant to which RMS paid a penalty (R4, tab 645 at 112352) (business card holders and travel mugs deemed to be expressly unallowable gifts to job applicants) is binding upon RMS and authoritative regarding Raytheon (gov't br. at 119-20). There are no proposed fact findings and no developed record regarding this contention. Under the circumstances, we reject it.

under the circumstances, the Board does not have jurisdiction to do so and the government is seeking an impermissible advisory opinion when it asks the Board to find the costs to be expressly unallowable (*id.*).

II. RRI Costs are Unallowable

First, the government's argument that, due to its prior practice of withdrawing 85% of its RRI costs, Raytheon has tacitly acknowledged that its RRI costs are unallowable, is plainly wrong, as this litigation exemplifies. As we have found, in the past, DCMA and Raytheon resolved their RRI cost dispute with the stated cost allocation, but Raytheon continued to believe that its RRI costs were allowable (finding 234). However, we conclude that the most reasonable reading of the regulations pertinent to this dispute is that the costs of the items in question are unallowable.

FAR 31.205-1(a), upon which the government relies, defines "public relations" as:

> all functions and activities dedicated to –
>
> (1) Maintaining, protecting, and enhancing the image of a concern or its products; or
>
> (2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term public relations includes activities associated with areas such as advertising, customer relations, etc.

Subsection (d) of FAR 31.205-1 lists the "only allowable" advertising costs. Items such as the RRI items in question are not named. In fact, by way of analogy, the regulation specifies in subsection (d)(2), regarding costs of activities to promote product sales, that "such costs do not include the costs of memorabilia (e.g. models, gifts, and souvenirs) . . . ." However, subsection (d)(3) includes among allowable costs those that are allowable under FAR 31.205-34, addressed below.

Subsection (e) of FAR 31.205-1 lists allowable public relations costs. Items such as the RRI items in question are not covered. Subsection (f) lists "[u]nallowable public relations and advertising costs," including in subsection (5), "[c]osts of promotional material . . . [and] handouts . . . designed to call favorable attention to the contractor and its activities." The items at issue are certainly promotional material designed to call favorable attention to Raytheon. The unallowable costs also include, per subsection (6), "[c]osts of souvenirs, models, imprinted clothing, buttons, and other mementos provided to customers or the public." (Finding 232) We consider that attendees at collegiate job fairs or similar events could reasonably be described as members of the public or, at least, a segment thereof.

Raytheon relies upon FAR 31.205-34, which makes allowable listed recruitment costs. The RRI items in question are not listed. While Raytheon contends that they could fairly be included in subsection (a)(1)'s allowable "[c]osts of help-wanted advertising," subsection (b)(1) states that help-wanted advertising costs are unallowable if the advertising "[d]oes not describe specific positions or classes of positions." While some, if not all, of the disputed items are marked with Raytheon's recruiting website, which would show available jobs if accessed, there is no evidence that the physical items themselves describe specific positions or classes of positions (finding 236). To the extent that the RRI items display the web address for a recruiting webpage containing information regarding job listings, the RRIs conceivably would comply with the spirit of the FAR; however, they do not comply with the FAR as written. We apply the FAR as written. FAR 31.205-34(b)(2) additionally provides that help-wanted advertising costs are unallowable if they "[i]nclude[] material that is not relevant for recruitment purposes, such as extensive illustrations or descriptions of the company's products or capabilities." Thus, the FAR strictly limits allowable help-wanted advertising to advertising describing specific positions or classes of positions without irrelevant material. The RRIs do fit within this narrow definition.

We conclude that, on balance and in practicality, the physical items in question are most properly classified as "souvenirs," which are things "kept as a reminder." Merriam Webster Dictionary, merriam-webster.com, (last visited January 29, 2021). Souvenir costs are not allowable. Indeed, the governing statute provides that "[c]osts of promotional items and memorabilia, including models, gifts, and souvenirs" are not allowable. Title 10 U.S.C. § 2324 (e)(1)(I); (finding 232). The disputed items also fit the categories of unallowable promotional items, memorabilia and mementos.[39] Raytheon's Senior Manager of Government Accounting at the Corporate office agreed that the RRIs could be characterized as souvenirs, reminder items, giveaways and mementos (finding 236).

Accordingly, we deny Raytheon's appeal. However, contrary to the government's assertion that we should conclude that the RRI costs were expressly unallowable, we decline to do so when the CACO and his COFD on appeal did not do so (finding 235). Moreover, this is not an obvious case of unallowability and of a contractor's flaunting the regulations. The parties had operated for years under a negotiated resolution under which Raytheon was allowed to include 15% of its RRI costs in its incurred cost proposals (finding 234). Further, under CACO Holt's June 17, 2013 "Contracting Officer Determination on Allowability-- Public Relations and Advertising Costs-(FAR 31.205-1)," DCMA was not going to consider such costs to be expressly unallowable until 2009 (finding 235), which is after the 2008 year in question.

DECISION

We deny ASBCA No. 60056 to the extent that it covers RRIs.

[39] We need not address whether the items are gifts.

SUMMARY OF DECISIONS

We sustain ASBCA Nos. 59435, 59436, 59438, 60056, 60057, 60058, 60059, 60060, and 60061. Except for the immaterial amount of spousal travel costs stated, we sustain ASBCA No. 59437. We sustain ASBCA No. 60056 in part, to the extent stated, and deny it to the extent that it covers RRIs.

Dated: February 1, 2021

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 59435, 59436, 59437, 59438, 60056, 60057, 60058, 60059, 60060, 60061, Appeals of Raytheon Company and Raytheon Missile Systems, rendered in conformance with the Board's Charter.

Dated: February 3, 2021

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

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 22, 2020

CBCA 5683

PERNIX SERKA JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

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

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

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

SOMERS, Board Judge.

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

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

In response, DOS stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

I. Standard for Summary Judgment

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

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

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

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

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

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

III. PSJV Attempts to Shift the Risk to the Government

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

A. Cardinal Change

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

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

PSJV asserts a cardinal change occurred here when:

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

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

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

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

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

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

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

B. Constructive Change

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

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

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

C. Constructive Suspension of Work

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

Decision

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

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

In the United States Court of Federal Claims

No. 19-506C
Filed: January 8, 2021
FOR PUBLICATION

BANNUM, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant.

Keywords: Summary Judgment; RCFC 56; Bureau of Prisons; Contract Disputes Act; 41 U.S.C. § 7104; Termination for Convenience; Termination Settlement Proposal

Justin T. Huffman, Camardo Law Firm, P.C., Auburn, NY, for the plaintiff.

P. Davis Oliver, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C., *Monica Barron*, Bureau of Prisons, of counsel, for the defendant.

MEMORANDUM OPINION

***HERTLING*, Judge**

The plaintiff, Bannum, Inc., seeks $317,490.55 in bid preparation and other costs under the Contract Disputes Act, 41 U.S.C. § 7104, resulting from the termination of Bannum's contract. The defendant, the United States, acting through the Bureau of Prisons ("BOP"), terminated its contract with Bannum for convenience, as part of corrective action following a bid protest. Subsequently, the BOP contracting officer rejected Bannum's certified claim, submitted in the form of a termination settlement proposal, which included the costs sought in this case.

The defendant has moved for summary judgment under Rule 56 of the Rules of the Court of Federal Claims ("RCFC"). It argues that the undisputed material facts demonstrate that Bannum is not entitled to recover any costs in connection with the termination of the contract. The Court agrees and grants the defendant's motion for summary judgment.

I. BACKGROUND

In January 2015, the BOP awarded Contract No. DJB200231 to Bannum for residential re-entry services in New Orleans, Louisiana. (ECF 1, ¶ 6.) The incumbent contractor, Volunteers of America Greater New Orleans, Inc. ("VOAGNO"), filed a protest of the award at the Government Accountability Office ("GAO"). (*Id.* ¶ 7.) As a result, contract performance was automatically stayed. (*Id.*)

As a result of VOAGNO's protest, the BOP decided to take corrective action, including reevaluating offerors' proposals and making a new source selection decision. (*Id.* ¶ 8.) The contracting officer identified four issues that necessitated the BOP's corrective action:

> (1) the language in the technical evaluation did not support the overall ratings and risk level for Bannum in the site location and facility evaluation factors; (2) [the contracting officer] failed to consider a statement in Bannum's proposal that qualified its obligation to meet the 120-day availability requirement; (3) the source selection decision relied on an earlier draft of the technical evaluation report and as a result had assigned a higher risk level to Bannum's proposal than was assigned in the final technical evaluation report; and (4) the source selection decision did not fully consider the substance, relative merits, and ratings of each contract submitted for evaluation of past performance.

(ECF 23, App. at 2.)

In February 2015, the GAO dismissed VOAGNO's protest as academic, due to the BOP's proposed corrective action. (ECF 1, ¶ 8; ECF 23, App. at 2.)

In March 2015, Bannum filed its own protest with the GAO, claiming that the BOP's corrective action in response to VOAGNO's protest was improper. (ECF 23, App. at 3.) In June of the same year, the GAO dismissed Bannum's protest, finding that "the concerns raised by the contracting officer reasonably justified the agency's decision to take corrective action." (*Id.* at 10.) The GAO found that "the contracting officer identified an inconsistency in assigning Bannum's proposal a satisfactory rating and low risk under the facility factor in light of the poor state of Bannum's proposed facility . . . ." (*Id.*)

In July 2015, a BOP contracting officer notified Bannum that Contract DJB200231 was terminated in its entirety, for convenience of the government, at no cost to the government. (ECF 1, ¶ 9; *see* ECF 1, Ex. 2.) In that notice, the contracting officer asked Bannum to sign an enclosed bilateral modification to the contract, but Bannum did not sign it. (ECF 1, ¶ 9; ECF 23, App. at 2.)

In August 2015, Bannum filed another protest with the GAO, arguing that the termination of its contract was improper. (ECF 1, ¶ 10; ECF 23, App. at 3.) On November 2, 2015, the GAO dismissed Bannum's second protest. (ECF 1, Ex. 1.)

Three days later, the contracting officer sent to Bannum a second notice of termination of Contract DJB200231 in its entirety for the convenience of the government, at no cost to the government. (ECF 1, ¶ 11; *see id.*, Ex. 3.) The contracting officer enclosed a unilateral modification reflecting the termination of the contract, noting that the termination was the corrective action taken in response to VOAGNO's protest. (*Id.*) The unilateral modification provided that "[t]he termination of Contract DJB200231 reflects a no-cost settlement." (ECF 1,

Ex. 3 at 3.) Bannum, however, had not agreed to any settlement of costs, including a no-cost settlement. (ECF 1, ¶ 12.)

In October 2016, Bannum submitted its final settlement proposal for the termination to the BOP, requesting payment in the amount of $317,490.55. (*Id.* ¶¶ 14-17; *see* ECF 1, Ex. 4 at 31-35.) Bannum's settlement proposal included four types of costs: (1) Other Costs Associated with the Contract ($300,033.31); (2) General and Administrative Expenses ($5020.94); (3) Profit ($5,523.04); and (4) Settlement with Subcontractors ($6,913.26). (ECF 1, ¶ 17.) The category "Other Costs Associated with the Contract" included Bid & Proposal Costs ($5,664.74), Initial/Preparatory Costs ($44,544.68), Protest Costs ($33,596.10), and Estimated Lost Profit and Overhead ($216,727.80). (ECF 1, Ex. 4 at 33.) The settlement proposal form that Bannum submitted to the contracting officer included a box labeled "CERTIFICATE." (*Id.* at 30.) Bannum signed and certified the proposal. (*Id.*)

In response to Bannum's settlement proposal, on November 14, 2016, the contracting officer requested further documentation associated with Bannum's termination costs. (ECF 1, ¶ 18; *see* ECF 1, Ex. 5.) Specifically, the contracting officer requested invoices, proof of payment, and any corresponding retainer agreements or contracts. (ECF 1, Ex. 5 at 2.)

In 2017, the BOP issued a new solicitation seeking to replace the contract it had terminated with Bannum. The BOP eliminated Bannum from the competitive range of the competition. (ECF 23, App. at 7.) The contracting officer had requested updated right-to-use information because he had learned that the proposed property under the contract had been sold.[1] (*Id.*) Bannum responded to the BOP's discussion notices for the New Orleans property and advised that its option to lease the proposed property remained valid, regardless of any sale of the premises. (ECF 24, Ex. 1, Decl. of John D. Rich ¶ 22.) Bannum had not received a notice of termination of the lease from either the original lessor or the successor owner; it still had a valid lease. *(Id.* ¶ 23.) Despite three requests from the BOP contracting officer for updated documentation, Bannum did not provide the requested updated documentation concerning its right to use the proposed site location. (ECF 23, App. at 7.) The contracting officer eliminated Bannum from the competition, and the BOP ultimately awarded VOAGNO a five-year contract. (*Id.*) Bannum protested its exclusion from the competitive range, but the GAO denied the protest. (*Id.*)

In April 2018, the contracting officer issued a final decision regarding Bannum's settlement proposal, concluding that the documents Bannum submitted with its proposal were insufficient to substantiate the costs it had claimed. (ECF 1, Ex. 6 at 2.) The final decision also

[1] The contracting officer was concerned because, in a separate procurement, Bannum had failed to inform him that it had lost the right to use a property in Cincinnati, Ohio until discussions over the procurement were reopened. (ECF 23, App. at 6.) Another BOP contracting officer had also encountered a similar problem when Bannum failed to inform her that it had lost the right to use the proposed property until the information was requested during later discussions. (*Id.*)

noted that, despite the contracting officer's request, Bannum had not provided invoices, proof of payment, and any corresponding retainer agreements or contracts in support of the costs it was seeking in its proposed settlement. (*Id.*) The final decision concluded that the government would pay no costs in connection with the termination of the contract. (*Id.*) The letter informed Bannum that it had no right to appeal the decision administratively, "since Bannum's termination settlement proposal was submitted more than one year after the effective date of the termination." (*Id.*) Bannum alleges that this latter finding was erroneous because it had submitted its termination settlement proposal on October 27, 2016, within one year of the November 5, 2015 effective date of the termination. (ECF 1, ¶ 21.)

In 2019, Bannum filed a complaint in this court challenging the contracting officer's final decision denying Bannum's termination settlement proposal. (ECF 1.) Discovery closed on August 31, 2020. (ECF 20.) Following discovery, the defendant has moved for summary judgment pursuant to RCFC 56. (ECF 23.) The motion has been fully briefed, and the Court determines that oral argument would not assist in the resolution of the motion.

II. JURISDICTION AND STANDARD OF REVIEW

The Tucker Act grants this Court "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). The Court also has jurisdiction to adjudicate claims arising from contracts covered by the Contract Disputes Act ("CDA"), 41 U.S.C. § 7101 *et seq*. *See* 28 U.S.C. § 1491 (a)(2). Portions of Bannum's claim arise under the CDA; others arise directly under the Tucker Act.

Bannum's complaint meets the CDA's threshold requirement of arising under an "express . . . contract . . . made by an executive agency for . . . the procurement of services." 41 U.S.C. § 7102(a)(2). The complaint also satisfies the CDA's jurisdictional requirements that Bannum's certified claim for a sum certain be submitted to and receive a final decision by the contracting officer on the same operative facts and legal theory. *See K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015). Bannum submitted its certified claim in the form of a termination settlement proposal to the BOP contracting officer to recover $317,490.55 in alleged costs, and the contracting officer issued a final decision denying that claim. (ECF 1, Exs. 4 & 6.) Bannum challenges that final decision. The Court reviews a contracting officer's decision *de novo*, according it no deference. 41 U.S.C. § 7104(b)(4).

Under RCFC 56, the Court shall grant summary judgment if the pleadings, affidavits, and evidentiary materials filed in a case reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a).

A material fact is one "that might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists when the finder of fact may reasonably resolve the dispute in favor of either party. *See id.* at 250.

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "'[T]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)). To establish "that a fact cannot be or is genuinely disputed," a party must "cite[ ] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." RCFC 56(c)(1)(A).

One way that a moving party can demonstrate that no material fact is genuinely disputed is by showing that the non-moving party lacks evidence needed to prove an essential element of its claim. *See Celotex Corp.*, 477 U.S. at 322-23 ("[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."). The moving party must do more than merely assert that the non-moving party has not produced enough evidence, but the moving party may show that a fact cannot be genuinely disputed by showing "that an adverse party cannot produce admissible evidence to support the fact." RCFC 56(c)(1); *see Mirror Worlds Techs., LLC v. Facebook, Inc.*, 800 F. App'x 901, 910 (Fed. Cir. 2020) (requiring the moving party to show that sufficient evidence cannot be produced by the non-moving party and denying summary judgment, in part, because discovery was still open).

If the non-moving party responds to such a motion by pointing to sufficient evidence for the Court reasonably to find an essential element of the non-moving party's claim, the Court will find a genuine dispute, deny summary judgment, and allow the non-moving a chance to prove its claim at trial. *See Anderson*, 477 U.S. at 248. The response "must point to an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc). While the non-moving party may defeat a motion for summary judgment with evidence, such as hearsay, that would not be admissible at trial, such evidence must be corroborated or reflect some indicia of reliability. *See Alpha I, L.P. v. United States*, 93 Fed. Cl. 280, 293 (2010), *appeal dismissed in relevant part*, 687 F.3d 1009 (Fed. Cir. 2012), *cert. denied*, 571 U.S. 1094 (2013). Nonetheless, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." RCFC 56(c)(4). If "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,'" and a grant of summary judgment is appropriate. *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)).

III. DISCUSSION

The defendant argues that undisputed material facts demonstrate that Bannum is not entitled to recover any costs in connection with its settlement proposal for the contract termination. The plaintiff counters that there are material facts in dispute.

The Court has before it several submissions from the parties. The plaintiff has submitted a bid protest decision from the GAO (Bannum Inc., B-411074.4 (Comp. Gen. Nov. 2, 2015))

(ECF 1, Ex. 1); two letters from the BOP contracting officer terminating Bannum's contract (ECF 1, Exs. 2 & 3); Bannum's termination settlement proposal (ECF 1, Ex. 4); one letter from the BOP contracting officer requesting further documentation needed to analyze the settlement proposal (ECF 1, Ex. 5); the contracting officer's final decision denying the settlement proposal (ECF 1, Ex. 6); and a declaration of John D. Rich, president and corporate counsel of Bannum (ECF 24, Ex. 1). The defendant has submitted a declaration of Kevin Hoff, the BOP contracting officer (ECF 23, App.); two bid protest decisions from the GAO (Bannum, Inc., B-411074.2, B-411074.3 (Comp. Gen. June 12, 2015); Bannum, Inc., B-411074.5 (Comp. Gen. Oct. 10, 2017)) (ECF 23, App.); an invoice from Lee Demers Construction (*id.*); a complaint filed by Bannum against seven current or former BOP employees at the U.S. District Court for the District of Columbia and that court's ultimate dismissal of the case (*Bannum, Inc. v. Charles E. Samuels, Jr., et al.*, No. 15-1233 (D.D.C. Oct. 28, 2016)) (ECF 25, App.).

The costs that a contractor can recover following a termination for convenience are determined by the terms of the contractual agreement between the contractor and terminating party. *OK's Cascade Co. v. United States*, 97 Fed. Cl. 635, 646 (2011), *aff'd*, 467 F. App'x 888 (Fed. Cir. 2012). The contract between the BOP and Bannum incorporated FAR 52.249-2, which provides that the cost principles in FAR Part 31 shall govern all costs claimed, agreed to, or determined under FAR 52.249-2. *See* FAR 52.249-2(i). The plaintiff bears the burden of proving its termination costs with certainty, "'as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.'" *Corban Indus., Inc. v. United States*, 24 Cl. Ct. 284, 286 (1991) (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987) (quoting *Willems Indus., Inc. v. United States*, 155 Ct. Cl. 360, 376 (1961), *cert. denied*, 370 U.S. 903 (1962))).

If the contractor and the contracting officer fail to agree on an amount to be paid after a contracting officer terminates a contract for convenience, FAR 52.249-2 provides that the contractor shall be paid: (1) "[t]he contract price for completed supplies or services . . . not previously paid for"; (2) "[t]he costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto"; (3) "[t]he cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract"; (4) a fair and reasonable profit; and (5) "[t]he reasonable costs of settlement work terminated." FAR 52.249-2(g).

The plaintiff's settlement proposal, in the form of a certified claim, sought payment for bid and proposal costs, bid protest costs, preparatory costs, general and administrative costs, profit on work performed, settlement expenses, and lost profit and overhead. The plaintiff renews its claim for these costs in this suit. The Court addresses each category of the requested costs in turn.

A. Bid and Proposal Costs

The plaintiff seeks $5,664.74 in bid and proposal costs. (ECF 1, Ex. 4 at 33.) Bannum allegedly incurred these costs in expending time on its proposal and in setting up contractually required systems, such as calendaring, notification, and information systems. (*Id.* at 34 n. ii.)

The costs included a labor charge that Bannum calculated based on estimated hours expended by its Vice President of Operations, Sandy Allen. (*See id.* at 34 n. ii, 47-50.)

FAR Part 31 allows recovery of precontract costs "to the extent that they would have been allowable if incurred after the date of the contract . . . ." FAR 31.205-32.[2] That regulation defines precontract costs as "costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when such incurrence is necessary to comply with the proposed contract delivery schedule." *Id.* This court has found that bid and proposal costs were inherently precontract costs. *AT&T Techs., Inc. v. United States*, 18 Cl. Ct. 315, 323 (1989).

Under FAR 31.205-32, three requirements must be satisfied to recover precontract costs: (1) "[s]uch costs must be incurred prior to the contract definitization"; (2) "they must be incurred directly pursuant to negotiations with the contracting authority"; and (3) "the costs would have been allowable if incurred after the contract was delivered." *Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 47 Fed. Cl. 248, 256 (2000), *aff'd*, 36 F. App'x 650 (Fed. Cir. 2002), *reh'g denied*. The parties do not dispute that Bannum incurred its bid and proposal costs prior to the effective date of the contract.

In *Integrated Logistics*, this court held that the second element of FAR 31.205-32 "mandates that a contractor seek approval from the contracting officer prior to spending." 47 Fed. Cl. at 256. The court reasoned that this approval requirement protected the public fisc:

> This approval, at the very least, requires the contractor to inform the contracting authority of the proposed work, thereby putting the Government on notice, and to await government approval. Without notice the contractor drives the process, and the Government is at the contractor's whim. Without approval, the Government has no say in how monies are spent and no check to prevent abuse. This is not the procedure established by FAR § 31.205-32. That regulation protects the contractor by promising reimbursement for legitimate, sanctioned expenses incurred prior to contract definitization, and protects the Government by obligating the contractor to obtain approval for such expenditures from the contracting authority prior to spending.

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[2] FAR 31.205-18(c) also allows recovery of bid and proposal costs in bid protests brought under 28 U.S.C. § 1491(b)(2), which expressly provides for bid preparation and proposal costs. The plaintiff concedes that it does not raise a claim under § 1491(b)(2) in its complaint and does not argue that FAR 31.205-18(c) provides a basis for Bannum to recover bid and proposal costs.

Id. at 256-57. There is no dispute that Bannum neither had approval from the contracting officer to recover bid and proposal costs nor incurred those costs pursuant to a negotiation with the contracting officer.

Although not challenging the contract termination itself, the plaintiff argues that its bid and proposal costs are recoverable upon termination due to the government's breach of its implied contract to consider bid proposals fairly and honestly. The Court has jurisdiction under the Tucker Act over claims founded upon implied contracts with the United States. 28 U.S.C. § 1491(a)(1); *see also MED Trends, Inc. v. United States*, 101 Fed. Cl. 638, 650 (2011) ("The Federal Circuit has held that this court retains the implied-in-fact contract jurisdiction conferred under section 1491(a)(1), even after the enactment of section 1491(b)(1), at least when the plaintiff has no remedy under section 1491(b)(1).") (citing *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010)). As a specific and narrow category of precontract costs, bid and proposal costs "are the only pre-contract costs recoverable for the government's breach of its implied duty to fairly and honestly consider proposals." *AT&T Techs.*, 18 Cl. Ct. at 323.

Bannum argues that it secured the contract with the BOP through full and open competition, but that after VOAGNO challenged that award, the BOP undermined its own evaluation process by implementing corrective action for reasons not even alleged in VOAGNO's protest. Upon recompeting the contract, Bannum alleges that the BOP improperly eliminated it from the competition altogether.

Aside from assertions and hearsay regarding the antipathy towards it of various BOP officials, whose role in the award and termination of the particular contract at issue is not elaborated, Bannum presents no actual evidence that the BOP did not fairly and honestly consider its proposals. The contracting officer identified four issues that necessitated the BOP's corrective action in the face of VOAGNO's GAO protest:

> (1) the language in the technical evaluation did not support the overall ratings and risk level for Bannum in the site location and facility evaluation factors; (2) [the contracting officer] failed to consider a statement in Bannum's proposal that qualified its obligation to meet the 120-day availability requirement; (3) the source selection decision relied on an earlier draft of the technical evaluation report and as a result had assigned a higher risk level to Bannum's proposal than was assigned in the final technical evaluation report; and (4) the source selection decision did not fully consider the substance, relative merits, and ratings of each contract submitted for evaluation of past performance.

(ECF 23, App. at 2.)

On their face these four issues support the BOP's decision to rescind the initial award and conduct a second procurement. The record is devoid of any indication of bad faith or improper motive on the part of the BOP in taking corrective action following VOAGNO's protest. In fact,

the initial award of the New Orleans contract at issue to Bannum undercuts its assertions of bad faith on the part of the BOP, especially in light of the valid reasons identified by the contracting officer in support of the corrective action taken in the face of VOAGNO's GAO protest.

During the BOP's new solicitation, the contracting officer requested updated right-to-use information because he had learned that the property Bannum proposed to use had been sold, and he and the BOP had prior experiences with Bannum losing its right to use property without notifying the BOP. (*Id.* at 7.) Despite three requests for updated documentation, Bannum did not provide that documentation concerning its right to use the proposed site location. (*Id.*) Accordingly, the BOP eliminated Bannum from the competitive range for the new solicitation. (*Id.*)

Bannum does not dispute that it failed to provide the information requested by the BOP. The plaintiff has thus failed to support its claim that the defendant breached its implied duty to consider Bannum's proposal fairly and honestly. Instead, during the new solicitation, the plaintiff failed to submit updated right-to-use information after repeated requests, resulting in Bannum's elimination from the competitive range. In considering the proposals, the contracting officer eliminated Bannum on account of its own inaction, not due to a refusal by the contracting officer to treat Bannum's proposal fairly.

Without the defendant's breach of its duty, the plaintiff is left to rely solely on FAR Part 31 as the basis for its effort to recoup bid and proposal costs. Because Bannum did not seek the contracting officer's approval for bid and proposal costs, these costs are not recoverable as a matter of law because they are not recoverable precontract costs under FAR Part 31.

There are no material facts in dispute regarding the plaintiff's bid and proposal costs, and the plaintiff presents no legal basis to recover those costs. The plaintiff's contention that the defendant did not fairly and honestly consider its proposals is unsupported. Accordingly, the plaintiff cannot recover its bid and proposal costs, whether the claim is considered under § 1491(a)(1) or the CDA.

B. Bid Protest Costs

The plaintiff seeks $33,596.10 in costs incurred during its bid protests at the GAO. (ECF 1, Ex. 4 at 33.) Most of the bid protest costs are legal fees, but the total also includes $261.82 of costs attributed to Bannum's home office. (*Id.* at 33, 35.)

There is no dispute that bid protest costs are not included in the termination for convenience provisions of the FAR. *See* FAR 52.249-2(g). The defendant argues that there is no legal basis for Bannum to recover its bid protest costs. Bannum incurred these costs challenging the termination of the contract at the GAO; that challenge failed.

The plaintiff again argues that its bid protest costs are recoverable because the BOP breached an implied contract to consider Bannum's bid fairly and honestly. The plaintiff uses the same general assertions the Court described in the preceding section. Among these assertions is that the BOP undermined its own evaluation process and as a result improperly

eliminated Bannum from the competition. This argument fails for the same reason explained above: the contracting officer identified issues with Bannum's bid necessitating the BOP's corrective action, and the contracting officer eliminated Bannum from the competition for the new solicitation because of Bannum's own inaction. The plaintiff has not supported its claim that the defendant breached its duty to consider Bannum's bid fairly and honestly.

Because there is no dispute that bid protest costs are not allowable under the termination for convenience clause as a matter of law, and because the plaintiff does not provide support for its claim that the defendant breached its implied duty to consider Bannum's bid fairly and honestly, the plaintiff cannot recover its bid protest costs.

C. Preparatory Costs

The plaintiff seeks $44,544.68 in initial and preparatory costs. (ECF 1, Ex. 4 at 33.) Bannum's claims for preparatory costs fall into six categories: (1) the estimated hours spent by Bannum Vice President of Operations, Sandy Allen; (2) the amount paid to Lee Demers Construction for alterations to Bannum's New Orleans facility; (3) the charges made on Bannum's American Express business card for the storage and transportation of beds, equipment, furniture, office items, and the like; (4) the non-refundable deposit made to Fortune One Property for the New Orleans facility; (5) the fees incurred in setting up a limited liability company ("LLC") for the New Orleans facility; and (6) delivery costs associated with the contract. (*Id.* at 34-35.)

The defendant acknowledges that these costs are recoverable after a termination for convenience. *See* FAR 52.249-2(g); FAR 31.205-42. The defendant argues, however, that the plaintiff has failed to provide the documentation to justify and support its claims. All that Bannum has submitted in support of its claims for these costs is a spreadsheet it prepared based on its general ledger. Bannum's summary of costs from its general ledger, the defendant argues, is insufficient to support the amounts it claims for these preparatory costs. The spreadsheet is unverified; the plaintiff has not provided any explanation as to how it prepared the spreadsheet, who prepared it, or what source documents underlie the figures.

The plaintiff bears the burden of proving its termination costs with certainty. *Corban Indus.*, 24 Cl. Ct. at 286. Bannum submitted a summary of costs from its general ledger in support of its termination settlement proposal in each of the preparatory-cost categories. (*See* ECF 1, Ex. 4 at 45-54.) As part of that submission, a spreadsheet noted the "Total Estimated Hours" that Ms. Allen allegedly expended on the terminated contract. (*Id.* at 47.) The spreadsheet noted an estimate of hours spent on each individual task, along with Ms. Allen's wage rate of $22.11 per hour. (*Id.*) Bannum has not provided the basis for Ms. Allen's wage rate, such as an explanation of its method of calculating the rate. To support its claim for these costs, Bannum has not submitted a declaration from Ms. Allen in support of the hours claimed, her pay stub, or any other documentation. While Mr. Rich does attest to Ms. Allen's wage rate

(ECF 24, Ex. 1, ¶ 28), and while that sworn attestation might be enough to support the wage rate, the number of hours remains unsupported.[3]

The summary of costs also included $27,720 that Bannum allegedly paid to Lee Demers Construction for alterations to the New Orleans facility. (ECF 1, Ex. 4 at 52.) The defendant obtained an invoice from Lee Demers Construction to support Bannum's claim of construction expenses, but the invoice notes only a request to Bannum for a deposit of $27,000; it labels John Rich as the intended recipient but does not bear any mark indicating a returned payment. (*See* ECF 23, App. at 23.) Despite the defendant's subpoena request for payment documentation, Lee Demers Construction produced no proof that the plaintiff paid the invoice. (ECF 25 at 9.) The plaintiff likewise provided no payment documentation beyond the spreadsheet to show that it had paid the invoice. The defendant argues, and the Court agrees, that in the absence of documentation showing that Bannum has paid the invoice, an invoice requesting payment of a deposit suggests that the more likely explanation is that the construction firm did not perform alterations.

Similarly, Bannum has not provided payment documentation for any of the remaining initial and preparatory costs; instead, it relies on the spreadsheet it prepared itself and submitted to the BOP and again to the Court in support of its complaint. The Court is confronted with a spreadsheet of alleged costs without any explanation of the method of its preparation or declaration attesting either to that method or to its accuracy. Despite the contracting officer's request for documentation for the costs claimed (ECF 1, Ex. 5), the plaintiff did not submit to the BOP payroll records, timesheets, invoices, proof of payment, contracts, or any other source

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[3] Under a schedule proposed by the parties and accepted by the Court, discovery in the case was initiated in October 2019 and was due to conclude at the end of April 2020. (ECF 12.) On the date discovery was due to conclude, the parties jointly moved to extend the deadline to complete discovery until the end of August 2020. (ECF 16.) That same day, the Court granted the parties' motion, again accepted the parties' proposed schedule, and extended discovery through August 2020. In doing so, the Court advised the parties that further extensions of the discovery deadline would not be forthcoming. (ECF 17.) Shortly before the revised closing date of discovery, the plaintiff moved to extend discovery to the end of October 2020. Among the issues that remained outstanding was Ms. Allen's deposition. (ECF 18.) The plaintiff indicated that Ms. Allen, the plaintiff's own employee, was unavailable for a deposition for several weeks due to "a personal matter." The defendant opposed the motion. (ECF 19.) The Court denied the plaintiff's motion because the plaintiff had failed to explain why additional time was necessary to complete discovery. (ECF 20.) With respect specifically to Ms. Allen's deposition, the Court noted that simply asserting "a personal matter" did not demonstrate good cause. The Court allowed the plaintiff to renew its motion, including under seal if needed to protect private or health information, to extend discovery in order to allow for Ms. Allen's deposition if the plaintiff could provide an explanation for Ms. Allen's unavailability sufficient to show good cause to extend the deadline for that purpose. The plaintiff never renewed its motion in order to take Ms. Allen's deposition and did not submit a declaration of Ms. Allen in response to the defendant's motion for summary judgment.

documentation in support of its claimed costs. Bannum has failed to produce any such documentation during discovery and has not provided any to the Court in opposition to the defendant's motion for summary judgment.

Instead, Bannum continues to rely on the spreadsheet it prepared and on a declaration by its president, John Rich. Mr. Rich does not indicate that he prepared the spreadsheet or that he has personal knowledge of any of the costs it includes. He notes that he is "fully familiar" with the matters to which he attests (ECF 24, Ex. 1, Decl. of John D. Rich ¶ 2) but fails to explain how the spreadsheet was prepared, what documentation was consulted in its preparation, or what documentation is available to support its contents. It is possible the spreadsheet could have raised disputed issues of material fact, a question the Court does not resolve, if it had been verified in some manner or had supporting materials appended. Mr. Rich, however, did not verify the spreadsheet, and no one else has done so either.

The defendant cites to authority involving similar pricing data to support its motion for summary judgment. In reviewing an Armed Services Board of Contract Appeals decision, the Federal Circuit recently found that the Board did not err in finding that a contractor had failed to prove the reasonableness of its costs. *Kellogg Brown & Root Servs., Inc. v. Sec'y of the Army*, 973 F.3d 1366 (Fed. Cir. 2020). The case involved a claim for equitable adjustments for which the reasonableness of cost was at issue. The Federal Circuit found that the contractor failed to support the reasonableness of its double-handling costs with any record evidence. *Id.* at 1374. The contractor had submitted only spreadsheets summarizing monthly costs but never submitted pricing data from other sources. *Id.* Additionally, the contractor's description of the work performed lacked necessary detail. *Id.* Likewise, in *White Buffalo Constr., Inc. v. United States*, 52 Fed. Cl. 1, *appeal dismissed*, 45 F. App'x 906 (Fed. Cir. 2002), this court held that "[a] mere estimation performed years later of hours believed to be worked" is insufficient in light of plaintiff's "burden of proving that these wages were actually incurred." *Id.* at 13. This court similarly found that it could not rely on general ledgers that lacked both explanation and supporting documentation for the information contained in those ledgers. *See Englewood Terrace Ltd. P'ship v. United States*, 113 Fed. Cl. 718, 739 (2013), *aff'd*, 629 F. App'x 977 (Fed. Cir. 2015).

The plaintiff distinguishes these cases, noting that *Kellogg* was not decided in the context of a summary judgment motion and *White Buffalo* was resolved at trial. The court decided *Englewood Terrace* following a remand from the Federal Circuit on one portion of the damages calculation previously determined at trial; the court reviewed the trial record and additional submissions of the parties on remand. *Id.* at 719-20. The Court recognizes also that the analysis in *Kellogg* did not stand on the lack of record evidence alone. The Federal Circuit considered several other deficiencies, not relevant here, in the contractor's cost data. *See Kellogg*, 973 F.3d at 1374. Additionally, the *Kellogg* court was limited by the standard of review on appeal. The reasonableness of a cost, as a finding of fact, could have been set aside only if it was "'(A) fraudulent, arbitrary, capricious; (B) so grossly erroneous as to necessarily imply bad faith; or (C) not supported by substantial evidence.'" *Id.* at 1370 (quoting 41 U.S.C. § 7107(b)).

Nonetheless, the Court finds the reasoning in these cases persuasive. It is undisputed that the plaintiff has the burden to prove its termination costs with more than mere speculation. *See*

Corban Indus., 24 Cl. Ct. at 286. In *Corban*, a decision on a motion for summary judgment, the "plaintiff provided no cost information, nor explained why it was unable to separate and document its costs." *Id.* at 287. The court granted summary judgment "insofar as plaintiff's failure to raise a genuine issue concerning the absence of evidence of costs of materials and plaintiff's failure to explain its inability to produce this evidence preclude plaintiff from recovering termination costs for materials, including profit." *Id.* at 288.

In this case, Bannum has not produced records supporting the costs it has claimed, despite having been requested to do so by the contracting officer and again to address the sufficiency of the records supporting its claims before this Court. Bannum also does not claim to have further proof of its costs to present at a later stage of litigation; instead, it argues only that the information summarized from its general ledger and contained in the spreadsheet is adequate to support its claim for termination costs, at least at the summary judgment stage. Bannum's summary of costs, however, provides only a spreadsheet with various costs and prices, noting an "Explanation of Costs" in single phrases, such as "Moving & Storage Costs" or "LLC for New Orleans Contract." (ECF 1, Ex. 4 at 52.) The spreadsheet provides only general estimates of Ms. Allen's time. (*Id.* at 47-50.) The plaintiff does not support any of the cost categories with other sources beyond these spreadsheets.

Spreadsheets in the control of and prepared by the claimant are inadequate without supporting receipts of other evidence, or at least some explanation by the person who prepared them to explain how they were prepared and how the information in them was validated. Such documents are easy to manufacture and manipulate. There is no evidence that Bannum has manipulated the spreadsheets presented in support of its claimed costs, and the Court does not suggest that it has; yet, there is likewise no evidence contemporaneous with those costs to support them. Companies do not do business without receipts, contracts, documentation of costs, and the like. And companies do not remain in business by failing to maintain such records, at least for as long as the tax man may be able to come in and check the books.

The "best evidence" rule, Rule 1002 of the Federal Rules of Evidence ("FRE"), similarly requires the original records to support a claim when a party seeks to prove the contents of a writing. FRE 1002; *RN Expertise, Inc. v. United States*, 97 Fed. Cl. 460, 473 (2011); *see also Bendix Corp. v. United States*, 220 Ct. Cl. 507, 519 (1979) ("It is well settled, under the best evidence rule, that in proving the contents of a document, the document itself must be produced unless it is shown to be unavailable through no fault of the proponent."). The plaintiff has not produced original records, but, instead, has provided only a summary of costs from its general ledger.

The admission of summaries as evidence is governed by FRE 1006.[4] In *Doninger Metal Products, Corp. v. United States*, 50 Fed. Cl. 110 (2001), this court found, on a motion for

[4] FRE 1006 provides:

summary judgment, that the plaintiff's pricing summaries were insufficient under FRE 1006. Centering its analysis on the reliability of summary documents, the court found that the plaintiff was "obligated under [FRE] 1006 to provide an opportunity to the defendant to review and object to the underlying documents." *Id.* at 131. FRE 1006 recognizes "'that the preparation of summaries from other documents carries risks of error or distortion that must be guarded against by giving the opposing party an opportunity to review and object to the underlying documents.'" *Id.* at 130 (quoting *Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1997)). The plaintiff could not produce the source documents underlying its summaries and could not demonstrate a factual issue regarding the location of the documents necessary to prove its claims. *Id.* at 131,135. Because the plaintiff could not show that there was a disputed material fact, the court granted the defendant's motion for summary judgment. *Id.* at 139-40.

In this case, the plaintiff has had multiple opportunities to produce admissible evidence—or at least point to some underlying admissible evidence it plans to present at trial—to support its claimed costs. *See Alpha I*, 93 Fed. Cl. at 295 ("At the summary judgment stage, the underlying information, rather than the form of the information, must be admissible."). The contracting officer requested the source documentation; Bannum did not produce it. If it had, this aspect of the suit would have been resolved before arriving at the Court's doorstep. The defendant took discovery of the plaintiff and sought such records in discovery; Bannum did not produce them. The defendant now argues that the absence of such records dooms Bannum's case. Once again, instead of meeting the point head-on, Bannum simply asserts that it need not produce these records to defeat summary judgment. On that point, Bannum is wrong.

The burden the Court places on Bannum is modest. The plaintiff need not prove its case at this stage. It must, however, show that it has a case to make at trial. The plaintiff claims that the defendant has failed to meet its burden of showing that no material facts are in dispute, but the plaintiff cannot avoid summary judgment based on its own failure to provide some indication that it has proof that would ultimately be admissible at trial to support its asserted facts.

The Court finds that the spreadsheets prepared by the plaintiff—unverified by the person who prepared them and unsupported by normal business documentation—are insufficient to support the plaintiff's claim for termination costs. The spreadsheets, standing alone, would be inadmissible at trial and insufficient to support the plaintiff's case-in-chief, and they are insufficient to survive a motion for summary judgment. Accordingly, Bannum has failed to raise a genuine issue concerning the absence of further evidence and cannot recover its preparatory costs.

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

D. General & Administrative Expenses; Profit; and Settlement Expenses

The plaintiff seeks $5,020.94 in general and administrative ("G&A") expenses, profit of $5,523.04, and $6,913.26 in settlement expenses. (ECF 1, Ex. 4 at 33.) The G&A expenses are calculated as 10 percent of the combined total of Bannum's bid and proposal costs ($5,665.74) and preparatory costs ($44,544.68). (*Id.*) The profit requested is calculated as 10 percent of work performed. (*Id.* at 34.) The settlement expenses include $4,000 in legal fees and $2,913.26 in continuing costs (continued rental costs for storing furniture for the facility). (*Id.* at 34-35.)

The G&A expenses are based on a percentage of other costs that, as discussed previously, are not recoverable, *i.e.*, Bannum's bid and proposal costs and preparatory costs. The bid and proposal costs are not recoverable because the plaintiff has failed to support its contention that the defendant did not fairly and honestly consider its proposals. The preparatory costs are not recoverable because the plaintiff has failed to provide the documentation needed to support those costs. Because the plaintiff bases its G&A expenses entirely on other nonrecoverable costs, it cannot recover those expenses.

A "reasonable allowance for profit of work done" is allowable under the termination for convenience regulation. FAR 52.249-2(f). Bannum allegedly calculated profit based on a percentage of work performed, but Bannum has conceded that "the contract was terminated before performance could begin." (ECF 1, Ex. 4 at 34 n. ii.) Because the regulation limits recovery of profit to "work done," when no work is performed under the contract, no claim for profit is available under the regulation. Having conceded the essential fact necessary for its claim for profit, the plaintiff cannot recover profit as a matter of law.

A contractor may recover settlement expenses under the termination for convenience regulation. *See* FAR 52.249-2(g)(3). The plaintiff seeks legal fees and rental costs but supports these costs only with its spreadsheet. As the Court already explained regarding Bannum's preparatory costs, its spreadsheet is insufficient to establish its termination costs with certainty. The plaintiff has failed to provide supporting documentation, and it does not claim that any further documentation is forthcoming. As a result, the plaintiff cannot recover its settlement expenses.

E. Lost Profits and Overhead

Distinct from the claim for profit rejected above in III.D, the plaintiff also seeks $216,727.80 in estimated lost profits and overhead based on the BOP's alleged breach of contract. (ECF 1, Ex. 4 at 33 & 35.) The plaintiff alleges a breach of contract due to the BOP's bad faith.

When a termination for convenience is "tainted by bad faith or an abuse of contracting discretion," a breach of contract results. *Krygoski Const. Co., Inc. v. United States*, 94 F.3d 1537, 1541 (Fed. Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997). The plaintiff must present clear and convincing evidence of bad faith to overcome the presumption that the government acted in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). To overcome the defendant's motion for summary judgment, the plaintiff "must point to

an evidentiary conflict created on the record; mere denials or conclusory statements are insufficient." *SRI Int'l*, 775 F.2d at 1116; *see also Hoch v. United States*, 31 Fed. Cl. 111, 114 (1994) ("In opposing a motion for summary judgment, the non-movant may not simply rest on mere allegations on issues it asserts are disputed.").

The plaintiff presents two theories of the BOP's alleged bad faith, resulting in a breach of contract:

> [E]ither the BOP intended to terminate the contract as soon as it became possible to award said contract to VOAGNO, or counsel and other BOP personnel directed the Contracting Officer to terminate Bannum's contract at the earliest opportunity, in such a manner that the Contracting Officer abdicated his independent decision-making authority when he followed said direction in direct contravention of his prior award of the contract to Bannum.

(ECF 24 at 16.) The plaintiff has failed to present anything other than mere assertions to support these theories.

The plaintiff tells a story of "certain forces at work within the BOP and VOAGNO" that redirected the contract from Bannum to VOAGNO. (ECF 24 at 15.) The BOP initially awarded Bannum the contract considering its evaluation criteria. (*Id.*) Then, after VOAGNO filed its protest, the BOP took corrective action, rather than standing behind Bannum. (*Id.*) The plaintiff alleges that counsel for the BOP had shown animus toward Bannum for being a "litigious contractor." (*Id.* at 16.) Bannum alleges that BOP counsel has suggested that the BOP would be better off with Bannum out of business.[5] (*Id.* at 4 & 16.) The BOP then terminated Bannum's contract and allegedly delayed award under the new solicitation, awarding multiple sole-source bridge contracts to VOAGNO as the incumbent. (*Id.* at 15.) The contracting officer ultimately eliminated Bannum from the competition, allegedly "improperly challeng[ing] Bannum's right-

[5] The plaintiff cites to ECF 1, Exhibit 4 at pages 1, 2, and 5 for support. Exhibit 4 is Bannum's final termination settlement proposal. It contains multiple documents, including a memorandum from the Camardo Law Firm to the BOP contracting officer, three redacted notices from the BOP providing justification for other than full and open competition for bridge contracts to VOAGNO, and Bannum's Form 1436, which requests costs on a "total cost" basis. It is unclear to which among these documents the plaintiff cites, though its argument is likely referencing the memorandum. The memorandum mentions the "BOP counsel who detests Bannum" on page 1 and "a BOP attorney with a history of animosity toward Bannum" on page 2, and alleges that "BOP counsel and certain members with the BOP have shown for years their disdain and hatred toward Bannum" on page 5. (ECF 1, Ex. 4.) The Court is unable, however, to find support in the cited exhibit (or any other exhibit) for Bannum's allegation that the BOP counsel suggested that the BOP would be better off with Bannum out of business.

to-use documentation." (*Id.*) In so doing, Bannum alleges that the BOP improperly eliminated full and open competition for the contract. (*Id.* at 16.)

The undisputed facts fill in the gaps and expose the plaintiff's story for what it is: mere speculation of animus unsupported by the record before the Court. After VOAGNO filed its protest, the BOP reevaluated the proposals. (ECF 1, ¶ 8.) As noted above, the contracting officer identified four issues that necessitated the BOP's corrective action. (ECF 23, App. at 2.) In response to the identified issues, the BOP terminated its contract with Bannum and began a new solicitation. (ECF 1, ¶ 9.) Bannum challenged the BOP's corrective action at the GAO, and the GAO dismissed the protest, finding that the record showed that "the concerns raised by the contracting officer reasonably justified the agency's decision to take corrective action." (ECF 23, App. at 10.) The GAO also dismissed Bannum's protest that claimed the termination of its contract was improper. (ECF 1, Ex. 1.); *see also Nationwide Roofing and Sheet Metal Co., Inc. v. United States*, 14 Cl. Ct. 733 (1988) (holding that the Air Force properly terminated a contract award for convenience after discovering that the lowest bidder's bid had been improperly declared nonresponsive).

During the new solicitation, the contracting officer learned that the property Bannum planned to use had been sold. (ECF 23, App. at 7.) In two prior procurements, Bannum had not informed the BOP when it had lost the right to use a property. (*Id.* at 6.) Considering the new information and the BOP's previous experience with Bannum, the contracting officer, on three separate occasions, requested updated right-to-use documentation. (*Id.* at 7.) When Bannum failed to provide that documentation, the contracting officer eliminated it from the competitive range. (*Id.*)

Bannum protested its exclusion from the competitive range, but the GAO denied the protest. (*Id.*) The GAO found that "despite its contentions of agency animus, Bannum has failed to provide sufficient support for its allegations that the contracting officer acted in bad faith or was otherwise biased against the protester." (*Id.* at 18.) The GAO's decisions are not binding on this Court, but they reflect that the plaintiff previously suffered a failure of proof on its claim of bad faith. That failure, together with the allegations in its complaint here, should have made the BOP's bad faith a central element of the opportunity the plaintiff had to take discovery from the BOP in this case. Despite having had that opportunity, the plaintiff has presented no evidence apart from hearsay and speculation regarding the bad faith of BOP officials.

Ultimately, the BOP excluded Bannum from the competition and awarded VOAGNO the contract. The plaintiff, however, fails to provide any support for its allegation that the BOP *improperly* redirected the contract to VOAGNO. *See Kalvar Corp., Inc. v. United States*, 211 Ct. Cl. 192, 199 (1976) ("The mere fact that a contracting officer awards a contract to another company after terminating the plaintiff's contract is insufficient to show bad faith.").

In a decision on a motion for summary judgment, this court found that a contractor had failed to establish by clear and convincing evidence that the Air Force's termination of a contract for convenience was in bad faith. *Rice Sys., Inc. v. United States*, 62 Fed. Cl. 608 (2004). Deposition testimony contained what Judge Horn called "uncorroborated allegations" of gender

discrimination. *Id.* at 631. Without more, the uncorroborated allegations failed to meet the clear and convincing evidence standard. *Id.*

The plaintiff here similarly relies solely on uncorroborated allegations from its own lawyer of the BOP's bad faith without pointing to an evidentiary conflict. The undisputed facts show that the contracting officer had a good faith basis for terminating Bannum's contract, and Bannum has lost at the GAO in each of its challenges. As the non-moving party to a motion for summary judgment, the plaintiff must provide more than allegations to show that there are material facts in dispute. Bannum had an opportunity to take whatever discovery it needed in order to develop a factual basis to support its assertions of bad faith on the part of the BOP and its officials. The plaintiff has failed to adduce, or at least place in the record before the Court, facts that put in dispute the issue of whether the BOP acted in bad faith. Because the plaintiff has failed to demonstrate that there are material facts in dispute, it cannot recover lost profits and overhead based on a breach-of-contract theory.

IV. CONCLUSION

The plaintiff is not entitled, under either the Tucker Act or the Contract Disputes Act, to recover any of the costs or profit it claims as a result of the defendant's termination of the contract for convenience. The Court grants the defendant's motion for summary judgment.

The Court will issue an order directing judgment for the defendant in accordance with this memorandum opinion.

s/ Richard A. Hertling

Richard A. Hertling
Judge

In the United States Court of Federal Claims

No. 19-1668C
(Filed: June 10, 2021)

* *

LAX ELECTRONICS, INC.
d/b/a AUTOMATIC CONNECTOR,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Bid protest; Cross-motions for judgment on the administrative record; Qualified Products List; Department of Defense Manual.

* *

Justin T. Huffman, Auburn, NY, for plaintiff.

Reta E. Bezak, Trial Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom were *Brian M. Boynton*, Acting Assistant Attorney General, *Martin F. Hockey*, Acting Director, and *Deborah A. Bynum*, Assistant Director, for defendant. *John J. Pritchard*, Senior Counsel, Defense Logistics Agency, of counsel.

OPINION

Plaintiff, LAX Electronics, Inc., doing business as Automatic Connector ("Automatic"), alleges that the Defense Logistics Agency ("DLA") improperly removed Automatic from a Qualified Products List ("QPL") to supply electrical connector parts to Department of Defense ("DOD") component clients. Plaintiff filed a motion for judgment on the administrative record, seeking a permanent injunction to be placed back on the QPL. Defendant opposes the request and cross-moved for judgment on the record. Oral argument was held on May 27, 2021. Because the removal was neither procedurally deficient nor substantively irrational, we must deny plaintiff's request.

BACKGROUND

I. Factual History

Automatic has supplied electronic connectors to the government for over 50 years as a supplier on the DLA QPL at issue. As part of maintaining the approved provider list, DLA regularly conducts audits of QPL suppliers to ensure that the listed parts continue to meet military standards set by DOD and DLA. The events in question center on a June 2019 audit of Automatic, which referenced an earlier 2016 audit. Both are relevant to the challenged agency action and records of both were properly included in the administrative record. One of plaintiff's general allegations here is that the 2019 audit was, in essence, pretextual because the same auditor had decided in 2016 that Automatic should be excluded from the QPL. No evidence of bad faith was provided, nor did plaintiff pursue this avenue seriously in its papers.

During the 2019 audit, DLA flagged multiple major concerns and several minor ones. One major concern was "Automatic chang[ing] a major process for machining parts without informing DLA," which, if disclosed, would have required Automatic to go through the requalification process. Administrative Record ("AR") at 448. Another concern of the DLA auditor was systemic traceability problems where Automatic lacked a process to track the components used in connectors through multiple stages of the manufacturing process. *Id.* Automatic also failed to properly document its testing of parts on the QPL, a repeat problem from 2016. *Id.* at 450. The final major concern was Automatic's failure to report to DLA orders of parts shipped for QPL jobs. *Id.* at 451. The other significant concern highlighted in the audit report, although not a direct violation of the standards tested during the audit, was that Automatic had failed to document and could not show any record of implementing corrective actions that it told DLA it would accomplish following a 2016 audit. *Id.* at 453. During that audit, a stop shipment order was implemented by DLA due to problems the audit turned up. The promised corrective actions were necessary before DLA would lift the stoppage.

The 2016 audit primarily concerned testing of Automatic's connectors. *Id.* at 288–91. As mentioned above, during the audit, a stop shipment of several of plaintiff's products was enforced by DLA. Following the final report, Automatic was required to provide corrective action reports ("CARs") to address the problems found. *Id.* at 291. Following Automatic's

submission of its CARs, the corrective actions were accepted.[1]

On July 2, 2019, DLA once again sent a stop shipment letter to plaintiff due to the errors identified by the 2019 audit report. *See id.* at 457-58. As stated in that report, DLA required Automatic to provide CARs within 30 days, which were to describe how Automatic would address the problems found during the audit. AR at 456. On August 7, 2019, Automatic sent DLA seven CARs prepared by a consultant brought in to help with the problems uncovered by the audit. *Id.* at 462-78. Also on August 7, 2021, plaintiff sent a letter from counsel regarding the CARs and the stop shipment order, requesting dialogue regarding the problems and proposed fixes and asking DLA to lift the stop shipment order.[2] AR at 481-83.

On September 12, 2019, DLA removed Automatic from the QPL, informing plaintiff by letter dated that same day. AR at 519–20. DLA wrote that, based on the June 2019 audit results, Automatic had "engaged in a repeated and continuing course of conduct resulting in a significant number of program violations requiring its removal from the electronic QPL." *Id.* at 519. The letter then listed 11 failures that the audit found, including undocumented supplier changes, changes to product design without requalification, failures of testing and calibration, and a general failure "to comply with specification and standards traceability requirements for QPL

[1] To its reply brief, Automatic attached two letters it received from DLA after the 2016 audit. Both letters discuss Automatic's corrective actions for the errors found during that audit. The first letter, sent May 11, 2016, found that the deficiencies discovered during the audit had been corrected and lifted the stop shipment order. Pl.'s Reply Ex. 1. The second letter, sent August 15, 2017, clarified that it found the CARs to be acceptable and that DLA would review the corrective actions' implementation during their next audit of Automatic. Pl.'s Reply, Ex. 2. These documents are not part of the record, and plaintiff has not moved to supplement the record with them.

[2] The Amended Complaint also alleges that, on August 13, 2019, Automatic received a letter from DLA, requiring Automatic to issue a report through the Government-Industry Data Exchange Program ("GIDEP") to inform GIDEP participants of the problems with Automatic's QPL parts found during the June 2019 audit. Plaintiff also alleges that it responded by letter to DLA, arguing that a GIDEP notice would be premature given the lack of comment from DLA on Automatic's CARs. These documents were not included by the agency in the Administrative Record nor separately provided by plaintiff.

parts." *Id.* at 520. Also noted as a reason for the removal was Automatic's refusal to issue a GIDEP notice. *Id.* at 519. The letter provided, consistent with the Department of Defense Manual, that Automatic was afforded an opportunity to "respond and set forth any facts [it] deem[ed] relevant." *Id.* at 520. An internal DLA memo explaining Automatic's removal, dated the same day, recorded that DLA considered the CARs sent by Automatic, but it did not rely on them because of the "repeat findings that occur during subsequent audits."[3] *Id.* at 522–23. It is clear from this and statements in the audit report that the agency was particularly concerned with Automatic's history of problems and its lack of documented fixes.

Following Automatic's removal from the QPL, DLA sent plaintiff a letter on October 9, 2019, informing it that DLA would issue a GIDEP notice to inform participants of Automatic's non-compliance and violations. That notice subsequently issued on May 29, 2020. *Id.* at 526. Automatic did not respond to either the September or October 2019 notice.

II. Procedural History

Automatic responded to its removal by filing suit in this court on October 28, 2019. The Amended Complaint made two claims. First, Automatic alleged that DLA violated multiple provisions of the Department of Defense Manual ("DoDM") Number 4120.24, Enclosure 14, when removing Automatic from the QPL. Specifically, Automatic alleged that DLA failed to consider Automatic's CARs before removing Automatic from the QPL. Second, Automatic alleged that DLA violated FAR § 9.205(a) by not allowing Automatic sufficient time to re-qualify for the QPL and by failing to give notice of DLA's intent to establish a qualification requirement, including the "anticipated date that the agency will begin awarding contracts subject to the qualification requirement." 48 C.F.R. § 9.205(a)(4) (2020).

The government filed a motion to dismiss the complaint for lack of subject-matter jurisdiction. *LAX Elecs., Inc. v. United States*, 2019 WL 6880939 at *2 (Fed. Cl. Dec. 17, 2019). We agreed in part, dismissing the first claim because it was untethered to an "alleged violation of statute or regulation in connection with a procurement or a proposed procurement" as it was the result of an audit that was untied to any particular procurement or proposed procurement. *Id.* at *2 (citing 28 U.S.C. § 1491(b)(1) (2012)). Although finding jurisdiction over the second claim, we *sua spante* dismissed

[3] This document was not provided to plaintiff until the Administrative Record was filed in this docket.

it for failure to state a claim because FAR § 9.205(a) concerns new qualifications imposed on offerors; it does not deal with offerors ousted from the QPL or those attempting to requalify. *Id.* at *4.

On appeal, the Court of Appeals for the Federal Circuit reversed the jurisdictional dismissal, holding that Automatic's removal from the QPL meant that it could not bid on future procurements, putting it within the Tucker Act's jurisdictional grant. *Lax Elecs., Inc. v. United States*, 835 Fed. Appx. 553, 558-59 (Fed. Cir. 2020). The appellate court affirmed the ruling on the second count regarding the FAR violation. *Id.* at 559. Following the mandate and remand, the government filed the administrative record, and the parties submitted the case on cross-motions for judgment.

DISCUSSION

When reviewing bid protests, we apply the standards set forth in the Administrative Procedures Act ("APA"). *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1350–51 (Fed. Cir. 2004). Unless the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," it will remain undisturbed. 5 U.S.C. § 706(2)(A). In other words, if the agency's decision was reasonable and not in violation of any law or regulation, then it meets the APA standard and will be upheld.

Automatic challenges its removal from the QPL, alleging that DLA violated multiple provisions of the DoDM by failing to evaluate and consider Automatic's CARs before removing it from the QPL. It also argues that the support for the agency's decision is lacking because there is neither record support for the idea that Automatic is a repeat offender for any particular violation nor is there evidence that it failed to implement its prior corrective actions. Plaintiff seeks to permanently enjoin DLA from (1) "barring Automatic from the QPL" and (2) "issuing any more contracts for parts that Automatic had listed on the QPL." Pl.'s Mot. at 14. At oral argument, plaintiff qualified its request by clarifying that it only sought to be reinstated pending a proper consideration of its CARs and that it did not seek to stop DOD from otherwise buying QPL parts prior to its restored ability to bid on procurements.

Defendant responds that the invocation of the DoDM is unavailing because it does not have the force of law and thus cannot serve as the basis for a protest. Furthermore, even if the manual does bind the agency, DLA followed the relevant provisions, argues the government. The government

also defends the removal decision generally as rational because it is supported by ample evidence of a considered agency decision.

We agree with defendant on all points, though the issue of the force and effect of the DoDM is something of a red herring because, although there is no indication that it was the product of notice and comment ruling making, it is the standard DLA attempted to adhere to. Thus, even though we agree with the government on the point, we consider below whether the agency met the procedural requirement anyway.

I. Department Of Defense Manual 4120.24 Does Not Have The Force And Effect Of Law

The Federal Circuit in *Hamlet v. United States* outlined a four-part test for when an agency's handbook or manual "is a regulation entitled to the force and effect of law." 63 F.3d 1097, 1105 (Fed. Cir. 1995). It goes as follows:

> (1) the promulgating agency was vested with the authority to create such a regulation; (2) the promulgating agency conformed to all procedural requirements, if any, in promulgating the regulation; (3) the promulgating agency intended the provision to establish a binding rule; and (4) the provision does not contravene a statute.

Id.[4] There is no real question that DOD has the authority to create procedures for the Defense Standardization Program, of which the DoDM is a part. 10 U.S.C. sections 2451–2452 give the Secretary of Defense the authority to create a standardization program for supplies for the Department of Defense.[5] The QPL is part of this effort. In the introduction to the manual, it states that it is published "in accordance with the authority in DoD Directive (DoDD) 51340.1 . . . and DoD Instruction (DoDI) 4120.24 . . . to assign responsibilities and prescribe the procedures for implementing the [Defense

[4] Although the Federal Circuit in *Hamlet* applied this test to an agency's personnel manual, the Court of Federal Claims has applied this test to other types of agency materials. *See,* e.*g., Infrastructure Def. Techs., LLC v. United States*, 81 Fed. Cl. 375, 397–98 (2008) (considering whether a DOD and a DLA Acquisition Directive had regulatory effect).

[5] The standardization program is how the Department of Defense standardizes the supplies it uses. 10 U.S.C. § 2451(a) (2012).

Standardization Program] in accordance with sections 2451-2457 of Title 10, United States Code . . . ." AR at 1.

That being said, there is no indication in the record or other legal authority cited by the parties that DOD followed applicable procedural requirements in order to give the DoDM regulatory effect. The procedural requirements for promulgating regulations can be found in the APA at 5 U.S.C. § 552(a). Commonly known as "notice-and-comment rulemaking," the APA requires an agency to publish a proposed rule in the Federal Register, allowing time for the public to submit comments on the proposed rule. The agency will then take those comments into consideration as it develops its final rule. The final rule is then published in the Federal Register.

The DoDM was published neither for comment nor permanently in the Federal Register. The DoDM is published only on DOD's website. The APA requires, however, that, "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . rules of procedure . . . ." 5 U.S.C. § 552(a)(1)(C) (2018). We are aware of no exception that would apply to DOD procedures. [6]

DOD's informal publication on its website further suggests that the agency did not intend for the manual to have the force of law. The Federal Circuit in *Hamlet* provided four factors to establish whether a promulgating agency intended to establish a binding rule: "(a) whether the language of the provision is mandatory or advisory; (b) whether the provision is 'substantive' or 'interpretive'; (c) the context in which the provision was promulgated; and (d) any other extrinsic evidence of intent." 63 F.3d at 1105.

The language relied on by plaintiff in the DoDM is precatory, not mandatory. The procedural provision that Automatic cites as having been violated is DoDM 4120.24, Enclosure 14, § 12(b)(1), which states that a contractor's products "*should* again be included on the electronic QPL… once the deficiencies noted have been corrected to the government's satisfaction." (emphasis added). As *Hamlet* and multiple other cases have recognized, when a provision establishes that the government "should" do

[6] In *Hamlet*, the handbook' promulgation met procedural muster despite not following the APA's requirements because the statute specifically exempts personnel materials from its ambit. 63 F.3d 1097, 1105 n.6 (Fed. Cir. 1997) (citing 5 U.S.C. § 553(b) (2012)).

something, that provision is, absent other affirmative indications, not mandatory. *E.g.*, *id.* at 1104.

The provisions cited are also procedural, not substantive rules. "[I]f a provision of an agency's personnel manual or handbook constitutes such a 'substantive rule,' it is far more likely to be considered a binding regulation for purposes of Tucker Act jurisdiction than if the provision were in the category of 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" *Id.* at 1105 n.6 (it is unclear which authority the circuit court was quoting). Although section 12 of Enclosure 14 lists reasons that removal from a QPL might be warranted, which are essentially substantive, the manual states only that "removal might be warranted." AR at 96. When considered as a whole, especially those provisions cited by plaintiff, DOD has not expressed an intent that these provisions be binding.[7]

We conclude that the DoD Manual is not a binding regulation. Nevertheless, as noted above, it is the standard the agency applied. As such, we consider, as part of our larger analysis of the rationality of the agency action, whether it met its own DoDM-stated goals in the process.

II. The Process And Decision Were Reasonable

The procedures outlined for removal in DoDM are that, if a product or products are removed from the QPL, DLA must send "a written notice (registered, with a return receipt requested) of the action taken, the reasons for removal, and an opportunity to respond to that notice." DoDM 4120.24, Enclosure 14, § 12(b)(2). The letter of September 12, 2019, ticks each of those boxes. It gave Automatic notice of its removal from the QPL along with a list of 11 reasons for it, citing approved reasons for removal listed in Enclosure 14, § 12(a). It also cited section 12(b)(2) when stating that DLA was affording Automatic an opportunity to respond.

Automatic failed to avail itself of this opportunity. Now, in essence, it relies on those CARs, submitted before the notice of removal, as constituting its response. Or it argues, in essence, that no response was

[7] The final factor is whether the provision in question contravenes a statute. If it did, it could not have regulatory effect. That is not an issue here, however, as the manual is clearly promulgated pursuant to the Defense Standardization Act cited above.

necessary given its previously submitted CARs. We cannot agree. We find no arbitrary conduct nor any violation of the manual in the process followed by the agency and afforded to Automatic. Plaintiff's own decision not to respond to the removal notice cannot and does not establish any procedural omission on the part of the agency. The bona fides of the removal decision thus stand or fall on their own.[8]

Furthermore, even if the CARs submitted to DLA could somehow be considered a response to Automatic's removal from the QPL, DLA did take the CARs into consideration, contrary to Automatic's assertions. Plaintiff claims that DLA's memo supporting Automatic's removal from the QPL reveals that DLA did not review the CARs because the memo states that the "corrective actions are not effective as is demonstrated by the repeat findings that occur during subsequent audits." Pl.'s Mot. at 10 (quoting AR at 523). That is a mischaracterization of the memo, however. The memo is plain that DLA considered Automatic's corrective actions insofar as it did not believe that they would be effective. To support that assertion, the memo points to Automatic's past incidents, referencing past audits, stop shipments, and corrective actions that were not implemented, or at least no record of which could be produced to the auditor.[9] The DoDM, in fact, lists consideration of whether deficiencies in a product "reflect a repeated or continuing course of

[8] To the extent that plaintiff argues that the notice was deficient by not affirmatively stating that Automatic's past failures to document or implement CARs was a basis for removal, we find no prejudice. Automatic was on notice of the issue based on the findings regarding that issue in the June 2019 Audit Report. *See* AR at 453. The cover letter to the CARs submitted in response to DLA, dated August 6, 2019, references the issue and even requests copies of documents from DLA. AR 460. Further, although inarticulate, there are two statements in the September letter that reference Automatic's conduct going back several years, which given the context provided by the Audit Report, informed plaintiff of this basis for removal. AR at 519-20 ("Automatic Conductor has engaged in a repeated and continuing course of conduct . . . . [F]or several years, Automatic Connector has ignored and circumvented VQ's authority as the qualifying activity.").

[9] Although not meaningfully treated by the parties, the Administrative Record also contains an array of correspondence regarding the 2016 findings, corrective actions, and stop shipment issues that lasted through 2018. Automatic had a stop shipment notice issued in July 2017, which was not lifted until October 2018. *See* AR 340 (stop shipment); AR 446 (release of stop shipment).

conduct" when deciding whether a product or products should be placed back on the QPL. DoDM 4120.24, Enclosure 14, § 12(b)(1). DLA considered Automatic's CARs and reasonably believed, based on past actions, that the CARs would not be effective.

There is also no *per se* violation of the manual in DLA's decision not to put Automatic back on the QPL as contemplated by section 12(b)(1). This provision states that "once the deficiencies noted have been corrected to the government's satisfaction," the product "should again be included on the electronic QPL." There is no evidence that the government was satisfied that the deficiencies were or would be corrected to its satisfaction. Further, as noted above, this language is not mandatory. Even if the record suggested that the agency was satisfied with the CARs, this provision alone would not force the government's hand.

On the bona fides of the decision to remove, plaintiff takes no issue with the findings in the Audit Report. Automatic challenges none of the reasons asserted in the notice or internal memo other than arguing that it did not have a problem with repeated failings. Plaintiff argues that the first audit was mainly concerned with testing and the second with traceability issues. That, notion, however, is belied by the record. There were testing issues revealed by both audits.

We thus find no irrationality in the agency's finding that the problems were repeated. That leaves plaintiff with only the argument that the agency's worries should have been allayed by its proposed corrective actions. This argument we cannot entertain because it would require the court to second guess the agency's deliberative process. We cannot do so. That plaintiff disagrees or that a reasonable person might even come to a different conclusion is not enough. The agency needs only a reasonable basis for its action. We find that DLA's decision was informed. It considered the relevant information, that information was correct, and DLA concluded in a valid exercise of its discretion to remove Automatic from the QPL.[10] Nothing more is required in these circumstances. The procedure afforded was likewise rational.

[10] It is also of no note that DLA did not discuss the issues or plaintiff's proposed response to them prior to removal. The record is replete with correspondence during and after the audit process. Notice was given and plaintiff did not avail itself of its final opportunity to respond.

CONCLUSION

Automatic has not shown procedural error or other irrationality in DLA's decision to remove it from the QPL. Accordingly, plaintiff's motion for judgment on the administrative record (ECF No. 27) is denied. Defendant's motion for judgment on the administrative record (ECF No. 31) is granted. The Clerk of the Court is directed to enter judgment for defendant. No costs.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Senior Judge

United States Court of Appeals for the Federal Circuit

TRIPLE CANOPY, INC.,
Appellant

v.

SECRETARY OF THE AIR FORCE,
Appellee

2020-2165

Appeal from the Armed Services Board of Contract Appeals in Nos. 61415, 61416, 61417, 61418, 61419, 61420, Administrative Judge Kenneth David Woodrow, Administrative Judge Owen C. Wilson, Administrative Judge Richard Shackleford.

Decided: September 29, 2021

JONATHAN DAVID SHAFFER, Smith, Pachter, McWhorter, PLC, Vienna, VA, argued for appellant. Also represented by TODD MATTHEW GARLAND, RICHARD C. JOHNSON, Tysons Corner, VA.

NATHANAEL YALE, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., PATRICIA M. MCCARTHY.

Before NEWMAN, SCHALL, and DYK, *Circuit Judges*.

SCHALL, *Circuit Judge*.

Triple Canopy, Inc. ("Triple Canopy"), appeals the decision of the Armed Services Board of Contract Appeals ("Board") that denied six consolidated appeals brought by Triple Canopy under the Contract Disputes Act of 1978, 41 U.S.C. § 7101 *et seq*. ("CDA"). *Triple Canopy, Inc.*, ASBCA Nos. 61415, 61416, 61417, 61418, 61419, 61420, 20-1 BCA ¶ 37,675. The Board denied the appeals after concluding that the claims asserted in them were time-barred because they were not submitted to the contracting officer within six years of when they accrued, as required by 41 U.S.C. § 7103(a)(4)(A). Because we conclude that the Board erred as a matter of law in determining when Triple Canopy's claims accrued, we reverse and remand.

BACKGROUND

I.

Triple Canopy is a private security company ("PSC"). Its appeal arises out of its performance of six separate, fixed-price contracts for security services in Afghanistan. The contracts were awarded during the period March 15, 2009, through September 17, 2010. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,894. The contracts were awarded by the Department of Defense, through the Combined Joint Special Operations Task Force-Afghanistan ("CJSOTF-A"). *Id.* Each of the contracts required that Triple Canopy comply with local law and incorporated Federal Acquisition Regulation ("FAR") 52.229-6, Taxes—Foreign Fixed-Price

Contracts (June 2003) ("Foreign Tax Clause").[1] *Id.* That FAR provision provides in relevant part, as follows:

> [T]he contract price shall be increased by the amount of any after-imposed tax or of any tax or duty specifically excluded from the contract price by a provision of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer or to comply with the provisions of paragraph (i) below.
>
> . . . .
>
> (i) The Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned or its political subdivisions or which the governments of the United States and of the country concerned have agreed shall not be applicable to expenditures in such country by or on behalf of the United States.

FAR § 52.229-6(d)(1), -6(i).

II.

In February of 2008, the Government of the Islamic Republic of Afghanistan ("GIRA") issued a directive entitled "Procedure for Regulating Activities of Private Security

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[1] The FAR is codified in title 48 of the Code of Federal Regulations. For brevity, we refer to the FAR without corresponding C.F.R. citations.

Companies in Afghanistan" ("PSC Regulation"). *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,893. Article 7 of the PSC Regulation required all PSCs to observe Afghan law, including the PSC Regulation itself. *Id.* Article 10 of the PSC Regulation provided: "The number of staff of each Security Company shall not be more the [sic] 500 people, unless the Council of Ministers agrees an increased number of staff." *Id.* Although the PSC Regulation limited the number of PSC personnel to 500, the regulation did not provide for the imposition of fees or penalties on PSCs operating in Afghanistan that exceeded the 500-person limit.

On August 13, 2010, the contracting officer ("CO"), Air Force Captain Brussell C. Bungay, sent a letter to Afghanistan's Ministry of Interior ("MOI") on behalf of the Department of Defense. Corrected Joint Appendix ("J.A.") 282–83. In the letter, the CO informed the MOI that "Triple Canopy's manning requirement in support of US Military contracts will exceed 500 personnel." *Id.* at 283.[2] The CO stated:

> In order to ensure there is no disruption to Afghanistan's reconstruction process, the CJSOTF-A [ ] respectfully requests an exemption excepting from the 500 allowable security staff, for the above referenced contracts. It is understood and expected that Triple Canopy will still be required to abide by all other relevant laws and regulations as a licensed Private Security Company.

Id. The CO further stated: "This exemption shall be considered immediately valid by both [ ] CJSOTF-A and Triple Canopy." *Id.* On August 16, 2010, Triple Canopy

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[2] Although none of the individual contracts required that Triple Canopy supply more than 500 personnel, the contracts combined required it to provide more than the 500 personnel specified by Article 10 of the PSC Regulation. *Triple Canopy*, 20-1 BCA ¶37,675 at 182,894.

submitted the CO's letter to the MOI in support of its request that the MOI issue it a formal exemption with respect to the 500-person limit. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895.

On March 15, 2011, GIRA issued Presidential Directive No. 7339 ("PD7339"). *Id.* PD7339 required that all PSCs operating in Afghanistan pay a fee of 100,000 Afghan Afghani ("AFN") (Afghan currency), a sum equal to $2,323.42 at that time, for each person over the 500-employee cap and 250,000 AFN ($5,808.56) for each foreign national working without an Afghan visa. *Id.*

On March 24, 2011, GIRA implemented PD7339 by assessing "penalties" for each individual Triple Canopy employed over the 500-person limit. J.A. 429. The penalties were assessed against Triple Canopy's total number of personnel across all of its contracts. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895. The assessment totaled 37,860,000 AFN ($879,647.95).[3] GIRA directed Triple Canopy to pay the assessment within 15 days. J.A. 429. GIRA informed Triple Canopy, however, that if it objected to the assessment, it could provide its "reasoning in writing" within two weeks. *Id.*[4]

On March 27 and 28, 2011, representatives of the Department of Defense again issued memoranda to GIRA

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[3] The penalties assessed included 24,900,000 AFN for 204 people exceeding the 500-person cap, including 7,500,000 AFN for 30 foreign nationals working without Afghan visas. The assessment also included additional penalties of 12,960,000 AFN relating to weapons registered by Triple Canopy. J.A. 429.

[4] The Board, *see Triple Canopy*, 20-1 BCA ¶37,675 at 182,895, and the parties, *see* Appellant's Br. 10 and Appellee's Br. 6, all are of the view that the March 24, 2011 GIRA assessment gave Triple Canopy the right to appeal the assessment. We agree.

requesting that Triple Canopy be exempted from the 500-person limit "to ensure there is no disruption to Afghanistan's reconstruction process." *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895; J.A. 430–34.

Triple Canopy formally appealed the assessment on April 8, 2011. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895. In its appeal, Triple Canopy indicated it had first sought an exemption with respect to the 500-person limit in August of 2010 and that it was waiting for the MOI's High Coordination Board and Council of Ministers to approve its request to maintain up to 1,000 personnel in Afghanistan. J.A. 435, 438–39. Thereafter, on April 21, 2011, Triple Canopy informed the CO that it would submit requests for equitable adjustments if its appeal of the March 24 assessment was denied. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895.

On July 6, 2011, GIRA sent a letter to Triple Canopy adjusting the total penalty assessed in its March 24 letter. *Id.* The total penalty assessed was reduced to 18,550,000 AFN ($430,994.97). *Id.*[5] On July 18 and 20, 2011, Triple Canopy paid the reduced assessment. *Id.* at 182,896.

III.

On June 6, 2017, within six years of both GIRA's letter of July 6, 2011, and Triple Canopy's payment of the reduced assessment on July 18 and 20, 2011, Triple Canopy submitted claims to the CO under each of the six CJSOTF-A contracts. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,896. In its claims, Triple Canopy sought reimbursement under the Foreign Tax Clause for the penalties it had paid to

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[5] The July 6 letter assessed a penalty of 100,000 AFN per person for 174 Afghan nationals and four foreign nationals and a penalty of 250,000 AFN per person for three additional foreign nationals working without Afghan visas. J.A. 446–47. The letter did not assess any penalty for weapons. *Id.*

GIRA allocable to each contract. *See id.* On November 20, 2017, after the CO failed to issue a final decision, Triple Canopy's claims were deemed denied. *See* 41 U.S.C. § 7103(a)(3), (f)(5); FAR § 33.211(a)(4), (g). Triple Canopy then appealed to the Board.

As noted above, the Board denied Triple Canopy's appeals on the grounds that the asserted claims were time-barred because they were not submitted to the CO within six years of the date they accrued, as required by 41 U.S.C. § 7103(a)(4)(A).

Although the CDA does not define claim accrual, the FAR does. The FAR defines "[a]ccrual of a claim" as "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." FAR 33.201.

The Board began its analysis as to when Triple Canopy's claims accrued by observing that, to determine when the claims accrued and when the events that fixed the government's alleged liability were known, it was required to examine the legal basis for the claims. The legal basis for Triple Canopy's claims, the Board determined, was FAR 52.229-6, the Foreign Tax Clause provision noted above that was incorporated into each of Triple Canopy's CJSOTF-A contracts. As seen, that provision provides, in relevant part, that "the contract price shall be increased by the amount of any after-imposed tax or of any tax or duty . . . that the Contractor is required to pay or bear, including any interest or penalty . . . if liability for such tax, interest, or penalty was not incurred through the Contractor's . . . failure . . . to comply with the provisions of paragraph (i) below." FAR 52.229-6(d)(1). The Board stated that, if it accepted Triple Canopy's contention that the GIRA assessment was an "after-imposed tax," then Triple Canopy's "legal obligation to pay the assessment [arose]

when Triple Canopy [was] 'required to pay or bear' the assessment." *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,896. Noting that there was "no dispute that GIRA demanded payment of the assessment on March 24, 2011," *id.*, the Board reasoned that Triple Canopy "knew it was obligated to pay the GIRA assessment when it received GIRA's demand letter" on March 24, 2011, *id.* at 182,897. Thus, in the Board's view, the claims accrued on March 24, 2011, more than six years before they were submitted to the CO on June 6, 2017.

In its decision, the Board rejected Triple Canopy's argument that its claims did not accrue until it paid the revised penalty assessments on July 18 and 20, 2011. In so doing, the Board agreed with the government that Triple Canopy's obligation to pay the penalties was fixed on March 24, 2011, when GIRA assessed the penalties. The Board stated that "[o]nce Triple Canopy became legally obligated to pay the assessment, the costs were incurred. The fact that the final amount could change does not matter, nor does the fact that actual payment had not yet occurred." *Id.* (first citing *Gray Pers., Inc.*, ASBCA No. 54652, 06-02 BCA ¶ 33,378 at 165,476; then citing *McDonnell Douglas Servs., Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325 at 169,528).

The Board also rejected Triple Canopy's argument that its claims under the contracts did not accrue until it exhausted its appeal right because it was required to do so under paragraph (i) of the Foreign Tax Clause. In so holding, the Board distinguished *Kellogg Brown & Root Services, Inc. v. Murphy*, 823 F.3d 622 (Fed. Cir. 2016). There, we stated that the CDA limitations period "does not begin to run if a claim cannot be filed because mandatory preclaim procedures have not been completed." *Id.* at 628. In *Kellogg Brown*, the Army repeatedly told contractor KBR that it had to resolve its disputed costs with its subcontractor before KBR could present a claim for reimbursement of those costs. Consequently, in *Kellogg Brown*, we held that KBR's claim accrued only after it had resolved the disputed

costs with its subcontractor and KBR had received a claim from its subcontractor. *Id.* at 628–29. After contrasting the facts of *Kellogg Brown* with the circumstances of Triple Canopy's claims, the Board stated: "[W]e conclude that the process of appealing the fine levied on Triple Canopy was not mandatory, but was rather an optional process Triple Canopy elected to undergo in order to potentially reduce the amount of the fine . . . . Therefore, the appeal process did not toll the statute of limitations." *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,898.

Having found that each of Triple Canopy's claims was submitted more than six years after it had accrued, the Board denied each of Triple Canopy's appeals as time barred. Following the Board's denial of its appeals, Triple Canopy timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10).

DISCUSSION

I.

Pursuant to 41 U.S.C. § 7107(b)(1), we review the Board's decisions on questions of law de novo. *Parsons Glob. Servs., Inc. v. McHugh*, 677 F.3d 1166, 1170 (Fed. Cir. 2012). Interpretation of a government contract and interpretation of applicable procurement regulations are questions of law subject to de novo review. *Forman v. United States*, 329 F.3d 837, 841 (Fed. Cir. 2003); *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc).

II.

On appeal, Triple Canopy argues that the Board erred in ruling that its claims accrued when GIRA assessed it penalties on March 24, 2011. As noted above, FAR 33.201 provides that a claim accrues "when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred." Triple Canopy contends that, as

of March 24, 2011, all events that fixed its liability had not occurred. Noting that its six contracts were fixed-price contracts, Triple Canopy argues that it had no right to seek an adjustment of the contract prices unless contract provisions granted it that right. As it did before the Board, Triple Canopy points to the Foreign Tax Clause as such a provision and argues that no claims accrued under that clause until it complied with paragraph (i) of the clause, which required that it "take all reasonable action to obtain exemption from or refund of any taxes or duties." FAR 52.229-6(i). Triple Canopy posits that this meant it had to appeal the GIRA assessment before it could submit claims under the clause. Hence, Triple Canopy reasons its claims did not accrue until GIRA ruled on its appeal. *See* Appellant's Br. 13, 20–26.

The government responds that the Board correctly held that Triple Canopy's claims accrued on March 24, 2011, the date on which GIRA assessed Triple Canopy penalties for violating its directive limiting the number of personnel PSCs could employ in Afghanistan. The government states that March 24 was the date when Triple Canopy knew it was obligated to pay the GIRA assessment. It was at that point, the government argues, that "all events had taken place that fixed purported liability under the FAR provision at issue, and Triple Canopy knew or should have known that they had taken place." Appellee's Br. 13–14.

The government also urges us to reject Triple Canopy's argument that its claims did not accrue until the GIRA appeal process was completed. The government contends that paragraph (i) of the Foreign Tax Clause did not set forth a mandatory pre-claim procedure that prevented submission of the claims as of March 24, 2011. The government notes that paragraph (i) only requires a contractor to take "all reasonable action to obtain exemption" from "any taxes" or "penalt[ies]," and it states that this requirement is only triggered when the contractor is "exempt under the laws of the country concerned." Appellee's Br. 20, quoting FAR 52.229-6(i). According to the government, Triple

Canopy has failed, both before the Board and now on appeal, to identify a legal basis for its claimed exemption from the 500-person limit. *Id.* The government states that because Triple Canopy is a PSC and because there is no dispute that it had more than 500 personnel in the country at the time of GIRA's penalty assessment, it "was not required to take any additional action with . . . GIRA by pursuing a legal exemption that did not exist, and the [B]oard properly found that such a process was not mandatory." *Id.* In other words, the government contends that because Triple Canopy could not qualify for an exemption from the GIRA directive, paragraph (i) of the Foreign Tax Clause did not apply. Thus, Triple Canopy was not required to appeal GIRA's assessment. Finally, the government argues that the plain language of FAR 52.229-6 does not dictate that a contractor must take its "reasonable action" seeking an exemption prior to submitting a claim under the CDA. The government concludes that Triple Canopy's appeal does not present the situation addressed in *Kellogg Brown*, where a claim could not be filed "because mandatory pre-claim procedures [had] not been completed." Appellee's Br. 21 (quoting *Kellogg Brown*, 823 F.3d at 628).

In the alternative, the government urges us to affirm the Board's decision on the ground that Triple Canopy failed to establish entitlement to a contract adjustment under FAR 52.229-6(d). That is, the government argues that we should find that Triple Canopy did not establish that the GIRA's assessment constituted a "tax" requiring a contractual adjustment pursuant to the Foreign Tax Clause. *Id.* at 11, 28–33.

III.

We have stated that "when a CDA claim accrued is determined in accordance with the FAR, the conditions of the contract, and the facts of the particular case." *Kellogg Brown*, 823 F.3d at 626 (citing *Parsons Glob. Servs.*, 677 F.3d at 1170). In our view, the FAR, the conditions of Triple Canopy's CJSOTF-A contracts, and the facts of the

case compel the conclusion that Triple Canopy's claim did not accrue until its appeal of the GIRA assessments was decided on July 6, 2011.

We begin with the governing FAR provision. Pursuant to FAR 33.201, a contractor's claim accrues "when all events, that fix the alleged liability of . . . the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred."

We turn next to "the conditions of the contract" and "the facts of the particular case." As seen, the relevant contract provision is the Foreign Tax Clause, which was contained in each of Triple Canopy's six contracts. Paragraph (d) of the clause provides in relevant part that "the contract price shall be increased by the amount of any after-imposed tax or of any tax or duty . . . that the Contractor is required to pay or bear, including any interest or penalty . . . if liability for such tax, interest, or penalty was not incurred through the Contractor's . . . failure . . . to comply with the provisions of paragraph (i) below." Paragraph (i) provides in relevant part that "[t]he Contractor shall take all reasonable action to obtain exemption from . . . any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by this contract are exempt under the laws of the country concerned."

We agree with Triple Canopy that, because it was seeking reimbursement of the GIRA assessment pursuant to the Foreign Tax Clause, it had to comply with paragraph (i)'s requirement that it "take all reasonable action" to obtain "exemption" from the assessment. This meant appealing the assessment. In the circumstances of this case, we thus view the appeal to GIRA as a "mandatory preclaim procedure" that had to be completed in order for Triple Canopy's claims to accrue and the CDA limitations

period to begin to run. *Kellogg Brown*, 823 F.3d at 628; *cf. Electric Boat Corp. v. Sec'y of the Navy*, 958 F.3d 1372, 1376 (Fed. Cir. 2020) (quoting *Kellogg Brown* but noting that "the contract [at issue] did not require that Electric Boat undertake any such procedures").

We are unable to agree with the Board and the government that Triple Canopy's obligation to pay the assessment was fixed on March 24, 2011, when GIRA first assessed the penalties. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,897. The problem with the Board's conclusion is that it overlooks the requirement of paragraph (i) of the Foreign Tax Clause that Triple Canopy "take all reasonable action" to obtain an exemption from the penalties.

The Board dismissed Triple Canopy's argument that, pursuant to paragraph (i) of the Foreign Tax Clause, it was required to appeal the GIRA penalty assessment before submitting its claims to the CO. We disagree. We think the structure and language of the Foreign Tax Clause defeats any suggestion that, in this case, pursuing an appeal of the GIRA assessment before Triple Canopy submitted its claims to the CO was optional. The Department of Defense repeatedly requested an exemption from GIRA on behalf of Triple Canopy and indicated that such an exemption would be "considered immediately valid" by the Department of Defense and Triple Canopy. *Id.* at 182,894–95. Having been informed by the Department of Defense that it was considered to have a "valid" "exemption" from the 500-person limit, Triple Canopy could not properly disregard paragraph (i)'s requirement that it "take all reasonable action" and not appeal the GIRA assessment, and still be eligible for reimbursement under the Foreign Tax Clause for the "penalties" that were assessed against it.

In our view, *Kellogg Brown* is controlling. It is true that, in *Kellogg Brown*, the Army repeatedly told contractor KBR that it had to resolve its disputed costs with its subcontractor before KBR could submit a claim for reimbursement of those costs. 823 F.3d at 628. It also is true

that in this case there are no similar statements by the CO with respect to Triple Canopy appealing the GIRA assessment. Nevertheless, we have no difficulty concluding that, in view of paragraph (i) of the Foreign Tax Clause and the Department of Defense's repeated assurances that Triple Canopy was considered to have a valid exemption from the 500-person limit, it was proper for Triple Canopy to conclude that appealing the GIRA assessment was a "mandatory pre-claim procedure[ ]," *id.*, and that it should act accordingly. That meant appealing the GIRA assessment before submitting its claims to the CO. *See Crown Coat Front Co. v. United States*, 386 U.S. 503, 510–12, 514 (1967) (pre-CDA case, finding that a government contractor's claim "first accrued" for purposes of the statute of limitations "upon the completion of the administrative proceedings contemplated and required by the provisions of the contract" rather than at the time of the contract's completion).[6]

In its decision, the Board relied upon *Gray Personnel, Inc.*, ASBCA No. 54652, 06-02 BCA ¶ 33,378, and *McDonnell Douglas Services, Inc.*, ASBCA No. 56568, 10-1 BCA ¶ 34,325, in concluding that Triple Canopy's obligation to pay the GIRA assessment was fixed on March 24, 2011. In *Gray Personnel*, the Board addressed the requirement of FAR 33.201 that "some injury" must have occurred in addressing whether Gray needed to have completed the government's delivery order or the contract for liability to be "fixed" and, accordingly, for Gray's claim to have accrued.

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[6] At the end of its decision, in addressing an argument by Triple Canopy that it could not properly submit a claim to the CO while simultaneously appealing the GIRA assessment, the Board stated: "[P]ursuant to [the Foreign Tax Clause], Triple Canopy had a duty . . . to challenge the amount of the fine." *Triple Canopy*, 20-1 BCA ¶37,675 at 182,898. We agree with this statement, which is consistent with our conclusion above.

06-02 BCA ¶ 33,378 at 165,476. The Board concluded that Gray need not have completed the delivery order or contract, stating that "[t]he CDA permits contractors to submit claims before they have incurred the total costs relating to the claim." *Id.* In reaching this conclusion, the Board noted Congress's intent that "contractors . . . submit claims as soon as they are identified." *Id.* (quoting *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 863 (Fed. Cir. 1991)). In *McDonnell Douglas*, the Board determined that the government was "on notice of, was aware of, or should have been aware of, its potential defective pricing claim against the prime contractor" more than six years before two contracting officers' decisions issued in June 2008 that asserted the claim. 10-1 BCA ¶ 34,325 at 169,529. The Board rejected the government's argument that its earliest possible claim accrual date was the date on which it received a final prime contractor audit because prior to that it did not know the "sum certain" for which McDonnell was allegedly liable. *Id.* at 169,527–28. In both *Gray Personnel* and *McDonnell Douglas*, therefore, the relevant point in time for purposes of determining when liability was fixed was when the claimant became aware of, or should have been aware of, its potential claim, even if the amount of the claim had not been fixed. *See Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,897.

We are not bound by Board decisions. *See Raytheon Co. v. United States*, 747 F.3d 1341, 1352 (Fed. Cir. 2014). In any event, in view of the requirements of paragraph (i) of the Foreign Tax Clause, and the Department of Defense's repeated requests to GIRA that Triple Canopy be exempt from the 500-person limit of Article 10 of the PSC Regulation, *Gray Personnel* and *McDonnell Douglas* clearly are distinguishable from this case.

We also are not persuaded by the government's additional arguments on appeal. The government takes the position that paragraph (i) of the Foreign Tax Clause only requires a contractor to "take all reasonable action to obtain exemption" from a tax or penalty. As noted, the

government states that Triple Canopy has never identified a legal basis for its claimed exemption. The government also argues that because it is undisputed that Triple Canopy had more than 500 personnel in the country at the time of the penalty assessment, Triple Canopy was not obligated to "pursu[e] a legal exemption that did not exist." Appellee's Br. 20.

We do not agree. We do not see how it can be argued that, in its appeal to GIRA, Triple Canopy failed to claim a legal exemption from the GIRA penalty. Triple Canopy first sought an exemption with respect to the 500-person limit in August of 2010. *Triple Canopy*, 20-1 BCA ¶ 37,675 at 182,895. Thereafter, in its GIRA appeal, Triple Canopy expressly referenced the Department of Defense's August 2010 communication to the MOI. *See* J.A. 438–39. As seen, in that communication the CO stated that the Department of Defense was requesting an exemption from the 500-person limit to ensure that there was "no disruption to Afghanistan's reconstruction process." J.A. 283. In our view, seeking an exemption from the 500-person limit in order to prevent disruption to Afghanistan's reconstruction process was tantamount to asserting a legal basis for the purpose of securing an exemption, regardless of the number of employees Triple Canopy presently had in the country. Moreover, we think it was reasonable for Triple Canopy to take the position that it was exempt "under the laws of the country concerned," pursuant to paragraph (i) of the Foreign Tax Clause, because the United States Department of Defense had repeatedly requested an exemption that was "considered immediately valid," and because Triple Canopy had not received notice from the High Coordination Board that its exemption request had been denied. Significantly, while the contractor's appeal did not result in an exemption, it did result in a substantial reduction of the assessment. The government's suggestion that the appeal was somehow meritless is difficult to fathom. It would hardly serve the government's interest for the contractor to forego an appeal that substantially benefited the government.

CONCLUSION

For the foregoing reasons, we hold that Triple Canopy's claims under the six contracts did not accrue until July 6, 2011, the date GIRA issued its decision in response to Triple Canopy's April 8, 2011 appeal. Triple Canopy's claim submission to the CO on June 6, 2017 was thus within the six-year CDA limitations period. The Board therefore erred as a matter of law in denying Triple Canopy's appeal. The decision of the Board is reversed, and Triple Canopy's appeal is remanded to the Board for proceedings on the merits.[7]

REVERSED AND REMANDED

COSTS

Costs to Triple Canopy.

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[7] As noted, the government urges us to hold that Triple Canopy did not establish that GIRA's assessment constituted a "tax" for purposes of the Foreign Tax Clause, which the government argues is the prerequisite for an adjustment under FAR 52.229-6(d). The contractor argues that the Foreign Tax Clause embraces more than "taxes." Reply Br. 18. As Triple Canopy notes, Reply Br. 16, the Board made no findings on the scope of the clause or the factual question regarding the nature of the GIRA assessment. This question of fact is not for us to decide in the first instance on appeal. We therefore do not address it. It is for the Board to consider on remand.