2022 Annual Review
Claims, Disputes & Terminations Panel

Supplementary Materials

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United States Court of Appeals for the Federal Circuit

JKB SOLUTIONS AND SERVICES, LLC,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2021-1257

Appeal from the United States Court of Federal Claims in No. 1:19-cv-01390-TCW, Judge Thomas C. Wheeler.

Decided: November 17, 2021

WILLIAM A. LASCARA, Pender & Coward, PC, Virginia Beach, VA, argued for plaintiff-appellant.

AMANDA TANTUM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, STEVEN JOHN GILLINGHAM, MARTIN F. HOCKEY, JR.

Before MOORE, *Chief Judge*, NEWMAN and O'MALLEY, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

JKB Solutions & Services, LLC appeals a decision of the Court of Federal Claims ("Claims Court") granting the government's motion for summary judgment on JKB Solutions' breach of contract claim. *JKB Sol'ns & Servs., LLC v. United States* (*JKB Sol'ns II*), 150 Fed. Cl. 252 (2020). The Claims Court held that the United States Army constructively invoked the termination for convenience clause incorporated in JKB Solutions' contract, such that JKB Solutions could not recover the damages it sought. Because that clause does not apply to JKB Solutions' service contract, we vacate and remand for further proceedings.

BACKGROUND

In September 2015, JKB Solutions and the Army entered into a three-year indefinite-delivery/indefinite-quantity contract for instructor services for the Operational Contract Support course. Military personnel enroll in the course to learn, *inter alia*, "contractor management" and the "development of acquisition-ready requirements packages." J.A. 121. Under the contract, JKB Solutions agreed to provide instructional services to support a maximum of fourteen classes per year.

The contract incorporates Federal Acquisition Regulation ("FAR") 52.212-4, entitled "Contract Terms and Conditions—Commercial Items." Among the terms in FAR 52.212-4 is a termination for convenience clause, by which "[t]he Government reserves the right to terminate this contract, or any part hereof, for its sole convenience." FAR 52.212-4(*l*) (2015). The contract also incorporates Defense Federal Acquisition Regulation Supplement ("DFARS") 252.216-7006, which requires all supplies and services furnished under the contract to be ordered by issuance of delivery or task orders. DFARS 252.216-7006(a) (2015). These task orders are subject to the terms and conditions of the contract. DFARS 252.216-7006(b).

The Army issued three yearlong task orders over the term of the contract. Each task order listed one lot of training-instructor services, the price per class, and a total price corresponding to the price of fourteen classes. Each year, the Army used JKB Solutions' services for fewer than fourteen classes and used its own personnel to teach the remainder of the classes. The Army paid JKB Solutions for each class the contractor actually taught and refused to pay the total price listed in the task orders.

In September 2019, JKB Solutions sued the government for breach of contract. The government moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment. It argued that (a) the contract and task orders required the government to pay only for services that JKB Solutions actually provided and (b) if the contract and task orders were ambiguous, JKB Solutions could not recover because the ambiguities were patent. The Claims Court denied the government's motion to dismiss, determining that there were latent ambiguities about whether the Army must pay the total price listed in the task orders. *JKB Sol'ns & Servs., LLC v. United States* (*JKB Sol'ns I*), 148 Fed. Cl. 93, 96–98 (2020). The Claims Court also denied the government summary judgment because there were genuine issues of material fact that precluded summary judgment. *Id.* at 98–99.

In a joint preliminary status report after the Claims Court's decision, the government raised the issues of (a) whether the *Christian* doctrine—established in *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963)—applied, such that the contract and task orders included a termination for convenience clause by operation of law, and (b) whether JKB Solutions' recovery is limited to termination for convenience costs under the doctrine of constructive termination for convenience. At the request of the Claims Court, the parties agreed to brief the applicability of the *Christian* doctrine in a motion for summary judgment. Before filing the motion for summary

judgment, the government notified the court and JKB Solutions that the contract's incorporation of FAR 52.212-4 made briefing on the *Christian* doctrine unnecessary. Over JKB Solutions' objections, the Claims Court permitted the government to move for summary judgment based on FAR 52.212-4 and the doctrine of constructive termination for convenience. The government's motion raised the applicability of the *Christian* doctrine only in a footnote.

The Claims Court granted the government's motion for summary judgment. *JKB Sol'ns II*, 150 Fed. Cl. at 257. First, the court found that JKB Solutions' contract contained a termination for convenience clause by its incorporation of FAR 52.212-4. *Id.* at 256. The court agreed with the government that nothing in the FAR limited the applicability of the termination for convenience clause in FAR 52.212-4 to commercial item contracts only. *Id.* Second, the court found no indication that the Army terminated the task orders in bad faith or abused its discretion by doing so. *Id.* The court explained that there could not be bad faith or an abuse of discretion because the Army never *actually* terminated the contract for convenience. *Id.* Even if the Army had terminated the contract for convenience, the Claims Court found that there would have been no bad faith or abuse of discretion in that termination. *Id.* at 256–57. Third, the court invoked the doctrine of constructive termination for convenience because the contracting officer could have terminated for convenience when it became clear that, for each task order, the Army required fewer classes than originally anticipated. *Id.* at 257. Finally, applying the doctrine of constructive termination for convenience, the court determined that JKB Solutions could only recover termination for convenience costs, which it did not seek in its complaint. *Id.*

JKB Solutions timely appealed to this court. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

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. Fed. Cl. R. 56(a). We review a grant of summary judgment *de novo*. *City Line Joint Venture v. United States*, 503 F.3d 1319, 1322 (Fed. Cir. 2007). We also review contract interpretation *de novo*. *Nw. Title Agency, Inc. v. United States*, 855 F.3d 1344, 1347 (Fed. Cir. 2017).

On appeal, JKB Solutions principally argues that the termination for convenience clause of FAR 52.212-4 does not apply to its service contract. JKB Solutions also argues that there are genuine disputes of material fact that render summary judgment inappropriate. We agree with JKB Solutions that the termination for convenience clause of FAR 52.212-4 does not apply, and we therefore do not reach its other arguments.

Generally, absent specific legislation to the contrary, common-law contract doctrines limit the government's power to contract just as they limit the power of any private person. *Torncello v. United States*, 681 F.2d 756, 762–63 (Ct. Cl. 1982) (en banc) (plurality opinion). Consequently, a contracting officer may only terminate a contract for the convenience of the government—i.e., where there has been no fault or breach by the non-governmental party—if the contract has an applicable termination for convenience clause.[1] *Id.* at 763; *see Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988).

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[1] The *Christian* doctrine permits courts to insert a clause into a government contract by operation of law if applicable federal administrative regulations require it. *Gen. Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993). To insert the clause, a court must find that the clause (1) is mandatory and (2) expresses a

Where a contracting officer does not actually exercise a contract's termination for convenience clause but stops or curtails a contractor's performance for ultimately questionable or invalid reasons, the contract's termination for convenience clause may constructively justify the government's actions, avoid breach, and limit liability. *See Torncello*, 681 F.2d at 759. The doctrine of constructive termination for convenience stems from *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925), where the Supreme Court observed:

> A party to a contract who is sued for breach may ordinarily defend on the ground that there existed, at the time, a legal excuse of nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later.

Id. at 15–16 (footnotes omitted).

A contract's termination for convenience clause "is not an open license to dishonor contractual obligations." *Maxima*, 847 F.2d at 1553. A contracting officer's decision to terminate for convenience is only conclusive in the absence of bad faith or clear abuse of discretion. *See Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995). We presume that the government acts in good faith when contracting. *Id.* To overcome that presumption, a contractor must show through "well-nigh irrefragable proof" that the government had a specific intent to injure it. *Id.* (quotation marks omitted) (finding no bad faith or abuse of discretion where the contracting officer terminated a contract for convenience after determining that an

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significant or deeply ingrained strand of public procurement policy. *Id.*

amendment could not remedy an error arising out of a poorly drafted, critical contract provision).

Similarly, the government may not resort to the doctrine of constructive termination for convenience if it "evinced bad faith or a clear abuse of discretion in its actions." *See Kalvar Corp. v. United States*, 543 F.2d 1298, 1300–01 (Ct. Cl. 1976). The government may also not use the doctrine of constructive termination for convenience to terminate a contract retroactively so as to change its obligations under a fully performed contract. *Maxima*, 847 F.2d at 1553–54, 1557 (holding that the government could not recover its payment of the unused contractual minimum a year after contract completion under the theory that its failure to order the contractual minimum constituted a constructive termination for convenience); *see also, e.g.*, *Ace-Federal Reps., Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000); *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1542 n.2 (Fed. Cir. 1996).

The government acts in bad faith when, for example, it "contracts with a party knowing full well that it will not honor the contract." *Caldwell*, 55 F.3d at 1582; *accord Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990). In *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (en banc), the government entered into a requirements contract with Torncello, knowing that there was a cheaper bidder, and proceeded to use the cheaper bidder's services for items covered by its contract with Torncello. *See id.* at 758 (plurality opinion); *Salsbury*, 905 F.2d at 1521 (discussing *Torncello*). The Court of Claims held that there cannot be a constructive termination for convenience in these circumstances. *See id.* at 773 (Friedman, J., concurring); *Salsbury*, 905 F.2d at 1521 ("The [*Torncello*] court, not surprisingly, held that the government could not avoid the consequences of ignoring its promise to *that* contractor by hiding behind the convenience termination clause."); *Krygoski*, 94 F.3d at 1541–42 ("The Navy [in *Torncello*] used the termination for

convenience clause to escape a promise it never had an intention to keep."). The government, therefore, acts in bad faith by terminating a contract for convenience "simply to acquire a better bargain from another source." *Krygoski*, 94 F.3d at 1541 (citing *Torncello*, 681 F.2d at 772).

Here, the Claims Court erred by holding that JKB Solutions' contract contained an applicable termination for convenience clause. The Claims Court relied solely on the contract's incorporation of FAR 52.212-4 by reference. *JKB Sol'ns II*, 150 Fed. Cl. at 256. But, as explained below, FAR 52.212-4 governs the termination of commercial item contracts for the government's convenience, and it does not apply to service contracts, such as the contract at issue in this case.[2]

FAR 52.212-4 provides for the insertion of numerous contract terms and conditions "[a]s prescribed in [FAR] 12.301(b)(3)." FAR 52.212-4. FAR 12.301 implements 41 U.S.C. § 3307, which provides that the FAR "shall contain a list of contract clauses to be included in *contracts for the acquisition of commercial end items*." 41 U.S.C. § 3307(e)(2)(B) (2012) (amended 2018) (emphasis added); *see* FAR 12.301 (2015). The statute constrains the list of contract clauses:

> To the maximum extent practicable, the list shall include only those contract clauses that are—
>
> (i) required to implement provisions of law or executive orders applicable to acquisitions of

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[2] For purposes of its summary judgment motion, the government did not dispute JKB Solutions' characterization of the contract as a service contract (and not a commercial item contract). Oral Arg. at 23:20–25:28, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=21-1257_09022021.mp3.

> commercial items or commercial components; or
>
> (ii) determined to be consistent with standard commercial practice.

41 U.S.C. § 3307(e)(2)(B). FAR 12.301 contains substantially similar language limiting the list of contract clauses. *See* FAR 12.301(a). The regulation prescribes the insertion of "clauses," like FAR 52.212-4, "in solicitations and contracts *for the acquisition of commercial items*." FAR 12.301(b) (emphasis added). Because FAR 52.212-4 applies only to commercial item contracts and because, for purposes of this summary judgment motion, JKB Solutions' contract is not a commercial item contract, the Claims Court erred in relying on FAR 52.212-4 to supply an applicable termination for convenience clause.

The Claims Court rationalized its holding, finding that "nothing in the FAR limits the applicability of Section 52.212-4(*l*) to commercial item contracts." *JKB Sol'ns II*, 150 Fed. Cl. at 255–56. The government reiterates this reasoning on appeal. As previously noted, the text of FAR 52.212-4 and FAR 12.301 limit the applicability of the incorporated termination for convenience clause to commercial item contracts. The existence of other termination for convenience clauses in the FAR further supports our conclusion. For example, Part 52 of the FAR provides for the insertion of several termination for convenience clauses "[a]s prescribed" in FAR 49.502. *See* FAR 52.249-1 to 52.249-5 (2015). FAR 49.502 prescribes the insertion of FAR 52.249-4's "Termination for Convenience of the Government (Services) (Short Form)" clause in certain "contracts for services." FAR 49.502(c) (2015). Moreover, the FAR provides that the part to which FAR 49.502 belongs "does not apply to commercial item contracts awarded using part 12 procedures." FAR 49.002(a)(2) (2015). A different FAR provision, which references FAR 52.212-4, governs the termination policies of those contracts for the

acquisition of commercial items. *Id.* (citing FAR 12.403 (2015)). The FAR's own distinction between termination for convenience clauses based on types of contracts confirms that FAR 52.212-4's termination for convenience clause does not apply to JKB Solutions' service contract.

We are unpersuaded by the government's remaining arguments as to the applicability of FAR 52.212-4. First, the government argues that JKB Solutions did not preserve its arguments that FAR 52.212-4 only applies to commercial item contracts. We disagree. In JKB Solutions' opposition to the government's motion for summary judgment, JKB Solutions argued that FAR 52.212-4's termination for convenience clause "is inapplicable here because it concerns only Commercial Item contracts whereas the present dispute concerns a Service Contract." J.A. 557–58. JKB Solutions' argument referenced other FAR provisions, including FAR 12.301, FAR 49.502, and FAR 52.249-4. *Id.*

Second, the government argues that FAR 52.212-4's termination for convenience clause necessarily applies to JKB Solutions' contract because, through incorporation by reference, it is a binding term on the parties. This argument conflates two separate concepts: (1) whether JKB Solutions manifested its acceptance of the terms of the contract, such that it is bound by them, and (2) whether the termination for convenience clause that the contract incorporates by reference applies to the contract, i.e., has effect. As noted, FAR 52.212-4 applies only to contracts for the acquisition of commercial items; it has no effect on the service contract between JKB Solutions and the government. *See Torncello*, 681 F.2d at 763 (plurality opinion) ("Therefore, this court will read the termination for convenience clause in the contract in this case as it would read any contract term and give effect to it or deny effect to it as dictated by the general law."). Giving the incorporated termination for convenience clause no effect does not "deny the Government the benefit of its bargain," as the Claims Court found. *JKB Sol'ns II*, 150 Fed. Cl. at 256. In drafting the contract,

the government simply incorporated a FAR provision that, on its face, applies only to commercial item contracts.

CONCLUSION

For the reasons discussed above, the Claims Court erred in holding that FAR 52.212-4 supplied an applicable termination for convenience clause. We therefore vacate the Claims Court's decision and remand for further proceedings consistent with this decision. On remand, the Claims Court may consider whether the *Christian* doctrine applies to incorporate a termination for convenience clause and whether, in light of our case law, the doctrine of constructive termination for convenience applies in these circumstances.

VACATED AND REMANDED

COSTS

Costs to JKB Solutions.

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 31, 2021

CBCA 6772

MICROTECHNOLOGIES LLC dba MICROTECH,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Joseph J. Petrillo and Karen D. Powell of Smith Pachter McWhorter, PLC, Tysons Corner, VA, counsel for Appellant.

Robin M. Fields and Matthew Vince, Office of General Counsel, Executive Office for United States Attorneys, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **DRUMMOND**, and **CHADWICK**.

GOODMAN, Board Judge.

Appellant, Microtechnologies LLC dba Microtech, has filed this appeal from the decision of a contracting office of respondent, Department of Justice (DOJ), denying its claim for termination for convenience costs. Appellant and respondent have filed motions for summary judgement. We grant respondent's motion, deny appellant's motion, and deny the appeal.

Background

Appellant holds a multiple-award government-wide acquisition contract (the contract) for information technology products and services. On September 25, 2017, respondent issued a fixed-price delivery order (the order) under the contract, effective September 27, 2017, for a brand name of workstation perpetual software licenses, plus travel and software maintenance. The period of performance included one base year (September 29, 2017, to September 28, 2018) and two potential option years (September 29, 2018, to September 28, 2019; and September 29, 2019, to September 28, 2020). The cost of software maintenance during each option year, if exercised, was $688,051.80.

On September 29, 2017, at the beginning of the base year of performance, appellant purchased the perpetual software licenses and software maintenance for the base year and both option years and paid the invoice for this purchase on October 31, 2017.

Two days after the base year period of performance ended, on Sunday, September 30, 2018, at approximately 2:30 p.m., appellant's financial services manager emailed respondent's Executive Office for United States Attorneys acquisitions staff, chief of operations, indicating that she had not heard from the contracting officer's representative (COR) regarding the exercise of the first option year. Later that day, at approximately 6:30 p.m., respondent transmitted via attachment to email a proposed bilateral modification designated P00002 (modification 2), which stated in part: "To exercise option year 1 for [brand name] Workstation Perpetual Software License for the period of September 29, 2018, through September 28, 2019, in the amount of $688,051.80." Appellant accepted, signed, and returned modification 2 the same day at approximately 9:10 p.m.

On Monday, October 1, 2018, at 8:37 a.m., the assistant director of respondent's acquisitions staff sent an email to appellant's financial services manager informing appellant that the option year had been exercised in error. Attached to the email was modification P00003 (modification 3), which read in part as follows: "The purpose of this modification is to terminate Option Year One. The option year was exercised in error." At 9:09 a.m., appellant received an email from respondent requesting signature on a modification terminating the option year. Appellant did not sign that modification, and on October 2, 2018, respondent sent appellant a unilateral modification dated October 1, 2018, terminating the option year, which was signed by the contracting officer.

By letter dated November 29, 2018, appellant informed respondent that the manufacture of the brand name work stations does not sell software maintenance for less than a one-year term, and so respondent will be liable, as the result of the termination of the modification, for the full cost of a one-year maintenance subscription. Therefore, appellant suggested that respondent rescind the termination, and requested a response so that it could

send a termination cost proposal if the termination was not rescinded. The letter also stated that the "short form" Termination for Convenience clause referenced in the modification was not in the order or in the contract; instead, the correct convenience termination clause was the one for commercial item contracts, Federal Acquisition Regulation (FAR) 52.212-4(l).

By letter dated May 17, 2019, appellant sent respondent a claim for termination costs in the amount of $688,051.80, which represented the price of one year of software maintenance in modification 2. On February 18, 2020, respondent's contracting officer transmitted an undated letter denying the claim, stating that appellant had not provided any data to substantiate that any work was performed between the issuance of the modification exercising the option year and its termination, nor any data to substantiate that any costs were incurred between the issuance of the modification and its termination. Additionally, the decision stated that confirmation that the option year services would not be required was provided by telephone to appellant by the COR on Friday, September 28, 2018, and respondent is not responsible for the reimbursement of costs associated with appellant's decision to pre-pay for the three years of software maintenance which it purchased at the beginning of the contract.

Discussion

Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986); *Harris IT Services Corp. v. Department of Veterans Affairs*, CBCA 5814, et. al., 20-1 BCA ¶ 37,533 (2019). A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139.

Appellant contends in its motion for summary judgment that it is entitled to be paid the cost of one year of maintenance for the erroneously exercised option year pursuant to the termination clause of the contract, which reads in relevant part:

> the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges . . . [that] have resulted from termination.

FAR 52.212-4(l). Appellant alleges that the cost of one year of maintenance for the option year was a reasonable charge that resulted from the termination of the modification, even though it purchased the maintenance for the option years at the beginning of the base year, not knowing whether or not the option year would be exercised, and the modification was terminated within twelve hours. Appellant states:

> Since [the manufacturer] sells such maintenance in increments of one year, MicroTech was required to purchase a minimum of one year's worth of software maintenance in order to fulfill its performance requirements when the Order was extended. DOJ complains that MicroTech actually purchased the software maintenance in advance, but this is irrelevant. MicroTech was not only justified in purchasing a year's software maintenance as of September 30 (the date of the bilateral modification), it was contractually obligated to do so. The termination for convenience did not occur until a day or two later. That the actual purchase occurred earlier than September 30 does not make it unnecessary or improper.

Appellant's Motion at 7-8.

Appellant states further:

> MicroTech has acted reasonably and responsibly to mitigate its costs. [The manufacturer] does not refund software maintenance costs once paid.[1]

Appellant's Motion at 9 (footnote omitted).

Respondent states in its motion:

> MicroTech is not entitled to termination costs for $688,051.80, the price of one-year of software maintenance under Option Year 1 of the [order] . . . after the Government terminated Modification P00002 . . . on October 1, 2018. First, MicroTech seeks to recover termination costs relating to its advanced payment to [the manufacturer] for option years . . . even though no options had been exercised at the time of MicroTech's payment to [the manufacturer]. Those costs are not recoverable because the Government did not terminate the Order; it expired by its own terms on September 28, 2018 when the Government did not exercise Option Year 1. Indeed, there was no guarantee that the Government would exercise its options under the contract. Therefore, MicroTech can only claim termination costs resulting from the Government's termination of Mod[ification] 2, which was a separate agreement the Government entered into by mistake on September 30, 2018 and subsequently terminated within 12-hours.

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[1] The manufacturer's Support and Maintenance Services Agreement does not address whether the purchase is refundable. Appeal File, Exhibit 4 at 6.

> Second, preponderant record evidence shows that MicroTech cannot recover under the first prong of the commercial items termination for convenience clause because it did not perform any work during the 12-hours that Mod[ification] 2 was in effect prior to the Government's termination for convenience. Third, preponderant record evidence further shows that MicroTech is not entitled to recovery under the second prong of the commercial items termination for convenience clause because MicroTech's decision to prepay [the manufacturer] for a three-year term of software maintenance was not a reasonable charge resulting from the termination of Mod[ification] 2 a year later. And it certainly was not a reasonable charge resulting from the natural expiration of the underlying Order.

Respondent's Motion at 4-5 (footnotes omitted).

Thus, appellant maintains that software maintenance costs for which it seeks recovery as a termination cost was a reasonable charge in connection with the termination of the modification.[2] Respondent emphasizes in its motion for summary judgement that appellant has offered no evidence that appellant has supplied work under the modification. Rather, respondent contends that appellant's purchase of the software maintenance at the beginning of the base year, with no assurance that the option years would be exercised, did not result from the issuance of modification 2, nor had any work been performed in the short period between the erroneous issuance of modification 2 and the termination for convenience of the modification.

By pointing out this lack of evidence of work performed, respondent has shifted to appellant the burden to show that there exist disputed factual issues.[3] While the scope of

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[2] Appellant relies upon *Dream Management, Inc. v. Department of Homeland Security*, CBCA 5517, 17-1 BCA ¶ 36,716; *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537; *Rex Systems, Inc.*, ASBCA 59624, 16-1 BCA ¶ 36,350; *SWR, Inc.*, ASBCA 56708, 15-1 BCA ¶ 35,832 (2014); and *Information Systems & Networks Corp.*, ASBCA 46119, 02-2 BCA ¶ 31,952. These decisions do not address the issue of entitlement to termination costs arising from a termination of an erroneously exercised option period.

[3] "[W]hen the non-moving party bears the burden of proof . . . , the moving party can simply point out the absence of evidence creating a disputed issue of material fact. The burden then falls on the non-moving party to produce evidence showing that there is such a disputed factual issue in the case." *Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012).

modification 2 was the supply of software maintenance for the second option year, appellant alleges that it purchased non-refundable software maintenance almost a year previously when it did not know if the maintenance would be required, and that it was contractually obligated to purchase the maintenance when it received the modification and the purchase was not refundable. These are allegations without evidence, which fail to set forth specific facts showing that there is a genuine issue of material fact, and as such cannot defeat the motion for summary judgment. *Michael Johnson Logging v. Department of Agriculture*, CBCA 5089, 18-1 BCA ¶ 36,938 (2017).

Appellant fails in its burden of proof, as it rests on allegations that do not offer specific facts evidencing entitlement to recover the costs at issue or showing genuine issues of fact. Appellant does not set forth specific facts that prove that the one year of software maintenance at issue that was purchased at the beginning of the base year was required under the contract when purchased. Appellant further fails to prove its allegation that this purchase was non-refundable, when the purchase allegedly became non-refundable, or if the alleged non-refundability was the result of the issuance and termination of modification 2. There is no evidence that appellant took action to activate or apply the software maintenance upon receipt of modification 2, or during the approximately twelve-hour period between the execution of the modification and notice that the modification was an erroneous exercise of the option, that would have resulted in appellant supplying the software maintenance to the Government pursuant to modification 2. Accordingly, appellant has not proved that the software maintenance at issue was supplied to the Government under modification 2, and therefore the cost of that software maintenance is not a cost arising from the termination of modification 2.

Decision

Respondent's motion for summary judgement is granted. Appellant's motion for summary judgement is denied. The appeal is **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge

Kyle Chadwick
KYLE E. CHADWICK
Board Judge

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Lockheed Martin Corporation	)	ASBCA No. 62377
	)	
Under Contract No. N00019-11-C-0083 *et al.*	)	

APPEARANCES FOR THE APPELLANT: Nicole J. Owren-Wiest, Esq.
Catherine Shames, Esq.
Eric Ransom, Esq.
Crowell & Moring LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Arthur M. Taylor, Esq.
DCMA Chief Trial Attorney
Peter M. Casey, Esq.
Debra E. Berg, Esq.
Trial Attorneys
Defense Contract Management Agency
Hanscom AFB, MA

OPINION BY ADMINISTRATIVE JUDGE SWEET

This appeal is a declaratory action regarding whether the Fly America Act, 49 U.S.C. § 40118 (FAA) and Federal Acquisition Regulation (FAR) 52.247-63 only apply to direct personnel performing direct work on covered contracts, or also apply to indirect personnel or indirect travel. On August 3, 2020, the government moved to dismiss this appeal, arguing that we do not possess jurisdiction because appellant Lockheed Martin Corporation (Lockheed Martin) did not submit a claim seeking a sum certain to the Corporate Administrative Contracting Officer (CACO), and the contract the government allegedly breached was not a contract within the meaning of the Contract Disputes Act, 41 U.S.C. § 7101 *et seq.* In the alternative, the government argues that we should exercise our discretion, and decline to grant declaratory relief because there is no live dispute. Lockheed Martin disputes each of those arguments.

For the reasons discussed below, we decline to grant declaratory relief because there is no live dispute. Therefore, we do not address the government's alternative arguments, grant the motion to dismiss, and dismiss this appeal without prejudice to file a new appeal in the event a live dispute arises.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On April 10, 1997, the government and Lockheed Martin executed a memorandum of understanding (MOU), under which the parties agreed that the FAA only applied to direct personnel performing direct work on covered contracts, and did not apply to indirect personnel or indirect travel (R4, tab 2).

2. On April 25, 2019, the CACO sent Lockheed Martin a letter, stating that the government was withdrawing from the MOU because the MOU misinterpreted FAR 52.247-63 (withdrawal letter) (R4, tab 15).

3. In a declaration, Chad F. Connell—Lockheed Martin's Vice President of Government Finance and Compliance—states that the government has not denied payment or disallowed any indirect costs of international transport on the basis of noncompliance with the FAA and FAR 52.247-63 (app. resp. at ex. 1, Connell decl. ¶ 9). Moreover, Lockheed Martin "has not made any change whatsoever to its billing, accounting, or international air transportation practices" (*id*. ¶ 8). Indeed, Lockheed Martin "did not perceive the withdrawal letter as mandating any action be taken to [align] Lockheed Martin's accounting or international air transportation practices with the Government's newly advanced interpretation of the FAA and FAR 52.247-63" (*id*. ¶ 7). We have carefully searched this declaration for a statement about any way that the government's withdrawal from the MOU has affected Lockheed Martin and we have found nothing.

4. On June 27, 2019, Lockheed Martin submitted a claim to the CACO, requesting an interpretation of the FAA and FAR 52.247-63 (R4, tab 16 at 310-11). The claim indicated that Lockheed Martin would continue to operate in compliance with the MOU (*id*. at 316).

5. On October 30, 2019, the CACO issued a final decision on Lockheed Martin's claim, interpreting the FAA and FAR 52.247-63 as applying to indirect costs of international transportation (R4, tab 18).

6. Lockheed Martin appealed that decision to the Board, seeking a declaration that the FAA and FAR 52.247-63 only apply to direct foreign air transportation costs, and do not apply to indirect costs (compl. ¶ 47).

DECISION

Assuming, without deciding, that we possess jurisdiction over Lockheed Martin's claim for declaratory relief, we decline to grant such relief because there is no live dispute between the parties. We may decline to grant declaratory relief if (1) the claim does not involve a live dispute between the parties; (2) a declaration will not resolve that dispute;

or (3) the legal remedies available to the parties are adequate to protect their interests. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999). A live dispute exists where a disagreement clearly exists, has significant ramifications, and continues to impact the contractor. *Kellogg Brown & Root Services, Inc.*, ASBCA No. 58578, 13 BCA ¶ 35,411 at 173,712 (holding that a live dispute existed when the Defense Contract Audit Agency (DCAA) issued a Notice of Contract Costs Suspended and/or Disapproved Form stating that DCAA disapproved the costs, the contracting officer (CO) sent a letter indicating that contractor's interpretation of the contract was based upon bad assumptions, and there was a *qui tam* action pending against the contractor regarding its interpretation of the contract).

Here, Lockheed Martin argues that, under *Kellogg Brown & Root*, the withdrawal letter has had significant ramifications for, and a continuing impact upon, Lockheed Martin. However, unlike in *Kellogg Brown & Root*, there was no DCAA Notice of Contract Costs Suspended and/or Disapproved Form stating that DCAA disapproved the costs, or a *qui tam* action. Moreover, the withdrawal letter in this case is different than the CO letter in *Kellogg Brown & Root* because—contrary to Lockheed Martin's argument that the government's interpretation of the FAA and FAR 52.247-63 requires Lockheed Martin to change its international air transportation or cost accounting systems, processes, policies, and employee training (app. resp. 23-24; app. supp. resp. 8-9)— Mr. Connell declares that Lockheed Martin has not made "any change whatsoever to its billing, accounting, or international air transportation practices" as a result of the withdrawal letter (SOF ¶ 3). Indeed, Mr. Connell concedes that Lockheed Martin does not even view the withdrawal letter as mandating that it take any action (SOF ¶ 3).[*] Therefore, Mr. Connell's declaration establishes that any dispute has not had significant ramifications for, or a continuing impact upon, Lockheed Martin. As a result, unlike in *Kellogg Brown & Root*, this appeal does not involve a live dispute, and we exercise our discretion by declining to grant declaratory relief. *Alliant Techsystems*, 178 F.3d at 1270-71; *Kellogg Brown & Root Services*, 13 BCA ¶ 35,411 at 173,711-13.

[*] It is not necessary for the government to disallow costs in order for there to be a live dispute. *TRW, Inc.*, ASBCA Nos. 51172, 51530, 99-2 BCA ¶ 30,407 at 150,330-32. However, here, not only has the government failed to disallow any costs (SOF ¶ 3), but Lockheed Martin has not even taken any action in response to the withdrawal letter, and does not view the withdrawal letter as mandating any action (SOF ¶ 3).

CONCLUSION

For the reasons discussed above, we exercise our discretion and decline to grant declaratory relief because there is not a live dispute. Therefore, the motion is granted, and we dismiss this appeal without prejudice to file an appeal, if and when a live dispute arises.

Dated: January 7, 2021

James R. Sweet

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62377, Appeal of Lockheed Martin Corporation, rendered in conformance with the Board's Charter.

Dated: January 8, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Lockheed Martin Aeronautics Company	)	ASBCA Nos. 62505, 62506
	)	
Under Contract Nos. FA8615-16-C-6048	)	
FA8615-17-C-6045	)	

APPEARANCES FOR THE APPELLANT: Stephen J. McBrady, Esq.
Skye Mathieson, Esq.
Michelle D. Coleman, Esq.
John Nakoneczny, Esq.
Crowell & Morning LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrant, Esq.
Air Force Chief Trial Attorney
Caryl A. Potter, Esq.
Christopher M. Judge-Hilborn, Esq.
Trial Attorneys

MAJORITY OPINION BY ADMINISTRATIVE JUDGE PROUTY

The question presented by these appeals is whether a unilateral contract definitization[1] action by a contracting officer (CO) constitutes a government claim that may be directly appealed to the Board by the contractor (as happened here), or whether it is an act of contract administration, subject to a claim by the contractor, but not a direct appeal. It turns out, we answered this question 33 years ago in *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048. In that case, we held that such a unilateral contract definitization is not a government claim and that, to obtain relief, the contractor must first file a claim with the CO and then appeal to us if it is dissatisfied with the results. Appellant here, Lockheed Martin Aeronautics Company (LM), is well aware of *Bell Helicopter*, but appealed the unilateral definitization directly to us anyway, arguing that *Bell Helicopter* has been effectively, if not expressly, overruled in the years since its issue. Judge Clarke, in dissent, agrees with LM.

Though we certainly agree that the definition of "claim" and the universe of actions subject to a claim has grown more liberal since the issuance of *Bell Helicopter*,

[1] Contract definitization is the setting of a final price for a contract that was awarded without a set price.

see, e.g., Todd Constr. v. United States, 656 F.3d 1306, 1311-12 (Fed. Cir. 2011), we respectfully disagree with Judge Clarke's conclusion that it has changed so much as to effectively overrule that decision. That being the case, we must follow our prior precedent, *see SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 at 175,220, and continue to hold that a unilateral contract definitization does not constitute a government claim and may not be directly appealed to us. The government motion to dismiss on these grounds is granted.

STATEMENT OF FACTS FOR THE PURPOSES OF THE MOTION

Strictly speaking, the motion before us is a motion to dismiss for lack of jurisdiction. The government submitted with its motion a statement of undisputed material facts, in the style of a motion for summary judgment. Those proposed facts – at least those which we find material to our decision today – may be gleaned almost completely from LM's complaint in this action.[2] The salient ones are below.

These appeals involve two contracts in which the Air Force contracted with LM to upgrade F-16 fighter aircraft on behalf of two different foreign governments pursuant to the Foreign Military Sales program. Contract No. FA8615-16-C-6048 (the Singapore contract) was entered in December 2015 and was for the purpose of upgrading the avionics of F-16s owned by Singapore. Contract No. FA8615-17-C-6045 (the Korea contract) was entered into in November 2016. (*See* compl. ¶¶ 1-2).

Each contract was an undefinitized contract action (UCA), meaning that the contract was awarded before the final price was set (*see* compl. ¶ 2). In each case, LM was entitled to charge the government for the costs that it incurred as it performed the contract until it was definitized (*see* compl. ¶ 3). Each contract also included a "not to exceed" (NTE) amount, which limited the costs that LM could incur before the contract price was definitized (*see* compl. ¶ 17 (Singapore contract); ¶ 19 (Korea contract)).

The contract provisions governing definitization came from different sources for each contract, though they were identical for our purposes. The relevant provision for the Singapore contract came from the Federal Acquisition Regulation (FAR) 52.216-25(c); the provision for the Korea contract came from the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) 252.217-7027(c). (*See* compl. ¶ 5). Each

[2] In a motion to dismiss for lack of jurisdiction, well-pleaded facts in the complaint are generally treated as true unless controverted. *See, e.g., Reynolds v. Army and Air Force Exch. Svs.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

provided that, in the event the parties were unable to come to agreement upon the definitized price within the time set by the contract:

> the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

See compl. ¶ 10 (citing FAR 52.216-25(c); DFARS 252.217-7027(c)).

And, speaking of the Disputes clause, each contract included the same Disputes clause, FAR 52.233-1, DISPUTES (MAY 2014) ALTERNATE I (DEC 1991)) (*see* compl. ¶ 11; R4, tab 1 at 47 (Singapore contract); R4, tab 7 at 42 (Korea contract)).

LM submitted proposals for definitization of the contracts in a timely manner and included cost data to support its proposals (*see* compl. ¶¶ 20-43 (Singapore contract); ¶¶ 47-65 (Korea contract)). Nevertheless, after a period of several years, the parties were unable to come to agreement upon the contract prices and, on February 12, 2020, the CO issued contract modifications to unilaterally set the price for each contract. In the case of the Singapore contract, Modification No. PZ0010 unilaterally definitized the total project price at $1,008,584,243 (*see* comp. ¶ 44). In the case of the Korea contract, Modification No. PZ0012 unilaterally definitized the total project price at $970,462,643 (*see* compl. ¶ 66).

LM did not file a claim with the CO challenging these definitization actions. Instead, on May 8, 2020, LM filed Notices of Appeal of each definitization action with the ASBCA, stating that it was appealing directly from the government's two unilateral modifications. (*See* compl. ¶ 12). At the time of its submission of the appeals, LM asserts, both contracts had over a year of performance remaining and in neither contract had LM's costs exceeded the unilaterally definititzed price set by the CO (*see* compl. ¶ 9).

The appeals have since been consolidated.

DECISION

I. *Bell Helicopter* is Dispositive (if it Remains Good Law)

As noted above, the government has moved to dismiss these appeals upon the ground that LM has not filed claims with the CO challenging the two definitization actions at issue. Without a decision upon claims to appeal, of course, there is no

jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. *Islands Mechanical Contractor, Inc.*, ASBCA No. 59655, 17-1 BCA ¶ 36,721 at 178,809.

LM recognizes the need for a CO final decision for Board jurisdiction, but argues that it has that in the CO's definitization decision, which LM asserts is a government claim against the contractor which may be directly appealed (*see* app. opp'n at 15-16 (citing *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 749-50 (Fed. Cir. 1993))). Unfortunately for LM, that argument was rejected by the Board in *Bell Helicopter*, where we held that a "contracting officer's decision [that] did no more than establish the contract price in accordance with [the terms of the contract] did not amount to a government claim." 88-2 BCA ¶ 20,656 at 104,392. The CO's decisions challenged here, likewise, established the contract price in accordance with the contracts' terms, and are thus not government claims – so long as *Bell Helicopter* remains binding.

II. *Bell Helicopter* Remains Good Law

As will be discussed herein, LM's challenges to *Bell Helicopter* come in two primary categories. The first is that the judicial expansion of the meaning of "other relief" as a category of claim under the CDA, which happened subsequent to the *Bell Helicopter* decision, now embraces definitization, making it a claim.[3] The second category of challenge to *Bell Helicopter* is premised upon the notion that it was decided incorrectly in the first place. Neither category of challenge is persuasive in the context we are operating under here: our decision today is not based upon what we would do if we were working on a blank slate and the Board had not issued *Bell Helicopter*; instead our decision – and the analysis which we must undertake in addressing LM's arguments – is premised upon *Bell Helicopter* being the law, which we do not have the power to overrule.[4] Our

[3] LM also argues that *Bell Helicopter* did not address whether definitization constituted "other relief", thus, technically, making it unnecessary for us to actually overrule that decision (app. sur-reply at 4-8). Contrary to LM's argument, *Bell Helicopter* addressed whether the government seeks other relief when it definitizes prices by expressly holding that the government did not seek any "recourse" when it definitized prices. 88-2 BCA ¶ 20,656 at 104,392. In any event, we find that LM's argument cuts things too finely: the *Bell Helicopter* decision considered whether a unilateral definitization was a government claim and found that it was not; the "other relief" text was, of course, part of the CDA at the time and we presume our predecessors were familiar with it, even if they did not explicitly cite it. In any event, in dealing with the argument that the law on "other relief" expanded post-*Bell Helicopter*, we largely deal with LM's argument that the *Bell Helicopter* panel ignored "other relief."

[4] To be clear, we do not mean to imply that, without *Bell Helicopter*, we would necessarily rule in LM's favor or that we disagree with the outcome of that case. We do not reach those questions because, if *Bell Helicopter* remains the law (as

authority to disregard the holding of *Bell Helicopter* can only rest on its being directly overruled by a body with the authority to do so, such as the Board's own Senior Deciding Group (SDG) [5] or the Federal Circuit, or its foundational underpinnings having been so changed as to effectively overrule it. *See Lighting Control Ballast, LLC v. Phillips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1282 (Fed. Cir. 2014), *vacated on other grounds sub nom. Lighting Control Ballast, LLC v. Universal Lighting Tech., Inc.*, 574 U.S. 1133 (2015); *cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).[6]

A. The Ascendance of "Other Relief" Does Not Sufficiently Change the Basis of *Bell Helicopter* to Overrule it.

The decision that LM and Judge Clarke's dissent argue is most salient to this appeal is the Board's SDG decision in *Gen. Elec. Co.*, ASBCA Nos. 36005, 38152, 91-2 BCA ¶ 23,958, which was affirmed by the Federal Circuit in *Garrett*, *supra* (*see* app. opp'n at 23-24). *General Electric* involved the CO's direction to appellant to repair a number of non-complying jet engines produced under the contract. Since the government's demand was nonmonetary, it had been argued that prior Board decisions requiring a monetary aspect to a CO's directive to make it a government claim – *H.B. Zachry Co.*, ASBCA No. 39202, 90–1 BCA ¶ 22,342, was the primary example – precluded that direction from being a government claim. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,945-46. The SDG decision overruled any such decisions, recognizing that "other relief" under the FAR's definition of "claim" embraced the CO's directive to repair the engines and that any notion of limiting government claims to ones specifically seeking money was wrong. *Id*. at 119,946. The Federal Circuit's opinion essentially agreed with this, holding that the government's direction to the contractor was a government claim despite its choice to pursue a nonmonetary remedy. *See Garrett*, 987 F.2d at 749.

None of this directly addresses *Bell Helicopter*, about which the SDG was conspicuously silent, despite its explicitly overruling of *Zachry*. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,946. To be sure, *Bell Helicopter* was mentioned in one of the three dissenting opinions in which it was included in a string cite for the proposition that directions by contracting officers to perform additional work were not considered to be

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we find that it is), there is no more reason to second guess it than any other binding precedent.

[5] The SDG is the way that the Board overturns its past precedents. *See SWR*, 15-1 BCA ¶ 35,832 at 175,220. It may be considered the equivalent of an *en banc* decision, but it does not involve every member of the Board, just the most senior.

[6] In footnote four of its sur-reply, LM cites four prior opinions of ours in support of its assertion that we have routinely "jettisoned" our past precedent when the Federal Circuit has "signal[led] a new jurisdictional trajectory" (app. sur-reply at 6, n.4). That particular test is not to be found in any of our opinions. A change in foundational underpinnings, the proper test, is different than a vague "signal."

claims. *See Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,947 (Spector, J., dissenting). But, with due respect to that dissenting opinion, that alleged holding of *Bell Helicopter*'s is not, in fact, an accurate representation of its actual holding, for the unilateral contract definitization in *Bell Helicopter* entailed no requirement for *additional* work, and nothing in *Bell Helicopter* is premised upon the notion that only monetary claims can be government claims.

Judge Clarke argues that concerns expressed by the dissenters in *General Electric* – that finding a government claim in those circumstances would unduly intrude into contract administration – show that those concerns are now relegated to dissents. In other words, they have been rejected by the winning side of that decision and the same rejection should apply to *Bell Helicopter*, which is (supposedly) premised upon similarly misplaced views of keeping the Board's hands out of contract administration. But not everything said in a dissent is necessarily wrong. Judge Williams' concurring opinion in *General Electric* shared the dissenters' "legitimate concern that the Board not become embroiled in matters that are primarily contract administration." *Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,947. He, nevertheless, found that the circumstances in *General Electric* did not go too far into such administration. *Id*. Indeed, the Federal Circuit's opinion in *Garrett* recognized the problematic aspects of judicial intrusion into contract administration, but, like Judge Williams (with whom it agreed), found them to be inapplicable to the circumstances presented in that appeal, given, *inter alia*, that contract performance was already complete at the time the government revoked its acceptance of the jet engines and required the contractor to fix them. *Garrett*, 987 F.2d at 751-52.

Hence, in and of themselves, neither *General Electric* nor *Garrett* overruled *Bell Helicopter*, either explicitly or implicitly. Moreover, they did not appreciably change the legal terrain regarding "other relief" as a basis for government claims. As the SDG opinion in *General Electric* noted, the Board had ample past precedent prior to that case (and *Bell Helicopter*) in which the Board found the government's availing itself of other relief constituted a claim. *Gen. Elec.*, 91-2 BCA ¶ 23,958 at 119,944-45 (citing cases).

LM argues that the Federal Circuit's more recent decision in *Todd Construction, supra*, further opened up the definition of claim so as to embrace a definitization action. A more accurate reading of *Todd Construction* would be to say that it opened up the matters that could be subject to claims. Importantly, *Todd Construction* did not hold that the challenged performance evaluations[7] were, themselves, government claims; rather, it held that seeking relief from those evaluations was the proper subject of a claim. *See Todd Constr.*, 656 F.3d. at 1313-14. This, we think, is key: it is not that every written action in the course of a contract that a party considers to be adverse to it is a claim;

[7] The issue in *Todd Construction* was whether the CDA permitted a contractor to file a claim challenging contractor performance reports. The Federal Circuit decided that it did. *See* 656 F.3d. at 1313-14.

instead, it is the seeking of relief from those actions that is the claim. The Federal Circuit in *Todd Construction* never concluded that the performance evaluations were, themselves, government claims. *Id.*

And it is a very good thing for the private contracting community that *Todd Construction* did not do so: if an adverse performance evaluation were, in fact, a government claim, then a contractor would be subject to the CDA's statute of limitations to appeal it to the Board or the Court of Federal Claims. *See* 41 U.S.C. § 7104. Does *Todd Construction* really mean that, in all acts of contract administration by the government that the contractor may later dispute, the contractor must immediately vault to the courthouse door prior to filing its own claim or risk losing its appeal rights? Under LM's reading of the case, it must.[8] But we think not. Instead, the CDA, sensibly, gives the contractor ample time to decide whether to file a claim in the first instance (6 years, *see* 41 U.S.C. § 7013(a)(4)), and a much shorter period of time after the claim is denied (90 days for appeals to the Board; a year for appeals to the Court of Federal Claims) to appeal the claim denial. 41 U.S.C. § 7104. To its credit, *Todd Construction* did not change this.

LM cites a number of other types of appeal which do not, in and of themselves, expand the definition of "claim" but that it argues are the "progeny" of *General Electric* and, by analogy, suggest the definitization here must be a claim (*see generally*, app. opp'n at 18-19; 25-42). To put it slightly differently, LM's argument is that, "if these other things are government claims, surely a contract definitization must be." We generally question whether argument by analogy is sufficiently direct to cause us to recognize that one of our precedential opinions had been since overturned by our reviewing court. But, in any event, the analogous cases cited by LM are all distinguishable from contract definitization or were taken into consideration by the Board when *Bell Helicopter* was issued, thus precluding their use as bases to set aside that case.

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[8] Perhaps LM might argue here that, since performance evaluations and other such CO actions do not include appeal rights, they are not necessarily government claims unless the contractor wishes them to be. But such an argument would both be contrary to the position it is taking in this appeal, that a decision may be a government claim even if the appeal rights are left off (*see* app. opp'n at 47), and be mistaken. We have long held that CO final decisions with defective notification of appeal rights can, nevertheless, be considered valid and not toll the statute of limitations – in particular, when the contractor has not detrimentally relied on the defective notification. *See Mansoor Int'l Dev. Servs.*, ASBCA No. 58423, 14-1 BCA ¶ 35,742 at 174,926; *cf. Decker & Co v. West*, 76 F.3d 1573, 1579-80 (Fed. Cir. 1996). This law does not provide room for the contractor to pick and choose which CO's decisions were ripe for appeal and which it would prefer to let lie and perhaps later submit a claim upon.

The first set of "analogous" cases cited by LM are a number involving the use of the contract's inspection clause by the government to direct the contractor to do new work on the contract (*see* app. opp'n at 25-28). These cases are all similar to *General Electric* and present similar fact patterns. Inasmuch as we have already discussed *General Electric* above, and find that it does not change the viability of *Bell Helicopter*, we may dispose of these arguments out of hand: the cases cited all involved directing the contractor to incur additional costs of performance – that has not happened here.
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LM next argues that cost accounting standard (CAS) non-compliance determinations, which are government claims, are similar to the definitization here (app. opp'n at 28-32). In support of this conclusion, LM relies principally on one of our opinions: *CACI Int'l, Inc*., ASBCA No. 57559, 12-1 BCA ¶ 35,027, and a Court of Federal Claims opinion cited in *CACI*, *Newport News Shipbuilding & Dry Dock Co. v. United States*, 44 Fed. Cl. 613 (1999) (*see* app. opp'n at 28-30). Those cases stand for the (hardly novel) proposition that a CAS non-compliance determination, which imposes the cost of a new accounting system on the contractor, is a government claim. *See CACI*, 12-1 BCA ¶ 35,027; *Newport News*, 44 Fed. Cl. at 616-17. LM asserts that a unilateral cost definitization is like a non-compliance finding because it will "invariably forc[e] cost overruns down the road" (app. opp'n at 28).

That is quite some assertion. Especially given how foundational it is to LM's argument. Absent a claim *by the contractor*, we have no way of knowing whether the particular price definitization imposed by the government will force later cost overruns in a particular case, much less whether any and all unilateral definitizations would "invariably" cause such overruns.[9] In any event, it is safe to say that the reasoning in *CACI* did not overturn *Bell Helicopter* and that neither it, nor *Newport News*, a case in a court that is not binding upon us, could have overturned *Bell Helicopter* in any event.

We also note that *CACI* is not the first case of ours finding a CAS non-compliance finding to be a government claim. In 1983, five years before *Bell Helicopter*, we came to that very conclusion in *Brunswick Corp.*, ASBCA No. 26691, 83-2 BCA ¶ 16,794, obviating LM's suggestion that there was any change in law supporting setting aside *Bell Helicopter*.[10]

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[9] LM asserts in its complaint that it is being wronged by tens of millions of dollars (*see* comp. ¶¶ 73, 80), but it does not argue that such figures may be found in the CO's definitization decision or that all unilateral priced definitizations will "invariably" cause cost overruns.

[10] *Newport News*, the Court of Federal Claims case cited by LM here, also relied upon one of the Board's pre-*Bell Helicopter* decisions for its holding that CAS non-compliance findings could constitute government claims. 44 Fed. Cl. at 616 (citing *Systron Donner, Inertial Div.*, ASBCA No. 31148, 87-3 BCA ¶ 20,066).

Equally meritless is LM's argument that cases holding terminations for default to be government claims necessarily overturned *Bell Helicopter* (*see* app. opp'n at 32-34). This holding was the law prior to *Bell Helicopter*, and was indeed discussed by the panel that considered *Bell Helicopter*, and dismissed by it. *See* 88-2 BCA ¶ 20,656 at 104,392. It is not a basis to argue that the law has changed since we issued the *Bell Helicopter* decision.

LM's penultimate argument by analogy is to compare the present circumstances to data rights claims, in which the government's ordering the removal of restrictive data rights markings (or its unilateral removal of such markings), which we have held constitutes a government claim (*see* app. opp'n at 34-38). First, as LM recognizes, such data rights issues were recognized as government claims even before *Bell Helicopter*, *see, Bell Helicopter Textron*,[11] ASBCA No. 21192, 85-3 BCA ¶ 18,415 (cited by app. opp'n at 37), and were cited immediately after it. *See Ford Aerospace & Comms. Corp.*, ASBCA No. 29088, 88-2 BCA ¶ 20,748 at 104,829 (cited by app. opp'n at 37). Indeed, two of the three judges who signed *Bell Helicopter* (Spector, J., and Ruberry, J.) also signed *Ford Aerospace*, so it is rather clear that the consideration of the data rights actions to be government claims is not a change to the law since *Bell Helicopter*, indicating that its time has passed. Moreover, the data rights cases are easily distinguishable from the definitization we are dealing with here: perhaps there had been no monetary impact by the government's arrogation of contractor-owned data rights, but they involved the taking of property from the contractor by the government – a wrong that was ripe for relief. The unilateral contract definitization, however, as the *Bell Helicopter* Board put it, sought nothing from the contractor and merely established the price as required by the contract. *See* 88-2 BCA ¶ 20,656 at 104,392. The two types of cases are consistent – and are certainly not so inconsistent as to compel the reversal of *Bell Helicopter*.

LM's final argument by analogy is that the government's unilateral establishment of indirect cost rates constitutes a government claim, which would mean that the government's unilaterally establishing the contract's price should also be a government claim (app. opp'n at 38-42). In some ways, this is LM's strongest argument because there are commonalities in the circumstances – namely that the government is setting a price for a portion of contract performance that is different than what the contractor requested. But there are reasons that it is not dispositive.

First, LM's brief rests largely on an interpretation of our decision in *Fiber Materials, Inc.*, ASBCA No. 53616, 07-1 BCA ¶ 33,563, which, LM argues, demonstrates that unilateral indirect cost rate determinations by the CO may be directly

[11]This is not to be confused with the appeal which is central to our opinion today, though it does bear the same name.

appealed as non-monetary claims[12] (*see* app. opp'n at 38-41). But *Fiber Materials* (issued in 2007) did not see itself as plowing new ground. Instead, in rather summary form, it plainly stated that, "[t]he government's disallowance of appellant's indirect costs, as reflected in the ACO's unilateral rate determination, and her imposition of penalties, are government claims subject to appeal under the CDA" and cited four prior Board decisions in support of that holding – every one of them pre-dating *Bell Helicopter*. *See* 07-1 BCA ¶ 33,563 at 166,251 (citing cases). Thus, the notion that the unilateral setting of indirect cost rates constitutes a government claim is longstanding and not a change to the legal landscape after *Bell Helicopter*. Indeed, as discussed at length above, *Bell Helicopter* does not rest on the price definitization being a non-monetary claim. Hence, LM's fixation on *Fiber Materials'* allowance of a non-monetary government claim is of far less moment than LM appears to think.

Moreover, on the merits, the CO's unilateral establishment of indirect cost rates, coming, as it must, after provisional billing and payment for indirect costs is different than unilateral price definitization when already-incurred costs have been paid, but the definitive price has not. The former almost always will entail a refund to the government, even if the amount is not necessarily calculated by the CO and demanded at the time she or he issues their decision establishing the rate. To be sure, LM has proposed a hypothetical in which it is possible that the contractor's rejected indirect cost rates were higher than those for which it billed, thus leading to the imposition of rates lower than it requested, but equal to the amount that it had billed such that no money was owed to the government (*see* app. opp'n at 41), but that strikes us as highly unlikely and none of the cited cases show that to have actually occurred and been held to be a government claim. Perhaps it might happen on rare occasion, but the general character of a unilateral indirect cost rate determination by the government is the taking away of money expected by the contractor.[13]

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[12] LM's brief makes the statement that *Fiber Materials* clarified that such claims "must" be non-monetary (app. opp'n at 39). We do not follow this argument. There is no reason apparent to us that a CO decision unilaterally setting indirect cost rates could not also expressly demand the return of a sum certain from the contractor.

[13] The government did not address unilateral rate determinations in its reply brief and this issue was not addressed by LM, so we make the following observation without the benefit of argument: we note that, under the FAR provision governing *Fiber Materials*, FAR 52.216-7(d)(4), a disagreement about rates is considered a contract dispute, subject to the Disputes clause, *see* 07-1 BCA ¶ 33,563 at 166,235 (quoting the FAR), while the law tells us that the CO's deciding a unilateral rate (presumably *after* the disagreement) is the subject of the claim. The clauses governing unilateral price definitization here do not refer the parties to the Disputes clause until *after* the CO has issued her or his determination. *See* FAR 52.216-25(c) and DFARS 252.217-7027(c). Thus, though we do not

B. Arguments That We Have Ruled Contrary to *Bell Helicopter* Are Mistaken

Judge Clarke argues that prior opinions of ours have held that definitization actions are government claims, thus reflecting the Board's determination that *Bell Helicopter* is no longer good law. We have not so found.

The primary case discussed by Judge Clarke for this proposition is *Litton Sys., Inc., Applied Tech. Div.*, ASBCA No. 49787, 00-2 BCA ¶ 30,969, which he characterizes as stating that a unilateral determination constituted a government claim. To be sure, if *Litton* said as much, we would be facing a very different legal terrain! But it does not. The 2000 opinion cited by Judge Clarke, in fact, is merely reporting the result of a 1993 decision in the same case on a motion to dismiss. *See Litton Sys., Inc., Applied Tech. Div.*, ASBCA No. 49787, 93-2 BCA ¶ 25,705. The 1993 opinion did not hold that a unilateral determination was a government claim; rather, it held that in a case involving a firm fixed price contract, a unilateral reduction in the price, requiring the return of money by the contractor, constituted a government claim. This is consistent with our view of the law, which is that CO decisions requiring the return of money to the government (somewhat like was seen in *General Electric*, where it was a possibility), are government claims. Again, this does not affect the continued viability of *Bell Helicopter*. If it did, we would have expected the case to have been referenced in *Litton*, but it was not.

C. Arguments That *Bell Helicopter* was Decided Incorrectly are Unhelpful

A number of the arguments advanced by LM and Judge Clarke are premised, either explicitly or implicitly, upon the notion that the Board erred in the first instance when it issued *Bell Helicopter*. No matter how compelling such arguments might be to the persons advancing them, they are not helpful to us today. As discussed above, being bound by precedent means that we do not afford ourselves the power to second-guess our prior opinions, but only to determine whether they, or their legal underpinnings, have been overruled since they were issued.

One example of LM's implicitly arguing that *Bell Helicopter* was incorrectly decided is its reliance on the portion of the FAR governing definitizations and that provision's referring the parties to the Disputes clause as a means for the contractor to appeal. This, LM argues, indicates that the FAR Council intended the contractor to have the right to direct appeal to the Board in the event of a unilateral definitization action. (*See* app. opp'n at 9). The problem with this argument is that our predecessors who wrote *Bell Helicopter* faced circumstances involving an almost identical clause providing recourse to the Disputes clause. *See Bell Helicopter*, 88-2 BCA ¶ 20,656 at 104,392. If

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necessarily see this as dispositive, the two contracting actions may not be treated quite so much alike as LM argues.

that clause did not cause our predecessors to question their result, it would be disingenuous of us to find that it provided a basis for revisiting the opinion now.

LM also argues throughout its motion that the CO's decision here is an "adjustment or interpretation of contract terms" (app. opp'n at *passim*). But, again, that argument was squarely rejected by both the original *Bell Helicopter* decision and the decision denying the contractor's request for reconsideration. *See* 88-2 BCA ¶ 20,656 at 104,392; *Bell Helicopter Textron*, 88-3 BCA ¶ 21,048 (denial of request for reconsideration). And for that reason, we continue to reject it here: nothing has changed justifying a different result.

Moreover, we reject LM's request, made in a footnote (app. opp'n at 48, n.19), to permit a "protective appeal" in a matter over which we possess no jurisdiction. We are confident that LM has the means and the time to submit a claim it deems appropriate before the expiration of the statute of limitations.

CONCLUSION

For the reasons discussed above, we are unpersuaded that the holding of *Bell Helicopter*, that a unilateral contract definitization is not a government claim, has been overturned or that its legal underpinnings have been sufficiently eroded as to effectively overrule it. Accordingly, we dismiss these appeals for lack of jurisdiction because LM has submitted no claims to the CO for final decision.

Dated: June 24, 2021

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

(Signatures continued)

I concur

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

I concur

JAMES SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

BRIAN S. SMITH
Administrative Judge
Armed Services Board
of Contract Appeals

I dissent (see attached opinion)

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

JUDGE CLARKE'S DISSENTING OPINION

I respectfully dissent. I was the original judge assigned to this appeal and drafted the decision with which my colleagues disagree. Rather than appending my entire draft decision as my dissent as I have done before, I present only a portion thereof.

Bell did not Consider "Other Relief"

This appeal involves the question of if a government unilateral definitization of an Undefinitized Contract Action (UCA) is a government claim supporting Board jurisdiction similar to a termination for default. The majority cites *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048 to justify denying jurisdiction. *Bell* does indeed hold that a unilateral definitization of a UCA is not a government claim. In *Bell* we held the unilateral definitization was routine contract administration and not a contract adjustment. Aside from the fact I do not agree with that holding, I rely on the Disputes Clause, FAR 52.233-1 that defines a claim as a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, for the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. In *Bell* this Board based its decision on only the first two elements of a claim:

> The contracting officer's decision was not premised on an issue of contract interpretation or adjustment. Instead, the contracting officer's action was the initial establishment of the contract price pursuant to Clause H–1.

(*Bell*, 88-2 BCA ¶ 20,656 at 104,392). This Board did not analyze H-1, or consider "other relief arising under or relating to this contract." It seems to me that this omission in the 1988 decision limits *Bell*'s scope and leaves the door open for this Board to consider if a unilateral definitization is a government claim based on, "other relief arising under or relating to this contract." If my colleagues had allowed such consideration, I believe we would have found jurisdiction based on "other relief." This approach would leave *Bell* intact but limit it to consideration of "contract interpretation or adjustment." Our decision in this appeal by Lockheed Martin (LM) would allow our jurisdiction over a unilateral definitization as "other relief" relating to the contract and not conflict with *Bell*.

Bell Has Not Been Followed

In addition to my primary argument stated above, I trace the evolution of case law in this area concluding that unilateral definitization of a UCA is a government claim. I believe *Bell* was wrongly decided and rightly ignored over the last 40 years. *Bell* relies on a finding that unilateral definitization of a UCA is a matter of routine contract administration, like appointing a new Contracting Officer's Representative (COR).

Unilateral Definitization is not routine contract administration. It is the contracting officer, after reaching an impasse on price, unilaterally imposing a lower contract price on a contractor. *See Bell*, 88-2 BCA ¶ 20,656 at 104,392 quoted below. Because unilateral definitization is not routine contract administration, it is an "adjustment of contract terms" as envisioned by the Disputes Clause. I understand that bad decisions may never-the-less be binding law, but I am not inclined to resurrect *Bell* after 40 years of conflicting treatment to affirm its bad decision as good law today.

Developing Case Law

The parties, particularly LM, cited numerous cases and made alternative arguments. I selected cases cited by the parties that represent the development of the law in this area and discuss them in chronological order to understand where the somewhat chaotic jurisdictional case law is today. I agree with LM that "the modern interpretation of a CDA-cognizable "claim" is "broad" and "expansive" which supports my argument.

I start where the Air Force (AF) starts in its motion to dismiss, with the March 21, 1988 decision in *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048. In *Bell* we dealt with its appeal of the AF's unilateral definitization of a UCA with which Bell disagreed. We held that the unilateral definitization was not a government claim but an initial establishment of the contract price required by the contract:

> On 13 September 1985, appellant was awarded subject Advance Acquisition Contract (AAC) for the production of certain aircraft and associated data and support. Clause H–1 of the contract provided that the parties would promptly enter negotiations to definitize the contract price. The clause further provided that "the Contracting Officer may, with the approval of the Head of the Procuring Activity, determine a reasonable price in accordance with Federal Acquisition Regulation subject to appeal by the Contractor as provided in the 'Disputes' clause of the contract." After nearly two years of negotiations, the contracting officer, on 30 September 1987, issued a unilateral modification establishing a total contract price of $79,076,088 (later amended to $76,463,678). In an accompanying cover letter, the contracting officer stated that the unilateral modification was his final decision and advised the contractor of its appeal rights.
>
> . . . .

> Appellant argues further that the contracting officer's decision was a Government claim in that it was a written assertion that "sought 'as a matter of right' ... pursuant to Clause H–1 of the contract ... 'the adjustment or interpretation of contract terms....'" We disagree. The contracting officer's decision was not premised on an issue of contract interpretation or adjustment. Instead, the contracting officer's action was the initial establishment of the contract price pursuant to Clause H–1. The contracting officer was merely performing the duty prescribed by the contract when the parties failed to reach agreement on a price. Again, the contracting officer's action did not amount to a Government claim.

(*Bell*, 88-2 BCA ¶ 20,656 at 104,392). This is the case the AF relies upon in support of its motion. Significantly, the Board's analysis of H-1 relies on "contract interpretation or adjustment" but fails to consider the third element of a claim / jurisdiction in the Disputes Clause, FAR 52.233-1(c), "or other relief arising under or relating to this contract." As argued above, I believe this is a fatal omission from the analysis of H-1 in view of the subsequent decisions that increasingly rely on this third element of jurisdiction and the fact that *Bell* has not been followed in 40 years of subsequent decisions.

On June 16, 1988, the Court of Appeals for the Federal Circuit (CAFC) issued *Malone d/b/a/ Precision Cabinet Co. v United States*, 849 F.2d 1441 (Fed. Cir. 1988) where the Court held that a termination for default was a government claim: "This case, however, concerns a *government* claim against a contractor. Caselaw supports the proposition that a government decision to terminate a contractor for default is a government claim (Case Cites Omitted)." *Malone*, 849 F.2d 1441, 1443. This unremarkable decision that a termination for default is a government claim is used later in our case analysis to expand the Board's jurisdiction. *See Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958.

On March 21, 1998, the ASBCA issued *LTV Aerospace and Defense Co.*, ASBCA No. 35674, 89-2 BCA ¶ 21,858 where the Armed Services Board of Contract Appeals (ASBCA or "Board") held that a unilateral price reduction pursuant to an Economic Price Adjustment Clause was a government claim. The Board distinguished the Board's decision in *Bell*:

> Further, unilateral reduction of the contract price pursuant to an EPA clause is analagous to cases concerning alleged defective cost or pricing data in which the Government seeks

> a contract price reduction. We have held that those cases involve a Government claim, not a contractor claim.
>
> The Government's reliance on *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, aff'd on mot. for recon, 88-3 BCA ¶ 21,048 is misplaced. In that case, the contracting officer unilaterally definitized the total contract price because a clause in the contract required him to do so. In that case, we specifically found that "the Government has not and is not seeking any recourse or payment from appellant." 88-2 BCA ¶ 20,656 at 104,392. In this case, the Government by final decision unilaterally reduced the contract price by $914,830 and subsequently, by modification, deobligated contract funds by that amount.

(*LTV*, 89-2 BCA ¶ 21,858 at 109,951). I see that the Board relied on a sum certain price reduction and deobligation of that amount to support its finding of a government claim. This view of what constitutes a government claim is relaxed in later decisions.

On September 29, 1989, the ASBCA issued *H.B. Zachry Co.*, ASBCA No. 39202, 90-1 BCA ¶ 22,342 where the Board held that a government order that *Zachry* replace or repair defective piping was not a government claim because the government did not demand payment for the defective work. *Zachry*, 90-1 BCA ¶ 22,342 at 112,287. As I explain below, the Senior Deciding Group (SDG) overruled *Zachry*. I include it to show the Board's change in thinking over time.

On April 23, 1991, the ASBCA SDG issued *Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 where the SDG held that contracting officer's direction to the contractor to correct or replace previously accepted contract work because of alleged latent defects, and not demanding or asserting any right to the payment of money is a government claim:

> A demand for refund of part of the contract price in the present cases would indisputably have represented seeking "the payment of money in a sum certain"—the first category of "claim." The parallel, alternative remedy elected by the Government instead—a direction to correct or replace the defective work at no increased cost—seems to us to fall squarely within the parallel third category of "claim" recognized by the FAR and Disputes clause definitions: i.e., "other relief arising under ... the contract." We see no reason to treat such a demand for correction or replacement under

> the Inspection clause, absent a demand for monetary relief, any differently for jurisdictional purposes than a termination for default under the standard Default clause, long recognized as a proper Government claim before there is any monetary claim by either party, as discussed earlier, or any differently than the various kinds of nonmonetary Government claims we discuss in III below.

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,944). Unlike *Bell*, the SDG relied on the third type of claim "other relief" as do I. In its decision the SDG "overruled" *Zachry*:

> To the extent that *Zachry* suggests either (i) narrowly, that a Government demand for correction or replacement of accepted contract work because of alleged latent defects, in lieu of demanding payment for unsatisfactory work, is not the proper subject of a contracting officer's decision asserting a Government claim, or (ii) more broadly, that there can be no nonmonetary Government claims apart from default terminations, it conflicts both with the FAR 33.201 definition of the term "claim" and with the decisions of this Board recognizing various kinds of nonmonetary Government claims other than terminations for default (discussed in III above).
>
> . . . .
>
> To the extent any part of the decision in *Zachry* is inconsistent with the holdings herein, it is overruled.

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,946). There was one concurring decision by Judge Williams and three dissenting decisions by Judges Spector, Gomez and Riismandel. Judge Williams wrote in part:

> While I share the dissenting judges' legitimate concern that the Board not become embroiled in matters that are primarily contract, administration it is my opinion that revocation of "final acceptance" can, and under the circumstances of these appeals does, exceed the bounds of ordinary contract administration resulting in a Government claim under the FAR DISPUTES clause definitions. To hold otherwise would, in my view, unduly restrict the interpretation of the disputes clause definition of claims for "other relief arising under or relating to the contract."

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,947). Dissenting Judge Spector cited *Bell Helicopter Textron*, ASBCA No. 35950, 88-2 BCA ¶ 20,656, *aff'd on mot. for recon.*, 88-3 BCA ¶ 21,048 and argues *General Electric* "smack[s]" of contract administration:

> Under our precedents the direction of the contracting officers to perform the alleged extra work, even if designated a "final decision," would not be a Government claim. H.B. Zachry Co., ASBCA No. 39202, 90–1 BCA ¶ 22,342; Winding Specialists Co., Inc., ASBCA No. 37765, 89–2 BCA ¶ 21,737. See also, Woodington Corporation, ASBCA No. 37272, 89–2 BCA ¶ 21,602; Bell Helicopter Textron, ASBCA No. 35950, 88–2 BCA ¶ 20,656, motion for recon. denied 88–3 BCA ¶ 21,048. As stated in H.B. Zachry Co., supra, "This is a classic case where a contractor should perform the work and file a claim."

(*General Electric*, 91-2 BCA ¶ 23,958 at 119,947). Dissenting Judges Gomez and Riismandel also express concern over extending claims jurisdiction to matters of contract administration. (*General Electric*, 91-2 BCA 23,958 at 119,948-949). This idea of not extending claims jurisdiction over contract administration is precisely the theory employed in *Bell* and is relegated to the dissent in *General Electric.*

The SDG's decision in *General Electric* was appealed to the CAFC. On February 24, 1993 the CAFC issued *Garrett v. General Electric Co.*, 987 F.2d 747 (Fed. Cir. 1993) where the Court affirmed *Appeals of General Electric Company and Bayport Construction Corporation*, ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 holding that nonmonetary direction to correct or replace defective engines constitutes "other relief" supporting Board jurisdiction:

> The Navy directed GE to correct or replace the defective engines. Under the contract, the Navy had three options. It could have reduced the contract price or demanded repayment of an equitable portion of the contract price. Rather than seek these monetary remedies, the Navy chose "other relief arising under ... the contract." The Navy's alternative to a monetary remedy—the directive to correct or replace defective engines—constitutes "other relief" within the FAR's third category of "claims." Thus, the regulations, GE's contract, and the facts of this case suggest that the Navy's choice of relief—a substitute for monetary remedies—fit within the CDA concept of "claim." Accordingly, the Board correctly

> determined its jurisdiction to adjudicate this Government claim.

(*Garrett*, 978 F.2d 747 at 749). The CAFC's affirmance of the SDG's reliance on "other relief" to support our jurisdiction over government direction to replace defective engines supports my belief that a unilateral definitization is likewise a government claim.

On August 12, 1996, the ASBCA issued *Outdoor Venture Corp.*, ASBCA No. 49756, 96-2 BCA ¶ 28,490 that involved the government's demand that Outdoor Venture repair or replace non-conforming tents that had already been accepted pursuant to the contract's warranty clause. Outdoor Venture appealed to this Board. The government moved to dismiss for lack of jurisdiction contending that the CO had not issued a final decision. In its decision holding that the demand pursuant to the warranty clause was a government claim, this Board commented on SDG's and CAFC's decisions in *General Electric*:

> We construed this regulation in *General Electric Co*., ASBCA Nos. 36005, 38152, 91-2 BCA ¶ 23,958, aff'd 987F.2d 747 (Fed. Cir. 1993). There, we held that a Government direction to a contractor to correct or replace work allegedly containing latent defects was appealable because it constituted a CDA claim, rather than merely being a matter of contract administration. More specifically, the Board ruled that such Governmental demands fell into the FAR 33.201 category of claims "related to" the contract. Because the decision asserting the claim was issued by the contracting officer, involved each party's rights under the contract, and was adverse to the contractor, we found that the CDA's jurisdictional requirements were satisfied.
>
> For similar reasons, we conclude that the Government's demand that OVC proceed with the warranty work constitutes a Government claim. Accordingly, OVC may waive the other defects contained in the letter of 15 April 1996.

(*Outdoor Venture*, 96-2 BCA ¶ 28,490 at 142,273)

On May 28, 1999, the CAFC issued *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999) where the Court, relying on its decision in *Garrett v. General Electric Co.*, 978 F.2d 747, held that the Court of Federal Claims had

jurisdiction over a request for declaratory judgment that an option exercise was invalid. The CAFC discussed its decision in *Garrett*:

> In the *Garrett* case, the contracting officer directed General Electric to correct or replace certain allegedly defective engines after the engines had been accepted and certain latent defects had appeared. The Board of Contract Appeals treated the contracting officer's directive as a "claim" over which the Board of Contract Appeals had jurisdiction, and this court agreed. The court's analysis in *Garrett* is inconsistent with the government's theory of this case, since General Electric could have performed as directed and sought monetary compensation for its work afterwards. Instead, the court held that the nonmonetary claim provided a viable basis for board jurisdiction. Since the court further held that board jurisdiction is in "parity" with the jurisdiction of the Court of Federal Claims, the *Garrett* case stands for the proposition that nonmonetary claims are not outside the jurisdiction of the Court of Federal Claims simply because the contractor could convert the claims to monetary claims by doing the requested work and seeking compensation afterwards.

(*Alliant Techsystems*, 178 F.3d 1260, 1270). Again the CAFC affirms that nonmonetary claims support jurisdiction, this time at the Court of Federal Claims.

On April 28, 2000, the ASBCA issued *Litton Systems, Inc., Applied Technology Division*, ASBCA No.49787, 00-2 BCA ¶ 30,969 where the Board held it had jurisdiction over Litton's (ATD) claim because it was filed in response to a government nonmonetary claim:

> The Government moved to dismiss ATD's allegations of additional work for lack of jurisdiction because no claim had been submitted to the contracting officer. We found that ATD's allegations of additional work were raised only as a defense to the Government's unilateral definitization of the 4436 Contract and were sufficiently intertwined with the Government's claim for a reduction of the contract price to fall within the scope of our jurisdiction.

(*Litton Systems*, 00-2 BCA ¶ 30,969 at 152,834). Here the Board expanded its jurisdiction over a government nonmonetary claim for unilateral definitization, to cover a monetary claim by Litton that was not presented as a claim to the CO for a final decision.

More importantly for our purposes, the Board held that unilateral definitization was a government claim.

On August 29, 2011, the CAFC issued *Todd Construction v. United States*, 656 F.3d 1306 (Fed. Cir. 2011) where the Court affirmed the Court of Federal Claims jurisdiction over a Corps of Engineers performance evaluation:

> Todd Construction, L.P. ("Todd") is a government contractor. Todd filed suit in the Court of Federal Claims ("Claims Court") under the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 *et seq.*, alleging that the United States Army Corps of Engineers (the "government") gave it an unfair and inaccurate performance evaluation. The Claims Court held that the CDA provided it with subject matter jurisdiction over such a claim, but dismissed Todd's complaint for lack of standing and failure to state a claim. *Todd Constr., L.P. v. United States*, 85 Fed.Cl. 34 (2008) ("*Todd I*"); *Todd Constr. L.P. v. United States*, 88 Fed.Cl. 235 (2009) ("*Todd II*"); *Todd Constr. L.P. v. United States*, 94 Fed.Cl. 100 (2010) ("*Todd III*"). We affirm both the Claims Court's determination that it had jurisdiction under the CDA and its dismissal of Todd's complaint on the grounds of lack of standing and failure to state a claim.
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> . . . .
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> Not only is the term "claim" broad in scope, the "relating to" language of the FAR regulation itself is a term of substantial breadth. The term "related" is typically defined as "associated; connected."
>
> . . . .
>
> As we made clear in *Applied Companies*, CDA jurisdiction exists when the claim has "some relationship to the terms *or performance* of a government contract." 144 F.3d at 1478 (emphasis added) [footnote omitted]. A contractor's claim need not be based on the contract itself (or a regulation that can be read into the contract) as long as it relates to its performance under the contract [Footnote omitted].

(*Todd*, 656 F.3d 1306, 1312, 1314). Jurisdiction over performance ratings must mark the outer boundary of our jurisdiction over non-monetary government claims.

On May 31, 2017, the Court of Federal Claims issued *L-3 Communications Integrated Systems L.P. v. United States*, 132 Fed. Cl. 325 (2017) where the Court held that in a unilateral definitization case, where L-3 sought sum certain damages, that L-3 was required to submit a certified claim to the CO:

> In this case, L–3 contends that it suffered monetary losses because the Air Force imposed arbitrary, capricious, and unreasonable rates for the two CLINs at issue here when it definitized the contract. The government argues that this Court lacks jurisdiction over L–3's complaint because, among other reasons, L–3 never presented a certified claim to the CO for payment of a sum certain to cover the losses it alleges it suffered. Def.'s Mot. at 5–6. The Court agrees.

(*L-3 Communications*, 132 Fed. Cl. 325, 331). In this case L-3 contended it suffered losses in a sum certain amount and submitted what it argued was a claim, but failed to certify its claim. The Court was not dealing with the facts in *Bell* or "administrative act" argument.

Summary and Conclusion

From the March 1988 *Bell* decision through the May 31, 2017 *L-3* decision to the present, I found no case actually deciding a case similar to *Bell*[14]. In our 1988 *Bell* decision, the Board declined to treat the unilateral definitization of a contract price as a government claim because "The contracting officer was merely performing the duty prescribed by the contract when the parties failed to reach agreement on a price." *Bell*, 88-2 BCA ¶ 20,656 at 104,392. This "contract administration" approach has not been followed in later cases. Additionally, the Board's jurisdictional analysis of H-1 relied on the Disputes Clause's, FAR 52.233-1(c), first two elements of a claim, "contract interpretation or adjustment" but failed to consider the third element of a claim in the Disputes Clause, "or other relief arising under or relating to this contract." In 1991 the Board's SDG relied upon "The parallel third category of 'claim' recognized by the FAR and Disputes clause definitions: i.e., 'other relief arising under . . . the contract'" to hold that a "demand for correction or replacement under the Inspection Clause, absent a demand for monetary relief," should be treated no differently than a termination for default which is a government claim. *General Electric*, 91-2 BCA 23,958 at 119,944-45. The SDG specifically overruled *Zachry* which required a demand for payment for defective work under the inspection clause as a prerequisite to being considered a government claim, a direct conflict with the SDG's *General Electric* decision. *General*

[14] According to Westlaw bell has been cited 17 times but not one of the citations was a decision actually dealing "administrative act" facts and argument in *Bell*.

Electric, 91-2 BCA 23,958 at 119,946. Although *Bell* was not similarly overruled, it was cited in Judge Spector's dissent and by inference its "contract administration" approach was not looked upon favorably by the majority of the SDG. I view this as significant. On appeal the CAFC affirmed agreeing that the "other relief" category of claims was "a substitute for monetary remedies" and "fit within the CDA concept of 'claim'" *General Electric*, 987 F.2d 747, 749. Again, a significant departure from the logic in *Bell*. In *Outdoor Venture,* the Board explained that *General Electric* established that government demands that a contractor correct or replace latent defects was a government claim. In *Alliant Techsystems,* the CAFC followed *Garrett's* holding that a nonmonetary claim provided a viable basis for board jurisdiction. In *Litton Systems, Inc., Applied Technology Division* (ADT) we found that the unilateral definitization of a contract was a government claim contradicting our 1988 decision in *Bell*. In *Todd Construction,* the CAFC affirmed that the Court of Federal Claims had jurisdiction over a challenge to a COE performance evaluation.[15] In our May 31, 2017 *L-3* decision L3 submitted an uncertified claim and that is what the court had before it, not the *Bell* argument. Our conclusion is inescapable, in 40 years of decisions, *Bell* has not been followed. Contrary to *Bell*[16], a unilateral definitization of a UCA should now be considered a government claim over which we take jurisdiction.

CONCLUSION

In accordance with the above analysis, I would deny the Air Force's motion.

Dated: June 24, 2021

Craig Clarke

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

[15] As seen in *L-3 Communications*, *Securiforce*, *Greenland*, and *Parsons*, these non-monetary government claim cases do not abandon the fact that if the remedy sought by a contractor is essentially monetary, the contractor must file a claim with the contracting officer.

[16] *Bell* may still have precedential value for a yet unidentified act of minor contract administration, but why would any contractor choose to appeal such an action.

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. 62505, 62506, Appeals of Lockheed Martin Aeronautics Company, rendered in conformance with the Board's Charter.

Dated: June 25, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ECC International Constructors, LLC	)	ASBCA No. 59586
	)	
Under Contract No. W912ER-10-C-0054	)	

APPEARANCES FOR THE APPELLANT:
R. Dale Holmes, Esq.
Michael H. Payne, Esq.
Cohen Seglias Pallas Greenhall & Furman PC
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT:
Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Sarah L. Hinkle, Esq.
Geoffrey A. Mueller, Esq.
Matthew Tilghman, Esq.
Kathryn G. Morris, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Middle East
Winchester, VA

OPINION BY ADMINISTRATIVE JUDGE MCILMAIL ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

This appeal was consolidated (not merged) with ASBCA No. 59643, *see generally Avant Assessment, LLC*, ASBCA No. 58867, 16-1 BCA ¶ 36,436 at 177,601 (distinguishing consolidation from merger), and was heard with ASBCA No. 59643. In the interest of efficiency, we address the jurisdictional challenge to this appeal separately. The government moves for the dismissal of the appeal for lack of jurisdiction, saying that appellant, ECC International Constructors, LLC (ECCI), did not provide sums certain for what the government says are separate claims. This opinion addresses that issue. In addition, in post-hearing briefing both parties claim $940,274 in liquidated damages. That issue will be addressed in a separate opinion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

In September 2010, the parties contracted for ECCI to design and construct a military compound in Afghanistan (R4, tab 5 at 2, 179 § 1.1). On February 12, 2014, ECCI submitted to the contracting officer a demand for $13,519,913.91 for 329 days of alleged government delay in three categories:

(1) changes to address security requirements for the contract; (2) review of the 95% and 100% design submissions; and (3) other directives to perform additional work or to change the requirements of the contract (R4, tab 72 at 1). The submission breaks the $13,519,913.91 demand amount into cost elements (e.g., labor, labor overhead, equipment, etc.), but does not break it down by particular delay categories or events (R4, tab 72 at 270). Nor does the breakdown include any component for the return of liquidated damages (*id.*); indeed, the February 12, 2014 submission to the contracting officer does not request remission of liquidated damages.

In its claim to the contracting officer, ECCI explained the basis of its claim of alleged delays to the 95% and 100% design submissions:

> While developing the initial design deliverables, ECCI began incurring delays resulting from longer than scheduled Government design review periods . . . . The most notable impact to our design schedule after 10 July 2011 was derived from excessive delays in the Government's issuance of the "Utility Consolidation" or "Site Synchronization" modification, requiring significant changes to the design of site civil and utility infrastructure to accommodate and support the neighboring Aviation Compound project. It was on 19 October 2011, over seven months after ECCI originally priced the modification, and over three months after the cut-off date for the items addressed in the 65% Design Delay modification, when the "Utility Consolidation" or "Site Synchronization" modification was finally negotiated and issued. While the construction cost impacts were addressed by Modification P0004, the associated delay and delay costs were not addressed . . . . A line item summary of the delays related to design, construction submittals, and other over-reaching actions from the Government is provided in Attachment A.

(R4, tab 72 at 12) ECCI also identified the basis of its claim of alleged delays from alleged government directives to add work or to change contract requirements, consisting of (1) directives to add and change communications system; (2) government delay in HVAC design and construction submittal delay and direction to provide changed HVAC equipment; (3) government delay in approval of fire protection design and construction submittals; (4) changing direction regarding design and provision of Uninterruptible Power Supply (UPS); (5) unilateral kennel modification; (6) HVAC start up and commissioning technical expert banned from Camp Pratt; (7) electrical and fire alarm stop work order; and (8) dedicated communications rooms electrical panels (R4, tab 72

at 25-51). In addition, ECCI summarized the basis of its claim for alleged delays associated with directed security changes:

> The Government imposed direct and significant changes to the security requirements of this contract, made countless revisions to their written policies that were not communicated to ECCI, and imposed numerous and ever-changing unpublished revisions, interpretations and additional requirements to those policies.

(R4, tab 72 at 58) Finally, the submission to the contracting officer includes a spreadsheet entitled Estimate Detail Report; that series of monthly project cost data does not identify the specific rates that apply to specific sub-claims (R4, tab 72 at 273-95).

Regarding the security requirements issue, on January 24, 2019, in *ECC Int'l Constructors, LLC*, ASBCA No. 59138 *et al*., 19-1 BCA ¶ 37,252 at 181,315, *aff'd*, 817 Fed. App'x 952 (Fed. Cir. 2020) (unpublished opinion), we entered summary judgment in the government's favor, holding that, when the International Security Assistance Force (which is not an agency of the United States Government) encompassed the contract work site within its base security fence, and enforced its own base security procedures at the contract work site, there was no breach of a contract warranty, and no constructive change to the contract, that might have entitled ECCI to recovery from the government. Familiarity with that opinion is assumed. Because that decision, affirmed on appeal, is final, *see generally Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 261 (Fed. Cir. 1995) (concluding that Board's decision granting partial summary judgment was final for purposes of appellate review), the claim for the cost of delays arising from a change in security requirements is no longer before us.

Finally, ECCI filed this appeal on September 19, 2014, and the government filed its motion on June 23, 2020, during post-hearing briefing.

DECISION

ECCI has the burden of proving the Board's jurisdiction by a preponderance of the evidence, including that it presented to the contracting officer a claim, which, in the case of a demand for money, must be stated in a sum certain. *See Naseem Al-Oula Co.*, ASBCA No. 61321 *et al*., 20-1 BCA ¶ 37,490 at 182,148. Identifying what constitutes a separate claim is important. *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005-06 (Fed. Cir. 2015). The jurisdictional standard must be applied to each claim, not an entire case; jurisdiction exists over those claims that satisfy the requirements of an adequate statement of the amount sought and an adequate statement of the basis for the request. *Id.* Congress did not intend the word "claim" to mean the whole case between the contractor and the Government, but, rather, that "claim" means each claim under the

Contract Disputes Act (41 U.S.C. §§ 7101-7109) for money that is one part of a divisible case. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1281 (Fed. Cir. 1985). The requirement that a claim adequately specify both the amount sought and the basis for the request means that requests involve separate claims if they either request different remedies (whether monetary or non-monetary) or assert grounds that are materially different from each other factually or legally. *K-Con Bldg.,* 778 F.3d at 1005. This approach, which has been applied in a practical way, serves the objective of giving the contracting officer an ample, pre-suit opportunity to rule on a request. *Id.* at 1006.

Claims seeking different types of remedy, such as expectation damages versus consequential damages, are different claims. *See id.* 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) creates a different claim. *See id.* We must go beyond the face of claims to make these distinctions. *See id.* For example, although there may be a common type of fact involved in a contractor's various extended overhead claims, i.e., a cause of delay, that does not necessarily mean that each claim involves proof of a common or related set of operative facts. *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 909 (Fed. Cir. 1990). Such a "factual thread" is not determinative of whether there is only a single, unitary extended overhead claim. *Id.*

Consequently, a contractor's monetary claim must not only state a bottom-line sum certain for the overall claim, it must also state a sum certain for any distinct claim component within the overall claim. *See K-Con Bldg.,* 778 F.3d at 1005; *Joseph Sottolano*, ASBCA No. 59777, 15-1 BCA ¶ 35,970 at 175,735. If no sum certain is specified, the contracting officer cannot settle the claim by awarding a specific amount of money, because such a settlement would not preclude the contractor from filing suit seeking the difference between the amount awarded and some larger amount never specifically articulated to the contracting officer. *N. Star Alaska Hous. Corp. v. United States*, 76 Fed. Cl. 158, 184; *dismissed*, 226 F. App'x 1004 (Fed. Cir. 2007) (table).

The government contends that "[a]lthough these are all claims for delay, the operative facts for each of the claims are separate and independent of the operative facts for all of the other claims." Thus, the government concludes, "the claim is not a unitary claim, but rather a number of separate claims," and without a sum certain for each of those claims, the claim was never properly submitted to the contracting officer for a decision. (Gov't mot. at 9) ECCI counters that the government's motion is contrary to the evidence contained in the record (app. resp. at 3).

ECCI's claim submission to the contracting officer sets forth a bottom-line sum certain, but does not set forth sums certain for any of the discrete sub-claims that comprise that submission. Other than the security changes sub-claim no longer before us, those sub-claims fall into two categories: (1) the 95% and 100% design submissions; and

(2) other additional work or contract changes. Each of these categories relies upon its own set of operative facts: the design delay claims rely upon "facts concerning longer than scheduled Government design review periods," and the remainder of the submission to the contracting officer that is still at issue rely upon facts – according to the narrative of the submission itself – concerning eight distinct categories of alleged government action. However, in its claim to the contracting officer ECCI assigns to none of those a sum certain.

Citing *Phi Applied Physical Sciences, Inc.*, ASBCA No. 56581, 13 BCA ¶ 35,308 at 173,337, ECCI invokes the rule that the sum certain requirement is met if the sum, although not expressly totaled by the contractor, "is readily calculable by simple arithmetic" (app. opp. at 17), saying that "if there was any question about the costs arising from any specific cause of delay, those questions could be answered via 'simple arithmetic' by multiplying the number of days by the applicable rate at the time the delay occurred" (*id.* at 18). In addition, ECCI points to the Estimate Detail Report that accompanies the submission to the contracting officer, saying that the spreadsheet "provided the Government with all of the calculations used to determine the costs associated with each of the critical path delays addressed in ECCI's delay claim" (app. opp. at 9-10 ¶ 15-17). However, that spreadsheet does not identify the specific rates that apply to specific sub-claims, nor does it indicate how the contracting officer would calculate those rates. Moreover, having reviewed the spreadsheet, we do not see how sums certain for the sub-claims at issue would be readily calculable by simple arithmetic. Presumably not coincidentally, ECCI does not even now identify what those rates are, much less, as the government points out (gov't reply at 9), does ECCI even now perform the arithmetic that it says is simple. Consequently, ECCI fails to demonstrate that the sums at issue are readily calculable by simple arithmetic. *Cf. Sweet Star Logistic Serv.*, ASBCA No. 62082, 20-1 BCA ¶ 37,704 at 183,046 ("appellant's purported claim is ambiguous, unclear, and gives the [contracting officer] inadequate notice of the basis and amount of the claim"); *CDM Constructors, Inc.*, ASBCA No. 59524, 15-1 BCA ¶ 36,097 at 176,239 ("By failing either to specify, expressly, that $972,476 was the claim amount, or to provide the contracting officer with easily-understood information from which that amount could be arrived at through a simple calculation, CDM failed to state a sum certain."); *Al Bahar Co.*, ASBCA No. 58416, 14-1 BCA ¶ 35,691 at 174,689 ("Although appellant's written objection does not itself state a sum certain, the totality of the correspondence between the parties establishes, by simple mathematical calculation of the dollar amounts of the 10 DD250s that appellant submitted [], appellant had submitted to the [contracting officer] a claim for $44,500 (10 x $4,450)."); *N. Star Alaska*, 76 Fed. Cl. at 185 ("While plaintiff suggests that administrative claims can be cobbled together from various documents that were possessed by defendant, as to most of the claims at issue, there are no select group of documents, supplied by plaintiff or otherwise, that provide a "clear and unequivocal" indication as to the amount sought by plaintiff.").

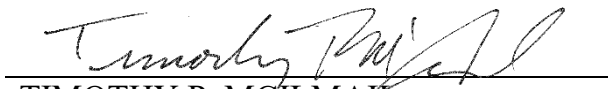
Finally, citing Board Rule 7(b), which provides (emphasis added) that "[a]ny motion addressed to the jurisdiction of the Board *should* be promptly filed," ECCI challenges the timeliness of the government's motion, given that the June 23, 2020 motion was filed post-hearing and more than six years after the February 12, 2014 presentation of ECCI's submission to the contracting officer (app. opp. at 2-3, 20-21). However, the use of the term "should" is precatory, not mandatory, *see Antor Media Corp.*, 689 F.3d 1282, 1290 (Fed. Cir. 2012); *Record Steel & Constr., Inc. v. United States*, 62 Fed. Cl. 508, 515 (2004). Moreover, the jurisdiction of the Board may be raised at any time prior to final decision by the parties or by the Board itself. *B.W. Hovermill Co.*, ASBCA No. 5570, 59-2 BCA ¶ 2,439; *see Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004).

For these reasons, the affirmative monetary claims set forth in appellant's February 12, 2014 submission to the contracting officer arising from (1) government review of the 95% and 100% design submissions, and (2) other directives to perform additional work or to change the requirements of the contract, are dismissed for lack of jurisdiction. A separate opinion will address the parties' claims for liquidated damages, including whether the Board possesses jurisdiction to entertain those claims.

CONCLUSION

The government's motion is granted in part: the affirmative monetary claims set forth in appellant's February 12, 2014 submission to the contracting officer arising from (1) government review of the 95% and 100% design submissions, and (2) other directives to perform additional work or to change the requirements of the contract, are dismissed for lack of jurisdiction.

Dated: May 17, 2021



TIMOTHY P. MCILMAIL
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. 59586, Appeal of ECC International Constructors, LLC, rendered in conformance with the Board's Charter.

Dated: May 21, 2021

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

United States Court of Appeals for the Federal Circuit

SAFEGUARD BASE OPERATIONS, LLC,
Plaintiff-Appellant

v.

UNITED STATES, B&O JOINT VENTURE, LLC,
Defendants-Appellees

2019-2261

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00061-MBH, Senior Judge Marian Blank Horn.

Decided: March 4, 2021

ALEX DANIEL TOMASZCZUK, Pillsbury Winthrop Shaw Pittman LLP, Los Angeles, CA, argued for plaintiff-appellant. Also represented by KEVIN REZA MASSOUDI, AARON RALPH; ALEXANDER BREWER GINSBERG, McLean, VA.

P. DAVIS OLIVER, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., DOUGLAS K. MICKLE; JAMES CALVIN CAINE, Federal Law Enforcement Training Centers,

United States Department of Homeland Security, Glynco, GA.

RICHARD WILLIAM ARNHOLT, Bass Berry & Sims PLC, Washington, DC, for defendant-appellee B&O Joint Venture, LLC. Also represented by BRIAN IVERSON, TODD OVERMAN, ROY TALMOR, SYLVIA YI.

Before PROST, *Chief Judge*, NEWMAN and O'MALLEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* O'MALLEY.

Dissenting opinion filed by *Circuit Judge* NEWMAN.

O'MALLEY, *Circuit Judge*.

This is a bid protest case involving, *inter alia*, an implied-in-fact contract claim in the procurement context. Disappointed offeror Safeguard Base Operations, LLC ("Safeguard") appeals the final judgment of the United States Court of Federal Claims ("Claims Court") in favor of the eventual contract awardee, B&O Joint Venture, LLC ("B&O"), and the United States ("Government"). During the proposal evaluation process, the Government eliminated Safeguard's proposal from consideration because Safeguard omitted pricing information for sixteen contract line item numbers ("CLINs") totaling $6,121,228.

On appeal, Safeguard asserts that the Claims Court erred by determining that the solicitation at issue required offerors to submit that pricing information and by determining that the solicitation provided notice that elimination was possible if that pricing information was omitted. Safeguard also contends that, even if it were required to submit the missing pricing information, the Claims Court erred by finding the omissions to be materi-

al and not subject to waiver or clarification. Finally, Safeguard contends that the Claims Court erred by denying its email request to supplement the administrative record through discovery and by denying its motion to supplement the administrative record with affidavits. Safeguard contends that these additional materials would establish that those evaluating its proposal failed to fairly and honestly consider it. Because the Claims Court did not err in any of those respects, we affirm.

In so doing, we also address a question of first impression—whether the Claims Court has jurisdiction over a claim that the Government breached an implied-in-fact contract to fairly and honestly consider an offeror's proposal in the procurement context. That question has received conflicting answers from different Claims Court judges. We address it and conclude that the Claims Court has such jurisdiction under 28 U.S.C. § 1491(b)(1), making the issue reviewable under the Administrative Procedure Act ("APA").

I. BACKGROUND

This appeal requires a detailed background discussion. In particular, we discuss the solicitation at issue, the evaluation process, and the proceedings before the Claims Court. For a more exhaustive background, see *Safeguard Base Operations, LLC v. United States*, 144 Fed. Cl. 304 (2019).

A. The Solicitation

On October 11, 2017, the Department of Homeland Security ("Government") issued Solicitation No. HSFLGL-17-R-00001 (the "Solicitation") as a Request for Proposal ("RFP"). The Government sought to award a valuable, potentially multi-year contract for dorm management services at the Federal Law Enforcement Training Center in Glynco, Georgia. The Solicitation contemplated an

initial base period of performance, followed by up to seven twelve-month option periods.

The Solicitation outlined a commercial item acquisition for a firm-fixed price contract. The acquisition and source selection were to be conducted, *inter alia*, under Federal Acquisition Regulations ("FAR"), Parts 12 and 15 using the best value source selection process.[1] The Government was required to evaluate proposals based on several non-price factors as well as price. The non-price factors were approximately equal in importance to the price factor.

Beyond these general terms, there are several portions of the Solicitation that are relevant to this appeal—(1) the pricing provisions, (2) Schedule B, (3) the elimination provisions, and (4) the clarification and waiver provisions.

1. Pricing Provisions

At a minimum, proposals had to show "price and any discount terms." J.A. 1502.[2] The Solicitation explained that "[t]he Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement." J.A. 1514. Price was to be evaluated using "one or more of the price analysis and/or cost realism techniques outlined in FAR 15.305 and 15.404." J.A. 1519. Further, the Solicitation provided that "[p]rice will be evaluated to determine if the offeror's proposed price is fair and reasonable, complete, balanced and/or realistic." J.A. 1519. "Completeness/Accuracy" meant that "[t]he offeror's proposal is in compliance with the Price Volume instructions in the

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[1] The FAR System is codified at 48 C.F.R., Chapter 1. For brevity, we refer to the FAR without corresponding C.F.R. citations.

[2] We cite to the non-confidential Joint Appendix.

solicitation." J.A. 1519. Those instructions required a "detailed breakdown" of proposed costs by CLIN and a "completed Schedule B." J.A. 1513. If there was a discrepancy between the price proposal and Schedule B, then Schedule B governed.

2. Schedule B

Schedule B, which contained the basic terms of the proposed bargained-for exchange, made up the first 30 pages of the Solicitation. In it, the Government listed the supplies/services it sought from offerors by CLIN and included blank spaces for offerors to submit what they would charge in exchange for providing those supplies/services.

The CLINs were four-digit numbers sometimes accompanied by two letters in ascending order—e.g., 0001, 0002, 0002AA, 0002AB, etc.[3] The first digit of each CLIN corresponded to the relevant period of performance. For example, any CLIN with an initial digit of zero concerned the base period, while any CLIN with an initial digit of one concerned the first twelve-month option period. The Solicitation followed this pattern for all seven option periods, repeating the description of each supply/service for each period. For example, the description of a supply/service for CLIN 0001 matched the description of the same supply/service for CLINs 1001, 2001, 3001, 4001, 5001, 6001, and 7001.

Each CLIN had a corresponding quantity and unit as well as blank spaces for offerors to provide the unit price and amount.

As originally issued, the Solicitation in Schedule B pointedly instructed offerors "*****DO NOT SUBMIT

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[3] The Solicitation uses the terms 'contract line item number' and 'item number' interchangeably.

PRICING FOR THESE CLINS*****" for sixteen CLINs, numbered X007AA and X007AB.[4] For those CLINs, the Solicitation informed offerors that the Government itself had provided the relevant amounts—even though such information was missing.

Although Schedule B did not contain the necessary amounts, the Solicitation still required that offerors submit subtotals for all CLINs in each time period as well as a grand total for all CLINs in all time periods. Obviously, it would have been impossible for an offeror to submit accurate subtotals or grand totals without the missing amounts.

At least one potential offeror inquired about the missing amounts. In response, the Government provided the amounts for each of the 16 CLINs to all offerors and explained that, "For bidding purposes please include the following 'not-to-exceed' amounts in the applicable CLIN." J.A. 2223 (Government's response to Question 9 referencing the Section B Price Schedule and Schedule B). *See also* J.A. 2225 (Question 16 concerned a similar issue in the context of Volume 3—Price, and the Government referenced its response to Question 9). While this information was clearly noted in the question and answer portion of Amendment No. 0003, Schedule B itself was never amended.

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[4] The sixteen CLINs are 0007AA, 1007AA, 2007AA, 3007AA, 4007AA, 5007AA, 6007AA, 7007AA, 0007AB, 1007AB, 2007AB, 3007AB, 4007AB, 5007AB, 6007AB, and 7007AB. Like the Claims Court, we refer to these CLINs as X007AA and X007AB, with the "X" representing the initial digit corresponding to the performance period. Throughout this opinion, we quote and cite the Solicitation with respect to the base periods, CLINs 0007AA and 0007AB. The relevant language is the same for all CLINs X007AA and X007AB.

Notably, the Government responded to several additional questions concerning CLINs X007AA and/or X007AB, and the questions typically referenced the CLINs as appearing in "Schedule B" of the "Section B Price Schedule." *See, e.g.*, J.A. 2223 (Questions 7 and 8). Several questions referenced the "Section B Price Schedule" without referencing "Schedule B" while referring to specific CLINs from Schedule B. *See, e.g.*, J.A. 2224–25 (questions 11–16). One question referenced the "Section B Price Schedule" while referring to Government forms that only appeared in Schedule B. *See* J.A. 2223 (Question 6).

3. Elimination Provisions

In general, the Solicitation specified that any noncompliance with its terms and conditions "may cause [an offeror's] proposal to be determined unacceptable or be deemed non-responsive and excluded from consideration." J.A. 1507 (quoting Addendum to FAR 52.212-1(b)(1)). More specifically, elimination was possible under a provision in a portion of the Solicitation labeled 'Section A Solicitation General Information.' That provision stated: "Pricing Schedule and Periods of Performance (POP) Service dates for each CLIN are detailed in Section B. *Note: Exceptions to line item structure in Section B may result in a bid not considered for award*." J.A. 1350 (emphasis added).

Although the preceding warning was clear, it was also unusual because the portion of the Solicitation labeled 'Section B Price Schedule' did not appear to contain any "line item structure" or pricing schedule and period of performance service dates for "each CLIN." The only such details were found in Schedule B.

4. Clarifications and Waiver Provisions

According to the Solicitation, the Government intended to award a contract based on its evaluation of the

proposals "without discussions with offerors." Although the Government reserved the right to conduct discussions if it later deemed them necessary, the Solicitation made clear that all initial offers "should contain the offeror's best terms." J.A. 1505, 4503. The Government contemplated establishing a competitive range *only if* it determined that an award could not be made without discussions. If the Government declined to seek discussions, then the Government was permitted to seek clarifications from offerors, which by nature are less substantive than discussions. *See* J.A. 1350; FAR 15.306**.** The Solicitation also specified that the Government could waive "informalities and minor irregularities" in an offeror's proposal. J.A. 1505 (quoting FAR 52.212-1(g)).

B. The Evaluation Process

The evaluation process included three selection decisions. In each decision, the Government determined that B&O's proposal provided the best value for the Government. In each decision, the Government faulted Safeguard's proposal because, *inter alia*, Safeguard failed to submit the pricing information for CLINs X007AA and X007AB.

1. Critical Personnel

Three contracting personnel played roles in the proposal evaluation process.

First, Joseph Williams was the source selection authority and was tasked with making the final source selection decision. Williams was also tasked with approving any course of action involving the establishment of a competitive range or discussions.

Second, Sheryle Wood was the contracting officer and Source Selection Evaluation Board ("SSEB") chairperson. As the contracting officer, Wood was tasked with deciding whether to recommend establishing a competitive range and to conduct discussions with offerors in that range. As

the SSEB chairperson, Wood was tasked with managing the SSEB's overall activities, distributing workload, and ensuring compliance with source selection information security procedures. Wood also led one of the boards comprising the SSEB—the Price Evaluation Board.

Third, James Caine was legal counsel for the acquisition. Caine was tasked with providing legal advice to Williams and to the SSEB. Caine was a non-voting member of the SSEB and was to "not participate in the caucus process unless specifically asked to do so by the board Leader." J.A. 13 (citation omitted).

2. Timeline of Events

On March 16, 2018, the Government received seven proposals from seven offerors, including Safeguard and B&O. On March 22, 2018, Wood completed a Price Evaluation Report and observed that four offerors—including Safeguard—had failed to include the required pricing information for CLINs X007AA and X007AB. Safeguard's proposal did not include pricing for CLINs X007AA and X007AB in any location—including in Safeguard's submitted Schedule B.

Despite this, Wood recommended that Safeguard's price be determined fair and reasonable "without need for discussion or exchanges with regard to price." J.A. 13 (citation omitted). Wood also recommended that Safeguard be retained in the competitive range and that calculation errors, inclusion of the missing pricing information, and full breakdown of phase in costs and other direct costs would be a "discussion element" for all years. J.A. 13. In one portion of the Price Evaluation Report, Wood increased Safeguard's overall price by adjusting it for the missing pricing information.

In the same report, Wood recommended that B&O's price be determined fair and reasonable "without need for discussions or exchanges with regard to price." J.A. 14.

Wood recommended that B&O be retained in the competitive range, once the competitive range was established. J.A. 14.

i. First Source Selection Decision

On June 8, 2018, Williams completed the first Source Selection Decision Document. Williams indicated that the Government had decided not to establish a competitive range or hold discussions with offerors and that B&O's proposal provided the best value to the Government. Williams noted that only B&O and Prosperitus Solutions could have been awarded a contract without discussions. Williams observed that Safeguard's proposal did not comply with the instructions in several ways, including the failure to include the pricing for CLINs X007AA and X007AB. Williams stated that "awarding to [Safeguard] presents some risk to the Government without a completely revised price proposal accounting for all costs." J.A. 15. Further, "[b]ecause of a non-compliant price proposal, and a price that is unrealistically low, this proposal should have been eliminated from the competition without a technical evaluation." J.A. 15. Even with discussions, a "substantial" update to their technical proposal, and a "completely revised price proposal," it was unlikely that Safeguard would have "become much more competitive." J.A. 15.

On June 14, 2018, the Government sent a pre-award notice to Safeguard indicating that it had selected B&O as the apparent successful offeror. One day later, Safeguard requested a debriefing. On the same day, Wood provided a written debriefing indicating several errors in Safeguard's proposal, including the absence of pricing for CLINs X007AA and X007AB. Wood stated that, even with a number of corrections—including adding the missing CLIN data—the total price was still "well below the IGE [(Independent Government Estimate)] and presents a slight performance risk." J.A. 16. Wood warned

Safeguard to follow the solicitation instructions carefully in future submissions.

On June 21, 2018, Safeguard filed a protest at the Government Accountability Office ("GAO") challenging the award to B&O and the Government's decision to assign Safeguard a deficiency for offering the Government a certain no-charge benefit. It did not protest the Government's other stated reasons for its award decision. On July 16, 2018, the Government indicated it would take corrective action as to the protest item and that Williams would render a new award decision. On July 19, 2018, the GAO dismissed the protest as moot.

ii. Second Source Selection Decision

On August 2, 2018, Williams issued a second Source Selection Decision Document. Williams raised Safeguard's rating for its technical approach, after removing the protested deficiency, but again noted that Safeguard had omitted the required pricing information. Williams adjusted Safeguard's price after accounting for its errors. Nevertheless, Williams observed that: "Because of a non-compliant price proposal with a questionable low price, and Corporate Experience and Past Performance volumes that were submitted without discerning between the prime and sub-contractors in the joint venture, this proposal could have been eliminated from the competition without a technical evaluation." J.A. 17. Williams again noted that only B&O and Prosperitus Solutions could be awarded a contract without discussions and that B&O's proposal provided the best value to the Government and should be selected.

On August 7, 2018, the Government again awarded the contract to B&O. The Government concluded that "[b]ecause of their superior ratings and the identified strengths, demonstrated relevant past efforts and performance of the prime contractor, and a complete submitted price that is reasonable and realistic, the price premium

over [Safeguard's] total evaluated price is justified for the assurance of superior services when spread over the life of a seven-year contract." J.A. 18 (citation omitted).

On August 20, 2018, Safeguard filed another protest at the GAO. This time, Safeguard argued that the Government had arbitrarily and capriciously evaluated Safeguard's past performance, did not justify the price premium associated with B&O's proposal correctly, and that the Government's actions were biased against Safeguard. This time, Safeguard also contended that it was not required to submit pricing for CLINs X007AA and X007AB. Safeguard asserted that it believed other offerors did not include such pricing and "[t]herefore, it would be arbitrary and capricious for the [Government] to fail to apply the same evaluation criteria and scoring method to the awardee's proposal." J.A. 18 (citation omitted).

On August 24, 2018, Safeguard filed an amended protest at the GAO, asserting that the Government had violated FAR 15.404-1(d)(3) (permitting some cost realism analyses, but forbidding adjustments to a proposal's offered prices) by increasing the price of Safeguard's proposal to account for the missing price information. Safeguard again asserted that the pricing information for CLINs X007AA and X007AB was not required. Safeguard further asserted that the Government engaged in disparate treatment to the extent it revised only Safeguard's proposed price upward.

On August 28, 2018, Caine sent a letter to the GAO stating that the Government had discovered mistakes in the evaluation process and would take corrective action by making a new source selection decision. On August 31, 2018, the GAO dismissed Safeguard's August 20 protest and August 24 amended protest, again as moot.

iii. Third Source Selection Decision

On September 20, 2018, Williams issued a third Source Selection Decision Document. The Government streamlined its analysis this time. It refused to make price adjustments to reflect the omitted pricing and, instead, concluded that the appropriate cause of action was to disqualify all proposals which were non-compliant on their face. The Government concluded, apparently based on Caine's legal advice, that price adjustments for those CLINs were inconsistent with FAR 15.404-1(d)(3), as Safeguard had contended in its protest. Williams indicated that four offerors were not eligible for award because each of their proposals failed to include the Government-provided amounts for CLINs X007AA and X007AB. On September 20, 2018, the Government sent Safeguard a post-award notice that also functioned as a written debriefing, indicating that B&O was the contract awardee. In that notice, the Government stated that:

> In general terms, [Safeguard's] price proposal was determined non-compliant because the price volume failed to include government provided amounts for the Service Work Request CLINs, which was required by Amendment 00003 [(*sic*)] to the solicitation. The government response to Question Number 9 specifically stated:[ ] A. For bidding purposes please include the following 'not-to-exceed' amounts in the applicable CLIN . . . The solicitation further specifically stated the following 'Exceptions to the line item structure in Section B may result in a bid not considered for award.' Therefore, [Safeguard] is not eligible for award.

J.A. 20.

On September 25, 2018, Safeguard filed another bid protest at the GAO followed by a supplemental protest on October 12, 2018. Safeguard again asserted, *inter alia*,

that it was not required to include pricing for CLINs X007AA and X007AB. On December 14, 2018, the GAO denied Safeguard's protest, determining, *inter alia*, that the Solicitation permitted the Government to reject proposals that omitted the pricing information for CLINs X007AA and X007AB.

C. Claims Court Proceedings

On January 11, 2019, Safeguard filed a complaint in the Claims Court. On January 17, 2019, the Claims Court granted B&O's motion to intervene. Safeguard alleged that the Government arbitrarily and capriciously disqualified Safeguard's proposal and violated an implied contract to fairly and honestly consider Safeguard's proposal. To support its allegations, Safeguard attached an affidavit from Diana Parks Curran, an attorney for Safeguard and SRM Group, Inc. ("SRM").[5] Safeguard asserted that the Claims Court had jurisdiction under 28 U.S.C. § 1491(b) and under its jurisdiction to consider Safeguard's implied contract claim.

On February 26, 2019, the Government filed the administrative record. On February 28, 2019, the Claims Court issued an order instructing the parties to notify the court of any disagreements regarding the completeness of the administrative record. On March 4, 2019, Safeguard informed the court via email that the parties disputed whether the administrative record was complete. Safeguard recounted that it had asked the Government to allow Safeguard to depose the contracting officer, the source selection authority, and the legal advisor and to supplement the administrative record with the deposition transcripts. Safeguard reported that the Government

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[5] Under an earlier-awarded contract, SRM had provided the same dorm management services at issue in the Solicitation. SRM owned 49% of Safeguard.

opposed the taking of those depositions. Safeguard stated that it was prepared to participate in a call to discuss the issue or to file a motion if so directed by the court.

Two days later, the Claims Court denied Safeguard's request to take the depositions as insufficiently supported at that time, but it required the Government to investigate whether the administrative record was complete, particularly with respect to documents relevant to the source selection and "documents relevant to the disqualification of other offerors in the procurement for the same or similar reason as a result of which [Safeguard] was eliminated." J.A. 144. The court also required a joint status report regarding the administrative record.

In a March 12, 2019 joint status report, the parties indicated that Safeguard continued to seek supplementation, but this time with an affidavit from Curran and an affidavit from Sadananda Suresh Prabhu, the president of SRM. The Government and B&O opposed supplementation. There was no indication that Safeguard continued to seek depositions of the contracting officials. On the same day, Safeguard moved to supplement with the Curran and Prabhu affidavits, but did not mention the need for depositions.

Curran's affidavit had been attached to the amended complaint and remained unchanged. In Prabhu's affidavit, he indicated that Caine denigrated Prabhu during earlier litigation between SRM and the Government and that Wood had vowed to never work with Prabhu or SRM again. Prabhu also alleged that Wood told him that no one who sued the Government—referencing the prior litigation—had been awarded a later contract.

On March 15, 2019, the Government filed a corrected administrative record with additional documents. On March 22, 2019, after holding a hearing on the issue, the Claims Court denied Safeguard's motion to supplement as not warranted because it found that the affidavits were

not necessary for effective judicial review. On April 2, 2019, Safeguard and the Government filed cross-motions for judgment on the administrative record. On the same date, B&O filed a motion to dismiss, or in the alternative, a cross-motion for judgment on the administrative record.

On July 2, 2019, the Claims Court granted the Government's and B&O's motions for judgment on the administrative record; denied B&O's motion to dismiss; and denied Safeguard's motion for judgment on the administrative record.

The Claims Court reviewed the administrative record under the standards set forth in the APA pursuant to 28 U.S.C. § 1491(b). The court concluded that Safeguard and other offerors were required to include the Government-provided amounts for CLINs X007AA and X007AB in their proposals and that the Government had not arbitrarily and capriciously disqualified Safeguard. The court determined that the Solicitation's statement that "[e]xceptions to the line item structure in Section B may result in a bid not considered for award" provided notice to offerors that they had to include the pricing information because Section B included Schedule B. The court concluded that Safeguard's omissions were material omissions that could not have been clarified without discussions or waived, and that the Government did not abuse its discretion in declining to seek clarifications. The court also determined that the Government had not breached any implied duty of good faith and fair dealing. The court explained that, in each source selection decision, the Government consistently determined that Safeguard's proposal was non-compliant based on its failure to include the pricing information for CLINs X007AA and X007AB and that Safeguard's proposal should have been eliminated without a technical evaluation.

Although Safeguard's two proffered affidavits were not part of the administrative record, the court examined

them and stated that, even if those affidavits had been included, they would not have affected the outcome. The court explained that the affidavits (1) did not concern the ultimate decision-maker, Williams; (2) indicated that Wood was unfavorably disposed towards Safeguard, while the record reflected otherwise since she treated Safeguard fairly and sought to maintain, not disqualify, Safeguard in consideration for the contract award; and (3) otherwise concerned Caine whose role in the evaluation process was limited.

On July 3, 2019, the Claims Court entered final judgment in favor of the Government and B&O. Safeguard timely appealed, and we have jurisdiction under 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

We begin, as we must, by examining whether the Claims Court had jurisdiction. We then recite the applicable standards of review and turn to the merits, addressing the four issues raised by Safeguard on appeal. Ultimately, we affirm the Claims Court's final judgment.

A. Jurisdiction

"As an appellate court, we must be satisfied that the court whose opinion is the subject of our review properly exercised jurisdiction, regardless of whether the parties challenge the lower court's jurisdiction." *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006). "[W]e review the Claims Court's findings of fact related to jurisdictional issues for clear error." *Id.* We review de novo the Claims Court's jurisdiction as a question of law. *Id.* at 1354.

Here, Safeguard alleged, *inter alia*, that the Government breached an implied-in-fact contract to fairly and honestly consider Safeguard's proposal for the procurement at issue. The Claims Court conceivably could have had jurisdiction under 28 U.S.C. § 1491(a)(1), which

concerns implied contracts generally, or § 1491(b)(1), which concerns procurement bid protests.[6] This is important because the applicable standard of review differs depending upon the governing jurisdictional predicate.

1. Relevant History

As we have noted, "[t]he history of the judicial review of government contracting procurement decisions is both long and complicated." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1331 (Fed. Cir. 2001).

In 1940, the Supreme Court held that private parties lacked standing to challenge Government contract awards for violation of procurement law because Congress enacted procurement laws to protect the Government, rather than those contracting with the Government. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 126 (1940).

But, in 1956, the Claims Court[7] found that disappointed bidders could sue to recover the costs of preparing a bid under an implied contract theory that the Government would "give fair and impartial consideration to [the disappointed bidder's] bid." *Heyer Prods. Co. v. United States*, 140 F. Supp. 409, 413 (Ct. Cl. 1956). At the time,

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[6] *Compare* 28 U.S.C. § 1491(a)(1) ("jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States") *with* § 1491(b)(1) ("jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of any contract or any alleged violation of statute or regulation in connection with a procurement or proposed procurement").

[7] For simplicity, we refer to each predecessor court of the Claims Court as the Claims Court.

the Claims Court could only provide monetary relief, typically in the recovery of bid preparation and proposal costs—not injunctive or declaratory relief regarding the procurement itself. *See* David S. Black & Gregory R. Hallmark, *Procedural Approaches to Filling Gaps in the Administrative Record in Bid Protests Before the U.S. Court of Federal Claims*, 43 Pub. Cont. L.J. 213, 219 (2014). *See also* Frederick W. Claybrook, Jr., *The Initial Experience of the Court of Federal Claims in Applying the Administrative Procedure Act in Bid Protest Actions – Learning Lessons All Over Again*, 29 Pub. Cont. L.J. 1 (1999).

The court in *Heyer* did not cite the relevant jurisdictional statute—28 U.S.C. § 1491—but, at the time, the statute contained the same operative language that appears in current § 1491(a)(1)—providing the court with jurisdiction over claims based on an express or implied contract with the United States. *See* Act of Sept. 3, 1954, ch. 1263, § 44(b), 68 Stat. 1226, 1241–42. These implied contract cases have been—and still are—interpreted as limited to implied-in-fact contracts. *See generally* Frederick W. Claybrook, Jr., *Wrong from the Start: Withholding Implied-in-Law Contract Jurisdiction from the Court of Claims*, 46 Pub. Cont. L.J. 1 (2016). At the time of *Heyer*, § 1491 did not mention possible relief and was not divided into any subsections.

In 1970, the United States Court of Appeals for the D.C. Circuit concluded that, because of the intervening passage of the APA, *Perkins* was no longer controlling law and district courts could review procurement decisions of Government agencies by applying the review standards in the APA. *See Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). Several other federal courts of appeal adopted this reasoning. *See, e.g.*, *Impresa*, 238 F.3d at 1331 (citing cases from the First and Sixth Circuits). Under *Scanwell*, disappointed bidders could now challenge contract awards in federal district court for

alleged violations of procurement laws or regulations or for lack of rationality. *Id.*

In 1982, Congress amended 28 U.S.C. § 1491 in the Federal Courts Improvement Act of 1982 ("FCIA"), Pub. L. No. 97–164, § 133(a), 96 Stat. 25, 40. Under the FCIA, § 1491 was split into subsections (a)(1)–(3) and (b). In § 1491(a)(3), the FCIA expressly permitted the Claims Court to grant declaratory, equitable, and extraordinary relief, including injunctive relief on any contract claim brought before the contract was awarded. The operative statutory language authorizing the court's implied contract jurisdiction remained unchanged, but the FCIA placed that language in § 1491(a)(1). New § 1491(b) contained language precluding the court from exercising jurisdiction over certain actions concerning the Tennessee Valley Authority and the Court of International Trade.

In 1983, this court concluded that, after the FCIA, the Claims Court only could consider implied contract claims in the *pre-award* context, but that it now had the authority to provide a broader scope of relief in that context. This Court reasoned that Congress had not broadened the scope of the Claims Court's jurisdiction over implied contract claims in the bid protest context, but had broadened the scope of relief that could be provided. *See generally United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983) (en banc).

In 1996, Congress enacted the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104–320, § 12, 110 Stat. 3870, 3874–76. The ADRA redesignated former § 1491(b) as § 1491(c) and removed former § 1491(a)(3) (providing expanded relief powers).

The ADRA created new § 1491(b), which included (b)(1)–(4). Under § 1491(b)(1), the Claims Court was given jurisdiction to hear bid protests by disappointed bidders, regardless of whether the protest was pre-award or post-award. Under the ADRA, new § 1491(b)(2) per-

mitted "any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs." New § 1491(b)(4) required judicial review pursuant to the APA standards in 5 U.S.C. § 706. Although Congress added § 1491(b)(1) in the ADRA, Congress retained the operative language of § 1491(a)(1), under which the Claims Court previously had jurisdiction to hear claims concerning implied contracts with the Government.

In 2010, this court determined that the Claims Court continued to possess jurisdiction under § 1491(a) over implied contracts outside of the procurement context—e.g., the sale of government property—"where the new statute [§ 1491(b)(1)] does not provide a remedy." *Res. Conservation Grp., LLC v. United States*, 597 F.3d 1238, 1245 (Fed. Cir. 2010).

The court stated:

> Before enactment of section 1491(b)(1), the Court of Federal Claims exercised jurisdiction over solicitations for the sale of government property, just as it did in the procurement area. The new statute on its face does not repeal the earlier jurisdiction. The government argues, however, that continuation of the implied-in-fact jurisdiction would be inconsistent with the purposes of the ADRA, which clearly was designed to place all bid protest challenges in a single court (after a sunset period) under a single standard (the APA standard). We agree that Congress intended the 1491(b)(1) jurisdiction to be exclusive where 1491(b)(1) provided a remedy (in procurement cases). The legislative history makes clear that the ADRA was meant to unify bid protest law in one court under one standard. However, it seems quite unlikely that Congress would intend that

> statute to deny a pre-existing remedy without providing a remedy under the new statute.

Id. at 1245–46 (footnote omitted).

Since the enactment of the ADRA, this court has not addressed whether the Claims Court still has implied-in-fact contract jurisdiction in the procurement context, and if so, whether that jurisdiction falls under § 1491(a) or (b). Different judges at the Claims Court have reached different conclusions. Some Claims Court judges have concluded that such jurisdiction no longer exists. *See Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 693 (2010); *Metro. Van & Storage Co. v. United States*, 92 Fed. Cl. 232, 249 n.7 (2010). At least one Claims Court judge has concluded that such jurisdiction exists under § 1491(a). *See L-3 Commc'ns Integrated Sys., L.P. v. United States*, 94 Fed. Cl. 394, 398 (2010). But other Claims Court judges have concluded that such jurisdiction exists under § 1491(b)(1). *See J.C.N. Constr., Inc. v. United States*, 107 Fed. Cl. 503 (2012); *Castle-Rose, Inc. v. United States*, 99 Fed. Cl. 517, 531 (2011); *Bilfinger Berger AG Sede Secondaria Italiana v. United States*, 97 Fed. Cl. 96, 151–52 (2010).

2. The Claims Court Had Jurisdiction Here

Addressing the issue for the first time, we conclude that the Claims Court has jurisdiction over implied-in-fact contract claims in the procurement context under § 1491(b)(1), and only § 1491(b)(1).

> Statutory interpretation starts with the plain language of the statute. When interpreting a statute, however, courts must consider not only the bare meaning of each word but also the placement and purpose of the language within the statutory scheme. The meaning of statutory language, plain or not, thus depends on context.

Barela v. Shinseki, 584 F.3d 1379, 1382–83 (Fed. Cir. 2009) (citations omitted). "Courts may also rely on legislative history to inform their interpretation of statutes." *N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 887 (Fed. Cir. 2018). Here, the plain language of 28 U.S.C. § 1491, the statutory context, and the legislative history demonstrate that Congress intended the Claims Court to have jurisdiction over implied-in-fact contract claims in the procurement bid protest context under 28 U.S.C. § 1491(b)(1).

Section 1491(a)(1) appears to provide the Claims Court with jurisdiction over claims against the Government founded upon *any* "implied contract" with the Government. But § 1491(b)(1) specifically provides the Claims Court with jurisdiction over procurement bid protest matters.

The legislative history indicates that Congress did not intend to limit the Claims Court's jurisdiction over any type of procurement bid protest; it, instead, intended to consolidate jurisdiction over all such matters in the Claims Court. The legislative history also indicates that Congress intended for the APA standard of review to apply in all such cases. According to the Conference Report to the ADRA:

> This section [(referring to the changes to pre-existing § 1491)] also applies the Administrative Procedure Act standard of review previously applied by the district courts (5 U.S.C. sec. 706) to all procurement protest cases in the Court of Federal Claims. It is the intention of the Managers to give the Court of Federal Claims exclusive jurisdiction over the full range of procurement protest cases previously subject to review in the federal district courts and the Court of Federal Claims. This section is not intended to affect the jurisdic-

> tion or standards applied by the Court of Federal Claims in any other area of the law.

H.R. Rep. No. 104–841, at 10 (1996).

As we expressed in *Resource Conservation Group*, it would have been anomalous for Congress to deny a pre-existing remedy without providing a remedy under the new subsection in § 1491(b). But that result is avoided if we construe § 1491(b)(1) to provide the Claims Court with jurisdiction over implied-in-fact contract claims in the procurement context and construe § 1491(a) to govern all other implied-in-fact contract claims. Section 1491(b)(2) explicitly authorizes the Claims Court to grant the relief historically associated with implied contract bid protest claims in the procurement context—"monetary relief limited to bid preparation and proposal costs" while also permitting other forms of relief previously available under former § 1491(a)(3).

For these reasons, we conclude that the Claims Court has jurisdiction over such claims under § 1491(b)(1) and only § 1491(b)(1).

B. Standards of Review

Given the foregoing, we adopt the traditional standards of review applicable in other bid protest cases brought under § 1491(b)(1) to bid protests cases which also raise implied-in-fact contract claims in the procurement context. We review bid protests under the APA, *see* 28 U.S.C. § 1491(b)(4) (citing 5 U.S.C. § 706), "by which an agency's decision is to be set aside only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Per Aarsleff A/S v. United States*, 829 F.3d 1303, 1309 (Fed. Cir. 2016) (citation omitted). *See also Impresa*, 238 F.3d at 1332 n.5 (citing § 706(2)(D) "without observance of procedure required by law" as also applicable).

"[P]rocurement decisions are subject to a 'highly deferential rational basis review.'" *PAI Corp. v. United States*, 614 F.3d 1347, 1351 (Fed. Cir. 2010) (citation omitted). "Applying this highly deferential standard, the court must sustain an agency action unless the action does not 'evince[ ] rational reasoning and consideration of relevant factors.'" *Id.* (citation omitted). "We review rulings on motions for judgment on the administrative record de novo." *Id.* "Interpretation of [a bid] solicitation is a question of law' that is reviewed de novo." *Per Aarsleff*, 829 F.3d at 1309 (citation omitted). We review the Claims Court's evidentiary determinations, including determinations to grant or deny a motion to supplement the administrative record, for abuse of discretion. *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009).

C. The Merits: The Claims Court Did Not Err

The Claims Court did not commit any of the four errors alleged by Safeguard on appeal. First, the Claims Court did not err by misinterpreting the Solicitation as requiring offerors to submit the Government-provided amounts for CLINs X007AA and X007AB. Second, the Claims Court did not err by interpreting the Solicitation as providing notice that offerors could be eliminated from consideration for failing to include those amounts. Third, the Claims Court did not err by determining that Safeguard's omissions of the amounts were material and could not have been waived or resolved by clarifications. Fourth and finally, the Claims Court did not err by denying Safeguard's email request and separate motion to supplement the administrative record.

1. Submitting the Pricing Information

We apply de novo review to the Claims Court's interpretation of the Solicitation, and we apply the same principles concerning the interpretation of Government contracts to the interpretation of Government solicita-

tions. *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1353 & n.4 (Fed. Cir. 2004). A solicitation "is ambiguous only if its language is susceptible to more than one reasonable interpretation." *Id.* at 1353. We must consider the Solicitation as a whole and interpret "it in a manner that harmonizes and gives reasonable meaning to all of its provisions." *Id.* "An interpretation that gives meaning to all parts of the contract [or solicitation] is to be preferred over one that leaves a portion of the contract [or solicitation] useless, inexplicable, void, or superfluous." *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004).

Here, while the solicitation is hardly a model of clarity, there is only one reasonable way to interpret the Solicitation; offerors were required to submit the Government-provided amounts in their proposal totals. This is the only interpretation that harmonizes and gives reasonable meaning to all of the Solicitation's provisions, without rendering any part superfluous or void. The Solicitation instructed offerors "DO NOT SUBMIT PRICING FOR THESE CLINS" while also stating "[f]or bidding purposes please include the following 'not-to-exceed' amounts in the applicable CLIN." J.A. 1322, 2223. The way to understand and harmonize these provisions is to interpret 'pricing' as offeror-provided pricing.

In Schedule B, the Solicitation referenced the "amount listed" and "amount provided" variously as a Government "ceiling," a "'not-to-exceed' amount," and a "lump sum." J.A. 1322–23 (capitalization varies in original). True, there was no such "amount listed" or "amount provided" initially. But, after a potential offeror noted the discrepancy and inquired about it, the Government not only provided the missing amounts, but also emphasized the fact that offerors were required to include those amounts under the relevant CLIN. The Solicitation's continued instruction not to submit 'pricing' makes sense in the context of the express instruction to include the

Government-provided *amounts*, if 'pricing' refers to offeror-provided pricing.

Safeguard's alternative reading—that 'pricing' referred to *all* types of pricing information and that the Government itself would later "please include" the amounts in an awarded contract—is not a reasonable one. It neither harmonizes nor provides reasonable meaning to all provisions. It effectively renders the "please include" instruction useless and inexplicable. Safeguard never explains why the Solicitation would instruct *offerors* to "DO NOT SUBMIT PRICING," but instruct the *Government* to "please include" the amounts it provided in response to Question 9. It makes little sense for the Government to answer a potential offeror's question by responding to itself—i.e., the Government—with a 'note to self.'

Safeguard complains that limiting 'pricing' to offeror-provided pricing impermissibly inserts additional language into the Solicitation and changes its plain meaning. But Safeguard incorrectly assumes that *its* particular interpretation of 'pricing' is correct, without explaining why it is reasonable given the context. At least one other potential bidder clearly understood the difference between 'pricing' and Government-provided amounts when it noted the absence of the Government-provided amounts from the Solicitation. Once the Government corrected the fact that the amount quantities had been overlooked, any confusion was removed.[8]

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[8] Safeguard argues that, to the extent the "DO NOT SUBMIT PRICING" provisions and the provision requiring certain Government-provided amounts to be included were contradictory, we must rely on the Solicitation's Order of Precedence Clause. Because we find no such contradiction, we reject this argument.

2. Notice of Possible Elimination

The Claims Court also did not err in determining that the Solicitation provided notice that an offeror's proposal could be eliminated from consideration for failing to include the pricing for CLINs X007AA and X007AB by the statement in Section A that "[e]xceptions to line item structure in Section B may result in a bid not considered for award," because Section B necessarily included Schedule B. We must consider the Solicitation as a whole and interpret "it in a manner that harmonizes and gives reasonable meaning to all of its provisions." *Banknote*, 365 F.3d at 1353. The only reasonable interpretation is that the Solicitation provided adequate notice because Section B included Schedule B.

In 'Section A Solicitation General Information,' the Solicitation stated:

> Pricing Schedule and Periods of Performance (POP) Service dates for each CLIN are detailed in Section B. *Note: Exceptions to line item structure in Section B may result in a bid not considered for award.*

J.A. 1350 (emphasis added).

Although Section A referred to the pricing schedule and periods of performance service dates for each CLIN as being detailed in "Section B" and the line item structure as appearing in "Section B," none of these details appeared in the Solicitation in the portion labeled 'Section B Price Schedule.' That portion of the Solicitation was later amended to reference one CLIN, but still did not detail any price schedule and periods of performance service dates for "each CLIN" or contain any "line item structure." Instead, that portion of the Solicitation contained only general information about *Schedule B*—the actual price schedule organized by CLIN. This makes sense in light of the other label for that portion—'Section B Price

Schedule General Information' as shown on page 31 of the Solicitation.

The rest of the Solicitation similarly referred to Section B as containing details found only in Schedule B. For example, Question 6 of Amendment No. 0003 referred to the "Section B Price Schedule" in terms of Government forms SF 1449 and Optional Form 336—but these forms were only used for Schedule B. Question 6 also referenced CLINs from Schedule B. Similarly, Questions 7 and 8 referenced "Section B Price Schedule: Schedule B" and specific CLINs from Schedule B. Questions 11–16 also referenced the "Section B Price Schedule" while referring to specific CLINs from Schedule B.

Reading the Solicitation as a whole, the interpretation that harmonizes and gives meaning to all of these provisions is one in which Schedule B is part of Section B, as the Claims Court concluded. Safeguard offers no compelling alternative interpretation or explanation.

Notably, the Solicitation stated that any noncompliance "may cause [an offeror's] proposal to be determined unacceptable or be deemed non-responsive and excluded from consideration." J.A. 1507 (quoting Addendum to FAR 52.212-1(b)(1)). Safeguard and other offerors were clearly on notice that exceptions to the line item structure of Schedule B could result in elimination. Safeguard's multiple failures to submit the pricing information for the sixteen CLINs X007AA and X007AB were such exceptions.

3. Clarifications and Waiver

The Claims Court similarly did not err by determining that Safeguard's omissions of the pricing information for CLINs X007AA and X007AB were material, not re-

solvable by clarifications, nor subject to waiver.[9] Regardless of whether the omissions were capable of clarification or waiver, moreover, the Government had discretion to seek clarifications or apply waiver and did not abuse its discretion by declining both options.

i. Clarifications

Under FAR 15.306(a)(1), (2), clarifications are "limited exchanges" in which the Government is permitted—but not required—to allow offerors to "clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor clerical errors." "Clarifications are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal." *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 998 (Fed. Cir. 2018) (citation omitted). *Cf. Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1323 (Fed. Cir. 2003) ("There is no requirement in the regulation that a clarification not be essential for evaluation of the proposal.").

Here, Safeguard's omissions were incapable of clarification because they were proposal deficiencies and material omissions that, if clarified, would have materially altered the cost elements of the proposal and revised the proposal. They were not minor clerical errors.

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[9] It is ironic that Safeguard even makes these arguments after having protested the contracting officials' efforts to add the missing amounts into Safeguard's price proposal. It effectively contends here that the contracting officials should have done via clarification or waiver what it argued FAR 15.404-1(d)(3) prohibits.

This is evident from the many provisions in the Solicitation that emphasized the necessity of including the amounts for pricing purposes. The omissions constituted "[e]xceptions to [the] line item structure in Section B" and therefore "may result in a bid not considered for award." J.A. 1350. The amounts were necessarily required in a completed "Section B price and price breakdown." J.A. 1508. Similarly, the price proposal had to be "complete"—i.e., "compliance with the Price Volume instructions in the solicitation." J.A. 4829. Those instructions required a "completed Schedule B." J.A. 4823.

More directly, the importance of the amounts were emphasized in the Government's response to Question 9 ("please include" the pricing information); in FAR 52.212-1 ("[a]s a minimum, offers must show . . . Price and any discount terms" and "[o]fferors shall provide a detailed breakdown of how it arrived at proposed cost as follows: Contract Line Item Number"); and in the Addendum to FAR 52.212-1 (the "[p]rice proposal shall include price for the phase-in period, base period and seven option periods."). Proposals would be evaluated by adding the total price for all option periods to the total price for the basic requirement. FAR 52.212-1(g) required the offeror to include its "best terms from a price and technical standpoint." The Government evaluated the proposals based on price as an important factor—roughly equal to all other factors combined.

Safeguard's failure to include the pricing information meant that its total price was not only inaccurate, but inaccurate in a significant way. It was $6,121,228 lower than it should have been. This was not an inconsequential or negligible amount. More than the inaccurate price itself, Safeguard's omissions prevented the Government from properly evaluating Safeguard's proposal. As Williams noted, Safeguard needed "a completely revised price proposal accounting for all costs." J.A. 15. The omissions were significant enough that they resulted in the elimina-

tion of all four proposals that contained them. They were far from immaterial.

ii. Waiver

Safeguard's omissions were not waivable for the same reasons. Under FAR 52.212-1(g), the Government may waive "informalities and minor irregularities." While this court has not examined that FAR provision in a precedential opinion, in a non-precedential opinion, we emphasized that waiver under FAR 52.212-1(g) is discretionary. *See Strategic Bus. Sols., Inc. v. United States*, 711 F. App'x 651 (Fed. Cir. 2018) (declining to find that the Government was required to waive a protestor's failures to redact necessary information). We agree.

FAR 14.405 provides examples of what might constitute a minor informality or irregularity.[10] Safeguard's omissions are materially different from those examples. For instance, FAR 14.405 provides that:

> A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. . . . Examples of minor informalities or irregularities include failure of a bidder to—

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[10] "When determining the plain meaning of a regulation a court may look to the language of related regulations." *JBLU, Inc. v. United States*, 813 F.3d 1377, 1382 (Fed. Cir. 2016); *see also Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1038 (Fed. Cir. 2009).

> (a) Return the number of copies of signed bids required by the invitation;
>
> (b) Furnish required information concerning the number of its employees;
>
> (c) Sign its bid, . . .
>
> (d) Acknowledge receipt of an amendment to an invitation for bids, . . . ; and
>
> (e) Execute the representations with respect to Equal Opportunity and Affirmative Action Programs . . . .

Safeguard's omissions were unlike these minor failings. They were omissions of substance, not form. They concerned material defects and variations from the exact requirements that would have been prejudicial to other bidders unless the same omissions were waived for them as well. The roughly $6 million increase in price was not negligible when contrasted with the total cost or scope of the services being acquired.

iii. Discretion to Waive or Seek Clarifications

Even if the omissions were waivable or subject to clarification, the Government did not abuse its discretion by declining to waive or clarify them. This court may affirm on any basis supported by the record. *See Music Square Church v. United States*, 218 F.3d 1367, 1373 (Fed. Cir. 2000). FAR 15.306 and 52.212-1(g) each provide that the Government "may" waive or clarify. The "word 'may' clearly connotes discretion," though "discretion is not whim." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931 (2016) (cleaned up).

Given this record, we cannot find that the Government abused its discretion in declining to waive or clarify the omissions. The Solicitation stated that the Government intended to award a contract without establishing a competitive range or engaging in discussions. The Solici-

tation required complete pricing information in general, including a completed Schedule B. Such complete pricing information was crucial to the Government's evaluation of the proposals and its intent to award a contract without discussions. As source selection authority Williams noted, remedying the omissions would have required a completely revised price proposal. We cannot find that the Government abused its discretion in declining to seek clarifications or applying waiver.

4. Supplementing the Administrative Record

Finally, the Claims Court did not abuse its discretion by denying Safeguard's email request and separate motion to supplement the administrative record.

"[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). "The purpose of limiting review to the record actually before the agency is to guard against courts using new evidence to 'convert the "arbitrary and capricious" standard into effectively de novo review.'" *Axiom*, 564 F.3d at 1380 (citation omitted). Supplementation "should be limited to cases in which 'the omission of extra-record evidence precludes effective judicial review.'" *Id.* (citation omitted). "Judicial review is 'effective' if it is consistent with the APA." *AgustaWestland N. Am., Inc. v. United States*, 880 F.3d 1326, 1331 (Fed. Cir. 2018). *See also CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1356 (Fed. Cir. 2008) (declining to address whether supplementation was proper, because "[w]ithout supplementation, the record in this case provides a rational basis for [the Government's] decision").

Here, the Claims Court found that the information in the proffered affidavits was not necessary for effective judicial review. Not only did the court point to the unfixable patent defects in Safeguard's proposal, but it found the statements in the affidavits either inaccurate or irrelevant.

"Evidentiary determinations by the [Claims Court], including motions to supplement the administrative record, are reviewed for abuse of discretion." *Axiom*, 564 F.3d at 1378. "An abuse of discretion is found when: (1) the court's decision is clearly unreasonable, arbitrary or fanciful; (2) the decision is based on an erroneous construction of the law; (3) the Claims Court's factual findings are clearly erroneous; or (4) the record contains no evidence upon which the district court rationally could have based its decision." *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1341 (Fed. Cir. 1999). We find no abuse of discretion in those conclusions.

Far from abusing its discretion, the Claims Court took pains to ensure effective judicial review. In denying Safeguard's email request to supplement with transcripts of proposed depositions, the court required that the Government investigate whether the administrative record was complete, particularly regarding documents relevant to the source selection and "documents relevant to the disqualification of other offerors in the procurement for the same or similar reason as a result of which [Safeguard] was eliminated." J.A. 144. The court also denied Safeguard's email supplementation request only 'at that time.' Safeguard never renewed its request for depositions and, instead, sought to supplement the record with affidavits from Curran and Prabhu, which the court examined and considered.

The allegations in the affidavits were not borne out by the record. Prabhu alleged that Wood was predisposed against Prabhu and SRM, but the record reflected that

Wood not only treated Safeguard fairly, but favorably during the evaluation process. Prabhu also alleged that Caine was predisposed against Prabhu and SRM, but, even if true, Caine had almost no role in the procurement. Similarly, while Curran alleged that Caine was predisposed against Prabhu, SRM, and Safeguard, there was no reason to believe that, even if true, that fact impacted Williams's conclusions, which were consistent across all three evaluations, even those occurring prior to any advice from Caine.

We agree with the Claims Court that the administrative record provided more than sufficient grounds to conclude that the Government's decision was proper under the applicable standards and that supplementation was unnecessary for effective judicial review.

III. CONCLUSION

We have considered the parties' remaining arguments and do not find them persuasive or necessary to address. For the foregoing reasons, we affirm the final judgment of the Claims Court.

AFFIRMED

United States Court of Appeals for the Federal Circuit

SAFEGUARD BASE OPERATIONS, LLC,
Plaintiff-Appellant

v.

UNITED STATES, B&O JOINT VENTURE, LLC,
Defendants-Appellees

2019-2261

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00061-MBH, Senior Judge Marian Blank Horn.

NEWMAN, *Circuit Judge*, dissenting.

This bid protest by Safeguard Base Operations, LLC ("Safeguard") relates to a small business set-aside contract for dormitory maintenance services at the Federal Law Enforcement Training Center ("FLETC") of the Department of Homeland Security ("DHS" or "Agency"). Safeguard's related company SRM Group, Inc. was the incumbent contractor.

On the bidding for the successor six-year contract, the Agency disqualified Safeguard because of a purported error in its bid. Four of the seven offerors, including Safeguard, made the same "error": they followed a bidding instruction in the Solicitation document instead of the instruction in a

later question-and-answer ("Q&A") document. The Agency disqualified the offerors who followed the instruction in the Solicitation. Safeguard states that the terms of the Solicitation were not properly amended as required by the Federal Acquisition Regulation ("FAR"), and that it was unfairly disqualified.

The Court of Federal Claims held that the Agency's disqualification of Safeguard, without consideration of the merits of its bid, was reasonable;[1] my colleagues on this appeal agree. I respectfully dissent.

DISCUSSION

The so-called erroneous bid concerns a provision in the "Price" section of the Solicitation. This section requires detailed pricing information, including, for example, labor rates for all positions, overtime hours and rates, exempt and non-exempt fringe benefits, health and welfare, pensions, general and administrative costs, profits, direct costs, bonding costs, etc. However, for contract line item numbers X007AA and X007AB the Solicitation states, in capital letters set off by asterisks:

*****DO NOT SUBMIT PRICING FOR THESE CLINS*****

J.A. 4251. Safeguard complied with the instruction and did not submit pricing for the designated line items, which were for certain fixed-price not-to-exceed "plug number" items that were not subject to variation in bid. The Solicitation provided no dollar amounts for these CLINS. However, in a Q&A document responding to 272 questions, issued four months after the issuance of the Solicitation as Amendment No. 3, Q&A 9 was as follows:

> 9. Q: Section B Price Schedule: Schedule B – CLIN X007AA & X007AB**:** These CLINs state "The

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[1] *Safeguard Base Operations LLC v. United States*, 144 Fed. Cl. 304 (2019) ("Fed. Cl. Op.").

> amount listed is the Government 'Ceiling' and is a 'not-to-exceed' amount", however there are no amounts listed. What are the not-to-exceed amounts for these CLINs?
>
> A: For bidding purposes please include the following 'not-to-exceed' amounts in the applicable CLIN: [giving dollar amounts for each line item, total $6,121,228].

J.A. 4297. The government does not dispute that the "please include" in Q&A 9 is contrary to the "DO NOT SUBMIT" instruction in the Solicitation.

Safeguard (and three other bidders) did not submit pricing for the "DO NOT SUBMIT" line items. The briefs state that the Contracting Officer spotted this discrepancy among the bidders. From the briefs, it is not clear why adjustment did not occur. But it is clear that the Agency "disqualified" Safeguard as a bidder because of the perceived discrepancy. And the Agency's promised remedial action, after Safeguard complained to the General Accountability Office, did not occur.

On appeal to the Court of Federal Claims, Safeguard pointed to several Agency errors. First, Safeguard stated that the Agency did not follow the FAR procedures for changing the terms of the Solicitation, pointing out that the Q&A request to include the previously omitted line item amounts required some formality to change the pricing terms of the Solicitation. Safeguard argued that the Q&A document contained apparently inconsistent instructions, and that the FAR requires that a substantive change is either processed by FAR 15.306 (clarification), or resolicited. *See Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 998 (Fed. Cir. 2018) ("Clarifications are not to be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal." (quoting *JWK Int'l Corp. v. United States*, 52 Fed. Cl. 650, 661 (2002))).

The Court of Federal Claims held that Safeguard's failure to include the CLIN "plug numbers" was a material omission from Safeguard's bid. Fed. Cl. Op. at 346. However, no formal change in the Solicitation's price instruction was ever made.

Second, Safeguard cited the Order of Precedence for resolution of inconsistencies, for the Order of Precedence was a clause of this Solicitation:

> (s) *Order of precedence.* Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

J.A. 1359. Safeguard argues that the Schedule of Supplies/Services directing offerors not to submit pricing on the CLINS in question has precedence over any addenda to the solicitation. *See Magnus Pac. Corp. v. United States*, 133 Fed. Cl. 640, 681 (2017) ("If there are direct conflicts between information contained in different parts of a solicitation, the court may rely on the contract's 'order of precedence' clauses to discern the reasonable interpretation of the contract.").

Third, Safeguard states that its summary disqualification is illuminated by the Agency's known bias against Safeguard. The Court of Federal Claims denied Safeguard's request to depose Agency officials. Safeguard

submitted two affidavits on this aspect, but the court refused to enter these affidavits into the administrative record.

In the proffered affidavit of Safeguard's President, Suresh Prabhu, he averred that "Ms. Wood [the Contracting Officer] called me wanting to know why SRM had chosen to file another REA. She stated that I had 'humiliated' her by filing the Amended REA [Request for Equitable Adjustment] and vowed never to work with me or SRM in the future. I asked if that meant that DHS would not renew SRM's Contract, and her response was, 'Nobody who has ever sued the Government has been awarded a Contract.'" J.A. 1301.

The affidavit of Safeguard's local counsel, Diana Parks Curran, averred that DHS lawyer James Caine "stated that 'it is not a secret that there is bad blood between FLETC and [SRM's President] Suresh [Prabhu]' and that if he could avoid ever awarding another contract to Suresh, he would ensure Suresh never works at FLETC ever again." J.A. 1226, ¶ 6 (alterations in original).[2]

The Court of Federal Claims held that it was unnecessary to consider the charge of bias, because "[i]n sum, the administrative record does not indicate that the Agency breached its duty to fairly and honestly consider proposals, even if the court were to consider the [affidavits] . . . , both of which affidavits were not permitted by the court to be

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[2] Safeguard states that there were several disputes during the prior contract term, primarily concerning change orders. However, the record shows no criticism of the Safeguard company's past performance, and Safeguard reports receipt of a "DHS Small Business Achievement Award for its outstanding work in support of the DHS mission" in April 2018. Safeguard Br. at 5; J.A. 158, ¶ 16.

included in the administrative record as not necessary for effective judicial review." Fed. Cl. Op. at 353.

On appeal to the Federal Circuit, Safeguard stresses the flawed Agency procedures, and the impropriety of Safeguard's summary disqualification without permitting remedy of the perceived error due to inconsistent instructions concerning the designated line items.

The panel majority finds that there is no inconsistency between the Solicitation and Q&A 9. The majority also finds that the Q&A 9 instruction to "please include" pricing is an "explanation" of the "DO NOT SUBMIT PRICING" command in the Solicitation. The majority further finds: "The way to understand and harmonize these provisions is to interpret 'pricing' as offeror-provided pricing." Maj. Op. at 26. The majority reasons that the bidder is required to "provide a detailed breakdown of how it arrived at proposed cost," Maj. Op. at 31, although for these line items there can be no such breakdown, for these line item "plug numbers" are provided by the Agency. The majority also explains its ruling by stressing "the importance of the amounts," Maj. Op. at 31, ignoring that the amounts at issue are not subject to competitive bidding.

The government does not offer such strained theories. The government agrees that the Q&A No. 9 instruction is a change from the Solicitation, and states that it superseded the Solicitation. Accepting that this was the Agency's intention, the flaw is in the uncertainty and absence of clarification as the FAR requires, accompanied by the summary disqualification of four bidders.

Of course the terms of a solicitation can be changed, and the FAR provides procedures for doing so. Here no such procedures were followed. *See Dubinsky v. United States*, 43 Fed. Cl. 243, 267 n.56 (1999) ("[The FAR] does not grant contracting officers carte blanche to notify offerors of one rating system in the RFP [Request for

Proposals] and then to apply a different system during the evaluation of proposals.").

"When the evaluation of proposals materially deviates from the evaluation scheme described in the solicitation, the agency's failure to follow the described plan may constitute evidence of arbitrary and capricious decision-making." *L-3 Commc'ns EOTech, Inc. v. United States*, 83 Fed. Cl. 643, 654 (2008). Yet my colleagues hold that because Safeguard followed the Solicitation instruction instead of the Q&A 9 instruction, Safeguard was properly disqualified. Precedent is contrary. *See Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273 (2004) ("The agency's failure to follow its own selection process embodied in the Solicitation is . . . a prejudicial violation of a procurement procedure established for the benefit of offerors.").

It is noteworthy that four of the seven bidders made the same purported "error." *See LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1555 (Fed. Cir. 1995) ("[T]he bastion of federal procurement policy [is] that all offerors must possess equal knowledge of the same information in order to have a valid procurement." (quoting *Logicon, Inc. v. United States*, 22 Cl. Ct. 776, 788 (1991))).

My colleagues dispose of the question of bias by holding that the government did not breach an "implied-in-fact contract to fairly and honestly consider an offeror's proposal in the procurement context."[3] Maj. Op. at 3. The covenant to

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[3] The panel majority bases jurisdiction on "an implied-in-fact contract claim," reciting "an implied-in-fact contract to fairly and honestly consider an offeror's proposal in the procurement context." Maj. Op. at 2–3. Without doubt, the Court of Federal Claims has jurisdiction of this bid protest appeal. However, I do not agree that jurisdiction is a matter of an implied-in-fact contract to deal fairly and honestly with offerors. The government's

fairly and honestly implement the bidding process underlies the vast framework of government procurement. Here, however, the government disposes of the charge of bias by stating that Safeguard was engaged in a "fishing expedition" and that consideration of the charge of bias "was not necessary for effective judicial review of whether the Agency fairly and honestly considered Safeguard's proposal." Gov't Br. 43, 47.

This casual disposition of responsible allegations disserves the federal-private partnership that serves the nation's complex needs. *See Pitney Bowes Gov't Sols., Inc. v. United States*, 93 Fed. Cl. 327, 332 (2010) ("Where bias is alleged, the administrative record frequently will not be complete or suffice to prove or disprove the allegation. Consequently, to address bias, the court will entertain extra-record evidence and permit discovery . . . ."); *Int'l Res. Recovery, Inc. v. United States*, 61 Fed. Cl. 38, 42 (2004) ("This Court and other fora resolving bid protests have traditionally considered extra-record evidence in assessing alleged bias or bad faith."); *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 747 (2014) ("An allegation of bad faith or bias in particular calls for extra-record evidence to support requests for supplementation or discovery.").

The Court of Federal Claims erred in its refusal to resolve the allegation of bias, and my colleagues err in rationalizing the Agency's departures from the rules and policy

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obligation to deal fairly and honestly with offerors is a covenant that underlies all government procurement. It is the foundation on which the private sector provides goods and services for government needs. The obligation to deal fairly and honestly with offerors is not subject to negotiation, mutuality of understanding, and consideration—the requirements of an implied-in-fact contract. Thus I do not share the majority's theory of jurisdiction.

of federal procurement. I respectfully dissent from the denial of this bid protest.

In the United States Court of Federal Claims

No. 19-1520C

(Filed: January 29, 2021)

JOHNSON LASKY KINDELIN ARCHITECTS, INC., for the benefit of IMEG CORP., f/k/a KJWW ENGINEERING	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

OPINION AND ORDER

The Court once again must decide whether it has jurisdiction – pursuant to the Tucker Act, 28 U.S.C. § 1491(a), and the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101–7109 – to decide a case predicated upon a government claim contained in a contracting officer's final decision finding that two, unrelated contractors are jointly liable for the same injury and sum certain arising from alleged breaches of their respective, independent contracts. For the reasons discussed below, and based upon the Court's previous decision in *Johnson Lasky Kindelin Architects, Inc. v. United States ("JLK I")*, No. 19-1419C, -- Fed. Cl. --, 2020 WL 7649972 (Dec. 23, 2020), the Court dismisses this case for lack of jurisdiction.

I. Factual Background

Plaintiff Johnson Lasky Kindelin Architects, Inc. ("JLK") filed two separate complaints against Defendant, the United States of America, acting by and through the General Services Administration ("GSA"). Both cases involve the same underlying contract. This Court dismissed the first matter in *JLK I*. This decision addresses JLK's second case against the government.

In 2010, GSA retained JLK to provide professional design services as the architect-engineer supporting the relocation of existing National Labor Relations Board ("NLRB") office space. *JLK I*, 2020 WL 7649972, at *1 (Dec. 23, 2020). GSA separately

contracted with Master Design Build, LLC ("MDB") to provide the necessary construction services for the relocation of the NLRB office space. *Id*.

In *JLK I*, the claim at issue involved a supplemental air conditioning unit, which JLK designed for the NLRB space and MDB installed. *Id*. Ultimately, a condenser fluid pipe in the newly installed cooling system malfunctioned and caused extensive damage to parts of the NLRB space, as well as portions of the United States Bankruptcy Court on the sixth and seventh floors of the building in which the NLRB space was located. *Id*. at *2. GSA retained Bailey Edward, an independent architecture and engineer consulting firm, to investigate the cause of the condenser fluid piping system failure. *Id*. Following that investigation, Bailey Edward issued a report, in which the firm concluded that "that the leak resulted due to the confluence of several factors," including issues with JLK's design and MDB's installation failures. *Id*. Bailey Edward, however, "determined that it could not assign fault to JLK to the exclusion of MDB (or the government) . . . ." *Id*.

After reviewing Bailey Edward's report, the cognizant contracting officer issued a single contracting officer's final decision ("COFD") to both JLK and MDB for $1,938,866.86, claiming that both companies were jointly and severally liable to GSA for that amount. *Id*. at *3. While the COFD acknowledged that the design and construction services were provided *separately* by JLK and MDB under different contracts, the contracting officer nevertheless concluded that JLK and MDB were jointly and severally liable for the resulting damages and, accordingly, instructed them to collectively reimburse GSA. *Id*. In essence, the contracting officer issued a COFD finding two, unrelated contractors – JLK and MDB – jointly and severally liable for the same sum certain arising from independent breaches of their respective contracts with GSA. *Id*. at *1. It is this COFD upon which JLK's first claim and complaint were predicated and that this Court ultimately dismissed in *JLK I*.

The above-captioned case raises a similar issue. As part of JLK's prime contract with GSA, JLK hired a subcontractor, IMEG Corp. ("IMEG"), to provide design services for the installation of a fire alarm system. ECF No. 1 ("Compl.") ¶ 9. After GSA determined that certain conduit connections for the fire alarm system were not furnished and installed per project specifications, MDB charged GSA $48,795.54 to complete the additional work. *Id*. at ¶¶ 15, 16. On October 2, 2018, the same contracting officer who had issued the COFD in *JLK I* issued another COFD, this time finding that JLK and MDB were jointly liable for the $48,795.54 MDB charged to GSA for the conduit work.[1] *Id*. at ¶¶ 17, 18. The COFD at issue here uses identical language

[1] JLK, as a prime contractor, is responsible for the actions of its subcontractors. *See Todd Const., L.P. v. United States*, 656 F.3d 1306, 1316 (Fed. Cir. 2011) ("[A] contractor is responsible for the

as the COFD in *JLK I*, with the agency claiming a sum certain from the same parties and under the same contracts at issue in *JLK I*, once again invoking a tort theory of joint liability.[2]

II. Procedural History

On October 1, 2019, JLK, for the benefit of IMEG, filed suit in this Court, alleging that the COFD for $48,795.54 was unreasonable and erroneous, or in the alternative, incomplete. Compl. at 7. JLK also filed a notice of directly related case, informing the Court that the instant case involved the same contracts as those at issue in *JLK I*, which had been filed several weeks prior. ECF No. 2. On January 9, 2020, GSA filed an answer and counterclaim, requesting that the Court enter judgment in GSA's favor in the amount of $48,795.54 and dismiss JLK's claim. ECF No. 14. JLK filed an answer to GSA's counterclaim on January 30, 2020. ECF No. 15. The case was reassigned to the undersigned Judge on February 5, 2020. ECF Nos. 16, 17.

On March 19, 2020, the parties filed a joint preliminary status report requesting that further proceedings be stayed "in light of enforcement proceedings that the General Service Administration (GSA) will bring against Master Design Build, LLC (MDB) for the exact same debt – $48,795.54 – that is at issue in this litigation." *See* ECF

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unexcused performance failures of its subcontractors."). This claim, brought by JLK on behalf of IMEG, is a sponsored (or "pass-through") claim. *See Montano Elec. Contractor v. United States*, 114 Fed. Cl. 675, 680 (2014) ("Even absent privity of contract, a subcontractor's claims may be brought against the government if the prime contractor brings the suit on behalf of the subcontractor—as a pass-through or sponsored claim."), *aff'd*, 610 F. App'x 987 (Fed. Cir. 2015); *see also* Compl. ¶ 10 ("In August of 2019 . . . JLK transferred its appellate rights against the GSA to IMEG, effectively, sponsoring any de facto claims which could be incurred by IMEG in relating to this matter.").

[2] In particular, the contracting officer determined as follows:

> JLK & MDB [a]re jointly liable because: 1) MDB/their sub did not provide the submittal initially that clarified what conduit/connection components were for the fire alarm system and what were for the remainder of the electrical systems installation; 2) JLK/their MEP sub did not clarify this further in their review of the submittals, to assure that the installation of the fire alarm system followed the specifications.

Compl. at ¶ 18. Moreover, according to the second COFD, because "both JLK and MDB have both provided design and construction services, respectively, on numerous projects for GSA, they both were totally familiar with the all of the GSA requirements of a fire alarm system installation; simply put, this oversight on both of their parts should not have occurred in the first place." *Id*.

No. 18 at 2. Those planned collection proceedings are based on the fact that "the final decision finding MDB liable for $48,796.54 is conclusive and binding against MDB," because MDB "failed to either appeal [the COFD] to the Civilian Board of Contract Appeals (CBCA) within 90 days of the decision or appeal the final decision to this Court within a year of that decision." *Id*. The government acknowledged that "the collection of MDB's debt by GSA would moot this litigation," and thus requested that this case be stayed while it "diligently pursue[d] the collection of that debt against MDB." *Id*.

On December 23, 2020, this Court entered an Order and Opinion in *JLK I*, dismissing that case, as noted above, for lack of subject matter jurisdiction. *JLK I*, 2020 WL 7649972, at *1 (Dec. 23, 2020). In that opinion, the Court held that the COFD at issue was invalid because it invoked joint and several liability, a tort theory of damages, to claim the same sum certain from both JLK and MDB for the alleged breach of their respective, independent contracts with GSA. *Id*. at *11 ("This Court lacks jurisdiction to decide this case because both the government's Counterclaim and the predicate COFD constitute a 'damages [claim] . . . sounding in tort.'" (quoting 28 U.S.C. § 1491(a)(1))). Additionally, the Court noted that "the government's approach . . . provides this Court – and more importantly, JLK – with no assurances, no procedural method, and no substantive rule to ensure that the government will *not* seek a double recovery via two separate judgments in two separate fora." *Id*. at *22.

In light of the similarities between the COFD at issue in *JLK I* and this case, this Court ordered the government to show cause as to why this matter should not be governed by the result in *JLK I*, and, thus, dismissed for lack of jurisdiction. ECF No. 19. On January 15, 2021, the government responded to the Court's order, conceding that, based on the Court's reasoning and subsequent holding in *JLK I*, the government was not aware of any basis on which to distinguish the instant case. ECF No. 20 at 1–2. The government acknowledged that

> [t]he COFD from which plaintiff appeals in this case – like the COFD in *JLK I* – found that JLK and MDB are jointly and severally liable for the loss at issue. Because, according to *JLK I*, joint and several liability is a tort concept, this Court would not possess jurisdiction to entertain this litigation . . . .

Id. at 2. Thus, the government ultimately agreed that *JLK I* requires the dismissal of this case for lack of subject matter jurisdiction. *Id*.

III. The COFD At Issue In This Case Suffers From The Same Defects As The COFD In *JLK I* And Thus This Court Lacks Jurisdiction

Pursuant to Rule 12(h)(3) of the Court of Federal Claims ("RCFC"), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." A court's "[s]ubject-matter jurisdiction may be challenged at any time by the parties, or by the court *sua sponte*." *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) (citations omitted). As acknowledged by the government in its response to this Court's order to show cause, the predicate COFDs in both *JLK I* and the instant case use nearly identical language, which the Court previously held invokes a tort theory of recovery, rendering the COFD invalid and the case outside of this court's jurisdiction. ECF No. 20 at 2. The government thus further agreed that the rationale in *JLK I* requires the dismissal of this case for lack of jurisdiction.[3] *Id*. The Court concurs with the government's assessment.

We write further only to emphasize that the hypothetical situation with which we were concerned in *JLK I* has actually materialized in this case. Because MDB failed to appeal the COFD at issue here, MDB is liable to the government for the full amount of $48,795.54 at issue in this case. In essence, then, the government already has held another contractor liable for the same sum certain that it seeks to recover from JLK in this case. In *JLK I*, we expressed that precise concern – *i.e.*, that there is no mechanism to ensure that the government would not "seek a double recovery via two separate judgments in two separate fora." *JLK I*, 2020 WL 7649972, at *22 (Dec. 23, 2020). Here, the government seeks to do just that: despite the fact that it already has declared the judgment against MDB to be "conclusive and binding," the government is still pursuing the identical sum certain for the same injury, but under a different contact and from a different contractor in the matter before us. The Court in *JLK I* determined that no contract language or theory of damages permitted the government to take such an approach.

The fact that the Court has granted the government's request to stay this case pending any collection action against MDB does not cure the problem. In that regard, the government itself repeatedly has admitted that it cannot collect the same sum certain from both JLK and MDB. Specifically, in the government's request to stay this case, the government acknowledged that "the collection of MDB's debt by GSA would moot this litigation" because it seeks to recover from MDB "the *exact same debt* – $48,795.54 – that is at issue in this litigation." *See* ECF No. 18 at 2 (emphasis added). The government conceded the identical point in *JLK I*, recognizing that should JLK tender the entire amount due to GSA pursuant to the COFD at issue in that matter,

[3] To be clear, the government does not concede that *JLK I* was correctly decided.

MDB's pending CBCA appeal of that first COFD would be moot "because there would be nothing left for the CBCA to adjudicate." *JLK I*, 2020 WL 7649972, at *18 n.14 (Dec. 23, 2020). The government, however, has not directed the Court to any authority demonstrating that our jurisdiction to decide a contract case may turn on the collectability of a judgment against another company on another contract. Indeed, as this Court noted in *JLK I*, the possibility of that situation – which, again, apparently has materialized in this case – provides further evidence that the COFD's claim of joint liability is grounded in a tort theory of liability, and, thus, is not within this Court's CDA jurisdiction. *Id*. at *23. ("In the Court's view, the fact that neither the Court nor the CBCA can preclude the government from a double recovery at a minimum suggests that the government's approach to this matter is erroneous.").

For the above reasons, as well as those explained in *JLK I*, the COFD at issue in this case is invalid, as it improperly relies upon a tort theory of recovery, and thus this Court lacks subject-matter jurisdiction to decide this case. Accordingly, both the Plaintiff's Complaint and the government's Counterclaim are **DISMISSED**, without prejudice, pursuant to RCFC 12(h)(3).

IT IS SO ORDERED.

s/Matthew H. Solomson
Matthew H. Solomson
Judge

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6689 DISMISSED FOR LACK OF JURISDICTION;
CBCA 6784 DENIED: November 12, 2020

CBCA 6689, 6784

MIAMI-DADE AVIATION DEPARTMENT,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Altanese Phenelus, Assistant County Attorney, Aviation Division, Miami-Dade County Attorney's Office, Miami, FL, counsel for Appellant.

James F. H. Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **VERGILIO**, **SULLIVAN,** and **CHADWICK**.

SULLIVAN, Board Judge.

The Miami-Dade Aviation Department (MDAD) twice appealed the denial of its claim for underpayment of rent for space occupied by federal agency tenants under a lease with the General Services Administration (GSA). MDAD alleged that, in 2011, one agency vacated less space than GSA indicated in its notice of termination and, therefore, MDAD is owed rent for the space that remained occupied between 2012 and 2017. The Board dismisses for lack of jurisdiction MDAD's first appeal, docketed as CBCA 6689, which was of the contracting officer's decision on an uncertified claim. The Board cannot review the second claim, docketed as 6784, because MDAD submitted it more than six years after the claim accrued

and, thus, the claim is barred by the six-year statute of limitations in the Contract Disputes Act (CDA). 41 U.S.C. § 7103(a)(4) (2018). We grant GSA's motion for summary judgment and deny MDAD's second appeal.

Background

I. Relevant Contract Terms

In August 2005, GSA executed a lease for office space to be occupied by three federal agency tenants, including the Food and Drug Administration (FDA), near the Miami International Airport. Exhibit 1 at 1.[1] GSA leased from MDAD 56,597 rentable square feet in exchange for the payment of annual rent of more than $1 million. *Id*. (paragraph 3). The lease also stated the amount of space that each of the three federal agencies would occupy, including 14,103 rentable square feet by FDA. *Id*.

GSA had the right to measure the square footage to ensure that all of the space offered was delivered by the lessor:

> 5. Rental is subject to the Government's measurement of plans submitted by the Lessor or a mutual on-site measurement of the space and will be based on the rate, per [Building Owners and Managers Association (BOMA)] useable square foot (PUSF) as noted in paragraph 3 above, in accordance with Clause 26 (PAYMENT), GSA form 3517, General Clauses. The lease contract and the amount of rent will be adjusted accordingly, but not to exceed the maximum BOMA useable square footage requested in Solicitation for Offers (SFO) [], Paragraph 1.1, (Amount and Type of Space). Rent for a lesser period shall be prorated.

Exhibit 1 at 2. The lease incorporated the terms of the solicitation for offers (SFO), which contained paragraph 26, clause 552.270-20 PAYMENT (SEP 1999) (VARIATION), which provided for measurement of the space at the beginning of the lease. *Id*. (SFO, General Clauses).

Paragraph 4 of the lease provided that, "except as provided for in paragraph 17," GSA could terminate the lease, in whole or in part, after five years with 120 days notice. Exhibit 1 at 1. Paragraph 17 of the lease further provided that GSA could terminate increments of

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[1] "Exhibit X" refers to the exhibits submitted by the parties in support of their briefs and joint statement of facts, unless otherwise noted.

10,578 rentable square feet of space at any time after the first twelve months of the lease. *Id*. at 3.

The lease also contained a Disputes clause, FAR 52.233-1, which required, in part, that "[a] claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within [six] years after accrual of the claim to the Contracting Officer for a written decision." Exhibit 1 (SFO, General Clauses).

II. Events Leading To Dispute

In November 2011, GSA notified MDAD that the FDA would be vacating its portion of the space under lease; 10,578 rentable square feet would be vacated immediately and 3525 rentable square feet would be vacated the following March.[2] In March 2012, MDAD notified GSA that the amount of space vacated by FDA was less than the amount set forth in GSA's notice. Notice of Appeal (CBCA 6784), Claim at 2, Exhibit C). Beginning in April 2012, MDAD invoiced GSA for 40,140 useable square feet, including the space that it believed was still occupied; GSA paid less than the amount invoiced, an amount calculated based upon 34,568 square feet. *Id*., Claim at 2-3, Exhibit H.[3]

In August 2012, MDAD again emailed GSA to reiterate that the space vacated was less than GSA stated and reported that a representative of one of the tenant agencies had verified this information by conducting a walk-through of the space. Exhibit 11b. MDAD asked whether GSA wanted to conduct a walk-through of the space prior to executing a "supplemental agreement." *Id*. In December 2014, the same tenant agency representative walked the space with MDAD and "confirmed that the space vacated by the FDA was the same as that indicated by MDAD since 2012." Notice of Appeal (CBCA 6784), Claim at 2; Exhibit 16.

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[2] With this partial termination, the rentable square feet under the lease was 42,494 (56,597 - 14,103). MDAD alleged in its claim that GSA's notice was defective because GSA did not provide the required 120-day notice. With its notice, GSA properly partially terminated the lease for 10,578 square feet immediately, as permitted by lease paragraph 17, and terminated another 3525 square feet after 120 days, as permitted by lease paragraph 4.

[3] The lease states the space under lease in both rentable and useable square feet, with the useable square feet as the smaller amount. While the parties used both terms and figures in the course of the lease, the use of one figure over another is not material to the dispute.

In October 2013, the parties executed lease amendment 2, with which the parties sought to "increase 42,494 rentable square feet (34,548 ANSI/BOMA office area square feet) to 44,310 rentable square feet (36,318 ANSI/BOMA office area square feet)" and increase the annual rent amount. Exhibit 3 at 1-2. Thereafter, the parties executed a series of lease amendments, which increased the annual rent and/or extended the lease term, but the rentable square footage remained the same. Exhibit 4 at 2 (SLA 3); Exhibit 5 (SLA 4); Exhibit 6 (SLA 5); Exhibit 7(SLA 6). Despite these amendments, MDAD continued to invoice GSA for amounts greater than GSA paid in rent. Notice of Appeal (February 2020 Claim, Exhibit H).

Before executing lease amendments 5 and 6 in March 2016, MDAD sent a letter to the contracting officer, putting GSA on notice that the square footage amount set forth in those proposed lease amendments was in dispute and reserving its rights to seek unpaid rent. Exhibit 18 at 1. The contracting officer acknowledged the reservation with his signature on MDAD's notice, *id*., and the parties executed lease amendments 5 and 6.

In September 2017, the parties executed lease amendment 8, in which the useable square feet figure was changed to 40,141, and the annual rent was set at $999,709.49, for the period March 1, 2017, through February 28, 2019. Exhibit 9. According to MDAD, this lease amendment resolved the discrepancy in the space under lease and the amount MDAD invoiced GSA for rent matched the amount that GSA paid. Notice of Appeal (Feb. 2020 Claim at 3).

In June 2019, MDAD submitted an uncertified claim to the contracting officer for the difference between what it invoiced versus what GSA paid in rent from April 2012 through February 2017. The contracting officer issued a decision in August 2019, which MDAD received in September 2019 and appealed on December 19, 2019 (docketed as CBCA 6689). Counsel for the parties, having identified the jurisdictional defect in the appeal, sought a stay of the Board's consideration of that appeal while MDAD submitted a properly certified claim to the contracting officer on February 27, 2020. Order (Jan. 9, 2020). On March 31, the contracting officer issued a decision denying the certified claim and MDAD filed its second appeal on April 6, 2020 (docketed as CBCA 6784).

Discussion

I. The Board Lacks Jurisdiction In CBCA 6689

MDAD first appealed the contracting officer's decision on its uncertified claim to the Board. "The contracting officer's decision on an uncertified claim is a nullity and may not serve as a basis for Board jurisdiction." *Hillcrest Aircraft Co. v. Department of Agriculture*,

CBCA 2233, 11-1 BCA ¶ 34678 (citing *Newport News Shipbuilding & Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1552-53 (Fed. Cir. 1993)); *Whiteriver Construction, Inc. v. Department of the Interior*, CBCA 2045, 10-2 BCA ¶ 34,582; 41 U.S.C. § 7103(b)(1), (f)(2)). Although GSA has not moved to dismiss this appeal, both parties acknowledged this jurisdictional defect in proceedings before the Board and the Board sua sponte dismisses CBCA 6689 for lack of jurisdiction.

II. The Six-Year Statute of Limitations Forecloses the Board's Review of MDAD's Second Claim

The issue presented by GSA's motion is when did MDAD's claim accrue? GSA asserts that MDAD's claims prior to the execution of lease amendment 2 are barred by the six-year statute of limitations contained in the Contract Disputes Act (CDA). We agree. However, we also find that, because MDAD's claim accrued prior to February 27, 2014, the Board's consideration of MDAD's entire claim is barred by the statute of limitations.[4]

Pursuant to the CDA and the lease at issue, "[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after accrual of the claim." 41 U.S.C. § 7103(a)(4); *see* 48 CFR 33.206(a) ("Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period."). "Whether and when a claim has accrued is determined according to the Federal Acquisition Regulation (FAR), the language of the contract, and the facts of the particular case." *Electric Boat Corp. v. Secretary of the Navy*, 958 F.3d 1372, 1375 (Fed. Cir. 2020).

The FAR defines claim accrual as "the date when all events that fix the alleged liability on 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." 48 CFR 33.201. "[O]nce a party is on notice that it has a potential claim, the limitations period begins to run." *Thinkglobal, Inc. v. Department of Commerce,* CBCA 4410, 16-1 BCA ¶ 36,489 (quoting *Cardinal*

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[4] In its motion, GSA argues that the claims before lease amendment 2 are barred by the six-year statute of limitations and the claims for amounts after the lease amendment are barred by the terms of the lease amendment 2 and subsequent lease amendments. Respondent's Motion at 9. Because the statute of limitations forecloses our review of MDAD's entire claim, we do not reach this issue. However, we do address MDAD's arguments in response to this argument as well as the statute of limitations argument. Appellant's Opposition at 13-17.

Maintenance Service, Inc., ASBCA 56885, 11-1 BCA ¶ 34,616, at 170,610 (2010)). "Claim accrual does not depend on the degree of detail provided. . . . It is enough that the [party] knows, or has reason to know, that some costs have been incurred, even if the amount is not finalized or a fuller analysis will follow." *Raytheon Co., Space & Airborne Systems*, ASBCA 57801, et al., 13 BCA ¶ 35,319, at 173,377.

"A party's failure to submit a claim within six years of accrual is an affirmative defense to the claim." *Thinkglobal, Inc.* GSA asserts statute of limitations as a defense to MDAD's claim, thus it bears the burden of proving MDAD's claim is untimely. *Id*.

The legal basis for MDAD's claim is that federal tenants continued to occupy space in its building after GSA partially terminated its lease, space for which MDAD asserts it was owed rent. Beginning in April 2012, MDAD invoiced GSA but did not receive payment for this additional space. These facts, asserted in MDAD's claim, establish that MDAD knew the basis for its claim and suffered some injury more than six years prior to the submission of its February 2020 claim. On this basis, GSA has established that MDAD's claim was untimely.

Lease Measurement Provision Does Not Establish a Pre-Claim Procedure. MDAD urges the Board to consider the contract provisions regarding measurement of the space and find that GSA's failure to comply with these provisions was a "mandatory pre-claim procedure" that precluded the filing of a claim and precluded the running of the statute of limitations. Opposition at 10 (citing *Kellogg Brown & Root Services Inc. v. Murphy*, 823 F.3d 622, 628 (Fed. Cir. 2016)). According to MDAD, GSA was obligated to measure the space at MDAD's request following the partial termination and the six-year statute of limitations could not run until GSA measured the space (through a tenant agency representative) in December 2014.

The measurement provision allows GSA to measure the space at the beginning of a lease term to confirm that the lessor has been provided all the space offered in response to the solicitation of offers. The measurement provision incorporates a second provision (provision number 27) of the SFO which discusses drawings provided by the lessor in response to the solicitation and grants the contracting officer the right to decide whether to measure the space. This interpretation is logical since the lessor is a position to know the space occupied in its building; GSA needs the right to measure to confirm. Nothing in the terms of the measurement provision suggests that GSA had an obligation to measure the space or that the measurement of the space was a necessary pre-condition to MDAD's ability to file a claim. Moreover, MDAD was able to invoice GSA beginning in April 2012 for the difference in the rent; MDAD did not need GSA to measure the space to determine the additional amount that it believed it was owed as a result of the continued use of the space.

MDAD's Claim is Not a Continuing Claim. MDAD also suggests that its claim is a continuing claim and its claims within six years of the February 2020 claim survive. Opposition at 10 (citing *JBG/Federal Center LLC v. General Services Administration*, CBCA 5506, 18-1 BCA ¶ 37,087). "Where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongly withheld in breach of the contract." *Id*. (quoting *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964)). The continuing claim doctrine does not assist MDAD in overcoming the statute of limitations. MDAD's claim arose when federal tenants continued to occupy greater space. Unlike in *JBG*, where the government's obligation to pay taxes did not arise until the lessor presented a paid tax bill, here the space did not change from 2012 and was reiterated in the bilateral amendment in 2013. While GSA had an obligation to pay rent monthly, in arrears, the space for which MDAD invoiced GSA was fixed when the federal tenant failed to vacate all of the space identified in the notice of termination.

No Basis for Equitable Tolling. MDAD also asserts that the six-year limitation should be equitably tolled because it had to wait for GSA to measure the space. Opposition at 12. To establish a basis for equitable tolling, MDAD must establish that "(1) it has been pursuing its rights diligently, and (2) that some extraordinary circumstances" prevented the timely filing of its claim. *Pegasus Enterprises, LP v. General Services Administration*, CBCA 5420, 19-1 BCA ¶ 37,459 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). As already discussed, GSA was not required to measure the space before MDAD could submit its claim. MDAD has offered no other explanation as to why it could not submit a timely claim; thus, there is no basis on which to equitably toll the statute of limitations.

Reservation of Rights Cannot Toll Statute of Limitations. In response to GSA's arguments regarding the binding effect of lease amendments, MDAD provides evidence of its reservation of rights prior to the execution of lease amendments 5 and 6. While this reservation may have precluded the enforcement of the terms of bilateral lease amendments 5 and 6 had MDAD filed a timely claim, it does not toll the six-year statute of limitations.

No Basis for Equitable Estoppel. MDAD also asserts that GSA should be equitably estopped from asserting the statute of limitations as a bar to its claims because it refused to measure the space, despite MDAD's requests that it do so, and it "unilaterally inserted" square footage figures into the bilateral lease amendments executed by the parties. Appellant's Opposition at 17. MDAD has failed to show the "affirmative misconduct" on the part of GSA, necessary for GSA to be estopped. *MLJ Brookside, LLC v. General Services Administration*, CBCA 4963, 15-1 BCA ¶ 36,166. GSA was not obligated to measure the space. Moreover, GSA's insertion of square footage amounts to which MDAD

registered an objection prior to execution of lease amendments 5 and 6 does not demonstrate "affirmative misconduct."

MDAD Did Not Assert Mistake in its Claim. MDAD also asserts for the first time that it made a unilateral mistake in "its reading of the square footage and rent in the SLAs." Appellant's Opposition at 16. Each "claim" brought under the CDA must be submitted in writing to the contracting officer, with adequate notice of the basis for the claim. *Strawberry Hill, LLC v. General Services Administration*, CBCA 5149, 16-1 BCA ¶ 36,561 (citing *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). An action brought under the CDA "must be 'based on the same claim previously presented to and denied by the contracting officer.'" *Qwest Communications Co. v. General Services Administration*, CBCA 3423, 14-1 BCA ¶ 35,655 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). "It must arise from the same operative facts and claim essentially the same relief." *Id.*; *see EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630. MDAD did not allege unilateral mistake nor assert the facts necessary to establish this defense in its claim to the CO. Thus, the Board lacks jurisdiction over such a claim and it cannot be the basis for a defense to GSA's motion.

Decision

CBCA 6689 is **DISMISSED FOR LACK OF JURISDICTION**. GSA's motion for summary judgment in CBCA 6784 is granted and the appeal is **DENIED**.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
BAE Systems Ordnance Systems, Inc.	)	ASBCA No. 62416
	)	
Under Contract Nos. W52P1J-11-C-0012	)	
W52P1J-11-D-0013	)	

APPEARANCE FOR THE APPELLANT:	Michael A. Richard, Esq. Obermayer Rebmann Maxwell & Hippel LLP Philadelphia, PA
APPEARANCES FOR THE GOVERNMENT:	Scott N. Flesch, Esq. Army Chief Trial Attorney LTC Gregory T. O'Malley, JA LTC Jess R. Rankin, JA Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PROUTY

The issue before us in the government's pending motion to dismiss is whether the Federal Circuit's recent decision in *Hejran Hejrat Co. Ltd v. United States Army Corps of Engineers*, 930 F.3d 1354 (Fed. Cir. 2019), so alters the law regarding requests for equitable adjustment (REAs) that a contractor submitting documents plainly intended to be REAs, but not claims pursuant to the Contract Disputes Act (CDA), and scrupulously avoiding requesting final decisions from the contracting officer (CO) must, nevertheless, be considered to have submitted claims pursuant to the CDA. In the case before us, the conversion of the REAs to claims without the contractor's intent or knowledge would require dismissal of the appeal because the time between the denial of the REAs and the submission of this appeal is beyond the CDA's statute of limitations. For the reasons explained below, *Hejran Hejrat* does not require such a result and the Army's motion to dismiss, advancing that argument, is denied.[1]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

BAE Systems Ordinance Systems, Inc. (BAE) had two related contracts with the United States Army (Army). The first contract in the caption above (the 12 contract) is

[1] The government has also requested a stay of this case. That request is mooted by this decision.

the one relevant to the pending motion to dismiss, and it was to perform Facilities Operation and Maintenance of the Radford Army Ammunition Plant (RFAAP), collocated in Radford and Dublin, Virginia (*see* R4, tab 1). The second contract in the caption (the 13 contract) was to produce propellant at the RFAAP for use in artillery (*see* R4, tab 3).

An issue arose during contract performance regarding who would be responsible for payment of certain costs relating to environmental conditions at the site and fines that BAE was incurring from state regulators as a result (*see* R4, tabs 122, 186, 192). As a consequence, BAE submitted three letters to the CO: The first letter was submitted on December 7, 2016 (REA 1[2]) (R4, tab 122). The second was submitted on August 3, 2017 (REA 2) (R4, tab 186). The third was submitted on September 6, 2017 (REA 3) (R4, tab 192).

The "subject" line of each of the three letters from BAE labelled it as an REA (R4, tab 122 at 1338, tab 186 at 1612, tab 192 at 1680). Consistent with that label, the introductory paragraph of each letter begins with the words, "In accordance with FAR 52.243-1, Changes – Fixed Price (Alternate I), and DFARS 252.243-7002, Requests for Equitable Adjustment, BAE Systems Ordnance Systems Inc. (BAE Systems) herein submits our Request for Equitable Adjustment (REA) for . . ."[3] (R4, tab 122 at 1339, tab 186 at 1612, tab 192 at 1680). BAE did not request a CO's final decision pursuant to the CDA in any of the three letters (R4, tabs 122, 186, 192).

The penultimate paragraph of each letter consisted of the following words:

> I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

(R4, tab 122 at 1343, tab 186 at 1615, tab 192 at 1683) This is precisely the language contained in DFARS 252.243-7002, regarding REAs. The next paragraph was simply a sentence referring the CO to the person signing the letter if she had any questions. They were then signed by Shelley R. Czapkewicz-Klingborg, BAE Senior Manager, Contracts. (R4, tab 122 at 1343, tab 186 at 1615, tab 192 at 1683) Nowhere in the

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[2] We refer to these letters here as REAs because that is what they were labelled by BAE and, as will be seen later in this opinion that is what we find them to be.

[3] The subject lines of the letters all referred to the REAs as being brought pursuant to the 12 contract (R4, tab 122 at 1338, tab 186 at 1612, tab 192 at 1680). The 12 contract incorporated by reference both Federal Acquisition Regulation (FAR) 52.243-1, Changes – Fixed Price (Alternate I), and the Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) 252.243-7002, Requests for Equitable Adjustment (R4, tab 1 at 22).

letters does BAE state that the adjustment reflects the amount for which the contractor believes the government is liable, nor do they state that the certifier is authorized to bring the claim on behalf of the contractor (*id.*), which is the language required for claims certification by the CDA. 41 U.S.C. § 7103(b)(1).

BAE's opposition to the government's motion included the declaration of Roosevelt Burden. Mr. Burden testified that he was the Senior Manager of Contracts for BAE who was tasked with converting REA 1, REA 2, and REA 3 into claims within the meaning of the CDA (Burden decl. ¶ 6). Mr. Burden asserts that BAE did not intend for REA 1, REA 2 or REA 3 to be submitted or treated as a claim pursuant to the CDA (Burden decl. ¶¶ 7, 9). This was because BAE initially sought to negotiate the resolution of the REAs rather than pursue a CDA claim (Burden decl. ¶ 8, 10). Mr. Burden explained that in preparation of REA 1, REA 2 and REA 3, BAE purposefully avoided making a request to the CO for a final decision as defined in the CDA, 41 U.S.C. § 7103(d-f) (Burden decl. ¶¶ 7, 9-10).

Thus, on the facts before us, we conclude that each of the three letters was intended by BAE to be an REA as opposed to a CDA claim and that each letter unambiguously communicated as much to the government.

The government has alleged no communications from BAE which expressed a desire to convert these apparent REAs into CDA claims, nor, critically, has it identified any request from BAE for a final decision on the REAs. On the record before us, we find that there was no such request by BAE.

The CO responded to the REAs by letter on November 13, 2018. In the opening paragraph, she described the nature and purpose of the letter:

> The purpose of this letter is to notify BAE of my position on contractor entitlement relative to . . . [the] REA submittals. A technical and legal review of the initial REAs submitted were conducted, and were also considered in reaching my position. Upon thorough review and analysis of the information provided, I do not find merit or entitlement to any of the cost elements of the three REAs presented. However, the Procuring Contracting Officer (PCO) is willing to entertain reimbursement of a portion of the penalties paid . . . .

(R4, tab 197 at 1716) To be fair to the government, she did state that a contractor was required to prove its "claims" by a preponderance of evidence and that BAE had not done so (R4, tab 197 at 1719); moreover, she also referred to the REAs as a "claim" once when disavowing any admission of liability stemming from any settlement

discussions (R4, tab 197 at 1721), but did not otherwise suggest that she was issuing a final decision upon a claim or that the matter was being treated any differently than an REA. The letter closed by requesting further information from BAE by November 20, 2018 (a week later) (*id.*).

BAE responded to the CO's letter on November 19, 2018. The company's correspondence similarly described its purpose and intent:

> Th[e] purpose of this letter is to confirm receipt of the ACC-RI entitlement determination letter . . . [on the] REA submittals. BAE Systems respectfully disagrees with the Government's entitlement determination and does not accept the Government's reimbursement of a portion of the penalties but appreciates the opportunity to further substantiate our REAs. However, given the length of time that the Government took to evaluate and respond to BAE Systems REA submittals and the number of questions and issues raised by the letter, BAE Systems finds the Government's requested response date to be unreasonable. BAE Systems will need time to assimilate a comprehensive response that proves BAE Systems entitlement.

(R4, tab 200)

The CO responded to BAE's request on November 21, 2018:

> The Government is in receipt of . . . [BAE's] letter, in which BAE advised it would need additional time to provide a response that proves BAE entitlement regarding . . . [the] REAs. BAE is reminded that, as is stated in [the determination] with respect to the referenced REAs, BAE has failed to fully demonstrate by a preponderance of evidence its claims that the Government bears full responsibility for the fines and penalties . . . .
> The purpose of this letter is to formally notify BAE that my Final Determination regarding referenced REAs will be forthcoming by close of business on December 14, 2018. If BAE has any additional information it would like to submit for consideration, it is welcome to do so prior to

> this date. I will consider any additional information with respect to [the] REAs provided it is received by close of business on December 13, 2018.

(R4, tab 202 at 1728-29) This letter also included the same language that was in the CO's November 19 letter disavowing any admission of liability stemming from any settlement discussions over BAE's "claims" (R4, tab 202 at 1729).

On December 13, 2018 Mr. Burden from BAE sent a letter which stated:

> Thank you for your correspondence dated 13 November 2018 . . . in which you explain the government's position regarding three requests for equitable adjustment submitted by BAE Systems . . . . We are pleased to know the government's concerns and questions so that we may be better able to respond. The purpose of this letter is to provide further explanation and substantiation of BAE Systems' entitlement to the referenced REAs. In addition, we provide a certificate in accordance with DFAR 252.243-7002 at the end of this correspondence. As you know, in these REAs . . . BAE Systems seeks equitable adjustments to the subject contract . . . arising out of certain environmental fines . . . . BAE Systems paid the fines for these violations, and now seeks reimbursement from the government.

(R4, tab 203 at 1731) With that letter, BAE included the certification required by DFARS § 252.243-7002 (the same REA certification that had been in its earlier correspondence) because it was providing additional information to support its REAs (R4, tab 203 at 1739; Burden decl. ¶ 12). As in its prior correspondence, BAE did not include the certification required for a claim under the CDA or request a CO's final decision (R4, tab 203).

On January 9, 2019 the CO reiterated her response to BAE's REAs but couched as a final determination on the merits of the REAs:

> The purpose of this letter is to notify BAE of the Procuring Contracting Officer's Final Determination relative to [the] REAs. The Government has thoroughly reviewed the data submitted to date, including the additional information provided December 13, 2018 . . . . Taking all of the information provided to date into consideration, the Government finds that BAE has still failed to establish

> entitlement or merit for its claims, including evidence that the Government bears full responsibility for the fines and penalties imposed for violations and other cost elements claimed in the REAs . . . .
> Accordingly, the Government's Final Determination rejects the referenced REAs in their entirety, as BAE has failed to establish its entitlement to recovery under law and regulation. If BAE chooses to dispute this determination, it is entitled to submit a claim in accordance with FAR 52.233-1 – Disputes.

(R4, tab 232 at 6040-41) In that letter, the CO only refers to BAE's submissions as REAs. She also clearly differentiated those submissions from claims as defined by the CDA, and did not refer to her letter as a Contracting Officer's Final Decision. This characterization of the REAs was confirmed by the direction to BAE to "submit a claim" if it disagreed with the CO's determination.

The CO went through that same process again in a letter on February 12, 2019, sent to provide BAE with an "additional opportunity to submit additional evidence or data to support [the] REAs"[4] (R4, tab 235 at 6052). Again the contracting officer referred to BAE's submissions only as REAs. The contracting officer included a warning that "BAE is hereby reminded that the additional opportunity presented by this letter shall not be misconstrued as deviation from the Final Determination" (R4, tab 235 at 6052).

On February 13, 2019, in response to this letter, BAE sent a short correspondence to the CO informing her that, though it had thought it had adequately supported its REAs, it would forward additional information for the CO's consideration by March 7, 2019 (R4, tab 238 at 6061). On February 21, 2109, BAE sent another letter to the CO, informing her that on further consideration, it had decided to not send a further response to the CO's February 12 letter (R4, tab 240 at 6067).

The CO tied up any loose ends on February 27, 2019, sending BAE a short letter reconfirming the Final Determination provided in the January 9, 2019 correspondence (R4, tab 243 at 6080). The February 27 letter again advised BAE that it could submit a claim following the procedure contained in its contract in FAR 52.233-1–Disputes (*id.*).

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[4] This letter does not appear to have been a response to a formal letter or inquiry from BAE in response to the CO's January 9, 2019 letter, and the CO stated that she had not heard "directly" from BAE on the matter; rather, the CO was responding to what she "underst[ood]" to be questions BAE might have had about her final determination (R4, tab 235 at 6051).

In accordance with that advice and that same guidance in the January 9 final determination, BAE decided to "submit a claim" rather than file an appeal (Burden decl. ¶ 15). On June 17, 2019, BAE submitted a letter to the Army claiming entitlement to the same dollars sought through REA 1, REA 2 and REA 3 (R4, tab 246 at 6090). In contrast to the prior correspondence, BAE's introductory paragraph stated:

> BAE Systems Ordnance Systems, Inc. (BAE Systems) submits its claim arising from Contract No. W52P1J-11-C-0012 with the U.S. Army Joint Munitions Command (Army) for the operation and maintenance of the Radford Army Ammunition Plant (RFAAP) in Radford and Dublin Virginia. BAE Systems submits this claim pursuant to the Contract Disputes Act, 41 U.S.C. 7101-7109 (CDA), and requests a contracting officer's final decision.

(*Id*.) The recovery requested in the claim is nearly identical to the amount sought by the REAs.[5] The claim included a certification by Vincent Bevilaqua as director of contracts for BAE which states:

> I certify that this claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief, that the amount requested accurately reflects the contract adjustment for which I believe the Federal Government is liable, and that I am authorized to certify this claim on behalf of BAE Systems Ordinance Systems, Inc.

(R4, tab 246 at 6116-17) Mr. Bevilaqua's certification closely adheres to the certification required in 41 U.S.C. § 7103(b).

On August 13, 2019 the CO acknowledged "receipt of the . . . letter and related environmental claim submission. At this time no final decision has been made and the Government intends to submit its formal response by October 15, 2019." (R4, tab 260) Once it was received, the CO kept BAE informed of the government's progress in evaluating the claim. On October 11, 2019, the CO informed BAE that

[5] BAE's claim letter, which essentially converted the REAs under the 12 contract into a claim, also alleged, in the alternative, that it was entitled to relief under the 13 contract (R4, tab 246 at 6116-17), which explains the two contracts in the caption of this appeal.

"the Government is still evaluating. At this time, no final decision has been made and the Government intends to submit its formal response by 31 OCT 2019." (R4, tab 262 at 6308) On October 31, 2019, the CO informed BAE by email that "BAE's environmental claim dated 17 JUN 2019" was still being evaluated, that "no final decision has been made at this time" and he intended to issue a formal response by November 21, 2019 (R4, tab 266 at 6318). The next email was sent by the contracting officer on November 20, 2019 (R4, tab 268 at 6325). In that email BAE was informed that the government believed that "[m]ore time than previously anticipated is needed to continue our thorough evaluation of the subject environmental claim. As a result, no final decision has been made at this time. The Government intends to submit its formal response on/before 13 Dec." (*Id*.)

The government's self-imposed December deadline passed. On January 15, 2020, BAE was informed that the CO was out of her office because of a personal matter (R4, tab 273 at 6353). On January 30, 2020, BAE was informed by the CO that she had returned to her office and that she would provide a response by February 28, 2020 (R4, tab 275 at 6368). On February 24, 2020, BAE appealed the deemed denial of its claim to this Board.

DECISION

The Army has moved to dismiss this appeal asserting that BAE's challenge to the contracting officer's decision is untimely since the REAs were, in fact, CDA claims, and the CO's final determination upon them was thus a CO's Final Decision upon the claims (*see* gov't mot. at 10-11). Indeed, the Army is correct that there is little basis for arguing that the text of the REAs did not meet the requirements for claims under the CDA (notwithstanding the clear intent of BAE to limit itself to REAs) (gov't mot. at 11), with one very intentional exception: BAE did not request a CO's final decision. BAE argues that this exception is enough to preclude the finding of a claim (app. opp'n at 16-17). BAE also argues that its use of the REA form of certification, rather than the CDA claim form of certification, is an additional basis for finding that it did not submit a claim (app. opp'n at 18-19). We reject BAE's argument regarding the form of certification as being contrary to the law. Nevertheless, we find that, unlike the circumstances in *Hejran Hejrat* which the Army relies upon, BAE's actions never explicitly or implicitly requested a decision, thus changing them to claims. Thus, because the first CO's decision on a claim from BAE was appealed in a timely fashion, we deny the government's motion.

I. The Distinction Between a Claim and an REA[6]

Broadly speaking, an REA is a request from a contractor to a CO to consider adjusting contract terms. Because of their (relatively) non-adversarial nature, contractors sometimes prefer to pursue REAs prior to submitting CDA claims so as to preserve the relationship of the parties during contract performance. *See generally, Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995) (overruled in part on other grounds, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1579, n.10 (Fed. Cir. 1995)). Also, significantly, under certain circumstances, contractors may receive compensation for the sometimes-significant work required to prepare an REA that is short of a claim, but are foreclosed from such compensation if the document they submit to the CO is a claim. *Bill Strong Enterprises*, 49 F.3d at 1547-50. An REA is not defined by the CDA.

"Claim" is not defined by the CDA, either, thus the Federal Circuit instructs that we turn to the FAR for its definition. *See, e.g., H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564-65 (Fed. Cir. 1995). FAR 2.101 provides that a claim is "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or related to the contract."

For us to possess jurisdiction over a claim under the CDA, it must request a final decision from the CO. 41 U.S.C. § 7103(a); *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, 1543 (Fed. Cir. 1996) ("The CDA [] requires that a claim indicate to the contracting officer that the contractor is requesting a final decision."). But, the Federal Circuit has made clear that a claim requires no "particular form or use any particular wording" nor does it "require an explicit request for a final decision; 'as long as what the contractor desires by its submissions is a final decision, that prong of the CDA claim test is met.'" *Maropakis*, 609 F.3d at 1327-28 (quoting *Ellett*, 93 F.3d at 1543). In fact, a contractor's submission may merely imply a request for a contracting officer decision without explicitly doing so. *Ellet*, 93 F.3d at 1543 (quoting *Heyl & Patterson, Inc. v. O'Keefe*, 986 F.2d 480, 483 (Fed. Cir. 1993) ("a request for a final decision can be implied from the context of the submission.")).

The distinction between an REA and a claim is somewhat blurry, and often comes down to the second major component, whether the contractor has requested a final decision from the CO. In *Air Services, Inc.*, ASBCA No. 59843, 15-1 BCA ¶ 36,146, we explained that, "[t]here is no bright-line distinction between an REA and

[6] As will be discussed further in this section, a document entitled an REA can also be considered to be a CDA claim. Here, we are discussing non-claim REAs.

a CDA claim." *Id.* at 176,424. Citing *Reflectone*, we noted that even a document referring to itself as an REA often meets the definition of a claim in that it makes a non-routine written demand for payment as a matter of right. *Id.* at 176,424-25 (citing *Reflectone*, 60 F.3d at 1577). Hence, in *Hejran Hejrat*, the communication with the CO was styled as an REA and the contractor disavowed any intention of submitting a claim, but the Federal Circuit nevertheless held that the document met the FAR's definition of a claim. 930 F.3d 1357-58. In *Air Services* and other cases, an REA was converted to a claim upon the simple expedient of the contractor subsequently requesting a final decision from the CO. *Air Services*, 15-1 BCA ¶ 36,146 at 176,425; *see also Hejran Hejrat*, 930 F.3d at 1357-58 (court "loath to believe" communications not meant as request for final decision); *cf. Madison Lawrence, Inc.*, ASBCA No. 56551, 09-2 BCA ¶ 34,235 (Appellant explicitly stated that it was converting its REA into a claim and it submitted a proper CDA claim certification.); *DTS Aviation Servs., Inc.*, ASBCA No. 56352, 09-2 BCA ¶ 34,288 (Contractor submitted a letter converting REA to a CDA claim).

II. The (Ir)Relevance of the Form of Certification

One distinction that does not make a difference between an REA and a claim is the form of the certification used. The CDA requires that all claims over $100,000 in value be certified in accordance with 41 U.S.C. § 7103(b). *Special Operative Grp., LLC*, ASBCA No. 57678, 11-2 BCA ¶ 34,860 at 171,480 (citation omitted). The DFARs include a special certification to be used for REAs that does not include all of the statements required for certification of claims by the CDA's statutory language. *Compare* DFAR 252.243-7002 (the DFARs REA certification provision) *to* 41 U.S.C. § 7103(b). In *Air Services*, we held that the use of the REA certification did not prevent a submission from being a valid claim since the REA certification, notwithstanding its limitations, could be considered a defective, but curable CDA certification. 15-1 BCA ¶ 36,146 at 176,426-27. Likewise, the REA in *Hejran Hejrat*, which the Federal Circuit held to constitute a CDA claim, used the DFARs-prescribed REA certification language. *See Hejran Hejrat Co. LTD*, ASBCA No. 61234, 18-1 BCA ¶ 37,039 at 180,322-23 (Board decision describing use of DFARS REA certification); *Hejran Hejrat*, 930 F.3d at 1359 (finding any defect in certification not to be dispositive).

BAE argues that its use of the REA certification prevents its letters from being considered to be claims and that they can only be considered to be claims if it remedies their certification defects – something which it is unwilling to do, in contrast to the other cases cited above where it was the contractor that wished the defective certification to be remedied (*see* app. opp'n at 35-37). This is a clever argument, but, ultimately, unpersuasive: in the present case, we are dealing with a question of the statute of limitations. Statutes of limitations are based upon when a case *can* be brought. *See, e.g., Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 104 (2013). If the REAs

were, in fact claims with defective certifications (as the government argues), their appeals could, nevertheless, be brought as soon as they were denied or deemed denied by the CO, *see* 41 U.S.C. § 7104; thus, the running of the statute of limitations is not impacted by the subsequent need to remedy the defective certification.

We do, however, believe that the use of the REA certification may prove relevant in providing context for communications from the contractor. Thus, when evaluating whether certain communications from the contractor to the CO represent an implicit request for a final decision, the fact that the contractor chose to use a non-claim certification could prove to be a helpful, though not necessarily dispositive, data point.[7]

III. BAE Did Not Request a CO's Final Decision

With the exception of arguing that its REA certification is inadequate for a CDA claim, BAE wisely makes little effort to argue that its REAs, on their faces, do not constitute claims. Instead, it primarily argues that it avoided converting them into claims by scrupulously refraining from requesting a CO's final decision. It succeeded.

First, the government identifies no explicit request for a contracting officer's decision in the correspondence regarding the REA's. This is hardly surprising as BAE intentionally sought to avoid converting its REAs into claims.

The government, instead, argues that BAE implicitly requested a final decision, analogizing it to the circumstances in *Hejran Hejrat*. It is mistaken. To be sure, the Federal Circuit in *Hejran Hejrat* found a document purporting to be an REA on its face and requesting that it be treated as an REA should be treated as a claim because, under the circumstances, the court felt the document implicitly requested a decision by the CO. *See* 930 F.3d at 1356-58. But in *Hejran Hejrat*, there had been a year-long exchange of documents and course of dealings between the parties which the Federal Circuit characterized in such a way as to make clear that things had changed between the parties by the time of the submission of the document that the court deemed to be a claim, including, notably, the addition of a certification that had not been present in earlier communications. *See id*. That is not the case presented here. Instead, there were three original submissions plainly not requesting CO decisions; there was a preliminary determination by the government which included a request for extra

[7] In a similar vein, though we do not believe that the opinion of the CO matters in determining whether a document is a claim (whether a document is a claim is surely an objective determination and not subject to the CO's wishes), the communications from the CO to the contractor in response to the contactor's submissions and the contractor's response thereto may prove helpful context in understanding what implicit requests are being made by the contractor.

information from BAE; BAE provided some additional information in December 2018, but no certification beyond what it had previously done[8] (in contrast to the circumstances in *Hejran Hejrat*, where the certification was new); and then, in February 2019, BAE generally indicated it might give the CO yet more information upon its request before thinking the better of it and declining to offer more substantive responses to the CO before she made her determination.

Thus, unlike the circumstances in *Hejran Hejrat*, the posture between the parties did not change substantially as the conversation regarding the REAs went forward. That was underscored by the correspondence between the parties indicating that the CO believed no claim had been submitted for a final decision and by the fact that BAE felt no need to correct that understanding. To be sure, this decision may be a closer call than it would have been prior to the *Hejran Hejrat* ruling, but on the very specific facts before us, we are persuaded that BAE did all that it could to keep its REAs from falling within the realm of being also considered CDA claims by carefully avoiding making a request – explicit or implicit – for a CO's final decision. The Army argument, that, despite its best efforts, BAE effectively made an implicit request for a CO's final decision by accident,[9] is mistaken. Notably, the Federal Circuit's *Hejran Hejrat* decision was based in part upon its finding that, in the circumstances presented in that case, it was "loathe to believe" that a "reasonable contractor" was not requesting a final decision in the circumstances of that case. 930 F.3d at 1358. By contrast, the reasonable contractor here, for its own good reasons, did not wish to cross the Rubicon by requesting a final decision. Thus, we will not find a request for a final decision where it was not explicitly made and not implicitly intended. At the end of the day (consistent with the law, of course), whether a contractor submits a claim or a non-claim REA should be up to the contractor.

[8] This certification was the REA certification which, while not dispositive (as discussed above), provides added support for a finding that BAE intended to avoid submitting a CDA claim.

[9] Another way to read the Army argument is that *Hejran Hejrat* effectively did away with non-claim REAs. If that were the Federal Circuit's intent, we believe our reviewing court would have said so directly before eliminating such an important aspect of contract administration.

CONCLUSION

The government's motion to dismiss for lack of jurisdiction is denied.

Dated: February 10, 2021

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62416, Appeal of BAE Systems Ordnance Systems, Inc., rendered in conformance with the Board's Charter.

Dated: February 10, 2021

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

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.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
BNN Logistics	)	ASBCA Nos. 61841, 61862, 61905
	)	62241,62355, 62356
	)	62357, 62651
	)	
Under Contract No. W91B4N-11-D-7005	)	

APPEARANCES FOR THE APPELLANT:

Michael D. Maloney, Esq.
Williams Mullen PC
Tysons Corner, VA

Todd W. Miller, Esq.
Miller & Miller
Denver, CO

Enayat Qasimi, Esq.
Whiteford, Taylor & Preston L.L.P.
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Scott N. Flesch, Esq.
Army Chief Trial Attorney
Zachary F. Jacobson, Esq.
MAJ Aaron McCartney, JA
MAJ James A. Wallace, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE OSTERHOUT ON GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Army files three motions for full and partial summary judgment against BNN Logistics (BNN or appellant), arguing that the six-year statute of limitations bars at least parts of BNN's claims in four appeals related to a National Afghan Trucking contract. BNN files its own cross-motion for summary judgment in one appeal, alleging that an audit report from the Army establishes a breach of contract.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The Bagram Regional Contracting Center (Army or the government) awarded Contract No. W91B4N-11-D-7005 (National Afghan Trucking Contract, or NAT) to BNN, among several other contractors, on August 15, 2011 (R4, tab 5 at 2-4, tab 284). This was an Indefinite Delivery/Indefinite Quantity Multiple Award Task Order contract for trucking services in Afghanistan with an estimated value of AFN 20,771,689,159 (R4, tab 5 at 1). The contract divided the cargo into three suites: Suite I for fuel, Suite II for dry cargo, and Suite III for heavy cargo (R4, tab 4 at 2, 24). Under the first suite, the contract allowed the contractor to observe fuel uploading onto the trucks (R4, tab 4 at 10). The government would periodically conduct a Performance Requirement Summary (PRS), part of which involved application of the Quality Assurance Surveillance Plan (QASP). The QASP set forth performance standards and allowed for deductions on invoices for failure to meet given metrics. (*See* R4, tab 4 at 2-3, 18-19).

2. Another part of the PRS was the Order of Merit List (OML) that the government calculated weekly to rank the NAT contractors and assign upcoming missions accordingly. This was to "ensur[e] all awardees in the applicable suite [we]re provided 'fair opportunity' to be considered for each shipment under the" task orders. (R4, tab 5 at 53) The contract established the evaluation criteria, and included ranking the contractors by performance and price. The Army would then notify each contractor of its score and rank each week, and assign a corresponding percentage of the total missions for the coming week (R4, tab 5 at 53-60, tab 480 at 7).

3. When the contract began, if the Army found more than 5% of fuel was missing from a contractor's fuel delivery once it arrived at its destination, the Army would consider the mission failed and not pay the contractor for the mission (R4, tab 1 at 9-10, tab 4 at 10). Further, the government would require the contractor to reimburse it for the missing fuel at a pre-established rate (R4, tab 4 at 10, tab 382 at 1, 4).

4. After BNN submitted its invoices, the government returned them with deductions it had applied based on its performance, and appellant then submitted these invoices for payment (R4, tab 5 at 5).

5. The government applied several deductions to BNN's first invoices both under the QASP and for alleged pilfering of fuel (*see*, R4, tabs 8, 11, 17). However, the Army was delayed in returning these initial invoices due to both the fuel deductions discussed above and BNN's submission of documents the Army believed to be fraudulent (*see*, *e.g.*, R4, tabs 310, 328). On March 12, 2012, for example, the Army returned BNN's first fuel invoice which covered September 15 – November 15, 2011 (R4, tab 304; tab 362 at 1). On March 24, 2012, BNN sent an email to the Army, acknowledging

receipt of "the final fuel invoice for the 16-30 November 2011 period" (R4, tab 314 at 1). Deductions on these invoices were large, and BNN owed the Army enough money on its first invoice, that the debt was applied against other suites' invoices in installments for several months into the future (R4, tab 8, tab 11 cells J21-26, tab 302, tab 311 at 1, tab 327, tab 468).

6. While the Rule 4 file contains several invoices for Suite I (*see,* R4, tabs 8, 11, 17, 36), most of the invoices do not specifically state what day BNN submitted them to the government, nor when the government returned them to appellant with the deductions applied, nor which of these versions the provided documents are. The Rule 4 file demonstrates that the Army had paid 11 invoices, numbered AAA0002-0010, as of March 17, 2012, which means appellant had received the invoices back and submitted them for payment. While these invoices used a different number system than that used in the Rule 4 file, it appears at least some of these may have been for dry and heavy cargo (app. supp. R4, tab 4 cells Y69-88; tr. 12-13; R4, tab 319 at 1, 3 (identifying 0006 and 0007 as duplicates of 0009 and 0010 for "December 2011 invoice")). The following chart identifies when the record demonstrated that BNN received invoices by suite.[1]

Invoices	Fuel	Demurrage	Dry	Heavy Cargo
Sept-Nov 15, 2011	March 12, 2012 (R4, tab 304, 362 at 1)			
Later Nov 2011	March 24, 2012 (R4, tab 314)			
Dec 2011	March-April, 2012 (R4, tab 412 at 2)		March 20, 2012 (R4, tab 313)	March 20, 2012 (R4, tab 313)
Jan 2012	March-April, 2012 (R4, tab 412 at 2)		October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Feb 2012	March-April, 2012 (R4, tab 412 at 2)		October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Mar 2012	March-April, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Apr 2012	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	May 18, 2012 (R4, tab 431 at 2)	May 18, 2012 (R4, tab 431 at 2)

[1] This chart does not include all of the invoices in the subject appeals. The chart primarily focuses on the invoices impacted by the motions.

May 2012	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	January 26, 2013 (R4, tab 456; R4, tab 456b)	January 26, 2013 (R4, tab 456; R4, tab 456b)
Jun 2012	August 6, 2012 (R4, tab 360); October 31, 2012 (tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	January 26, 2013 (R4, tab 456; R4, tab 456c)	August 30, 2012 (R4, tab 363 at 3)
Jul 2012	August 30, 2012 (R4, tab 364 at 2); October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	August 30, 2012 (R4, tab 363 at 5)	August 30, 2012 (R4, tab 363 at 3)
Aug 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	October 31, 2012 (R4, tab 412 at 2)	December 17, 2012 (R4, tab 419)	December 17, 2012 (R4, tab 419)
Sept 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	October 31, 2012 (R4, tab 412 at 2)	December 17, 2012 (R4, tab 419)	December 17, 2012 (R4, tab 419)
Oct 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	December 12, 2012 (R4, tab 543)	December 12, 2012 (R4, tab 543)
Nov 2012	February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	January 1, 2013 (R4, tab 543)	January 1, 2013 (R4, tab 543)
Dec 2012	February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	January 31, 2013 (R4, tab 469 at 3)	January 31, 2013 (R4, tab 469 at 3)
Jan 2013			March 9, 2013 (R4, tab 543)	March 9, 2013 (R4, tab 543)
Feb 2013			March 27, 2013 (R4, tab 543)	March 27, 2013 (R4, tab 543)
Mar 2013			September 8, 2013 (R4, tab 543)	September 8, 2013 (R4, tab 543)

7. In a dispute of its OML ranking in fuel for the week of July 16-22, 2012, BNN's documentation included the ranking of the next lowest contractor, ANL (R4, tab 355 at 18). However, this was uncommon, and all other OML disputes only contained data for BNN (*see*, *e.g.*, R4, tab 350 at 4-10; tab 355 at 4-17, tab 399 at 3-10).

8. An internal BNN email from October 31, 2012, stated BNN received all of its completed invoices covering its work through March 2012 back from the

government "only at the end of March and April 2012" (R4, tab 412 at 2). The email also discussed deductions taken in fuel invoices through July 2012 and demurrage from March 2012 through September 2012 (R4, tab 412 at 2).

9. On January 31, 2013, the Army sent an email to BNN discussing its outstanding fuel debt. In this email, the Army discussed "a positive amount for fuel for the months of June, July, August, September 2012 and demurrage for June, July, August, September, October, and November 2012." The email also informed BNN of the amount of its fuel invoice "for October 2012, demurrage for December 2012 and positive amount for dry and heavy [cargo] for December 2012." (R4, tab 469 at 3)

10. On February 13, 2013, the Army completed an audit report of the NAT contract, concerning among other things the application of the OML performance metrics using "the information from the initial 6 months of the contract" (R4, tab 480 at 1, 5). This report noted "process weaknesses" in several areas (R4, tab 480 at 2). It also found in the "command's application of the OML closure rate element in Suite I-Bulk Fuel . . . command appropriately applied the contract criteria to assess contractor performance. However, we found significant discrepancies between the data used and the source documents." (R4, tab 480 at 9) Elsewhere, the report stated

> "The OML process wasn't effectively implemented because the criteria to measure contract performance was difficult to follow and command personnel didn't receive specific training . . . . Because the process wasn't fully understood during the contract implementation, rating methodology procedures were developed inconsistent with contractual requirements. Consequently, the OML application produced inconsistent or inaccurate results for contractor performance evaluations and rankings. In some instances, command made unauthorized deviations from the contract criteria and potentially violated the fair opportunity for consideration requirements."

(R4, tab 480 at 21) The report did not explicitly or implicitly single out any individual contractor. It noted it was limited in its review, but concluded "[c]ommand personnel should reassess the OML closure rate element data for bulk fuel and determine the potential cause of the data discrepancies and the validity of the data." (R4, tab 480 at 10)

11. BNN notified the government in an email sent on February 24, 2013, that its "[d]rivers [we]re not allowed to watch the upload process at Camp Phoenix." In another email sent on March 4, 2013, BNN reported to the Army "a fuel truck at Camp Phoenix was loaded with less than [the amount] annotated on [the] mission sheet. We

have sent a manager to this location and they too were not allowed to watch the upload." (R4, tab 499 at 1-2)

12. In an email dated September 8, 2013, BNN submitted a spreadsheet to the government indicating it had received the November and December fuel invoices no later than February 1, 2013 (R4, tabs 543, 543i).

13. BNN submitted a certified claim for $416,491.83 on April 17, 2018, for deductions taken through the QASP from November 2011 through January 2013 under the Fuel Suite (R4, tab 141 at 1, 3, 9-10). Appellant appealed the deemed denial of this claim on October 16, 2018, and the Board docketed this as ASBCA No. 61841. The contracting office subsequently issued a final decision (COFD) denying this claim in part on November 28, 2018 (R4, tab 153). Appellant appealed this COFD on December 7, 2018, which the Board docketed as ASBCA No. 61905.

14. BNN submitted another certified claim for $15,441,941.94 on May 7, 2019, alleging it did not receive the proper allocation of missions under the OML process (R4, tab 166). BNN stated it received the "Full Mission Data" from which the Army calculated the OML on September 19, 2017, leading it to believe it should have received an additional 4,170 missions (R4, tab 166 at 3; app. supp. R4, tabs 2-3). BNN claimed it was under-allocated missions for various weeks, and not given all the missions it was allocated in each week. It noted the number of missions it should have received in a given week was unknowable from the OML, since the Army expressed BNN's allocation as a percentage of total missions for all NAT contractors for the week, a number BNN did not have access to. (R4, tab 166 at 7, 9) The Army issued a COFD denying this claim on August 8, 2019 (R4, tab 167). Appellant appealed this COFD to the Board on October 30, 2019, which the Board docketed as ASBCA No. 62241.

15. BNN submitted a third certified claim on March 27, 2020, concerning "all improperly imposed financial penalties [for fuel pilferage] and unpaid demurrage, which amounts to $2,988,718.86" (R4, tab 264 at 19). This claim included an exhibit detailing improper payments and deductions on invoices spanning September 2011 to January 2013 (R4, tab 264a). BNN appealed the deemed denial of this claim on August 24, 2020, and the Board docketed this appeal as ASBCA No. 62651.

DECISION

Legal Framework

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors*, *Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of demonstrating both elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248 (1986). Accordingly, even if there is a genuine dispute, the disputed fact is only material if it might make a difference in the result of a case. *Id.* at 248-49. When considering motions for summary judgment, the evidence produced by "the non-moving party is to be believed, and all justifiable inferences are drawn in [its] favor." *Europe Asia Constr. Logistic*, ASBCA No. 61553, 19-1 BCA ¶ 37,267 at 181,351 (citing *American Boys Constr. Co.*, ASBCA No. 61163, 18-1 BCA ¶ 36,949 at 180,051). In deciding a motion for summary judgment, the Board does not resolve factual disputes, but ascertains whether material disputes of fact are present. *Macro-Z Tech.*, ASBCA No. 56711, 12-1 BCA ¶ 35,000 at 172,004 (citing *Anderson*, 477 U.S. at 248).

The parties both cite *Elec. Boat Corp. v. Sec'y of the Navy*, 958 F.3d 1372 (Fed. Cir. 2020) as a good authority on the accrual of a claim (ASBCA No. 61841 gov't mot. at 5; 61841 app. opp'n at 9). [2] Indeed, this case discusses the current legal framework which shall control for all four motions. Claim accrual occurs as of

> "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." . . . Although "monetary damages need not have been incurred," "[f]or liability to be fixed, some injury must have occurred."

[2] To avoid confusion, we cite to the filings of the different motions and appeals with the primary ASBCA No., the filing being cited and the pinpoint, if used. For example, when citing to the first page of the government's motion for ASBCA Nos. 61841 and 61905, we will use the citation "ASBCA No. 61841 (61841) gov't mot. at 1." When referencing the government's motion concerning ASBCA No. 62651, we will use the citation "ASBCA No. 62651 (62651) gov't mot." Similarly, when referencing the government's motion concerning ASBCA No. 62241, we will use the citation "ASBCA No. 62241 (62241) gov't mot." We will similarly cite appellant's cross-motion and complaints, as well as both parties' responses and replies.

Elec. Boat Corp., 958 F.3d at 1375-76 (quoting 48 CFR § 33.201). A claim must be submitted within six years of the accrual of the claim. 41 U.S.C. § 7103(a)(4)(A). Although Electric Boat argued in that case that it had not suffered an injury for purposes of claim accrual until its actual compensation was affected, the Federal Circuit rejected that rationale. "Electric Boat was not required to incur actual costs . . . before filing a claim for equitable adjustment" but rather, once it had the right to request a cost adjustment, and was capable of knowing that its cost of performance would be affected. *Id.* at 1374, 1377. Similarly, we have held that "a cause of action for breach of contract accrues at the time of the breach." *Canvs Corp.*, ASBCA No. 57784, 18-1 BCA ¶ 37,156 at 180,890. "Damages need not have actually been calculated for a claim to accrue." *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018. The events fixing liability should have been known when they occurred unless they can be reasonably found to have been either concealed or "inherently unknowable" at that time. *Id.* at 173,017.

The Army's Arguments

In all three of its motions, the Army asserted the affirmative defense of the passage of the six-year statute of limitations for all or part of BNN's claims. We address each motion below.

For ASBCA Nos. 61841 and 61905, the Army asserted that BNN knew or should have known of several of its QASP deductions before April 17, 2012, six years before it filed its claim on April 17, 2018, because the deductions were included on the invoices the Army returned to it (61841 gov't mot. at 4-6). Thus, the Army sought summary judgment on "[t]he monthly invoices for the Contract up until the March 2012 invoice."[3] (61841 gov't mot. at 7). As support, it pointed to the requirement to submit invoices monthly (61841 gov't mot. at 2-3), the monthly invoices BNN submitted which are included in the Rule 4 file, and exhibits demonstrating an internal BNN discussion of various invoices through September 2012 (61841 gov't reply exs. G-1A, G-1B, G-2).

Similarly, in its motion for summary judgment in ASBCA No. 62651 regarding fuel pilferage deductions, the Army argued that BNN was aware of its concerns for its November 2011 through January 2013 invoices before March 27, 2014, six years prior to BNN filing its claim on March 27, 2020 (62651 gov't mot. at 5-7).

[3] This excludes the invoices for December 2011 and February 2012, which BNN does not include in its claim (61841 compl. ¶ 32). BNN also includes "Nov-11" in its complaint, though this appears to refer to the invoices covering September 15 – November 15, 2011, and November 16-30, 2011 (*id.* at ¶ 38).

Lastly, in ASBCA No. 62241, the government argued "the claim[s] arose when BNN received the OML Sheet from the Army each week memorializing the percentage of missions that BNN . . . would receive that week." (62241 gov't mot. at 7). Therefore, by May 7, 2013, six years before BNN filed its claim on May 7, 2019, "appellant should have known of any loss it would incur by not receiving the proper allocation of missions under the OML process" (62241 gov't mot. at 7). In its reply, the Army mentioned numerous disputes BNN raised about the OML process during the performance of the contract. According to the government, this indicates BNN knew there were issues with the OML, which is sufficient to put it on notice of the problems it now raises (62241 gov't reply at 10-17).

Appellant's Arguments

For ASBCA Nos. 61841 and 61905, BNN argued its "claims accrued when the Army paid the invoices that contained improper deductions. Until that time, BNN had suffered no injury" (61841 app. opp'n at 9). BNN also argued that the Army has not established when it issued the invoices to BNN. Appellant pointed to a chart displaying when the Army paid several invoices prior to the April 17, 2018, cutoff date, claiming none of them were the invoices in question. However, the invoices were identified in a different numbering system than the relevant invoices submitted to the Army. (*Id.* at 8) As stated above, however, we believe several were for the dry and heavy cargo suites (SOF ¶ 6).

For ASBCA No. 62651, BNN argued the Army had a right to impose proper fuel pilferage deductions, but the claim could not have accrued until BNN knew the deductions were improper (62651 app. opp'n at 1). According to BNN in a new argument in ASBCA No. 62651, it became aware of this impropriety when it received in another related litigation what it calls the "Doggett memo," though does not identify the specific date of receipt (*id.* at 5). This memo, issued by a COR on this contract, dated October 5, 2013, stated, "[i]n some instances, [fuel] download measurements may not be in full compliance with fuel regulations and policy, which degrades the Carrier's ability to properly invoice fuel missions" (62651 app. opp'n ex. A at 5). BNN thus argued that the Board should suspend the claim accrual until its undated receipt of this memo (62651 app. opp'n at 5-6). Finally, it requested further discovery in any event, but does not identify what it needs or how it would help its case (*id.* at 7-8).

For its OML claim, ASBCA No. 62241, BNN repeated its earlier arguments about claim accrual, namely that its claims accrued once it had "the evaluation[s] of NAT contractors underlying the OML sheet" and knew "the number of total missions assigned to all contractors that week" (62241 app. opp'n at 7). It pointed to the Army's audit report, providing snippets which focus on the Army's alleged

wrongdoing,[4] arguing its claim was inherently unknowable until it received this report and the Full Mission Data in 2017 (*id.* at 8-9). BNN also argued that it's unclear how "the mere receipt of an OML Sheet would put BNN on notice that the Army would not be allocating as much work in the *coming* week as it promised in the OML Sheet" (*id.*at 7) (emphasis in original).

Finally, BNN cross-moved for summary judgment, arguing "that the Army breached the OML provisions of the Contract, subject to whatever defenses to the breach the Army may subsequently be able to provide" (*id.* at 10). However, BNN failed to prove what it acknowledged is a required element of the breach theory (*see*, *e.g.*, 62241 app. cross-mot. reply at 7 ("BNN is seeking summary judgment only on the first three elements [of breach]")). BNN defended not proving the final element on policy grounds, saying it would potentially need to prove the same things twice, which would not be efficient (*id.* at 7 n.1). The Army stated in its opposition to the cross-motion that BNN did not satisfy all of the elements (62241 gov't opp'n at 23-24).

BNN also raised the theory of a breach of the duty of good faith and fair dealing in each of these appeals (61841 compl. at 13, 62651 compl. at 11, 62241 compl. at 7). The Army did not specifically refer to these theories or any facts unique to them in any of the motions, so it is unclear whether the motions apply to these theories as well. "A breach of an implied covenant of good faith and fair dealing does not require a violation of an express provision in the contract." *Cooper/Ports America*, *LLC*, ASBCA Nos. 61349, 61350, 19-1 BCA 37,285 at 181,405 (citing *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014). Proof of this theory requires a case-specific and fact-specific inquiry. *Boston Edison Co. v. United States*, 64 Fed. Cl. 167, 186 (2005) (citing *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997). Thus, we will not grant appellant's motion on these theories, because as BNN notes, it has had only limited discovery at this stage (62651 app. opp'n at 7-8), and a tribunal must be cautious when granting summary judgment if insufficient discovery has taken place. *Burnside-Ott Aviation Training Ctr.*, *Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993)

The Army's Motion for Partial Summary Judgment in ASBCA Nos. 61841 and 61905

Appellant stated in its complaint, "BNN seeks to recover for refunds of deductions taken improperly by the Agency from invoices under the Contract for services performed by BNN" (61841 compl. ¶ 1). BNN argued that the Army failed to follow the formula in the contract, applied deductions that were not applicable, and improperly manipulated data to increase deductions (*id*). The formula by which the Army was imposing the QASP deductions was available in the contract (SOF ¶ 1; *see*

[4] This version of the Audit Report removes all alleged wrongdoing by NAT contractors. The full report is available at R4, tab 480. *See* SOF 10.

also 61841 compl. ¶¶ 30-31 (referring to the formula in the contract)), and was dependent only on BNN's performance (SOF ¶ 1). BNN argued that the Army's improper institution of the deductions was the breach of contract. Thus, with BNN's access to the contract and its own performance data, it should have known what was and was not a proper deduction at the time the Army imposed one.

BNN's arguments that it only suffered an injury when it was paid misses the text of the FAR and the cases it cites, which specifically state that a monetary damage is not required, only an injury of some sort. 48 CFR § 33.201; *Elec. Boat Corp.*, 958 F.3d at 1376. In this case, BNN's injury is the Army's reduction of the portion of its invoices to which BNN was entitled. BNN's claim accrued when it received the invoices back from the Army instituting these deductions. Therefore, the six-year statute of limitations in 41 U.S.C. § 7103(a)(4)(A) bars BNN from seeking compensation from the Army for any deductions it was aware of prior to the filing of its claim on April 18, 2018. In this appeal, that is April 18, 2012 (SOF ¶ 13).

However, this only answers half the question. The government cites a single email in which BNN admits it received "all its fuel invoices for the month September 2[0]11-March 2012 only at the end of March and April 2012." This email's timeframe includes the cutoff date, and thus is of limited value in this appeal. The Army's arguments that invoices were to be submitted monthly is unconvincing, as that ignores what happened in reality. Upon review of the Rule 4 file, BNN had received the September-November 2011 invoice by March 17, 2012, and stated it had received the "final fuel invoice for the 16-30 November 2011 period" in a March 24, 2012 email. (SOF ¶ 5) However, the Rule 4 file and exhibits do not provide further clarity on when BNN received back the other two relevant invoices, those for January and March 2012.

Appellant's misplaced factual disputes and arguments concerning claim accrual at the time of payment are unconvincing, and it does not dispute that the deductions were known to BNN once it received the invoices from the Army. For these reasons, we grant, in part, the government's motion for partial summary judgment, as it applies to the invoices covering September 15, 2011, to November 30, 2011, and deny it, in part, as it concerns the January and March 2012 invoices.

The Army's Motion for Summary Judgment in ASBCA No. 62651

The Army's motion for summary judgment asserted the same statute of limitations argument for denial of BNN's claims for allegedly improper fuel invoice deductions and allegedly improper demurrage payments taken before March 27, 2014, six years before BNN filed its claim on March 27, 2020 (SOF ¶ 15). BNN's complaint included the assertion that "[t]he Army breached the [c]ontract, in part, by wrongfully imposing financial penalties on BNN because of the alleged pilferage of fuel" and that it "also seeks amounts owed by the Army for completed deliveries of fuel and for

demurrage payments on the Fuel Suite" (62651 compl. ¶ 1). This complaint and motion concerned invoices from September 2011 to January 2013 (SOF ¶ 15; 62651 gov't mot. at 7). It pointed to the Army's alleged failure to properly measure fuel during upload and download, a failure to investigate the responsible party for fuel pilferage, and imposition of deductions for missions "under the control of the Army" (62651 compl. ¶ 2). None of these allegations address why BNN would not know whether a fuel pilferage deduction was properly or improperly taken or demurrage was correctly or incorrectly calculated by the time the Army returned the invoices to BNN with those deductions.

The Army did not provide or direct the Board to any evidence indicating when it sent BNN the relevant invoices, so a review of the Rule 4 file is required to determine the applicable dates. BNN's October 31, 2012 email, which the government cited in the motion above, demonstrated that BNN had received its invoices, with deductions for pilferage, through July 2012. Further, it provided totals for demurrage from March to September 2012 (SOF ¶ 8). A January 31, 2013, email from the Army to BNN informed BNN of the net positive amount it is due to be paid from its October .2012 fuel invoice, and the demurrage, dry, and heavy cargo suites for December 2012. It also provided another total that included the November 2012 demurrage invoice amount, with sufficient specificity for BNN to understand whether it was receiving deductions it found improper on those invoices (SOF ¶ 9). BNN's September 8, 2013 email included its August to December 2012 fuel invoices, which BNN indicated it had received some months earlier (SOF ¶ 12). However, the record does not demonstrate clear evidence of when BNN received its fuel invoice for January 2013. Because we must draw all justifiable inferences in favor of appellant and the record before us does not demonstrate that BNN received this before this appeal's cutoff date of March 27, 2014, we must deny that portion of the government's motion.

Appellant raised tortured arguments, arguing that since it was not allowed to observe the uploading of fuel, it could not know whether the Army was performing it properly or not, and it needs more discovery to determine if the Army was aware of the impropriety of its actions and concealed them from BNN (62651 app. opp'n at 5-6). Even if this were relevant, BNN was aware of this issue prior to the cutoff date (SOF ¶ 11). Further, BNN argued that the contract allowed the imposition of deductions, but that its claim concerned whether the deductions were improper (ASBCA No. 62651 app. opp'n at 4). This is a distinction without a difference. BNN did not refute in any meaningful way that it had the best access to its employees' actions, and thus it should have had the best knowledge of whether or not its employees were pilfering fuel. If it believed the deductions were not proper, it could have raised a claim for the deductions upon receipt of the invoices. BNN did not explain how further discovery would help it escape this reality or locate another

material factual dispute, and so failed to persuasively argue for a successful resolution. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984). Therefore, we grant this motion, in part, as it relates to the fuel invoices from September 2011 to December 2012, and the demurrage invoices from March to December 2012. We deny the motion, in part, regarding the fuel and the demurrage invoices for January 2013, as well as any demurrage invoices before March 2012, for lack of information.

The Army's Motion for Partial Summary Judgment in ASBCA No. 62241

The Army's motion in ASBCA No. 62241, based on the Army's allegedly faulty calculation of the weekly OML score, sought to deny BNN's appeal as it pertained to BNN "receiving the proper allocation of missions under the OML process" before May 7, 2013, years before BNN's claim on May 7, 2019 (62241 gov't mot. at 7). After receiving the "Full Mission Data" on September 19, 2017, BNN stated it was able to recalculate the OML rankings and discover the discrepancy – allegedly a difference of 4,170 missions (SOF ¶14). Though the Army's motion does not appear to draw a very clear distinction (62241 gov't mot. at 7-8), BNN's claim asserted two bases for compensation: first, for the miscalculation of the OML resulting in faulty allocations for a given week; second, for the failure by the Army to actually assign the number of missions indicated on the weekly OML sheet over the course of the applicable week (*id.*; 62241 app. opp'n at 3).

BNN argued it could not have known about the Army's miscalculation of the OML until receiving the Full Mission Data in September 2017, and thus claim accrual did not happen until that point (62241 app. opp'n at 8). While BNN had access to the metrics in the contract, and its own performance data that it could use to verify the OML raw data, and was active in doing so (SOF ¶¶ 2, 15), it did not have access to the performance data of the other NAT contractors. This information factored into the weekly rank within each suite that all NAT companies would receive. (*See* 62241 app. opp'n ex. B). Importantly, NAT contractors were assigned a number of missions only as a percentage of total missions, a number BNN alleged it did not have access to until receiving the Full Mission Data (62241 app. opp'n at 7). The government referenced a long list of Rule 4 documents showing BNN disputing the OML sheets it received on numerous occasions (62241 gov't reply at 10, 13, 14,). The government also argued that BNN admitted in its filings that rankings were not done in the first eight weeks of the contract, putting BNN on notice that there were issues with the OML (*id.*at 13-16). However, this does not meaningfully rebut BNN's argument.

The Army's suggestion that failure to apply the OML rankings put BNN on notice for all future misapplications of the criteria is illogical. BNN disputed the calculation of its rank using the data it had available to it, but the record indicates BNN did not have access to information that would allow it to justify its rank among other

contractors' performance.[5] BNN also did not possess information to verify whether the percentage of total missions it was allegedly allocated was accurate, and did not receive a discrete number. For this reason and because we must draw all justifiable inferences in favor of appellant when deciding a motion for summary judgment, we cannot determine, based on the record currently before us, that BNN's claim accrued earlier than its receipt of the Full Mission Data, which was less than two years before the filing of its complaint. Thus, we must deny this motion.

BNN's Cross-Motion for Summary Judgment in ASBCA No. 62241

With its opposition, appellant filed a cross-motion for summary judgment, relying exclusively on the Army's audit report (SOF ¶ 10), arguing that the Army breached the OML and fair opportunity provisions of the contract through misapplication of the OML ranking system (62241 app. cross-mot. at 9-11). The parties disagreed about whether this report constituted inadmissible hearsay[6] (62241 gov't opp'n at 7, 17-18; 62241 app. cross-mot. reply at 8-9). However, this does not present a disputed issue of material fact, as the audit report does not conclusively establish a breach in this appeal. Even if it were taken as fact, the audit report does not detail an instance when BNN, or any contractor for that matter, was itself injured by the Army's actions, and only refers abstractly to general misapplication of the OML formulae instead of discrete instances. (SOF ¶ 10) BNN provided no answer to this shortcoming.

Beyond that, BNN repeatedly declined to prove one of the four elements of breach of contract (that it was damaged by the Army's actions), despite acknowledging that a showing of breach requires all four elements (62241 app. cross-mot. reply at 7 ("BNN is seeking summary judgment only on the first three elements")). The government highlighted this shortcoming (62241 gov't opp'n at 24-25). In response, BNN still failed to establish all four elements and only reasserted that proving this element would be a waste of its time and inconsistent with the Board's efforts to provide speedy dispute resolution (62241 app. cross-mot. reply at 7 n.1), apparently conflating proof that it was damaged at all and proving quantum. Thus, we deny this motion for failure to establish all four elements.

We have considered the parties' other arguments in these motions and found them unpersuasive.

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[5] This is subject to one exception. BNN's dispute of its OML from July 16-22, 2012, does include the contractor at the next lowest rank. SOF ¶ 7. Why it should have this information is not addressed by either party, nor do they nor the record suggest this was the norm. Thus, we will not further analyze it.

[6] This is despite the government offering it as part of the Rule 4 file. *See* SOF ¶ 10.

CONCLUSION

For the reasons discussed above, we grant, in part, the Army's motion for partial summary judgment in ASBCA Nos. 61841 and 61905 as relates to the invoices covering September through November 2011, but deny it, in part, as to the January and March 2012 invoices. We grant the motion in ASBCA No. 62651, in part, as relates to the fuel invoices from September 2011 to December 2012, and the demurrage invoices from March to December 2012. However, we deny the motion, in part, regarding the fuel and the demurrage invoices for January 2013, as well as any demurrage invoices before March 2012. Finally, we deny both the Army's motion for partial summary judgment and BNN's cross-motion for summary judgment in ASBCA No. 62241.

Dated: August 5, 2021

HEIDI L. OSTERHOUT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61841, 61862, 61905, 62241, 62355, 62356, 62357, 62651, Appeals of BNN Logistics, rendered in conformance with the Board's Charter.

Dated: August 5, 2021

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

NO. 7:11-CV-270-FL

United States ex rel. RICKEY HOWARD, Plaintiff, v. CADDELL CONSTRUCTION COMPANY, INC. an Alabama Corporation; W.G. YATES & SONS CONSTRUCTION COMPANY a Mississippi Corporation; and JULIAN MARIE BRESLOW; and DAVID J. VALDINI & ASSOCIATES, P.A., a Florida Professional Association, Defendants.	)	ORDER

This matter is before the court upon motion for summary judgment by defendants Caddell Construction Company, Inc. ("Caddell") and W.G. Yates & Sons Construction Company ("Yates") (collectively "defendants").[1] (DE 271). The motion has been briefed fully, and in this posture the issues raised are ripe for ruling. For the following reasons, the motion is granted.

STATEMENT OF THE CASE

Plaintiff commenced this False Claims Act case on December 22, 2011, by filing a complaint in camera and under seal, claiming that defendants engaged in a fraudulent scheme to

[1] As set forth in more detail herein, defendants Julian Marie Breslow ("Breslow") and David J. Valdini & Associates, P.A. ("Valdini Law Firm"), are named in the operative second amended complaint, but there has been no proof they have been served with it, and they did not join in the instant motion. All unqualified references to "defendants" in this order are to defendants Caddell and Yates only. The court also constructively has amended the caption of this order to reflect dismissal of other formerly-named defendants as described in more detail herein.

submit false claims and statements regarding their use of small business subcontractors in the course of performing a government construction contract. As relator, on behalf of himself and the United States of America (the "government"),[2] plaintiff asserts the following claims:

1. False claims in violation of 31 U.S.C. § 3729(a)(1)(A);
2. False statements in violation of 31 U.S.C. § 3729(a)(1)(B);
3. Conspiracy to commit violations of False Claims Act, in violation of 31 U.S.C. § 3729(a)(1)(C);
4. Reverse false claims, in violation of 31 U.S.C. § 3729(a)(1)(G); and
5. Violation of the Anti-Kickback Act, 41 U.S.C. § 53.[3]

Plaintiff seeks trebled damages, civil penalties, costs, fees, and an award of 25% or 30% of the proceeds of the action, depending on whether the government intervenes and continues in the action.

Upon motions by the government, the court extended the time to intervene seven times, until September 17, 2014. On that date, the court unsealed the case, following notice by the government of its decision to partially intervene for purposes of settling civil claims against former

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[2] The False Claims Act allows a person to bring a civil action "for the person and for the United States Government," wherein, as here, "[t]he action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). The government thereafter may elect to "proceed with the action, in which case the action shall be conducted by the Government; or . . . notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." Id. § 3730(b)(4). Although the terms "relator" and "ex rel." do not appear in the statute, they are the names commonly used to denote a private plaintiff suing on behalf of the government under the False Claims Act. E.g., Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507, 1514 (2019).

[3] Plaintiff asserted in his original complaint an additional claim for retaliation, in violation of 31 U.S.C. § 3730(h), which did not carry through to the operative second amended complaint as set forth herein, and which is not subject of the instant motion.

defendant David J. Valdini ("Valdini") and defendant David J. Valdini & Associates, P.A., (the "Valdini Law Firm"), and of its decision to decline to intervene as to the remaining defendants.[4]

On March 18, 2015, plaintiff filed an amended complaint.[5] The court denied defendants' motion to dismiss on February 29, 2016, and a period of discovery followed.[6] In the course of discovery, the court entered a protective order regarding certain information the government had agreed to produce to plaintiff, relating to criminal proceedings against defendant Breslow and defendant Valdini Law Firm.[7]

On July 17, 2017, with leave of court, plaintiff filed the operative second amended complaint,[8] reasserting the same statutory claims against defendants but with additional and updated facts and theories of relief, based upon additional materials produced by the government.[9]

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4 The government noticed its partial intervention on July 14, 2014, and it reported on August 22, 2014, that a settlement agreement was executed with Valdini and the Valdini Law Firm (DE 41, 44).

5 In addition to defendants, plaintiff asserted therein claims against defendant Breslow and defendant Valdini Law Firm. However, plaintiff asserted that he and the United States entered into a settlement agreement with defendant Valdini Law Firm on August 18, 2014, and, as a result, defendant Valdini Law Firm "has been released as to all claims, except for statutory attorneys' fees." (DE 66 at 7 n.1). In addition, that same date, plaintiff filed a document styled as a "notice of voluntary dismissal" as to former defendants Pompano Masonry Corporation; Breslow Construction, LLC; Seitlin & Company; Stephen Jay Siegel; Cleetus Mchenry; Joseph Canitano; Dale A. Belis; and Jillian Breslow Phelps.

6 The court also denied plaintiff's motion for entry of default against defendant Breslow, on February 16, 2016.

7 In case No. 7:14-CR-8-D in this district, defendant Breslow pleaded guilty to one count of false statement to the United States and aiding and abetting, in violation of 18 U.S.C. §§ 1001 and 2, and was sentenced on June 16, 2015, to a term of imprisonment of 30 months. In case No. 7:14-CR-11-D, defendant Valdini Law Firm pleaded guilty to fraud relating to a major contract with the United States and aiding and abetting, in violation of 18 U.S.C. § 1031 and 2, and was sentenced on October 15, 2014, to a term of probation of 18 months. In addition, in accordance with the government's settlement agreement in the instant case, Valdini Law Firm was ordered to pay the United States $30,000.00.

8 United States Magistrate Judge Kimberly A. Swank granted plaintiff's motion to file a second amended complaint over defendant's objection on July 12, 2017. (See Order (DE 189)). This court denied defendants' appeal of the same and affirmed the magistrate judge's order on December 12, 2017. (See Order (DE 223)).

9 Plaintiff continues to assert claims against defendant Breslow and defendant Valdini Law Firm, but again with the caveat that Valdini Law Firm "has been released as to all claims, except for statutory attorneys' fees. (DE 190 at 8 n. 1).

Defendants filed an initial motion for summary judgment on January 23, 2018. Upon plaintiff's motion to strike the same, however, the court on September 25, 2019, denied without prejudice the initial motion for summary judgment, and granted in part and denied in part the motion to strike. The court reasoned that defendants had relied upon certain documents in support of summary judgment that they had failed to disclose in a timely and proper manner. (See Order (DE 257) at 4).[10] The court noted it "does not believe this particular violation is so egregious to rise to the level requiring total exclusion of these documents," but "in fairness to both parties, the court finds discovery should be re-opened in this matter for the limited purpose of allowing relator the opportunity to question witnesses regarding these late-disclosed documents, depose any witnesses who may have relevant information relating to these documents, and to utilize any other means of discovery deemed reasonably necessary by" the magistrate judge. (Id. at 5-6). The court directed the parties to confer in an attempt to resolve during the reopened discovery period additional disputed items subject of plaintiff's motion to strike. A period of reopened discovery followed, concluding February 7, 2020.

Defendants filed the instant motion for summary judgment on March 23, 2020, relying upon a statement of material facts and appendix including the following exhibits or categories of exhibits: 1) Affidavits of Cleetus E. McHenry ("McHenry"),[11] Chet Hailey ("Hailey"), Diana McGraw ("McGraw"), John Mac Caddell ("Caddell"), and Nathan Huff ("Huff"); 2) excerpts of depositions of plaintiff, Clint Bledsoe ("Bledsoe"), Joseph Canitano ("Canitano"), Richard Gurner

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[10] The subject documents were referenced in the court's order only as "Composite Exhibit C, App. 31-510," which, according to plaintiff, "go[] to a key issue in the case—materiality." (Order (DE 257) at 2, 4).

[11] Appendix A to this order lists all the names of individuals referenced herein, and their positions during the relevant time period as portrayed in the record.

("Gurner"); McGraw, McHenry, and Valdini; 3) exhibits to affidavits and depositions, including correspondence between the parties, third parties, and the government; contract documents and submissions; including the following documents: a) "Subcontracting Plan for Small Business-Small Disadvantaged Business," dated August 11, 2008 (the "Subcontracting Plan") (App. 542-547);[12] b) "Contract Award" dated September 15, 2008 (the "Contract") (App. 548-601); c) "Caddell Yates Joint Venture Subcontract" with Pompano Masonry Corporation ("Pompano"), dated March 2, 2009 (the "Pompano subcontract") (App. 611-625); d) a letter from Valdini to McHenry, dated July 21, 2009, with "self-certification" (the "Valdini Self-Certification Letter") (App. 637); e) a letter from Tom Newton ("Newton") to Breslow, dated August 14, 2009, returning "one copy of our fully executed subcontract" (the "Breslow Construction" subcontract) (App. 643-658); f) individual subcontracting reports covering periods from contract inception to March 31, 2016 (App. 661-695); and 4) demonstrative charts prepared for litigation showing "Contract Billings, Payments, and Individual Subcontracting Reports [] Filings" and "Comparison/Contrast." (App. 1439-1443).

Plaintiff responded in opposition to the instant motion on May 20, 2020, relying upon an opposing statement of facts and appendix including the following exhibits or categories of exhibits: 1) plaintiff's declaration; 2) additional excerpts of depositions of the same deponents relied upon by defendants, as well as Sid Adams ("Adams"), William Barbee ("Barbee"), Del Buck ("Buck"), Reginald Foy, Jr. ("Foy"), Newton, Patsy Reeves ("Reeves"), John Mark Smith ("Smith"), Lisa Stokes ("Stokes"), Charles Tiefer ("Tiefer"), Frank Baker ("Baker"), and Robert Farmer ("Farmer"); 3) exhibits to affidavits and depositions, including correspondence between the

[12] Citations to "App.," when used, are to page numbers specified on the face of the parties' consecutively numbered appendix pages (filed at DE 273-274, 281-284, numbered App. 1 through App. 3033), and not to the page numbers designated by the court's case management and electronic case filing (CM/ECF) system.

parties, third parties, and the government; contract documents and submissions; including the following documents: a) an American Arbitration Association award (App. 1447-1462); b) expert witness reports of Barber and Tiefer (App. 1508-1568); c) Inspector General, Defense Criminal Investigative Service, report of agent interview of Smith, dated January 17, 2013 (App. 1569-1573); d) a United States Small Business Administration "Handbook for Small Business Liaison Officers," dated January 2005 (App. 1592-1672); e) United States Naval Criminal Investigative Service report of interviews with Vernon Ashley Walton ("Walton") and J.D. Patton ("Patton"), dated May 31, 2012 (App. 1768-1769); 4) subcontracts and related documentation produced in discovery by defendant Yates (App. 1770-2033); 5) transcripts of arraignment and sentencing of Breslow (App. 2829-2909); 6) reports captioned Baker Roofing Company v. MPI Business Solutions and Caddell Yates, "Preliminary Impact Analysis and Change Order Request" and Precision Walls, Inc. v. MPI Business Solutions and Caddell Yates, "Preliminary Impact Analysis and Claim for Damages" (App. 2918-3006); 7) excerpts from Application and Certification for Payment forms, from Caddell Yates Joint Venture to Naval Facilities Engineering Command Mid-Atlantic ("NAVFAC") (App. 3013-3033).

Defendants replied on June 17, 2020, relying upon an opposing statement of material facts and an exhibit comprising plaintiff's designation of expert reports. With leave of court, plaintiff filed a surreply on July 22, 2020, relying on excerpts of a deposition of Larry A. Hinson ("Hinson").[13] Defendant filed a response thereto on August 19, 2020, and plaintiff filed a sur-surreply on September 2, 2020.

[13] Plaintiff's surreply originally was styled as including a motion to strike defendants' reply statement of material facts. On February 1, 2021, after the matter was reassigned to the undersigned, the court granted plaintiff's alternative motion for leave to file surreply, stating that the court will consider briefing thereon in consideration of defendants' motion for summary judgment.

STATEMENT OF FACTS

The undisputed facts may be summarized as follows. Defendants are general-commercial construction companies based in Alabama and Mississippi, respectively. (Defs' Stmt. (DE 272) ¶ 1).[14] Both defendants serve as general contractors for federal and commercial projects. (Id.). In 2008, defendants formed a joint venture to submit a proposal to NAVFAC for design and construction of the Wallace Creek Regimental Complex at the Marine Corps Base Camp Lejeune in Jacksonville, North Carolina. (Id. ¶ 2). This project included site clearing and grubbing of raw land, grading and drainage, and construction of more than 20 buildings to serve and house approximately 3,000 Marines at Camp Lejeune (the "Project"). (Id. ¶ 3).

On September 15, 2008, NAVFAC awarded the Project to defendants in a $181,882,000 "firm fixed price contract" (the "Contract"). (Id. ¶ 4; App. 576).[15] The Contract includes numerous design requirements, environmental and quality control expectations, safety and security parameters, hazardous material restrictions and waste management planning, with detailed processes prescribed for regular design and construction approval as work progresses. (Defs' Stmt. ¶ 5; App. 548-601). The Contract specifies mandatory performance completion in 1095 days (3 years). (Defs' Stmt. ¶ 6; App. 549). The Contract sets out a "Description of Work," including the following:

> This is a Design/Build to provide the design and construction of three FY07 projects and three FY08 projects, consisting of 20 new structures comprising nearly 570,000/square feet. These projects will construct the necessary administrative headquarters, operation, maintenance, and mission support, training and housing facilities to support 3000+ Marines to be stationed at Wallace Creek. . . . The contractor shall provide all labor, supervision, engineering, materials, equipment,

[14] Pursuant to Local Rule 56.1(a)(2), the court cites to paragraphs in defendant's statement of facts, or portions of such paragraphs, where not "specifically controverted by a correspondingly numbered paragraph in the opposing statement" of plaintiff.

[15] In Contract documents and records quoted herein the term "Contractor" refers to the Caddell/Yates joint venture, which the court designates for purposes of this order as "defendants," for ease of reference.

> tools, parts, supplies and transportation to perform all of the services described in the plans and specifications.

(Defs' Stmt. ¶ 8; App. 551).

The Contract incorporates "by reference" 104 separate provisions of the Federal Acquisition Regulations ("FAR"), which document a wide range of government contracting preferences, goals, and rules. (App. 577-579; see 48 C.F.R. §§ 53.203-3 to 252.243-7002, also referenced as FAR 53.203-3 to 252.243-7002). For example, such incorporated FAR provisions include but are not limited to "Combatting Trafficking in Persons" (FAR 52.222-50), "Drug Free Workplace" (FAR 52.223-6), "Accident Prevention" (FAR 52.236-13), "Display of DOD Hotline Poster" (FAR 252.203-7002), and "Preference for Certain Domestic Commodities" (FAR 252.225-7012). (App. 577-579).

The Contract also incorporates "by full text" 20 FAR provisions, including, for example, "Buy American Act – Construction Materials Under Trade Agreements" (FAR 52.225-11), "Performance of Work by the Contractor" (FAR 52.236-1), "Organizational Conflicts of Interest," (FAR 52.209-9300), and "Accident Prevention" (FAR 52.236-9303). Among the provisions referenced and incorporated "are a number of ancillary requirements that implement various socio-economic programs," including "small business subcontracting plan, various labor laws, and working conditions." (Defs' Stmt. ¶ 9).

As pertinent to the analysis herein, the court summarizes, in turn below, incorporated FAR provisions of the Contract related to payment, and those related to small business subcontracting. With respect to each, the court summarizes defendants' performance, followed by further details regarding the subcontracts at issue in plaintiff's claims.

A. Payment

The Contract incorporates FAR 52.232-5, which provides that "[t]he Government shall pay the Contractor the contract price as provided in this contract." FAR 52.232-5(a).[16] It further provides that "[t]he Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer,[17] on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer." FAR 52.232-5(b). The Contractor's request for progress payments must "include the following substantiation" –

> (i) An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested.
>
> (ii) A listing of the amount included for work performed by each subcontractor under the contract.
>
> (iii) A listing of the total amount of each subcontract under the contract.
>
> (iv) A listing of the amounts previously paid to each such subcontractor under the contract.
>
> (v) Additional supporting data in a form and detail required by the Contracting Officer.

FAR 52.232-5(b)(1). In addition, "[a]long with each request for progress payments, the Contractor shall furnish the following certification, or payment shall not be made" –

> I hereby certify, to the best of my knowledge and belief, that—
>
> (1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;
>
> (2) All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with

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16 All citations to this FAR are to the September 2002 version as specified in the Contract. (App. 578).

17 The Contracting Officer is "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings" for the government. FAR 2.101.

> subcontract agreements and the requirements of chapter 39 of Title 31, United States Code; [and]
>
> (3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract[.][18]

FAR 52.232-5(c). Further, "if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved." FAR 52.232-5(e).

Also incorporated into the contract are provisions for "Inspection of Construction," which provides that "[t]he Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements," and "[a]ll work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract." FAR 52.246-12(b).[19] Likewise, "the Contractor warrants . . . that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed." FAR 52.246-21(a).

Defendants submitted monthly progress payment requests to NAVFAC from November 2008 through November 2011, on a form incorporating the language and certification set forth in the FAR. (Defs' Stmt. ¶ 143; e.g., App. 3013-3019). The actual payment requests submitted to the government are in the form of both a "payment certificate," tracking exactly the FAR 52.232-5(c) language as quoted above, as well as an "application for payment" that sets forth an additional

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[18] A fourth paragraph in the certification is optional.

[19] "Work" is defined to include "materials, workmanship, and manufacture and fabrication of components." FAR 52.246-12(a).

certification stating: "to the best of the Contractor's knowledge, information, and belief, the work covered by this Application for Payment has been completed in accordance with the Contract Documents." (E.g., App. 3013).[20] A "continuation sheet" to each submission includes a table showing "Description of Work" "Work Completed" and "Balance to Finish." (E.g., App. 22, 3015). In this manner, defendants submitted additional payment requests in March and September of 2012, an additional request in January 2015, and a final request in January 2016. (Defs' Stmt. ¶ 143; e.g., App. 21-28, 3020-3033). In all, defendants submitted 40 payment requests. (Defs' Stmt. ¶ 143).

"During performance, NAVFAC amended the Contract through 44 contract Modifications. These Modifications resulted in a final contract value of $194,731,380.97 at completion in late 2011." (Defs' Stmt. ¶ 7). The government paid all monthly progress payment requests made by defendants throughout construction of the Project. (Defs' Stmt. ¶ 150). These included payments on 36 monthly progress payment requests between December 2008 and November 2011, totaling approximately $185,245,897.00, plus two additional payments on requests made in April 2012, and November 2012, totaling approximately $9,334,584.00, and two final payments in March 2015 and March 2016, totaling approximately $150,900.00. (See id.; App. 1439-1440).

On March 12, 2012, Patton, the government's project manager for NAVFAC, issued the Final Performance Evaluation Report for the Project. (Defs' Stmt. ¶ 176). The government rated defendants' overall contract performance as "Outstanding," the highest rating allowed. (Id.). The government rated all performance elements as satisfactory or above. (Id.). The narrative remarks by the government stated:

[20] An additional page with a "QC Invoice Certification" similarly provides that "[a]s-built drawings are current, and the work for which this payment is requested, including stored material, are in compliance with contract requirements." (E.g. App. 3033; McHenry Aff. ¶10 (App. 3)).

> This project was very complex and had a high level of construction risk. Overall, [defendants] did an outstanding job of managing this complexity and risk. They established and maintained a good working relationship between the project team and the government. The project team was focused on customer satisfaction. All contract changes were handled professionally and all challenges were dealt with promptly. [Defendants] also maintained an impressive safety and environmental record throughout the project duration. This project was located in an environmentally sensitive area and great care was taken to ensure that there was no construction related environmental impact. [Defendants] completed over 2 MILLION man-hours of labor on this project without a lost time accident. This is an impressive accomplishment and this office would gladly work with [defendants] on projects.

(Id.). The barracks constructed by defendants are still being used to house approximately 3,000 Marines at Camp Lejeune. (Defs' Stmt. ¶ 192).

Since 2012, the federal government has awarded more than 35 construction contracts to Caddell, including approximately 17 projects since the government decided not to intervene in this case as to defendants in July 2014. (Defs' Stmt. ¶ 193). Since March 2012, the federal government has awarded seven construction projects to Yates. These seven construction projects include a NAVFAC contract awarded to a joint venture in which Yates is one of two partners. (Defs' Stmt. ¶ 194).

B. Small Business Subcontracting

The contract incorporates FAR 52.219-8, "Utilization of small business concerns," which provides: "[t]he Contractor hereby agrees to carry out this policy" that small businesses "shall have the maximum practicable opportunity to participate in performing contracts" "to the fullest extent consistent with efficient contract performance." FAR 52.219-8(a)-(b). "Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as a small business concern." FAR 52.219-8(d).

The Contract further incorporates FAR 52.219-9, which requires the "offeror, upon request by the Contracting Officer, [to] submit and negotiate a subcontracting plan," which must include

"[a] statement of – . . . Total dollars planned to be subcontracted to small business concerns . . . ." FAR 52.219-9(c), (d)(2). A "Subcontracting Plan for Small Business/Small Disadvantaged Business" (the "Subcontracting Plan"), dated August 11, 2008, was part of defendants' proposal submitted in response to the government's solicitation (request for proposal), and incorporated into the Contract upon award. (Defs' Stmt. ¶ 15; App. 542).

The Subcontracting Plan includes "targets . . . proposed for the total contract," comprising 77 % of total planned subcontracting dollars to small businesses and 14 % of total planned subcontracting dollars to subcontractors qualifying under the "Women-Owned Small Business" criteria established by the United States Small Business Administration. (Defs' Stmt. ¶ 17; App. 542-543). The Subcontracting Plan states: "The original copy of this plan is included in the file and made a material part of the contract." (Defs' Stmt. App. 547). It provides that Gurner, a Yates estimator, "will administer the subcontracting program." (App. 544).[21]

During the "entire life of the contract," the Contractor must "[s]ubmit periodic reports so that the Government can determine the extent of compliance by the [Contractor] with the subcontracting plan," including, as pertinent here, "Standard Form (SF) 294, Subcontracting Report for Individual Contracts," also known as Individual Subcontracting Reports or "ISRs". FAR 52.219-9(d)(10)(ii)-(iii). Such reports must be submitted to the government contracting officer twice per year for the six month period ending March 31 and September 31, respectively. (Defs' Stmt. ¶ 13; App. 546).

In April 2009, defendants began submitting individual subcontracting reports. (Defs' Stmt. ¶ 126). These reports do not request payment of any funds. (Id. ¶ 127). The first individual subcontracting report submitted by defendants was for the reporting period ending March 31, 2009.

[21] McHenry replaced Gurner as the small business subcontracting plan administrator on the Project after the design phase of the Project ended and Gurner moved on to other projects. (Defs' Stmt. ¶ 36).

That report showed no small business subcontracting at all. (Id. ¶ 128). An individual subcontracting report is due even where there has been no subcontracting at all. (Id.).

After the first individual subcontracting report, defendants submitted individual subcontracting reports via the government's electronic subcontracting reporting system. (Id. ¶ 129). The individual subcontracting reports provide information regarding the total cumulative subcontract award amounts by size (large/small) of business and socio-economic classification of small businesses. (Id. ¶ 130). Defendants' individual subcontracting reports were calculated and reported on a "commitment basis." (Id. ¶ 131). That means the total subcontract amount is captured for individual subcontracting report calculations "when you [Caddell-Yates] execute the subcontract award documents." (Id.).

The individual subcontracting reports submitted prior to 2014 do not identify any subcontractors. (Id. ¶ 132). Similarly, none of those reports identify any particular subcontract amount, identify which subcontractors actually performed work, or reflect the performance of work. (Id. ¶¶ 132, 137). Instead, they report the total cumulative of all subcontracts by size and by each socio-economic category. (Id.). They only report "Subcontract Award" dollars, and thus do not consider the prime contractor's self-performance portion of the total contract amount. (Id.).

McGraw, a marketing coordinator for Yates, prepared the individual subcontracting reports for the Contract, and consulted with McHenry, defendants' project executive, when drafting them. (Id. ¶¶ 105, 133). A small-business subcontract award (total subcontract amount) would be included in calculating the overall small business goal as well as each socio-economic classification, such as women-owned small business, applicable to the small business. (Id. ¶ 134). Thus, the total award amount of a particular small-business subcontractor would be included in

calculating not only the overall cumulative small business subcontracting achievement, but also the achievement for each socio-economic category for which such small business qualified. (Id.).

To gather information to prepare the individual subcontracting reports, McGraw required each subcontractor to deliver to her a form styled "Small Business Concern Self-Certification." (Pl's Stmt. (DE 106) ¶ 106). The form requires a subcontractor to indicate any socio-economic classifications applicable, and to "acknowledge[] that Caddell Yates Joint Venture will rely on the accuracy of the information." (App. 797). It also included a warning that "[u]nder 15 U.S.C. 645(d), any person who misrepresents its status may be subject to" criminal sanctions. (Id.; McGraw Dep. 147 (App. 1339)).

Defendants submitted 14 individual subcontracting reports for the Project. (Defs' Stmt. ¶ 135). Each individual subcontracting report contains a "certification" that it is accurate. (Id. ¶ 136; e.g., App. 664). Electronically filed individual subcontracting reports are certified as accurate at time of submission. (Id.). "This is a testament that the data being submitted on the report is accurate and that the dollars and percentages reported do not include lower tier subcontracts." (App. 994; see McGraw Dep. 151 (App. 1342)). If the contractor selects "No" to this certification, the "report will be rejected." (Id.).

While all pre-2014 individual subcontracting reports show that defendants were achieving greater than 77% overall small business contracting percentage, those 2014 and later show that defendants achieved a 68% overall small business subcontracting percentage. (Defs' Stmt. ¶ 141; App. 661-695). Thus, at the completion of the contract, defendants had not achieved the 77% overall small business subcontracting goal in its Subcontracting Plan. (Id.). Defendants included the following remarks in their March 31, 2014, individual subcontracting report:

> [Defendants] made significant efforts to meet the small business utilization goals for this project, resulting in $79,866,933 dollars in small business subcontracting.

> However, Breslow Construction has been reclassified as a large business based upon information obtained from public filings since the last reporting period. Due to this reclassification, we no longer meet one of our goals – Small Business Concerns.

(App. 684). Similar remarks follow in the remainder of individual subcontracting report submitted for 2014 and 2015. (App. 687, 690, 693).

On October 15, 2015, the contracting officer for NAVFAC informed defendants via letter it had reviewed the April 2015 individual subcontracting report and requested "information on how your company is making a good faith effort to comply with the subcontracting plan." (Defs' Stmt. ¶ 182; App. 2034). In the letter, NAVFAC warned defendants the government could assess liquidated damages pursuant to FAR 52.219-16 in the amount of $6,486,761.00. (Defs' Stmt. ¶ 183). In response, defendants provided a "Narrative of Good Faith Efforts" to the contracting officer for NAVFAC. (Id. ¶ 184). The Narrative of Good Faith Efforts references the criminal cases against Breslow and the Valdini Law Firm, which were then a matter of public record. (Id. ¶ 185). At the time, the instant action had been unsealed and was also a matter of public record. (Id.).

On November 4, 2016, the contracting officer for NAVFAC filed a contract completion statement that noted all purchasing office actions were fully and satisfactorily accomplished and closed NAVFAC's contract file regarding the project. (Id. ¶ 188). The contract completion statement was signed by the same NAVFAC contracting officer to whom the Narrative of Good Faith Efforts had been submitted. (Id. ¶ 189). NAVFAC did not pursue liquidated damages against defendants. (Id. ¶ 190).

C. Subcontract Details

1. Pompano and Breslow Construction

Plaintiff is a former estimator and president of operations for Pompano. (Id. ¶ 21). At all times relevant to this case until its dissolution in 2013, Pompano was a large masonry company headquartered in Pompano Beach, Florida. (Id. ¶ 22). Pompano had an office in Charlotte, North Carolina, where plaintiff was based. (Id.).

The Julian Marie Breslow Revocable Living Trust Agreement (the "Breslow Trust") purchased Pompano in 2007. (Id. ¶ 23). On January 16, 2009, plaintiff, on behalf of Pompano, submitted a bid of $13,245,739.00 to perform the masonry work on the Project. (Id. ¶ 24). On February 6, 2009, plaintiff stated in an email to Gurner that Steven Siegel ("Siegel") purchased Pompano in April 2007. (Id. ¶ 25). His email attached an undated page listing the following "principals" of Pompano:

> [Breslow] – Director/Chairman
> [Siegel] – Director/President
> Jillian Breslow – Director/Vice President
> Michael Ridgway ("Ridgway") – Director/Treasurer
> [Canitano] – Vice President/N.C. Operations
> Timothy Carroll ("Carroll") – Vice President/Maryland Operations

(Id.).

In February 2009, defendants met with plaintiff and Canitano in Mississippi to discuss the masonry work on the Project. (Id. ¶ 26). This was the only trip plaintiff or Canitano made to Mississippi regarding the Project. (Id.). Around February 24, 2009, plaintiffs decided to use Pompano for the masonry work on the Project. (Id. ¶ 28).

On February 24, 2009, Canitano informed McHenry that Pompano's attorney was reviewing a proposed subcontract. Pompano's attorney was Valdini, who had his own firm, the Valdini Law Firm, located in Fort Lauderdale, Florida. (Id. ¶ 30). The Valdini Law Firm website

stated: "The firm handles . . . statutory compliance" for construction clients. (Id. ¶ 31). The Valdini Law Firm promoted its "extensive experience helping (construction) companies deal with government contract regulations." (Id.). The site reflected Valdini had an "AV" peer rating by Martindale-Hubbell. (Id.). Valdini had handled the sale of Pompano to the Breslow Trust in 2007 and thereafter continued to represent Pompano. (Id. ¶ 32). On February 24, 2009, Valdini reviewed the proposed subcontract and advised Canitano about it in a telephone conference. (Id. ¶ 33).

Canitano executed the Pompano subcontract, which bears a date on its face of March 2, 2009, with a scope of work including "[c]omplete turnkey masonry package for all structures" in the Project, and a subcontract amount of $14,438,493.00. (App. 611-625).

On April 27, 2009, Dick Fitzgibbons ("Fitzgibbons"), a vice president and estimator for Yates, emailed other employees of defendants about the "Small Business goals" for the Project, noting "here is my blueprint for reaching the 77% small business goal." (App. 659). Among other items, Fitzgibbons noted the "present contract" with Pompano comprised "about 15.2 mil [large business] with the recent additions," and he stated, for Pompano, "They need to buy materials through a minority like First Construction or MPI. Also, they need to find a minority that they can subcontract some work to." (Id.).

On May 5, 2009, McHenry emailed Newton and Bledsoe stating: "Mark [Smith] brought me Pompano's contract today. He wants to discuss the SBP [small business plan] before executing." (App. 1495). Smith directed McHenry to hold onto the Pompano subcontract while defendants determined whether they would need to break up the Pompano subcontract to contract directly with Pompano's small business subcontractors and/or material suppliers to increase defendants' small business subcontracting. (Defs' Stmt. ¶ 36). In May 2009, Pompano began

performing masonry work on the Project and, by late July 2009, it had submitted two payment requests to defendants. (Id. ¶ 37).

Also in May 2009, Breslow decided to create a women-owned small business in order to obtain preferences for additional masonry business on federal, state, and local projects. (Defs' Stmt. ¶ 59; see App. 934). On May 27, 2009, Valdini conferred with Breslow and Ridgway (Pompano's chief financial officer) regarding "minority and small business certification." (Defs' Stmt. ¶ 61). Breslow and Ridgway did not mention the Project or defendants during this conference. (Id. ¶ 62). In the first few days of June 2009, Valdini and an associate at the Valdini Firm, Elaine Parris ("Parris"), assisted Breslow in creating a small business that became Breslow Construction, LLC ("Breslow Construction"). (Id. ¶ 63).

On June 3, 2009, Parris called Breslow about a small-business application and Parris reviewed a Broward County, Florida, Small Business Application form. (Id. ¶ 64). By June 3, 2009, Ridgway and the lawyers were considering several names for the new women-owned small business. (Id.). On June 4, 2009, after determining several alternative names were not available, they agreed to "set up the new company as Breslow Construction." (Id. ¶ 65). On June 9, 2009, Parris prepared the Articles of Organization and Operating Agreement for Breslow Construction, LLC. (Id.). On that day, Parris also prepared an IRS form to obtain an EIN for Breslow Construction. (Id. ¶ 66).

In June 2009, McHenry met with plaintiff and Canitano in a trailer onsite at Camp Lejeune to discuss defendants' need for their help to increase small business subcontracting participation. (Defs' Stmt. ¶ 69). According to plaintiff, McHenry stated to plaintiff and Canitano, "We're having . . . problems with small business participation . . . . Is there anything that your company can do?" or "[Y]our people in Florida, anything they can do?" (App. 2608, 2611). Canitano asked,

"[r]egarding what?" then McHenry further stated: "The going rate is one or two percent," or "It pays – you know it's two, three percent." (App. 2611). Canitano then stated: "I don't know about that. I need to talk to the people in Florida," referring to his managers headquartered in Florida. (App. 2608-2609).

On June 11, 2009, Fitzgibbons emailed McHenry, Bledsoe, Gurner, and Smith, regarding the "Small Business Plan" for the Project, stating: "Guys right now, for small business, I think that we are in the 46% to 47% range." (App. 1497). He noted "Pompano Masonry" as one of their "large business contracts," among other contracts totaling about $51,931,000.00, and that "[i]n order for [defendants] to make the [Small Business] goal of 77%, half of the above dollars, or about 26 million has to come out of these contracts and go to small business." (App. 1497).

On July 2, 2009, Canitano had a telephone conference with Parris "regarding Breslow Construction." The billings show that Parris then prepared an "Application for Small Business Certification." (Defs' Stmt. ¶ 78). The same Valdini Firm billings show that on July 9, 2009, Parris, Valdini, and Canitano had a telephone conference "regarding DBE [Disadvantaged Business Enterprise] qualifications for Breslow Construction." (Id. ¶ 79).

On July 10, 2009, Bledsoe informed Adams, a construction Manager for Caddell, by email that:

> [Pompano] called me yesterday [July 9, 2009] about possibly running their entire contract through a [women-owned small business] that they are setting up. They are discussing this with their lawyers and should let me know something by Monday or Tuesday of next week. This should help out with the cost of obtaining our small business goals.

(Id. ¶ 80). Relator or Canitano made the call to Bledsoe referenced in his July 10, 2009, email to Adams. (Id. ¶ 81).

In mid-July 2009, the Valdini Law Firm prepared a "Certificate of Authority" for Breslow Construction to do business in North Carolina. (Id. ¶ 83). Plaintiff knew that defendants had

requested a "letter from the attorney." (Id. ¶ 84). According to plaintiff, Canitano told him: "Now Cleet [McHenry] wants something from the damn attorney saying its okay." (Id.). Canitano told plaintiff he suggested McHenry have his attorney "talk to our counsel . . . to get the right thing." (Id.). Canitano told plaintiff that McHenry "wanted—his people, being Yates Construction, wanted additional protection." (Id.).

Plaintiff has no personal knowledge of any communications between McHenry, Bledsoe, or anyone at Yates and Breslow or Siegel. (Id. ¶ 85). Relator testified: "I don't know of any of these parties talking personally." (Id.).

On July 17, 2009, Canitano emailed McHenry, copying Valdini, stating: "Per our conversation, I think it is a good idea to have our Attorney contact your council [sic] in regards to our Small Business Certification. We want to make sure we are applying for correct type that benefits your project needs." (App. 635). McHenry then contacted a Yates in-house counsel who suggested he call McGraw, who assisted Yates project managers with small-business matters. (Defs' Stmt. ¶ 87). Later that same day, McGraw emailed Canitano, copying McHenry, stating:

> To meet the requirements of this project – small business women owned business, you will need to provide Cleet [McHenry] with a self certification. This self certification is a letter stating that you are in fact a small business and that you are women owned (more than 50% women owned). . . . Per your request, I have included several references for you.

(Id.). McGraw then provided links to the Small Business Administration, and she quoted FAR 19.703(b),[22] and provided a link to the FAR. (Id.).

On July 21, 2009, Valdini sent the Valdini Self-Certification Letter to McHenry, which stated:

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[22] The FAR in effect at the time provided, in pertinent part, that "a contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a . . . . woman-owned small business concern." 48 C.F.R. 19.703(b) (2008).

Re: Breslow Construction, LLC.
Project: Wallace Creek

Dear Mr. McHenry:

This law firm represents Breslow Construction LLC. Please be advised that Breslow Construction, LLC. is more than 51% women-owned. Breslow Construction, LLC. is a small business and its average annual receipts are less than $14 million. Enclosed please find the corporate documents for Breslow Construction, LLC. Please allow this correspondence to serve as Breslow Construction, LLC.'s self- certification and its intent to be considered for the above-referenced project.

(Defs' Stmt. ¶ 90; App. 637). This letter attached the articles of organization for Breslow Construction, which list the managing members as Breslow, Jillian Breslow, and Lauren Breslow. (Id.). The letterhead of the Valdini Self-Certification Letter noted Valdini was "Florida Bar Board Certified in Construction Law." (Id. ¶ 91).

The Valdini Self-Certification Letter and McGraw's call with Parris are the only communications between defendants and the Valdini Firm regarding Valdini's certification of Breslow Construction as a women-owned small business. (Id. ¶ 94). McHenry had no recollection of ever speaking to Valdini or anyone at his firm. (Id.). Plaintiff had no knowledge of any communication between McHenry and Valdini, Parris, or anyone else at the Valdini Firm. (Id. ¶ 95).

On July 23, 2009, Canitano e-mailed Bledsoe: "Here is a copy of the schedule that we all agreed to. Please use this as your template for the new contract for Breslow Construction LLC. I assume you will be adding the 2% fee to our current contract amount of $14,438,493. The revised amount is $14,727,262." (App. 642).

In response to Canitano's e-mail, Bledsoe obtained a copy of the final Pompano subcontract, which had been signed and placed on hold by Smith. (Defs' Stmt. ¶ 98). Bledsoe e-mailed this contract to both Canitano and plaintiff and wrote: "Here is contract you signed. I need

you to mark your changes on this contract so I can put them on the new contract for Breslow." (Id.).

Smith and Bledsoe were involved in negotiating a final subcontract price with Breslow Construction. (Id. ¶ 101).They agreed to increase the contract price by a 2% fee. (Id.). Also, they agreed to eliminate from the scope of work the obligation to maintain the worksite in return for a $25,000 bulldozer deduction. (Id.).

On August 14, 2009, defendants returned a fully executed subcontract between defendants and Breslow Construction bearing the typed date March 2, 2009 (the "Breslow Construction subcontract"). (Id. ¶ 102; App. 643-58). The amount of the final Breslow Construction subcontract was 2% higher than the Pompano subcontract, less the $25,000 bulldozer deduction. (Defs' Stmt. ¶ 102).

On August 19, 2009, Canitano wrote to Breslow and Ridgway, who was chief financial officer of Pompano, that defendants "will not have any problems with Breslow subbing to Pompano. They do want some site supervision under Breslow's people on the payroll." (Id. ¶ 103). Breslow Construction listed Pompano as a lower-tier subcontractor in its pay request. (Id.). Plaintiff acknowledged the subcontract required an onsite representative. (Id. ¶ 104). Plaintiff hired an onsite safety officer for Breslow Construction. (Id.).

McGraw first heard the name Breslow Construction when she was preparing the individual subcontracting report for the period ending September 30, 2009. (Defs' Stmt. ¶ 107). On October 7, 2009, Ridgway completed a "Small Business Concern Self-Certification," certifying Breslow Construction as a women-owned small business (hereinafter, the "Ridgway Self-Certification Letter") (Id. ¶ 108; App. 797). McGraw relied upon Ridgway's self-certification that Breslow Construction was a women-owned small business in preparing the individual subcontracting

reports that included Breslow Construction subcontract amounts in its percentages and totals. (McGraw Dep. 149 (App. 1341).

2. Pass-through Subcontracts

Defendants subcontracted with five small businesses—First Construction Co., Inc. ("First Construction"), MPi Business Solutions ("MPi"), Power Mulch Systems, Inc. ("Power Mulch"), Bailey Contracting, Inc. ("Bailey"), and S&L Painting & Decorating, Inc. ("S&L Painting") (collectively, the "first-tier small businesses")—that further subcontracted the work to large businesses. (Defs' Stmt. ¶ 52).

Each of the first-tier small businesses received 1% to 2% of the value of work further subcontracted as compensation for their role in contracting with defendants. (Id. ¶ 54). These first-tier small businesses did not "perform[] the actual labor and work," but rather "would be doing the billings and . . . have a representative on site for those contracts." (App. 1359-1360).

In one instance, for example, Power Mulch did "the Invoicing . . . for 1% of the invoice value plus an amount not to exceed $40,000.00 to keep an individual on site to represent [Power Mulch]." (App. 1482). A subcontract with defendants, dated June 5, 2009, provided for Power Mulch to work on a "cored slab bridge" on the Project, and it allotted a payment of $3,333.33 per month for "subcontractor's onsite personnel," not to exceed $40,000.00 per year, plus approximately 1% of the $858,764.00 subcontract fee going to Power Mulch, and the remaining amount to be "joint checked to S.T. Wooten." (App. 1673-1675). That same day, Power Mulch further subcontracted with S.T. Wooten for the same scope of work on the bridge. (App. 1919).

In another example, a subcontract with defendants, dated June 12, 2009, provided for Bailey Construction to work on "mechanical and plumbing work" on the Project, for a total subcontract amount of $27,090,350.00, with approximately 1.5% less, or $26,690,000.00, of that

subcontract fee to be "joint checked to John J. Kirlin." (App. 1861-1862). McHenry explained the arrangement in an email the previous day, stating: "I talked to Kirlin this morning and it looks like we can send their entire contract through Bailey for 1.5%. The 1% is to Bailey and the .5% is to cover the cost of paying Bailey's supervisor on site." (App. 1497).

In summary, the pass-through entity subcontracts that are subject of the instant action include the following, according to plaintiff's declaration:

"Pass Through" Entity	**Large Business Actually Performing Contract**	**Trade**	**Amount**
First Construction			
	C.H. Edwards	Door/HDW Supplier	$1,841,629
	ABG Waterproofing	Joint Sealants	$ 691,000
	Stark Steel	Metal Roof Trusses	$1,664,690
MPi Business Solution			
	Precision Walls	Metal Studs/ Drywall	$2,673,344
	McComb Glass	Glass/Glazing	$2,405,197
	Baker Roofing	S.S. Metal Roofing	$3,394,920
Power Mulch			
	Hawk	Food Service	$1,421,379
	S.T. Wooten	Bridge	$ 858,764
	B.R. McMillan	Specialties	$ 929,641
	Woodsystems	Millwork	$1,509,406
Bailey Contracting			
	J.J. Kirlin	Mechanical	$27,090,350
S&L Painting			
	Southeastern Interior	Flooring Systems	$2,664,522

(App. 2195).

Additional facts will be discussed in the analysis herein.

COURT'S DISCUSSION

A. Standard of Review

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once the moving party has met its burden, the non-moving party must then "come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (holding that a factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party).

"[A]t the summary judgment stage the [court's] function is not [itself] 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. In determining whether there is a genuine issue for trial, "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [non-movant's] favor." Id. at 255; see United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached

exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion.").

Nevertheless, "permissible inferences must still be within the range of reasonable probability, . . . and it is the duty of the court to withdraw the case from the [factfinder] when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982). Thus, judgment as a matter of law is warranted where "the verdict in favor of the non-moving party would necessarily be based on speculation and conjecture." Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485, 489 (4th Cir. 2005). By contrast, when "the evidence as a whole is susceptible of more than one reasonable inference, a [triable] issue is created," and judgment as a matter of law should be denied. Id. at 489-90.

B. Analysis

1. False Claims Act

Plaintiff's first three claims are based upon submission of false claims and false statements to the government in violation of the False Claims Act, 31 U.S.C. § 3729(a). That statute provides liability, in pertinent part, for:

> any person who--
>
> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; [or]
>
> (C) conspires to commit a violation of subparagraph (A) [or] (B).

31 U.S.C. § 3729(a).

"To state a claim under the FCA, the plaintiff must prove: (1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement or conduct was

made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due." United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 913 (4th Cir. 2003) ("Harrison II"). [23]

The court begins its analysis by addressing the element of a false claim for payment, then turns to the elements of materiality and scienter.

a. False Claim for Payment

"All FCA claims require, among other elements, that the false statement or conduct caused the government to pay out money or to forfeit money due." United States ex rel. Grant v. United Airlines Inc., 912 F.3d 190, 196 (4th Cir. 2018). "In order for a false statement to be actionable under either subsection of the FCA [§§ 3729(a)(1)(A) or (B)], it must be made as part of a false or fraudulent claim." Id. "The statute attaches liability not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'" Id. "A 'claim' is 'any request or demand, whether under a contract or otherwise, for money or property that . . . is presented to an officer, employee, or agent of the United States.'" Id. (quoting 31 U.S.C. § 3729(b)(2)(A)). "Therefore, a central question in all FCA cases is whether the defendant ever presented a false or fraudulent claim to the government, resulting in a call upon the government fisc." Id.

Plaintiff's claims are premised on the assertion that defendants "made express and/or implied false certifications that [each] was complying in good faith with its Subcontracting Plan and FAR 52.219-8" in their individual subcontracting reports and their monthly progress payment requests, when in fact they were not complying because Breslow Construction and other pass

[23] In all citations to cases in this order, internal quotation marks and citations are omitted unless otherwise specified.

throughs were not qualifying small business subcontractors. (Am. Compl. ¶¶ 173-177, 243, 247-248). Plaintiff's claims fail as a matter of law, however, because the certifications defendants made in their individual subcontracting reports were not claims for payment, and defendants did not make the asserted false certifications in their monthly progress payment requests. Finally, plaintiff fails to meet the requirements of an implied false certification. The court addresses each theory in turn below.

i. Individual Subcontracting Reports

Each individual subcontracting report submitted by defendants contains a "certification" that it is "accurate." (E.g., App. 664, 994). That certification, even if a false statement, is not actionable under the FCA because it is not part of a "claim for payment." Grant, 912 F.3d at 196. The individual subcontracting reports are not a "request or demand, whether under a contract or otherwise, for money or property that . . . is presented to an officer, employee, or agent of the United States." Id. (quoting 31 U.S.C. § 3729(b)(2)(A)). It is undisputed that the individual subcontracting reports do not themselves seek a payment of money. (Defs' Stmt. ¶ 127). They also are not submitted as part of the monthly progress payment requests through which defendants sought payment for their work under the Contract. (Defs' Stmt. ¶ 135; see Appendix B).

Plaintiff argues nonetheless that the individual subcontracting reports constitute claims for payment because they are "related" to the claims for payment made in the monthly progress payment requests, and because both relate to the same contract. (Pl's Mem. (DE 286) at 8).[24] The standard, however, is not whether statements made to the government are related to a claim for payment or related to the same contract upon which payment is sought, but rather whether the

[24] For briefs and other documents identified by a docket entry ("DE") number, page numbers in citations are to the page number provided by the court's case management/electronic case filing ("CM/ECF") system, rather than the page number, if any, shown on the face of the document.

statements are "made as part of a false or fraudulent claim." Grant, 912 F.3d at 196 (emphasis added).

Plaintiff cites to United States v. Family Medical Centers of S.C., LLC, No. CV 3:14-382-MBS, 2016 WL 6601017 (D.S.C. Nov. 8, 2016), as an example of a case where the government proceeded on a theory of "express certification," where a defendant physician "executed multiple certification statements in Section 15 of Form CMS-855B indicating that he would adhere to the requirements of Medicare laws, regulations, and program instructions, including, but not limited to, the Stark Law." Id. *3. But the court in Family Medical Centers did not undertake any analysis of the manner in which a claim there was presented for payment, and there is no discussion in the opinion regarding the language in "Section 15 of Form CMS-855B" concerning payment or requests for payment. See id. *2-3. Therefore, Family Medical Centers is not helpful to the instant analysis.

Plaintiff also argues that the court in Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999) ("Harrison I"), "endorses a fraudulent inducement theory of FCA liability, which by its very terms allows a claim of express false certification where that certification is not made with the claim for payment, but well before." (Pl's Sur-Surreply (DE 306) at 7). This is not what Harrison I says. Rather, Harrison I recognized that under a "fraud-in-the-inducement" theory, courts have "found False Claims Act liability for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct." Harrison I, 176 F.3d at 787 (emphasis added). As an initial matter, this theory reinforces, rather than undermines, the key requirement that the false claim or false statement must be one that "cause[s] the Government to

pay out sums of money." Id. at 788. In any event, plaintiffs here do not allege that defendants obtained the Contract itself through false statements or fraudulent conduct.

Plaintiff suggests that his claim under § 3729(a)(1)(B) should be analyzed under a different standard, excluding altogether the requirement of a claim for payment. (See Pl's Sur-Surreply (DE 306) at 7).[25] Plaintiff cites no authority for this approach. While subsection (a)(1)(A) expressly requires a "claim for payment," subsection (a)(1)(B) incorporates by reference the same requirement, by applying to any "false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a) (emphasis added). The court in Grant recognized this when stating that "[i]n order for a false statement to be actionable under either subsection of the FCA, it must be made as part of a false or fraudulent claim." 912 F.3d at 196 (emphasis added).

In sum, the statements in the individual subcontracting reports do not provide a basis for False Claims Act liability.

ii. Monthly Progress Payment Requests

Each monthly progress payment request contains the following certification, which plaintiff asserts provides a basis for False Claims Act liability: "I hereby certify, to the best of my knowledge and belief, that . . . [t]he amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract." FAR 52.232-5(b)(1); (see e.g., App. 26, 3018). Plaintiff asserts that this certification "should be read as an umbrella performance certification of the materials terms of the contract," which includes the requirement of "accurate" individual subcontracting reports. (Pl's Resp. (DE 286) at 5).

[25] Plaintiff also suggests that defendants do not raise any challenge to plaintiff's § 3729(a)(1)(B) claim based upon the element of a claim for payment. (Pl's Resp. (DE 286) at 20). This is not correct. In the first sentence of their argument as to claim for payment, defendants identify both plaintiff's claim under § 3729(a)(1)(A) and § 3729(a)(1)(B). (Defs' Mem. (DE 275) at 5).

Under an express certification theory, "liability for a false certification will lie only if compliance with the statutes or regulations was a prerequisite to gaining a benefit, and the defendant affirmatively certified such compliance." Harrison I, 176 F.3d at 787 (emphasis in original). "[W]here the government has conditioned payment of a claim upon a claimant's certification of compliance with a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation." Id. (emphasis added). The same reasoning applies when the government has conditioned payment on terms and conditions of a contract, such that liability will lie only if compliance with a term or condition is a prerequisite for payment and a defendant certifies compliance with that term or condition. See United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc., 543 F.3d 1211, 1217 (10th Cir. 2008).

Here, the monthly progress payment requests do not identify compliance with the terms and conditions of the Subcontracting Plan or FAR 52.219-8 as a prerequisite of payment and defendants did not certify compliance with those contract terms and conditions. (See, e.g., App. 26, 3018). Therefore, the general certification in the monthly progress payment requests does not provide a basis for False Claims Act liability under an express certification theory.

Plaintiff argues that Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016) ("Escobar"), rejects such a limitation on express certifications. Escobar, however, does not alter the express certification test as expressed in Harrison and Conner. Rather, it recognizes that another theory of certification altogether, the "implied false certification theory" may apply in certain circumstances. See Escobar, 136 S.Ct. at 1996. In particular, the court held that "False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment." Id.

"Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment." Id. The court addresses in the next section whether plaintiff has met the requirements for an implied false certification theory, as described in Escobar.

iii. Implied Certification

Under an implied certification theory, "liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement." Id. at 1995.

> The implied certification theory can be a basis for liability, at least where two conditions are satisfied: first, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and second, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Id. at 2001. For example, in Escobar, "by submitting claims for payment using payment codes that corresponded to specific counseling services, [the defendant] represented that it had provided individual therapy, family therapy, preventive medication counseling, and other types of treatment." Id. at 2000. Any one apprised of such representations "would probably—but wrongly—conclude that the clinic had complied with core Massachusetts Medicaid requirements," related to staff training and qualifications, and "basic staff and licensing requirements." Id. (emphasis added). Failure to disclose defendant's violations of those requirements made defendant's claims for payment "misrepresentations." Id. at 2000-01.

Similarly, the United States Court of Appeals for the Fourth Circuit has stated that Escobar "made clear that it was targeting omissions that 'fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations.'" United States v. Triple Canopy, Inc., 857

F.3d 174, 178 (4th Cir. 2017) (quoting Escobar, 136 S. Ct. at 2000). In Triple Canopy, Inc., the defendant contractor "knew its 'guards' had failed to meet a responsibility in the contract," qualification in marksmanship, which the court deemed a "core contract requirement[]" in a contract for armed security services. 857 F.3d at 178.

Here plaintiff's claims fail at the second prong of the implied certification test. In particular, while the monthly progress payment requests make specific representations about the work provided, defendant did not fail to disclose noncompliance with material statutory, regulatory, or contractual requirements that make its representations in its claims for payment misleading half-truths. Small business certifications in individual subcontractor reports are neither "core" nor "basic" requirements of the work provided under the Contract, in the manner that staff training and licensing requirements are core and basic requirements of providing counseling and treatment in a Medicaid facility, Escobar, 136 S. Ct. at 2000, nor in the manner that shooting straight is a core and basic requirement of providing security in a warzone. Triple Canopy, 857 F.3d at 178.[26]

Thus, plaintiff's claim premised upon an implied certification theory fails as a matter of law. In sum, plaintiff fails to demonstrate a genuine issue of material fact that defendant made a false claim for payment, requiring dismissal of plaintiff's first three claims under the False Claims Act.

b. Materiality

In addition, and in the alternative, plaintiff fails to demonstrate a genuine issue of fact as to the element of materiality.

[26] Plaintiff suggests that defendants made additional representations in responding to the government's request for information on defendants' good faith effort to comply with the subcontracting plan. (Pl's Mem. (DE 286) at 11 n.7 (citing App. 2022-2499). But, that response is not a claim for payment, and it thus does not meet the first prong of the Escobar implied certification test. See Escobar, 136 S. Ct. at 2001.

"[T]he term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Escobar, 136 S. Ct. at 2002 (quoting 31 U.S.C. § 3729(b)(4)). "[M]ateriality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." Id. "[C]oncerns about fair notice and open-ended liability can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements." Id. "Those requirements are rigorous," and "[t]he materiality standard is demanding." Id. at 2002-03.

"The False Claims Act is not an all-purpose antifraud statute, or a vehicle for punishing garden-variety breaches of contract or regulatory violations." Id. at 2003. "A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." Id. "Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance." Id. "[W]hen evaluating materiality under the False Claims Act, the Government's decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." Id.

"[A] misrepresentation is material if it concerns a matter to which a reasonable person would attach importance in determining his or her choice of action with respect to the transaction involved." Id. at 2003 n.5 (emphasis added). "Materiality . . . cannot be found where noncompliance is minor or insubstantial," but rather a misrepresentation may be material "if it went to the very essence of the bargain." Id. at 2003 & n. 5.

"[P]roof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." Id.

"Conversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." Id. "Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material." Id. at 2003-04.

In this case, defendants' asserted misrepresentations are not material due to a combination of multiple undisputed facts. First, the government did not expressly identify compliance with the Subcontracting Plan and FAR 52.219-8 as a condition of payment. Rather, each application for payment notably is focused on the "work" completed. (E.g., App. 3013-3019). Each application for payment certifies "the work covered by this Application for Payment has been completed in accordance with the Contract Documents." (E.g., App. 3013). Likewise, each application certifies that "[a]s-built drawings are current, and the work for which this payment is requested, including stored material, are in compliance with contract requirements." (E.g., App. 3033; McHenry Aff. ¶10 (App. 3)). A "continuation sheet" to each submission includes a table showing "Description of Work," "Work Completed," and "Balance to Finish." (E.g., App. 22, 3015).

The FARs incorporated into the Contract reinforce this focus: "The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer." FAR 52.232-5(b) (emphasis added).[27] The Contractor's request for progress payments must include substantiation "related to the various elements of work required by the contract covered by the payment requested." FAR 52.232-5(b)(1) (emphasis added). Likewise, "[a]ll work . . . is subject to

[27] "Work" is defined in the FAR to include "materials, workmanship, and manufacture and fabrication of components." FAR 52.246-12(a).

Government inspection . . . before acceptance to ensure strict compliance with the terms of the contract." FAR 52.246-12(b) (emphasis added). In sum, monthly progress payments are premised upon physical construction work, not upon the reporting of compliance with small business targets.

Second, and by contrast, it is critical to materiality that the Subcontracting Plan and individual subcontracting reports are submitted and evaluated separately, in accordance with different administrative rules and procedures. The Subcontracting Plan is, on its face a "plan," showing "Total dollars planned to be subcontracted to small business concerns." FAR 52.219-9(c), (d)(2) (emphasis added). It includes "targets . . . proposed for the total contract." (App. 542) (emphasis added). The individual subcontracting reports are submitted periodically "so that the Government can determine the extent of compliance" with the Subcontracting Plan. FAR 52.219-9(d)(10)(ii) (emphasis added). They are not timed to coincide with monthly progress payment requests, but rather only twice per year. (App. 546). In contrast with monthly progress payment requests, the individual subcontracting reports do not identify work performed, particular types of subcontracts, or particular subcontract amounts. (Defs' Stmt. ¶¶ 132, 137).

Third, the certification in the individual subcontracting reports, and the consequences of certification are much different from the certification in the monthly progress payment requests. The subcontracting report certification is one of accuracy, and, if a contractor selects "No" to this certification, the "report will be rejected." (App. 994; see McGraw Dep. 151 (App. 1342)). In other words, that does not mean work will stop, or that progress payments will stop, but rather it is a consequence related to the Subcontracting Plan.

Relatedly, the consequence for failure to comply with the Subcontracting Plan goals is assessed "at contract completion," in accordance with an administrative procedure for determining whether a contractor "failed to make a good faith effort to comply with its subcontracting plan."

FAR 52.219-16(b). The FAR provides a process for "written notice" to the contractor, with opportunity for the contractor to respond and "to discuss the matter." FAR 52.219-16(c). The contracting officer must make a decision "after consideration of all the pertinent data," and may then assess "liquidated damages" in "an amount equal to the actual dollar amount by which the Contractor failed to achieve each subcontract goal." FAR 52.219-16(b). The Contractor further has a right to appeal any such final decision. FAR 52.219-16(e). Again, notably, this is not tied to work performance under the Contract, nor to deduction, retention, or return of progress payments.[28]

Fourth, the history of the government's actual payments made in this case, as well as the government's subsequent contracting relationship with defendants further precludes a determination of materiality. After plaintiff commenced this action on December 22, 2011, defendants submitted two progress payment requests in 2012, and the government paid them in full, in the aggregate amount of $9,334,584.64. (App. 1440). After an indictment was filed on February 11, 2014, charging Breslow with using Breslow Construction as a sham small business, and a criminal information was filed on February 14, 2014, charging Valdini Law Firm with aiding in the scheme, defendants submitted, and the government accepted, two individual subcontracting reports in 2014. (Id.; App. 681-688). Both of those reports disclosed the error in classification of Breslow Construction, and disclosed that defendants were not meeting their Small Business Plan goals. (App. 681-688).

Then, notably, despite the criminal charges filed and the government's completion of its intervention determination in the instant case, defendants submitted and the government paid

[28] In contrast, regulations governing monthly progress payments include their own criteria for withholding payment: "[I]f satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved." FAR 52.232-5(e).

invoices on March 20, 2015, in the amount of $145,900.00, and on March 23, 2016, in the amount of $5,000.04. (App. 1440). Although these payments were very small in comparison to the total contract payments over time, in the aggregate of $194,731,380.97, it is nonetheless an additional materiality factor that these invoices were paid despite the errors in the individual subcontracting reports.

Likewise, it is further confirmation of non-materiality that the government actually proceeded in accordance with the parallel track administrative process for scrutinizing compliance with the Small Business Plan, by evaluating defendants' good faith effort to comply in 2015, rather than taking some other action regarding payments made or due under the Contract. (Defs' Stmt. ¶¶ 182-185). This factor is augmented by the undisputed fact that since 2012, the government has awarded more than 35 construction contracts to Caddell, including approximately 17 projects since the government decided not to intervene in this case. (Defs' Stmt. ¶ 193). Since March 2012, the government has awarded seven construction projects to Yates, one of which is a NAVFAC contract. (Defs' Stmt. ¶ 194); cf. Triple Canopy, 857 F.3d at 179 (noting factor for materiality that the government "did not renew its contract for base security with Triple Canopy and immediately intervened in the litigation").

Fifth, it is a factor precluding a determination of materiality that defendants did not violate "a requirement that the defendant[s] know[] is material to the Government's payment decision." Escobar, 136 S. Ct. at 1996 (emphasis added). In particular, there is no evidence that defendants knew that certification of compliance with the Subcontracting Plan and FAR 52.219-8 was material to the government's decision to make monthly progress payments under the Contract. There is likewise no evidence that any government officer told defendants otherwise, or that defendants should have believed otherwise, particularly given the other four objective materiality

factors as identified herein. To the contrary, McGraw testified: "based on my experience dealing with contracting officers, . . . pay applications [and] . . . performance" were "not tied to the [subcontracting] plan, and it was evaluated separate and apart." (App. 1325). McHenry testified: "[b]ased on my experience and knowledge, it is my belief and understanding that the Subcontracting Plan and its [individual subcontracting] reports have nothing to do with the request for payments submitted to the Government." (App. 3). He also testified: "I did not understand and had not reason to believe the . . . certification language [in the monthly progress payment requests] applied to or had anything to do with the Subcontracting Plan, compliance with that Plan or the [Individual Subcontracting Reports]." (App. 4).

For purposes of this materiality factor, the court does not undertake a determination that McGraw's or McHenry's understanding was correct for purposes of this factor, only that from their subjective standpoint, that is what they understood or had reason to understand to be the significance of the monthly progress payment requests, in contrast to separate certifications made for the individual subcontracting reports. In this respect, the Subcontracting Plan was not so obviously material to payment in the way that guns that "do not shoot" or "guards that cannot shoot straight" were in the examples highlighted in the following excerpts of Escobar and Triple Canopy:

> A defendant can have 'actual knowledge' that a condition is material without the Government expressly calling it a condition of payment. If the Government failed to specify that guns it orders must actually shoot, but the defendant knows that the Government routinely rescinds contracts if the guns do not shoot, the defendant has 'actual knowledge.' Likewise, because a reasonable person would realize the imperative of a functioning firearm, a defendant's failure to appreciate the materiality of that condition would amount to 'deliberate ignorance' or 'reckless disregard' of the 'truth or falsity of the information' even if the Government did not spell this out.
>
> Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight.

Triple Canopy, 857 F.3d at 179 (emphasis added) (quoting Escobar, 136 S. Ct. at 2001-02).[29]

Plaintiff argues that defendants' representation of compliance with the Subcontracting Plan is material because the Contract expressly declared that the Subcontracting Plan is a "material part" of the contract. (Pl's Mem. (DE 286) at 13; see Pl's Sur-surreply (DE 306) at 10). But, the fact that the Subcontracting Plan is a "material part" of the contract is not the same as a determination that compliance with the Subcontracting Plan is material to each decision by the government to pay, which is "the transaction involved" with each monthly progress payment request. Escobar, 136 S.Ct. at 2003 n.5. As the foregoing analysis demonstrates, compliance with the Subcontracting Plan is important to the individual subcontracting reports and determination of whether targets have been met in good faith upon completion of the contract. Such compliance is not tied, however, in any respect to the government's decision to pay in response to monthly progress payment requests. Plaintiff's argument thus fails to address the key requirement of materiality to "the payment or receipt of money." Id., at 2002 (quoting 31 U.S.C. § 3729(b)(4)).

Plaintiff cites to a "Presumed Loss Rule," set forth in the Small Business Jobs Act of 2010, 15 U.S.C. § 632(w)(1), and cases applying it, as an indication of materiality. That statute provides, in part:

> In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern

[29] Defendants suggested in their initial brief in support of summary judgment that an additional factor against a determination of materiality was that the government made payments "with knowledge that [defendants] used small businesses as first-tier subcontractors to administer work performed by lower-tier large businesses," in reference to plaintiff's allegation of a pass-through scheme. (Defs' Mem. (DE 275) at 13). The court does not rest its materiality determination on the government's knowledge of defendants' use of pass-through entities. Rather, the court addresses the government's knowledge of pass-throughs in addressing the element of defendants' scienter.

> other than a small business concern willfully sought and received the award by misrepresentation.

15 U.S.C. § 632(w)(1). While this statute illustrates the importance of small business contracting to the government, and the extent of damages that may be recouped by the government in the event of a failure of compliance with small business requirements, the statute does not advance the analysis of materiality for purposes of a False Claims Act claim. Two circuit court cases cited by plaintiff, United States v. Leahy, 464 F.3d 773, 778 (7th Cir. 2006), United States v. Blanchet, 518 F. App'x 932, 956-57 (11th Cir. 2013), are inapposite because they apply the presumed loss rule in the context of sentencing calculations in criminal prosecutions for fraud, not False Claims Act cases.

Two unpublished district court cases cited by plaintiff are instructively distinguishable and lack helpful analysis of materiality. In United States ex rel. Lardner v. Smith & Nephew Inc., No. 217CV02013JPMEGB, 2018 WL 7050835 (W.D. Tenn. Sept. 17, 2018), plaintiff alleged in a complaint that a defendant medical equipment manufacturer used a "sham small business non-manufacturer to procure federal contracts." Id. at *1. The sham small business "submit[ted] a product quotation and collect[ed] payment from the purchasing government agency before transmitting most of those funds" to the defendant. Id. There, the court's analysis of materiality linked the award of small business procurement contracts to the payment of government funds for each. Id. at * 5. Here, by contrast, the initial award of the Contract is not the basis of plaintiff's claim, giving rise to the need to evaluate the materiality of the certification of Subcontracting Plan compliance to the payment of monthly progress payment requests.

The second district court case cited by plaintiff, United States ex rel. Savage v. Washington Closure Hanford LLC, No. 2:10-CV-05051-SMJ, 2017 WL 3667709 (E.D. Wash. Aug. 24, 2017), is inapposite for two reasons. First, the government brought claims there not only for False Claims

Act violations, but also for breach of contract, unjust enrichment, and payment by mistake. Id. at *2. This illustrates well that if the government asserts it did not receive the value for which it contracted, it may seek damages directly for breach of contract. Second, the court's analysis only addressed the issue of damages available for all of the asserted claims, see id. at *4, which is not the issue presented by the materiality element of a False Claims Act claim.

Plaintiff also argues that materiality is demonstrated by the felony prosecutions of Breslow and the Valdini Law Firm for making false statements in certifications of compliance with Small Business Act regulations. The seriousness of the misrepresentations caused by Breslow and the Valdini Law Firm is not in question. The fact that Breslow and Valdini Law Firm were charged with felonies for this conduct, however, detracts from rather than adds to a determination of materiality of defendants' certification of compliance with the Subcontracting Plan to payment. In particular, despite the government's awareness that the whole subcontract with Breslow Construction was tainted by serious fraud, this did not trigger a stop in payments, or demand for repayment of progress payments, or intervention in the instant case. Rather, it triggered the administrative process of evaluating whether defendants made good faith efforts to comply with the Subcontracting Plan.

In sum, due to the combination the foregoing multiple factors, plaintiff fails to establish a genuine issue of fact as to the element of materiality.

c. Scienter

In addition, and in the alternative, plaintiff fails to establish a genuine issue of fact as to the element of scienter.

Under the False Claims Act, the terms "knowing" and "knowingly" –

(A) mean that a person, with respect to information –
(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or
(iii) acts in reckless disregard of the truth or falsity of the information; and
(B) require no proof of specific intent to defraud[.]

31 U.S.C. § 3729(b). As noted previously, the False Claims Act's "scienter requirements . . . are rigorous." Escobar, 136 S. Ct. at 2002 (citing United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1271 (D.C. Cir. 2010) ("SAIC")). "Establishing knowledge . . . requires the plaintiff to prove that the defendant knows . . . that it violated a contractual obligation . . . based on the proper standard for knowledge—which . . . excludes collective knowledge." SAIC, 626 F.3d at 1271. "This 'collective knowledge' doctrine would allow a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds." Harrison II, 352 F.3d at 918.

"Congress clearly had no intention to turn the FCA, a law designed to punish and deter fraud, into a vehicle for . . . imposing a burdensome obligation on government contractors rather than a limited duty to inquire." SAIC, 626 F.3d at 1274. "Although Congress defined 'knowingly' to include some forms of constructive knowledge, its definition of that term imposes liability for mistakenly false claims only when the defendant deliberately avoided learning the truth or engaged in aggravated gross negligence." Id. at 1274-75.

With these general principles of law in mind, the court considers in turn below the two categories of false claims asserted by plaintiff: 1) those arising from categorizing Breslow Construction as a small business, and 2) those arising from treating "pass-through" subcontracts as small business subcontracts.

i. Breslow Construction

Plaintiff's claim premised upon categorizing Breslow Construction as a small business do not meet the standard of scienter because there is no genuine issue of fact that defendants obtained self-certifications from Breslow Construction and its attorney, and defendants relied upon those self-certifications in good faith.

In particular, the FAR expressly provide that "a contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a . . . . woman-owned small business concern." 48 C.F.R. § 19.703(b) (2008). McGraw obtained just such a certification in this case from Breslow Construction, acting on behalf of defendants in preparing the individual subcontracting reports for the Contract. On October 7, 2009, Ridgway executed for defendants the Ridgway Self-Certification Letter, certifying Breslow Construction as a women-owned small business. (Defs' Stmt. ¶ 108). McGraw relied upon Ridgway's self-certification that Breslow Construction was a women-owned small business in preparing the individual subcontracting reports that included Breslow Construction subcontract amounts in its percentages and totals. (McGraw Dep. 149 (App. 1341)).

The provision allowing reliance on such a self-certification form in "good faith" did not require further inquiry on the part of McGraw, McHenry, or any other employee of defendants, in light of the circumstances presented. As an initial matter, the False Claims Act knowledge standard, even before consideration of the standard in FAR 19.703, encompasses a "limited duty to inquire." SAIC, 626 F.3d at 1274. The "good faith" standard in FAR 19.703, reinforces the limited nature of inquiry required under the circumstances. Although not defined in FAR 19.703, good faith commonly is defined as a "state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of

fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." Good Faith, Black's Law Dictionary (10th ed. 2014).

Further, while the False Claims Act's "scienter requirement requires no proof of specific intent to defraud," the court must "presume that Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary." Escobar, 136 S. Ct. at 1999 n.2; see id. (citing Restatement (Second) of Torts § 529 (1976)). Among other principles of tort law governing fraudulent misrepresentations, "[t]he recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." Restatement (Second) of Torts § 540 (1977) (emphasis added). By contrast, "[t]he recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." Id. § 541 (emphasis added).

Here, a combination of undisputed facts demonstrate as a matter of law that McGraw undertook sufficient steps on behalf of defendants to meet a standard of good faith reliance on the Breslow Construction self-certification forms. First, she relied upon the certification forms in the regular course of her duties for defendants. There is no genuine dispute that, to gather information to prepare the individual subcontracting reports, McGraw required each subcontractor to deliver to her a form styled "Small Business Concern Self-Certification." (Pl's Stmt. (DE 106) ¶ 106).

Second, the form she required subcontractors to sign was informative and included warnings to ensure subcontractor honesty. The form requires a subcontractor to indicate any socio-economic classifications applicable, and to "acknowledge[] that Caddell Yates Joint Venture will rely on the accuracy of the information." (App. 797). It also includes a warning that "[u]nder 15

U.S.C. 645(d), any person who misrepresents its status may be subject to" criminal sanctions. (Id.; McGraw Dep. 147 (App. 1339)).

Third, the specific response McGraw received from Breslow Construction, in the Ridgway Self-Certification Letter, was complete and gave no obvious indicia of unreliability or fraud. All sections were completed, and it was signed and clearly labeled with Ridgway's name and title, "Controller," followed by the date, October 7, 2009. (App. 797). There are no suspicious markings. The term "not certified" is handwritten next to the checked selection for "Women-Owned Small Business," providing further indication that the person who filled out the form was interested in portraying information on the form accurately and completely. (Id.).

Fourth, McGraw testified: "I understood that Yates in good faith could rely on the four corners of a document that was signed by someone with signatory power certifying that their business was, in fact, small." (App. 1333). In this respect, McGraw's subjective understanding of the importance of the self-certification is an additional factor precluding a determination that defendants were relying in bad faith on the self-certification of Breslow Construction.

Fifth, McGraw also testified, separately: "I understood that Mr. Pompano – or Mr. Canitano had an attorney, and so I would not be providing him with whether or not he is small." (App. 1332). McGraw testified that she was not aware of Breslow Construction until the individual subcontracting reporting period in October 2009, and she was not aware that Breslow Construction was the entity that was subject of prior communications between McHenry and Canitano. (App. 1327).

Similar factors compel a determination that McHenry relied in good faith on the Valdini Self-Certification Letter. On July 17, 2009, Canitano and McHenry exchanged emails regarding the benefits of consulting with counsel regarding certification. (App. 635). They further involved

McGraw in ensuring the types of information that would be required. (Defs' Stmt. ¶ 87). McGraw provided references to Canitano, including FAR 19.703(b). (Id.). The Valdini letter is formal and precise, and it includes supporting documentation. (App. 637). It is significant that the certification is one by an attorney, particularly one who held himself out as an expert in construction law, one who had at least one other attorney working with him, and one who had received warnings about the FAR provisions. (Defs' Stmt. ¶¶ 30-32, 91; App. 800-801). McHenry had known that Valdini had provided counsel to Pompano since February 2009. (Defs' Stmt. ¶ 87). There were thus no red flags about the competence or motives of Valdini. Based on the contents and context of this certification, there was no reason to doubt it or to conduct further inquiry into its accuracy.

Further, according to plaintiff, McHenry had suggested an attorney certification, "saying its okay" and "to get the right thing," wanting "additional protection." (Defs' Stmt. ¶ 84). McHenry testified he understood Breslow Construction "had hired an attorney that was well versed in government and contract law that was working on this. And that as long as they followed the small business regulations and do a self-certification then that that meets, you know, the requirements for the program." (App. 1397). McHenry testified: "I did not have any concerns about it, because at the time they were going through dealing with knowledgeable people, experts in this field, to set that up and do that correctly." (App. 1396-7).

In sum, both the Ridgway Self-Certification Letter and the Valdini Self-Certification Letter in themselves, based upon their content and context, preclude a determination of scienter on the part of defendants.

Plaintiff suggests that communications and circumstances preceding the Ridgway Self-Certification Letter and the Valdini Self-Certification Letter establish a genuine issue of material

fact as to whether defendants knew or should have known their small business certifications were false due to affiliation between Breslow Construction and Pompano Masonry. For example, plaintiff asserts that, in February 2009, defendants "knew that [] Breslow was the owner of Pompano Masonry; it received corporate structure documents showing this." (Pl's Mem. (DE 286) at 21 (citing App. 606-607)). Further, "[w]hen Breslow Construction was incorporated in June 2009, [defendants] knew that Breslow and Pompano had created it." (Id. (citing App. 1503-1504)).

These assertions, however, do not account for the determinative significance of the self-certification letters. Regardless of the information previously received by defendants about Breslow Construction and Pompano Masonry, and the individuals involved in creation of Breslow Construction, the self-certification letters by their contents and context provide a basis upon which defendants could rely in good faith in making Small Business certifications. McHenry and McGraw at the time had no reason to believe that Pompano Masonry's lawyers were incompetent or corrupt, or that Pompano Masonry and its lawyers had not worked through applicable affiliation rules. Possible prior affiliations between Pompano Masonry and Breslow Construction do not create an inference of bad faith, where the FAR provide that a newly formed business can rebut affiliation with an existing large company, and the affiliation rules are complex. See, e.g., 13 C.F.R. § 121.103.

Plaintiff also asserts that defendants "pressured Pompano [Masonry] to bring forth a small business entity," in May and June 2009 (Pl's Mem. (DE 286) at 22). Plaintiff cites, for example, defendants' delay in paying invoices to Pompany Masonry for work completed on the Project in May and June 2009 for this purpose. (Id.). Such pressure, however, does not tend to show that defendants knew or should have known Pompano Masonry was going to create an illegitimate or

sham small business. (See, e.g., App. 1278 (plaintiff stating, in testimony of McHenry: "Sham? No, he didn't mention that word. That's my word.")).

Plaintiff also cites internal communications by defendants' employees as evidence of scienter. For example, on September 14, 2009, Clint Bledsoe ("Bledsoe") sent Lisa Stokes an email, in response to her inquiry about payment of invoices, stating "It's all masonry work. Breslow is Pompano." (App. 1505). On June 15, 2010, Lisa Stokes sent McHenry an email stating: "I was told Breslow & Pompano were the same when I asked about joint checks." (App. 1492). These, however, are in the context of emails about accounting for payment, and not certification of Breslow Construction as a small business. Moreover, these statements lack probative value for scienter, on the issue of small business certification, where they do not take into account the Valdini and Ridgway self-certification letters.

Plaintiff further suggests that the "pass-through" relationship between Breslow Construction and Pompany Masonry should have alerted defendants that Breslow Construction was a sham entity and not a legitimate small business. (Pl's Mem. (DE 286) at 23). But, defendants had reason to believe that "pass-through" arrangements were acceptable to the government, as set forth in the next section of this order. Accordingly, the pass-through relationship does not undermine defendants' good faith reliance on the Valdini and Ridgway self-certifications.[30]

In sum, because of the undisputed facts concerning the contents and context of the Valdini and Ridgway self-certifications, plaintiff fails to establish a genuine issue of material fact on the element of scienter as it pertains to Breslow Construction.

[30] Plaintiff cites to a December 9, 2013, American Arbitration Association award (App. 1447-1462), for the proposition that "the parties lied to the arbitrators about the fact that Breslow was a sham company." (Pl's Mem. (DE 286) at 23). The award of the arbitrators, however, does not state that the parties lied about the fact that Breslow was a sham company. (See App. 1447-1462). In any event, such a suggestion in the award would be inadmissible hearsay.

ii. Pass-Through Subcontracts

Plaintiff asserts that defendants made false certifications of compliance with the Small Business plan by treating "pass-through" subcontracts as small business subcontracts. Plaintiff's claims premised upon such pass-through subcontracts, however, fail as a matter of law on the element of scienter.

As an initial matter, plaintiff has not demonstrated a genuine issue of material fact that defendants knew or should have known certifications based upon pass-through subcontracts were false, because their classification under the terms of the Contract and the FAR was unsettled. "It is well-established that the FCA requires proof of an objective falsehood." United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 377 (4th Cir. 2008). "As a result, mere allegations of poor and inefficient management of contractual duties are not actionable under the FCA." Id. "Likewise, imprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA." Id.

Here, the Contract, including the Small Business Plan and the Contract's other incorporated FAR provisions, do not mandate self-performance by small business subcontractors. The Contract expressly incorporates the full text of FAR 52.236-1, which provides that "[t]he Contractor shall perform on the site . . . work equivalent to at least 20% percent [sic] of the total amount of work to be performed under the contract." (App. 586) (emphasis added). The Contract is silent, by contrast, regarding self-performance by subcontractors. (App. 577-579).

Plaintiff suggests that each subcontractor was mandated to have self-performed at least 20% of the total amount to be performed under their subcontract, because defendants included in each subcontract the following statement: "Subcontractor is mandated to comply with the Contract Award listed in Attachment 'C' Dated January 30, 2009, which includes but is not limited to Davis

Bacon Wage Determinations and Federal Acquisition Regulation (FAR) Section – 52." (Pl's Stmt. ¶ 47). Plaintiff suggests that each subcontractor therefore also was required to comply FAR 52.236-1, and perform at least 20% of the work under each subcontract. But, this is far from the only reasonable interpretation of the Contract or the FAR. Where the contract incorporates 104 provisions of the FAR by reference, as well as a provision expressly applicable to the Contractor, it is reasonable to interpret the Contract as being silent as to requirements for subcontractor performance requirements for each subcontract.

Plaintiff argues that a Small Business Administration "Handbook for Small Business Liaison Officers," dated January 2005, demonstrates scienter, where it states the following, in an Appendix of "Frequently Asked Questions" (FAQ):

> **29. Q. A small business approached our company with an innovative idea. This consulting firm, which received various federal certifications, i.e. HUBZone, etc., has proposed to us that we issue subcontracts to his company and he in turn will forward the procurement to an appropriate member of his consortium for processing. The prime contractor will then be able to take credit for doing business with a certified small business.**
>
> A. This arrangement is merely a pass-through which adds little or no value to the procurement. It does not comport with the spirit or intent of the subcontracting program.

(App. 1669). As a threshold matter, it is not clear the pass-through described in the question is analogous to those used by defendants, where the question does not mention a 1% or 2% fee. The FAQ provides, moreover, that "[t]hese questions and answers provide guidance to prime contractors but are not intended to replace regulations." (App. 1661). As such, they are not binding authority on interpretation of the Contract or the FAR. "[N]on-authoritative guidance generally 'is not enough to warn a regulated defendant away from an otherwise reasonable interpretation' of a regulation for purposes of establishing FCA scienter." United States ex rel.

Complin v. North Carolina Baptist Hosp., 818 F. App'x 179, 184 n.6 (4th Cir. 2020) (quoting United States ex rel. Purcell v. MWI Corp., 807 F.3d 281, 290 (D.C. Cir. 2015)).

In any event, the court need not determine as a matter of law whether the Contract did or did not require subcontractors to perform at least 20% of the work under each subcontract, but rather only whether defendants' knew or should have known that it did. See Wilson, 525 F.3d at 377. "Consistent with the need for a knowing violation, the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation." Complin, 818 F. App'x at 184 (quoting Purcell, 807 F.3d at 287-288). This "is especially true [as] here, where there is regulatory ambiguity." Id.[31]

In some cases, "evidence that a defendant was 'warned away' from its interpretation of an ambiguous regulation may suffice to show 'knowledge' of falsity" under the False Claim Act. Id. In this case, however, there is not evidence that defendant was "warned away" from interpreting its Contract and the FAR to allow pass-through subcontracts. Rather, defendants disclosed both the concept of pass-through subcontracts to the government, and specific pass-through subcontracts to the government, but received no warning away from this approach.

With respect to the concept of a pass-through, Smith emailed Jerry T. Williams ("Williams"), and other government contract officers, on May 21, 2009, describing a proposed "approach on the electrical subcontracts," under which defendants "contract with a Native American Small Business electrical contractor as the electrical construction manager." (App. 716).

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[31] Plaintiff cites United States ex rel. Tran v. Computer Scis. Corp., 53 F. Supp. 3d 104, 121 (D.D.C. 2014), where the court rejected a defendant contractor's argument that a "pass-through scheme is unquestionably proper." As discussed in the text above, the court's analysis does not rest upon a determination that the pass-throughs were unquestionably proper. Moreover, Tran is instructively distinguishable. There, the court noted, for purposes of a motion under Federal Rule of Civil Procedure 12(b)(6), that under the alleged Subcontracting Plan there alleged, "the Small Business must actually perform the work described in the subcontracting plan—the work cannot be performed by a second tier subcontractor or by an entity that is not a Small Business." Id. at 111.

"The Native American small business electrical subcontractor, will, in turn, subcontract the work to multiple electrical subcontractors, one of them being a Yates affiliated company." (Id.) (emphasis added). "The Native American small business will have the responsibility for the execution of the entire electrical scope of work, as the electrical construction manager." (Id.). In this respect, Smith described a scenario involving a pass-through of work from a small business subcontractor to a large business. Williams forwarded this description to Joseph McGrenra ("McGrenra"), a NAVFAC deputy for small business, for guidance, noting defendants "can not meet the small business requirements with a large business performing the electrical [and] they are trying to provide a solution to meet the goals established in their contract." (App. 511). McGrenra responded, noting, inter alia, "[a]s long as the Native American Small Business is a Small Business, they can count that as subcontracting." (App. 511). Finally, Williams circles back to Smith, and McHenry, and others with defendants, that "what you proposed will be acceptable," without further comment. (Id.).

Plaintiff suggests that the foregoing example is not probative because it involves a different pass-through arrangement than those with a 1% or 2% fee, and it is limited to electrical contractors, and defendants did not suggest other pass-through arrangements in the foregoing example. These differences, however, are beside the point that defendants discussed the concept of a pass-through arrangement with the government and they received approval, rather than warnings, to use a pass-through arrangement. The foregoing example also illustrates that defendants sought guidance from the government to come up with "a solution to meet the goals established in their contract," (App. 511), where existing large business subcontractors would not enable achievement of those goals. Such dialogue with the government is probative of a lack of scienter. See United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 289 (4th Cir. 2002) ("[T]he

government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation."); United States ex rel. Spay v. CVS Caremark Corp., 875 F.3d 746, 756-57 (3d Cir. 2017) ("Generally, where the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.").

In addition, defendants submitted numerous change order pricing proposals for NAVFAC review and approval showing that first-tier small businesses were further subcontracting the work to second tier-large businesses. (McHenry Aff. ¶¶ 28-34 (App. 8-14)). These proposals in plain view included cover letters from the first tier small businesses showing the 1% to 2% fee or price difference, followed by the second-tier large business work descriptions and charges. (E.g., App. 36-37, 40-41, 44-45, 47-48, 50, 53-54, 56-57, 73-74, 75-77, 80-81, 83-85, 87-88, 90-91, 95-96, 101-103, 109-110, 117-118, 120-121, 122-124, 186-187, 198-199, 261-262, 307-309, 338-339, 407-408, 454-455, 498-501). On some occasions, these proposals expressly disclosed the first-tier small business "management fee" of 1% or 2% of the large business subcontractor labor and work pricing. (E.g., App. 44, 47, 53, 56-57, 62, 65, 73, 87, 120, 265, 454). In other instances, the 1% to 2% fee was described as an added value such as "profit and overhead," "OH&P," or "handling fee," or not described at all. (E.g., App. 36, 40, 76, 80, 84, 87, 109, 123, 286, 308, 330, 365, 498). These change order pricing proposals were transmitted to the government, and were among the topics discussed at weekly meetings between McHenry and NAVFAC construction managers and project managers, including Walton and Patton. (App. 8; e.g., App. 51-57, 58-59, 67, 104-108, 112-113, 152-155, 255-262, 323-325, 382, 441-446, 503). There is no evidence these officials objected or raised issue with these arrangements, and these change orders were paid to include the

fees for small business's participation together with the large business subcontractor's work and labor. (App. 14; e.g., App. 116, 252-253, 290, 382, 515-516, 721).

For example, on one occasion, Patton responded to a change order request stating: "I don't take any exception to the unit prices, etc., but I'm not sure why we would pay for 1328 locks when there are only 1312 doors . . . I redid the calculations using the given unit prices and standard mark-ups and came up with $81,624 . . . I am going to move forward with executing the modification at this price." (App. 245) (emphasis added). The proposal submitted showing 1328 locks included a "2% Management Fee" of First Construction, as well as the description by second tier subcontractor C.H. Edwards immediately following without the markup. (App. 253-254).[32]

In addition, McHenry testified, "on several occasions I met with the NAVFAC Small Business Representative" who was Kim Valone ("Valone"), "to show her our approach to subcontracting with small businesses that in turn would further subcontract all the work to large businesses." (McHenry Aff. ¶ 21 (App. 6)). According to McHenry:

> These discussions included the names of the subcontractors, the various subcontract amounts, and that the small business subcontractor would be involved in contract administration and was expected to have an onsite representative while further subcontracting all the labor and work to second tier large businesses. The purpose of these meetings was to explain how [defendants] would achieve the small business subcontracting goals in order to be sure NAVFAC did not have any concerns or issues with the small business receiving a 1 to 2% fee and further subcontracting all labor and work to a large business. The Small Business Representative did not have any issues with that approach and did not indicate there was anything improper about that above approach.
>
> A true and correct copy of an email I sent to NAVFAC concerning one of these meetings is attached hereto as Exhibit B. This email string was created in the

[32] Plaintiff objects to defendants' citation to this example in their response to plaintiff's surreply, on the basis that defendants asserted it "for the first time." (Pl's Sur-Surreply (DE 306) at 9). Defendants, however, relied in their initial brief in support of summary judgment upon the entirety of the change order submissions and responses as described and summarized in the McHenry affidavit, which submissions include the example discussed in the text above. (Defs' Mem. (DE 275) at 24).

> regular course of business at the time indicated and stored and maintained in the regular course of business in the electronic files of Yates.
>
> From these discussions, I knew NAVFAC, including its Small Business Representative, knew that [defendants were] subcontracting with these (5) small businesses (identified in paragraph 18 above) who received a 1 to 2% fee and further subcontracted all the labor and work to large businesses. I also knew NAVFAC and the Small Business Representative had no questions, concerns or objections and approved of the way this was done.

(McHenry Aff. ¶¶ 21-22 (App. 6-7)). The email referenced as Exhibit B in McHenry's testimony is an October 5, 2009, email from McHenry to Walton, construction manager for NAVFAC, stating:

> We met with Kim [Valone] today and she was very helpful. She mentioned that we needed to share the [Small Business Administration] plan with Jerry [Williams, government supervising contract officer]. Is there any way we could come by tomorrow and review it with the two of you? It might come up (probably will) on Wednesday and I would feel better if we could explain it in person before hand.

(App. 29).

In addition, McHenry testified:

> [W]e basically carried our small business program over and showed what we were doing and trying to . . . [meet] a 77 percent goal. . . . And in doing so we wanted to make sure that we complied with the requirement. So on several occasions we met with [Valone] . . . to get her guidance and direction on what we were doing and to make sure that she didn't see anything that was out of line or incorrect.

(App. 1356). McHenry explained to Valone "that [they] had a bridge contractor that was working with a small business and that the small business would be managing the overall process, but would not be performing the actual labor and work on those contracts." (App. 1359) (emphasis added). McHenry further testified "we met with them on numerous occasions and showed them our breakdown and told them who we were using." (App. 1401).

Plaintiff raises several objections to the foregoing testimony. Plaintiff argues, for example, that it does not establish that the government knew of all the details of the pass-through subcontracts, such as "that the pass-through entities had no relevant know-how and did no

'management' work." (Pl's Mem (DE 286) at 25). Plaintiff also suggests that McHenry never told the government how the first-tier subcontractors performed in practice, such as "reading romance novels all day in a trailer on site," and making "rare" appearances at daily subcontractor meetings. (Id.). However, the foregoing testimony remains probative show without dispute that the pass-through subcontracts themselves were disclosed to the government, that the change order requests documenting pass-throughs were disclosed to the government, and that defining concepts about them, such as the 1% to 2% fee and the lack of substantive work performance, also were disclosed to the government.[33] The foregoing testimony is also probative to show defendants presented these concepts to the government and did not know or should not have known that the government warned them against such an approach. Whether defendants disclosed actual performance under the pass-through subcontracts, such as a worker reading romance novels all day or making rare appearances at meetings, is irrelevant to the scienter inquiry in this context. See Escobar, 136 S. Ct. at 2002-03 (noting the False Claims Act is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations").

Plaintiff also argues that "McHenry's testimony as to NAVFAC officers' statements is inadmissible hearsay that cannot be considered." (Id.). However, in those parts where McHenry's testimony portrays a response by the government to the information he provided, it is considered not for the truth of the matter asserted by the government declarant (e.g., "pass-through

[33] As one example out of many, a Power Mulch cover letter for a "change order request for . . . kitchenette mirror" discloses its charge of $73,457.30, and the second-tier contractor B.R. McMillian's charge of $72,730.00, while plainly showing on the face of the cover letter "Power Mulch Services" logo and footer stating "Erosion Control Solutions." (App. 460-461) (emphasis added). In other words, the lack of substantive expertise is disclosed on the face of the document provided for government review.

arrangements are acceptable"), but rather to show defendants' knowledge of the government's response. See Fed. R. Evid. 801(c)(2).[34]

Plaintiff also asserts that there is "no corroborating evidence" of what McHenry told the government, and there is "no documentation of any paperwork that McHenry supposedly reviewed with [Valone] or gave to her." (Pl's Stmt. (DE 280) ¶ 55). Plaintiff argues that "[t]he credibility of McHenry and other witnesses on these matters is for the jury to decide, considering the testimony of all witnesses and admitted exhibits that indicate contrary facts." (Id.). However, plaintiff does not cite to contrary testimony of Valone or any other witness about what was presented to the government about pass-through subcontracts. Plaintiff does not create a genuine issue of material fact by speculating about what other witnesses not before the court would say, or by asserting generally that McHenry's testimony is not corroborated or not credible. See Matsushita, 475 U.S. at 587; Anderson, 477 U.S. at 248; Lovelace, 681 F.2d at 241.

Plaintiff suggests that McHenry's testimony is controverted by statements made by Walton, as reported in a Naval Criminal Investigative Service (NCIS) report dated May 31, 2012. (E.g., Pl's Stmt. (DE 280) ¶¶ 112-118; Pl's Resp. (DE 286) at 26). The NCIS report provides, in part: "WALTON explained that aside from the submission of certified payroll records, the OICC [Officer in Charge of Construction] has no knowledge or interaction for [sic] subcontractors hired by a prime contractor to work on a specific construction project." (App. 1768). As an initial

[34] By contrast, plaintiff cites two reports authored by "Fitzgerald & Associates, LLC" that portray contentions by Baker Roofing Company, regarding the intentions of defendants and MPi in entering into pass through-subcontracts. (Pl's Mem. (DE 286) at 21-22 (citing App. 2918-3006 (reports captioned Baker Roofing Company v. MPI Business Solutions and Caddell Yates, "Preliminary Impact Analysis and Change Order Request" and Precision Walls, Inc. v. MPI Business Solutions and Caddell Yates, "Preliminary Impact Analysis and Claim for Damages")); see Pl's Stmt. ¶¶ 260-263). Plaintiff's reliance on the contentions contained in these reports as a basis for proving defendants' scienter is flawed due to double hearsay and lack of basis in personal knowledge, which deficiencies are not remedied by commentary thereon in deposition testimony of subcontractor employees, Baker and Farmer. (App. 3007-3012).

matter, the quoted statement is hearsay (Walton's explanation of OICC's knowledge or interaction), within hearsay (the report of investigating agent). See Fed. R. Evid. 801(c). Moreover, the quoted statement does not controvert McHenry's testimony about what he showed Valone, or what he showed any government officer. While plaintiff argues that "Rule 56 does not require the nonmoving party to depose her own witness," or allows plaintiff to present evidence by affidavit, (Pl's Surreply (DE 295) at 8), the NCIS report is not an affidavit of Walton. Plaintiff has not forecasted through declaration or affidavit what Walton would testify if called at trial, much less Valone, on the issue of pass-through subcontracts. Thus, the NCIS report is insufficient to create a genuine issue of fact as to scienter.

In sum, the combination of the foregoing undisputed facts precludes a determination that defendants knew or should have known that certifications encompassing the pass-through subcontracts were false. Therefore, plaintiff has failed to establish a genuine issue of material fact as to scienter relating to pass-through subcontracts.

2. Reverse False Claims

Plaintiff asserts in his fourth claim that defendants concealed or failed to disclose their obligation to repay the government, in violation of the "Reverse False Claims" provision of the False Claims Act, 31 U.S.C. § 3729(a)(1)(G). (2d Am. Compl. 77, 80). Plaintiff contends that defendants "improperly retain[ed] funds to which they were not entitled," and improperly avoided or decreased an obligation to pay liquidated damages. (Id. ¶¶ 256, 276).

The False Claims Act imposes liability, in § 3729(a)(1)(G), upon any person who makes false claims to avoid or decrease an "obligation" to pay the government. The term "obligation" "means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from

statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b). Although the Fourth Circuit has not addressed the standard for a claim under this provision, other courts have held that a plaintiff must "identify an established duty that would bring [the] matter within the scope" of the False Claims Act, and the provision is "not meant to cover . . . contingent obligations," or "unadjudicated and unassessed statutory fines." United States ex rel. Simoneaux v. E.I. duPont de Nemours & Co., 843 F.3d 1033, 1039 (5th Cir. 2016). "Contingent obligations—those that will arise only after the exercise of discretion by government actors—are not contemplated by the statute." Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc., 190 F.3d 729, 738 (6th Cir. 1999).

Here, plaintiff's claim under § 3729(a)(1)(G) fails as a matter of law because defendants did not have an established obligation to pay liquidated damages. Rather, defendants had an obligation to pay liquidated damages that was contingent upon the government's determination that defendants' did not have a good faith basis for failing to meet targets in the Subcontracting Plan. (Defs' Stmt. ¶¶ 182-183). The asserted obligation was thus dependent upon the exercise of discretion by government actors, and it was unadjudicated and unassessed.

Plaintiff argues nonetheless that defendants' duty to pay liquidated damages for "breach of" the Subcontracting Plan is an "obligation" within the meaning of the reverse false claims provision. (Pl's Mem. (DE 286) at 30-31). Plaintiff emphasizes that the term "obligation" is defined as a duty arising "from the retention of any overpayment." (Id. at 31 (quoting § 3729(b)(3)). This definition, however, does not advance plaintiff's claim. The government made $194,731,380.97 in payments to defendants based upon their performance requests. (App. 522-523). Under the terms of the Contract and the FAR, a "breach" of the Subcontracting Plan does not trigger a repayment of any those performance payments. FAR 52.219-16(b)-(c). It does not

even result in an automatic obligation to pay separate liquidated damages, but rather triggers an administrative process for determining liquidated damages, if any. Id.

In sum, plaintiff's fourth claim, under § 3729(a)(1)(G), fails as a matter of law.

3. Anti-Kickback Act

Plaintiff asserts in his fifth claim that defendants violated the Anti-Kickback Act, 41 U.S.C. § 53, by unlawfully offering and providing kickbacks to Pompano Masonry and/or Breslow Construction in connection with the Project, then 1) making false statements in claims for payment that they had in place reasonable procedures designed to prevent violations of the Anti-Kickback Act, and 2) including the amount of kickbacks in the contract price charged to the government on the Project. (2d Am. Compl. ¶¶ 279-281). Plaintiff suggests that defendants paid Breslow Construction 2% more than it was going to pay Pompano Masonry in the original masonry subcontract as a "kickback" to induce Pompano Masonry to use Breslow Construction as a sham small business. (Id. ¶ 135).[35]

a. False Claims Act

In that part where plaintiff asserts a claim for violation of the False Claims Act premised upon defendants' certification of compliance with the Anti-Kickback Act, (id. ¶ 280), the claim fails for the same reasons as plaintiff's other claims under the False Claims Act. In particular, plaintiff has not established a false claim for payment expressly or impliedly conditioned upon compliance with the Anti-Kickback Act. Plaintiff has not demonstrated that any certification of compliance with the Anti-Kickback Act was material to the government's decision to pay under

[35] Although not asserted in the complaint, plaintiff also asserts in his brief in opposition to summary judgment that defendants violated the Anti-Kickback Act when "[t]he 1% to 2% fees paid to small business pass-throughs by [defendants] for rental of their status, and received by those small businesses, constituted 'kickbacks' within the meaning of the Anti-Kickback Statute." (Pl's Mem. (DE 286) at 28).

the monthly progress payment requests. And, plaintiff has not demonstrated a genuine issue of fact as to scienter.

b. Anti-Kickback Act

In that part where plaintiff asserts a stand-alone claim under the Anti-Kickback Act on the basis that defendants included the amount of a "kickback" to Pompano/Breslow Construction in contract prices charged to the government, the claim fails as a matter of law.

Under 41 U.S.C. § 8702:

> A person may not—
>
> (1) provide, attempt to provide, or offer to provide a kickback;
> (2) solicit, accept, or attempt to accept a kickback; or
> (3) include the amount of a kickback prohibited by paragraph (1) or (2) in the contract price—
> (A) a subcontractor charges a prime contractor or a higher tier subcontractor; or
> (B) a prime contractor charges the Federal Government.

41 U.S.C. § 8702 (formerly codified as 41 U.S.C. § 53). The statute provides a civil action for violation of this provision, which is limited as follows:

> The Federal Government in a civil action may recover from a person--
> (1) that knowingly engages in conduct prohibited by section 8702 of this title a civil penalty equal to--
> (A) twice the amount of each kickback involved in the violation; and
> (B) not more than $10,000 for each occurrence of prohibited conduct; and
> (2) whose employee, subcontractor, or subcontractor employee violates section 8702 of this title by providing, accepting, or charging a kickback a civil penalty equal to the amount of that kickback.

Id. § 8706(a).

As a threshold matter, apart from plaintiff's claim brought under the False Claims Act due to alleged false certification of compliance with the Anti-Kickback Act, (2d Am. Compl. ¶ 280), plaintiff has not provided any authority for obtaining damages based on a stand-alone claim for a violation of the Anti-Kickback Act. The statute expressly provides a cause of action only for "[t]he

Federal Government in a civil action," and it does not provide its own basis like the False Claims Act for suit by a private plaintiff on behalf of the government. Id.; see, e.g., United States ex rel. Vavra v. Kellogg Brown & Root, Inc., 848 F.3d 366, 371 (5th Cir. 2017) ("In this civil-enforcement action, the Government alleged that Kellogg Brown & Root was liable for kickbacks knowingly accepted by two of its employees. . . . The Government can enforce this prohibition through civil or criminal enforcement, or both.") (citing 41 U.S.C. §§ 8706-8707); cf. United States ex rel King v. Solvay Pharm., Inc., 871 F.3d 318, 324 (5th Cir. 2017) (stating, with respect to the Medicare anti-kickback statute ("AKS"), 42 U.S.C. § 1395nn, "[t]he AKS provides no private right of action; therefore, a private plaintiff may not sue a health care provider under the AKS alone").

In any event, plaintiff has not demonstrated a genuine issue of material fact that defendants "knowingly" included a "kickback" in the amount of a government contract price. 41 U.S.C. §§ 8702, 8706(a). In particular, for the reasons discussed above regarding the scienter element of plaintiff's False Claims Act claims, there is no plausible basis to infer that defendants knew the 2% fee paid to Breslow Construction, or the 1% to 2% fees paid to pass-through small businesses, was an unlawful kickback.

Therefore, plaintiff's Anti-Kickback Act claim fails as a matter of law and must be dismissed.[36]

C. Status of Defendants Breslow and Valdini Law Firm

As noted in the statement of the case, plaintiff names Breslow and Valdini Law Firm as defendants in the operative second amended complaint. Plaintiff asserts that due to a settlement

[36] Because the court has determined that all claims against defendants fail as a matter of law, the court does not reach defendants' additional argument that the court should grant summary judgment to defendants on plaintiff's claims for damages. (See Defs' Mot. (DE 271) at 3).

reached in 2014 he has "released" the Valdini Law Firm "as to all claims, except for statutory attorneys' fees." (2d Am. Compl. (DE 190) at 8 n.1). In any event, there is no proof of service of the second amended complaint on either defendants Breslow or Valdini Law Firm. Absent such proof of service, the court hereby provides notice to plaintiff that it will dismiss without prejudice defendants Breslow and Valdini Law Firm, pursuant to Federal Rule of Civil Procedure 4(m), unless plaintiff shows within 14 days of the date of this order good cause for failure to serve them. If no response to this order is filed by plaintiffs within 14 days of the date of this order, the clerk is directed to enter a separate judgment dismissing without prejudice defendants Breslow and Valdini Law Firm.

CONCLUSION

Based on the foregoing, defendants' motion for summary judgment (DE 271) is GRANTED. The clerk is DIRECTED to enter judgment in favor of defendants on all claims asserted against them. The court retains jurisdiction solely for purposes of disposition of defendants Breslow and Valdini Law Firm, in accordance with section C. herein. If no response to this order is filed by plaintiffs within 14 days of the date of this order, the clerk is DIRECTED then to enter a separate judgment dismissing without prejudice defendants Breslow and Valdini Law Firm, and to close this case.

SO ORDERED, this the 30th day of March, 2021.

LOUISE W. FLANAGAN
United States District Judge

Appendix A

Index of Names

Caddell Construction Company, Inc. ("Caddell")/W.G. Yates & Sons Construction Company ("Yates")

Sid Adams ("Adams") – construction manager for Caddell
Clint Bledsoe ("Bledsoe") – project manager for Caddell/Yates
Del Buck ("Buck") – vice president/estimator for Caddell
John Caddell ("Caddell") – executive vice president for Caddell
Dick Fitzgibbons ("Fitzgibbons") – vice president/estimator for Yates
Richard Gurner ("Gurner") – estimator for Yates
Chet Hailey ("Hailey") – comptroller for construction operations for Yates
Diana McGraw ("McGraw") – marketing coordinator for Yates
Cleetus E. McHenry ("McHenry") – project executive for Caddell/Yates
Monte McKinney ("McKinney") – executive vice president for Caddell
Tom Newton ("Newton") – subcontractor administrator for defendants
John Mark Smith ("Smith") – vice president for Yates
Lisa Stokes ("Stokes") – Yates employee

Pompano Masonry Corporation ("Pompano")/Breslow Construction, LLC ("Breslow Construction")

Julian Marie Breslow ("Breslow") – director/owner of Pompano/Breslow Construction
Jillian Breslow and Lauren Breslow – Breslow's daughters
Joseph Canitano ("Canitano") – vice president for North Carolina operations of Pompano
Timothy Carroll ("Carroll") – vice president or Maryland operations of Pompano
Plaintiff/relator Rickey C. Howard ("plaintiff") – estimator/president of Pompano
Elaine Parris ("Parris") – associate of David J. Validini & Associates, P.A. ("Valdini Law Firm")
Mike Ridgway – chief financial officer of Pompano
Stephen Jay Siegel ("Siegel") – director/president of Pompano
David J. Valdini ("Valdini") – attorney for Pompano/Breslow Construction

Government

Joseph J. McGrenra ("McGrenra") – deputy for small business for Naval Facilities Engineering Command Mid-Atlantic ("NAVFAC")
J.D. Patton ("Patton") – project manager for NAVFAC
Kim Valone ("Valone") – small business representative for NAVFAC
Vernon Ashley Walton ("Walton") – construction manager for NAVFAC
Jerry T. Williams ("Williams") – supervising contract officer for NAVFAC

Other entities

Frank Baker (“Baker”) – employee of subcontractor
William Barbee (“Barbee”) – retained expert for plaintiff
Robert Farmer (“Farmer”) – employee of subcontractor
Reginald Foy, Jr. (“Foy”) – employee of subcontractor
Larry A. Hinson (“Hinson”) – employee of subcontractor
Nathan Huff (“Huff”) – counsel of record for Caddell/Yates
Patsy Reeves (“Reeves”) – retained expert for defendants
Charles Tiefer (“Tiefer”) – retained expert for plaintiff

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Nauset Construction Corporation	)	ASBCA Nos. 61673, 61675
	)	
Under Contract No. W912SV-13-C-0007	)	

APPEARANCES FOR THE APPELLANT: John J. McNamara, Esq.
Elise M. Kuehn, Esq.
Lane McNamara LLP
Southborough, MA

APPEARANCES FOR THE GOVERNMENT: Scott N. Flesch, Esq.
Army Chief Trial Attorney
CPT Philip L. Aubart, JA
Harry M. Parent, III, Esq.
MAJ Felix S. Mason, JA
Trial Attorneys

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

Pending before the Board is a motion filed by the Department of the Army (government or respondent) to dismiss two of the three appeals[1] filed by Nauset Construction Corporation (Nauset or appellant). The government argues that the Board lacks jurisdiction on ASBCA Nos. 61673 (Claim 1) and 61675 (Claim 2)[2] because the claims involved fraud. The government also argues that ASBCA No. 61675, to the extent it appeals a termination for default, is untimely. We grant the motion in part as it relates to ASBCA No. 61675, and deny the remainder.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On November 1, 2013, the National Guard Bureau (Guard) awarded a contract to Nauset for $20,521,858.00 to build the Unit Training Equipment Site Project in Camp Edwards, MA (the project) (R4, tab 1 at 2).

[1] A companion case, Appeal No. 61674, involves a subcontractor claim and is not included in the motion to dismiss.

[2] For simplicity's sake we will refer to the claim appellant filed on May 12, 2017, as "Claim 1" and the claim it later filed on February 12, 2018, as "Claim 2" (*see* app. opp'n at 1-2).

2. On May 12, 2017, Nauset submitted a certified claim (Claim 1) to the contracting officer (CO) for $2,563,622 plus an extension of time, from the inception of the contract through October 26, 2016 (R4, tabs 182-85).

3. On July 6, 2017, Nauset's attorney researched the "best avenue of relief, Armed Services Board of Contract Appeals or Federal Court of Claim for filing suit" (R4, tab 200 at 27-28).

4. On July 10, 2017, the CO informed appellant that due to ongoing investigations into Nauset by multiple government agencies that may affect her decision, she would not be able to render a decision within the 60 days required by the Contract Disputes Act, and that she would issue a decision by November 7, 2017 (R4, tab 186 at 2).

5. On September 27, 2017, Nauset's attorney researched "docketing dates" (R4, tab 200 at 30). On October 18, 2017, Nauset's attorney conducted "[r]esearch of entitlement to additional time to respond to notice of default," and on October 19, 2017, he conducted "[r]esearch [on] FAR regulations; Research case law regarding termination for default under FAR" (*id.* at 15).

6. On November 7, 2017, the CO informed Nauset that she was still reviewing the claim of May 12, 2017, that ongoing investigations by multiple government agencies may affect her decision, and that she would issue a decision on Claim 1 by January 8, 2018 (app. supp. R4, tab 204).

7. On November 17, 2017, the CO terminated the contract for default (R4, tab 39). The 24-page termination notice detailed the causes for termination and included the following language:

> [T]he Government is completely Terminating [sic] Nauset for Default on contract W912SV-13-C-0007.
>
> . . . This notice constitutes such decision, and Nauset has the right to appeal under the Disputes clause of the contract . . . . This notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.
>
> . . . [T]his termination does not relieve Nauset of any and all liability relating to the outcome of the current

> investigations by the Department of Labor, Army Criminal Investigative Department, and the Defense Criminal Investigative Service.

(R4, tab 39 at 23-24)

8. The termination letter did not include the appeal language required by Federal Acquisition Regulation (FAR) 33.211(a)(4)(v).

9. On November 17, 2017, the same day the termination letter was issued, Nauset's attorney reviewed "[the] Government's 23 page notice of termination of Nauset; [held] Teleconferences with Mark Williams regarding termination notice; Teleconferences with Anthony N. Papantonis regarding termination notice; Teleconference with Robin P. Wilcox of Traveler's regarding termination notice" and "review[ed] the Federal Acquisition Regulations regarding avenues of appeal" (R4, tab 200 at 17-18). On November 29, 2017, Nauset's counsel conducted "[r]eview of cases under Contract Dispute Act regarding default terminations" (*id.* at 18).

10. On November 28, 2017, during a telephone conference with counsel for Nauset, the government's attorney stated that "it is possible that this matter could be converted to a termination for convenience"[3] (app. opp'n at 2 (citing McNamara aff. ¶ 5)).

11. On January 8, 2018, the CO informed appellant that she was still reviewing Claim 1 in coordination with legal and other advisors, and that due to the ongoing investigations by multiple government agencies that may affect her decision, she was unable to render a decision at that time. The CO stated that she would issue a decision on the claim by April 1, 2018. (R4, tab 197 at 3)

12. On January 17, 2018, 61 days after the termination notice, Nauset's project manager submitted a letter to the CO, titled "Response to Termination of November 17, 2017 and Certified Termination Claim and Request for Final Decision under the Contract Disputes Act" (R4, tab 198). In the letter, Nauset responded to the issues identified by the CO in the termination letter, disputed the termination and

[3] We note the government's objection to the inclusion of this statement in the record. The government argues that the statement, to the extent that it was made, was a communication covered by Federal Rule of Evidence 408, Compromise Offers and Negotiations, which prohibits the use of a statement made during compromise negotiations to prove the validity of a claim (gov't reply at 3). The Federal Rules of Evidence are not binding on the Board, but may guide the Board's rulings. *See* Board Rule 10(c). We will weigh the evidentiary value of this statement as appropriate.

stated that it intended to submit a second claim for costs not included in Claim 1. Appellant stated: "Nauset takes exception to the government's decision to terminate for default . . . . Nauset will continue to vehemently invest every available resource to support our Claim, our position and reputation" (R4, tab 198 at 14). Although the subject of the letter included the words "Certified Termination Claim and Request for Final Decision Under the Contract Disputes Act," Nauset did not include certification language nor request anywhere else in the letter a decision by the CO. Nauset's letter did not explicitly state that it wished to appeal the termination decision to the Board or to any other tribunal.

13. The CO acknowledged receipt of the January 17, 2018 letter by email of January 17, 2018, stating "email received" (app. supp. R4, tab 207).

14. On February 12, 2018, 87 days after the termination notice, appellant submitted to the CO a certified claim (Claim 2), titled "Claim for Extended Time and Unpaid Completed Contract Work – Part 2 and Wrongful Termination" (R4, tab 200). In Section I of the letter, Nauset asserted that the causes of termination were beyond its control and demanded payment of $1,076,189.00 for costs incurred from November 2016 until the date of termination in November 2017[4] (*id.* at 1-2). Section II of the letter, "Wrongful Termination," reflects that "Nauset intends to defend its position and prove that the government's decision to terminate was based on [circumstances] beyond our control" (*id.* at 3). Section II concludes with this statement: "Nauset specifically asserts that the termination was wrongful as a matter of fact and as a matter of law. Nauset specifically submits this wrongful termination claim in accordance with the Contract Disputes Act." (*Id.* at 4) Section III of the letter, titled "Request for Final Decision of the Contracting Officer Pursuant to the Contracts Dispute Act" requests that "the Contract [sic] Officer render a decision on the claim submitted by Nauset Construction Corp. within sixty (60) days of the date of this claim" (*id.*).

15. Nauset's letter of February 12, 2018, did not state it wished to appeal to the ASBCA or to any other tribunal.

16. The CO acknowledged receipt of Claim 2 via email on February 13, 2018, in a single word: "Received" (app. supp. R4, tab 208).

17. On March 26, 2018, the CO informed appellant that she was still reviewing Nauset's claims, and that due to the ongoing investigations, her projected decision date for both claims was July 1, 2018 (R4, tab 202).

18. On April 25, 2018, the government (including the CO) met with Nauset

[4] Nauset did not specify how many days of delay it wished to claim.

and Nauset's surety (app. supp. R4, tab 210). The minutes of the meeting reflect that the purpose of the meeting was to "assist the Surety in moving forward" (*id.* ¶ 8). The minutes reflect that Nauset's counsel inquired whether the government would be willing to rescind the termination (*id*. ¶ 16). The government responded that "it was confident that the termination of the principal was impartial, factually supported, properly executed and includes a number of grounds for termination that collectively and in some cases individually by themselves, would provide an appropriate basis for the termination findings" (*id*. ¶ 19).

19. On May 24, 2018, counsel for the Guard wrote to the attorneys for Nauset and the Surety responding to previous correspondence to coordinate a meeting between the attorneys (app. supp. R4, tab 211 at 1). The letter states: "At this time, the Government will not rescind the default termination" (*id.*). The letter further states that "the Government . . . clearly and unequivocally . . . re-state[s] our position . . . . The Government does not desire Nauset to be involved in the completion effort. The Government is required to contract with responsible contractors . . . . Nauset's actions have given rise to serious concerns about its contractor responsibility." (*Id.* at 1-2) Further, the letter states that "the Government **cannot assent** to the use of Nauset in the completion effort due to contractor responsibility concerns" (*id.*) (emphasis in original) (footnote omitted).

20. On June 27, 2018, Nauset appealed to the Board the deemed denial of Claims 1, 2, and the default termination.

21. On June 30, 2018, the CO informed appellant that due to ongoing investigations into Nauset by multiple government agencies including the Army Criminal Investigations Division and US Department of Labor, her projected decision date was now October 1, 2018 (app. supp. R4, tab 212).

22. On October 1, 2018, the CO informed Nauset that she was still reviewing Claims 1 and 2, that there were multiple government agencies investigating Nauset including the Army Criminal Investigative Division, and that she would issue a decision by November 1, 2018 (app. supp. R4, tab 214).

23. On November 1, 2018, the CO issued a letter to appellant containing the following language:

> The purpose of this letter is to provide a response to your 12 May 2017 and 12 February 2018 claims received by the National Guard for Contract No. W912SV- 13-C-0007. I have reviewed all of the facts pertinent to this claim with the assistance of legal as required by FAR§ 33.211.

> As I have previously informed you, the claims and this matter have been referred to investigative agencies. *See* FAR 33.209 ("If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud").
>
> Based on preliminary findings of the Army Criminal Investigation Division, the Defense Contract Audit Agency, as well as my review of the claimed cost, this office suspects that claimed costs are fraudulent or false. The National Guard is currently considering referral of this matter under the False Claims Act [FCA].
>
> FAR 33.210 states that a Contracting Officer's authority does not extend to the settlement, compromise, payment, or adjustment of any claim involving fraud. Therefore, I have no authority to take action on your claims.

(App. supp. R4, tab 215)

24. Appellant asserts that throughout 2018, Nauset continued to meet with the government, Nauset's surety, and counsel in regard to the project and Nauset's termination (app. opp'n at 3 (citing Papantonis aff. ¶ 29)).

25. On November 7, 2018, the CO's representative issued a Notice to Comply (the notice) to Nauset and to the Surety. The notice stated that Nauset had failed to comply with contract drawings and that water was leaking into the building, that the problems had been identified in a walk-through conducted on October 12, 2018, and that they needed to be resolved immediately (app. supp. R4, tab 216).

26. In response to the notice, Nauset and two subcontractors met with the government on December 4, 2018 (app. opp'n at 4 (citing Williams aff. ¶ 20, Papantonis aff. ¶ 34)).

27. Appellant asserts that December 13, 2018 was Nauset's last day on the project site (app. opp'n at 4 (citing McNamara aff. ¶ 21, Papantonis aff. ¶ 35)).

28. On February 6, 2019, the Army Criminal Investigation Command, Major

Procurement Fraud Unit, issued a memorandum stating that it "has an open, active investigation on [appellant] concerning the Massachusetts Army National Guard's construction project at the unit Training Equipment Site (UTES) project, Camp Edwards, MA" (gov't reply, ex. 2).

DECISION

The motion before us challenges our jurisdiction in two distinct areas. First, the government argues that the Board lacks jurisdiction on ASBCA Nos. 61673 and 61675 because the claims involved fraud. Secondly, the government argues that ASBCA No. 61675, to the extent it appeals a termination for default, is untimely. We examine each part of the motion in turn.

I. Does the Board lack jurisdiction over the claims in ASBCA Nos. 61673 and 61675 because the claims involved fraud?

The government argues that the CO had no authority to decide the claims because they involved fraud and accordingly the Board lacks jurisdiction over the deemed denial of the claims. Appellant opposes the motion, arguing that the CO's refusal to issue a decision based on a mere suspicion of fraud is not enough to deprive the Board of jurisdiction.[5]

We first examine the language of the applicable statute and regulation. The Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109, states that an agency head has no authority to "settle, compromise, pay, or otherwise adjust any claim *involving* fraud." 41 U.S.C. § 7103(c)(1) (emphasis added). The FAR provides a similar limitation on the CO's authority, establishing that the CO has no authority to decide or resolve "any claim *involving* fraud." FAR 33.210 (emphasis added). Additionally, the FAR provides that in case of "*suspected* fraudulent claims . . . the CO shall refer that matter to the agency official responsible for investigating fraud." FAR 33.209 (emphasis added).

When interpreting a statute we look first to the language of the statute itself. If that language is unambiguous our inquiry stops, unless there is a clearly expressed legislative intention contrary to the language of the statute itself. *See LSI Computer Sys., Inc. v. United States Int'l Trade Comm'n*, 832 F.2d 588, 590 (Fed.Cir.1987). This is sometimes called the "plain meaning" rule. As there appears to be no ambiguity in the CDA and FAR language quoted above, we examine the plain

[5] Appellant also argues that the CO's refusal to issue a decision upon suspicion of fraud amounts to an indefinite stay, as the investigation into the suspected fraud may take an undetermined amount of time. We do not reach this issue, as we decide the motion on other grounds.

meaning of the terms at issue. According to the NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010), to "involve" means "to include (something) as a necessary part or result." In contrast, to "suspect" means "to have an idea or impression of the existence, presence, or truth of (something) without certain proof." *Id.* It becomes clear that "involve fraud" and "suspect fraud" are not interchangeable. The record shows that the CO referred the suspected fraud to the investigative agencies, as required by the FAR, but she took her suspicion a step further: because she *suspected* fraud in Nauset's claims, she concluded that the claims *involved* fraud and that she had no authority to resolve them. In other words, substituting the terms for the definitions above, the CO had "an idea or impression of the existence, presence, or truth of fraud without certain proof" and concluded that the claims "included fraud as a necessary part or result." As explained further below, we do not agree that a CO's articulation of a suspicion of fraud is sufficient to deprive the Board of jurisdiction.

In a recent decision, *ESA South, Inc*., ASBCA Nos. 62242, 62243, 20-1 BCA ¶ 37,647, the CO issued a letter declining to issue a final decision due to a suspicion of fraud after the appellant appealed to the Board the deemed denial of its claim. The Board held:

> We do not agree that the contracting officer's 2020 letter divests us of jurisdiction to entertain these 2019 appeals. If it did, the government presumably could defeat any appeal before this Board simply by presenting to the Board a letter from the contracting officer written after the filing of the appeal articulating the contracting officer's suspicion that the claim underlying the appeal was fraudulent. We do not agree that section 7103(c)(1) [of the CDA] goes that far. Indeed, discussing that section we have said that "[we] have jurisdiction under the CDA to decide the contract rights of the parties even when fraud has been alleged," "we possess jurisdiction over an appeal if we do not have to make factual determinations of fraud," and "[t]hat fraud allegedly may have been practiced in the drafting or submission of . . . [a] claim does not deprive this Board of jurisdiction under the CDA."

ESA South, 20-1 BCA ¶ 37,647 at 182,772 (citing *Sand Point Servs., LLC*, ASBCA Nos. 61819, 61820, 19-1 BCA ¶ 37,412 at 181,859).

The government relies on *PROTEC GmbH*, ASBCA No. 61161 *et al*., 18-1 BCA ¶ 37,010, for the proposition that when a CO's final decision is based upon a suspicion of fraud there is no CDA jurisdiction (gov't mot. at 6). The government's reliance is misplaced. In *PROTEC* the Board found jurisdiction because the final

decision was grounded "exclusively in disputed contract issues . . . . [and was] not based upon – let alone solely based upon – a suspicion of fraud . . . ." *PROTEC*, 18-1 BCA ¶ 37,010 at 180,244. The government also offers *Medina Constr., Ltd. v. United States*, 43 Fed. Cl. 537(1999) and *Savannah River Nuclear Sols., LLC v. Dep't of Energy*, CBCA No. 5287, 17-1 BCA ¶ 36,749 for the same proposition. The Board rejected this argument in a recent decision, *Mountain Movers/Ainsworth-Benning, LLC*, ASBCA No. 62164, 20-1 BCA ¶ 37,664 at 182,868. Accordingly, we conclude the government's reliance on these cases inapposite.

The government also argues that the fact that there are ongoing investigations lends support to the CO's determination that the claims involved fraud (gov't mot. at 6, gov't reply at 6). We disagree. The fact that there is an ongoing investigation does not divest the Board of jurisdiction in a matter otherwise properly before the Board. *ESA South*, 20-1 BCA ¶ 37,647 at 182,772 (citations omitted).

In its ultimate analysis, in order to resolve the jurisdictional motion at hand, the government asks the Board to agree with the CO's determination that she had no authority to resolve the claims because they involved fraud. It is well settled that we possess jurisdiction over an appeal if we do not have to make factual determinations of fraud. *ESA South*, 20-1 BCA at 182,772. The Board has previously held that it "can maintain jurisdiction over a [separate defense] involving . . . fraud as long as it does not have to make factual determinations of the underlying fraud." *Laguna Constr. Co. v. Carter*, 828 F.3d 1364, 1368 (Fed. Cir. 2016); *see Supply & Service Team GmbH*, ASBCA No. 59630, 17-1 BCA ¶ 36,678 at 178,602 (following *Laguna*). In this vein, the Board has maintained jurisdiction, for example, when a finding of fraud is made by another authority competent to make such a finding. *See Laguna*, 828 F.3d at 1368-69 (citing *AAA Eng'g & Drafting, Inc*., ASBCA No. 48729, 01–1 BCA ¶ 31,256 at 154,367 (Board had jurisdiction where the government alleged fraud in contract administration, and the United States Court of Appeals for the Tenth Circuit had already determined that the contractor had committed fraud)); *see also Laguna Constr. Co.*, ASBCA No. 58324, 14-1 BCA ¶ 35,748 at 174,947-48 (the Board declined to make factual findings of fraud, but admitted into the record the guilty pleas of Laguna's officers entered in the United States District Court for the District of New Mexico, which the Board found helped "explain and support" how Laguna breached the contract). In the appeal before us, the record does not support that a finding of fraud in these claims has been made by an authority competent to make such a finding. We decline to make such a finding ourselves.

However, whether the claims involved fraud is not operative to resolve the jurisdictional matter before us. The essential fact before us is that two claims were presented to the CO and she declined to issue a decision on those claims. Under the CDA, the Board has jurisdiction over a CO's final decision (41 U.S.C. § 7104(a)) and over the deemed denial thereof (41 U.S.C. § 7103(f)(5)). Our jurisdiction attached

when Nauset filed an appeal from the deemed denial of its claims, after the CO continued to delay, again and again, issuing a decision on the pending claims (SOF ¶¶ 4, 6, 11, 17). The CO's letter determining she had no authority to decide the claims, issued after appellant appealed the deemed denial to the Board, does not change this result. "Once the Board is vested with jurisdiction over a matter, the contracting officer cannot divest it of jurisdiction by his or her unilateral action." *Mountain Movers/Ainsworth-Benning, LLC*, 20-1 BCA ¶ 37,664 at 182,869 (citing *Triad Microsystems*, *Inc.*, ASBCA No. 48763, 96-1 BCA ¶ 28,078 at 140,196).

For the reasons discussed above, we conclude that we have jurisdiction to hear Nauset's appeal of the CO's deemed denial of Claims 1 and 2, docketed as ASBCA Nos. 61673 and 61675.

II. Does the Board lack jurisdiction over the termination for default in ASBCA No. 61675 because it was untimely appealed to the Board?

The government argues that ASBCA No. 61675, to the extent it appeals a termination for default,[6] was not filed with the Board within 90 days of the termination and accordingly the Board lacks jurisdiction. The termination for default was issued and received by appellant on January 17, 2018. Thus, the government concludes that the 90-day appeal period expired on February 15, 2018. It is undisputed that appellant appealed the termination to the Board on June 27, 2018 (SOF ¶ 20). Appellant argues that the appeal is not time-barred because (1) the government's conduct vitiated the finality of the termination for default; (2) appellant effectively appealed the termination for default to the Board by notice to the CO and thus tolled the 90-day clock; and (3) the termination notice failed to provide appeal language and thus prejudiced appellant. We examine each argument in turn.

1. Did the government's conduct vitiate the finality of the termination for default?

Under the CDA, 41 U.S.C. § 7104 (a), the CO's decision must be appealed to the Board within 90 days. The 90-day period is jurisdictional and may not be waived. *See Cosmic Constr. Co. v. United States*, 697 F.2d 1389, 1390-91 (Fed. Cir. 1982); *Maria Lochbrunner*, ASBCA Nos. 57235, 57236, 11-2 BCA ¶34,783 at 171,186. We have recognized that the finality of a termination may be vitiated by acts of the government: "The test for vitiation of the finality of the CO's decision 'is whether the contractor presented evidence showing it reasonably or objectively could have concluded the CO's decision was being reconsidered.'" *Aerospace Facilities Group, Inc.*, ASBCA 61026, 18-1 BCA ¶ 37,105 at 180,605 (quoting *Sach Sinha and Assocs.,*

[6] As explained further below, Nauset submitted its disagreement with the termination as a claim, rather than as an appeal from the termination for default.

Inc., ASBCA No. 46916, 95-1 BCA ¶ 27, 499 at 137,042). In *Aerospace Facilities*, "written and oral communications with the government [subsequent to the termination] created a cloud of uncertainty as to the status of the . . . termination." 18-1 BCA ¶ 27, 499 at 180,605. However, a request to the CO to reconsider a final decision is not in itself sufficient to vitiate the termination decision. *Id.* (citing *Propulsion Controls Engineering*, ASBCA No. 53307, 01-2 BCA ¶ 31,494 at 155,508 ("it is unreasonable to conclude that a [CO] is reconsidering a final decision simply as a result of a request to do so.")). It is well settled that the government's actions must have occurred within the 90-day jurisdictional window in order to vitiate the finality of the termination. *See Godwin Corp.*, ASBCA No. 61410, 18-1 BCA ¶ 37,073 at 180,450 (finding that the CO's alleged agreement to review additional evidence submitted six months after the termination notice could not have had any effect on appellant's understanding of the termination's finality during the appeal period because the 90-day appeal window to the Board had already expired at the time that the CO allegedly made this representation (*see also Shafi Nasimi Constr. and Logistics Co.*, ASBCA No. 59916, 16-1 BCA ¶ 36,215 at 176,698)).

In the appeal at hand, Nauset argues that it reasonably believed the CO agreed to review her termination decision (app. opp'n at 9-15). Appellant argues that since the CO acknowledged receipt of Nauset's letters of January 17, 2018, and February 12, 2018, Nauset reasonably believed that the CO "accepted Nauset's [Claim 2] and would review her decision in regard to Nauset's termination" and that "this reasonable expectation . . . is supported by the [CO's] letter of March 26, 2018, [stating] that she was <u>still</u> reviewing Nauset's [Claim 2]" (app. opp'n at 13) (emphasis in original). These arguments are not persuasive. First, it is not reasonable for appellant to believe the CO was reconsidering the termination decision based on the cryptic acknowledgements of receipt (SOF ¶¶ 13, 16) of Nauset's submissions. Second, "it is unreasonable to conclude that a [CO] is reconsidering a final decision simply as a result of [appellant's] request to do so" *Propulsion Controls Engineering*, 01-2 BCA ¶ 31,494 at 155,508. Lastly, the CO's correspondence of March 26, 2018, was issued outside the 90-day window to appeal to this Board, so it could not have had any effect on appellant's understanding of the finality of the termination during the appeal period. *Godwin Corp.*, 18-1 BCA ¶ 37,073 at 180,450.

Nauset also argues that several communications between its attorney and government counsel vitiated the finality of the termination. Nauset asserts that on November 28, 2017, government counsel conveyed to appellant's counsel that it was possible that the termination for default could be converted to a termination for convenience (app. opp'n at 13; *see* SOF ¶ 10). Nauset argues that this conversation led it to believe that the CO was reconsidering the termination. We view this conversation as a statement made between lawyers in the midst of legal discussions, and conclude that it does not support a reasonable belief by appellant that the CO was reconsidering her decision. Nauset also argues that its counsel spoke with the

government's attorney "multiple times about the termination" (app. opp'n at 13) but we note that the supporting affidavit by Nauset's attorney is careful to state that *a meeting* between the parties was discussed extensively in the late fall 2017 and early spring of 2018 (McNamara aff. ¶ 6). Appellant also asserts that Nauset continued to meet with the government through 2018 in regard to the project and the termination (app. opp'n at 14; SOF ¶ 24). We note, however, that the record does not show that the CO was part of any of these conversations. For these reasons, we hold that these communications between the government and Nauset were not sufficient to reasonably lead Nauset to believe that the CO was reconsidering the termination.

Nauset also points to the meeting with the government on April 25, 2018 (SOF ¶ 18), the letter of May 24, 2018 (SOF ¶ 19) and the notice to comply issued on November 7, 2018 (SOF ¶ 25) as indicia that the CO was reconsidering the termination decision. These events took place after February 15, 2018, when the 90-day appeal window closed, and could not have had any effect on appellant's understanding of the finality of the termination during the appeal period. *See Godwin Corp.*, 18-1 BCA ¶ 37,073 at 180,450.

Appellant provided no evidence of government conduct during the 90-day appeal period that could have led the contractor to reasonably believe that the CO's decision was being reconsidered. Accordingly, we find that the government's conduct did not vitiate the finality of the CO's decision. *See, e.g., Shafi Nasimi Constr. and Logistics Co.*, 16-1 BCA ¶ 36,215 at 176,698.

2. Did appellant's Claim 2 submitted to the CO effectively appeal the termination for default to the Board and toll the 90-day clock?

Filing an appeal with the CO may satisfy the Board's notice requirement. *Aerospace Facilities*, 18-1 BCA ¶ 37,105 at 180,604 (citing *Hellenic Express*, ASBCA No. 47129, 94-3 BCA ¶ 27,189 at 135,503 ("filing an appeal with the [CO] is tantamount to filing with the Board" (citation omitted)). The Board has historically taken a liberal reading of contractor's communications to the CO in finding effective appeals. *Aerospace Facilities*, 18-1 BCA at 180,604 (citing *Thompson Aerospace, Inc*., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 at 149,570). *See also Afghan Active Group* (*AAG*), ASBCA 60387, 16-1 BCA ¶ 36,349 at 177,211. Adequate notice to the CO must be (1) in writing, (2) express dissatisfaction with the CO's decision, and (3) manifest an intent to appeal the decision to a higher authority (*Aerospace Facilities*, 18-1 BCA at 180,604 (citing *McNamara-Lunz Vans & Warehouses, Inc.*, ASBCA No. 38057, 89-2 BCA ¶ 21,636 at 108,856)).

As to the third requirement, i.e. manifest an intent to appeal the decision to a higher authority, "'[w]hile the Board historically has interpreted contractors' communications liberally in determining whether an intent to appeal exists, the record

reasonably must demonstrate an intent to appeal to the Board in order for our jurisdiction to attach.'" *Bahram Malikzada Constr. Co.*, ASBCA Nos. 59613, 59614, 15-1 BCA ¶ 36,134 at 176,370 (quoting *Oconto Elec., Inc.*, ASBCA No. 36789, 88-3 BCA ¶ 21,188 at 106,939, *aff'd*, 884 F.2d 1399 (Fed. Cir. 1989) (unpublished table decision)). Thus, in *Aerospace Facilities*, we found that a letter stating that "'we will appeal your decision through the various avenues open to us' adequately expressed the contractor's intent to appeal as a contractor can only 'appeal' to the Board." 18-1 BCA ¶ 37,105 at 180,604. However, a contractor's letter indicating [it] would appeal to either the Board or the Claims Court [is] not a notice of appeal because the CDA requires a notice of appeal to express an election of the forum in which it will seek relief. *Stewart-Thomas Indus., Inc.*, ASBCA No. 38773, 90-1 BCA ¶ 22,481 at 112,836.

In the appeal at hand, Nauset argues that its submission to the CO on February 12, 2018, satisfied the Board's notice requirement, as it was in writing, expressed dissatisfaction with the CO's decision, and manifested an intent to appeal the decision to higher authority (app. opp'n at 20-21). We agree that Nauset fulfills the first two requirements, but the third prong fails. Nauset's letter of February 12, 2018, (SOF ¶ 14) asserts that the termination was wrongful and submits a claim to the CO for additional costs. In this letter, appellant does not express an intent to appeal the termination to higher authority, and the word "appeal" does not appear anywhere in Nauset's letter. We examined appellant's letter of January 17, 2018, to ascertain whether, if read together with the letter of February 12, 2018, it may convey appellant's intent to appeal the termination. In the letter of January 12, 2018, appellant expresses its disagreement with the termination and states it intends to submit a new claim (SOF ¶ 12). The letter states that Nauset will "continue to vehemently invest every available resource to support our claim, our position and reputation" (*id.*), but it fails to express Nauset wishes to appeal the termination for default. Although we have historically construed liberally the language of a notice of appeal, Nauset's letters fail to express an intent to raise appellant's plight to an authority higher than the CO, and we hold that they do not suffice as a notice to appeal to the Board. *See Ft. McCoy Shipping & Svcs*., ASBCA No. 58673, 13 BCA ¶ 35,429 at 173,794.

3. Was appellant prejudiced by the CO's failure to provide appeal language in the termination letter?

Nauset argues that although the termination letter gave notice that it had the right to appeal under the Disputes clause, the CO failed to provide the appeal rights as required by the FAR and Nauset was prejudiced by this omission. Appellant asserts that because the termination letter did not provide the appeal language, it did not set in motion the 90-day period to appeal to the Board. The government argues that the omission of appeal rights in the termination letter did not prejudice appellant because appellant was represented by counsel throughout the performance of the contract, and

counsel conducted research on its appeal rights so appellant was aware of its rights to appeal the termination decision. We agree.

The termination letter included the following language: "This notice constitutes [a termination] decision, and Nauset has the right to appeal under the Disputes clause of the contract . . . . This notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause (SOF ¶ 7).

The contract incorporated by reference FAR 33.211(a)(4)(v) (SOF ¶ 1) which requires that a termination include language substantially as follows:

> This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

We have consistently held that '"when confronted with contracting officer decisions that only advise the contractor that it may appeal under the Disputes clause, omitting additional details of its rights, the Board has required the contractor to prove it was actually prejudiced by the omission, or that the contractor detrimentally relied upon it, to avoid the 90-day limitation period.'" *Shafi Nasimi Constr. and Logistics Co.*, 16-1 BCA ¶ 36,215 at 176,697 (quoting *Mansoor Int'll Dev.t Servs.*, ASBCA No. 58423, 14-1 BCA ¶ 35,742 at 174,926). *See also Access Personnel Servs., Inc.*, ASBCA No. 59900, 16-1 BCA ¶ 36,407 at 177,517. We have also consistently held that a termination for default is a government claim, and starts the 90-day clock as a final decision of the CO. *Western Trading Co.*, ASBCA No. 61004, 18-1 BCA ¶ 37,030 at 180,304 (citing *Bushra Co*., ASBCA No. 59918, 16-1 BCA ¶ 36,355 at 177,238).

Nauset states that it was prejudiced because it "did not understand that the Notice of Termination was a final decision of the contracting officer that was appealable to the ASBCA within ninety (90) days" (Papantonis aff. ¶ 9; *see* app. opp'n at 18; app. sur-reply at 3).

The facts before us suggest that Nauset did not understand the distinction between filing a claim with the CO and appealing a termination for default, which is a contracting officer's final decision (COFD) that must be appealed to the Board within

90 days of the termination. The January 17, 2018, letter states that Nauset intends, sometime in the future, to dispute the termination decision (SOF ¶ 12). Indeed, in its letter of February 12, 2018, to the CO, Nauset states that it intends to defend its position, that Nauset submits its wrongful termination claim in accordance with the Contract Disputes Act, and that in accordance with the CDA, Nauset requests that the CO render a final decision on its certified claim disagreeing with the termination within 60 days (SOF ¶ 14). This letter denotes Nauset's intent to file a *claim* against the default termination with the CO instead of an *appeal* with the Board, showing that Nauset did not understand that a termination for default is in itself a government claim, and starts the 90-day clock as a final decision of the CO. *Western Trading Company*, 18-1 BCA ¶ 37,030 at 180,304. The record does not explain the genesis of this confusion. However, we note that appellant's counsel conducted research on termination rights several times.

The record demonstrates that Nauset's attorney conducted extensive research on termination rights on the same day the termination letter was issued, including review of the "Government's 23 page notice of termination" which directed Nauset to the Disputes clause, and "[r]eview of Federal Acquisition Regulations regarding avenues of appeal" (SOF ¶ 9). On November 29, 2017, appellant's counsel researched "cases under Contract Dispute Act regarding default terminations" (*id.*). On July 6, 2017, Nauset's attorney researched the "best avenue of relief, Armed Services Board of Contract Appeals or Federal Court of Claims for filing suit" (SOF ¶ 3). On September 27, 2017, Nauset's attorney researched "docketing dates" (SOF ¶ 5). On October 18, 2017, Nauset's counsel conducted "[r]esearch of entitlement to additional time to respond to notice of default" and on October 19, 2017, he conducted "[r]esearch [on] FAR regulations; research case law regarding termination for default under FAR" (*id*.) Additionally, appellant's counsel was involved throughout the performance of the contract and termination process, and discussed the termination at length with the government (SOF ¶¶ 10, 18, 24). The contract incorporates by reference the Disputes clause (SOF ¶ 1) and the termination letter directs Nauset's attention to that clause, stating "Nauset has the right to appeal under the Disputes clause of the contract" (SOF ¶ 7). Given the amount of research conducted by counsel, and counsel's involvement throughout the performance and termination of the contract, we find it hard to believe that appellant was unaware of its appeal rights under the Disputes clause even if the termination letter did not include the language required by the FAR. Considered together, these facts do not support appellant's assertion that it was prejudiced by the termination letter's omission of appeals rights language. Accordingly, we conclude that the 90-day appeal period was not tolled (*see Access Personnel*, 16-1 BCA ¶ 36,407 at 177,517).

The 90-day period within which the CO's decision must be appealed to the Board is jurisdictional and may not be waived, and appellant failed to appeal the

COFD within the 90-day window. Accordingly, we do not have jurisdiction over ASBCA No. 61675.

CONCLUSION

For the reasons above, the Board asserts jurisdiction over the claims in the appeals docketed as ASBCA Nos. 61673 and 61675. To the extent ASBCA No. 61675 also appeals a termination for default, that portion of the appeal is time-barred and is hereby dismissed for lack of jurisdiction.

Dated: May 5, 2021

LIS B. YOUNG
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61673, 61675, Appeals of Nauset Construction Corporation, rendered in conformance with the Board's Charter.

Dated: May 5, 2021

PAULLA GATES LEWIS
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Hollymatic Corporation	)	ASBCA Nos. 61920, 61956
	)	
Under Contract No. HDEC04-18-D-0004	)	

APPEARANCE FOR THE APPELLANT: Bruce A. Courtade, Esq.
Rhoades McKee
Grand Rapids, MI

APPEARANCE FOR THE GOVERNMENT: Brian Lucero, Esq.
Deputy General Counsel
Defense Commissary Agency
Fort Lee, VA

OPINION BY ADMINISTRATIVE JUDGE THRASHER

These appeals involve a Defense Commissary Agency (DeCA or Government) commercial contract to purchase meat mixer/grinders[1] from Hollymatic Corporation (Hollymatic or appellant) for use in military commissaries. The government issued a contracting officer's final decision (COFD) terminating Hollymatic's contract for cause and asserted a government claim for return of $470,668 paid to Hollymatic (R4, tab 30). Hollymatic timely appealed the COFD decision: the termination for cause appeal was docketed as ASBCA No. 61920 and the appeal of the government's claim for return of the monies already paid was docketed as ASBCA No. 61956. The government's subsequent Answer asserted the affirmative defenses of fraud in the inducement. Thereafter, the parties requested that we bifurcate the proceedings and first address only this affirmative defense before other issues are addressed. We granted the parties request. Consequently, we only address whether there was fraud in the inducement. The parties have elected to proceed on the record pursuant to Board Rule 11.[2]

[1] These mixer/grinders, as the name implies, both grind and mixes the meat. The term mixer/grinder is sometimes used by the parties interchangeably with "grinder/mixers", "grinder" or "mixer". We likewise use these terms interchangeably.

[2] The record includes a joint stipulation of facts we refer to as (stip.)

FINDINGS OF FACTS

Background on the Parties

1. Hollymatic is a nearly 90 year-old manufacturer and supplier of equipment and packaging to food manufacturers throughout the United States and the world and has supplied meat grinders/mixers to the government for its store level meat processing departments for more than two decades. Prior to this incident in question there were no known complaints or prior problems relating to the safety approval status of Hollymatic's equipment. (Stips. 1-3) DeCA is an agency of the United States Department of Defense whose "mission is to operate an efficient and effective world-wide system of military store locations for the resale of groceries and household supplies at the lowest practical price ... to members of the military services, their families and other authorized patrons, while maintaining high standards for quality, products, and services." Department of Defense Directive 5105.55 (3).

The Solicitation

2. On April 3, 2017, the government published Solicitation No. HDEC04-16-R-0046 (Solicitation) to procure mixer/grinders for its store level meat processing departments (R4, tab 1). The Solicitation sought a commercial item pursuant to Federal Acquisition Regulation (FAR) Part 12. It contained FAR 52.212-1, -2, and -4. (R4, tab 1 at 25, 27, 30-31, 34) The definition of a commercial item, found in FAR 2.101, is: "any item that has been sold, leased, or licensed to the general public; or has been offered for sale, lease, or license to the general public."

3. The stated purpose of the Solicitation was to acquire a mixer/grinder to thoroughly mix and blend lean and fatty meat products for further processing into other products (R4, tab 1 at 29). The Solicitation provided that one award would be made based on a lowest price technically acceptable basis and that, "Failure by the offeror to submit all of the requirements may cause the offer to be rejected with no further consideration given." (R4, tab 1 at 25, 30) A rating of "Technically Acceptable" was required in order to be eligible for award and offerors would only be determined to be technically acceptable if their proposed product complied with the technical requirements and received at least an acceptable rating for each past performance evaluation sub-factor (*id.* at 30).

4. The solicitation directed:

> (b)(4) Product Information: Offerors shall submit descriptive literature, a matrix, specifications, drawings, cut sheets, or other information that demonstrates that their proposed products meet or exceed ALL the mandatory generalized

> operating specifications of the Commissary Equipment Description (CED). Be sure your documentation clearly shows which model is included in the proposal. Be sure to document how each specification in the CED is met or exceeded, but do not simply copy the CED into your technical proposal.

(R4, tab 1 at 26) Relevant to this appeal, CED 3.2.4 required auger and mixer arms powered by separate motors, CED 3.2.6 required a minimum 1.0 hp mixing motor, and CED 3.3.1 required that the product be Underwriters Laboratory (UL) listed and National Sanitation Foundation (NSF) 8 certified, or approved equivalent (R4, tab 1 at 29). Although there were two amendments to the solicitation, neither amendment changed the CED requirement for two motors (R4, tab 3, tab 42 at 570 ¶¶ 23-25). [3]

Hollymatic's Proposals

Initial Proposal

5. On April 17, 2017, appellant submitted a proposal in response to the solicitation that included a document titled "Hollymatic Approval Chart", dated April 5, 2017, showing that the proposed product, the Hollymatic grinder Model 180A (Model 180A) was UL listed on 5/16, and NSF certified on 1/87 (R4, tab 2 at 149). The proposal specifications and drawings also showed that a single 10 hp motor would drive the Model 180A grinder (*id.* at 148, 157). Additionally, the proposal included a diagram and parts list that included the UL label and the NSF label (*id.* at 155-56).

6. DeCA received multiple offers in response to the solicitation (R4, tab 42 at 568 ¶ 7). Ultimately the government conducted four rounds of discussions with Hollymatic and its remaining competitor (stip. 22). The initial proposal included an "Approval Chart" indicating the year of UL certification and NSF approval (R4, tab 2 at 149). The government accepted Hollymatic's representation regarding the UL certification (stip. 20) and NSF approval status in its initial proposal (R4, tab 41 at 485, 487, 489, tab 40

[3] During this appeal both Mr. Paul Andres and Ms. Liskey submitted sworn affidavits stating that the solicitation was modified to require the addition of the second motor (app. resp. br. at ex. 1, aff. of P. Andres ¶ 5; ex. 2, aff. of S. Liskey ¶ 15). Ms. Gross-Bendall's declaration directly contradicts this, stating the changes did not relate to the issues in this appeal (R4, tab 42 at 570 ¶¶ 23-25). Additionally, it is clear from a reading of the initial solicitation and the modifications that none of the changes to the CED had anything to do with the dual motor requirement.

at 471-472).[4] Additionally, Hollymatic received an acceptable past performance risk rating (R4, tab 40 at 471). However, Hollymatic's proposal was rated "Technically Unacceptable" after each of the first three rounds of discussions. Each of the Source Selection Evaluation Board (SSEB) Chairman's memorandums noted that the proposed product was a single motor grinder[5] (R4, tab 40, tab 41 at 484, 488, 512). Discussions were reopened on November 13, 2017 with Hollymatic and its competitor (R4, tab 3). Hollymatic was informed that same day, that its product was found to be technically unacceptable due to noncompliance with CEDs 3.2.4 (requiring two separate motors) and 3.2.6 (1.0 hp mixing motor) (stip. 23).

Final (Revised) Proposal

7. On November 13, 2017, the Contracting Officer (CO) and Source Selection Authority (SSA), Ms. Diana Gross-Bendall, forwarded a letter to Hollymatic's Governmental Accounts Sales Manager, Ms. Sue Liskey, informing her that due to some changes in the CEDs the government was reopening discussions. Additionally, this letter reminded Hollymatic that its proposal was previously found to be technically unacceptable due to not complying with CEDs 3.2.4 and 3.2.6 and requested Hollymatic provide the model number and technical specifications of the proposed item and to show how the product met the CED. (R4, tab 3)

8. Hollymatic submitted its final (revised) proposal the following day, November 14, 2017 (R4, tab 4 at 197). The revised proposal also contained specifications and drawings for the Model 180A which still included the UL label in the diagram and parts list (stip. 25). The revised proposal offered the Model 180A mixer/grinder, the same model number previously proposed, and included a Safety Label Placement drawing and Label List identical to the one in the initial proposal (R4, tab 2 at 155-56, tab 4 at 282-83). However, it did not include the "Approval Chart" provided in the initial proposal indicating the UL certification and NSF approval dates. The revised proposal also stated, "3.2.4 – Yes, Augers and Mixing arms are powered by separate motors. We are including our Mix Assist Motor Option at no cost. See Drawings. 3.2.6.- Yes, it is a 1.0 HP mixing motor – See Brochure, and Drawing Drive Components." (R4, tab 4 at 269) However, the proposal did not state any conditions or contingencies regarding the development of the dual motor Model 180A product, or UL and NSF approval status (R4, tab 42 at 571 ¶¶ 27-28).

9. Upon reviewing the Hollymatic's proposal, contract specialist, Ms. Melba Brown, forwarded an email on November 28, 2017 to Hollymatic requesting clarification

[4] It is undisputed that appellant's single-motor Model 180A grinder offered in its initial proposal was UL certified and NSF approved at all times relevant to this dispute (stip. 21).

[5] Other issues raised during discussions and changes to the Solicitation are not relevant to this appeal.

on "CED Responses – Please point out in your drawings of the CED and where in your narratives these are standard features and not options for the following: 3.2.4 [dual motor requirement] 3.2.6 [1 hp motor requirement] . . ." (R4, tab 41 at 525) Hollymatic, via Ms. Sue Liskey, responded that same day stating in pertinent part:

> 3.2.4. – 3D drawing is showing the mix motor. Also, Page 17 shows the grind motor. Page 18 shows the mix motor.
>
> 3.2.6. – Page 18 of the drawings. The 1 HP motor is under option because it is not used on a 175 machine. The brochure is used for both machines 175 & 180 machine. It was an option but will be standard equipment for the Government. All specifications on the CED will be standard equipment.

(Id.) Additionally, the technical data for the Model 180A, submitted in the final proposal, showed a second motor under "Optional Features" for the Model 180A (R4, tab 4 at 272).

10. After evaluating Hollymatic's revised proposal, the government determined that its proposed product was technically acceptable and on June 1, 2018 awarded contract No. HDEC04-18-D-0004 ("the contract") to Hollymatic (stips. 26-27).

Delivery Orders and Deliveries to Commissaries

11. Mr. Robert French, the DeCA contract specialist responsible for ordering the machines, testified that, "DeCA had an immediate need for mixer/grinders at multiple store locations due to the fact the previous contract had expired May 31, 2017 and no mixer grinders has been ordered for over a year" (R4, tab 43 at 577 ¶ 9). Ultimately, the government issued 23 delivery orders for a total of 42 units during performance of the contract until the date of contract termination and paid Hollymatic $470,668.00 for the 38 units that were delivered to the stores (R4, tabs 30, 35). The original sixteen (16) orders were delivered on various dates between August 21, 2018 and October 1, 2018. "At no time did Hollymatic disclose to [Mr. French] that the product was in development, that it was being tested for operation, and/or that UL approval was still pending." (R4, tab 43 at 578 ¶¶ 16-17).

12. After delivery and installation of the new mixer/grinders, multiple commissary stores reported electrical issues to the Equipment Maintenance Division at DeCA headquarters, such as: electrical cords and/or plugs on the new grinder which had to be replaced (R4, tabs 6-9). Photos of the new grinders delivered to the commissary stores show that the products displayed NSF approval stickers. (Rule 4, tabs 6A, 9A, 14A-14B, 15A-15C) On October 24, 2018, the government issued Hollymatic a cure notice, stating "These units are noncompliant with contract requirements 3.3.1, Industry

Standards: Underwriters Laboratory (UL) listed and National Sanitation Foundation (NSF) 8 certification, or approved equivalent and 3.2.2, minimum ground meat output of 35 pounds per minute." Hollymatic was given 10 days to make the necessary corrections and replace the noncompliant units at no additional cost to the Government. (R4, tab 23) Subsequently, the government verbally agreed to extend the deadline to comply with the 10-day cure period until November 6, 2018 (R4, tab 24).

13. On November 9, 2018, the government issued a COFD terminating the contract for cause, asserted a government claim for return of the $470,668 already paid to Hollymatic for delivery of 38 grinders and demanded Hollymatic pick-up all units at its expense (R4, tab 30).

14. Hollymatic responded that same day by letter requesting the government reconsider because the government's notice contained several significant misstatements and unsupported conclusions (R4, tab 31). The government did not respond to Hollymatic's request to reconsider the termination and on November 21, 2018, issued contract modification terminating the contract based on the contractor's failure to meet contract requirements specified in the contract and cure notice (R4, tab 32 at 427).

15. On December 28, 2018, the government received notice that the appellant appealed the contract termination and the government claim for return of the monies already paid to this Board and was docketed as ASBCA Nos. 61920, 61956 respectively. The notice of appeal stated, "After completely redesigning its machine to fit DeCa's new dual-motor requirements, Hollymatic beat out its competitors in a competitive-bid process and was awarded a five-year contract to provide the meat grinders."

16. On January 28, 2019, the government filed its Answer asserting an affirmative defenses of fraud in the inducement and material misrepresentation relating to the UL and NSF approval status of the units (gov't answer, Part III at 29-30). The government's Answer also included a counterclaim seeking payment of $470,668 for the rejected and noncompliant products (gov't answer, Part IV at 32-33). Thereafter, the parties agreed to bifurcate this appeal, stipulating, "In this bifurcated appeal, the issue of whether the equipment could satisfy the minimum meat output requirement is not currently before this Court, but may be at issue in the second portion of the appeal." (Stip. 44)

Development of the Dual Motor Model 180A

17. Given the realization that their only chance of winning award of this contract was to offer a dual motor machine meeting the CED requirements, Hollymatic began developing a dual motor version of the 180A single motor product during the source selection. Mr. Andres, Hollymatic's mechanical engineer, testified that,

> [¶ 4] Hollymatic sold only single-motor mixer/grinders and did not make or sell any dual-motor mixer/grinders prior to June 2018.
>
> [¶ 5] Hollymatic designed a two-motor mixer/grinder only because the Government changed the specifications in the Solicitation at issue in this case to require a dual-motor unit.
>
> [¶ 6] If Hollymatic did not receive the contract at issue in this dispute, it had no plans to produce a dual-motor mixer/grinder, so Hollymatic did not plan to seek UL or NSF certification unless it was the winning bidder on the contract.

(App. resp. br. at ex 1, aff. of P. Andres ¶¶ 4-6) Additionally, although offered as a version (option) of the 180A model, Hollymatic described the dual motor product in its notice of appeal to this Board as "complete[ly] redesign[ing]" of its mixer/grinder. (Notice of Appeal at 2, 5 ¶ II (d)). Hollymatic's response to government interrogatories described the complete redesign as follows:

> The complete re-design of the machine included figuring out a way to go from a single motor design to a dual motor design. The interior machine space had to be calculated to fit an extra motor and there needed to be a way to drive the mix process with a separate motor versus the traditional way of engaging a manual reversing clutch. New parts had to be machined and new electrical components had to be added to make this all possible.

(Gov't. supp. R4, tab 38 at 466-67, Response to Interrogatory No. 8)

The Dual-Motor Model Offered in Hollymatic's Final Proposal was not UL Listed or NSF Certified Until After Award and Delivery of the Machines

UL Listing

18. We find that the grinder/mixer offered in Hollymatic's final proposal was not UL listed or NSF certified at the time offered or at time of award. In fact, Hollymatic had no intention to seek UL listing or NSF certification until after contract award. Mr. Andres testified that, "[I]f Hollymatic did not receive the contract at issue in this dispute, it had no plans to produce a dual-motor mixer/grinder, so Hollymatic did not plan to seek UL or NSF certification unless it was the winning bidder on the contract." (App. resp. br. at ex 1, aff. of P. Andres ¶ 6) It was not until ten days after contract award, on June 11, 2018, that Hollymatic contacted UL "to open a new UL project on our 180 machine...

This will be a very hot item to get completed." The title of the email is "New ul project." (Gov't supp. R4, tab 36 at 436) On June 12, 2018, in an email to UL, Hollymatic identified the following changes to the Model 180A mixer grinder: "We will be adding a 1 H.P. motor to the machine. So the machine will now operate with two motors..." (gov't supp. R4, tab 36 at 439) UL responded that, "If you are adding a second motor to the unit, we will have to run tests." (Gov't supp. R4, tab 36 at 439)

19. On October 5, 2018, after receiving the store reports of electrical issues with the new mixer grinders, the government sent a direct inquiry to UL to confirm whether the new grinders delivered to the commissary stores (Model 180A, dual motor) had been tested and approved (stip. 31). On October 10, 2018, the government sent Hollymatic a Letter of Concern and requested that Hollymatic certify the following information on the new grinders: amp draw of equipment and UL listing (stip. 32). The letter additionally requested that NSF certification status be addressed in the signed response (R4, tab 18). The following day, October 11, 2018, Hollymatic submitted a letter to the government, stating "An internal issue caused an error with the UL approval process" (stip. 33). The letter also stated, "NSF approved and will resend if necessary." But did not provide any other information regarding the actual status of its UL certification (R4, tab 21).

20. On October 18, 2018, Hollymatic submitted another letter to the government admitting the machines delivered were not UL certified, stating,

> We are in the process of getting a hard date from UL. We suspect this will happen in the next few days... We propose as the machine is UL certified we will ship the new machine to the 23 locations. At that time, we will supply the information for the return of the uncertified machine or machines.

(Stip. 35) It was not until October 31, 2018, that UL issued a "Notice of Completion and Authorization to Apply the UL Mark" (R4, tab 25). We find that the grinder mixer offered in Hollymatic's final proposal was not UL certified until October 31, 2018.

NSF Certification

21. The government sought information regarding the status of NSF certification of the delivered machines and in response, on January 7, 2019, the government received an email from NSF stating "Only the 180A appears in our listings." The email also contained a weblink. (R4, tab 34 at 431) The weblink shown in the NSF email opens a document titled "175 & 180A mixer grinders." Specifications of the Hollymatic 175 and 180A are shown on the second page of the document (R4, tab 34A at 434). The government's supply management specialist reviewed the email and document provided by NSF. He stated: "[B]elow is the answer from NSF and when I copied and pasted the

link it led me to their website which lists only the previous model, with the 1 motor configuration. It appears to me as if they did not submit the 2 motor configuration for NSF certification." (R4, tab 34 at 431)

22. During the course of this appeal, Hollymatic submitted three exhibits showing communications with NSF, two dated February 2019 and one on April 2019 (app. supp. R4, tabs 3-4, 44). The Hollymatic exhibits dated February 2019 reference approval of a Hollymatic 180A mixer/grinder in December of 2009, "and has remained NSF certified without interruption in status" (app. supp. R4, tab 3 at 202). The Hollymatic exhibit dated April 2, 2019 shows an email exchange between Hollymatic and NSF. Hollymatic states: "We updated our 180A last summer, but only added another motor to the cabinet." (App. supp. R4, tab 44 at 214) NSF responded: "In adding another motor, will this change the model number or add an additional model to this family of products? If so, then the PIF and Listing need to be updated . . . If you are not changing or adding another model, and no changes are being made to the CPL or exterior design/construction of the machine, then there will be no need for updates. (*Id.*) In an email dated April 3, 2019, NSF states: "Please note that we should probably add a note to the PMF or a footnote to the listing." (App. supp. R4, tab 44 at 213) In the emails exchanged with NSF on April 2 and 3, 2019, Hollymatic, Mr. Andres, twice sought confirmation from NSF that there were prior discussions concerning the changes to the Model 180A. NSF did not confirm any prior discussions. (App. supp. R4, tab 44 at 213-14) Hollymatic did address this issue in Mr. Andres' supplemental affidavit stating, "[S]hortly after I found out that Hollymatic received the contract, I contacted Laura Hawkins, who is the person at NSF with whom I interact most often for product certification issues" (app. resp. br. at ex 1 at 3 ¶ b). Our findings establish there is no contemporaneous evidence of Hollymatic contact with NSF prior to February 2019 regarding their new dual-motor product and, based upon Mr. Andres' testimony, at a minimum, there was no contact until after award.

Affidavit of Ms. Susan Liskey and Declaration of Ms. Diana Gross-Bendall

23. Ms. Liskey testified that she was HPA's Government Account Sales Manager who prepared and submitted HPA's proposal at issue (app. resp. br. at ex 2, aff. of S. Liskey ¶¶ 5-6, 8). Her understanding of the requirements of the solicitation was:

> Based on my experience preparing proposals for the federal government for more than 25 years, my understanding is that when a contractor submits a proposal in response to a solicitation, the contractor is telling the government that <u>if</u> the contractor is selected as the vendor for that contract, <u>then</u> when the time comes to fulfill the contract, the vendor <u>will</u> provide goods and equipment, matching the specifications set forth in the solicitation and proposal.

(*Id.* ¶ 7)

24. Ms. Liskey's also explained her actions during the source selection while responding to government questions about the revised proposal:

> [¶ 21] On November 28, 2017, I received an email follow up from DeCA contracting agent Melba Brown seeking to confirm that the revised proposal addressed three concerns that she had after her initial review of the new submission involving the separate mix and grind motors and a heater system added by the government.
>
> [¶ 22] That same day, I responded via email to Ms. Brown and pointed her to specific pages of the brochure and operators manual that included drawings of the second (mixer) motor and heater system that were not included in the first submission. These drawings, like the proposal itself, were made to show the government how Hollymatic proposed to build the Model 180A mixer/grinder if it was awarded the contract.
>
> [¶ 23] I never made any representation – intentional or otherwise-that the proposed dual-motor Model 180A had already been UL-certified or NSF approved (although I assumed that it would be, either automatically or through a new application to the UL). The documents that I submitted showing prior UL and MSF approval clearly applied to the single-motor unit (which is why they were submitted with our initial proposal, when the government was soliciting production of a single-motor mixer/grinder).
>
> [¶ 24] When I received a request for clarification regarding whether the Hollymatic Mixer/Grinder would have one or two motors, I responded with information regarding the two-motor system that Hollymatic would produce if it received the government contract, including an explanation that the one horse power mixer motor that was available as an option on a similar but different product would be standard on all of the two-motor units produced pursuant to the contract.

(*Id.* ¶¶ 22-24)

25. Ms. Gross-Bendall was the contracting officer who issued the solicitation and the Source Selection Authority (SSA) for the contract award (R4, tab 42 at 567 ¶ 3). After reviewing the affidavits of Susan Liskey, Paul Andres, and James A. Trejo, she provided testimony directly contradicting critical aspects of Ms. Liskey's testimony, stating,

> [¶ 26] Ms. Liskey's affidavit states that the final revised proposal contained drawings "to show the government how Hollymatic proposed to build the Model 180A mixer/grinder if it was awarded the contract." However, the revised proposal did not state or otherwise indicate that this was a new design of the Model 180A that it proposed to build after award. Instead, the technical material in the final proposal stated "now available."
>
> [¶ 27] Also, the revised proposal did not state or otherwise indicate that the UL and NSF certifications only applied to the single motor Model 180A, and/or did not apply to the Model 180A with the included optional second motor.
>
> [¶ 28] Nothing in the proposal, nor any other communication during discussions with Ms. Liskey, clearly identified the dual motor mixer grinder as a product that was still in the R&D phase.
>
> [¶ 29] The DeCA equipment contracting division does not do R&D contracts; we solicit for commercial items only.
>
> [¶ 30] The solicitation contained clauses applicable only to commercial items, FAR 52.212-1, 52.212-4, and 52.212-5. Thus, the solicitation called for a commercial item.
>
> [¶ 31] In my twenty three years of federal government contracting, I have never had a contractor offer a non-existent product for a commercial item contract.
>
> [¶ 32] Based on what I know now, the product offered did not meet the definition of a commercial item.
>
> [¶ 33] A commercial item, per paragraph 1 of the commercial item definition in FAR 2.101, is any item that has been sold, leased, or licensed to the general public; or has been offered for sale, lease, or license to the general public.

> [¶ 35] According to the Supplemental Affidavits of Paul Andres and James A. Trejo, Hollymatic "had no plans to produce a dual-motor mixer/grinder" if they did not win the award. Based on this information, the item offered by Hollymatic did not meet the definition of a commercial item.
>
> [¶ 36] Mr. Trejo's affidavit also stated that he would have delayed delivery until such time the UL and NSF certifications were approved. Hollymatic's proposal also did not disclose that there were any circumstances that would delay delivery of the product after award.
>
> [¶ 37] The solicitation, and the resulting contract, required delivery of the product within 45 days of issuing an order pursuant to FAR 52.212-4(a). The Agency required mixer-grinders to be available for use immediately after award.
>
> [¶38] Hollymatic's proposal did not disclose that we would have to wait for them to build, test, and certify the product after award.

(*Id.* at 571-72 ¶¶ 26-38)

DECISION

The only issue before us is the government' affirmative defense of fraud in the inducement - that appellant made representations in its proposal that were either fraudulent or material misrepresentations rendering this contract *void ab initio* (gov't br. 25-26). The common law defense of fraud in the inducement may be established either by proof of fraud or material misrepresentation. RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981). It is well established that when one party to a contract induces the other party to enter into an agreement through fraud or misrepresentation, the contact is *void ab initio*. *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1200 (Fed. Cir 1988), *cert. denied*. 486 U.S.1057 (1988); *Supreme Foodservice GmbH*, ASBCA Nos. 57884 *et al.*, 16-1 BCA ¶ 136,387 at 177,397. However the Board does not have jurisdiction to impose civil or criminal penalties and forfeitures for a fraudulent claim. *Supreme Foodservice GmbH*, 16-1 BCA ¶ 36,387 at 177,401 n.17 (citing *United Technologies Corp*., ASBCA No. 46880 *et al.*, 95-2 BCA ¶ 27,698 at 138,079 n.1.) The only time we may base our decision upon findings of fact grounded in fraud is when a court of competent jurisdiction has determined that a fraud occurred. *Supreme Foodservice GmbH*, 16-1 BCA ¶ 36,387 at 177,384; *Environmental Systems, Inc.*,

ASBCA No. 53283, 03-1 BCA ¶ 32,167 at 159,053 (*on recon*.) (citing *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 547-48 (Fed. Cir. 1988)).

Here, we do not have a finding of fraud rendered by a court of competent jurisdiction. However, in such instances, we may make findings as to the material facts relating to material misrepresentation and the contract and how the acquisition regulations, statutes and contract clauses operate given those findings. *Aydin Corporation, Microwave Division*, ASBCA No. 34054, 89-1 BCA 21,206 at 106,997 ("When a contractor makes a material misrepresentation of fact that is relied on by the Government in entering into a contract, the Government has the common law right to rescind the contract (citations omitted)"); *Supreme Foodservice GmbH*, 16-1 BCA ¶ 136,387 at 177,384; *Servicios y Obras Isetan S.L.*, ASBCA No. 57584, 13 BCA ¶ 35,279 at 173,162 (citing *United States v. Acme Process Equipment Co*., 385 U.S. 1381 (1966)); *Toombs & Co*., ASBCA Nos. 35085, 35086, 89-3 BCA ¶ 21,993.

Three requirements must be met in addition to a misrepresentation to render a contract voidable: (1) the misrepresentation must have been fraudulent or material; (2) the misrepresentation must have induced the recipient to make the contract; and (3) the recipient must have been justified in relying on the misrepresentation. *Servicios Y Obras Isetan S. L.*, 13 BCA ¶ 35,279 at 173,162, citing RESTATEMENT (SECOND) OF CONTRACTS § 164 (1) (1981).

Did Hollymatic Misrepresent its Product During the Source Selection?

Misrepresentation is defined as, "an assertion that is not in accord with the facts." *L.C. Gaskins Construction Co*., ASBCA No. 58550 *et al.*, 17-1 BCA ¶ 36,780 at 179,286, citing RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). The government argues that the answer to this question can only be determined by considering Hollymatic's initial proposal with the final revised proposal within the context of the overall source selection (gov't br. at 27). We agree. Relevant here, the solicitation sought three requirements: that the mixer/grinder be UL listed, NSF certified, and two separate motors - one to drive the auger and a minimum 1.0 hp motor to drive the mixer (finding 4). Hollymatic's initial proposal offered the company's existing Model 180A mixer/grinder that was an existing commercial product, UL listed and NSF certified. It also included an "Approval Chart" date April 5, 2017 showing both UL and NSF had been granted years prior. Additionally, the proposal included documents and drawings from 2011 that specifically addressed the safety approval status of the products and directed the government to its drawings to confirm (finding 5). However, Hollymatic's initial proposal was found to be technically unacceptable, i.e., un-awardable, because its proposed product did not meet the minimum technical requirements (product offered only had one motor, not two as required by solicitation). Hollymatic's proposal continued to be technically unacceptable through three subsequent rounds of discussions because of the single motor issue. (Finding 6)

Hollymatic's final (revised) proposal submitted the Model 180A mixer/grinder (the same model number previously proposed), and included a Safety Label Placement drawing and Label List identical to the original initial proposal, and the specifications and drawings for the initially-proposed Model 180A mixer/grinder, which still included the UL label in the diagram and parts list. However, it did not include the "Approval Chart" submitted in the initial proposal. Importantly, the proposal for the first time included two motors stating, "Yes, Augers and Mixing arms are powered by separate motors. We are including our Mix Assist Motor Option at no cost. See Drawings." The final revised proposal did not identify any conditions or contingencies relating to the development of the product, UL listing or NSF certification. (Finding 8)

Probably somewhat surprised, the government requested clarification on the dual motor issue, requesting that appellant specially point out where in the CED drawings and the proposal narratives that these features were standard features and not options. Appellant, responded stating in pertinent part:

> 3.2.4. – 3D drawing is showing the mix motor. Also, Page 17 shows the grind motor. Page 18 shows the mix motor.
>
> 3.2.6. – Page 18 of the drawings. The 1 HP motor is under option because it is not used on a 175 machine. The brochure is used for both machines 175 & 180 machine. It was an option but will be standard equipment for the Government. All specifications on the CED will be standard equipment.

Additionally, the technical data for the Model 180A, submitted in the final proposal, showed a second motor under "Optional Features" for the Model 180A. (Finding 9)

The implication from appellant's final proposal was that it offered an option model of the 180A that had two motors, was UL listed, NSF certified, and more importantly, currently existed. The government evaluators had already understood that the product described in the initial proposal (Model 180A) was UL certified and NSF approved (finding 6). After reviewing the final technical proposal, the technical evaluation board rated Hollymatic's product technically acceptable resulting in appellant receiving award of the contract (finding 10).

Our findings establish that none of these representations were true. The reality is that the dual motor model did not exist during the source selection; it was a completely new product based upon a re-design of the 180A mixer/grinder requiring future development, testing and safety approval created solely to facilitate appellant's attempt to win this award (finding 17). Appellant's final proposal did not disclose the fact that the product offered in the final proposal did not yet exist because it was being developed specifically to compete for this contract and appellant was still conducting internal testing

of a dual model in July 2018, a month after contract award (findings 17, 25 ¶ 26). Regarding UL certification, appellant did not even start the process to obtain UL certification until ten days after award of the contract and it was not UL certified until October 31, 2018, some five months after the award (findings 18, 20). Likewise, the weight of evidence indicates appellant did not communicate with NSF regarding the dual motor model till 2019, months after the award and delivery of the mixer/grinders to the DeCA commissaries (findings 21-22).

Appellant's Arguments

Appellant asserts there was no misrepresentation (app. br. at 19-22; app. resp. br. at 14-33). This assertion is based primarily on two relevant arguments. First, although it is undisputed the dual-motor Model 180A did not exist and was not yet UL listed or NSF certified prior to award of the contract, the solicitation requirements (CEDs) did not specify when the CEDs must be met, but only required offeror's to promise they could meet the requirements by time of delivery (app. br. at 4-6).

Appellant, in support of its first argument, provides a sworn affidavit from Ms. Susan Liskey, HPA's Governmental Accounts Sales manager, who prepared and submitted HPA's proposal. Ms. Liskey testified that her understanding of the solicitation, based upon her 25 years of experience in preparing proposals for the federal government, was that the offer made during the source selection is only to perform at a future date, if selected and awarded the contract. (Finding 23)

We do not find Ms. Liskey's testimony or appellant's argument on this issue persuasive. None of the solicitation language indicates future compliance with the technical CEDs is sufficient to meet the CED requirements. Our plain reading of the solicitation indicates that DeCA sought to acquire a currently existing commercial product, i.e. not a developmental product, and that the product be currently UL approved and NSF certified to deserve a technically acceptable rating (findings 2-4). The whole structure of the source selection evaluation was established to confirm the offered product met the relevant CED requirements at the time of award. Additionally, Ms. Liskey's testimony was directly contradicted by the testimony of the government CO and SSA, Ms. Gross-Bendall (finding 25). Ms. Gross-Bendall testified the DeCA equipment contracting division "does not do R&D contracts; we solicit for commercial items only... and in her 23 years federal government contracting has never had a contractor offer a non-existent product for a commercial item contract" (*id.* ¶ 31).

Our reading of the solicitation is also supported by the fact this was a commercial acquisition pursuant to FAR Part 12 and the definition of a commercial item (product) in FAR 2.101, paragraph 1, requires the item to have been "sold, leased, or licensed to the general public; or has been offered for sale, lease, or license to the general public" (i.e., to presently exist in the market) (finding 2). This clearly was not the case. Mr. Andres's

testimony and appellant's notice of appeal admit appellant did not manufacture this product prior to the source selection and, in fact, only developed it to compete for this award, and if it did not receive the award, did not plan to produce a dual motor mixer/grinder. (Finding 17)

Second, appellant asserts no false statements or false facts were made in the final proposal or during the source selection, so there were no misrepresentations (app. resp. br. at 14-33). Ms. Liskey testified that:

> I never made any representation – intentional or otherwise- that the proposed dual-motor Model 180A had already been UL-certified or NSF approved . . . The documents that I submitted showing prior UL and NSF approval clearly applied to the single-motor unit (which is why they were submitted with our initial proposal, when the government was soliciting production of a single-motor mixer/grinder).

(Finding 24 ¶ 23) We do not find this testimony credible. It is true that Ms. Liskey never specifically stated the dual-model Model 180A had already been UL listed and NSF certified. However, by offering what appeared to be the existing Model 180A, representing the second motor as an option, created the impression the product was already UL listed and NSF as evaluated during the initial round of evaluation. As Ms. Gross-Bendall testified, the proposal, "did not state or otherwise indicate that the UL and NSF certifications only applied to the single motor Model 180A, and/or did not apply to the Model 180A with the included optional second motor." (Finding 25 ¶ 27) We conclude appellant's statements (and documentation) on the one hand and silence on the other related to the currency of UL listing and NSF certification was a "half-truth" [6] causing a misrepresentation. Additionally, appellant's statement concerning the existence of an option was false. There is no evidence that a dual-motor Model 180A option existed prior to this source selection. Appellant's one employee testified the company has never sold a dual motor mixer/grinder, development of one was only begun during this source selection to win the award, and if not awarded the contract there was no intention of selling a dual motor model (finding 17). We conclude this was clearly a misrepresentation. *L.C. Gaskins Construction Co*., 17-1 BCA ¶ 36,780 at 179,286, citing

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[6] *Half-truths.* A statement may be true with respect to the facts stated, but may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts. For example, a true statement that an event has recently occurred may carry the false implication that the situation has not changed since its occurrence. Such a half-truth may be as misleading as an assertion that is wholly false. RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (1981).

RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981). Additionally, the statement made by Ms. Liskey regarding the government initially soliciting a single motor mixer in the initial solicitation was false (findings 4 at n.3, 24 ¶ 21).

These facts taken together establish that Hollymatic made three misrepresentations in its final revised proposal - that the dual motor 180A model offered was an existing product (a commercial product), and that it was already UL listed and NSF certified. Hollymatic did not qualify its proposal or inform the government of these facts.

Was the Hollymatic's Misrepresentation Material?

Comment (a) to the RESTATEMENT (SECOND) OF CONTRACTS § 162 (2) states: "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." Appellant is not new to government contracts; it has a 20 year history of selling to the government (finding 1). The dual motor requirement was new for Hollymatic and they did not have an existing dual motor grinder. After three rounds of discussions having had their proposal found to be technically unacceptable, appellant knew its only chance to win this contract was to build a dual motor version of the 180A model. So they developed one during the source selection and offered it during their final proposal. However, the evidence establishes the model offered in the final proposal was not UL listed, NSF certified and the dual motor model was still under development after award. (Findings 18-22) Hollymatic's misrepresentations were material because without them Hollymatic's offered product would have been un-awardable and it would not have been awarded the contract.

Appellant's Argument

Appellant points to the government's failure to verify the UL and NSF certification of the dual motor mixer/grinder offered in the final proposal as evidence that these requirements were not material. As an example, appellant relies upon the fact that the government did not ask appellant to explain why there was no UL and NSF "Approval Chart" in the final proposal as provided in the initial proposal. (App. resp. br. at 32) We reject this line of argument because we interpret this as an attempt by appellant to shift the responsibility for the accuracy of its representations to the government. The government's requirement to verify solicitation requirements is for the benefit of the government, not the contractor, and appellant may not attempt to shift responsibilities for its deficiencies not discovered by the government. *Aydin Corporation, Microwave Division*, 89-1 BCA at 106,997; *Vertex Construction*, 14-1 BCA at 175,108. As we have held in the past, "government is entitled to rely upon contractor's bid representations", *Aydin Corporation, Microwave Division*, 89-1BCA at 106,997, and "the burden is not on the government to ferret out bid misinformation", *Vertex Construction*, 14-1 BCA at 175,107.

Additionally, as a practical matter, the government did inquire about the sudden appearance of a dual motor version of the 180A model but was not told the offered mixer/grinder was a newly developed product. Instead, appellant represented it was offering an option to the 180A model. The implication from this representation was that the option, i.e. the dual motor version, was an existing product (the 180A), not a new one in development. Given these facts, we conclude it was reasonable for the government to rely upon its prior verification of the 180A model's UL and NSF certification during the initial evaluation.

Did Hollymatic's Misrepresentations Induce the Government to make the Contract and was the Government Justified in Relying on Hollymatic's Misrepresentation?

Regarding the issue of inducement, the government's reliance upon Hollymatic's proposal is demonstrated by the stipulated facts that: the government accepted representations of UL approval in original proposal and revised proposal, rated the final proposal technically acceptable and then awarded the contract to Hollymatic (findings 6, 10). Additionally, regarding the reliance issue, the government's reliance was justified because the government had no reason to question Hollymatic's representations in its proposal: The parties enjoyed a mutually beneficial relationship with Hollymatic supplying the government with supplies and equipment for over 20 years, with no prior issues concerning the safety of Hollymatic equipment (finding 1).

Additionally, appellant argues there was no injury to the government warranting such a severe sanction as finding the contract *void ab initio* (app. resp. br. at 42). We disagree. Based upon the evidence we conclude appellant made three misrepresentations in its final (revised) proposal. These misrepresentations were material, the government relied upon them to award appellant this contract and was justified in doing so. We further conclude that appellant would not have been found technically acceptable and consequently awarded this contract had it not misrepresented its product to the government. Accordingly, we conclude appellant's actions constituted fraud in the inducement and we find the contract void ab initio. This is a severe remedy but it is premised upon the "potential for injury to the public interest by actions which compromise the integrity of the Federal contracting process." *Servicios y Obras Isetan S.L.*, 13 BCA ¶ 35,279 at 173,162, citing *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). We conclude that is the case here.

As the contract is deemed *void ab initio*, we need not address appellant's other arguments. Since the contract has been determined to be *void ab initio*, there is no CDA contract in being, therefore we are deprived of jurisdiction to consider appellant's affirmative appeal of the termination for cause or the appeal of the government's affirmative claim. Consequently, ASBCA Nos. 61920 and 61956 are denied. Likewise, we lack jurisdiction to order appellant to return the monies paid ($470,668) to appellant

for the 38 machines that were returned to appellant. *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 20-1 BCA ¶ 37,618 at 182,636; *ABS Development Corporation*, ASBCA Nos. 60022 *et al.*, 19-1 BCA ¶ 37,234 at 181, 233; *Servicios y Obras Isetan S. L.*, 13 BCA ¶ 35,279 at 173,163.

CONCLUSION

The appeals are denied.

Dated: March 22, 2021

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

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61920, 61956, Appeals of Hollymatic Corporation, rendered in conformance with the Board's Charter.

Dated: March 23, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Aeronautics Company	)	ASBCA No. 62209
	)	
Under Contract No. FA8625-07-C-6471	)	

APPEARANCES FOR THE APPELLANT: Stephen J. McBrady, Esq.
Skye Mathieson, Esq.
J. Chris Haile, Esq.
Michelle D. Coleman, Esq.
John Nakoneczny, Esq.
Crowell & Moring LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrant, Esq.
Air Force Deputy Chief Trial Attorney
Caryl A. Potter III, Esq.
Lawrence M. Anderson, Esq.
Danielle A. Runyan, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE PAGE ON APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON "LACHES," OR IN THE ALTERNATIVE TO STRIKE THE GOVERNMENT'S AFFIRMATIVE DEFENSE

The subject contract required LMA to upgrade 49 C-5 Galaxy aircraft. The parties have filed a series of cross-motions for summary judgment, which largely focus upon the timeliness of the underlying October 15, 2018 claim in the amount of $143,529,290. This claim was asserted by Lockheed Martin Aeronautics Company (LMA, appellant, or contractor) against the Air Force (USAF, Air Force, government, or respondent) for allegedly excessive "over & above" (O&A) work that resulted in greater costs and a cumulative lack of productivity. LMA also moved for partial summary judgment (or in the alternative to strike) the government's affirmative defense of laches (app. mot.). We grant appellant's motion for partial summary judgment on the issue of whether laches remains an allowable affirmative defense.[1]

[1] Because we grant partial summary judgment on this issue, it is unnecessary that we address appellant's alternative motion to strike the government's assertion of laches as an affirmative defense.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

On April 30, 2007, the Air Force awarded Contract No. FA8625-07-C-6471 for the "Reliability Enhancement and ReEngining Program" (RERP) to LMA. The contractor was to provide a set of upgrades to specified C-5 aircraft. This included the installation of new CF6-80C2 commercial engines and other enhancements to subsystems and major components. This work was done under mostly fixed-price contract line items (CLINs). (R4, tab 3 at 1-13, 28, 73-75)

On October 15, 2018, pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 (CDA) and Federal Acquisition Regulation (FAR) 52.233-1 DISPUTES, LMA submitted a certified claim in the amount of $143,529,290 and requested a final decision (COFD) from a government contracting officer (CO) (R4, tab 2 at 2-3).[2] Appellant's claim alleges that "excessive O&A work changes resulted in an additional, constructive change in the form of cumulative impacts to the performance of the fixed-price RERP efforts" (*id*. at 21). LMA "calculates a total of 428,482 production hours attributable to the cumulative disruptive impacts of O&A changes" in pricing its claim (*id*. at 25).

By correspondence dated December 7, 2018, the CO declined to issue a COFD on LMA's claim of October 15, 2018 (R4, tab 1).

On October 3, 2019, the contractor appealed to the ASBCA on the basis of the government's "deemed denial of its certified claim . . . submitted on 15 October 2018." The Board on October 7, 2019 issued its "Notice of Docketing" and designated the appeal as ASBCA No. 62209.

The government's answer of December 3, 2019 asserted the affirmative defense of laches (answer at 43).

DECISION

The Parties' Positions

1. *The Appellant*

On August 17, 2020, LMA filed "Appellant's Motion for Partial Summary Judgment on 'Laches,' or in the Alternative, to Strike Respondent's Affirmative Defense." LMA argues there are no disputed material facts, and that it is entitled to

[2] Where pertinent, the Board adopts the pagination affixed by the parties as part of the Rule 4 file submission.

favorable judgment as a matter of law. In the alternative, appellant seeks to strike the government's affirmative defense of laches. (App. mot. at 1, 4, 7)

LMA contends that although "[l]aches is an equitable doctrine that is appropriate, in some circumstances, where there is no applicable statute of limitations," this defense is unallowable in this appeal. Appellant maintains that "Laches is a 'gap-filling' doctrine that may be applied when there is no statute of limitations, but it is not a cognizable affirmative defense to claims governed by a Congressionally-enacted statute of limitations." The contractor says that because its claim was asserted under the CDA and "Congress specifically enacted a six-year statute of limitations for claims" for this act, this provision "applies to Lockheed Martin's claim, and there is no 'gap' for the doctrine of laches to fill." (App. mot. at 2)

Appellant's argument relies heavily upon the opinion of the United States Supreme Court in *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017). LMA asserts that this decision "clarified that the equitable defense of laches cannot be invoked against a legal claim when Congress has statutorily prescribed a reasonable limitations period for bringing such claims." (App. mot. at 4) Appellant points out that Congress amended the CDA by adding the six-year statute of limitations through the Federal Acquisition Streamlining Act of 1994. This amendment applies to all contracts awarded on or after October 1, 1995 and the contract between the government and LMA was awarded on April 30, 2007, bringing it within the six-year submission limitation. Appellant asserts that, in accordance with *SCA Hygiene*, the effect of the CDA's Congressionally-imposed statute of limitations is that the affirmative defense of laches is unavailable against LMA's claim. (App. mot. at 4-6) The contractor contends that, "although *SCA Hygiene* was not a CDA case, the rule against laches [articulated there] is broadly applicable to all legal claims that are subject to a Congressionally-enacted statute of limitations" (*id*. at 6).

2. *The Government*

The government does not raise any disputed material facts in opposing the motion (gov't opp'n at 2). It primarily argues that no tribunal has rendered a decision holding that the CDA bars laches as an affirmative defense to claims made under that Act. The government notes that *SCA Hygiene* was not a CDA case, and contends that the Board should not extend the holding in that case to encompass that statute. It asserts that ASBCA precedent, particularly in *Anis Avasta Constr. Co*., ASBCA No. 61107, 18-1 BCA ¶ 37,036, is in agreement that the affirmative defense of laches applies to CDA claims. (Gov't opp'n at 4-5)

The government observes that the Board in *Anis Avasta* relied in part upon *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F. 2d 1 (Fed. Cir. 1985) (*see* 18-1

BCA ¶ 37,036 at 180,317). The government says that *S.E.R.* stands for the proposition that laches remains an appropriate affirmative defense if it is necessary for the tribunal to prevent the injustice of a prejudicially-tardy claim, even where the suit is subject to a statute of limitations. The government quotes from this decision: "laches cannot ordinarily be invoked as a defense to legal claims where a statute of limitations is normally available to preclude the recovery on stale claims, *unless the offended party has been unmistakably prejudiced by the delay in assertion of the claim*.'" (Gov't opp'n at 3 n.1 (citing *S.E.R.*, 759 F. 2d at 8-9) (emphasis in original))

The government also cites FAR 33.203(c) (Applicability) to buttress its position that the CDA's six-year claim submission requirement was not intended to preclude the equitable defense of laches. It reasons that this FAR provision "preserves all contract claims and defenses of the parties that administrative agency Boards and contracting officers had the authority to consider and decide" prior to the enactment and/or amendment of the CDA, "including the equitable defense of laches against contractor 'equitable adjustment' claims under contract clauses." (Gov't opp'n at 5)

DISCUSSION

1. *The Standard of Review for Summary Judgment*

Summary judgment is a salutary measure for resolving litigation where there are no disputed material facts and the movant has proven that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F. 2d 1387, 1390 (Fed. Cir. 1987); Federal Rules of Civil Procedure (FED. R. CIV. P.) 56(a). The Board's duty in evaluating such motions is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). Our assessment "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits" (*id*. at 252), and we look to FED. R. CIV. P. 56 for guidance in deciding summary judgment motions (Board Rule 7(c)(2)). The "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). "Where 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.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (citation omitted).

The government as proponent here bears the burden of proving laches as an affirmative defense. *See, e.g.*, *Cornetta v. United States*, 851 F. 2d 1372, 1380 (Fed. Cir. 1988) ("the burden of proving prejudice rests with the defendant"). For purposes of the motion, it must demonstrate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citing FED. R. CIV. P.

56(e)). As nonmovant, the government must "make a showing sufficient to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The government cannot rest upon mere denials or conclusory statements, as these are insufficient to withstand summary judgment. *Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd*., 731 F. 2d 831, 836 (Fed. Cir. 1984).

2. *Affirmative Defenses to a Claim*

"Affirmative defenses" can protect a defending party from the consequences of its actions, even if everything alleged in the claim is true. This remedy is grounded in the notion that equity should be available to avoid suit or ensure a fair result to the one against whom the action was brought, even if the law might otherwise dictate a different result. *See, e.g.*, *Parkinson v. Dep't of Justice*, 874 F.3d 710, 724 n.9 (Fed. Cir. 2017);[3] *also Wisconsin v. Duluth*, 96 U.S. 379, 383 (1877) ("if [the affirmative defense] is found to be true in point of act, it will preclude any such action by this court as the plaintiff has prayed for.").

The Board has said:

> The Black's Law Dictionary defines an "affirmative defense" as "A response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim." It further explains that, "In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary 60 (6th ed. 1990).

United Technologies Corp., Pratt & Whitney Group, Gov't Engines and Space Propulsion, ASBCA No. 46880 *et al*., 95-1 BCA ¶ 27,538 at 137,230-31.

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[3] This note reads in full:

> *See, e.g*., *Affirmative Defense*, under *Defense*, Black's Law Dictionary (10th ed. 2014) ("A defendant's assertion of facts and argument that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true…. Also termed plea in avoidance; plea in justification. *Cf*. negative defense; confession and avoidance.").

Parkinson, 874 F.3d at 724 n.9.

Board Rule 6(b), which sets forth requirements for the government's pleadings, calls for the answer to include any affirmative defenses. "Although the Federal Rules of Civil Procedure do not apply to the Board as an administrative tribunal, we can look to them for guidance, particularly in areas our rules do not specifically address." *Thai Hai*, ASBCA No. 53375, 02-2 BCA ¶ 31,971 at 157,920. Thus, we look to FED. R. CIV. P. 8(c)(1), which provides that affirmative defenses (including laches) must be stated in a party's response to a pleading.[4] *See* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1270 (3rd ed. (2021) (discussing FED. R. CIV. P. 8 and affirmative defenses in general)).

3. *The Equitable Doctrine of "Laches" as an Affirmative Defense*

The Supreme Court has described laches as "a defense developed by courts of equity" to protect defendants against "unreasonable, prejudicial delay in commencing suit." *Petrella v. Metro-Goldwyn-Mayer, Inc*., 572 U.S. 663, 667-68 (2014). The theory of laches, which is derived from the concept of equity and is not predicated upon a statutory time limit, allows a tribunal to dismiss a suit where a party's:

> 'lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was such as to call for diligence.' *Benedict v. City of New York*, 250 U.S. 321, 328, 39 S. Ct. 476, 478, 63 L.Ed. 1005 [(1919)]. A suit in equity may fail though 'not barred by the act of limitations.' *McKnight v. Taylor*, [42 U.S. 161, 168 (1843)]; *Alsop v. Riker*, 155 U.S. 448, 15 S. Ct. 162, 39 L.Ed. 218 [1894)].
>
> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, — an inequity founded upon some change in the condition or relations of the property or the parties.

Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (further citations omitted).

[4] FED. R. CIV. P. 8(c)(1) requires that a party responding to a pleading must "affirmatively state any avoidance or affirmative defense, including: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver."

Prevailing on the defense of laches requires its proponent to furnish "'proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002) (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (further citation omitted)).

The ASBCA has held:

> Laches is an equitable doctrine that denies relief to "one who has unreasonably and inexcusably delayed in the assertion of a claim." *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 5 (Fed. Cir. 1985) (quoting *Brundage v. United States*, 504 F.2d 1382, 1384, 205 Ct. Cl. 502 (Ct. Cl. 1974).

The Boeing Co., ASBCA No. 54853, 12-1 BCA ¶ 35,054 at 172,197.

4. *The Statute of Limitations under the Contract Disputes Act*

Congress added the six-year statute of limitations to the CDA by the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (1994)). FASA § 10001(b)(2)(A)(2) provides that amendments:

> [M]ade by this Act shall apply to contracts in effect on October 1, 1995 "to the extent and in the manner prescribed in the final regulations . . . ." 108 Stat. 3404. The final regulations at FAR 33.206(a) state in relevant part: "This 6-year time period does not apply to contracts awarded prior to October 1, 1995."

JRS Management, ASBCA No. 57238, 10-2 BCA ¶ 34,571 at 170,452.

After examining the legislative history of 41 U.S.C. § 7103(a)(4)(A), the Federal Circuit concluded that the CDA's statute of limitations was not a jurisdictional requirement. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1322 (Fed. Cir. 2014 ("§ 7103 does not have any special characteristic that would warrant making an exception to the general rule that filing deadlines are not jurisdictional. We conclude that § 7103 is not jurisdictional . . . ."). The court reviewed the requirement that contractor claims must be brought within six years of the accrual of a claim:

> Section 7103(a)(4)(A) states that "[e]ach claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against

> a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 7103(a)(4)(A). A claim accrues as of "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." 48 C.F.R. § 33.201.

Sikorsky, 773 F.3d at 1320.

The CDA statute of limitations continues as a time bar to claims that were not presented to the CO within the defined period. *Environmental Safety Consultants, Inc*., ASBCA No. 58343, 14-1 BCA ¶ 35,681 at 174,666. It remains an affirmative defense before the Board (*see, e.g*., *Kamaludin Slyman CSC*, ASBCA No. 62006 *et al.*, slip. op. at 12 (April 29, 2021); *see also* FED. R. CIV. P. 8(c)(1)).

Analysis of Appellant's Motion

1. *The Substance of the Government's Affirmative Defense of Laches*

The government's answer details its reasons for seeking to deny LMA the complete six years set forth in 41 U.S.C. § 7103(a)(4)(A) to submit its claim. The government argues that it would be unfairly prejudiced by allowing appellant the full statutory period, and justifies the Board's imposition of a shorter, undefined interval as follows:

> Appellant's unreasonable delay in making its "cumulative impact" claim(s) with respect to unidentified "thousands of MDRs [Manufacturing Deficiency Reports]" and hundreds of thousands of unidentified hours of "O&A work" (e.g., Complaint paragraphs 51, 58, 67 and 134), with the obviously incurable prejudice to Respondent to be able to defend against so many "thousands" of individual MDRs/O&A hours and their alleged "impact on fixed-price CLINs for 21 aircraft in Lots 3-5," is a textbook case of laches precluding Appellant's claim(s) as Respondent asserted in its answer to Complaint paragraph 126 above.

(Answer at 43)

2. *The United States Supreme Court's Decisions in SCA Hygiene and Petrella Preclude the Affirmative Defense of Laches in CDA Appeals*

The government's argument that laches remains a viable affirmative defense is unpersuasive; it ignores the breadth of the Supreme Court's decisions regarding the relationship between federal statutes of limitation and the common law affirmative defense of laches. The government's contention that the holding in *SCA Hygiene* is not relevant to a CDA claim because that case arose from a Patent Act matter disregards the deliberately broad language of this decision. It also fails to recognize the Court's repeated endorsement of *Petrella*, 572 U.S. 663 (2014), which it favorably relied upon throughout (*see, e.g*., *SCA Hygiene,* 137 S. Ct. at 959-64). In responding to a challenge over whether the ruling in *Petrella* (which dealt with the Copyright Act) extended to a Patent Act issue in *SCA Hygiene*, the Court in the latter decision reiterated the general principle that laches is not an available defense where there is a legislatively-enacted statute of limitations:

> [The Court held in *Petrella*] that laches cannot defeat a damages claim brought within the period prescribed by the Copyright Act's statute of limitations. *Petrella*, 572 U.S., at ----, 135 S. Ct., at 1972-1975. And in so holding, we spoke in broad terms. See *id*., at --- - ---, 134 S. Ct. at 1974 ("[I]n the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.")

SCA Hygiene, 137 S. Ct. at 960 (emphasis added).

The Court in *SCA Hygiene* also emphasized the separate functions of judges and the legislative branch, just as it had in *Petrella* (*see, e.g*., *SCA Hygiene*, 137 S. Ct. at 960-61). It warned that it is inappropriate for a judge to allow an equitable doctrine such as laches to limit a party's rights where that party complied with a Congressionally-enacted statute of limitations. The Court acknowledged that laches (a judge-made doctrine that arose from equity) and statutes of limitation (enactments of the legislature explicitly circumscribing the period in which a claim can be brought) are both intended to shield those defending against untimely claims. *Id*.

Although the legislative and judicial approaches share the same goal of discouraging stale or overly-late claims, the rubric under which timeliness is established is very dissimilar. Chief among the differences is that tribunals rely on the doctrine of laches to decide on a case-by-case basis whether a particular claim was brought within a reasonable period, whereas legislatures adopt firm temporal limits for every claim brought under a specific law. Tribunals consider whether the party asserting laches was unjustly or unreasonably prejudiced by the timing of the claim,

whereas this is not a consideration in assessing whether a statute of limitations has been met.

The Court in *SCA Hygiene* warned against allowing judges to usurp Congressional power by permitting parties continued reliance on laches where the controlling statute set a time limit:

> The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore, applying laches within a limitations period specified by Congress would give judges a "legislation-overriding" role that is beyond the Judiciary's power. [*Petrella*], 134 S. Ct. at 1974. As we stressed in *Petrella*, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *Id*., at ----, 134 S. Ct., at 1967.

SCA Hygiene, 137 S. Ct. at 960.

Although the government correctly observes that the United States Court of Appeals for the Federal Circuit, the ASBCA's appellate body, has not applied *SCA Hygiene* to the CDA or otherwise ruled that laches is not available as an affirmative defense under that act, it is unnecessary that the Board wait for it to do so before ruling on this motion. While it would be preferable if the Federal Circuit had been given the opportunity to previously consider this issue, this Board is ultimately subject to the precedent of the United States Supreme Court and will adhere to its decisions.

We note that the Federal Circuit favorably applied the holdings in *SCA Hygiene* and *Petrella* in litigation outside the Copyright Act and the Patent Act.[5] In *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (*NOVA*), the court held that an advocacy group's "challenge is timely under the six-year statute of limitations provided by 28 U.S.C. § 2401(a) and that Federal Circuit Rule 15(f), establishing a 60-day time limit for bringing [a petition under 38 U.S.C.

[5] *But cf. Inserso Corp. v. United States*, 961 F.3d 1343 (Fed. Cir. 2020), a post-award bid protest in which the dissent regarded the "*Blue & Gold* 'Waiver Rule'" cited by the majority as "undermined by the reasoning in *SCA Hygiene*." *Inerso Corp*., 961 F.3d 1352-53. It was Judge Reyna's view that this "rule runs afoul of the separation of powers principle articulated" by the Supreme Court. *Id.* at 1353.

§ 502] is invalid." *Id.* at 1365. The Federal Circuit concluded that local court rules cannot "*either* expand[] *or* limit[] the time to file a claim where a statutory time limit applies." *Id.* at 1384. The court recognized its power under 28 U.S.C. § 2071(a) "to promulgate rules for conducting court business," but said that "'[s]uch rules shall be consistent with Acts of Congress.'" *Id.* (quoting 28 U.S.C. § 2071(a). It found "unavailing" the argument that the holdings in *SCA Hygiene* and *Petrella* should be distinguished "on the ground that they dealt with statutory time limits specific to a particular area of the law." *Id.* at 1385. The court affirmed that "Congress 'kn[o]w[s] how to impose' a more limited statutory time limit on challenges to agency action 'when it [chooses] to do so.'" *Id.* (citations omitted).

We find the government's reliance upon decisions involving laches that were rendered by various tribunals (but pre-date *SCA Hygiene*) is misplaced, as these do not reflect the current status of the law. Nor are we bound by *Anis Avasta*, 18-1 BCA ¶ 37,036 or other ASBCA decisions discussing the doctrine of laches that were rendered after the issuance of *SCA Hygiene*. The parties did not argue nor did the Board consider the effect of that decision (or *Petrella*) when it ruled in those appeals.

3. *FAR 33.203(c), Does Not Preserve Laches as an Affirmative Defense in an Appeal under the Contract Disputes Act*

We are not convinced by the government's unsupported argument that FAR 33.203(c), (Applicability) somehow overrides decisions of the Supreme Court or the dictates of Congress in 41 U.S.C. § 7103(a)(4)(A), or preserves the affirmative defense of laches; *see, e.g.*, FED. R. CIV. P. 56(e) Failing to Properly Support or Address a Fact.

FAR 33.203(c) (Applicability) provides:

> (c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Disputes statute and states certain requirements and limitations of the Disputes statute for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the

> statutory agency BCAs in the handling and deciding of contractor appeals under the Disputes statute.

48 C.F.R. 33.203(c) (underlining added)

We do not read the FAR's authorization of Boards of Contract Appeals to "have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract" as the wide-ranging grant of power espoused by the government. Nothing in FAR 33.203(c) preserves the pre-FASA affirmative defense of laches, and the government does not substantiate that the regulation supersedes the holdings in *SCA Hygiene* and *Petrella* that laches is not a cognizable defense where the statute of limitations is satisfied.

The government's reliance on this regulation to thwart or override rulings of the Supreme Court is incorrect as a matter of law, and it has not established a disputed material fact that we would be required to construe in its favor (*see* "*The Standard for Review for Motions for Summary Judgment," supra*). The government's "conclusory statements or completely insupportable, specious or conflicting explanations or excuses will not suffice to raise a genuine issue of material fact." *Range Tech. Corp.*, ASBCA No. 51953 *et al*., 04-1 BCA ¶ 32,456 at 160,545 (quoting *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1190 (Fed. Cir. 1993)).

CONCLUSION

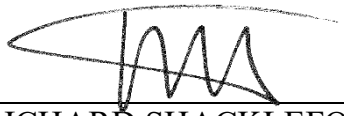
Appellant has demonstrated there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Where "Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg*, 327 U.S. at 395. We grant LMA's motion for partial summary judgment on the issue of laches, which is not available to the government as an affirmative defense against the CDA claim brought by the contractor.

Dated: June 22, 2021

REBA PAGE
Administrative Judge
Armed Services Board
of Contract Appeals

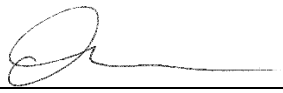
(Signatures continued)

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. 62209, Appeal of Lockheed Martin Aeronautics Company, rendered in conformance with the Board's Charter.

Dated: June 22, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
WECC, Inc.	)	ASBCA No. 60949
	)	
Under Contract No. 73-0014-1522	)	

APPEARANCES FOR THE APPELLANT: G. Scott Walters, Esq.
Brian S. Wood, Esq.
Alexander Gorelik, Esq.
Jacob W. Scott, Esq.
Smith, Currie & Hancock LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Scott N. Flesch, Esq.
Army Chief Trial Attorney
LTC Stephen M. Hernandez, JA
Harry M. Parent III, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE MELNICK

This appeal involves a contract to renovate the exchange at Langley Air Force Base. WECC, Inc. seeks delay damages and other costs. We find that WECC is entitled to recover $546,446.11, plus interest.

FINDINGS OF FACT

I. The Contract

1. On February 13, 2014, the Army and Air Force Exchange Service (AAFES or government) awarded the contract identified above to WECC to upgrade the Langley Air Force Base Exchange (R4, tab 1). Among other things, the fixed price agreement required WECC to renovate and construct additions to the exchange store, food court, mall, garden area, and shipping areas (R4 tabs 1, 3).

2. The contract drawings identified five separate building areas. They were Administrative, Retail, Mall Shops, Mall Corridor, and Food Court. Each area was then broken into multiple phases reflecting more specific locations in an area. For instance, Phase R-1 in the Retail area was ladies wear and Phase R-8 was menswear, or Phase M-1 in the Mall Shops was the barbershop and Phase M-4 was the beauty salon. WECC was to perform the work in each area in the phased sequences shown on

the drawings, which also specified the number of days that WECC was to spend in each phase. (R4, tab 2 at 4, tab 3 at 39, 111; demo. ex. 1; tr. 1/80) WECC was required to start work within 10 days of its receipt of the March 5, 2014 notice to proceed, and finish 240 days after the receipt, or by October 31, 2014 (R4, tab 1 at 1, tab 17 at 1). In the event WECC failed to complete the work on time, the contract imposed $1,500 in liquidated damages for each day of delay (R4, tab 1 at 55).

3. As required by the contract, WECC prepared a baseline schedule that followed the contract's phase requirements. In accordance with the drawings, the schedule planned for work to proceed in multiple areas concurrently. For each area it established a logical order of specific activities within each phase. (R4, tab 3 at 127, tab 264; demo. ex. 2; tr. 1/88-90, 99-101) Because WECC worked simultaneously in different areas, there were many chains of sequential activities on the project (R4, tab 2 at 4, tab 264). However, the chain with the longest duration was the "critical path." As the longest chain, it reflected the earliest the project could be completed (tr. 2/44). Any delay of a task on the critical path would delay completion of the overall project. As planned, the critical path started with mobilization and then ran through the Retail phases. (R4, tab 234 at 10-11, tab 264 at 1, 3-10; tr. 1/96-97, 109)

4. This contract with AAFES was not subject to the Federal Acquisition Regulation, but contained several clauses imposing comparable provisions (R4, tab 1 at 7). Thus, it contained Differing Site Conditions, Suspension of Work, Liquidated Damages, Retainage, and Changes clauses. Changes were further governed by General Provision 37 controlling price adjustments. (R4, tab 1 at 12, 19-21, 23, 26-27, 29, 55)

II. Performance, Change Orders, and the Claim

5. On March 19, 2014, shortly after receiving the notice to proceed, WECC and its subcontractor encountered unexpected conditions in the floors, which included a second layer of tile beneath the top layer, and an excessively deep mud bed (R4, tab 31 at 3, tab 78 at 11, tab 250; tr. 2/34-35). WECC also discovered that the concrete slab beneath the tile and mud bed was in such poor condition it could not be polished to the glossy surface contemplated by the contract. Instead, WECC had to remove and replace it. (R4, tab 36 at 6; tr. 1/123, 133-34) The government did not approve Change Order No. 11, in Amendment No. 2, for the replacement of concrete until June 19, 2014, and issued unilateral Change Order No. 6A for the demolition of the additional layers on August 27, (R4, tabs 36, 78). Change Order No. 11 was for $253,713. WECC's proposal for the change excluded additional time, extended overhead, and general conditions due to delays until the actual impact could be ascertained (R4, tab 36 at 11, 14). Although the amendment contained language stating that it was "in full settlement of all entitlements...arising from the changes," it also included documents where the parties recognized that extended overhead would be negotiated once all the work was completed (R4, tab 36 at 1-4, 14). WECC was able to perform work while it waited for the government to approve Change

Order No. 11 but not on the established schedule (tr. 1/153, 227). Also, the government did not release Mall Corridor Phase M-1A for concrete replacement until July 14, 2014 (tr. 1/140-41). The new concrete was poured between July 17 and 26 or 27 (R4, tab 234 at 15; demo. ex. 8; tr. 1/138, 140-41).

6. On August 11, 2014, while excavating for a footer in the M-1A phase, WECC discovered a storm drain that was not on any plans (R4, tab 85 at 3; tr. 1/141-42, 2/44-48; demo. ex. 8). This required WECC to suspend digging until the government unilaterally issued Change Order No. 52, in Contract Amendment No. 6, on September 29, 2014. WECC was then required to excavate and remove the storm drain and install a new one elsewhere. The change order for $55,940.87 was the full amount WECC had proposed. However, it failed to extend the contract performance period from August 11 until the work was completed, as requested by WECC. Accordingly, WECC reserved the right to seek an equitable adjustment for any extended overhead and general conditions costs. (R4, tab 85 at 1, 3, 20-22; tr. 1/142)

7. In six contract amendments issued during performance, the government acknowledged that the period of performance should be extended for a total of 89 days, to January 28, 2015. WECC signed two of those amendments. The first, Amendment No. 1, issued in May of 2014, approved additional direct costs associated with six change orders dealing with ventilation and plumbing, electrical panels, coil relocation, bulkheads and sprinklers, a floor drain, and light fixtures. It included $8,482 in Change Order No. 4 to relocate the coil and granted a 10-day extension. No extended overhead was included and WECC agreed that the amendment was "in full settlement of all entitlements directly or indirectly arising from the changes." (R4, tab 29) The second, Amendment No. 3, issued in July of 2014, approved direct costs associated with 13 change orders dealing with a freezer floor, electrical panel, feeder cables, gun vault, variable frequency drive, glazing, oven power, poles, light wires, angle removal, transition strip, sills, and a fire connection. It included $18,127.99 in Change Order No. 15 to extend feeder cables and granted 10 more days of extension. Again, no extended overhead was included and WECC agreed that the amendment fully settled all entitlements arising from the changes. (R4, tab 60)

8. The other four amendments granting the remaining 69 days were unilateral orders by the government. Amendment No. 7, issued September 30, 2014, generally added 35 days through Change Order No. 42 and stated that the parties would discuss additional days at the end of the project. The amendment also included Change Order No. 54, adding 7 days for slab replacement at the main entrance for $10,941; and Change Order No. 67, adding 3 days for asbestos abatement in the barber shop for $5,231 (R4, tab 88).[1] Amendment No. 10 included Change Order No. 38A, adding

[1] Amendment No. 7 acknowledged in the text that it was granting a total of 45 days, but then erroneously established a new contract completion date that only

7 days to raise sprinkler pipes for $11,971 (R4, tab 104). Amendment No. 11 included Change Order No. 74, adding 14 days to relocate roof drains for $5,837 (R4, tab 107). Finally, Amendment No. 12 included Change Order No. 102, adding 3 days to install temporary fixtures for $2,023 (R4, tab 115).[2] These amendments approved additional direct costs but no extended overhead.

9. One other relevant bilateral amendment that did not extend the contract was Amendment No. 5, issued September 3, 2014, which increased the contract price for installation of a support and freezer, demolition of flooring in the pharmacy, installation of new doors, and accounted for time and materials to install a bulkhead. It also contained the language providing for full settlement of all entitlements arising from the changes. (R4, tab 80)

10. WECC substantially completed the project on July 7, 2015 (R4, tab 283). WECC's last invoice, submitted August 21, 2015, left a contract retainage of $276,408.31 (R4, tab 142).

11. On October 28, 2015, WECC submitted a Request for Equitable Adjustment containing a certification meeting the criteria of the Contract Disputes Act, 41 U.S.C. §§ 7101-09, and that was treated as a claim (R4, tab 148; gov't br. at 31). The claim alleged 249 days of compensable delays by the government and sought extended overhead and miscellaneous costs, pursued subcontractor claims, and added markups, totaling $1,600,664.26 (R4, tab 148). During the next year, the parties engaged in negotiations, which included a visit by WECC's president and project manager to AAFES headquarters in Dallas, a couple of telephone calls, and WECC's modification of its overhead calculations (R4, tabs 158, 164; tr. 3/94, 127).

12. On November 23, 2016, the government unilaterally issued Amendment No. 16, extending the contract 38 more days to March 7, 2015.[3] The contracting officer vaguely explained only that the extension was for "various change orders that WECC requested" and that she considered the number to be "fair and reasonable." Without explaining any calculation, the amendment also approved "General Conditions" compensation in the amount of $2,006 for each of the 38 days, totaling $76,228. The amendment then took a $4,545 credit in favor of the government for drywall and painting.[4] Finally, after deducting another dollar because of an error, the government

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recognized 42 days (R4, tab 88 at 1, tab 234 at 4). We conclude the incorrect date was a drafting error.

[2] The January 25, 2015 completion date is erroneous due to the government's continuation of its mistake in Amendment No. 7. It should say January 28.

[3] Once again, the March 4, 2015 date in the amendment is off by three days due to the error in Amendment No. 7.

[4] WECC does not dispute this credit.

assessed liquidated damages at the contractual rate of $1,500 per day for 139 days or for a total of $208,500. The contracting officer told WECC that she calculated the liquidated damages from January 25, 2015 until July 22, 2015 (which is actually 177 days), despite the fact that Amendment No. 16 extended the contract to March 7. The total effect of the amendment was to decrease the contract price by $136,818. (R4, tabs 160, 236) The contracting officer never issued a final decision upon WECC's claim and it has appealed here based upon a deemed denial.

13. The total number of days of extension granted in the six amendments issued during performance plus Amendment No. 16 is 127.

III. Delay Analysis

14. WECC alleged a variety of potential delays and disruptions during the course of performance but our conclusions focus largely on the critical path analysis presented by its expert witness, Mr. Mark Doran. Mr. Doran determined the as-built critical path of activities, leading to substantial completion on July 7, 2015, 249 days after the initial scheduled completion date of October 31, 2014. He compared that analysis to the as-planned schedule, accounting for added complexities such as the effect of work performed out of sequence. (R4, tab 234 at 8, 10-11; tr. 2/198-99, 3/8). He broke the project into four periods to facilitate his review.

15. Period 1 spans from the March 5, 2014 Notice to Proceed to August 11, 2014, when excavation of the footings in Mall Corridor Phase M-1A could commence and WECC was performing work in all phases (R4, tab 234 at 14; tr. 2/210). During Period 1 the Mall Shops, Mall Corridor, and Retail areas experienced delays. Phase M-1A was originally scheduled to start by May 8, 2014, but government delays addressing the bad concrete slab and arising from the need to replace it, and the government's continued use of the space for seating, postponed its transfer to WECC by 67 days, until July 14. WECC then had to replace the slab over an 11-day period, followed by 14 more days spent removing and replacing ducts and mechanical equipment. Accordingly, by August 11, 2014, WECC was 92 days behind schedule in Phase M-1A. (R4, tab 234 at 14-17; tr. 2/214, 2/223-28)

16. By contrast, by August 11, 2014, WECC had made up time in the Retail area so it was far less delayed than the Mall Corridor and did not continue as the critical path. Indeed, the Retail phases were complete by the extended completion date in March of 2015, with the exception of two small areas adjacent to the Mall Corridor that could not be performed until the Mall Corridor work was performed. (R4, tab 234 at 19; tr. 2/200-08, 211-15, 218; demo. exs. 7, 9) Also, though there were early delays to the Mall Shops area, on June 14, 2014, the Mall Corridor phases overtook it as the longest path. Additionally, any Mall Shops delay ultimately became irrelevant because it was redesigned later by the government. (R4, tab 234 at 15; tr. 2/221-22)

Accordingly, delays in the Mall Corridor phases caused it to become the project's critical path (tr. 2/206-08, 213-14, 218-19, 223-24). There were no other concurrent delays to the critical path and no other critical paths (tr. 2/221-23, 3/12-17).

17. Period 2 runs from August 11, 2014, when WECC attempted to start footing excavations in Phase M-1A and discovered the unexpected storm drain, until a WECC schedule update dated October 29, 2014 (R4, tab 234 at 23). Upon that discovery, WECC had to cease excavating footers. It could not resume excavation until 70 days later, on October 20, 2014, after the government issued Change Order No. 52 and WECC finished removing and replacing the drain. (R4, tab 234 at 23-24; tr. 1/142, 2/238-40) Accordingly, the critical path was delayed the additional 70 days in Phase M-1A (R4, tab 234 at 25). After it finished replacing the drain, WECC took two more days than had been planned performing unrelated structural steel work that was also on the critical path (tr. 2/243). However, during Period 2 WECC performed some out of sequence work in Phases M-2A and M-4A that mitigated 16 days of delay, reducing the net delays during the period to 56 days. There was no concurrent critical path or concurrent delay during Period 2. (R4, tab 234 at 25; tr. 2/238-45)

18. Period 3 covers October 29, 2014 until January 29, 2015 (R4, tab 234 at 26). Mr. Doran claimed there were 78 days of delay to the M-1A phase during that time, but also concluded WECC mitigated 16 days of delay through out of sequence work in Phases M-2A and M-4A, leaving 62 days (R4, tab 234 at 29; tr. 2/247, 251). He stated that among the 78 days were 20 days of steel placement delay and cryptically contended that 10 of those were excusable and compensable because of "prior [o]wner delays." Mr. Doran recognized that 19 days of delay associated with slab work were WECC's responsibility. He then concluded that structural framing began 39 days late, which included 21 days that were excusable because of "rain and weekend work." In summary, Mr. Doran identified 47 days for which WECC was responsible (10 days for steel, 19 days for the slab, and 18 days for framing) and reduces that number by 16 days of mitigation to 31 days that were not excusable and that he assigned to WECC. He suggested the other 31 days (10 for steel and 21 for rain and weekend work) are compensable.[5] (R4, tab 234 at 9, 28-30) There were no concurrent delays during the period (tr. 2/251-52).

[5] Elsewhere in his report, Mr. Doran changed his position, indicating that 31 of the 62 days are compensable while not assigning responsibility for the other 31 to anyone (R4, tab 234 at 34). At the hearing, he changed his story again, suggesting that the 31 days he had previously said was WECC's responsibility, and then later said was not anyone's responsibility, was actually an excusable delay because one of WECC's subcontractors could not "get there right away" (tr. 2/255, 3/24).

19. Period 4 encompasses January 29, 2014 to the July 7, 2015 substantial completion date (R4, tab 234 at 30). Mr. Doran stated that at the end of Period 3 the project had 120 days of work remaining, dictating an estimated completion date of May 29, 2015. He said the July 7, 2015, actual completion shows that WECC was delayed 39 more days. Mr. Doran explained that on May 12, WECC began Change Order No. 11 slab replacement work in Mall Corridor Phase M-3A, which lasted 21 days until June 2 when M-3A baseline work began. That work was scheduled to take 21 days but WECC completed it and all other Mall Corridor work in 14 days, on June 16, mitigating the slab delay by 7 days. The critical path then shifted from the mall corridor to the unrelated M-7 optometry phase, which was the last area where work needed to be completed. The government reintroduced work in the optometry area that had been previously dropped. Because of the deletion, WECC had lost its place in its cabinet supplier's fabrication schedule, pushing substantial completion 21 more days to July 7. Though the 14 days for the slab and 21 days for optometry add up to 35 days, Mr. Doran concluded his analysis by inconsistently stating WECC required 28 days to perform the slab work, and encountered unspecified adverse weather and "weekend days not worked," to justify suggesting that all 39 days are compensable. There were no other concurrent delays during this period. (R4, tab 234 at 30-31; tr. 2/257, 260, 3/28-31, 33-35)

20. In total, Mr. Doran contended that the government is responsible for 218 days of delay to a modified contract completion date of June 6, 2015 (R4, tab 234 at 34; tr. 3/36, 38).[6]

21. Though the government delayed progress on the project's critical path at different points in time, it never placed WECC in a standby status. Moreover, WECC has not shown that it was not employed working somewhere in the building. Indeed, the evidence shows the contrary (R4, tab 148 at 9-11; demo. ex. 7).

IV. Quantum Data

22. WECC's Field Office Overhead after October 31, 2014 (also known as General Conditions) is based on daily unit costs for WECC payroll ($882.07 per day), outside labor ($479.43 per day), trucks and fuel ($314.84 per day), and equipment ($153.11 per day). It also incurred lump sum costs over the 218 days of extended performance it claims for per diem ($20,329.37), lodging ($26,079.34), field office and storage ($6,980.74), sanitation ($1,691.84), and traffic barriers and rental ($4,658.22). (R4, tab 148 at 117-42; tr. 3/96-101; app. br. at 37-38)

[6] At the hearing, WECC's counsel suggested to Mr. Doran through a leading question that he should add 31 more days to the 218 to reflect that all 62 days of mitigated delay addressed in Period 3 were excusable (tr. 3/36-37). This would extend the contract completion date to July 7, 2015. Because the testimony was more counsel's than Mr. Doran's we give it no weight.

DECISION

I. Compensable Delays and Liquidated Damages

WECC seeks compensation for government-caused delays to the project. "To prove entitlement for a compensable delay, [WECC] must show that the government was responsible for specific delays; overall project completion was delayed as a result; and any government-caused delays were not concurrent with delays within appellant's control." *Columbia State Bank*, ASBCA No. 59531, 16-1 BCA ¶ 36,399 at 177,456 (quoting *Versar*, *Inc.*, ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025 at 172,128). To establish a causal link, WECC "must show that the government's actions affected activities on the critical path of the contractor's performance of the contract." *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000).

WECC has shown that it encountered 78 days of compensable delay during Mr. Doran's 92-day Period 1. They include 67 days waiting for permission to access the Phase M-1A Mall Corridor area as well as the government's change order addressing the bad concrete slab, plus 11 more days to perform the work replacing it. WECC has also shown that by June 14 the delays to M-1A shifted the critical path to that chain of activities, which was an entire month before it became available for work to be performed. There were no concurrent delays.[7] (Findings 15-16) However, WECC has not made any effort to demonstrate that the duct and mechanical work performed over an additional 14 days was a change imposed by the government not already required by the contract.[8]

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[7] The government presented an expert who suggested that because the as planned critical path ran through the retail area, which he claimed was a parallel critical path to the mall corridor, five time impacts in the retail area pushed the contract completion to May 19, 2015. He contended that much of those delays were attributable in some manner to WECC. He said that mall corridor delays then delayed completion into July. We are not persuaded that the retail area work, which was almost entirely complete before the extended contract completion date in March, remained the critical path given the unrelated mall corridor delays into June of 2015 (findings 16, 19). Additionally, the government's expert subjectively assigned numerous days of delay or concurrent delay responsibility to WECC based upon his belief that it inadequately or irregularly staffed the project, or made "slow progress." (R4, tab 1056 at 22-46, tab 1057 at 56, 101) These conclusory assertions lack adequate explanation of their underpinnings for us to be convinced of their merit. Nor does his report sufficiently show how it calculates its final offsetting concurrent delay figures or support the source of inputs to his calculations (tr. 4/161-62, 177-83).

[8] Mr. Doran's conclusory opinion about the contract's requirements is irrelevant.

WECC has shown that it encountered 72 days of critical path delay in Phase M-1A during Mr. Doran's Period 2. Seventy of those days were spent awaiting the government's change order regarding the differing site presented by the unexpected storm drain that blocked excavation, and performing the work removing and replacing it. Two more days were then spent by WECC working on structural steel. However, WECC mitigated 16 days of delay, leading to 56 net days of compensable delay associated with the drain. There were no concurrent delays. (Finding 17)

WECC has not proven any excusable delays during Mr. Doran's Period 3. Mr. Doran generally stated there were 62 net days of delay during this period, which his report broke down to 31 compensable days and 31 that were not excusable and assigned to WECC.[9] However, he only purported to describe 10 compensable days due to "prior owner delays," not 31. WECC has not identified the particular owner delays about which Mr. Doran is referring. Nor does it justify finding them compensable. Beyond that, Mr. Doran did not identify any other compensable delays. He only discussed 21 additional days that he characterized as excusable (not compensable) because of rain and weekend work. WECC has also failed to identify those particular days, or show that it rained during them, or explain why they might be excusable. (Finding 18) The mere possibility that WECC encountered rain, or may have worked on a weekend, does not, by itself, demonstrate an excusable delay.

WECC has shown that it encountered 35 days of compensable delay during Mr. Doran's Period 4. They constitute 14 days of delay performing Change Order No. 11 slab replacement and 21 days in the optometry area resulting from its removal and subsequent restoration to the project. (Finding 19)

WECC is entitled to a total of 169 days of compensable time extension from the October 31, 2014 initial contract completion date to April 18, 2015.[10] It received 127 days of extension from the government, leaving a difference of 42 days (finding 13).

The government is thus entitled to liquidated damages of $1,500 per day for 80 days from April 18, 2015, when WECC should have completed the contract, accounting for government-caused delays, to July 7, 2015, when it actually did, totaling $120,000 (findings 2, 10).

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[9] Mr. Doran's opinion jumped from stating that the additional 31 days were WECC's responsibility, to their being nobody's responsibility, to finally contending that they were excusable (finding 18 n.5). His lack of certainty leaves us unconvinced that we should find for WECC upon the latter.

[10] 78 + 56 + 35 = 169.

II. Delay Quantum

A. Extended Field Office Overhead

Relying upon daily unit costs and lump sums, WECC seeks to recover its actual extended field office overhead, or general conditions, for the period of compensable delay.[11] Field office overhead encompasses costs related to the project but not distributed to particular tasks (tr. 3/89-90). It can include the cost of supervision, timekeeping, supplies, office trailer, travel, and temporary housing. Such costs are recoverable due to either an expansion in scope of work or a delay. *See CDM Constructors Inc.*, ASBCA No. 62026 *et al.*, 20-1 BCA ¶ 37,721 at 183,109; *see also M.E.S., Inc.*, ASBCA No. 56149 *et al.*, 12-1 BCA ¶ 34,958 at 171,855, *aff'd*, 502 F. App'x 934 (Fed. Cir. 2013); *DANAC, Inc.*, ASBCA No. 33394, 97-2 BCA ¶ 29,184; *Able Contracting Co.*, ASBCA No. 27411, 85-2 BCA ¶ 18,017.

The government contends that WECC is barred by the doctrine of accord and satisfaction from recovering any compensation for the 78 days of compensable delay associated with Mr. Doran's Period 1. An accord and satisfaction is a discharge of a claim because some performance other than that which was sought has been accepted as full satisfaction of the claim. *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010); *Bell BCI Co. v. United States*, 570 F.3d 1337, 1340-41 (Fed. Cir. 2009). The government points to the fact that none of the four bilateral amendments (Amendments Nos. 1-3 and 5) provided any overhead yet all of them contained language stating that they fully settled all entitlements arising from the changes.

To prove an accord and satisfaction the government must show proper subject matter, competent parties, a meeting of the minds of the parties, and consideration. *Meridian Eng. Co. v. United States*, 885 F.3d 1351, 1363-64 (Fed. Cir. 2018) (quoting *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965)); *Bell BCI*, 570 F.3d at 1341. The subject matter of the changes contained in Amendment Nos. 1, 3, and 5 do not pertain to the causes of the delays we have found here and therefore their language fully settling all entitlements arising from those changes is equally inapplicable (findings 7, 9). *See Meridian*, 885 F.3d at 1364 n.12 (citing *King Fisher Marine Serv., Inc. v. United States*, 16 Cl. Ct. 231, 236-37 (1989), for the proposition that the subject matter of the contract modification relied upon as an accord and satisfaction must be the same as the disputed claim). By contrast, Amendment No. 2 did contain Change Order No. 11 for the concrete slab replacement during Period 1 and it included the "full settlement" language relied upon by the government. However, the amendment also incorporated communications wherein the parties recognized that extended overhead

[11] As noted, although the government previously agreed to extend the contract for 127 of the 169 days of compensable extension to which WECC is entitled, none of those extensions provided for any extended overhead (findings 7-8).

costs would be deferred for later negotiation once the concrete replacement work was complete and the impact could be determined. (Finding 5) Accordingly, those costs were not within the scope of the amendment's settlement.[12]

Additionally, we can refuse to bar a claim based upon an accord and satisfaction when the government recognizes entitlement to an additional payment after the parties executed the modification upon which the accord and satisfaction defense is premised. *See England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 850 (Fed. Cir. 2004). Here, WECC submitted its claim after the parties executed the amendments containing the "full settlement" language (findings 5, 7, 9, 11). The government responded by then negotiating with WECC about the claim for over a year (finding 11). It followed those discussions by issuing unilateral Amendment No. 16 extending the contract 38 more days for "various change orders" and by approving general conditions compensation in the amount of $2,006 for each of those days (finding 12). There was no mention of accord and satisfaction barring anything. Taken as a whole, the parties' conduct manifested an intent not to consider the "full settlement" language of the contract amendments as an accord and satisfaction. There was no meeting of the minds supporting a bar to this claim. *See Meridian*, 885 F.3d at 1364-65 (recognizing that the meeting of the minds element of accord and satisfaction is informed by continued consideration of a claim after release, that the inquiry is fact specific, and influenced by a wide range of evidence); *Sherman R. Smoot*, 388 F.3d at 850 (finding that payment of a claim after issuance of the modifications purporting to constitute an accord manifested that the parties did not construe the modifications as a release).

The government also maintains that all overhead is capped by the terms of General Provision 37 of the contract. That provision governs contract price adjustments arising from WECC's performance of change orders (R4, tab 1 at 20-21). The government relies upon Paragraph (a)(1) limiting any adjustment to direct costs, plus 10% overhead and 8% profit. Paragraph (a)(2) states that these percentages cover field overhead. Only some of the delays we have found here, such as the periods during which WECC replaced the concrete and drain, involve WECC's performance

[12] The government developed no argument regarding the effect of the bilateral modifications on the computation of field office overhead damages except for accord and satisfaction, which we dispatch above. Its single statement in its brief that, "appellant arbitrarily ignores the bilateral amendments to the Contract" (gov't br. at 70-71), omits any explanation of what other effect (besides accord & satisfaction) those bilateral amendments should have, is less an argument than an unsupported allegation that WECC's analysis made a great mistake for reasons the government need not explain. We do not opine here whether there may have been other reasons that those bilateral modifications might have affected the calculation of damages because no argument has been presented about how they would.

of change orders. Other portions of the delays include the time WECC waited for the government to make Phase M-1A available, the time taken by the government to issue change orders, and the extra time required by the government's change of mind respecting the optometry area. But even for those portions relating to change order performance, General Provision 37 is not a constraint upon recovery. The government ignores paragraph (a)(5), which states that "[f]or changes that involve an extension of time the contracting officer may consider alternative equitable adjustments for extended field conditions." (R4, tab 1 at 21) Thus, General Provision 37 recognizes that additional field office overhead may be due when a change not only enlarges the scope of work but extends the period of performance.

There is no evidence that during performance the parties considered General Provision 37(a)(1) to cap field office overhead incurred during the extension period to a set percentage of direct costs. If they had, then Amendment No. 2 would likely have provided that amount. Instead, they deferred negotiating overhead associated with that amendment until the concrete replacement work was complete and the impact could be determined. (Finding 5) "[T]he parties' contemporaneous construction of an agreement, before it has become the subject of a dispute, is entitled to great weight in its interpretation." *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1375 (Fed. Cir. 2003) (quoting *Blinderman Constr. Co*., *v. United States*, 695 F.2d 552, 558 (Fed. Cir. 1982)). Similarly, after negotiating WECC's claim with it for over a year, the contracting officer approved Amendment No. 16, extending the contract by 38 days and granting General Conditions costs to WECC. But rather than calculate that as a percentage of some amount of direct costs, the contracting officer agreed to a daily rate of $2,006 per day. (Findings 11-12)

Turning to WECC's claim, it seeks $458,560 in field office overhead incurred over the 218 days it claims to have been delayed. However, we have found that WECC is entitled to 169 days of compensable time extension. Multiplying WECC's four daily unit cost items by 169 equals $309,177.05 (finding 22).[13] Added to that are the lump sum costs WECC incurred for five other items. That total was $59,739.51 over 218 days (*id.*).[14] Prorated to 169 days it equals $46,311.07.[15] Thus, the total field office overhead is $355,488.12.[16] This equates to $2,103.48 per day.[17] It is only marginally different than the $2,006 daily rate the contracting officer acknowledged was owed in Amendment No. 16 (finding 12).[18] WECC simply claims that it is

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[13] ($882.07 + $479.43 + $314.84 + $153.11) x 169 = $309,177.05.
[14] $20,329.37 + $26,079.34 + $6,980.74 + $1,691.84 + $4,658.22 = $59,739.51.
[15] ($59,739.51 / 218) x 169 = $46,311.07.
[16] $309,177.05 + $46,311.07 = $355,488.12
[17] $355,488.12 / 169 = $2,103.48
[18] The government's program manager suggested at the hearing that the contracting officer was mistaken when she approved $2,006 per day. He said she should not have consented to more than $1,395 per day. He claimed this number is

entitled to more days than the contracting officer recognized and at the slightly higher rate. We accept WECC's rate applied over the 169 days of extension to which it is entitled, equaling $355,488.12 in field office overhead. WECC's request for a 10% markup of this amount per the overhead allowance of General Provision 37(a)(1) is denied as seeking a double recovery. WECC's recovery of extended field office overhead under paragraph (a)(5) is in the alternative to the fixed 10% overhead authorized by paragraph (a)(1) (R4, tab 1 at 20-21). WECC is not entitled to both. By contrast, WECC's request for an eight percent profit markup under paragraph (a)(1) is granted because nothing in paragraph (a)(5) precludes it, increasing the total to $383,927.17 (R4, tab 1 at 21).[19]

B. Extended Home Office Overhead under Eichleay

WECC also seeks to recover $266,186.72 in extended home office overhead based upon the Eichleay formula. Home office overhead includes indirect costs not related directly to a particular project that are incurred to manage all of a contractor's work. These costs are allocated among all of the contractor's projects. (Tr. 3/90-91) *See Williams Constr*., *Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001) (explaining that home office overhead can include accounting and payroll services, insurance, salaries of senior management, heat, electricity, taxes, and depreciation); *see also West v. All State Boiler*, *Inc.*, 146 F.3d 1368, 1372 (Fed. Cir. 1998) (explaining that indirect costs are ones that continue to accrue despite construction inactivity). If the government suspends or delays work on the contract, these costs may accrue beyond the amount originally allocated to the contract, and thus may become "unabsorbed." *Id.*; *see also B.V. Construction*, *Inc.*, ASBCA No. 47766 *et al.*, 04-1 BCA ¶ 32,604

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supported by WECC's cost proposal in the contract, which identified $334,645 as "General Requirements." He divided that amount by the 240-day initial contract performance period to attain his number. (R4, tab 1 at 3; tr. 3/181-83) However, the contract does not define the term "General Requirements," and no testimony was presented about the parties' intended meaning of the term. We do not know it reflects WECC's anticipated general conditions costs during the initial performance period. Also, whatever general conditions costs WECC predicted at the time of bidding it might incur for the initial period of performance does not necessarily inform the costs it actually incurred during the extension period. Though she was present during the hearing, the contracting officer did not testify. What we do know is that after negotiating WECC's claim with it she approved general conditions costs of $2,006 per day for the 38 days that she extended the contract in Amendment No. 16 (finding 12). We infer from those acts that she believed this sum reasonably reflected WECC's actual daily rate. In the absence of testimony from her stating that she was mistaken, we are not inclined to conclude that she was.

[19] ($355,488.12 x .08) + $355,488.12 = $383,927.17

at 161,358. Often, such costs are recovered through the application of a fixed percentage to the additional costs included in a contract modification or equitable adjustment. *M.E.S., Inc. v. McHugh*, 502 F. App'x 934, 938 (Fed. Cir. 2013) (citing *C.B.C. Enters., Inc. v. United States*, 978 F.2d 669, 674-75 (Fed. Cir. 1992)); *see also Matcon Diamond, Inc.*, ASBCA No. 59637, 20-1 BCA ¶ 37,532 at 182,261. However, under certain circumstances, a daily rate may be employed and is calculated using what is called the Eichleay formula, which is derived from the decision of this Board by that name.[20]

The Eichleay formula is an extraordinary remedy with strict prerequisites. *Williams*, 271 F.3d at 1058; *Matcon Diamond*, 20-1 BCA ¶ 37,532 at 182,259. It is used to compensate a contractor for indirect costs that cannot be allocated for a period the government has made performance impossible while requiring the contractor to remain available to resume performance. However, if the contractor can still perform despite some governmental interference, though not in the way or as efficiently or effectively as it had originally anticipated, Eichleay does not apply. *Williams Constr., Inc. v. White*, 326 F.3d 1376, 1380-81 (Fed. Cir. 2003). Accordingly, one necessary element to recover is that the contracting officer either issued a suspension or other order expressly putting the contractor on standby, or the government delayed performance for an indefinite period during which the contractor could not bill substantial amounts of work on the contract and at the end of which it was required to be able to return to work at full speed and immediately. *P.J. Dick*, 324 F.3d at 1373.[21]

The government never expressly ordered a suspension of work putting WECC on standby. Nor has WECC shown that the government's delays to the critical path, though considerable, completely stopped performance of substantial amounts of contract work so as to effectively place WECC on standby.[22] WECC has not shown that it could not proceed with work in the other areas of the building during those periods, as contemplated by the contract. Indeed, the record shows WECC was employed working somewhere in the building. (Findings 3, 21) Having failed to establish that "much, if not all, of the work on the contract" was effectively suspended, WECC is not entitled to the Eichleay damages it seeks. *P.J. Dick*, 324 F.3d at 1371.

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[20] *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688. *West v. All State Boiler, Inc.*, 146 F.3d at 1379 n.4, provides the formula.

[21] As *P.J. Dick* explains, this is just one of multiple elements to the inquiry. 324 F.3d at 1370-73. It is not necessary to address the others in this decision.

[22] Some of the critical path delays occurred while WECC performed changed work arising from the differing site conditions WECC encountered, such as the slab and the drain. Periods of work on changes are not periods of standby. *Matcon Diamond*, 20-1 BCA ¶ 37,532 at 182,261.

III. Other Claimed Costs

A. Additional Field Management Costs

WECC seeks $76,557.30 in additional field management costs it claims to have incurred during the contract's original 240-day period of performance. It explains the amount reflects the cost of devoting its project manager to the contract full time. WECC contends that the project manager should only have had to work part time, implying that the government unexpectedly required his full attention and took him away from other productive work (tr. 3/119-20). WECC has not shown the percentage of the project manager's time it originally built into its contract price, so we do not know how much, if any, additional time he provided. Although WECC's project manager testified that he did not originally expect to be physically present on the site every day, he did not say that his daily participation from somewhere was unanticipated. Also, he admitted that he had no other project responsibilities to attend to (tr. 2/9, 54). WECC did not show that the government required or approved of an increase in the time spent by the project manager beyond the contract's original requirements, or that WECC notified the government that it considered the government to have changed the project manager's performance obligations. This claim is therefore rejected.

B. Asbestos Testing

WECC claims $751.50 for asbestos testing. WECC says that while an outside inspector was looking for mold, he identified a space that might contain asbestos. WECC then authorized him to perform a test for which he billed WECC $751.50. The test was positive. Upon notification, the government ordered WECC to stop work and the government provided abatement. (Tr. 3/121-24) WECC has failed to identify a legal basis for it to charge the government extra for this expense incurred without the government's knowledge or consent.

C. Steel Plates

WECC claims $999.21 for steel plates purchased in support of concrete replacement work (tr. 3/124). In response, the government observes that Change Order No. 92, included in Amendment No. 10, approved and paid $622 requested by WECC for "[a]dditional steel plates for multiple concrete pours" (R4, tab 104 at 1, 17). WECC says nothing in reply to the government's demonstration that it was already paid what it sought for steel plates. Accordingly, the request is rejected.

D. Internal Contract Administration Costs

WECC seeks $169,048.49 in "internal contract administration costs" representing the labor expenses of its president and project manager preparing and negotiating its claim

over a period of 16 months, between July 8, 2015 and November 23, 2016, plus their travel expenses (tr. 3/126-31). The amount is for initial claim preparation, one face to face meeting, a couple of telephone conversations, and preparation of amended documentation (tr. 3/127). The only record of these costs is $2,321.72 in travel charges. WECC could not describe any more specifics about the request. (R4, tab 285, tr. 3/155-56) WECC asserts that the costs it seeks were incurred for the genuine purpose of furthering negotiations and are normally allowable under *Bill Strong Enterprises v. Shannon*, 49 F.3d 1541, 1549-50 (Fed. Cir. 1995), *overruled in part on other grounds*, *Reflectone*, *Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc).

The cover letter to WECC's October 28, 2015, Request for Equitable Adjustment states that it is submitted pursuant to Title 41 of the United States Code, Chapter 71. Additionally, it is certified in accordance with the provisions of 41 U.S.C. § 7103(b) (R4, tab 148). Thus, as we have held, the parties treated it as a Contract Disputes Act claim (finding 11). Accordingly, WECC's claim preparation costs were in furtherance of the prosecution of its claim and are not allowable under *Bill Strong.* 49 F.3d at 1549-50. Also, the Board has observed that the regulation addressed in *Bill Strong*, FAR 31.205-33, expressly excludes costs for officers and employees of the contractor. *Bill Strong* does not support allowing recovery of the internal employee costs sought here by WECC. *See Vistas Constr. of Ill.*, ASBCA No. 58479, 16-1 BCA ¶ 36,236 at 176,797. Finally, WECC has almost entirely failed to offer records supporting its costs.[23] The request is therefore rejected.

E. Subcontractor Claims

WECC has forwarded documentation purporting to support "pass-through" claims of four of its subcontractors. WECC provides the claim submitted by Global Solutions, Inc., for $22,813.06, alleging it was delayed by "others," along with time sheets and invoices (R4, tab 148 at 157-247). WECC offers an email from Mid-Atlantic Concrete asserting that it made extra trips due to delays, leading to excessive costs. It accompanies the email with an "estimate" for $15,000. (R4, tab 148 at 249-50) WECC submits a letter from Sprinkle Masonry seeking extended overhead for equipment, supervision, and a forklift operator because of the time it took to perform the project. Accompanying the letter is a statement of direct costs for time spent, unit prices, and markups totaling $46,770. (R4, tab 148 at 254-55) Finally, WECC submits an unsigned statement purporting to be from Perfect Polish, the contractor that polished the concrete floors. It addresses the extra repairs it performed, equipment costs for 23 days that machines were idle, and seeks additional compensation for the demolition of tile and mud bed.[24] It says it provided a statement of its costs that are supported by daily reports

[23] Thus, even if we were to award an amount for this category it would not exceed $2,321.72 in travel charges for which WECC offered records.

[24] Change Order No. 6A compensated WECC for the tile demolition (finding 5).

and other documentation, but WECC fails to direct us to those materials. (R4, tab 148 at 252)

WECC does not advocate for the subcontractors' claims and does not vouch for their validity (tr. 3/157-58). With the exception of Perfect Polish, WECC presented no sworn testimony about them.[25] Even if we were to give weight to the hearsay correspondence WECC provided, it lacked any detailed explanation or support for the specific delays experienced by the subcontractors or proving their monetary impact. We agree with the government that WECC basically tossed these superficial demands to the Board with almost no effort to prove their merit. They are accordingly rejected.

F. Bond

WECC relies upon General Provision 37(a) to add a 1.5% markup for "bond premium" upon its recovery.[26] The paragraph recognizes that actual and verifiable payment bond fees may be recoverable when they are the direct costs attributable to a directed change (R4, tab 1 at 20). But WECC has failed to prove the extent of any such obligations. The only evidence WECC offers is testimony stating that, should it prevail in this appeal, it will have to pay bond fees to its surety (tr. 3/133). WECC presents no evidence of those obligations or how they are calculated. Thus, this portion of the appeal is rejected as well.

G. Unilateral Change Orders

WECC seeks $78,891.26 it says is due for work performed on 14 unilateral change orders. Nine of the change orders involved additional work and WECC complains that the government failed to sufficiently increase the contract price to cover the costs. Three of the orders involved deleted work where WECC claims the government decreased the

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[25] WECC did present testimony from Perfect Polish's president, but it was unfocused and failed to support its demands. Perfect Polish's purported claim is broken into three categories. They are "Materials," "Labor," and "Equipment." It seeks a lump sum for unidentified materials of $25,263.40, bases $90,031.11 in labor expenses upon 2,823 man hours, and premises $16,675 in equipment costs on 23 days of lost time. (R4, tab 148 at 252) Nothing in the president's testimony shed any light upon the lump sum sought for materials or supported the man hours (tr. 2/131-49). He generally stated that equipment had to be left idle during partial demobilizations, but he did not testify that it added up to the 23 days mentioned in the document or identify any records supporting that figure (tr. 2/137-38). Nor did he identify records supporting the actual costs incurred for idle equipment (tr. 2/145).

[26] WECC would apply this markup upon all of its claim categories except for unpaid unilateral change orders and contract retainage (app. br. at 83-84).

price by more than its cost savings. (App. br. at 49-52, 76-78, 95) Contrary to WECC's contention, two of the change orders, 68 and 104, were never issued by the government (R4, tab 115 at 1, 8, tab121 at 2, 82). For each change order, WECC states the amount authorized by the government and then declares that "WECC, however, substantiated a Contract Price [increase or decrease] of" X dollars. Each statement then cites to various estimates and commentary from WECC or its subcontractors that it submitted with its price proposals. (App. br. at 49-52) WECC offered no contextual explanation of these disparate materials. Otherwise, all WECC relies upon is a short letter from its project manager to the contracting officer generally complaining that the architect/engineer used by the government was "not provid[ing] accurate pricing estimates" and that therefore WECC was performing "at or below cost" (R4, tab 290).

If a change increases or decreases the cost of or time to perform, the contract's Changes clause requires an equitable adjustment (R4, tab 1 at 20). General Provision 37(a) provides that the adjustment for an increase in cost only includes actual and verifiable direct costs, plus indirect costs as calculated by the clause's terms (R4, tab 1 at 20). WECC has not demonstrated for each of the nine additive changes that its actual costs incurred performing were greater than the amounts recognized by the government in the change orders. Instead of actual costs, all it has offered are the estimates it submitted to the government ahead of time and a general complaint to the contracting officer. Without proof that its actual costs exceeded what the government approved, there is no basis for WECC to recover any further amounts. *See United Launch Servs*., *LLC*, ASBCA No. 56850 *et al.*, 14-1 BCA ¶ 35,511 at 174,067 (explaining that the equitable adjustment to which the contractor is entitled when the government unilaterally changes the contract is limited to those corrective measures necessary to keep the contractor whole); *ACS Constr. Co*., *of Mississippi*, ASBCA No. 33550, 87-1 BCA ¶ 19,660 (noting that the measurement of an equitable adjustment arising from a change is the difference between the cost of the work as performed and its cost as originally specified).

For the three change orders that deleted work the government is entitled to a price reduction equal to what it would have reasonably cost WECC to perform the eliminated work. Put another way, the deduction should leave WECC in the same financial position it would have been in had there been no change. Determining this figure can be hard because by definition there are no actual costs for us to review. So we must work with the best information available. Significantly, the government bears the burden of proving the amount of a deductive change. *Id.*; *see also Davis Constructors*, *Inc.*, ASBCA No. 40630, 91-1 BCA ¶ 23,394 (observing that the contractor's reduction in cost is the measure of a deductive change); *Glover Contracting Co.*, ASBCA No. 24973, 84-1 BCA ¶ 16,994 (finding the government failed to demonstrate entitlement to a deductive change), *aff'd*, 758 F.2d 668 (Fed. Cir. 1984) (Table). Here, WECC provided the government with estimates supporting deductions under Change Order Nos. 24, 36, and 80 totaling $24,611. The government, however, increased those deductions by an

additional $10,655.63. (R4, tab 95 at 1, 44-46, tab 121 at 2, 74-79, 114-24). The government has made no effort to support that determination. Because the government has failed to carry its burden of proof we conclude that WECC is entitled to a recovery for these change orders in the amount of $10,655.63.

CONCLUSION

WECC is entitled to $383,927.17 for extended field office overhead, and $10,655.63 in unsupported price deductions. These amounts total $394,582.80. However, the government's 169 days of delay from the initial contract completion date of October 31, 2014, only lead to a new contract completion date of April 18, 2015. The government is entitled to liquidated damages of $1,500 per day for 80 days until WECC substantially completed performance on July 7, 2015, or $120,000. WECC's recovery must also be reduced by the $4,545 maintenance cost that it does not dispute for a new total of $270,037.80. The government's proffered damages calculations acknowledged WECC's right to recover the $276,408.31 retainage (finding 10; gov't br. at 87, 89). WECC is therefore entitled to recover $546,446.11, plus interest under 41 U.S.C. § 7109 from October 28, 2015 until date of payment.[27]

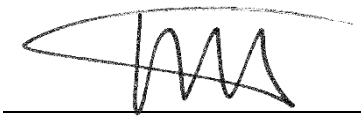
Dated: October 19, 2021

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

(Signatures continued)

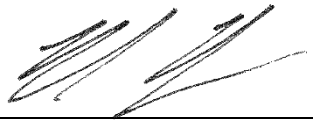
[27] WECC seeks interest upon the retainage from September 21, 2015, under the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-06. Absent a separate claim for PPA interest, we lack jurisdiction over that request and therefore express no opinion upon its merit. *Westphal GmbH & Co. KG*, ASBCA No. 38439, 91-3 BCA ¶ 24,175.

I concur



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

I concur



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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 60949, Appeal of WECC, Inc., rendered in conformance with the Board's Charter.

Dated: October 19, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Brantley Construction Services, LLC	)	ASBCA No. 61118
	)	
Under Contract No. W912HN-10-D-0056	)	

APPEARANCE FOR THE APPELLANT: William A. Scott, Esq.
Pedersen & Scott, P.C.
Charleston, SC

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Laura J. Arnett, Esq.
Allie E. Vandivier, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Savannah

OPINION BY ADMINISTRATIVE JUDGE PAGE

Brantley Construction Services, LLC (BCS or appellant) entered into a contract with the United States Army Corps of Engineers, Savannah District (government or COE) to construct and replace Taxiway Juliet at Mackall Auxiliary Airfield (Mackall AAF) and Taxiway Mike at Pope Army Airfield (Pope AAF). Appellant alleges that the specifications relating to Taxiway Juliet were defective, making it impossible to perform in conformance with the contract. Appellant also alleges that it was delayed in its completion of Taxiway Mike due to issues caused by the government with Taxiway Juliet and that the government constructively changed the contract by failing to provide access to a specific batch plant site during the time of performance. The government denies the allegations, and instead asserts all issues arose due to appellant's inabilities, lack of experience, and business choices. We deny the appeal.

FINDINGS OF FACT (FOF)

The Request for Proposal

1. The government issued a Request for Proposal (RFP) for Task Order No. W912HN-09-C-5944, for the repair and replacement of Taxiway Juliet at Mackall AAF and Taxiway Mike at Pope AAF, to the members of the Multiple Award Task Order Contract (MATOC) pool in August 2013 (Joint Stipulation of Facts (JSF) ¶¶ 1-3; R4, tab 3

at 56-57 [1]). BCS was a member of the MATOC pool, and submitted a bid for the work (JSF ¶¶ 2, 4).

2. The scope of work for the Task Order called for the replacement of both failed taxiways. This included demolishing the existing taxiways and replacing them to meet the current Unified Facilities Criteria (UFC) airfield requirements. The new taxiways work included "plain Portland cement concrete (PCC) airfield pavement, asphalt paved shoulders, replacement of appropriate airfield directional signage, runway/taxiway illumination, taxiway markings, and appropriate erosion and sediment control devices during construction." Taxiway Juliet was also to include permanent storm water controls. (R4, tab 3 at 57) As explained in greater detail below, the contract allowed the contractor to determine whether it would use the slipform method or the fixed-form method of paving[2] at each of these airfields (JSF ¶ 16).

[1] The Board will use the Bates-labeling to identify page numbers for any Rule 4 documents, unless otherwise noted. References to transcripts specify the volume and page number affixed by the court reporter, unless these are evidentiary depositions that have been admitted as part of the Rule 4 file.

[2] We distinguish between "ready mix" or "ready mixed" concrete, "Ready Mix Company," and "Ready Mix Concrete." "Ready Mixed Concrete Company" (sometimes called "Ready Mix Company") is the brand name of a commercial enterprise that furnishes ready-mixed concrete. Lower case references to "ready mix" or "ready-mixed" are to a type of concrete which, under the terms of this contract and as explained by testimony, is mixed *en route* and transported to the placement site in an agitating truck (*see, e.g.*, R4, tab 3 at 826; tr. 1/54-55, 57, 2/15). However, the distinction between the product and the company was not always strictly followed and the proprietary term is sometimes used in the vernacular. For example, T.C.P. Concrete Construction's (TCP) representative clarified that the "Ready Mix" concrete in that company's post-award bid to BCS was actually "ready mixed concrete" that it would have obtained from Concrete Services (*see, e.g.*, R4, tab 45 at 225). Sometimes, the agitating trucks that carried the concrete in rotating drums were referred to as "ready mix trucks" even though it was not clear these belonged to the Ready Mixed Concrete Company (*see, e.g.*, R4, tab 11 at 1204 and tab 30 at 3057-58). In similar fashion and as can be seen throughout the findings and decision, the paving method "slipform" is sometimes called "slip form" and the fixed-form paving method is also called "fixed form," and "haul time" is "Haultime."

3. The Taxiway Juliet contract required replacement of the entire taxiway, approximately 480 feet (tr. 1/46[3]). The contract defined the site by a red line surrounding the specific area where the work was to be performed (R4, tab 4 at 949; tr. 1/45). There are no gates or fences restricting access to Mackall AAF (tr. 1/42-43, 2/177, 4/82; R4, tab 44 at 93).

4. The Taxiway Mike contract required the replacement of the current taxiway, as well as the installation of a 60-inch storm drain under the taxiway (tr. 1/49-50). There is a gate restricting access to Pope AAF and a pass is required for those who enter the facility (tr. 1/47-48).

5. Prior to the issuance of the solicitation, the government completed a biddability, constructability, operability, and environmental review certification, which found that the "project is ready for advertisement and award" (R4, tab 93 at 907-08, ex. 54).

6. Numbered paragraph 4 of the RFP states that "[i]f an Offeror believes the requirements in this RFP contain an error, omission, or are otherwise unsound; the Offeror shall immediately notify the Contracting Officer in writing, to include supporting rationale" (R4, tab 3 at 57). BCS did not contact the contracting officer (CO) regarding any potential errors, omissions, or issues with the RFP requirements prior to submitting its bid (tr. 4/197; *see generally* tr. 2/205-19).

Requirements in the RFP and Contract for the Slipform Paving Method and the Fixed-Form Paving Method

7. The RFP includes contract specification § 32 13 11, which states the requirements for concrete pavement for airfields and other heavy-duty pavements (JSF ¶ 8 citing R4, tab 3 at 377-437, 795-855). This specification lays out stringent requirements for the concrete to be used in paving Taxiway Juliet and Taxiway Mike, and professional qualifications for the concrete specialists used by the contractor (R4, tab 3 at 795-855). For example, the contractor would be paid only for concrete that met certain tolerances, and was made and placed in accordance with technical publications as referenced (*see, e.g.*, *id*. at 795- 814, § 32 13 11, ¶¶ 1.1-1.6, including requirements for surface smoothness, edge slump and joint face deformation, plan grade, flexural strength, thickness, and diamond grinding of PCC surfaces). The contractor was held to quality control (QC) standards at § 32 13 11, ¶ 1.5 Quality Assurance (QA) (*id*. at 810-14), which included at ¶ 1.5.1 verifying to the CO that its QC staff, including the "petrographer, surveyor, concrete batch plant operator, and profilograph operator" were

[3] Although the transcript refers to Taxiway Mike, when the testimony is placed in context this was erroneous, and the testimony about approximate length was for Taxiway Juliet.

"American Concrete Institute (ACI) Certified" at specific levels; at ¶1.5.2 that its "other staff" were suitably trained; and at ¶1.5.3 that the laboratory and testing facilities used by the contractor were accredited (*id*. at 810-11).

8. Specification § 32 13 11, ¶ 1.5.6, Test Section, requires the contractor to "construct a test section as part of the production paving area" that would demonstrate to the CO in a satisfactory manner "the proposed techniques of mixing, hauling, placing, consolidating, finishing, curing, initial saw cutting, start-up procedures, testing methods, plant operations, and the preparation of the construction joints" at least 10 days prior to the start of concrete placement. The test section must meet all specification requirements and be acceptable to the CO. If it is not acceptable, the contractor is required to remove the failed test section at its own expense and construct "additional test sections at no additional cost to the Government." If the contractor wanted to use slipform paving but failed to place an acceptable test section, the contractor is required to remove the slipform paving equipment and complete the work using the fixed-form method. The contractor is not allowed to begin production paving "until the results on aggregates and concrete, including evaluation of the cores, and all pavement measurements … have been submitted and approved by the Contracting Officer." (R4, tab 3 at 394, 812)

9. The contract specifies the means of concrete placement for both taxiways (JSF ¶ 16; tr. 2/140-42). The contract allows the contractor to determine whether it will use the fixed-form method or the slipform method of placement at each of the two project sites. Specifically, specification § 32 12 11. ¶ 3.5.1, Paving General Requirements, states "[p]avement shall be constructed with paving and finishing equipment utilizing rigid fixed forms or by use of slipform paving equipment." (JSF ¶ 16 citing R4, tab 3 at 836) Government expert witness Dr. Raymond S. Rollings[4] said that he "saw nothing that would indicate that there was any problem executing either slip form or [fixed-] form construction of an airfield pavement under those specifications" as these "were of the normal type [used] . . . worldwide" (tr. 4/135). Depending upon which of these two paving methods the contractor decided to use, it had to comply with differing procedures that affected the formulation of the concrete, the timing and sequence of operations, the manner and place of mixing the concrete including "charging" it by adding water, the type of vehicle used to transport the concrete to the site, and the equipment used to place the concrete at the paving site (*see*, *e.g*., R4, tab 3 at 795-855; tr. 1/135).

[4] Appellant moved to exclude Dr. Rollings as an expert witness (app. br. at 30-31; tr. 4/122). We note that BCS stipulated during the hearing that it did not object to Dr. Rollings as "an expert in concrete placement under the specifications" for runways, but did object to his "defining haul time or some of the other issues" (tr. 4/124). We find that the government established Dr. Rollings's credentials as an expert (*see*, *e.g*., *Lebolo Watts Constructors 01 JV* (*LWJV* II), ASBCA No. 59740 *et al*., slip op. at 64-66), and deny the motion.

10. As contemplated by this contract, fixed-form placement involves the use of ready-mixed concrete hauled in mixer (agitating) trucks. The concrete was to be deposited between forms ("rails"), which hold the concrete in place while it sets up. As part of the fixed-form method, a finishing machine rides on top of a fixed rail. The concrete is placed in front of the machine, which finishes the concrete as it moves down the side rails. (Tr. 1/54-56; app. supp. R4, tab 82 at 247)

11. For the fixed-form method, specification § 32 13 11, ¶ 3.4, Concrete Production, states, "[ready mixed c]oncrete transported in truck mixers shall be deposited in front of the paver within 90 minutes from the time cement has been charged into the mixer drum of the plant or truck mixer" (JSF ¶ 17 citing R4, tab 3 at 835). The COE monitored the 90-minute placement time for fixed-form placement (R4, tab 44 at 51; tr. 4/187, 200-01). Ready-mixed concrete that exceeded the 90-minute placement time was not supposed to be used on the project (tr. 2/24).

12. In contrast, the slipform method involves placement of concrete mixed in a central or stationary batch plant ("batch concrete") that is transported in non-agitating dump trucks (R4, tab 3 at 822-28, § 2.10 Equipment). In slipform paving, the paver spreads, consolidates, and finishes the concrete with one pass of a single machine. No forms are used to support the concrete edges, and the concrete mixture must have sufficient cohesion and stiffness to stand unsupported behind the paver without slumping or bulging. (Tr. 1/52-55; app. supp. R4, tab 92, tab 46 at 14)

13. For the slipform method, the specifications provide:

> a. Specification § 32 13 11. ¶ 2.10.3, Transporting Equipment, states, "Slipform concrete shall be transported to the paving site in nonagitating equipment conforming to ASTM C94/C94M or in approved agitators."
>
> b. Specification § 32 13 11, ¶ 2.10.2, Concrete Mixers, subpara. e, Truck, indicates, "Truck mixers shall not be used for mixing or transporting slip formed paving concrete."
>
> c. Specification § 32 13 11, ¶ 3.4, Concrete Production, states, "Concrete transported in non-agitating equipment shall be deposited in front of the paver within 45 minutes from the time cement has been charged into the mixing drum, except that if the ambient temperature is above 90 degrees F, the time shall be reduced to 30 minutes."

> d. Specification § 32 13 11, ¶ 3.4.2, Transporting and Transfer, states, "Non-agitating equipment shall be used only on smooth roads and for haul time less than 15 minutes. Concrete shall be deposited as close as possible to its final position in the paving lane."

(JSF ¶ 18 citing R4, tab 3 at 825-26, 835-36)

14. The original contract required that the concrete used with the slipform method had to be delivered in non-agitating trucks (tr. 1/54-55). The effect of contract specification § 32 13 11, ¶ 2.10.2 Concrete Mixers, subparagraph e, which limited the use of certain trucks to mix or transport concrete used for slipform paving (R4, tab 3 at 825) was that the contract did not allow ready mixed concrete to be used for slipform paving.

15. Specification § 32 13 11, ¶ 3.4, Concrete Production, also requires the following:

> Every load of concrete delivered to the paving site shall be accompanied by a batch ticket from the operator of the batching plant. Tickets shall be on approved forms and . . . . shall be delivered to the placing foreman who shall keep them on file and deliver them to the Government weekly, or as directed by the Contracting Officer.

(R4, tab 3 at 417)

16. The contractor was also supposed to monitor the 45-minute window for batch concrete used for slipform placement (tr. 4/62-63, 78, 187). Consistent with specification § 32 13 11, ¶ 3.4 (R4, tab 3 at 835-36), the 45-minute placement window started when the cement was charged into the mixing drum and ended when the concrete was deposited in front of the paver (tr. 4/57-58, 169). The COE Chief of Construction indicated that the COE enforces "the actual execution of it" but explained, "[t]here's not a stopwatch on the trucks" (tr. 4/200). The batch concrete called for in slipform paving that exceeded the 45-minute placement window should have been rejected (tr. 4/63, 75, 78, 172).

17. Specification § 32 13 11, ¶ 2.10, Equipment, required BCS to submit the following:

> a. Details and data on the batching and mixing plant prior to plant assembly. . . .

> b. . . . (NRMCA)[5] certification of the concrete plant. . . .
>
> c. A description of equipment proposed for transporting concrete mixture. . . .
>
> d. A description of equipment proposed for machine and hand placing. . . .

(R4, tab 3 at 822-23)

Batch Plant Requirements and Bidder Inquiry Regarding Siting at Taxiway Mike

18. Specification § 32 13 11, ¶ 2.10.1, Batching and Mixing Plant, provided information regarding the location, type, capacity, and tolerances for the batching and mixing plant (JSF ¶ 10 citing R4, tab 3 at 823).

19. For Taxiway Juliet, specification § 32 13 11, ¶ 2.10.1, Batching and Mixing Plant, provided that "[t]he batching and mixing plant shall be located off Government premises no more than fifteen minutes haul time from the placing site" (JSF ¶ 11 citing R4, tab 3 at 823). Additionally, "[t]here are no disposal, borrow, or pavement batching facilities at [Mackall AAF]. Contractor is responsible for identifying and utilizing local (offsite) disposal, borrow, and pavement batching facilities in accordance with the specifications" (JSF ¶ 12 citing R4, tab 4 at 938). Taxiway Juliet Contract Drawing GI102 required that haul routes and pavement batching facilities be approved by the CO's representative (COR) and coordinated with the airfield manager. The contract also required that the location of the batch plant area be "coordinated with the contracting officer." (R4, tab 4 at 938-39)

20. Taxiway Mike Contract Drawing CS100 states, "[c]ontractor shall utilize site designated on this sheet for the batch plant and crushing operations." The drawing identifies both an existing crusher site and a batch plant. (JSF ¶ 13 citing R4, tab 4 at 912)

21. Another offeror inquired about the existing batch plant near the Taxiway Mike project site in bidder inquiry 5329272 (JSF ¶ 14). Prior to the bid, the COE responded:

> The batch plan[t] shown is the current batch plant being used for Blue Ramp. This and the crusher site were shown so that the Contractor would know where these operations <u>can be</u>

[5] "NRMCA" is an acronym for the "National Ready Mixed Concrete Association" (R4, tab 3 at 804).

> located. It should be assumed that when the current Contractor constructing Blue Ramp is finished, he will remove his batch plant.

(JSF ¶ 15) (emphasis added) The COE response did not specify when the Blue Ramp project would be finished (R4, tab 8 at 1181).

22. Taxiway Mike Contract Drawing GI102 indicated that the staging, laydown, and batch plant areas were "to be determined by the airfield manager and coordinated with the contracting officer" (R4, tab 4 at 905).

Lack of Pre-Bid Site Investigation and Related Bidder Inquiry

23. The contract included FAR Clause 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984). The pertinent parts of the Site Investigation and Conditions Clause state:

> (a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to
>
> > (1) conditions bearing upon transportation, disposal, handling, and storage of materials;
> >
> > (2) the availability of labor … and roads;
> >
> > …
> >
> > and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site … as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of

> successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.
>
> (b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government.

(JSF ¶ 6 citing R4, tab 5 at 1088-89)

24. Prior to the bid submittals, another bidder inquired whether a site visit was going to be scheduled. The COE responded, "[t]here will be no scheduled site visit due to this being a full-design project." (JSF ¶ 7) Brantley did not visit the sites before submitting its bid nor did it request to do so (tr. 2/12-13, 215, 3/16).

25. BCS presented no evidence that anyone involved in the project, whether it was its own employees or prospective subcontractors and suppliers, looked into, let alone drove, the possible routes to Taxiway Juliet at Mackall AAF prior to bid or checked into the time it would take to haul concrete and materials (tr. 3/17-18; R4, tab 44 at 84). When asked at the hearing if he would have considered the haul time if he had performed a site investigation, BCS founder and estimator, Mr. Sidney A. Brantley, testified:

> I would never have thought about that back then . . . . But back then that never even came across our radar. We weren't even thinking about that. That was something ain't even crossed our minds about the time being an issue on this thing.

(Tr. 2/192-93, 224)

BCS's Prior Airfield Paving Experience

26. Prior to this Project, BCS did not have experience with the slipform method of concrete placement (tr. 3/19-20). BCS's previous experience with airfield paving included 2-3 projects performed 20 to 25 years before that used the fixed-form method of placement (tr. 2/195, 3/19).

BCS's Estimate and Bid

27. Despite testimony that Mr. Brantley prior to bid never intended for BCS to self-perform the work on this project but planned to subcontract it out (tr. 2/205), he said that he prepared an estimate for appellant to do the work using the fixed-form method. When questioned at hearing, Mr. Brantley testified that although he did not want BCS to

self-perform, "it would have been on the rail rider method with fixed forms" if it had to do so. (Tr. 3/20-21) He agreed that there had been no need for him to include a portable batch plant in his estimate for Taxiway Mike, because one would not be necessary to pave using the fixed-form method (tr. 3/28-29). Mr. Brantley estimated a cost of $597,552 for Taxiway Juliet and $707,308 for Taxiway Mike. Mr. Brantley indicated that the paver rental was "a major expense that has to go in there" and if it had been included, the cost would have been "a much higher number" than reflected in his estimate (tr. 3/27-28, 46-48).

28. In preparation for presenting its bid, BCS requested proposals from prospective concrete subcontractors (R4, tab 49 at 319[6], 330). One proposal from Ready Mixed Concrete Co. provided a rate for ready mix supply concrete for "Taxiway Mike Only" (R4, tab 56 at 479). Another proposal by Triangle Grading and Paving (Triangle) proposed $551,046.09 for concrete paving at Taxiway Juliet and $883,823.55 for concrete paving at Taxiway Mike. Triangle's written quote did not indicate what method of concrete placement it was proposing or the type or source of the concrete. (R4, tab 49 at 336, tab 56 at 483-86)

29. At the hearing, Mr. Brantley testified he did not really look into Triangle's bid, because "[a]t the time of the bid, I think I may have just glanced at it, but I did not really go into great detail because … they were not low" (tr. 3/34-35).

30. There is a dispute over whether TCP Concrete Construction (TCP) provided a telephonic quote to appellant before BCS submitted its bid. Although TCP's estimator Mr. Robert Lawhorn agrees that he spoke with BCS prior to the bid, he said that his company declined to participate at that time and denied verbally giving unit prices to BCS. (Tr. 2/219-23, 3/51; *compare* R4, tab 45 at 202-03, 210, 212-23, 253-55, 266) Although Mr. Brantley identified the BCS pre-construction services estimator who "took the quote" from TCP prior to bid as Ms. Christina McAlhaney (tr. 2/206-07, 3/7, 3/37-40), she did not testify at the hearing, nor did appellant provide any deposition, declaration, or affidavit from her to support her participation in or view of the call. Interestingly, despite having a form for taking telephonic quotes, BCS did not use that form to write down TCP's alleged quote (tr. 3/39; R4, tab 41 at 10). Even though TCP denied providing a quote prior to BCS's bid submission to the government (giving multiple reasons the Board finds credible), Mr. Brantley testified that he took the unit prices from the alleged TCP quote and "expanded it out" based upon quantities that he had obtained from take-offs prepared at his request by Ms. McAlhaney (tr. 2/205-07,

[6] The page number indicated is from the COE-affixed Bates label at the top right corner of each page. When two sets of Bates labels exist, the Board uses the Bates label that begins with COE, generally located at the top right corner, although it is occasionally located on the bottom right corner of a page.

231). Mr. Brantley testified that he believed the Triangle bid and alleged TCP bid "took place the morning of the bid" (tr. 3/41).

31. Based on the evidence presented, the Board does not find that appellant has proven that TCP provided a telephonic proposal before BCS submitted its bid. Mr. Lawhorn, the estimator from TCP, testified that he had a post-award conversation with Mr. Brantley where he asked Mr. Brantley whose number BCS used to bid the project and Mr. Brantley responded, "I used my number, it's just concrete." Mr. Lawhorn indicated he felt Mr. Brantley's characterization was "really over-simplification. PCC concrete is not just concrete. It takes specialized equipment. It takes a knowledgeable workforce." (R4, tab 45 at 230) Additionally, as discussed below in finding of fact (FOF) 39, after contract award, BCS sent a post-award email to TCP, requesting a bid.

32. According to appellant, on the day of its bid to the government, BCS had three estimates, including two from potential subcontractors and one developed in-house. These were (1) a written proposal from Triangle that did not indicate the method of concrete placement that would be used or if the concrete would come from a batch plant or elsewhere (*see* FOF 28); (2) handwritten notes purportedly representing figures from a telephone call with TCP which Mr. Brantley had expanded into amounts for both Taxiway Juliet and Taxiway Mike (*see* FOF 30); and (3) Mr. Brantley's estimate for BCS to perform fixed-form placement which omitted costs for paver equipment, a petrographer, a foreman, overhead, and markup (tr. 3/20-21, 27-30, 46-47; R4, tab 41 at 8-9).

33. Mr. Brantley testified that he made the decision to use the unit prices from the alleged TCP telephonic quote in BCS's bid for the project (tr. 3/43-44). Mr. Brantley used his "low number" of $715,000 for Taxiway Mike and $513,746 for Taxiway Juliet (tr. 3/46-48).

34. Mr. Brantley also testified that he did not know what paving method TCP's alleged quote was for but that he assumed it was slipform. He was not concerned about where the concrete was going to come from or where the batch plant would be located because he "didn't know the facts as to how they were delivering their concrete." (Tr. 2/45, 3/44-45) As we found above, we do not believe that BCS has shown that TCP provided a quote to use the slipform method (or any other method) to BCS before the latter's bid was submitted to the government for this project.

35. There is no evidence that any of BCS's figures on bid day included costs for a batch plant, as required for slipform placement, despite Mr. Brantley's testimony he thought the proposal he had received from TCP was for slipform placement and did not know what method Triangle intended (tr. 3/27-30, 34-36, 44-47; R4, tab 56 at 483-86, tab 41 at 8-10).

36. Despite his testimony that prospective subcontractors submitting bids to BCS were going to perform slipform paving, the evidence does not show any pre-bid proposals for slipform placement. Instead, it shows Mr. Brantley did not know how the concrete would be delivered, what type of paving any alleged subcontractors would do, whether time limits would be met, or what type of concrete would be used. Furthermore, TCP's estimator testified that the company did not provide a pre-bid estimate at all, let alone one for slipform placement. We find there is no credible evidence that BCS, or the subcontractor whose figures BCS allegedly used in coming up with its pricing, relied during the pre-bid stage on the slipform method specifications.

37. On September 4, 2013, BCS submitted its bid for the project to the COE (R4, tab 6).

Contract Award

38. On September 26, 2013, Contract No. W912HN-10-D-0056, Task Order 0008 to BCS in the overall amount of $3,406,100 became effective between the COE and BCS. The contract duration was 270 calendar days. (JSF ¶ 5) According to Contract Line Item (CLIN) No. 0002, the work at Taxiway Mike was in the lump sum of $1,898,600 and the work at Taxiway Juliet was in the lump sum of $1,507,500 (R4, tab 7 at 1166).

BCS's Post-Award Efforts to Obtain Concrete Subcontractor(s)

39. On September 27, 2013, one day after the contract became effective, BCS sent an email to the estimator at TCP requesting a proposal. The email included a link to the contract specifications and said, "[t]hanks for taking a look at this again!" (App. supp. R4, tab 62)

40. When asked why BCS sent him the link to the plans and specifications the day after award, Mr. Lawhorn testified, "[BCS] received the award and [TCP] did not bid the project on the – on the bid side of it, and we were asked to take a look at it now that they had the project" (R4, tab 45 at 220). When asked what he did after receiving the email, Mr. Lawhorn testified that he "did an estimate for the scope of work that I put into my proposals. . . " (*id.* at 222).

41. By email dated October 11, 2013, an assistant project manager at BCS asked another prospective subcontractor, JD Contractors, LLC, for a lower quote, stating "Is that the lowest you can go with your numbers? It's a little bit high for what we have in the bid with our own numbers." The project manager indicated that BCS's budget was "around $700,000 on Mike, and $500,000 on Juliet." (R4, tab 49 at 344) (emphasis added) Of note, the emails indicate that its bid was done with BCS's own numbers, not those of a subcontractor it thought it would be working with.

42. Between October 25, 2013 and November 8, 2013, three prospective subcontractors (McCarthy Improvement Company (McCarthy), Certified Concrete Construction, and TCP) submitted post-award quotes to BCS for the airfield paving scope of work at both taxiways (*see* R4, tabs 11, 49, and 57). All indicated that their quotes were made working under the assumption they could use ready mix concrete for slipform placement. McCarthy's quote specifically stated, "[t]he prices above are based on concrete delivered in Ready Mix Trucks. The prime contractro [sic] will be responsible for having the specifications change [sic] to allow for delivery of concrete in Ready Mix Trucks for slip form paving" (R4, tab 11 at 1204). Certified Concrete Construction's quote indicated that a central batch plant is not available for the area and that its price is "based on the assumption that we will be able to use Ready Mixed Concrete who has a dry batch plant using truck mixers" (R4, tab 49 at 356). TCP's initial post-award quote was to perform demolition and slipform placement with ready mix trucks and "require[d] the work be awarded with no phasing considerations" (tr. 3/9; R4, tab 45 at 223-25, tab 57 at 491). Three days later, TCP provided a revised quote for demolition and slipform placement with ready mix trucks, which also included "panel removal/ replacement at Arm/De-Arm Pad" and a 6 inch drainage layer (tr. 3/9; R4, tab 57 at 493).

43. Mr. Brantley asked TCP to break out its proposal and remove demolition from the scope of the work, but TCP did not want to do the paving by itself (tr. 3/10; R4, tab 45 at 216-17, 224-25, 230). Mr. Brantley told Mr. Lawhorn that TCP's proposal was not "within his budget." When Mr. Lawhorn asked whose numbers BCS used for its bid, Mr. Brantley said, "I used my number." (R4, tab 45 at 230)

44. None of the subcontractor or supplier proposals obtained by BCS after award proposed slipform placement using batch concrete delivered in dump trucks from a portable batch plant (R4, tab 11 at 1202-04, tab 45 at 208, 237-38, tab 49 at 356, tab 57).

45. Mr. Brantley admitted that, prior to bid, he was unaware of the requirement for a 15-minute haul time for slipform placement (tr. 3/17). Specifically, he testified, "It wasn't even on my radar. I never even thought about it." When questioned at trial regarding what he "could have done to have avoided the problem either in the pre-bid process or after award, he suggested that "had [the government] put in their specs [that haul time is critical … we would have probably gone out there and timed it." (Tr. 3/14, 19)

46. After receiving TCP's proposal, Mr. Brantley spoke with an employee at Ready Mixed Concrete Co. about paving, and she raised an issue regarding haul time. Mr. Brantley testified that this was the first time that he learned about the haul time limitation and the possibility it could present a problem. (Tr. 3/11-12)

47. Mr. Raphael Maher, vice president and senior project manager for BCS, became involved with the project in the middle of November of 2013 (tr. 1/26, 57-58); this was about two months after BCS was awarded the contract (*see* FOF 38). Mr. Maher explained that when he started working on the project, BCS "had been in contact with Ready Mix[ed] Concrete [Co.] to see about getting a ready-mix concrete approved to use McCarthy as our subcontractor to do the job" (tr. 1/81). Specifically, Mr. Brantley told Mr. Maher that BCS planned to work "with McCarthy and that we were looking at using a ready-mix concrete with slip form" (tr. 2/14).

48. Mr. Maher testified that the project was "handed off" to him by Mr. Brantley, and at the time that happened, Mr. Brantley "knew that he could not . . . meet the 15-minute haul time and could not . . . place a [batch] plant on site" (tr. 2/27). Mr. Maher also testified that the contract did not impose restrictions on which taxiway had to be completed first, but did require that Taxiway Mike be completed in such a manner as to minimize impact on operations there. BCS decided to begin work at Taxiway Juliet, and once the concrete work was completed there to move to Taxiway Mike for that purpose. (Tr. 1/60-61; R4, tab 64 at 150-51; *see also* app. br. ¶¶ 63-64 at 9).

49. Ready Mixed Concrete Co. produces ready-mix concrete that is hauled in agitating trucks, which are not limited by the contract to a 15 minute haul time (tr. 2/15; R4, tab 3 at 417, 835). On November 21, 2013, Ready Mixed Concrete Co. submitted a proposal to BCS stating that it wanted to use ready mix concrete with slipform placement. As part of the proposal, Ready Mixed Concrete Co. proposed shipping the concrete from its plant 45 miles from Taxiway Juliet and 13 miles from Taxiway Mike. Due to the distance of the shipping, Ready Mixed Concrete Co. also proposed having the haul time in the contract changed to 90 minutes. (R4, tab 13 at 1247)

50. Nowhere in the proposal or subsequent correspondence did Ready Mixed Concrete Co. attempt or even discuss the possibility of setting up a portable batch plant. The Board finds that Ready Mixed Concrete Co. had an issue with the haul time not because it tried to follow the specifications laid out in the contract, but because it proposed to haul concrete from its existing plant 45 miles away to supply Taxiway Juliet. (R4, tab 13 at 1247)

51. On November 25, 2013, BCS consultant Mr. Randolph Marshall sent an email to the COE on behalf of BCS indicating that BCS had retained him to help with the project. Mr. Marshall listed issues he wanted to "discuss and resolve" including the use of "[a] slip form paver and some hand set forms" as well as BCS's "plan to use ready-mix concreted (sic) that is batched off site." (R4, tab 12)

52. By correspondence dated November 25, 2013, BCS sent a subcontract agreement to McCarthy, which incorporated the October 25, 2013 proposal from

McCarthy to perform slipform placement using ready mix trucks but with updated pricing (R4, tab 11 at 1186-1217).

53. On November 26, 2013, Mr. Maher and Mr. Marshall exchanged emails regarding a draft letter to the COE. In the exchange, Mr. Marshall stated, "I think our biggest deviation request would be [to] allow truck mixers to be [sic] to supply slip machines." Mr. Maher responded that they should "address a variance for the truck mixers with the slip forms because the plant cannot be located on Gov't properity [sic] per spec." (R4, tab 49 at 368)

54. Over the course of the next month, Mr. Marshall and Mr. Maher emailed various people who were not the CO or COR for the contract. They indicated the contractor was going to need a deviation from the specifications. (*See* R4, tab 13 at 1219-20, tabs 12, 14, 49 at 368; app supp. R4, tab 63 at 147-48).

55. On December 13, 2013, Mr. Maher sent an email to Ready Mixed Concrete Co., asking if it could provide portable batch plants: "if we cannot get [the deviation] approved, can your company provided [sic] an onsite central mixing plants?" Ready Mixed Concrete Co. responded that it did

> [N]ot have a Central Mix Plant available to place on these job sites nor do we have any of the paving mixers with in our fleet. If what we have proposed does not get approved we regretfully could not supply these two projects. At that point I would recommend using a turn key paving contractor like a McCarthy Improvement. They could provide the plant, the trucks, and the finishing.

(R4, tab 49 at 373)

The Notice to Proceed

56. The Notice to Proceed (NTP) was issued on December 13, 2013, with a stated contract duration of 270 calendar days (R4, tab 15). The original contract completion date would have been September 9, 2014.

BCS's Continued Post-Award Search for Concrete Subcontractors and Request to Deviate from Paving Specifications

57. On December 23, 2013, Mr. Maher had an email exchange with McCarthy, Mr. Marshall, and Ready Mixed Concrete Co. Mr. Maher later testified he was "looking for anywhere I could find [a portable batch plant] that was available," almost two weeks

after the NTP was issued. (Tr. 2/36-37) In its emails, McCarthy stated that it did "have a very portable, low profile central batch plant but it is tied up virtually all of next year" (R4, tab 49 at 383). McCarthy continued, indicating that there was obvious confusion about the project parameters:

> Based on multiple conversations I have had with your coworkers, I think it is safe to say there has been some confusion as to what is specified versus "doable" on this one and the military's specs need to override anything you might have picked up from other possible concrete subs. Sid [Brantley] and Evan [Meece] have conveyed to me various comments from these other subs and I have gotten the impression their "concerns" might be driven more by their own limitations versus the true specs …. Please allow me to reiterate our desire to do your work, if the [ready mix] trucks can be changed. Otherwise, I am afraid you are in a pickle finding a way to justify the cost of a central batch plant.

(R4, tab 49 at 382)

58. BCS submitted RFI-0004 on December 23, 2013, requesting:

> to use a slip form machine with ready mix trucks since the contract documents restrict the contractor from placing a concrete plant on site and the batch plant dump trucks must drop their concrete in placed with in [sic] 15 min. The ready mix trucks would allow 90 minutes for placement. It would not be possible to get a dump truck from an offsite plants [sic] within 15 minutes given the base configuration of the Post. Again our sub and concreteplants [sic] have used these ready mix trucks / slip forms on many concrete jobs on the Post and have had expellant [sic] results and high quality work.

(R4, tab 18 at 2)

59. The COE responded to RFI-0004 by correspondence dated January 6, 2014 in which it denied the variance request to use ready mix trucks. The COE indicated, "Request has been reviewed and will not be granted. When using slip form with readymix trucks, historically the Government has experienced lower quality airfield pavement wich [sic] is why the specs will not be changed. Specifications must be complied with." (JSF ¶ 21; R4, tab 18 at 2)

BCS's Unsuccessful Attempt to Self-Perform the Paving and Contract Modification 1A

60. After the request for a deviation was denied, BCS decided to hire "a paving machine manufacturer to bring in a paving machine and we hired a subcontractor – a finishing company behind him to perform the work" (tr. 1/100). As part of that plan, on February 20, 2014, BCS entered into an agreement with Heavy Equipment Manufacturing (HEM) to provide a "fixed form concrete paving machine complete with operator and ground man for a complete concrete construction job for the repair/replacement of two concrete taxiways . . . ." (R4, tab 21).

61. Starting in July 2014, BCS attempted placing test lanes at Taxiway Juliet using the fixed-form method. The placements failed due to poor quality and safety issues. (R4, tab 24 at 1985, 1997-98, 2005, tab 25 at 2582) Mr. Maher admitted during the hearing that BCS "failed miserably" at the fixed-form method (tr. 1/99-100).

62. Bilateral contract Modification 1A was executed by the government on August 5, 2014. The modification, which contained a release of all claims by the contractor, extended the performance by 264 calendar days and set two alternative periods of time for BCS to place concrete at Taxiway Mike. That work could "only occur between the months of April thru May or September thru October" 2015 since the work for Phase 1 of the project "requires a waiver submittal to the FAA to displace the runway during the construction." (R4, tab 16 at 152-156) The modified contract required BCS to complete Phase 1 before starting work on Phase 2, since the Phase 1 work area would no longer be accessible once work began on Phase 2 under the Taxiway Mike phasing plan (R4, tab 4 at 907, phasing note 3).

63. On August 7, 2014, the COE issued a Letter of Concern, expressing apprehension that BCS was behind schedule and had not successfully placed a test lane at Taxiway Juliet. The COE requested that BCS submit a recovery schedule. (JSF ¶ 22; R4, tab 26) This letter reminded BCS that the initial phase of the work was for it to complete the test lane at Taxiway Juliet but had failed on July 10, 2014 and while its second attempt of July 22 & 23, 2014 was being evaluated it was unlikely that this test lane would be successful either. The government noted that the work there was to be suspended by September 1, 2014, until "winter has passed." BCS was reminded that "all concrete placement at Taxiway Juliet was to be completed by July 23, 2014; and without a significant increase in your rate of progress you will fail to meet the milestone completion for Taxiway Juliet as well as the overall contract completion date of June 1, 2015." (R4, tab 26)

64. By correspondence dated August 21, 2014, BCS responded to the Letter of Concern, stating that the failed test lanes were "primarily impacted by equipment failures

beyond our control" (R4, tab 27 at 3049). On September 4, 2014, BCS submitted its recovery plan (R4, tab 28).

65. On October 24, 2014, the CO issued a Cure Notice, and notified BCS that its lack of progress was endangering performance of the contract (JSF ¶ 23; R4, tab 29).

66. In response to the Cure Notice, BCS stated in correspondence dated October 27, 2014 that it bid with the intent to deviate from the contract by using slipform placement with ready-mix trucks. Specifically, BCS said it

> [C]ontemplated the use of a specialty subcontractor to pour the concrete taxiways with the use of a slip form machine and ready-mix trucks. BCC's decision to bid the Project using such a method was reasonable where it was otherwise impossible to comply with the conflicting Specifications based on the configuration of the AAF and the proximity of the Project to the AAF's front gate.

(R4, tab 30 at 3057-58) (emphasis added) Although Mr. Maher said at trial the inclusion of the language indicating BCS's intent to have a subcontractor perform slipform paving using ready mix concrete when it bid the project was an error, we find that testimony self-serving and suspect, given the weight of the other evidence (tr. 1/125-26). Notably, this letter, more than one year after award of the contract, was the first time BCS alleged in writing to the COE that it was "impossible" to meet the contract requirements. As part of its letter, BCS requested the COE grant multiple deviations from the contract, which it believed would fix the problems encountered. (R4, tab 30)

67. On October 28, 2014, the COE and BCS met to discuss the project and BCS's plan to complete the work (JSF ¶ 24).

68. BCS submitted a letter to the COE on October 31, 2014, again responding to the Cure Notice and requesting a variance to "use slip form paving machine and ready-mix trucks for the remaining pours necessary to complete the Project." BCS indicated that it "intends to retain McCarthy Improvement . . . or another equally experienced specialty, slip form concrete paving subcontractor, to complete the remaining concrete paving on the Project." BCS stated "[u]sing McCarthy is our preferred plan as it is well-respected and highly experienced in the performance of the exact work and methods to be employed, and is available for immediate mobilization." BCS also renewed its request to "grind existing concrete in excess of percentages set forth in Specifications" because "the current Rail Rider HEM machine will not produce the required results needed for the contract specified smoothness tests." (JSF ¶ 25; R4, tab 31).

69. On October 30, 2014, McCarthy sent BCS an email, stating that it had not originally priced the project based on the contract specifications, and, as such, it was increasing its proposed pricing (R4, tab 49 at 458).

BCS's Request for a Variance to Use Ready-Mixed Concrete to Perform Slipform Paving Is Granted

70. On November 13, 2014, the CO granted BCS's request for a contract variance to use ready mix trucks with the slipform paving method "at [BCS's] own risk." The COE expressed concerns about BCS's ability to continuously supply concrete using ready mix trucks with the slipform paving method. (JSF ¶ 26; R4, tab 32)

BCS Subcontracts with McCarthy for Slipform Paving at Taxiway Juliet

71. On or about November 26, 2014, BCS and McCarthy executed a subcontract to perform slipform paving at Taxiway Juliet (JSF ¶ 27; R4, tab 33) and the project began to move forward. On December 5, 2014, the CO sent BCS a letter captioned "Response to Request for Constructive Change Modification." He acknowledged informal discussions regarding possible changes, but stated that these were "not . . . issued as a directive to change the requirements of the contract," which "remain unchanged and [BCS] shall proceed until formally directed otherwise." The CO reiterated the government's concerns about the project's progress. He noted that BCS had to "achieve satisfactory placement of concrete on Taxiway Juliet prior to the start of work at Taxiway Mike. . . ." (App. supp. R4, tab 74) On December 8, 2014, BCS submitted its Proposed Techniques/Paving Plan and three days later, the COE, BCS, and BCS's subcontractors participated in a preparatory meeting for placement of concrete (JSF ¶ 28-29). The slipform paver arrived on site on December 12, 2014, and on December 17, 2014, Test Lane 2 was placed at Taxiway Juliet using the slipform method (JSF ¶¶ 29-30). BCS successfully completed the paving at Taxiway Juliet by February 2, 2015 (JSF ¶ 32).

BCS's Subcontracts with RC Construction Co. for Slipform Paving at Taxiway Mike

72. As of December 2014, RC Construction Co. (RC) had an existing batch plant on Pope AAF in close proximity to the Taxiway Mike project site (JSF ¶ 34). On December 15, 2014, BCS entered into a subcontract with RC for concrete placement using the slipform method at Taxiway Mike (JSF ¶ 33; R4, tab 35).

73. At no point during performance did BCS request an alternate batch plant location on Pope AAF (JSF ¶ 41; R4, tab 43 at 31).

74. BCS alleged that there was supposed to be a batch pant site available for its use at Taxiway Mike, but it was unavailable when BCS began performance (app. br.

at 28). As we found in FOF 21-22 above, the contract stated that the area was being used and when the current contractor was done, it would remove the batch plant. The government's response to another bidder's inquiry made clear that it was not known when this would occur. We find that by entering into a subcontract with RC, BCS made a business decision to use a company with an existing batch plant at Pope AAF rather than finding another company that would need to build or furnish its own batch plant. Further, the government granted BCS's January 12, 2015 request to waive its requirement for a test lane at Taxiway Mike, and agreed to accept instead RC's successful performance of a lane under another contract at Pope AAF that had used the same equipment (R4, tab 24 at 2183-84; tr. 4/195-96).

75. On February 26, 2015, BCS submitted its Paving Plan for Taxiway Mike (JSF ¶ 35; R4, tab 37).

76. As a result of the bilateral agreement in Modification 1A, BCS could not begin work on Taxiway Mike before it was available from April to May 2015. This was the first of two periods during which the contractor could work there. (R4, tab 16 at 152-56; FOF 62)

77. On April 2, 2015, the parties conducted a preparatory meeting for airfield paving at Taxiway Mike (JSF ¶ 36).

78. From April 20, 2015 through May 11, 2015, BCS's subcontractor, RC, placed the required lanes at Taxiway Mike using the slipform method (JSF ¶ 37).

79. On June 18, 2015, both Taxiway Juliet and Taxiway Mike passed final inspection and BCS achieved substantial completion of the project (R4, tab 24 at 2342-43, tab 25 at 3047).

BCS's Request for Equitable Adjustment, Claim, and Notice of Appeal

80. In a Request for Equitable Adjustment (REA) dated December 22, 2015, BCS formally requested $1,474,200.33 in additional compensation (JSF ¶ 38; R4, tab 38 at 2). The REA was denied by the CO on May 4, 2016 (JSF ¶ 39; R4, tab 39).

81. On June 22, 2016, BCS submitted a certified claim for $1,474,200.33 in additional compensation (JSF ¶ 40; R4, tab 40). BCS claimed under the contract's standard Federal Acquisition Regulation (FAR) clauses for Disputes, Default, and Changes (R4, tab 40 at 4059). FAR 52.233-1, DISPUTES (JUL 2002), FAR 249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984), and FAR 243-1, CHANGES (JUN 2007) are found in the contract at R4, tab 5 at 1085-86, 1118-19, and 1099 respectively.

82. By correspondence dated January 17, 2017, the CO issued a final decision (COFD) denying BCS's claim (JSF ¶ 42; R4, tab 2).

83. BCS filed its Notice of Appeal with the Board on April 12, 2017, and the case was docketed the same day as ASBCA No. 61118.

DECISION

I. Overview of the Appeal, the Parties' Contentions, and Appellant's Burdens of Proof

To summarize key findings and the parties' dispute in this appeal, the contract allowed the contractor to choose between either the slipform method or the fixed-form method, to pave at Taxiway Juliet and Taxiway Mike. While BCS did not have to use the same method at both airfields, its choice of process in making its bid was critical, as the contract premised using these methods upon differing requirements for product composition and source, transport, equipment, personnel, time constraints, and manner of placement. Importantly, the contract as entered into allowed ready mix concrete to be used for slipform paving but did not allow its use for fixed-form paving.

The Parties' Contentions

In seeking to recover additional costs at Taxiway Juliet, BCS asserts that the contract is comprised of design specifications that carry an implied government warranty (*see, e.g*., app. br. at 14-26), but the contract's use of the undefined "term 'haul time'" is a latent ambiguity rendering the specifications defective (*id*. at 20-21) that made performance impossible (*id*. at 21-26). BCS denies it is foreclosed from recovery for failing to conduct a pre-bid site visit. It asserts that because there was "no scheduled site visit" prior to bid, the government in effect "deleted the site visit requirement from the contract." Thus, "it was reasonable for contractors to assume that the project could be completed as specified, and the COE assumed the risk of faulty specifications." (*Id.* at 26-27; app. reply br. at 25)

To recover for allegedly additional work at Taxiway Mike, BCS argues that it is entitled to costs under the contract's Changes clause because the government constructively changed the contract. It says that the government required BCS to "achieve satisfactory placement of concrete on Taxiway Juliet prior to the start of the work at Taxiway Mike," even though the contract did not require this sequence. Appellant contends this "direction, coupled with the threat of termination, may also be considered an order to accelerate" performance. (App. br. at 28-29) BCS next maintains that the government changed the contract by failing "to make the batch plant site that was

specified in the contract available" for appellant's use at the time BCS was ready for it. It says that this shortcoming, along with the government's failure to offer an equivalent alternative site, resulted in appellant having to hire RC and perform the work "in a different manner than originally intended and at extra cost. (*Id*. at 29-30)

The government agrees these were design specifications, but denies the contract was ambiguous or impossible to perform. It argues that BCS cannot recover under the theories espoused because appellant failed to prove it reasonably relied at bid upon the interpretation it now urges and did not avail itself of a pre-bid site investigation that would have disclosed the availability of offsite locations for batch plants. (*See* gov't br. at 59-70) As to the alleged constructive changes at Taxiway Mike, the government asserts that BCS has not proven that it relied to its detriment at bid on using the batch plant site at Taxiway Mike or that it would be available for use at a particular time; appellant's use of RC was a business decision and not the government's responsibility; and the contractor was not delayed by the government but performed in accordance with Modification 1A, which contained a release of all related claims (*id*., 70-73).

Appellant rejoins that the government "misses the point" in arguing that BCS "cannot show pre-bid reliance on its interpretation of 'haul time,'" because it is the contractor's "inability to locate a batch plant offsite and meet the haul time requirement that makes it impossible to meet the contract requirements" (app. reply br. at 23). BCS contends that "Sid Brantley clearly and unequivocally testified he relied on the specifications" in developing the contractor's bid. "Relying on the specifications, [BCS] believed the contract requirements for concrete placement, including the haul time requirements, could be met." (*Id*. at 23) It maintains its position that the government constructively changed the contract at Taxiway Mike (app. reply br. at 27-29).

Appellant's Burden of Proof

BCS bears the burden of proof for this appeal under the various legal theories it advances. Because it contends that the contract was defective and latently ambiguous for work at Taxiway Juliet regarding the contractor's ability to locate a batch plant within a 15-minute haul time, BCS must prove three things occurred prior to contract award. First, appellant must establish that the contract as advertised was ambiguous; second, that this ambiguity was latent (*i.e*., not obvious) and did not trigger a pre-bid duty on the part of a bidder to inquire; and third, that BCS reasonably relied at bid upon the interpretation it now urges. *See Optimization Consulting, Inc*., ASBCA No. 58752, 19-1 BCA ¶ 37,426 at 181,904 (citing *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004) and *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990)). This third criterion of reliance at bid may also be established where a contractor can prove that it then relied upon the interpretation of a subcontractor, as under appropriate circumstances, a subcontractor's bid to the prime can be imputed to appellant. *See Froeschle Sons, Inc., v.*

United States, 891 F.2d 270, 272 (Fed. Cir. 1989) and *M.A. Mortenson Co*., ASBCA No. 53647 *et al.*, 06-2 BCA ¶ 33,400 at 165,581.

Appellant cannot recover if it fails to prove any of these elements, as "An ambiguity will only be construed against the government if it was not obvious on the face of the solicitation and reliance is shown." *NVT Techn., Inc. v. United States*, 370 F.3d 1153, 1162 (Fed. Cir. 2004). However, even if BCS meets these pre-bid requirements, it is protected only to the extent that it proves its compliance with the defective specifications resulted in its injury; *see Pyrotechnic Specialties Inc*., ASBCA No. 57890 *et al.*, 17-1 BCA ¶ 36,696 at 178,693-94 citing *White v. Edsall Constr. Co*., 296 F.3d 1081, 1084-85 (Fed. Cir. 2002) (citing *United States v. Spearin*, 248 U.S. 132, 136 (1918)).

As to BCS's contentions that the government constructively changed the contract at Taxiway Mike regarding the timing and sequencing of work, availability of the onsite batch plant site, and BCS's hiring of RCC, appellant must prove that it "perform[ed] work beyond the contract requirements, without a formal order under the Changes clause, due either to an express or implied informal order from an authorized government official or to government fault." *Circle LLC*, ASBCA No. 58575, 15-1 BCA ¶ 36,025 at 175,974 citing *Bell/Heery v. United States*, 739 F.3d 1324, 1335 ((Fed. Cir. 2014); *Int'l Data Products Co. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007); *Versar, Inc*., ASBCA Nos. 56857 *et al*., 12-1 BCA ¶ 35,025 at 172,122. *See Mountain Chief Mgmt. Servs., Inc*., ASBCA No. 58725, 15-1 BCA ¶ 35,831 at 175,201 (quoting *Northrop Grumman Sys. Corp. Space Sys. Div.*, ASBCA No. 54774, 10-2 BCA ¶ 34,517 at 170,242-43).

II. Analysis of BCS's Arguments

A. Alleged Defective Specifications at Taxiway Juliet

BCS alleges that the project specifications provided by the government were defective design specifications. BCS claims it determined "after award" that it was impossible to comply with the haul time requirements to accomplish the slipform paving method, the "less expensive" method it intended to use. (App. br. at 14-15) Additionally, BCS alleges that "haul time" as used in the specifications, was ambiguous (*id*. at 15). The government opposes BCS's allegations, and argues that the contract's haul time requirement for slipform placement was not impossible or ambiguous (gov't br. at 53). The government also claims that BCS did not do its pre-bid due diligence or place its bid on the project consistent with one of the two authorized methods of placement as specified by the contract requirements (gov't br. at 73). Although BCS makes many arguments about the particular specifications being design specifications, the government

never disputed this assertion, and admits that the specifications are design specifications (app. br. at 16; gov't reply br. at 9).

Design specifications "describe in precise detail the materials to be employed and the manner in which the work is to be performed. The contractor has no discretion to deviate from the specifications, but is 'required to follow them as one would a road map.'" *Revenge Advanced Composites*, ASBCA No. 57111, 11 BCA ¶ 34,698 at 170,883, quoting *Blake Constr. Co. v. United States*, 987 F.2d 743, 745 (Fed. Cir. 1993)). "When the Government requires a contractor to follow detailed plans and specifications, it is well-established that it impliedly warrants that if the specifications are followed, the result will be adequate." *D.E.W., Inc.*, ASBCA No. 35896, 94-3 BCA ¶ 27,182 at 135,459 (internal citations omitted). In cases where the government provides alternate methods by which a contractor can complete a project, "the [g]overnment's warranty of its specifications extends to both options." *SPS Mech. Co., Inc.*, ASBCA No. 48643, 01-1 BCA ¶ 31,318 at 154,692 (citations omitted).

Here, the design specifications for placement of concrete carried an implied warranty that a batch plant could be located off Mackall AAF and that BCS could meet the 15-minute haul time requirement if it chose to use the slipform method, or, if it chose to use the fixed-form method, that the concrete could be deposited in front of the pavers within 90 minutes of charging the cement. Appellant does not dispute that it was possible to meet the 90-minute time restriction using the fixed-form method (app. br.; app. reply br., *passim*). As such, the parties' dispute focuses on the 15-minute haul time requirement for the slipform method.

The warranty of specifications does not relieve BCS from its responsibility to comprehend the stated requirements of the specifications, investigate the site, and prepare its bid to comply with the requirements. Further, while the definition of haul time was discussed extensively at trial and in the parties' briefs, the Board does not need to reach a definition of haul time for this contract because BCS fails to demonstrate any pre-bid reliance, as required in order to recover. "The general rule is that 'where a contractor seeks recovery based on his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid.'" *Fruin-Colnon Corp.*, 912 F.2d at 1430 (quoting *Lear Siegler Mgmt. Servs. Corp. v. United States*, 867 F.2d 600, 603 (Fed.Cir.1989) (internal citations omitted). "The burden of proving reliance on the claimed interpretation thus falls on the contractor." *Fruin-Colnon Corp.*, 912 F.2d at 1430.

BCS failed to prove that its founder and estimator relied on the specifications for slipform placement when he created the bid (*see, e.g.*, FOF 25, 27, 32). Although BCS argues that Mr. Brantley bid the contract per the specifications (app. reply br. at 23-27), the evidence and Mr. Brantley's own testimony suggest otherwise and that he lacked an

adequate understanding of what was required by the contract to perform either slipform or fixed-form paving at these airfields. Mr. Brantley admitted that he did not know about the 15-minute haul time requirement prior to submitting BCS's bid (FOF 25, 35, 45). Additionally, the subcontractors that prepared pre-bid proposals for BCS did not rely on the 15-minute haul time when preparing their bids (FOF 28, 32, 36), nor was there any proof that either BCS or its subcontractors investigated the site or surrounding areas (*see* FOF 19, 23-25). Even as part of the post-award proposals, none of the subcontractors attempted to comply with the 15-minute haul time (FOF 42, 69). As such, BCS has not met the burden of proving reliance on the claimed pre-bid interpretations of the 15-minute haul time.

Instead of making an allegation of pre-bid reliance, BCS uses impossibility as a smoke screen to seemingly try to skirt the reliance requirement of recovery by alleging the specification was impossible. Still though, "[a]bsent evidence of the prime contractor's reliance on the specifications, we cannot conclude that appellant is entitled to prevail." *Clearwater Constructors, Inc.*, ASBCA No. 45712, 96-2 BCA ¶ 28,495 at 142,293 (citing *Cf. Al Johnson Construction Co. v. United States*, 854 F.2d 467, 470 (Fed. Cir. 1988) (holding that the implied warranty of specifications did not run to a contractor failing to establish adherence to specifications)).

The arguments in this appeal parallel those in *Al Johnson Construction Co.* There, the appellant alleged that the Board erred in not making a finding related to whether specifications were defective. 854 F.2d at 470. The Federal Circuit held that "whatever defects existed would not make the implied warranty run to a contractor who did not construct the berm as the contract provided he should." *Id.* The Court explained its rationale succinctly, stating:

> The contractor who is awarded an Army Engineers $14,151,922 contract presumably has examined the plans and specifications, visited the site, and satisfied himself that the job could be done within the sum bid. There is nothing to show when or how the contractor became disillusioned with respect to the berm. He did recommend certain changes, which were rejected, in the way the berm was to be constructed, but does not assert he gave warning that the berm would fail unless it was built as he recommended. He does not show us when, or even whether, he became convinced that the berm design was defective. We think the restriction of the implied warranty to those who have fulfilled the specifications, or tried and failed to do so because of the defects themselves, has strong policy behind it that would not be served by allowing the implied warranty to run to one who

> has not done what he contracted to do and fails to satisfactorily explain why not. Any other exception should therefore be restricted to instances, not now foreseen, of manifest inequity, or to a deviation from the specifications shown to have been entirely irrelevant to the alleged defect.

Id. (emphasis added)

Here, we have found that BCS never proved that it intended at bid to use either of the methods for performance in the manner required under the contract, nor did it show that it understood how the method(s)/costs proposed by its pre-bid subcontractors related to what BCS bid to the government. Proof of the making of the contractor's bid yields little solid information other than the price BCS offered for each airfield, and provides at best an inchoate explanation of what the contractor thought about how it might do the work under this lump sum (fixed-price) contract. (*See, e.g*., FOF 24-25, 27-38)

Instead, BCS proved only that it had a theoretical idea of how it would complete the project using subcontractors, and when that idea never came to fruition, it decided to make an issue of the haul-time. It was not until November 2013, two months after the contract was awarded, that the issue of haul time was raised to BCS by one of the subcontractors it was trying to work with (FOF 38, 46). Even then, the reason the subcontractor raised the issue was because the subcontractor was not in a position to place a portable batch plant within the 15-minute haul time requirement. Instead, the subcontractor wanted to keep costs low by using its own plant more than 45 miles away from Taxiway Juliet. (FOF 49-50)

When BCS presented the government with its initial request for a deviation, it did not state that meeting the specification was impossible, only that its subcontractor wanted to use the slipform method with ready mix concrete, which was not permitted by the contract. The request did not indicate there was an inability to place a portable batch plant within the 15-minute haul time specified in the contract. (FOF 58) In fact, while there is a lack of clarity as to just what appellant bid (FOF 27-36), BCS later stated that it bid the project with the intent to deviate from the contract requirements (FOF 66).

Like the appellant in *Al Johnson Construction Co.*, BCS did not attempt to fulfill the specifications as required. BCS admitted it never intended to try to comply with the specifications, and, even if we did find impossibility, which we hold we do not need to address, the protection of an implied warranty does not apply to a contractor that has not done what it contracted to do.

We find that BCS did not rely on compliance with the 15-minute haul time as part of its bid or even during its attempted performance (FOF 13, 19, 23-25, 35-36). Because

we do not find a breach of the implied warranty, BCS is not entitled to recover any costs proximately flowing from the alleged breach, including the costs of its own failed fixed-form placement attempt. *See Am. Ordnance, LLC*, ASBCA No. 54718, 10-1 BCA ¶ 34,386 at 169,795-96. As such, BCS is not entitled to recover for any additional costs related to the performance at Taxiway Juliet.

B. Alleged Constructive Changes at Taxiway Mike

BCS contends that the government constructively changed the work at Taxiway Mike at Pope AAF (app. br. at 27-30). Appellant alleges it was wrongly made to first finish its work at Taxiway Juliet, which it says was delayed due to haul time issues; the government failed to make available the Pope AAF batch plant site (or "an equivalent alternate site") as required by the contract; and, as a result, BCS was made to hire RC to do slipform paving at Taxiway Mike (*id*. at 27-29).

The government responds that not only was BCS aware at bid that the batch plant site was already occupied, BCS was never given a date the site would be available (gov't br. at 70). The government argues that because BCS did not include a portable batch plant in its bid and provided no evidence there was a batch plant it intended to rent, BCS did not prove its intention of or ability to construct a batch plant at Pope AAF (gov't reply br. at 14).

II.B.1 Alleged Constructive Change by the Government Regarding Sequencing of Work at Taxiway Mike and Taxiway Juliet

We have rejected BCS's contentions regarding Taxiway Juliet in Decision § II.A, *supra*. We further have found that BCS agreed to limitations on the periods when it was allowed to work at Taxiway Mike in bilateral contract Modification 1A, in which it released all claims relating to the modification (FOF 62, 76). Consequently, we hold that appellant failed to prove the government constructively changed the contract or was at fault for delays associated with the haul time.

II.B.2 Alleged Constructive Change by the Government Regarding As-Planned Work at Taxiway Mike

Appellant states that the alleged constructive change at Taxiway Mike was not to the scope of the contract, but to the contractor's planned method of performance there:

> The COE's failure to make the batch plant site that was specified in the contract available for [BCS's] use was unquestionably a change to the contract. Mr. Maher's testimony that [BCS] was forced to hire RC to perform the work at

> Taxiway Mike demonstrates [BCS] was compelled to do work in a different manner than originally intended. While the scope of [BCS's] work was not changed, the method that [BCS] was entitled to use and intended on using to perform the work clearly was. Finally, [BCS] clearly did not volunteer to perform the work differently, but had to perform the work under the threat of termination. Those facts support entitlement for a constructive change to the contract.

(App. br. at 29)

BCS takes exception to the government's assertions that BCS "has not demonstrated that it relied to its detriment that the designated batch plant site location would be available for [BCS's] use"; the contractor was on notice that the date of the site's availability was uncertain following the government's answer to another's pre-bid inquiry; and, "there is no evidence that [BCS's] bid included the cost of a batch plant at Taxiway Mike." Appellant dismisses these by proclaiming that "Reliance is not an issue. The simple issue is: Did the COE change the contract by not making the designated batch plant site location available for [BCS's] use" in accordance with the specifications?" (App. reply br. at 28)

BCS errs, as proof of reasonable reliance upon the contract at the time of bid is an essential element to a contractor's recovery for a constructive change (*C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543-44 (Fed. Cir. 1993)). To prevail on its argument that the government constructively changed the contract regarding the batch plant site at Pope AAF near Taxiway Mike, BCS must prove that it reasonably interpreted the contract at bid to require that this batch plant location would be available when BCS was ready to begin that work, and that it was caused by the government to perform in a manner other than planned in its bid. It is necessary that BCS do both, as the purpose of the contract's Changes clause is to protect the contractor being made by the government to perform uncompensated work beyond contract requirements. A contractor's recovery for a constructive change is premised upon the "altered position" in which it finds itself "by reason of performing the 'changed' work'" *LWJV* I, 19-1 BCA ¶ 37,301 at 181,453-54 citing *Atherton Constr. Inc*., ASBCA No. 56040, 08-2 BCA ¶ 34,011 at 168,191 (further citations omitted). Proof of that "altered position" is contingent upon demonstrating the difference between how the contractor bid to do the work and how it was made to perform (*Fruin-Colnon Corp.*, 912 F.2d at 1431-32).

The greatest flaw to BCS's argument of a constructive change at Taxiway Mike is that it failed to prove that it reasonably interpreted and relied upon the contract at bid, and was made by the government to do anything differently than anticipated. Any superficial appeal to BCS's assertion that the contract obligated the government to make available

the batch plant site at Taxiway Mike when BCS was ready to use it is defeated by appellant's failure to reconcile its expectations under that provision with the government's pre-bid inquiry response that it was uncertain when RC would vacate that area (*see* FOF 18, 20-22). A contractor is not allowed to dismiss that type of information out of hand, nor does it become irrelevant once the contract is entered into.[7] The Board has held that pre-award questions and answers "are very important because bidders are entitled to rely on the government's answers. . ." which "are not 'wiped from the record by the formal execution of the contract.'" These are "highly relevant to the post award interpretation of contract provisions." *Fluor Fed. Solutions, LLC*, ASBCA No. 61093, 19-1 BCA ¶ 37,424 at 181,892-93 (further citations omitted).

The evidence it presents does not demonstrate, and appellant does not aver, that BCS's bid for the project included costs to set up a portable batch plant at Taxiway Mike (*see, e.g.*, FOF 27-36). Although his testimony is at times unclear and there is a lack of detail about how he planned for BCS to do the work on the project (*id.*), Mr. Brantley testified that he did not include a batch plant for work at Taxiway Mike as it was unnecessary to do so (FOF 27). Appellant failed to prove it performed this work contrary to its at-bid planned execution or that the government constructively changed the contract in that regard.

II.B.3. Alleged Constructive Change for the Government's Failure to Provide an Equivalent Alternate Batch Plant Site at Taxiway Mike

Although appellant says "the COE constructively changed the contract by failing to provide an equivalent alternate site for [BCS] to use for a batch plant" at Taxiway Mike (app. br. at 29), that argument it without merit. BCS agreed that it did not request an alternate site to construct a batch plant and it did not coordinate an alternate batch plant site with the CO (FOF 73).[8] The contractor did not request an alternate location, and has offered no proof that the government constructively changed the contract by failing to offer one.

[7] As neither party advances the argument that the government's response to the pre-bid inquiry caused an ambiguity, it is unnecessary that we address that legal theory. In any event, the outcome would be the same in that establishing either type of ambiguity (i.e., patent or latent) requires proof of pre-bid reliance on a consistent and reasonable interpretation of the contract (*LWJV* II, slip op. at 74-76).

[8] We note that after award, BCS unsuccessfully attempted to obtain a portable batch plant from both Ready Mixed Concrete Co. and McCarthy (FOF 55, 57), and appellant offered no evidence it succeeded in locating one from another subcontractor.

II.B.4. Alleged Constructive Change with Regard to BCS's Hiring of RC for Work at Taxiway Mike

The Board does not find BCS's assertions persuasive that the government constructively changed the contract or "forced" it to hire RC to perform at Taxiway Mike. The weight of the evidence supports the government's position that BCS made a business decision to use the subcontractor that already had a batch plant next to Taxiway Mike (FOF 74). Appellant's contention that it "did not volunteer to perform the work differently, but had to perform the work under the threat of termination" (app. br. at 29) is unavailing, as it was BCS's poor performance at Taxiway Juliet (it "failed miserably") that brought its ability to successfully complete the contract into doubt (FOF 60-61, 63-66). Appellant offers no proof of government participation in, much less causation of, BCS's decision to hire RC for the work at Taxiway Mike.

As noted above, BCS did not include the cost of constructing or otherwise obtaining a batch plant in its bid (nor did its potential subcontractor), which might have lent some support to BCS's allegation that it (or its subcontractor) intended to put its own batch plant at the site (*see* FOF 73). Lacking this proof of reasonable reliance, or of improper government action, BCS is not entitled to recover additional compensation based on the business decision it made to perform its obligations under the contract.

II.B.5 Appellant's Release of All Claims in Contract Modification 1A Including Schedule and Work at Taxiway Mike

Although this is mentioned in conjunction with alleged delays resulting from the sequencing of work with Taxiway Juliet, we note in conclusion that although BCS claims its performance was delayed by the several alleged constructive changes caused by the government at Taxiway Mike (app. br. at 27-30), BCS also entered into bilateral Contract Modification 1A that extended performance by 264 days and limited work at Taxiway Mike to April through May or September through October 2015 (FOF 62). Even assuming *arguendo* that BCS was delayed by the government for the work at Taxiway Mike (and we do not so find), appellant presented no proof that appellant was delayed beyond time authorized in the contract.

CONCLUSION

We have considered all arguments advanced by the parties. BCS has failed to meet its burden of proof. The appeal is denied.

Dated: January 28, 2021

REBA PAGE
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. 61118, Appeal of Brantley Construction Services, LLC, rendered in conformance with the Board's Charter.

Dated: January 29, 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.*	)	
	)	

APPEARANCES FOR THE APPELLANT: Richard B. O'Keeffe Jr., Esq.
Gary S. Ward, Esq.
Nicole E. Giles, Esq.
Wiley Rein LLP
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Arthur M. Taylor, Esq.
Chief Trial Attorney
Patrick B. Grant, Esq.
Trial Attorney
Defense Contract Management Agency
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

In the United States Court of Federal Claims

No. 19-1817
(Filed: 19 April 2021)

PAKTIN CONSTRUCTION COMPANY,	*	
	*	
Plaintiff,	*	Statute of Limitations; 28 U.S.C. 2501;
	*	Accrual Suspension Rule; Rule 12(b)(1);
v.	*	Standing; Fifth Amendment; Taking Clause;
	*	Substantial Connection Test.
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	

Daniel Marino, Marino Finley LLP, of Washington, D.C., with whom was *Tillman Finley*, Marino Finley LLP, of Washington, D.C., for plaintiff.

Miles Karson, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, with whom were *Joseph Hunt*, Assistant Attorney General, *Robert Kirschman, Jr.*, Director, *Kenneth Dintzer*, Deputy Director, all of Washington DC, for defendant. *James Van Debergh*, U.S. Army Corps of Engineers, of Washington DC, Assistant Counsel for Litigation.

OPINION AND ORDER

HOLTE, Judge

When the government engages in a long-running partnership with a foreign entity assisting the advancement of United States interests in a war zone, does the Constitution prohibit the government from taking the entity's property without just compensation? That is the question plaintiff presents to the Court. Afghan plaintiff Paktin Construction Company alleges the United States took its property without compensation in violation of the Fifth Amendment. Before 2011, plaintiff "maintained a business relationship with Coalition Forces in Afghanistan for many years," and plaintiff's work in the reconstruction and repair of local infrastructure damaged during the war was praised as "unparalleled thus far." According to plaintiff, in 2011, while it was working on a major development on behalf of the Army Corps of Engineers, the Army unilaterally terminated the contract and refused to return plaintiff's equipment or provide compensation. Plaintiff's efforts to retrieve its property continued for years, culminating in the Army instructing plaintiff to "never ask about the matter anymore" and leading to the present dispute. A foreign national receives constitutional protections when they operate within United States territory or have developed substantial connections with the United States over time. The government filed a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, arguing this Court does not have jurisdiction to entertain plaintiff's claim because plaintiff did not raise the claim within six years of its accrual and plaintiff does not have

substantial connections with the United States. Based on the facts alleged, including that plaintiff was repeatedly recognized and appreciated by the United States government for almost ten years of contributions to the overseas efforts in Afghanistan, the Court finds plaintiff sufficiently pleads substantial connections to establish standing to sue under the Fifth Amendment. For those and the following reasons elaborated in this Order, the Court **DENIES** the government's motion to dismiss.

I. Factual and Procedural History

A. Factual History

The Court draws the following facts from plaintiff's amended complaint, plaintiff's response to the government's motion to dismiss, and plaintiff's supplemental paper, assuming for the purpose of this motion all factual allegations are true. *See, e.g.*, *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000) (when ruling on a motion to dismiss for failure to state a claim, this Court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in [plaintiff's] favor"). Plaintiff is a construction company organized under the laws of Afghanistan and domiciled in Kabul, Afghanistan. Am. Compl., ECF No. 11 at ¶ 2. On 6 August 2011, plaintiff entered into an agreement to act as a subcontractor for Supreme Ideas-Highland Al Hujaz JV ("SI-HAH"), the prime contractor in the construction of a project for the United States Army Corp. of Engineers ("USACE") in the Paktia Province of Afghanistan. Am. Compl. at ¶ 7. Plaintiff was responsible for performing "planning and construction services under a scope of work . . . and schedule of values . . . for the USACE in accordance with the Prime Contract." *See* Declaration of Rahmatullah Zaland ("Zaland Declaration"), ECF No. 16-1 at 1.

SI-HAH informed USACE plaintiff would serve as "the primary subcontractor on this project," and plaintiff's employees and representatives "attended and participated in the weekly meetings with USACE personnel regarding the project." Zaland Declaration at 1. Plaintiff's job site was subject to the control of the U.S. Army and USACE, and the United States restricted access to the job site to only authorized individuals. Zaland Declaration at 1. Plaintiff's work was subject to "inspection, testing and, ultimately, acceptance by the United States and the health and sanitary requirements of the USACE" through provisions of USACE's prime contract with SI-HAH. Am. Compl. at ¶ 9. Pursuant to the subcontractor agreement, plaintiff moved various construction supplies and equipment onto the worksite. *Id*. at ¶ 10.[1]

On 25 January 2012, USACE sent a notice to SI-HAH demanding all work under the contract be stopped. *Id*. at ¶ 11. On the same day, SI-HAH directed plaintiff to stop work on the project and vacate the premises within 10 days of the notice. *Id*. at ¶ 12. SI-HAH further instructed plaintiff not to remove any materials from the construction site "until [SI-HAH] arranged an inventory procedure with the Government." *Id*. While there was "discussion of what amounts were owed and would be paid" to plaintiff and SI-HAH, plaintiff claims the U.S. Government never began a formal inventory procedure of the equipment and materials left at the

[1] The specific equipment and supplies plaintiff claims it moved to the job site include "mixers, compactors, vibrators, a welding machine, 207 tons of rebar, 500 bags of cement, piping, multiple generators, two 25,000-liter water tanks, and portable office and living quarters and facilities." Am. Compl. at ¶ 10.

job site. *See* Zaland Declaration at 2. Plaintiff claims a "dispute arose over payments" due from SI-HAH to plaintiff which, along with "security concerns," prevented plaintiff from recovering its property during this time. Am. Compl. at ¶ 13.

During the summer of 2013, plaintiff's CEO began inquiring whether he would be able to return to the site to retrieve plaintiff's construction equipment and materials. Zaland Declaration at 2. On 19 July 2013, plaintiff received an email from a representative of the U.S. military informing plaintiff it had until 22 July 2013 to remove some of its property from the construction site. *See id*. at 21. When plaintiff's CEO thereafter attempted to approach the construction site to remove its property, U.S. Government personnel informed plaintiff's CEO he could not enter the site or remove the equipment and threatened him with arrest should he attempt to return. *Id*. at 2.

On 4 August 2013, a special agent with the United States Special Inspector General for Afghanistan Reconstruction communicated with United States military personnel on the subject of plaintiff's attempts to recover its property and requested clarification on the dispute. *See id*. at 2, 22. The special agent informed plaintiff at the time he "would contact a USACE commander and let [plaintiff] know what to do." *Id*. at 2. Plaintiff followed up with the special agent on 22 August 2013 and included an inventory list of property still on the construction site but received no response. *Id*. On 14 September 2013 the U.S. military representative plaintiff spoke with on 19 July 2013 stated the military representative "had nothing to do with any of [plaintiff's] property being confiscated and that he was not directing anyone to [confiscate plaintiff's property]." *Id*. Plaintiff requested contact information for a USACE representative who could return its equipment, but never obtained the requested information. *Id*. at 2–3.

In December 2013, plaintiff's CEO first observed some Afghan National Army ("ANA") personnel using what the CEO believed to be plaintiff's property. Zaland Declaration at 3. On 24 December 2013, plaintiff's CEO met with USACE personnel and submitted documentation related to the equipment and materials plaintiff sought to recover. *Id*. USACE initially informed plaintiff it would "investigate" the matter, and later informed plaintiff USACE would return the property on 4 January 2014. *Id*. The government later informed plaintiff it gave plaintiff's property to the ANA, and plaintiff "should not ask about this matter anymore." *Id*. In April 2019 a commander of the ANA confirmed to plaintiff the U.S. Government gave plaintiff's property to the ANA. *Id*. Plaintiff has yet to recover the property left on the construction site or receive any compensation for the value of this property. Am Compl. at ¶ 15–19.

B. Plaintiff's Past Construction Projects with the U.S. Government and Commendations for its Work

Before involvement in the USACE project related to plaintiff's claim, plaintiff worked with the United States government as both a primary contractor and subcontractor on numerous construction projects in Afghanistan.[2] *See* Pl.'s Supp. Paper in Opp. to Def.'s Amended Mot. to

[2] During oral argument on the government's motion to dismiss, the Court raised a factual question regarding whether plaintiff had "any other connectivity with the United States in the past . . . other than the project of work that is described. . . in the complaint." Tr. at 24:5–9. Plaintiff's counsel was not prepared to provide such information at the oral argument. Tr. at 25:7–12. The Court accordingly permitted plaintiff to supplement the

Dismiss ("Pl.'s Supp. Paper"), ECF No. 28-1 at 2–5. Plaintiff's past work on construction projects tied to the United States government and the government's commendations to plaintiff for this work are summarized in chronological order from 2004 to 2011. *Id*.

Between 2004 and 2006, plaintiff worked as a subcontractor on four USAID-funded construction projects in various districts of Afghanistan. *See* Pl.'s Supp. Paper at 2 (citing Exhibits for Proposed Supplemental Paper ("Supp. Paper Ex."), ECF No. 28-2 at Ex. A).

In 2007, plaintiff completed a contract with Task Force Diablo and the 4-73rd Cavalry of the 82nd Airborne Division of the U.S. Army to repair the Gul Ghondy High School in the Jaji District after it was damaged by the Pakistani military. *See* Pl.'s Supp. Paper at 3 (citing Supp. Paper Ex. at Ex. E, Ex. F). For this project, plaintiff received a letter from the United States Department of Defense ("DOD") on 7 September 2007 recognizing plaintiff's "capability and competence." Supp. Paper Ex. at Ex. E. Plaintiff also received a Letter of Recommendation from the DOD on 7 October 2007 referencing this project, in which a U.S. military officer wrote "[plaintiff] is highly recommended for future CMO / CERP funded projects sponsored by Coalition Forces." Supp. Paper Ex. at Ex. F.

Plaintiff completed two construction projects in 2008 for the 506th Infantry Regiment, 4th Brigade Combat Team, 101st Airborne Division of the U.S. Army. *See* Pl.'s Supp. Paper at 4 (citing Supp. Paper Ex. at Ex. H, Ex. I, Ex. J). For both projects plaintiff received a Letter of Recommendation recognizing plaintiff's "capability and competence" by completing the project "on time and to the highest standard." *See* Supp. Paper Ex. at Ex. H, Ex. I, Ex. J. In a Letter of Recommendation from the DOD dated 1 February 2009, a U.S. military officer wrote "[plaintiff] has maintained a business relationship with Coalition Forces in Afghanistan for many years" and [plaintiff's] work [on projects tied to the U.S. government]. . . have been some of the best work I have seen throughout almost two years spent in Afghanistan." Supp. Paper Ex. at Ex. I.

From 2008 to 2009, plaintiff completed three projects as a contractor for the 1st Squadron, 61st Cavalry Regiment, 101st Airborne Division of the U.S. Army. Pl.'s Supp. Paper at 2–3 (citing Supp. Paper Ex. at Ex. D, Ex. G). The Department of the Army issued a Memorandum of Recommendation to plaintiff on 22 May 2008, in which a U.S. military officer complemented plaintiff's "pro-active attitude, and fundamentally community minded approach to development projects." Supp. Paper Ex. at Ex. G. According to the Memorandum of Recommendation, the government paid plaintiff $65,038 and $4,318.75 for two different projects. *Id.* In another Memorandum of Recommendation plaintiff received on 4 March 2009 a U.S. military officer wrote "I recommend the use of [plaintiff] in all endeavors." Supp. Paper Ex. at Ex. D.

Plaintiff completed two additional projects between 2008 to 2009 in the Kuchi and Logar provinces of Afghanistan as a contractor for the 506th Infantry Regiment, 4th Brigade Combat Team, 101st Airborne Division of the U.S. Army. Pl.'s Supp. Paper at 4 (citing Supp. Paper Ex. at Ex. I, Ex. J, and Ex. K). The U.S. Army noted "[plaintiff] began [one of] the project[s] before receiving initial payment and finished ahead of schedule," and plaintiff's performance "help[ed]

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factual record with any additional projects it worked on for the United States other than the project which gave rise to plaintiff's claimed injury. *See id*. at 25:11–13.

the people of Logar Province improve their quality of life and increase the legitimacy of the Afghan government." Supp. Paper Ex. at Ex. J.

In 2009, plaintiff contracted with the 3rd Brigade Special Troops Battalion, 10th Mountain Division of the U.S. Army to clear snow and ice from Tera Pass in the Logar Province of Afghanistan. Pl.'s Supp. Paper at 4 (citing Supp. Paper Ex. at Ex. I). The DOD issued a letter of recommendation for plaintiff on 1 February 2009 referencing plaintiff's work on the project as "unparalled thus far." Supp. Paper Ex. at Ex. I. The officer also noted plaintiff "has maintained a business relationship with Coalition Forces in Afghanistan for many years," and the officer has "been repeatedly impressed by their professionalism and technical capabilities." *Id.* In 2011, plaintiff contracted again with the 3rd Brigade Special Troops Battalion, 10th Mountain Division to clear snow and ice from Tera Pass in the Logar Province and received a Certificate of Appreciation from the U.S. Army for its work. Pl.'s Supp. Paper at 4; Supp. Paper Ex. at Ex. K.

From October 2009 to March 2010, plaintiff constructed cool storage buildings as a contractor for the 1-45th Oklahoma Agribusiness Development Team, U.S. Army. Pl.'s Supp. Paper at 2 (citing Supp. Paper Ex. at Ex. B, Ex. C). For this project, plaintiff received a letter from the DOD on 5 March 2010 expressing the government's appreciation for completing the construction in a "professional" and "extraordinary" manner. Supp. Paper Ex. at Ex. B. Plaintiff also received a Certificate of Appreciation from the Oklahoma Army National Guard expressing appreciation for plaintiff's contribution. Supp. Paper Ex. at Ex. C.

In 2011, plaintiff worked as a subcontractor for Paktya ADT to construct the Sayed Karam cool storage facility in Sayed Karam District, Paktia. Pl.'s Supp. Paper at 5 (citing Supp. Paper Ex. at Ex. L). The government issued Letter of Recommendation for plaintiff referencing plaintiff's contribution in this project. Supp. Paper Ex. at Ex. L.

C. Procedural History

On 27 November 2019, plaintiff filed a complaint "seeking an award of just compensation under the Fifth Amendment of the Constitution of the United States" for the value of property allegedly taken for public use by the United States government. *See* Compl., ECF No. 1 at 1. On 10 April 2020, the government filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"). *See* Def.'s Mot. to Dismiss, ECF No. 10. On 1 May 2020 plaintiff filed an amended complaint, adding facts relating to alleged substantial connections with the United States. *See* Am. Compl. On 15 May 2020 the government filed a motion to dismiss the amended complaint pursuant to RCFC 12(b)(1). See Def.'s Amended Mot. to Dismiss ("Mot. to Dismiss"), ECF No. 14. Plaintiff filed its response to the government's amended motion to dismiss on 12 June 2020. *See* Pl.'s Opp. To Def.'s Am. Mot. to Dismiss ("Pl.'s Resp."), ECF No. 16. Plaintiff attached to its response to the government's amended motion to dismiss an affidavit from its CEO, which in part described the contract between plaintiff and SI-HAH and email correspondence between plaintiff's CEO and employees of the United States government. *See* Zaland Declaration. The government filed a reply in support of its motion to dismiss on 8 July 2020. *See* Def.'s Reply Br. in Supp. of its Mot. to Dismiss Pl.'s Amended Compl. ("Gov't's Reply"), ECF No. 19. The Court held oral argument on the government's motion to dismiss on 17 September 2020. *See* Order, ECF No.

21. On 30 November 2020, in response to a factual question raised by the Court during oral argument, plaintiff filed a motion for leave to file a supplemental paper and attached the proposed supplemental paper to the motion. *See* Pl.'s Mot. for Leave to File Supp. Paper ("Pl.'s Mot. for Leave"), ECF 28; Proposed Supp. Paper ("Pl.'s Supp. Paper"), ECF No. 28-1. On 14 December 2020, the government responded to plaintiff's motion for leave to file supplemental brief. *See* Def.'s Resp. to Pl.'s Mot. for Leave to File Supp. Paper ("Def.'s Resp. to Pls.'s Mot. for Leave"), ECF No. 29. Plaintiff filed a reply in support of its motion for leave to file a supplemental brief on 21 December 2020. *See* Pl.'s Reply in Support of Mot. for Leave to File Supp. Paper ("Pl.'s Reply in Support of Supp. Paper"), ECF 30.

II. Jurisdiction and Standard of Review

A. 12(b)(1) Motion to Dismiss

Plaintiffs "bear the burden of establishing the court's jurisdiction by a preponderance of the evidence." *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016) (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)). "In determining jurisdiction, a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Id.* (quoting *Trusted Integration*, 659 F.3d at 1163) (internal quotation marks omitted). "If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a 'facial' attack on the pleading—then those allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); 2A James W. Moore et al., *Moore's Federal Practice* ¶ 12.07[2.-1], at 12-51 to -52 (1993)); *see also N. Hartland, L.L.C. v. United States*, 309 F. App'x 389, 391 (Fed. Cir. 2009) (citing *Scheuer*, 416 U.S. at 236; *Cedars-Sinai Medical Center*, 11 F.3d at 1583) (In affirming a dismissal order appealed from the Court of Federal Claims, the Federal Circuit explained, "[w]hen a Rule 12(b)(1) motion merely challenges the facial sufficiency of the pleadings to establish subject matter jurisdiction, this court takes the allegations in the pleadings as true and construes them in the light most favorable to the complainant."). When presented with a challenge to the Court's jurisdiction "denying or controverting necessary judicial allegations . . . the court may consider evidence outside the pleadings to resolve the issue." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996).

B. Establishing Article III Standing to Sue

"[S]tanding is a threshold jurisdictional issue." *Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–04 (1998)). "The Court of Federal Claims, though an Article I court, applies the same standing requirements enforced by other federal courts created under Article III." *Anderson v. United States*, 344 F.3d 1343, 1350 n.1 (Fed. Cir. 2003) (internal citation omitted). "The party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "Because Article III standing is jurisdictional, this court must consider the issue sua sponte even if not raised by the parties." *Fuji Photo Film Co. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1289 (Fed. Cir. 2007).

C. The Statute of Limitations as a Jurisdictional Bar

"The Tucker Act, 28 U.S.C. § 1491 (a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1359 (Fed. Cir. 2013) (citation omitted). "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2012). Pursuant to Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC"), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3). "Because the statute of limitations is jurisdictional, the plaintiff bears the burden of proof." *Petro-Hunt, L.L.C. v. United States*, 862 F.3d 1370, 1378 (Fed. Cir. 2017).

III. Applicable Law

A. Standing of a Foreign Company to Allege a Taking of Property in a Foreign Country[3]

The Supreme Court has limited the scope of constitutional protections offered outside the territory of the United States, rejecting "the view that every constitutional provision applies wherever the United States Government exercises its power." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990). A foreign national "only. . . receive[s] constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. The respondent in *Verdugo-Urquidez* was "an alien who has had no previous significant voluntary connection with the United States," and therefore the Court found he did not have standing to claim violations of the Fourth Amendment by U.S. government employees which allegedly occurred in Mexico and involved a Mexican citizen. *Id.*

i. The Federal Circuit's "Substantial Connections" Test

Protections offered under the Takings Clause of the Fifth Amendment are similarly limited when claims involve a foreigner alleging a taking occurred outside the territorial jurisdiction of the United States. The Federal Circuit has ruled the Takings Clause protects

[3] 28 U.S.C. §2502(a), also known as the Reciprocity Act, mandates "[c]itizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction." During oral argument, the Court *sua sponte* raised the issue of plaintiff's standing under 28 U.S.C. §2502(a). Tr. at 79:14–80:1. Based on the government's research and government counsel conferring with the State Department and the Department of Justice lawyers in Afghanistan, the government expressed it has "no concerns to raise with respect to the applicability of the Reciprocity Act." Tr. at 80:6–9. Plaintiff informed the Court at oral argument of one case in Afghanistan where a U.S. company sued and prevailed against the Afghan government. Tr. at 80:19–21. Based on the representations made by both parties during oral argument on the government's motion to dismiss, the Court finds the Reciprocity Act does not bar plaintiff's claim.

property located outside the territorial jurisdiction of the United States but owned by an American citizen. *See Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir. 1985) ("It is settled law that the United States is bound by our Constitution when it takes actions that affect citizens outside our territory . . . therefore the government must provide just compensation for takings by its forces which occur abroad, when not acts of war."). The Fifth Amendment similarly applies to the property of foreigners taken within the territorial boundaries of the United States. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491–92 (1931) ("As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country."). When a plaintiff alleging a Fifth Amendment violation is a foreign national and seeks restitution for a taking which occurred outside of the territorial jurisdiction of the United States, the Federal Circuit requires the plaintiff demonstrate adequate "significant connections" to the United States to establish standing. *Atamirzayeva v. United States*, 524 F.3d 1320, 1328 (Fed. Cir. 2008).

In *Atamirzayeva*, the Federal Circuit reviewed a case dismissal for lack of standing brought by a plaintiff who owned a cafeteria located on property next to the U.S. embassy in Uzbekistan. *Id*. at 1321–22. The plaintiff in *Atamirzayeva* brought a taking claim under the Fifth Amendment for compensation after her cafeteria was allegedly destroyed by Uzbekistani officials upon the United States government's request, the government sought to dismiss the case on the ground the plaintiff lacked standing to sue. *Id*. The Court of Federal Claims ruled the plaintiff "has not alleged substantial connections with the United States" and therefore "does not have standing to invoke the protection of the just compensation clause of the Fifth Amendment for an alleged taking by the United States." *Atamirzayevea v. United States*, 77 Fed. Cl. 378, 387 (2007). Referencing *Verdugo-Urquidez*, the Federal Circuit upheld the trial court's reliance on the "substantial connection test" to determine whether plaintiff had a right to relief under the Fifth Amendment. *Atamirzayeva*, 524 F.3d at 1325–26. Rejecting plaintiff's attempt to craft a "broad rule. . . under which a plaintiff could pursue a Takings Clause action for a taking of property in a foreign country even in the absence of any allegation of a relationship between the plaintiff and the United States," the Federal Circuit noted whether a plaintiff has standing to recover compensation for an alleged government taking of the foreign property of a foreign national must be based on "the facts of that case." *Id*. at 1328–29.

Prior to the Supreme Court's decision in *Verdugo-Urquidez*, the Court of Claims extended the protections of the Fifth Amendment to a takings claim brought by a Philippine corporation for the alleged taking of property in the Philippines. *See Turney v. United States*, 126 Ct. Cl. 202, 215 (1953). The Court of Claims upheld standing to sue under the Fifth Amendment, stating the just compensation clause applied to the particular "taking abroad" the plaintiffs in *Turney* presented the court. *Id*. In *Atamirzayeva*, the Federal Circuit examined the extraterritorial application of the Fifth Amendment under *Verdugo-Urquidez* and explained *Turney* does not conflict with the requirements for standing expressed in *Verdugo-Urquidez*, because the Philippine corporation suing for the alleged taking in *Turney* "had three significant connections to the United States" which, when considered "under the facts of that case," meant "providing a right to seek just compensation was appropriate." *Atamirzayeva*, 524 F.3d at 1328. As the Federal Circuit stated *Turney* was still good law after *Verdugo-Urquidez*, the protections of the Fifth Amendment are available to a foreign plaintiff who has substantial connections with

the United States and is claiming a taking occurred outside the territory of the United States. *See id.* In *Atamirzayeva*, the Federal Circuit highlighted three significant connections the *Turney* plaintiff had with the United States: (1) whether the corporation "had been formed by two United States citizens"; (2) whether the corporation "received its ownership interest in the surplus property by assignment from those United States citizens"; and (3) after liquidation of the corporation, whether "a United States citizen was appointed as the liquidating trustee and the plaintiff in the Court of Claims action." *Id*. Recognizing the "significant connections" the *Turney* claimant had with the United States, the *Atamirzayeva* court explained "[t]he sounder approach is to treat the holding in *Turney* as limited to the proposition that providing a right to seek just compensation was appropriate under the facts of that case." *Id.*

ii. Applications of the Substantial Connections Test by the Court of Federal Claims

Following *Atamirzayeva*, the Court of Federal Claims has applied the Federal Circuit's substantial connections test to determine whether foreign plaintiffs have adequate standing to bring a claim for an alleged government taking occurring outside the territorial jurisdiction of the United States. In *Doe v. United States*, an Iraqi citizen who previously provided intelligence assistance to the United States sought to bring a Fifth Amendment takings claim for the occupation of his home by the United States military. 95 Fed. Cl. 546, 551 (2010). The court in *Doe* concluded "the circumstances that underlie plaintiff's takings claim do not satisfy the *Verdugo-Urquidez* substantial connections test." *Id*. at 575. Applying the standard the Federal Circuit established in *Atamirzayeva* and considering the "three significant connections to the United States" the plaintiff relied on to establish standing in *Turney*, the court in *Doe* concluded plaintiff's assertions "are not sufficient to establish plaintiff's substantial connections to the United States." *Id*. at 576. Plaintiff failed to establish substantial connections with the United States solely through his "agreement and subsequent relationship with United States intelligence operatives" to provide covert action. *Id* at 582. The court in *Doe* concluded a plaintiff must be able to show "connections to the United States independent of [plaintiff's] claim… [o]therwise, the test would be 'eviscerated' because 'all alien plaintiffs asserting a takings claim would necessarily meet it.'" *Id*. at 575 (internal citations omitted)*; see also Al-Qaisi v. United States*, 103 Fed. Cl. 439, 444 n.5 (2012) (citing *Doe* as "instructive" of when a foreign national in a foreign country demonstrates "significant connections" with the United States sufficient to have standing to sue, as the plaintiff in *Doe* "was recruited by the United States to help during the war in Iraq, attended meetings with many different officers and embassy officials, and generally held 'extensive voluntary contacts' with the United States.")

More recently, in *Kuwait Pearls*, the Court of Federal Claims applied the Federal Circuit's "substantial connections" test as articulated in *Atamirzayeva* to rule a foreign corporation sufficiently pleaded substantial connections with the United States to establish standing to assert a claim under the Fifth Amendment. *Kuwait Pearls Catering Co., WLL v. United States*, 145 Fed. Cl. 357, 365–67 (2019). The plaintiff in *Kuwait Pearls*, a subcontractor who provided dining services to the United States military in Iraq, brought a takings claim when the government "physically exclude[ed] [plaintiff] from a temporary dining facility . . . its predecessor built and [plaintiff] operated" and "prevent[ed] [plaintiff's] continued performance under its subcontract." *Id*. at 360. The government argued the *Kuwait Pearls* plaintiff lacked

standing to bring a taking claim "because it has not alleged the required substantial connections with the United States." *Id*. at 366. Rejecting the government's argument the plaintiff had not demonstrated adequate "substantial connections," the court in *Kuwait Pearls* noted the plaintiff "established its voluntary business connections with the Army and direct involvement serving the United States military." *Id*. In addition, the court noted the government "relied heavily" on plaintiff "to feed United States troops in both Iraqi wars" and plaintiff's "long history with the United States Government and is in direct privity of contract with the United States Government on various other contracts." *Id*. at 367. "Based on the record as a whole," this court concluded plaintiff established substantial connections with the United States "sufficient to assert a claim for compensation under the Takings Clause." *Id*.

B. The Statute of Limitations under 28 U.S.C. § 2501

28 U.S.C. § 2501 creates a six-year statute of limitations for civil actions against the United States, measured from "the time a right of action first accrues." *FloorPro, Inc. v. United States*, 680 F.3d 1377, 1380 (Fed. Cir. 2012). "In general, a cause of action against the government accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Id*. at 1381 (citing *Goodrich v. United States*, 434 F.3d 1329, 1333 (Fed. Cir. 2006)). Whether "the pertinent events" necessary to fix liability against the government and begin the statute of limitations period is an objective standard; "a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). The statute of limitations begins to run once "all events necessary to fix the alleged liability of the government . . . ha[ve] occurred," regardless of the knowledge of one or both of the parties. *FloorPro*, 680 F.3d at 1381. Claims brought under the Fifth Amendment are limited by the six-year statute of limitations, and "a claim alleging a Fifth Amendment taking accrues when the act that constitutes the taking occurs." *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009)*; see also Steel Imp. & Forge Co. v. United States*, 174 Ct. Cl. 24, 29–30 (1966) ("It is axiomatic that a cause of action for an unconstitutional taking accrues at the time the taking occurs."). The statute of limitations under 28 U.S.C. § 2501 is jurisdictional and thus not subject to equitable tolling principles. *FloorPro*, 680 F.3d at at 1382.

i. When the Statute of Limitations on a Fifth Amendment Takings Claim Begins to Run

A Fifth Amendment taking generally occurs when the government deprives an owner of the use and enjoyment of his or her property. *United States v. Causby*, 328 U.S. 256, 261–62 (1946); *see also Pete v. United States*, 531 F.2d 1018, 1031 (Ct. Cl. 1976) ("Property is legally taken when the taking directly interferes with or substantially disturbs the owner's use and enjoyment of the property.") In determining when a cause of action for the taking of personal property by the government first accrues, "neither actual physical control or custody by the Government. . . nor the absence of such factors. . . is necessarily conclusive." *Cuban Truck & Equipment Co. v. United States*, 166 Ct. Cl. 381, 388 (1964). The "guiding questions" a court must consider are: (1) whether the Government "acquired effective control over the property which it seeks to utilize for a public purpose"; and (2) if the government has acquired effective control, "when the extent of the taking, or the kind and quantity of the property appropriated, [is]

determined and determinable." *Id*. at 388–89. In *Cuban Truck & Equipment Co*., the Federal Circuit determined the point at which the government had acquired effective control over the property at issue as the date "there were no further steps which would have given the [government] greater control over the trucks than it had." *Id.* at 390. At that point, "plaintiff could immediately have brought suit" for the value of the property taken. *Id*. at 391. When the government makes a declaration of the taking of public property on a date after actually taking control of the property, the Supreme Court has made clear the date the statute of limitations begins to run is "the [earlier] date on which the Government entered and appropriated the property to public use" rather than the date of the later public statement. *United States v. Dow*, 357 U.S. 17, 23 (1958).

To calculate when the statute of limitations starts to run, courts look at the date the government first "interferes with a plaintiff's property rights." *Katzin v. United States*, 120 Fed. Cl. 199, 214 (2015). "To rise to the level of a taking, . . . such interference [with plaintiff's property rights] must be 'so complete as to deprive the owner of all or most of his interest in the subject matter.'" *Nat'l Food & Beverage Co., Inc. v. United States*, 105 Fed. Cl. 679, 695 (2012) (quoting *R.J. Widen Co. v. United States*, 357 F.2d 988, 993 (Ct. Cl. 1966)). Notices or threats of a potential taking "by themselves do not suffice" to trigger the statute of limitations, and a takings claim "does not accrue based on the United States' 'mere assertion of title.'" *Katzin*, 120 Fed. Cl. at 214 (quoting *Cent. Pines Land Co. v. United States*, 107 Fed. Cl. 310, 325 (2010)*; see also Etchegoinberry v. United States*, 114 Fed. Cl. 437, 475 (2013) ("For a physical taking, the act that causes the taking also causes the accrual of a takings claim."). Similarly, this court has previously ruled a "temporary imposition" may not be enough to "deprive [plaintiff] of all or even most of its interest in the property." *Nat'l Food & Beverage Co., Inc*., 105 Fed. Cl. at 696. For example, the court in *Katzin* ruled "public documents and meetings from the 1980s" and the "placement of signs" which expressed federal ownership of the plaintiffs' land are not sufficient to "constitute an evident interference with [the plaintiffs'] property rights." *Katzin*, 120 Fed. Cl. at 214. Instead, the question is whether the government "[does] anything that interfered with the [plaintiffs'] use, enjoyment, and marketability of the subject property." *Id*. at 215. The court in *Katzin* found the first instance of actual interference with the use and enjoyment of the plaintiffs' property did not occur until the government's claim on the property resulted in prospective purchasers refusing to proceed with the sale. *Id*. At such a point, the government's action "rendered the subject property inalienable as a practical matter." *Id*.

ii. The Accrual Suspension Rule

Under the "accrual suspension rule," the accrual of a claim against the United States "will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim." *Ingrum*, 560 F.3d at 1314. In such an instance, the accrual will be suspended "until the claimant knew or should have known that the claim existed." *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc). The accrual suspension rule derives from the use of the term "accrues" in § 2501 and is therefore a matter of statutory interpretation rather than of equitable tolling. *Id*. A plaintiff's ignorance or "excusable neglect" of the existence of a claim against the government "is not enough to suspend the accrual of a claim." *Id*. at 1318. Instead, the accrual date of a cause of action will be suspended in only two circumstances: (1) the plaintiff can show the "defendant has concealed its acts with the result that

plaintiff was unaware of their existence"; or (2) the plaintiff's injury was "inherently unknowable" at the time the cause of action accrued. *Id*. at 1319. A government action cannot be said to constitute an "inherently unknowable activity" if it is an "open and notorious activity" sufficient to put the plaintiff on notice of a possible injury to its property rights. *Ingrum*, 560 F.3d at 1315. A landowner "will be deemed to be on inquiry of activities that are openly conducted on his property," even if the landowner doesn't visit the property or have actual knowledge of the events. *Id*. at 1316. The Federal Circuit has described the "inherently unknowable" standard as a "strict standard" which does not apply whenever the government's actions related to the plaintiff's property are open and notorious. *Id*. at 1317; *see also Martinez*, 333 F.3d at 1303 (stating a claim accrues under § 2501 "when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'") (quoting *Nager Elec. Co. v. United States*, 177 Ct. Cl. 234, 240 (1966)).

In applying the "inherently unknowable" circumstance of the accrual suspension rule, the Court of Federal Claims has stated "that a claim is 'inherently unknowable' when there is nothing to alert one to the wrong at the time it occurs." *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 61 (2009)*; see also Tex. Nat. Bank v. United States*, 86 Fed. Cl. 403, 414 (2009) ("The phrase 'inherently unknowable' has been construed to mean that the factual basis for the claim is 'incapable of detection by the wronged party through the exercise of reasonable diligence.'") (quoting *Ramirez-Carlo v. United States*, 496 F.3d 41, 47 (1st Cir. 2007)). The rule will not apply where "all the relevant facts were known" but "the meaning of the law was misunderstood." *Catawba Indian Tribe of S.C. v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993) (emphasis omitted). It is also "not necessary that the plaintiff obtain a complete understanding of all the facts before the tolling ceases and the statute begins to run." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). A plaintiff must instead make "reasonable inquiry" into the facts underlying the taking claim, "exercise diligence," and "take reasonable steps to look into" any facts which would put the plaintiff on notice of the taking. *Tex. Nat. Bank*, 86 Fed. Cl. at 414.

IV. Parties Arguments

In support of its motion to dismiss pursuant to RCFC 12(b)(1), the government argues plaintiff filed its complaint more than six years after the alleged taking occurred and therefore this Court lacks jurisdiction to hear the claims under 28 U.S.C. § 2501. *See* Mot. to Dismiss at 9. Plaintiff filed its complaint in November 2019, and the government claims the complaint alleges government interference with plaintiff's property rights sufficient to constitute a taking "in July 2013, more than six years before [plaintiff] filed this lawsuit." *Id*. According to the government, by July 2013 "[t]here were no further steps that would have given the Government greater control over [plaintiff's] property than it had at that time." *Id*. As an alternative ground for its motion to dismiss, the government argues the property is outside U.S. territory and plaintiff, as a "foreign company seeking compensation for the taking of foreign property," did not plead the necessary substantial connections with the United States to establish standing to sue for an alleged violation of the Fifth Amendment. Mot. to Dismiss at 6.

In response, plaintiff argues the Court has jurisdiction to hear its claims. It asserts the statute of limitations did not begin to run until December 2013 at the earliest, either because the

claim did not accrue or because plaintiff was unaware of a potential claim against the government for the taking of its property. Pl.'s Resp. at 6–7. In support of this position, plaintiff points to various statements made by government employees throughout the summer and fall of 2013, which it claims "delayed or suspended" the accrual of the takings claim for statute of limitations purposes. *Id*. at 5–11. Plaintiff also argues its relationship with the United States through a subcontract for the development of a project built on behalf of the USACE and subject to USACE oversight and restrictions creates sufficient connections to the United States to give it standing to bring a claim under the Fifth Amendment. *Id*. at 11–13.

V. Plaintiff's Supplemental Paper

During oral argument, the Court raised a factual question regarding whether plaintiff had "any other connectivity with the United States in the past . . . other than the project of work that is described. . . in the complaint." Transcript ("Tr."), ECF No. 25 at 24:5–9. The parties did not discuss this question in their briefing prior to oral argument. *See generally* Am. Compl.; Mot. to Dismiss; Pl.'s Resp. As suggested by the government, these facts—addressing whether plaintiff has connections with the United States separate from the facts underlying the alleged taking—are imperative to whether plaintiff has substantial connections with the United States, because plaintiff must show connections to the United States that are independent of the claim at issue. *Id.* at 19:7–25. Plaintiff's counsel was not prepared to provide such information at oral argument. *Id*. at 25:7–12.

Following oral argument, plaintiff moved for the Court's leave to file a supplemental paper answering the Court's question regarding whether plaintiff had previous connections with the United States before the present subconstruct. *See* Pl.'s Mot. for Leave and *infra* discussion in FN 7. Plaintiff proposes to supplement the record with "15 additional U.S. Government-funded projects in which Plaintiff participated as a prime contractor or subcontractor." *Id.* at 1. Plaintiff indicates the supplemental information "is provided as a direct response to a factual question posed by the Court and raised by the Government's attempted distinction of a case relied upon by Plaintiff." *Id.* The government objects to plaintiff's proposed supplemental paper, arguing it is untimely and does not aid the Court's analysis. Def.'s Resp. to Pls.'s Mot. for Leave at 1. The government does not cite any law to support plaintiff's supplemental paper being stricken as untimely but simply argues plaintiff "had ample opportunity to present argument and information to the Court relating to its standing and should not now be permitted to further delay resolution of the Government's motion." *Id.* at 3. The government further argues plaintiff's supplemental paper does not aid the Court's analysis because the supplemental information reflects plaintiff's reliance on *Kuwait Pearls*, a case the government notes "is not controlling authority in this case" and which the government believes "cannot serve as a basis for establishing standing because it was wrongly decided" or, at least, is "factually distinguishable." *Id.* at 3. The government does not contend it is prejudiced by allowing plaintiff's supplemental paper or point to any law forbidding plaintiff from supplementing the record at this stage of litigation. *See generally id*.

The question whether plaintiff had prior connections with the United States independent of plaintiff's claim was first raised *sua sponte* by the Court during oral argument when discussing *Doe v. United States* with the government. Tr. at 19:7–13; *see also Doe v. United*

States, 95 Fed. Cl. 546, 575 (2010) ("Plaintiff must show connections to the United States independent of his claim. The text of the Supreme Court's opinion in *Verdugo–Urquidez* supports this ruling."). The government cited *Doe* in its motion to dismiss but did not raise the issue that *Doe* requires "plaintiff must show connections to the United States that are independent of his claim." *See* Mot. to Dismiss at 11, 12, 15.[4] Contrary to the government's allegation plaintiff could have provided the information to the Court earlier, it was not until oral argument that plaintiff was first put on notice its prior connections to the United States could be a relevant issue.

The government's second argument is plaintiff is merely rehashing arguments based on *Kuwait Pearls* and therefore plaintiff's supplementary information does not aid the Court's analysis. Def.'s Resp. to Pls.'s Mot. for Leave at 3. Plaintiff submitted the paper to specifically answer the Court's question, which was prompted by a discussion between the Court and the government on *Doe v. United States*. *See* Tr. at 24:5–9, 19:7–25. The Court does not find such information duplicative because the record prior to the supplemental paper was missing plaintiff's connections with the United States *before* the SI HAH contract. Without reaching the merits of whether plaintiff's reliance on *Kuwait Pearls* is legally sound, the Court disagrees with the government's argument plaintiff's supplemental paper does not aid the Court's analysis. Rather, plaintiff's supplemental paper reflects information similar to what was considered by the *Kuwait Pearls* court in concluding substantial connections existed. *See Kuwait Pearls Catering Co., WLL v. United States*, 145 Fed. Cl. 357, 365–67 (2019). Indeed, the parties' arguments based on *Kuwait Pearls*, though not determinative, substantively aid the Court's analysis of whether plaintiff has substantial connections with the United States. *See infra.* Accordingly, the Court grants plaintiff's motion for leave to file its supplemental paper and thereby considers the information in plaintiff's proposed supplemental paper. *See e.g. King v. United States*, No. 18-1115C, ECF No. 67 (Fed. Cl. Aug. 31, 2020) (granting a similar motion on the ground of good cause shown and finding no prejudice to the non-moving party); *System Fuels, Inc. v. United States*, No. 03-2623C, ECF No. 54 (Fed. Cl. Jan. 28, 2005) (same); *see also infra* discussion in FN 7.

VI. Plaintiff's Substantial Connections with the United States

The Supreme Court has consistently rejected "the view that every constitutional provision applies wherever the United States Government exercises power." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990). Indeed, "[t]he Supreme Court has long taken the view that the Constitution is subject to territorial limitations." *Atamirzayeva v. United States*, 524 F.3d 1320, 1322 (Fed. Cir. 2008); *see also Verdugo-Urquidez*, 494 U.S. at 269. Referencing *Verdugo-Urquidez*, the Federal Circuit in *Atamirzayeva* upheld the trial court's reliance on the "substantial connection test" to determine whether plaintiff had a right to relief under the Fifth Amendment. *Atamirzayeva*, 524 F.3d at 1325-26. The Federal Circuit held there is no "blanket

[4] In its motion to dismiss, the government cited *Doe v. United States* to argue plaintiff failed to plead a substantial connection with the United States to bring a takings claim under the Fifth Amendment, because plaintiff "[does not] allege[] that it had a direct contractual relationship with the United States, nor does it allege that the Afghan National Army Regional Military Training Center was considered to be American territory or property (and it was not)." *See* Mot. to Dismiss at 11, 12, 15 (citing *Doe v. United States*, 95 Fed. Cl. 546, 569, 575).

rule that the Fifth Amendment protects the foreign property of citizens of every foreign country without regard to their connections with the United States." *Id.* at 1328.

The government contends the Court should dismiss plaintiff's takings claim because, "as a foreign company alleging the taking of property in a foreign country," plaintiff "fail[s] to allege the substantial connection with the United States necessary to invoke the Fifth Amendment's Takings Clause." Mot. to Dismiss at 11. Plaintiff does not dispute it is "a foreign subcontractor providing services" to the United States in Afghanistan. Pl.'s Resp. at 12. Plaintiff argues instead it has sufficiently pled a substantial connection with the United States by showing it was "directly involved with the USACE personnel regarding the contract through weekly meetings and . . . was subject to U.S. Government's control, authority, supervision and requirements." *Id.* at 12–13. The government agrees with plaintiff's factual summary on the "control, authority, and supervision" that the United States had over plaintiff. Tr. at 29:3–10. The government, however, insists plaintiff's contractual connections are with the Afghanistan government, and plaintiff's subcontract with the United States, as being governed by Afghanistan law, does not confer standing to plaintiff in this Court. *Id*. at 29:24–30:18. According to the government, plaintiff does not have a substantial connection with the United States because plaintiff (1) has no alleged previous voluntary connections with the United States and (2) has no alleged direct relationship with United States in this case. *Id*. at 6:3–9.

A. Plaintiff's Connection with the United States in the Project Giving Rise to Plaintiff's Claim

The government argues *Atamirzayeva* and *Kuwait Pearls* both require "a direct relationship with the United States" to establish a substantial connection. Tr. 6:14–25 (citing *Atamirzayeva*, 524 F.3d 1320 (Fed. Cir. 2008), *Kuwait Pearls Catering Co., WLL v. United States*, 145 Fed. Cl. 357 (2019)). In particular, the government explains "direct contacts that the Court in *Kuwait Pearls* found [are] . . . the United States . . . had direct management of the plaintiff's performance of its contract, such that it restricted the plaintiff's autonomy to perform its services. The United States [in *Kuwait Pearls*] had 'complete control' over . . . a number of the plaintiff's services." Tr. at 16:9–15. The government argues the connections plaintiff pled in the complaint, including "[plaintiff's] subcontract with HLH, . . . the fact that the USACE had overall supervision of the construction project[,] and that payment originated from USACE," fail to prove "[plaintiff] provided any services directly to the United States" and therefore fail to establish plaintiff has sufficient substantial connections with the United States. Mot. to Dismiss at 14.

In *Atamirzayeva*, the Federal Circuit found plaintiff had no substantial connection with the United States because she "ha[d] not pleaded any relationship, business or otherwise, with the United States," and her only connections with the United States were "that her cafeteria was adjacent to the U.S. Embassy and that embassy officials directed the seizure." *Atamirzayeva*, 524 F.3d at 1328. The *Atamirzayeva* court upheld the application of the "substantial connection test" to determine a foreign plaintiff's right to relief under the Fifth Amendment, and, by interpreting *Turney*, provides certain examples of possible "substantial connections" with the United States. *Id.* at 1326, 1328. The Federal Circuit did not set out the examples in *Turney* as a set of requirements lower courts must follow to determine what constitutes a "substantial

connection," but rather instructed each analysis of whether substantial connections exist must depend on whether plaintiff has a right to seek just compensation "under the facts of that case." *Id.* at 1328.

The government argues *Atamirzayeva* mandates "a direct relationship with the United States" to establish substantial connections. Tr. 6:14–25. *Atamirzayeva* does not require "a direct relationship with the United States," or provide any other rigid requirement for specific type of relationship, to establish a substantial connection between plaintiff and the United States. *See Atamirzayeva*, 524 F.3d at 1327–29. Instead of drawing a hasty conclusion based on a single dispositive factor, the Court examines the totality of "the facts of [this] case" to decide whether plaintiff has a right to seek just compensation. *Id.*

As suggested by both parties, the facts of this case are most similar to the facts of *Kuwait Pearl*, the first case from this court finding a foreign subcontractor has standing to sue the United States in a Fifth Amendment takings case. Indeed, the government cannot identify a case finding a subcontractor on a project to benefit the United States does not have standing to sue under the substantial connections test. Tr. at 17:12–19 (When asked by the Court if the government "can point to [any example case] where a plaintiff who was a genuine subcontractor with the United States could not establish standing," counsel for the government answered he was not aware of one "in the context of a foreign subcontractor bringing a Fifth Amendment takings claim."). The *Kuwait Pearls* court analyzed and distinguished *Atamirzayeva* from the facts before it, noting, unlike "the plaintiff in *Atamirzayeva* [who] had failed to plead 'any relationship, business or otherwise, with the United States,'" the plaintiff in *Kuwait Pearls* "has established its voluntary business connections" with the United States military. 145 Fed. Cl. at 366 (emphasis omitted). The court in *Kuwait Pearls* found sufficient voluntary business connections with the United States by considering the following facts: plaintiff provided dinning services directly to the United States military on a United States base under a subcontract; a government official approved the subcontract; and plaintiff's services were funded through the primary contact with the United States. *Id*. at 366–367.

Plaintiff's alleged injury in this case stems from a construction project in Afghanistan, in which plaintiff was an approved subcontractor for the USACE. Am. Compl. at ¶ 5–9. Plaintiff's employees and representatives "attended and participated in the weekly meetings with USACE personnel regarding the project." Zaland Declaration at 1. Plaintiff's job site was subject to the control of the U.S. Army and USACE, and the United States restricted access to the job site only to authorized individuals. *Id*. Plaintiff's work was also subject to "inspection, testing and, ultimately, acceptance by the United States and the health and sanitary requirements of the USACE." Am. Compl. at ¶ 9. Plaintiff's payments were subject to retainage to be determined and invoked by the United States government. Tr. at 10:4–6. The *Kuwait Pearls* court relied on similar facts to find the existence of a substantial connection between plaintiff and the United States. *See Kuwait Pearls*, 145 Fed. Cl. at 366–367. Based on the factual similarities between *Kuwait Pearls* and this case, and the fact the court in *Kuwait Pearls* found sufficient substantial connections existed to establish standing, the Court finds *Kuwait Pearls* does not support the government's argument plaintiff does not have a substantial connection with the United States due to a lack of a direct relationship with the government.

B. Plaintiff's Connections with the United States Separate from the Project Giving Rise to Plaintiff's Claim

The government argues plaintiff must have "previous voluntary connections" and "direct relationship" with the United States to establish substantial connections. Tr. at 6:6–9. In particular, the government contends plaintiff's connection with the United States cannot "solely be the injury . . . [or] the conduct that gives rise to the claim." Tr. at 20:5–9. Instead, plaintiff must have "an overarching relationship, . . . work unrelated to the claim and communications unrelated to the claim" with the United States. Tr. at 21:4–6. In advocating for this approach, the government urges the Court to consider whether the plaintiff had "a long history with the United States [g]overnment" and was "in direct privity of contract with the United States [g]overnment on various other contracts" or was "a preferred vendor of the United States [m]ilitary." Tr. at 16:16–21; *see also* Mot. to Dismiss at 14–15.

The government's "previous voluntary connections" argument is rooted in the Supreme Court's *Verdugo-Urquidez* decision, Tr. at 7:5–14, where the Court found Verdugo-Urquidez, a citizen and resident of Mexico, "had no previous significant voluntary connection [prior to his extradition] with the United States," and as such, lacked substantial connections sufficient to claim Fourth Amendment protections. *Verdugo-Urquidez*, 494 U.S. 259 at 271. The *Kuwait Pearls* court applied *Verdugo-Urquidez* in the context of a foreign subcontractor working for the United States abroad. *Kuwait Pearls*, 145 Fed. Cl. at 360, 367. In *Kuwait Pearls*, the fact "[plaintiff] has a long history with the United States [g]overnment and is in direct privity of contract with the United States [g]overnment on various other contracts" supported the court's finding plaintiff had adequate substantial connections with the United States. *Id.* at 367.

This court further applied *Verdugo-Urquidez* to analyze if a foreign national can bring a takings claim for property located abroad in *Doe v. United States*. 95 Fed. Cl. 546, 575 (2010). In *Doe*, plaintiff was an Iraqi citizen claiming the Coalition Forces occupied his property without fair compensation during the United States' military actions in Operation Iraqi Freedom. *Id.* at 551–52. The court in *Doe* found all of the plaintiff's alleged connections with the United States were related to the incident giving rise to plaintiff's claims, and therefore held: "[T]he circumstances that underlie plaintiff's takings claim do not satisfy the *Verdugo–Urquidez* substantial connections test. Otherwise, the test would be eviscerated because all alien plaintiffs asserting a takings claim would necessarily meet it." *Id.* at 575 (citation omitted).

In this case, plaintiff entered into a 2011 agreement to serve as a subcontractor for a SI-HAH contract with the USACE, an agreement which ultimately led to plaintiff's claim. Am. Compl. at ¶ 7. Beginning at least seven years prior to the SI-HAH work, and ranging from 2004 to 2011, plaintiff maintained a long-term business relationship with the United States government. *See generally* Pl.'s Supp. Paper. Between 2004 and 2006, plaintiff completed four USAID-funded construction projects as a subcontractor. *Id*. at 2. Starting in 2007, plaintiff worked directly with the United States as a primary contractor for a wide range of projects. For each project plaintiff worked as the primary contractor detailed in the record, plaintiff received a letter of recommendation or a memorandum of appreciation from the United States government recognizing plaintiff's contribution and quality of work. *See e.g.* Supp. Paper Ex. at Ex. E, Ex. F. In a letter of recommendation from the DOD dated 7 October 2007, the officer wrote

"[plaintiff] is highly recommended for future CMO / CERP funded projects sponsored by Coalition Forces." Supp. Paper Ex. at Ex. F. Additionally, in a letter of recommendation from the DOD dated 1 February 2009, a United States military officer wrote "[plaintiff] has maintained a business relationship with Coalition Forces in Afghanistan for many years" and "[plaintiff's] work . . . have been some of the best work I have seen throughout almost two years spent in Afghanistan." Supp. Paper Ex. at Ex. I.

At least between 2007 and 2011, plaintiff was in direct privity of contract with the United States government on various contracts. *See supra*. As demonstrated by the letters and memorandums plaintiff received, plaintiff was a preferred vendor of the United States for construction projects in Afghanistan. Unlike *Atamirzayeva* where plaintiff's only connection with the United States was her cafeteria allegedly being seized at the United States embassy's direction, 524 F.3d at 1328, the record shows plaintiff has "previous significant voluntary connection [prior to the current dispute] with the United States." *Verdugo-Urquidez*, 494 U.S. at 271 (1990). In other words, this case is dissimilar from the situation in *Atamirzayeva* where the United States allegedly came out of blue and took plaintiff's property. *Atamirzayeva*, 524 F.3d at 1329. Instead, as in *Kuwait Pearls*, these facts—showing "[plaintiff] has a long history with the United States [g]overnment and is in direct privity of contract with the United States [g]overnment on various other contracts"—support a finding that plaintiff has substantial connections with the United States. *Kuwait Pearls*, 145 Fed. Cl. at 367. Plaintiff has alleged sufficient facts to show its connections with the United States exist beyond only the USACE subcontract giving rise to plaintiff's claims. Plaintiff's relationship with the United States satisfies the *Verdugo–Urquidez* substantial connections test, as plaintiff had "previous significant voluntary connection [prior to the alleged takings] with the United States." *Verdugo-Urquidez*, 494 U.S. at 271.

C. The United States Community

The government further argues, for a foreign citizen to receive constitutional protection, the substantial connection test in *Verdugo-Urquidez* requires plaintiff to have "sufficient connections with the United States to be considered part of the community." Tr. at 14:19–20. Plaintiff agrees with the government's characterization of *Verdugo-Urquidez* as imposing such a "community" requirement and contends plaintiff is part of the U.S. community by willingly "going into a U.S.-funded project in Afghanistan" and "putting [itself] at the U.S. government's whim." Tr. at 33:20–23, 32:23–25. Between 2004 and 2011, plaintiff worked for the Army to reconstruct and repair various local infrastructures damaged during the war. *See generally* Pl.'s Supp. Paper. For example, in 2007, plaintiff helped the Army to restore a high school in the Jaji District of Afghanistan after it was damaged by fire from the Pakistani military. *Id*. at 3. In 2009, plaintiff worked on clearing snow and ice for the Army from Tera Pass in the Logar Province of Afghanistan. *Id*. at 4. The Army described plaintiff' work as "unparalled thus far" because it "resulted in zero casualties due to road conditions in the Tera Pass this year, down from 18 the year before." Supp. Paper Ex. at Ex. I. Plaintiff noted at oral argument local companies working in Afghanistan "at the behest and with the funding of the U.S. Government" were "choosing a side and . . . putting your company and yourself and your family at risk from people who didn't want the U.S. there." Tr. at 33:16–25. Plaintiff also points to the special preference for U.S. visas Afghan subcontractors receive as a result of the U.S. government

recognizing their "work at the behest and with the funding of the U.S. [g]overnment" and thus including them into the U.S. community. Tr. at 33:20–34:3.

In *Verdugo-Urquidez*, the Supreme Court stated "'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Verdugo-Urquidez*, 494 U.S. at 265 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)). While the majority contrasted the language of these Amendments with "the words 'person' and 'accused' used in the Fifth and Sixth Amendments regulating procedure in criminal cases," Justice Kennedy emphasized the importance of the distinction between constitutional claims raised by citizens and those raised by "noncitizens who are beyond our territory." *Id.* at 276 (Kennedy, concurring). The Federal Circuit applied *Verdugo-Urquidez* to Fifth Amendment takings claims brought by a foreign citizen for oversea properties and upheld the requirement of the "substantial connection test" in such settings. *Atamirzayeva*, 524 F.3d at 1325–26. While the Federal Circuit did not elaborate on the meaning of the term "United States community" in the context of a Fifth Amendment takings claim, it instructed lower courts to consider whether a foreign plaintiff has a right to seek just compensation under the facts of each particular case. *Id.* at 1328.

As discussed *supra*, the Court finds plaintiff has satisfied the substantial connection test of *Verdugo-Urquidez* and *Atamirzayeva* by demonstrating sufficient facts related to its connections with the United States. Whether plaintiff can be considered part of the United States community is therefore not a dispositive factor for this issue, particularly when there is no clear precedent defining what it means to be a member of the "United States community" sufficient to give this Court jurisdiction over a Fifth Amendment takings claim brought by a foreign national related to alleged government actions in a foreign country. Nevertheless, as the parties both advance relevant arguments, the Court makes the following observation. Plaintiff was involved in at least 15 contracts with the United States between 2004 and 2012, eight of which plaintiff was the primary contactor dealing directly with the government. Pl.'s Supp. Paper at 1. Plaintiff has received numerous letters of recommendation and appreciation from the United States government for completing those projects. For example, one letter issued by the Army on 16 November 2008 recognized plaintiff's work "help[ed] the people of Logar Province improve their quality of life and increase the legitimacy of the Afghan government." Supp. Paper Ex. at Ex. J. Another letter from the DOD dated 7 October 2007 stated "[plaintiff] is highly recommended for future CMO / CERP funded projects sponsored by Coalition Forces." Supp. Paper Ex. at Ex. F. Additionally, in a letter dated 1 February 2009, a U.S. army officer wrote "[plaintiff] has maintained a business relationship with Coalition Forces in Afghanistan for many years" and "[plaintiff's] work . . . have been some of the best work I have seen throughout almost two years spent in Afghanistan." Supp. Paper Ex. at Ex. I. These communications demonstrate the government's recognition of plaintiff's contribution to the government's overseas projects. As plaintiff's attorney noted during oral argument, "[i]t was part of the overarching policy of the government to foster economic development in Afghanistan and . . . build the country, build its economy, build allies." Tr. at 33:10–13. The government indeed acknowledged and appreciated plaintiff's assistance in the government's efforts in Afghanistan. *See generally* Supp. Paper Ex. The Court accordingly observes the facts currently in the record

strongly support plaintiff being considered part of the United States community. *See Verdugo-Urquidez*, 494 U.S. at 265.

D. Conclusion on Plaintiff's Substantial Connections with the United States

The Court disagrees with the government's argument plaintiffs must establish substantial connections through a showing of "a direct relationship with the United States," or under any other rigid requirement for certain type of relationship. Instead of drawing a hasty conclusion based on a single dispositive factor, the Court examines the totality of "the facts of [the] case" to decide whether plaintiff has a right to seek just compensation. *See Atamirzayeva*, 524 F.3d at 1328. Here, the Court finds plaintiff satisfies the *Verdugo–Urquidez* substantial connection test based on at least the following facts: (1) plaintiff was an approved subcontractor with frequent interactions with the government during its work on the contract giving rise to plaintiff's claim; (2) plaintiff was in direct privity of contract with the United States on various contracts and was a preferred vendor of the United States for construction projects in Afghanistan, demonstrating plaintiff's connections with the United States went beyond the USACE subcontract that gives rise to plaintiff's claims; and (3) plaintiff was repeatedly recognized and appreciated by the government for plaintiff's contributions to the government's overseas efforts in Afghanistan, which supports plaintiff being considered part of the United States community. *Verdugo-Urquidez*, 494 U.S. at 265, 271; *see also Kuwait Pearls*, 145 Fed. Cl. at 366–367. Accordingly, construing the record before the Court in the light most favorable to plaintiff, the Court finds plaintiff has met the burden to overcome the jurisdictional requirement at the motion to dismiss stage, as plaintiff sufficiently pleads substantial connections with the United States to establish a standing to sue the government under the Fifth Amendment's Takings Clause. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *N. Hartland, L.L.C. v. United States*, 309 F. App'x 389, 391 (Fed. Cir. 2009), *Atamirzayeva*, 524 F.3d at 1325–26.

VII. The Statute of Limitations

Plaintiff filed its initial complaint on 27 November 2019. *See* Compl. The government contends plaintiff's claim is barred as untimely because the six-year statute of limitations began to run in July 2013 when the government "open[ly] and notorious[ly]" interfered with plaintiff's property rights. Mot. to Dismiss at 10. Plaintiff argues its claim "did not accrue until, at the earliest, in or about December 2013," when plaintiff "observed ANA personnel using what it thought to be some of its generators." Pl.'s Resp. at 5, 6–7.

A. The Government's "Use and Enjoyment" of Plaintiff's Property

A Fifth Amendment taking generally occurs when the government deprives an owner of the use and enjoyment of his or her property. *United States v. Causby*, 328 U.S. 256, 261–62 (1946). "'[W]here the actions of the government are open and notorious . . . [the] plaintiff is on inquiry as to its possible injury,' and the statute of limitations begins to run." *Ingrum v. United States*, 560 F.3d 1311, 1315 (Fed. Cir. 2009) (quoting *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 867 (1981)). To determine when a claim first accrues for the purpose of calculating when the statute of limitations started to run, courts look at when the government first

actually "interferes with a plaintiff's property rights." *Katzin v. United States*, 120 Fed. Cl. 199, 214 (2015).

On 25 January 2012, the USACE terminated the contract with SI-HAH, and on the same day, SI-HAH directed plaintiff to stop working on the project and vacate the premises. Am. Compl. at ¶ 11–12. As instructed by SI-HAH, plaintiff did not remove any materials from the construction site. *Id*. at ¶ 12. On 19 July 2013, plaintiff received an email from a representative of the U.S. military informing plaintiff it had until 22 July 2013 to remove its property from the construction site. Zaland Declaration at 21. Nevertheless, when plaintiff thereafter attempted to approach the construction site to remove its property, U.S. government personnel told plaintiff's employees they could not enter the site or remove the equipment and threatened the employees with arrest should they attempt to return. Zaland Declaration at 2.

During oral argument, the government argued, "at that moment [in July 2013 when U.S. government personnel denied plaintiff access to the construction site], the [g]overnment literally had physical possession and control of [plaintiff's] property and is alleged to have clearly interfered with [plaintiff's] property rights." Tr. at 39:16–19. The government also contends its actions in July 2013 were sufficiently "open and notorious" to put plaintiff on inquiry notice of the government's alleged takings, and therefore the six-year statute of limitations began to run July 2013. Mot. to Dismiss at 10. Plaintiff contends, as it was working on the government's controlled-access premises and had voluntarily moved its property to the government's restricted jobsite as early as 2011, "the exercise of physical control and restrictions on access [to plaintiff's property] itself" cannot establish the appropriation in this case; instead, takings happen when "[the government has] determine[d] . . . [it's] not going to leave this property here anymore, [it's] going to go do something else with it, [or] make some other use of it." Tr. at 46:16–47:5. Plaintiff agrees it was deprived of the use and enjoyment of its property earlier than July 2013. Tr. at 49:4–8 (When asked when plaintiff was deprived of the use and enjoyment of its property, plaintiff's counsel answered: "[plaintiff] did not have the use and enjoyment of its property after January of 2012."). Plaintiff contends, however, if the claim accrued by July 2013, the accrual suspension doctrine applies to suspend the accrual date until December 2013. Tr. at 49:13–25.

As both parties agree the government deprived plaintiff of the use and enjoyment of its property since at least July 2013, absent events triggering the suspension of the claim accrual date the six-year statute of limitations period for plaintiff's claim expired July 2019. *See Causby*, 328 U.S. at 261–62.

B. The Accrual Suspension Rule

Under the "accrual suspension rule," the accrual of a claim against the United States "will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim." *Ingrum*, 560 F.3d at 1314 (citing *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634 (1967)). The "accrual suspension rule" applies when plaintiff's injury was "inherently unknowable" at the time the cause of action accrued. *Id*. at 1315. Courts have previously defined a claim as "inherently unknowable" "when there is nothing to alert one to the wrong at the time it occurs." *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 62 (2009); *see also Tex. Nat. Bank v. United States*, 86 Fed. Cl. 403, 414 (2009) ("The phrase 'inherently unknowable' has been construed to mean that the factual basis for the

claim is 'incapable of detection by the wronged party through the exercise of reasonable diligence.'") (quoting *Ramirez-Carlo v. United States*, 496 F.3d 41, 47 (1st Cir. 2007)). The plaintiff must make "reasonable inquiry" into the facts underlying the taking claim, "exercise diligence," and "take reasonable steps to look into" any facts which would put the plaintiff on notice of the taking. *Tex. Nat. Bank*, 86 Fed. Cl. at 414.

Plaintiff was informed by a representative of the United States military it had until 22 July 2013 to remove its property, and in fact attempted to retrieve its property on 19 July 2013, but was denied access to the site and threatened with arrest. Zaland Declaration at 2, 21. After plaintiff failed to retrieve its equipment in July 2013, it contacted Mr. Peter Hughes, a special agent with the United States Special Inspector General for Afghanistan Reconstruction, for assistance. *Id.* at 2. On 4 August 2013, Mr. Hughes communicated with United States military personnel on plaintiff's behalf and requested clarification on the dispute. *Id.* at 2, 22. Mr. Hughes later informed plaintiff "he had spoken to Captain Finlay" and "would contact a USACE commander and let [plaintiff] know what to do." *Id.* at 2. On 14 September 2013, Captain Finlay notified plaintiff he "had nothing to do with any of [plaintiff's] property being confiscated and that he was not directing anyone to do that." *Id*. Plaintiff immediately requested contact information for a USACE representative who could return its equipment, but never obtained the requested information. *Id*. at 2–3. In December 2013, plaintiff's CEO observed some ANA personnel using plaintiff's property. *Id*. at 3. On 24 December 2013, plaintiff met with USACE personnel and submitted documentation related to the equipment and materials plaintiff sought to recover. *Id*. The USACE then informed plaintiff it would receive the property back on 4 January 2014. *Id.* Nevertheless, plaintiff did not receive any of the property by 4 January 2014, and when plaintiff again attempted to contact the U.S. government, it was told the government had given plaintiff's properties to the ANA, and plaintiff "should not ask about this matter anymore." *Id.*[5]

The government originally contended plaintiff's claim accrued in July 2013 when plaintiff should have been on "inquiry notice" of the government's interference of plaintiff's property right. Mot. to Dismiss at 10. During oral argument, the government explained the July 2013 accrual date was deduced from the allegations on the complaint. Tr. at 54:6–11. The government argued in the alternative the July 2013 date did not consider the email exchange between plaintiff and U.S. government personnel—Mr. Hughes and Captain Finlay—during fall 2013, and the government argued for an accrual date of September 2013 after it accounted for the communications. *See* Tr. at 65:17–19 ("But even . . . taking a generous read of these emails, by September, [p]laintiff was on inquiry notice."). In particular, the government cites Captain Finlay's response to plaintiff on 14 September 2013—"I have nothing to do with any of your property being confiscated. I am not directing anyone to do it and I don't know who is taking your property"—to support the argument plaintiff was on inquiry notice that "it had a claim or a potential claim" against the government. Tr. at 65:23–66:4, 66:13–15, 67:15–18 ("Captain Finlay's response, if you take at the face value, . . . it puts . . . [plaintiff] on inquiry notice that it has a potential claim."). Additionally, the government views plaintiff's 4 August 2013 email, in which plaintiff asked Mr. Hughes "[y]ou may please find a legal track for me that I could get my

[5] The Court is not able to discern from the record the exact date when the government told plaintiff it "should not ask about this matter anymore." *See* Zaland Declaration at 3.

rights or if there is any other department or agency whom are in high position that I should register my claim for my rights," as plaintiff was "conducting an inquiry" into its claim. Tr. at 72:17–22, 73:5–13.

The government characterizes the communications between plaintiff and USACE personnel in December 2013 and January 2014 as "immaterial considering everything that happened leading up to it" and therefore inadequate to continue to suspend the accrual of plaintiff's claims. Tr. 68:2–3. The government contends, because none of the its statements during the fall of 2013 "assur[ed] the [p]laintiff that it would get its property back," the December 2013 and January 2014 communications are "after the fact" of plaintiff already having inquiry notice. Tr. at 71:4–16.

If a plaintiff is on inquiry of a possible injury, the accrual suspension rule does not apply and the statute of limitations begins to run. *Ingrum*, 560 F.3d at 1314 (quoting *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. at 867) ("The line of 'accrual suspension' cases dealing with takings claims has established that '[w]here the actions of the government are open and notorious ... [the] plaintiff is on inquiry as to its possible injury,' and the statute of limitations begins to run."). Here, the question is whether plaintiff was, or should have been, on inquiry notice of the government having deprived plaintiff of its property right by at least September 2013. *Id*.

In early August 2013, Mr. Hughes informed plaintiff "he had spoken to Captain Finlay" and "would contact a USACE commander and let [plaintiff] know what to do." Zaland Declaration at 2. Throughout August and September 2013, plaintiff was making continuous efforts to retrieve its property from the government by communicating with Mr. Hughes and Captain Finlay. *Id.* at 18 (plaintiff's email to Mr. Hughes on 22 August 2013 stating "you had promised me that you will solve this matter for me but still its [sic] pending), *id.* (Captain Finlay's email to Mr. Hughes on 14 September 2013 stating "[plaintiff] just gave me a phone call concerning some of his property that he is still trying to track down"), *id.* at 17–18 (plaintiff's email to Captian Finlay on 14 September 2013 stating government personnel are preventing plaintiff from removing its property and "have the intention to confiscate" the property, while also asking Captain Finlay if there is a designated person with whom plaintiff may "contact . . . for negotiation."). On 14 September 2013, Captain Finlay replied to plaintiff saying he was not directing anyone to confiscate plaintiff's property, and he did not know who was taking it. *See id*. at 17. Plaintiff immediately replied by asking Captain Finlay for the correct USACE personnel it should contact to recover its property, but Captain Finlay did not appear to respond. *Id.* The record currently before the Court shows plaintiff's conversations with government personnel paused until December 2013, when plaintiff met with the USACE to submit documentation regarding plaintiff's missing equipment. *Id.* at 3. USACE then assured plaintiff USACE would return the equipment on 4 January 2014. *Id*.

When deciding a motion to dismiss, the Court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016) (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)). The August and September communications in the record demonstrate plaintiff believed the government had not yet seized

its property, with plaintiff describing the matter as "pending" and seeking to "negotiate" with the right government personnel to retrieve its property. Zaland Declaration at 17–18. The government's representatives, Captain Finlay and Mr. Hughes, spoke as if they were investigating plaintiff's request and never definitively told plaintiff it would not get the property back. *Id.* Captain Finlay's 14 September 2013 statement, which the government relied on at oral argument to show plaintiff was on inquiry notice about its claim by at least September 2013, shows Captain Finlay did not know what happened to plaintiff's property and did not direct anyone to confiscate plaintiff's property. Zaland Declaration at 17. Similarly, plaintiff's August 2013 email seeking to enforce its "rights" in the property, also relied on by the government to show inquiry notice, merely reflects plaintiff's efforts to retrieve its property from the government-controlled site. *See* Zaland Declaration at 20 (Plaintiff emailed Mr. Hughes: "You may please find a legal track for me that I could get my rights or if there is any other departments or agency whom are in high position that I should register my claim for my rights."). Drawing all reasonable inferences in plaintiff's favor, the Court agrees with plaintiff that the government's actions in August and September 2013 were not enough to put plaintiff on notice of the accrual of a takings claim. *See Acevedo*, 824 F.3d at 1368. The government's actions were not sufficiently "open and notorious" to put plaintiff on inquiry of a possible injury until December 2013 at the earliest, when plaintiff observed ANA personnel using its property. *Ingrum*, 560 F.3d at 1314 (quoting *Coastal Petroleum*, 228 Ct. Cl. at 867 (1981)) ("[W]here the actions of the government are open and notorious . . . plaintiff is on inquiry as to its possible injury . . . .") (internal quotation marks omitted).

Plaintiff argues the "accrual suspension rule" suspends the accrual date of plaintiff's claim until December 2013 because, "[e]ven if the government had exercised dominion and control over [p]laintiff's property and repurposed it to some other use prior to December 2013," the permanent nature of the government's action was inherently unknowable by plaintiff. Pl.'s Resp. at 10–11. In applying the "inherently unknowable" circumstance of the accrual suspension rule, this court has previously found "a claim is 'inherently unknowable' when there is nothing to alert one to the wrong at the time it occurs." *Petro-Hunt, L.L.C.*, 90 Fed. Cl. at 61. A plaintiff must make a "reasonable inquiry" into the facts underlying the taking claim, "exercise diligence," and "take reasonable steps to look into" any facts which would put the plaintiff on notice of the taking. *Tex. Nat. Bank*, 86 Fed. Cl. at 414. Here, plaintiff made reasonable inquiry into the government's position regarding plaintiff's property in August and September 2013, as demonstrated by plaintiff's continuous communications with U.S. government personnel. *See* Zaland Declaration at 16–22. After plaintiff observed some ANA personnel using its property and attempted further communications with the USACE in December 2013, plaintiff was informed it would get the property back on 4 January 2014. Zaland Declaration at 3. Although the Court is not able to discern from the record the exact date of the last communication between plaintiff and the government, the government did not eventually fulfill its promise, and plaintiff was eventually informed the government had given plaintiff's property to the ANA and plaintiff "should not ask about this matter anymore." *Id.*

In conclusion, reading all facts and drawing all reasonable inferences in plaintiff's favor, the government's actions were not sufficiently "open and notorious" to put plaintiff on inquiry of its possible injury until December 2013 at the earliest, when plaintiff observed ANA personnel using its property. *Ingrum*, 560 F.3d at 1314 (quoting *Coastal Petroleum*, 228 Ct. Cl. at 867

(1981)) ("Where the actions of the government are open and notorious . . . plaintiff is on inquiry as to its possible injury."). As plaintiff's equipment was in the government's possession since at least 2011, the fact the government denied plaintiff access to its property in July 2013 is not sufficient to establish inquiry notice. Indeed, the government itself, during oral argument, acknowledged the alleged accrual date may instead be as late as September 2013. *See* Mot. to Dismiss at 10; Tr. at 65:17–19. The repeated misleading or inconclusive statements by government personnel, including the emails from Mr. Hughes and Captain Finlay informing plaintiff they were investigating the matter, as well as the USACE's promise that plaintiff could receive its property back, renders the government's taking of plaintiff's property "inherently unknowable" to plaintiff until December 2013 at the earliest, when plaintiff was put on inquiry by observing ANA personnel using its property. *See Ingrum*, 560 F.3d at 1314–1315; *see also Petro-Hunt, L.L.C.*, 90 Fed. Cl. at 61–62, *Tex. Nat. Bank*, 86 Fed. Cl. at 414. Accordingly, the Court finds the "accrual suspension rule" applies in this instance, and the accrual of plaintiff's claim against the United States was suspended until December 2013 at the earliest. *Ingrum*, 560 F.3d at 1314. Based on the current record, the Court is not able to ascertain the exact accrual date at this stage in the proceeding, whether it was in December 2013 or January 2014. As plaintiff filed the complaint on 27 November 2019, neither date bars plaintiff's claim under the statute of limitations.[6]

C. Conclusion Regarding Statute of Limitations

As both parties agree the government deprived plaintiff of the use and enjoyment of its property since July 2013, plaintiff's takings claim against the United States government would have accrued in July 2013 absent suspension. *See Causby*, 328 U.S. at 261–62. The accrual date, however, was suspended until December 2013 at the earliest due to the repeated misleading or inconclusive statements made by government personnel rendering plaintiff's takings claim "inherently unknowable" to plaintiff. *See Ingrum*, 560 F.3d at 1314–1315; *see also Petro-Hunt, L.L.C.*, 90 Fed. Cl. at 62, *Tex. Nat. Bank*, 86 Fed. Cl. at 414. Accordingly, construing the record before the Court in the light most favorable to plaintiff, the Court finds the six-year statute of limitations began to run in December 2013, and plaintiff's claim is not barred. *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993), *N. Hartland, L.L.C. v. United States*, 309 F. App'x 389, 391 (Fed. Cir. 2009).

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[6] Plaintiff also argues the statute of limitations was stayed until at least December 2013 under the justifiable uncertainty doctrine, which delays the accrual of a takings claim when the government promises to mitigate the damage caused by a taking. Pl.'s Resp. at 6 (citing *Prakhin v. United States*, 122 Fed. Cl. 483, 490 (2015)). The government objects to plaintiff's reliance on the justifiable uncertainty doctrine, arguing the justifiable uncertainty doctrine is an extension of the stabilization doctrine, and the doctrines of stabilization and justifiable uncertainty apply solely to determine the accrual date in cases involving continuous, gradual environmental damage allegedly caused by the government's action. Gov't's Reply at 11 (citing *United States v. Dickinson*, 331 U.S. 745, 67 S. Ct. 1382, (1947) (applying to temporary and permanent flooding of land); *Swartzlander v. United States*, 142 Fed. Cl. 435, 443–44 (2019) (applying to land erosion); *Prakhin* v. United States, 122 Fed. Cl. 483, 485 (2015) (applying to sand accretion); *Banks v. United States*, 120 Fed. Cl. 29, 36 (2015) (applying to erosion)). Plaintiff cannot identify any cases applying the justifiable uncertainty doctrine to personal property. Tr. at 49:1–3. As discussed *supra*, the Court analyzes this case under the accrual suspension rule, specifically regarding the government's "inquiry notice" argument and plaintiff's "inherently unknowable" argument. The Court concludes it is not necessary to analyze whether the statute of limitations bars plaintiff's claims under the justifiable uncertainty doctrine, particularly when neither party can point to an instance of this doctrine being applied in personal property claims.

VIII. Conclusion

Plaintiff pleads sufficient substantial connections with the United States to establish standing to sue the government under the Fifth Amendment's Takings Clause, and plaintiff's claim is not barred by the statute of limitations. Accordingly, the Court **DENIES** the government's motion to dismiss. The Court further **GRANTS** the plaintiff's motion for leave to file its supplemental paper and **STRIKES** plaintiff's Reply in Support of Supp. Paper, ECF No. 30, from the record.[7]

IT IS SO ORDERED.

s/ Ryan T. Holte
RYAN T. HOLTE
Judge

[7] On 17 September 2020, the Court held a telephonic oral argument on the government's motion to dismiss. *See* Order, ECF No. 21. During oral argument, the Court raised a factual question regarding whether plaintiff had "any other connectivity with the United States in the past . . . other than the project of work that is described. . . in the complaint." Tr. at 24:5–9. The parties did not raise this legal issue in any of the briefs on the government's motion to dismiss, and plaintiff was not prepared to answer the question at oral argument. *See generally* Am. Compl.; Mot. to Dismiss; Pl.'s Resp; Tr. at 25:7–12. After oral argument, plaintiff filed a "Supplement to its Opposition" to the government's motion to dismiss "to address the Court's questions during the September 17, 2020 oral argument relating to Plaintiff's work on other U.S. Government projects." *See* Pl.'s Supplement to Opp. to Def.'s Amended Mot. to Dismiss, ECF No. 26. The Court struck the supplement, as there is no provision in the Court's Rules for such a filing. *See* Order, ECF No. 27 ("24 November 2020 Order"). In the 24 November 2020 Order, the Court directed plaintiff to file a motion for leave to file a supplemental paper and for the government to file a response, if any, to plaintiff's motion. *See id.* Plaintiff thereafter filed a motion for leave to file a supplemental paper, which the government opposed. *See* Pl.'s Mot. for Leave; Def.'s Resp. to Pls.'s Mot. for Leave. The government opposed plaintiff's motion on the grounds it is untimely and because plaintiff's proposed supplemental paper does not aid the Court's analysis. Def.'s Resp. to Pls.'s Mot. for Leave at 1. The Court finds the government's objections unpersuasive. It was not until oral argument when plaintiff was first put on notice that its prior connections to the United States was a relevant legal issue, and thus plaintiff could not have provided such information to the Court prior to or during oral argument. Plaintiff took a reasonable amount of time to investigate the question and file the supplemental paper, especially considering the likely hardship for an Afghan client to communicate with counsel in the United States. Additionally, when the government challenges plaintiff's allegations of jurisdiction in a Rule 12(b)(1) motion to dismiss, "the court may consider evidence outside the pleadings to resolve the issue." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996). Accordingly, the Court grants plaintiff's motion for leave to file its supplemental paper and thereby considers the information contained in plaintiff's proposed supplemental paper in resolving the government's motion to dismiss. *See King v. United States*, No. 18-1115C, ECF No. 67 (Fed. Cl. Aug. 31, 2020) (granting a similar motion on the ground of good cause shown and finding no prejudice to the non-moving party); *System Fuels, Inc. v. United States*, No. 03-2623C, ECF No. 54 (Fed. Cl. Jan. 28, 2005) (same). While the Court now grants plaintiff's motion for leave to file its supplemental paper, it observes the 24 November 2020 Order did not permit plaintiff to file a reply to the government's response. Nevertheless, plaintiff filed a reply in support of its motion for leave to file a supplemental brief on 21 December 2020. *See* Pl.'s Reply in Supp. of Mot. for Leave to File Supp. Paper, ECF No. 30. Accordingly, the Court strikes Pl.'s Reply in Support of Mot. for Leave to File Supp. Paper, ECF No. 30, from the record.

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON APRIL 27, 2021

GRANTED: April 14, 2021

CBCA 6654

FORCE 3, LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Joseph J. Petrillo and Karen D. Powell of Smith Pachter McWhorter PLC, Washington, DC, counsel for Appellant.

Terrius Greene, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **SHERIDAN**, and **KULLBERG**.

BEARDSLEY, Board Judge.

This matter is before us on the Department of Health and Human Services's (HHS) motion to dismiss for failure to state a claim upon which relief could be granted, and cross-motions for summary judgment. For the reasons set forth below, Force 3, LLC's (Force 3) motion for summary judgment is granted. HHS's motion to dismiss and motion for summary judgment are denied.

Statement of Undisputed Facts

In May 2016, HHS placed a fixed-price delivery order under a multiple-award government-wide acquisition contract with Force 3 for FireEye support services for certain appliances previously purchased by HHS.[1] The FireEye appliances, software, and support services together made up a computer security system that protected HHS data systems from malware such as viruses, ransomware, and other attacks. The parties contracted for a base year and two one-year option periods. The base year of the contract ran from May 5, 2016, to May 4, 2017. HHS exercised the first option year, which extended the period of performance to May 3, 2018. HHS did not exercise the second option year.

Each contract year had a price of $1,130,000, which included FireEye's per-year cost plus Force 3's margin (indirect costs and profit). Force 3 purchased, in advance, a three-year subscription to the FireEye support services, including software rights and maintenance, in order to offer HHS competitive pricing. FireEye provided license keys to HHS for the support services on June 16, 2016. An email from FireEye to HHS indicated that the end date for the licenses was March or May 2019. FireEye's standard practice is not to sell support services for less than one year and not to provide refunds to customers that want to discontinue services before the end of the purchased term.

The HHS order incorporated the terms and conditions of Force 3's May 11, 2016, proposal by express reference. The proposal's terms and conditions stated that, "[a]fter the date of expiration, non-renewal or termination of the contract, the Government shall certify in writing that it has deleted or disabled all files and copies of the software from the devices on which it was installed and is no longer in use by [sic] Government."

In July and August 2018, FireEye notified Force 3 and Force 3 notified HHS that HHS "continued to download software updates and security updates" and to seek technical support after the delivery order expired. HHS had also failed to certify that it had deleted or disabled

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[1] The support services purchased by Force 3 from FireEye enabled HHS to obtain from FireEye (1) continuous intelligence (security) updates; (2) content packages; and (3) software updates. Security updates provided new security signatures and detection capabilities; content packages included updates to virtual machine guest images and associated security information; and software updates provided access to new software releases and emergency fixes. The order also included a subscription to an upgraded form of security updates and content packages called Advanced Threat Intelligence (ATI) that provided updated and contextual information about malware and other threats, and 24x7x365 technical support by FireEye by live chat, phone, email, and web.

all files and copies of the software from the FireEye devices. The parties then unsuccessfully attempted to negotiate a payment for the services. Force 3 proposed payment of the full option period with no reinstatement penalties. HHS asked for a six-month quote. Force 3 responded that FireEye would not provide renewals for less than twelve months. On September 10, 2018, HHS's information specialist stated that, "[a]fter further discussion with leadership, we would like to pay what we owe from 5/3/2018–10/3/2018 and cancel the rest of the contract."

The contract specialist notified the contracting officer on September 10, 2018, that HHS continued to use the FireEye support services, despite failing to exercise the second option period. "Once the responsible contracting officer was apprised of the situation, she made it very clear to Force 3, through the contract specialist, that Force 3 was not authorized to continue services after the expiration of the first option year." The contracting officer maintained that the services were not ordered, requested, authorized, or required by HHS, and instructed the contract specialist to ask Force 3 to discontinue the service. The contract specialist notified Force 3 on September 12, 2018, that "it is FORCE 3, INC's responsibility, as the contractor, to discontinue support when the servers are no longer under contract with the Federal government."

Because Force 3 purchased three years of support services for the FireEye appliances owned by HHS, Force 3 could not discontinue the updates or software, stop HHS from using the software, or stop FireEye from providing the services to HHS. "FireEye devices, once enabled with the 36-month FireEye software licenses, could not be shut off remotely by FireEye." According to FireEye's vice-president of the U.S. Public Sector, in his sworn affidavit, there were several ways for HHS to stop the downloads of security content or software delivery: "unplug the FireEye appliances," "disable internet access to the appliances," or "change configuration settings" in the appliances. "None of these actions required the support or cooperation of FireEye." HHS could also "disable the operation of term-limited software and/or updates to perpetual software on their appliances" without FireEye's support or cooperation. HHS, however, "would generally require support from FireEye" in order to remove previously downloaded items (such as security updates, content packages, and software updates) from the system. Nonetheless, not until early 2019 did HHS "attempt to identify and disable any government-owned equipment that was 'checking in' with FireEye in order to prevent the equipment from receiving software updates and maintenance." "HHS directly contacted the original equipment manufacturer (OEM), FireEye, via email on January 30, 2019 to determine whether the software files could be deleted or disabled by HHS." HHS also states that it was told by FireEye representatives on a follow-on telephone call on or around January 31, 2019, that it was unlikely that the agency, or even FireEye's higher level program managers, could delete or disable the software files short of deleting or disabling all other installed software from the equipment.

FireEye records show that HHS continued to download updates (security content or software updates) until January 22, 2019, and continued to operate the FireEye appliances at least through March 19, 2019. FireEye records also show that HHS users contacted FireEye for technical support on several occasions during the period from May 4, 2018, to January 7, 2019. HHS failed to ever certify that it had deleted or disabled the content and software updates it had downloaded between May 4, 2018, and January 22, 2019.

Force 3 submitted a certified claim to the HHS contracting officer in December 2018. As a result of HHS's questions regarding the claim, Force 3 submitted a restated claim to the contracting officer in May 2019. In its claim, Force 3 sought recovery of $1,130,000 in costs for HHS's continued use of software services and technical support after the contract expired. Force 3 advanced several legal theories to justify recovery, including breach of contract, constructive execution of an option, and breach of the implied duty of good faith and fair dealing. HHS denied the claim in its entirety, contending that Force 3 failed to show that HHS continued to download software updates or that HHS was still using the software, failed to prove that HHS breached the contract because it was Force 3's duty, not HHS's, to disable and delete the software services when HHS did not exercise the second option period, and failed to prove that the breach of contract was the proximate cause of Force 3's damages. Force 3 timely appealed the contracting officer's final decision to the Board.

Discussion

Motion to Dismiss

To survive a motion to dismiss, a party "must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *SRA International, Inc. v. Department of State*, CBCA 6563, et al., 20-1 BCA ¶ 37,543 (quoting *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1380 (Fed. Cir. 2019)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [tribunal] to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "In reviewing a motion to dismiss for failure to state a claim, 'we accept as true the complaint's well-pled factual allegations,' though not its 'asserted legal conclusions.'" *Id.* (quoting *American Bankers Ass'n*, 932 F.3d at 1380). "We decide legal issues for ourselves, and we may treat any document that is incorporated in or attached to the complaint as part of the pleadings." *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272 (citing *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, and Fed. R. Civ. P. 10(c)).

HHS moves to dismiss the entire appeal because Force 3 "does not present a facially plausible breach-of-contract claim." HHS, however, has not moved to dismiss Force 3's other two claims—constructive exercise of the option and breach of the implied duty of good faith and fair dealing—which are alternative claims for damages in the amount of the second option price of $1,130,000. We find, therefore, that, at the least, these two claims survive HHS's motion to dismiss.

HHS asserts that Force 3's breach of contract claims should be dismissed for failure to state a claim upon which the Board could grant relief because Force 3 cannot demonstrate that HHS's alleged breach of contract caused Force 3's damages. "It is fundamental in contract law that in order to recover on a breach of contract claim, a plaintiff must prove damages—that it has been harmed." *Northrop Grumman Computing Systems, Inc. v. United States*, 823 F.3d 1364, 1368 (Fed. Cir. 2016) (citing Restatement (Second) of Contracts § 346 (1981) ("The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.")). "This harm can be expectancy damages, measured relative to expected profits; restitution damages, measured relative to a plaintiff's position when the contract was signed; or reliance damages, as a sum of damages sustained as a result of a breach." *Id.* (citing *Glendale Federal Bank, FSB v. United States*, 239 F.3d 1374, 1380-82 (Fed. Cir. 2001)). "Contract damages take into account both a party's losses and the losses that a party avoided." *Id. at* 1369 (citing Restatement (Second) of Contracts § 347 (1981)). Assuming HHS's continued use of the support services without exercising the option resulted in a breach of contract, we are not convinced that Force 3 is precluded from recovering its damages just because it purchased the support services in advance. Force 3 should reap the benefit of the bargain it negotiated, specifically, that if HHS wanted to continue to use the support services offered by Force 3, it would exercise the second option period and pay Force 3 $1,130,000 for the services.

In support of its motion, HHS relies on cases in which the contractor could not recover incurred costs that it assumed it would recover if the Government had exercised the option, as expected. *See Centennial Leasing v. General Services Administration*, GSBCA 11409, 93-2 BCA ¶ 25,609 (1992), *aff'd*, *Centennial v. Austin*, 17 F.3d 1443 (Fed. Cir. 1994) (table) (finding that the contractor could not recover the cost of financing leased vehicles incurred after the option expired even though the contractor believed that the Government had invalidly cancelled the option); *Vehicle Maintenance Services*, GSBCA 11663, 94-2 BCA ¶ 26,893 (holding that a contractor assumes the risk of its financial planning if it is based on an assumption that an option will be exercised). These cases, however, can be distinguished because in these cases, the Government did not continue to use the services after the contract expired.

HHS is correct that it had no obligation to exercise the option period, and Force 3 accepted the risk that HHS would not exercise the option period to its financial detriment. HHS, however, cannot rely on the propriety of its decision not to exercise the option to receive services at no cost, even if those services had already been paid for by Force 3. HHS's motion to dismiss is denied.

Motions for Summary Judgment

Both parties moved for summary judgment, asserting that there are no genuine issues of material fact in dispute. Summary judgment is appropriate when there is "no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Proveris Scientific Corp. v. Innovasystems, Inc.*, 739 F.3d 1367, 1371 (Fed. Cir. 2014). "'The moving party bears the burden of demonstrating the absence of genuine issues of material fact,' and '[a]ll justifiable inferences must be drawn in favor of the non-movant.'" *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600 (2016) (quoting *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256). "A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing." *Id.* We agree that there are no material facts in dispute, and Force 3 is entitled to judgment as a matter of law.

Force 3 contends that HHS constructively exercised the second option period by continuing to utilize the FireEye support services. The Government, however, cannot exercise an option by doing something other than strictly complying with the terms of the contract which created the option. *Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1366 (Fed. Cir. 2000) ("The Government must exercise the option in exact accord with the terms of the contract."). Here, HHS did not even attempt to exercise the second option period in strict compliance with the terms of the contract.

Boards and other tribunals have held, however, that "the government's failure to exercise an option in strict compliance with its terms, while requiring the contractor to perform, is a constructive change, absent waiver or estoppel against the contractor." *General Dynamics C4 Systems, Inc.*, ASBCA 54988, 08-1 BCA ¶ 33,779 (citing *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 323-24 (Fed. Cir. 1997); *Chemical Technology Inc.*, ASBCA 21863, 80-2 BCA ¶ 14,728; and *Holly Corp.*, ASBCA 24975, 83-1 BCA ¶ 16,327); *see also Tecom, Inc.*, IBCA 2970, et al., 94-2 BCA ¶ 26,787 (finding that if the option exercise was defective, the contractor may be entitled to an equitable adjustment under the Changes clause taking into account all of its costs incurred, plus a reasonable profit). "The constructive change doctrine has been applied historically even though

Changes clauses often do not precisely cover the circumstances of an improperly exercised option." *Tecom, Inc.*, IBCA 2970 A-1, 95-2 BCA ¶ 27,607. These boards and other tribunals "referred to the concept of 'constructive change orders' as a basis for compensating a contractor whom the Government directed to perform extra-contractual work." *Pembroke Machine Co.*, ASBCA 39028, 90-1 BCA ¶ 22,528 (1989) (citing *International Telephone & Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972) (untimely notice of fund availability for multi-year contract); and *Chemical Technology, Inc.* (invalid option)). "Although the additional work directed by the Government in such contexts was beyond the express scope of the Changes clause, the notion of 'constructive change orders' served as a way to fashion a remedy 'arising under the contract.'" *Id.* (citing *General Dynamics Corp.*, ASBCA 20882, 77-1 BCA ¶ 12,504 (invalid option)).

Most of these cases finding a constructive change involve the ineffective attempt by the Government to exercise an option. Here, however, HHS did not even attempt to exercise the option, much less exercised the option ineffectively. Moreover, the fact that HHS did not direct Force 3 to perform extra-contractual work argues against the application of the constructive change theory of recovery. *Cf. International Telephone & Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1293 (Ct. Cl. 1972) (when the contracting officer required plaintiff to furnish the equipment at contract prices, despite the fact that the contract had been cancelled, it amounted to a constructive change for which plaintiff was entitled to an equitable adjustment).

We find, instead, that HHS ratified its commitment to use the Force 3 support services. By contract, HHS agreed that when the last exercised option period ended so did HHS's right to use the support services. Nonetheless, HHS continued to use the support services at no cost and with the knowledge of the contracting officer. "Both the Court of Claims and the Comptroller General have held that acceptance of benefits with the actual or implied knowledge of the contracting officer who does nothing to deter a contractor will, in the proper case, result in a ratification by inaction or implication entitling the contractor to recover." *HFS, Inc.*, ASBCA 43748, et al., 92-3 BCA ¶ 25,198 (citing *Williams v. United States*, 130 Ct. Cl. 435 (1955); and *Equal Employment Opportunity Commission*, B-207492, 82-2 CPD ¶ 112 (July 30, 1982)). "It is recognized that the acceptance of benefits by [authorized] representatives of the Government with knowledge of the circumstances may, in the proper case, result in a ratification of an unauthorized act by implication on a quantum meruit basis." *Id.* (citing *To Mr. Prentice*, B-164087 (July 1, 1968)).

> "Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized," and "unauthorized contracts become binding," as written, "if they are ratified." *Parking Co. of America*, GSBCA

> 7654, 87-2 BCA ¶ 19,823, at 100,296; *see Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) ("Ratification is 'the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.'" (quoting Restatement (Second) of Agency § 82 (1958)). There is no one specific test that applies to every situation to determine whether ratification has occurred, *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 16-1 BCA ¶ 36,320, at 177,079, but ratification ultimately must "be based on a demonstrated acceptance of the contract." *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998).

Crowley Logistics, Inc. v. Department of Homeland Security, CBCA 6188, et al., 20-1 BCA ¶ 37,579.

Force 3 points to *HFS* to support its argument that HHS ratified the unauthorized commitment. In *HFS*, the Government had to pay software license fees and on-call maintenance in instances in which the contracting officer was aware that agency users were ordering support services that were not covered by the contract. The board held that the contracting officer's knowledge plus inaction amounted to "a ratification by implication or inaction by the authorized official." Here, the contracting officer knew that HHS was using the support services and took no action to stop that use until nine months after the contract expired. HHS benefitted from the support services received at no cost, hiding behind its discretionary decision to not exercise the option period. The contracting officer's failure to curtail the use of the support services once notified resulted in a ratification of that commitment by implication or inaction. Accordingly, Force 3 is entitled to receive payment for the support services "under the terms and conditions which existed" under the contract. *Id.*

HHS argues that the contracting officer did not ratify the commitment because the support services were provided without her authorization and against her explicit direction to the contrary. We disagree. "Implicit ratification is a fact-based action that occurs when those with the authority to ratify gain actual or constructive knowledge of an unauthorized contract commitment and then affirmatively act, or fail to act, in a manner that implicitly adopts or approves that commitment." *Crowley Logistics, Inc.* (citing *Villars v. United States*, 126 Fed. Cl. 626, 633 (2016); and *Parking Co. of America*). By failing to take action to stop the use of the support services or to disable or delete the software updates and content, the contracting officer implicitly ratified and adopted the commitment for HHS's continued use of the support services. *Americom Government Services* ("[O]ne of the situations that will support ratification is one in which an agency overreaches by allowing

the continuation of the services and benefits but denies payment." (citing *Janowsky v. United States*, 133 F.3d 888, 892 (Fed. Cir. 1998))). HHS continued for at least nine months to use the FireEye support services at no cost and for almost five months with the knowledge of the contracting officer.

HHS's contention that the contract required Force 3, not HHS, to disable and delete the software has no merit. This interpretation of the contract would violate the rule of contract construction requiring us to "'give[] a reasonable meaning to all parts of an instrument' and not to 'leave[] a portion of it useless, inexplicable, inoperative, void insignificant, meaningless or superfluous.'" *P.K. Management. Group, Inc. v. Department of Housing. & Urban Development*, CBCA 6185, 19-1 BCA ¶ 37,417, *aff'd*, 987 F.3d 1030 (Fed. Cir. 2021) (quoting *Jane Mobley Associates, Inc. v. General Services Administration*, CBCA 2878, 16-1 BCA ¶ 36, 285). By incorporating the Force 3 proposal into the contract, the contract terms specifically required that HHS, not Force 3, discontinue its use of the support services and delete and disable all files and copies of the software from the appliances once it decided not to exercise the option.

HHS argues that, unknown to it at the time of contracting, it was impossible or impracticable for HHS to delete or disable the software or to stop using it once Force 3 had purchased the three-year subscription. "A party has no duty to perform a contractual obligation if 'performance is rendered impossible or impracticable, through no fault of the party, because of a fact, existing at the time the contract was made, of which the party neither knew nor had reason to know and the non-existence of which was a basic assumption of the party's agreement.'" *Hicks v. United States*, 89 Fed. Cl. 243, 258 (2009) (quoting *Massachusetts Bay Transportation Authority v. United States*, 254 F.3d 1367, 1372 (Fed. Cir. 2001)). To establish the defense of impossibility, HHS must show that performance was "objectively impossible." *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002) (citing *Jennie-O Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct. Cl. 1978)). There is no evidence that it was objectively impossible for HHS to delete or disable the software or that performance was rendered impracticable. Force 3 has provided proof in the form of sworn testimony that HHS could have stopped the downloads of security content or software delivery and, with FireEye's help, HHS could have deleted the downloads. Moreover, HHS did not even ask FireEye how to stop the downloads until nine months after the contract expired, and even then, according to HHS, FireEye told HHS it could delete or disable the software files by deleting or disabling all other installed software from the equipment. While maybe not ideal, it was not impossible. Nonetheless, by January 2019, the downloads stopped, suggesting that HHS found a way to stop the software updates.

HHS argues that Force 3's payment in advance to FireEye for the second option year of support services discharged HHS's obligation to pay Force 3 for the support services used

after May 3, 2018. This advance payment, however, does not preclude Force 3's recovery of the costs for HHS's continued use of the support services. While Force 3 accepted the financial risk that HHS would not exercise the second option period, it did not assume the risk that HHS would not pay Force 3 for its continued use of the support services. By contract, HHS had a duty to disable, delete, and stop using the support services. It failed to do so.

Damages

We find that HHS ratified an unauthorized commitment, and therefore, Force 3 is entitled to recover damages for HHS's continued use of FireEye support services. Force 3 is entitled to "the same rights to compensation, reimbursement, and indemnity as [it] would have had, if this act had been previously authorized." *Crowley Logistics, Inc.* (quoting *Leviten v. Bickley, Mandeville & Wimple, Inc.*, 35 F.2d 825, 827 (2d Cir. 1929)). Given that Force 3 has established that FireEye only sells the services that HHS utilized in twelve-month increments and customers discontinuing support services prior to the expiration of the purchased term are not entitled to a refund from FireEye, Force 3 is entitled to the cost of a full year of FireEye services. Moreover, HHS provided no evidence that it ever disabled or deleted or stopped using the downloaded FireEye support services. Since the cost of the FireEye services for that second option year had already been agreed to by the parties, Force 3 is entitled to an award of $1,130,000.

Decision

For the foregoing reasons, the Board denies HHS's motion to dismiss and motion for summary judgment. The Board grants Force 3's motion for summary judgment and awards damages in the amount of $1,130,000. The appeal is **GRANTED**.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge