2022 Annual Review Construction Contracting Panel

Supplementary Materials

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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Gulf Pacific Contracting, LLC	)	ASBCA No. 61434
	)	
Under Contract No. FA4417-16-D-0002	)	

APPEARANCE FOR THE APPELLANT: Laurence J. Zielke III, Esq.
Zielke Law Firm, PLLC
Louisville, KY

APPEARANCES FOR THE GOVERNMENT: Jeffrey P. Hildebrant, Esq.
Air Force Deputy Chief Trial Attorney
Christopher M. Judge-Hilborn, Esq.
Maj Michelle E. Gregory, USAF
Trial Attorneys

MAJORITY OPINION BY ADMINISTRATIVE JUDGE PROUTY

The Davis-Bacon Act, 40 U.S.C. §§ 3131-3148, is a fact of life in federal government construction contracting. By requiring the payment of local prevailing wages to contractor employees in certain circumstances, it may force contractors to pay their employees more than they might otherwise when they begin contract performance and to further increase wages in the midst of performance or following the exercise of options by the government. The Federal Acquisition Regulation (FAR) provides a contracting officer (CO) multiple ways to address these increased costs through prescribed clauses to be inserted into a contract. One such clause (which we will refer to as "the no-adjustment clause" throughout) takes the approach of informing the contractor that there will be no adjustment to the prices in the awarded contract unless it is provided for elsewhere in the contract, which implies that (unless there is a separate contract provision saying otherwise) the contractor should price its option years to take into account the risk of increased wages. That is the clause that was included in the above-captioned contract (the contract) which is the subject of today's dispute.

This appeal is before us under the auspices of Board Rule 11, which permits its resolution on the record, without a hearing and live testimony. As detailed below, appellant, Gulf Pacific Contracting, LLC (Gulf Pacific), had a contract to perform various construction-related services at Hurlburt Field in Florida. Coincident with the government's exercise of its first option year, the Department of Labor (DOL) issued new wage determinations, with the upshot being that Gulf Pacific needed to pay some of its employees more during the option period. Gulf Pacific demanded additional

compensation from the government and the CO refused, pointing to the no-adjustment clause, which precluded such additional payment. Gulf Pacific appeals this decision, arguing that it was not on notice that it would be required to absorb this cost in its option pricing and that the no-adjustment clause is defective.

Judge Clarke agrees with Gulf Pacific, contending that the FAR-required no-adjustment clause contained in the contract did not meet the requirements of the policy portion of the FAR which set forth the CO's options for addressing wage adjustments. We respectfully disagree with Judge Clarke. The drafters of the FAR made the no-adjustment clause consistent with their earlier dictates about how to handle such situations. Gulf Pacific also argues that the no-adjustment clause is ambiguous. It is not. Gulf Pacific, as discussed below, is entitled to no additional compensation.

FINDINGS OF FACT

On September 26, 2016, the United States Air Force 1st Special Operations Contracting Squadron awarded to Gulf Pacific the contract, a firm-fixed-price, indefinite-delivery indefinite-quantity (IDIQ) construction contract, to paint the interior of facilities, paint the exterior of facilities, and stripe runway pavement at Hurlburt Field in Florida (R4, tab 4 at 1-4). The base period of performance was one year, with four option years (*id.* at 5-6).

As part of the solicitation that led to the award of the contract, offerors were required to provide prices for the base year and each option year, and those prices were to come from a "Line Item List" attached to the solicitation that the contractor was to fill out (app. supp. R4, tab 14 at 4-6). The Line Item List is an extensive 15-page document and includes services that may be ordered under separate contract line items, estimated quantities of those services, and space for the contractor to insert its pricing. It includes separate pricing lists for the base year and all four individual option years. (*See* R4, tab 4a) In its initial bid, Gulf Pacific, in fact, priced some components of its option years[1] differently than the base year (compare R4, tab 11 at 13-15 to R4, tab 11 at 19-21). A number of Gulf Pacific's prices in the line items went down between the base year and the option years – enough for the government to raise the issue with Gulf Pacific during pre-award discussions. In response to these concerns, Gulf Pacific ascribed the decreased

[1] Based on the parties' discussions during the government's consideration of Gulf Pacific's proposal, we can conclude that there were changes in unit pricing between the base year and the option years as well (*see* R4, tab 2 at 3 (referencing discussions about variance in base and option years)), but the Line Item List for the base year, as completed by Gulf Pacific does not appear to be part of the record for us to report it directly. Apparently, neither party was able to find it during discovery (*see* gov't br. at 6 n.1), but this is of no significance since the matter is not in dispute.

prices to its anticipated "increased production efficiency" as it performed the contract (R4, tab 2 at 3). To be clear, however, at least one[2] price component increased between option years 1 and 3 (*compare* CLIN 1004AG, located at R4, tab 11 at 15 to CLIN 3004AG, located at R4, tab 11 at 21).

The contract incorporates by reference FAR 52.222-6, CONSTRUCTION WAGE RATE REQUIREMENTS (MAY 2014) (R4, tab 4 at 14). In part, this provision requires "laborers and mechanics employed or working upon the site of the work will be paid unconditionally . . . at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof." FAR 52.222-6(b)(1)

The contract also incorporates by reference FAR 52.222-30, CONSTRUCTION WAGE RATE REQUIREMENTS—PRICE ADJUSTMENT (NONE OR SEPARATELY SPECIFIED METHOD) (MAY 2014) (R4, tab 4 at 14). This is the no-adjustment clause referenced herein. In relevant part, this provision inserts the following text into the contract:

> (a) The wage determination issued under the Construction Wage Rate Requirements statute by the [DOL], that is effective for an option to extend the term of the contract, will apply to that option period.
>
> (b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of [such a wage determination]

FAR 52.222-30.

For the contract at issue here, there is no other mechanism for adjusting the option price to cover increases or decreases in wages caused by wage determinations "provided for elsewhere in th[e] contract" (*see* R4, tab 4).[3]

For unknown reasons, the contract also incorporates by reference FAR 52.216-7, ALLOWABLE COST AND PAYMENT – ALT I (JUN 2013) (*see* R4, tab 4 at 14). This

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[2] The government identified this one particular increase, but no others, and we have not compared the remainder of the prices line by line as it is unnecessary for our decision today.

[3] Gulf Pacific argues that two particular contract provisions may constitute mechanisms to pay wage rate increases, which we will address in the Decision section, below, but identifies no provision establishing an entitlement to payment for wage rate increases.

FAR provision, by its terms, governs compensation in cost reimbursement or time-and-materials contracts and the first line of the clause directs that it is used "as prescribed in 16.307(a)." FAR 16.307(a), in turn, prescribes the use of the clause in FAR 52.216-7 in cost reimbursement and time-and-materials contracts. Subpart 16.3 of the FAR (of which FAR 16.307 is a subsidiary part) is entitled "COST-REIMBURSEMENT CONTRACTS." As stated earlier, the contract at issue is not a cost reimbursement contract, but is a firm-fixed-price contract.

Of relevance to the arguments advanced by Gulf Pacific here, we also note that the contract incorporated by reference the clause found in the Department of Defense Supplement to the FAR (DFARS) 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (DEC 2012) (R4, tab 4 at 16).

On September 8, 2016 (18 days before contract award), the government amended the solicitation for the contract to include the most recent applicable DOL Wage Rate Schedule, No. FL160029, dated August 5, 2016 (app. supp. R4, tab 15). Gulf Pacific submitted its final prices on September 15, 2016 (R4, tab 12) and, as previously noted, the contract was awarded on September 26, 2016.

On September 8, 2017, the DOL issued a wage determination increasing the hourly prevailing wages for painters (*see* R4, tab 7 at 5). Thus, on September 14, 2017, while unilaterally modifying the contract to exercise Option Year 1, the CO incorporated this new wage determination (R4, tab 7).

Upon receipt of the contract modification the same day, Gulf Pacific asked the CO how it would be compensated for the increased wage costs. The CO initially responded in an email stating that it could file a request for equitable adjustment, but reversed himself 18 minutes later, informing Gulf Pacific that the FAR's no-adjustment clause, incorporated into the contract, did not allow for such compensation. (R4, tab 13)

Gulf Pacific submitted a certified claim to the CO on October 11, 2017, seeking an equitable adjustment in the amount of $120,000, representing the additional costs it expected it would incur as a result of the prevailing wage adjustment (R4, tab 8). The CO denied the claim in a final decision dated October 23, 2017 (R4, tab 9).

Gulf Pacific timely appealed this decision to the Board.

DECISION

The question before us is whether the CO's inclusion in the contract, by reference, of the FAR's no-adjustment clause was sufficient to preclude Gulf Pacific from recovering the extra costs it incurred by imposition of higher wage rates after contract award. The answer is that it does.

I. The FAR Permits the Government to Make no Compensation to the Contractor for Wage Increases if the Contract so Specifies

The no-adjustment clause is not included in the contract by happenstance, nor is its wording careless. Rather, it fits within a well-planned regulatory scheme to address the consequences of the Davis-Bacon Act, which begins with FAR 22.404-12, LABOR STANDARDS FOR CONTRACTS CONTAINING CONSTRUCTION REQUIREMENTS AND OPTION PROVISIONS THAT EXTEND BEYOND THE TERM OF THE CONTRACT (MAY 2014). Subsection (c) of this regulatory provision requires the CO to include, in fixed price construction contracts, a clause that specifies one of four methods, "to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract." The four methods are: 1) no adjustment, but the contractor may have the opportunity to take the possible changes into account when it bids the options; 2) some sort of adjustment separately specified in the contract; 3) a price adjustment based on a percentage rate of a published economic indicator specified by the contract; and 4) a price adjustment based upon actual costs.

Since method (1) (no adjustment) was the choice of the CO here, it is helpful to quote it in its entirety:

> (1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer must not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

FAR 22.404-12(c)(1)

Just a few pages later in the FAR, FAR 22.407 specifies that pre-drafted contract clauses contained in the FAR are to be inserted into contracts to effect the four particular options denoted by FAR 52.222-30. As stated in FAR 22.407(e), both the "no adjustment" method and the "separately specified" method were to be reflected by the insertion of the contract clause contained in FAR 52.222-30, the no-adjustment clause. This is what happened here.

Gulf Pacific argues that, by law, the government is required to compensate a contractor through the use of an equitable adjustment when compliance with a DOL wage

determination increases its costs, and cites our opinion in *Sonoran Tech. and Prof'l Svs., LLC*, ASBCA Nos. 61040, 61101, 17-1 BCA ¶ 36,792, in support of this conclusion (*see* app. br. at 13). But in *Sonoran Technology*, the government used a different type of contract than present here (it was a services contract, rather than a construction contract), and, instead of including the no-adjustment clause, the contract (properly) used the clause in FAR 52.222-43, which expressly *required* adjustment of the contract price to account for increased wage rates. *See* FAR 52.222-43(d) (quoted in *Sonoran Tech.*, 17-1 BCA ¶ 36,792 at 179,329).[4]

Thus, the FAR permits the government to draft a contract to preclude additional payment to a contractor for increased costs during performance of an option that are caused by new Davis-Bacon Act labor rates and direct that the method it uses to do so be the inclusion of the contract provision set forth in FAR 52.222-30, the no-adjustment clause.

II. The No-Adjustment Clause Complies With the FAR's Davis-Bacon Act Framework

Judge Clarke's dissenting opinion is based upon the notion that the no-adjustment clause does not comply with the Davis-Bacon Act framework set forth in FAR 22.404-12. As Gulf Pacific and Judge Clarke would have it, a FAR-compliant contract provision for the no-adjustment option would specifically inform the contractor that it would not receive any adjustment in contract price for labor rate adjustments and direct them to price their option years accordingly. They argue that the no-adjustment clause does not do so. They are incorrect both in terms of what the FAR required and about what was included in the contract.[5]

[4] *Sonoran Technology* was also a single-judge decision, issued under the auspices of Board Rule 12.2, which means that it has no value as precedent. *See Sonoran Tech.*, 17-1 BCA ¶ 36,792 at 179,328 n.1. Thus, even if its facts were similar to those presented here, it would not be controlling.

[5] We do, however, agree with Judge Clarke that whether the contract complies with the FAR provisions relating to adjusting payment to account for wage rate increases is a matter that may be challenged by a contractor. *See Freightliner Corp. v. Caldera*, 225 F.3d 1361, 1365 (Fed. Cir. 2000).

A. We Read the FAR as a Whole

The argument that one part of the FAR is not compliant with another, and therefore must be set aside, is problematic and unsupported by law cited to us. To be sure, the FAR is comprehensive, spanning multiple volumes, but the R in FAR stands for regulation: singular. As such, we interpret it as we would any other regulation. Thus, we read it in a manner that seeks to avoid finding portions of it "inoperative or superfluous, void or insignificant," an interpretation that is disfavored by the law. *See, e.g., Baude v. United States*, 955 F.3d 1290, 1305 (Fed. Cir. 2020) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). Put another way, we generally presume that the authors of the FAR, the FAR Council, knew what they were doing and drafted their mandatory contract provisions to be consistent with the portions of the FAR laying out the policy those provisions were drafted to effect.[6]

B. "May" Does not Mean "Must" and the Mandatory Contract Clause at FAR 52.222-30 – the No-Adjustment Clause – is Consistent With the Policy set Forth in FAR 22.404-12

Judge Clarke's dissent argues that the provision in FAR 22.404-12 governing the "no change" option which states that "[t]he contracting officer *may* provide the offerors the opportunity to bid or propose separate prices for each option period" (emphasis added) means that the no-adjustment clause, in fact, *must* give the contractor such an opportunity. The basis for this conclusion is the earlier, introductory language in FAR 22.402-12 stating that the purpose of the mandatory contract clause was "to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract." To Judge Clarke, if the contractor were not given an opportunity to propose separate prices for option years in the mandatory clause, there would be no "allowance for" the increases or decreases in costs due to wage determinations. We do not find this argument compelling.

First, of course, when we interpret a regulation (or statute or contract for that matter), in addition to reading it as a whole, we generally give its words their normal or usual meanings. *See, e.g., Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005); *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227-28 (Fed. Cir. 1997) (plain language and "ordinary meaning"). The normal use of "may" is that it is a permissive choice, not a command. Indeed, that is the word's essence, so we see the FAR Council's selection of "may" rather than "shall" or "must" to bear particular significance.

[6] Of course, if there were an unresolvable contradiction between a policy portion of the FAR and its mandatory contract provisions, we would need to address it. As discussed below, we do not have that here.

Second, the fact that the no-adjustment clause does not require the CO to provide an allowance for separate offers for option periods is also proof that the FAR Council meant "may" as "may." At first blush this may seem as circular reasoning, but it is not: there would need to be good evidence for us to find that the FAR Council intended "may" to mean "must," but, instead, the same body that chose "may" in FAR 22.402-12 drafted the provision in FAR 52.222-30 differently than it would have if "may" meant "must." This is good evidence that, yes, "may" meant "may."

An argument that rhymes with the previous one (though is not *exactly* the same) is that reading "may" as "must" in FAR 52.222-30 would be to make the no-adjustment clause "inoperative or superfluous, void or insignificant," *see Baude*, 955 F.3d at 1305, which we have already stated is a disfavored interpretation.

We answer Judge Clarke's argument, that the no-adjustment clause would not provide any allowance for an increase in costs if it was not required to allow for them, by making two observations: the first is that this language may be read as prefatory or introductory, explaining what the general intent (or aspiration) of the provision is without imposing direct requirements – the actual requirements being what comes in the sentences to follow. The second is that the "allowance for cost" is made by the multiple options that follow in this FAR provision, and that if the CO chooses the one option where there is no ability to charge for costs and no requirement to permit the submission of different prices for option years[7], then the very act of stating as much in the contract provision provides for such an allowance in its own way: the contractor is on notice that it must price its entire contract so that the possible exercise of an option after a wage increase is accounted for. Put slightly differently, if the contractor knows before it prices its contract that it risks its options being exercised after a wage increase and that there will be no other recompense, it may price its contract to account for such a contingency. Thus, a contract provision making this statement would meet the goal of "providing an allowance for the increase or decrease" of labor costs during option years.

Finally, even if may meant must, nothing in FAR 22.402-12 would require that the allowance for separately-priced option years be placed in the no-adjustment clause, itself. The CO would only be required to do that somewhere in the contract. And, of course, the contract permitted different option year pricing, which Gulf Pacific took advantage of, as described above in the Facts section.

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[7] Even though we find this permissible, we find it an extremely unlikely circumstance. Although technically possible, we have never seen a solicitation in which the government required option year pricing to be exactly the same as that in the base year (it certainly did not require it here). To be sure, a contractor might choose to bid a contract that way, but that would be by choice, not government mandate.

With all of this in mind, we find that the contract provisions set forth in the FAR's no-adjustment clause meet the relatively simple requirements of FAR 22.402-12 since all that is truly required in the no-adjustment option is that the contracting officer make no adjustment to the contract price. FAR 22.404-12(c)(1).

III. The Inclusion of the No-Adjustment Clause in the Contract Precluded Payment to Gulf Pacific for Labor Rate Increases During the Option Years

A. The CO was Within his Rights to Include the No-Adjustment Clause in the Contract

Gulf Pacific makes the argument that the no-adjustment clause was only to be used in circumstances in which the contract was limited to three years of total performance (*see* app. br. at 3; app. reply br. at 5-6). Like Judge Clarke, we find that the regulation was not so limiting. The regulatory language provided that, "generally," the no adjustment provision was to be used in contracts not expected to last more than three years. *See* FAR 22.404-12(c)(1). It did not preclude its use in contracts that lasted longer: it was "general" in application and, indeed, could be read to say when the no-adjustment clause was to be used, not when it wasn't.

B. The Language of the No-Adjustment Clause Included in the Contract is not Ambiguous and Precludes Payment to Gulf Pacific

Having held above that the FAR permits the CO to decide to preclude extra compensation for wage adjustments and that the language in the no-adjustment clause effecting that decision is not defective because it does not separately inform the contractor that it should price its option years to account for the possibility of Davis-Bacon Act wage adjustments, we turn to the final significant challenge made by Gulf Pacific: its assertion that the no-adjustment clause is ambiguous. This alleged ambiguity rests upon the clause's statement that no adjustment to the price would be made "other than provided for elsewhere in this contract." Gulf Pacific argues that both the clause allowing for requests for equitable adjustment (REAs) and the Allowable Payment clause provide some venue "elsewhere in the contract" for payment (*see* app. reply br. at 7-8). The argument is unpersuasive.

The REA clause incorporated by reference in the contract is DFARS 252.243-7002. This clause explains how to file an REA for "contract adjustment[s] for which the Contractor believes the Government is liable." DFARS 252.243-7002(a) It does not establish entitlement to the adjustment in the first place. *Id.* Thus, it does not create an ambiguity because the REA clause cannot be reasonably read to create an independent basis for the CO to pay Gulf Pacific for the wage increase. *See NVT Tech., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citing *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999)) (contract ambiguous if susceptible to more than one reasonable interpretation).

The Allowable Payment clause, too, does nothing to make the meaning of the no-adjustment clause ambiguous. As noted above, this standard clause, though included in the contract, has no applicability to it since, by its terms, it governs cost-reimbursement contracts. Gulf Pacific argues that it must have some applicability to the contract on the basis that a contact "must" be read so as to leave no portion superfluous (app. reply br. at 7 (citing *NVT*, 370 F.3d at 1159)). But the law is not quite what Gulf Pacific says it is. It does not require the impossible action of forcing a square contractual peg into a round hole that has no room for it, but merely *prefers* an interpretation that harmonizes all parts of the contract, if possible. *See NVT*, 370 F.3d at 1159 ("interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous"). Indeed, we have recognized that, contracts being assembled by people, surplus boilerplate can, on occasion, be included without changing the meaning of the contract. *See Watts Constructors, LLC*, ASBCA No. 61493, 20-1 BCA ¶ 37,563 at 182,385-86. The Allowable Payments clause, since it cannot be applicable to the contract, creates no vehicle for adjusting the price of the contract and thus creates no ambiguity.

Finally, we note that, had there been any confusion on the part of Gulf Pacific, that confusion should have been eliminated when it looked up the no-adjustment clause in the FAR.[8] The preface to the clause states that it is inserted pursuant to the direction in FAR 22.407(e). FAR 22.407(e), in turn, refers the reader to FAR 22.404-12(c)(1) and (2), which underscore exactly how the regulatory scheme is laid out. Thus, Gulf Pacific's arguments that the contract was ambiguous are even less supported, just as its generalized, equitable arguments that it was not on notice that it would need to deal with Davis-Bacon Act wage adjustments (*see* app. reply br. at 8-9) are unpersuasive.[9]

With this in mind, there is no basis for us to read the no-adjustment clause in any way besides precluding additional payment by the CO.

[8] Because the clause is incorporated by reference, recourse to the FAR provision would be necessary.

[9] Of course, Gulf Pacific was on particular notice of the salience of Davis-Bacon Act wage adjustments by virtue of the fact that the government required a re-bid just prior to contract award when a DOL wage adjustment was issued.

CONCLUSION

For the reasons stated herein, the appeal is denied.

Dated: September 16, 2021

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

I concur

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

I concur

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 Service Board
of Contract Appeals

I respectfully dissent. I would hold that FAR 52.222-30 fails to comply with FAR 22.404-129(c). Gulf Pacific (GP) was not given sufficient pre-award notice of an opportunity to price its options to account for a possible wage increase as required by FAR 22.404-12(c). The Air Force (AF) contends that FAR 52.222-30 is clear and unambiguous and provides sufficient notice and opportunity to increase option prices and it should be enforced. I disagree.

This case was originally assigned to me and I drafted the preliminary decision with which my colleagues disagree. I attach that decision as my dissent.

FINDINGS OF FACTS

This appeal and decision deal primarily with questions of law which is why there are no detailed recitation of facts other than the FAR provisions to be interpreted.

1. On 27 September 2016, the 1st Special Operations Contracting Squadron awarded to Gulf Pacific Contracting, LLC (GP) a firm-fixed-price, indefinite delivery indefinite-quantity (IDIQ) construction contract, contract number being FA4417-16-D-0002 (Contract No. 0002), to paint the interior of the facilities, paint the exterior of the facilities, and stripe runway pavement at Hurlburt Field in Florida. (R4, tab 4 at 1-4). The base period of performance is one year, with four option years. (R4, tab 4 at 5-6).

2. The contract incorporates FAR 52.222-6, CONSTRUCTION WAGE RATE REQUIREMENTS (AUGUST 2018), subparagraph (b)(1), that requires "laborers and mechanics employed or working upon the site of the work will be paid unconditionally. . . at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof (R4, tab 4 at 14). Attached to Contract No. 0002 was Schedule of Wage Rates No. FL160029, August 5, 2016 (R4, tab 4 at 33).

3. FAR 22.404-12, LABOR STANDARDS FOR CONTRACTS CONTAINING CONSTRUCTION REQUIREMENTS AND OPTION PROVISIONS THAT EXTEND THE TERM OF THE CONTRACT (MAY 2014), includes[10]:

> (a) Each time the contracting officer exercises an option to extend the term of a contract for construction, or a contract that includes substantial and segregable construction work,

[10] FAR 22.404-12 is not a FAR Part 52 clause and is not specifically incorporated into the contract, thus no cite to the record.

the contracting officer *must* modify the contract to incorporate the most current wage determination.

. . . .

(c) The contracting officer *must* include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:

(1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer *must* not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(2) The contracting officer may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of option exercise, the contracting officer must incorporate a new wage determination into the contract, and must apply the specific pricing method to calculate the contract price adjustment. An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book *(e.g.*, the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), which is multiplied in the contract by a factor proposed by the contractor (*e.g.*, .95 or 1.1). At option exercise, the contracting officer incorporates the pricing data from the latest annual edition of the unit pricing book, multiplied by the factor agreed to in the basic contract. The contracting officer must not further adjust the contract price as a result of the incorporation of the new or revised wage determination.

> (3) The contracting officer may provide for a contract price adjustment based solely on a percentage rate determined by the contracting officer using a published economic indicator incorporated into the solicitation and resulting contract. At the exercise of each option to extend the term of the contract, the contracting officer will apply the percentage rate, based on the economic indicator, to the portion of the contract price or contract unit price designated in the contract clause as labor costs subject to the provisions of the Construction Wage Rate Requirements statute. The contracting officer must insert 50 percent as the estimated portion of the contract price that is labor unless the contracting officer determines, prior to issuance of the solicitation, that a different percentage is more appropriate for a particular contract or requirement. This percentage adjustment to the designated labor costs must be the only adjustment made to cover increases in wages and/or benefits resulting from the incorporation of a new or revised wage determination at the exercise of the option.
>
> (4) The contracting officer may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract. Generally, this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Labor Standards statute and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.

(Emphasis added). I refer to FAR 22.404-12(c)(1) as the "none" method, (c)(2) as the "separately specified pricing" method, (c)(3) as the "percentage" method and (c)(4) as the "actual" method. FAR 22.407.

4. FAR 22.407 Solicitation Provision and Contract clauses, includes:

> (e) Insert the clause at 52.222-30, Construction Wage Rate Requirements-Price Adjustment (None or Separately

Specified Pricing Method), in solicitations and contracts if the contract is expected to be-

(1) A fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404-12(c)(1) or (2); or

(2) A cost-reimbursable type contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract.

(f) Insert the clause at 52.222-31, Construction Wage Rate Requirements-Price Adjustment (Percentage Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate contract price adjustment method is the method at 22.404-12(c)(3).

(g) Insert the clause at 52.222-32, Construction Wage Rate Requirements-Price Adjustment (Actual Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the contracting officer may extend the term of the contract, and the contracting officer determines the most appropriate method to establish contract price is the method at 22.404-12(c)(4).

5. Contract No. 0002 incorporates FAR 52.222-30 Construction Wage Rate Requirements-Price Adjustment (None or Separately Specified Method) that reads:

(a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour Division, U.S. Department of Labor, that is

effective for an option to extend the term of the contract, will apply to that option period.

(b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of-

(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or

(3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Construction Wage Rate Requirements statute.

(R4, tab 4 at 14). FAR 52.222-30 implements both the "none" and "separately specified pricing" methods, FAR 22.404-12(c)(1) &(c)(2). Surprisingly there is no mention of the "separately specified pricing" method in FAR 52.222-30.

6. FAR 52.222-31 implements the "percentage" method:

(b) The Contracting Officer will adjust the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute to provide for an increase in wages and fringe benefits at the exercise of each option to extend the term of the contract in accordance with the following procedures."

(1) The Contracting Officer has determined that the portion of the contract price or contract unit price(s) containing labor costs subject to the Construction Wage Rate Requirements statute is _____ *[Contracting Officer insert percentage rate]* percent.

(2) The Contracting Officer will increase the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute by the percentage rate published in _____ *[Contracting Officer insert publication]*.

52.222-31(b)

7. FAR 22.404-12(c)(3), and FAR 52.222-32 implement the "actual" method:

> (c) The Contracting Officer will adjust the contract price or contract unit price labor rates to reflect the Contractor's actual increase or decrease in wages and fringe benefits to the extent that the increase is made to comply with, or the decrease is voluntarily made by the Contractor as a result of—

8. The second,[11] third and fourth methods provide for an increase in contract price when an option is exercised to compensate the contractor for the increase in costs caused by the inclusion of a new wage determination increasing wages, the first "none" method does not. The only protection available to a bidder when the "none" method is selected by the contracting officer is setting option prices to anticipate increased wages before award.

9. On 8 September 2017, the Department of Labor issued Wage Determination FL170262, adjusting the hourly prevailing wage for brush, roller, and spray painters to $16.55, representing $14.54 in wages and $2.01 in fringe benefits. (R4, tab 7 at 5) On September 14, 2017, while unilaterally modifying the contract to exercise Option Year 1, the AF incorporated Wage Determination FL170262. (R4, tab 7)

10. On October 11, 2017, GP filed with the AF a certified claim for an equitable adjustment in the amount of $120,000, representing the additional costs it would incur as a result of the prevailing wage adjustment. (R4, tab 8 at 1) GP stated, "[t]here was no opportunity to negotiate an increase in the event of an increase in the wage determination" (*id.* at 2).

11. On October 23, 2017 the AF issued a final decision, relying on FAR 51.222-30, denying the claim:

> Contract FA4417-16-D-0002 was awarded on September 26, 2016. The requirement was set aside for 8(a) competitive proposals. The contract is a firm-fixed price IDIQ contract with a base and four option years. The contract contains a

[11] While FAR 52.222-31 and 32 provide instructions on how the increase for the "percentage method" and "actual method" is calculated. FAR 52.222-30 which implements both the "none" and "separately specified pricing" methods provides no instructions on the "separately specified pricing" method. We see no obvious explanation for this omission.

> pre-priced schedule for the base year and each option year. The contractor was given the opportunity to include pricing for wage rate increases in their proposal.
>
> . . . .
>
> As a result of FAR 52.222-30 being incorporated into the solicitation and resulting contract, no adjustment in contract price will be made. The clause is very specific in stating that no adjustment in contract price to cover any increases or decreases in wages and benefits will be made as a result of incorporation of the wage determination applicable to the exercise of the option to extend the term of the contract. This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals.

(R4, tab 9) On November 20, 2017, GP appealed the final decision to the Board (R4, tab 10) and the appeal was docketed as ASBCA No. 61434 on November 24, 2017.

DECISION

Positions of the Parties

GP relies on three arguments. First, GP states there was nothing in the solicitation or contract warning GP that its only ability to recover for an increased wage determination was by adjusting its option bid prices upward before award. (App. reply br. at 2) It is undisputed that based on FAR 52.222-30, GP was not allowed an adjustment upon option exercise and incorporation of a new wage determination that increased GP labor costs. (App. amended br. at 1) According to GP, the inclusion of FAR 52.222-30 in the contract "does not sufficiently notify the contractor of the mandate in FAR 22.404-12(c)(1) that the contracting officer must not further adjust the contract price as a result of the incorporation of a new or revised wage determination." (App. amended br. at 11) GP argues that it was entitled to a clear warning pointing out that its only ability to recover for increased labor costs was to adjust its pre-award option bids upward to account for the possibility of an increase in wages at option exercise. (*id.*) Second, GP argues that the conflicting language of FAR 52.222-30 and FAR 22.404-12 create ambiguity that should be decided in GP's favor. (App. amended br. at 12) Finally, the Contract was for a total potential term of up to 5 years. (Finding 1) FAR 22.404-2(c)(1) includes, "Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years." (App. reply br. at 5-6, FAR 22.404-12(c)(1)) GP argues that, based on the 3 year language in FAR 22.404-2(c)(1), the CO should not have selected the "none" option.

For its part, the AF argues it complied with the requirements associated with FAR 22.404-12(c)(1). The Solicitation incorporated the mandatory clause at FAR 52.222-30, warning that no price adjustment would be provided. (Gov't br. at 2) Accordingly, by virtue of FAR 52.222-30 alone, offerors[12] were provided the opportunity to propose separate prices for each option period. The AF also points out that offerors were required to complete the Line Item List, proposing separate unit prices and line item prices for the base period and each option period. The Line Item List provides each service that may be ordered and the estimated quantity to be ordered. (Gov't br. at 5) The AF concludes by stating that it satisfied the requirements of FAR 22.404-12(c)(1) and it was not required to highlight a contract clause appellant should have read. *See Systems & Computer Information, Inc.*, 78- 1 BCA ¶ 12,946. (Gov't br. at 5-7)

GP May Challenge the AF's Adherence to FAR 22.404-12(c)

As a preliminary matter I must determine if GP has a cause of action to challenge the AF's adherence with FAR 22.404-12. In this regard I follow the guidance of the Court of Appeals for the Federal Circuit in *Freightliner Corp. v. Caldera*, 225 F.3d 1361 (Fed. Cir. 2000):

> In order for a private contractor to bring suit against the Government for violation of a regulation, that regulation must exist for the benefit of the private contractor. *See Cessna*, 126 F.3d at 1451; *Rough Diamond Co. v. United States*, 173 Ct. Cl. 15, 351 F.2d 636, 640-42 (Ct. Cl. 1965). If, however, the regulation exists for the benefit of the Government, then the private contractor does not have a cause of action against the Government in the event that a contracting officer fails to comply with the regulation. *See Cessna*, 126 F.3d at 1451-52; *Rough Diamond*, 351 F.2d at 642.

(*Id.* at 1365) FAR 22.404-12(c) starts with:

> The contracting officer must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government, *to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract*:

[12] We use "offeror" synonymously with bidder and proposer.

(emphasis added) (Finding 3). What follows are four "Methods" to provide relief to the contractor when a new wage determination is incorporated into their contract at an option exercise as follows:

> (1) The "none" method. The contracting officer, before award, may allow the offerors to increase the price of each option year to account for the risk of a new wage determination increasing the wage rate being incorporated into the contract upon option exercise.
>
> (2) The "separately specified pricing" method. The contracting officer may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract.
>
> (3) The "percentage" method. The contracting officer may provide for a contract price adjustment based solely on a percentage rate determined by the contracting officer using a published economic indicator incorporated into the solicitation and resulting contract.
>
> (4) The "actual" method. The contracting officer may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract.

(Finding 3, 5-7) It is clear that each of these four "methods" benefits contractors by allowing them to account for the risk of mandatory inclusion of new wage determinations increasing wages at each option exercise. Therefore, GP has a cause of action to challenge the AF's compliance with FAR 22.404-12 and may pursue its defense.

FAR 22.404-12(c)(1) is Not Limited to Contracts Lasting Three Years

FAR 22.404-12(c)(1) ends with the following language:

> (1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period. The contracting officer *must* not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. *Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.*

(Finding 3) (Emphasis added) GP argues that because its contract had a base year and four option years for a total of five years it was improper for the AF to select Method (1). (App. reply br. at 5-6) I disagree. The word "Generally" cannot reasonably be interpreted as mandatory language imposing a strict limit on the use of 22.404-12(c)(1) to contracts lasting no more than three years. It may well have been "inappropriate" for the AF to select Method (1) for a five year contract, but it was within the CO's discretion. I would hold GP's interpretation is unreasonable.

There is No Ambiguity Between FAR 52.222-30 and FAR 22.404-12

GP argues:

> At a minimum, the provisions of FAR 52.222-30 and FAR 22.404-12 create an ambiguity *within the Contract* with respect to how increased costs resulting from the incorporation of a new wage determination during the option years will be handled.

(Emphasis added) (App. br. at 14) The flaw in this argument is readily seen in GP's own language. FAR 22.404-12 is not "within the Contract." (*Id.*) I deal with both FAR Part 52 and Part 22 in this decision. FAR Part 52 contains clauses that may be incorporated into contracts, the other FAR Parts do not. FAR 22.404-12 provides policy guidance to procurement officials to include which FAR Part 52 clauses should be incorporated into contracts.

The AF cites well-known contract interpretation case precedence:

> The contract terms are interpreted and read as a whole, giving reasonable meaning to all of its parts, and without leaving 'a portion of the contract useless, inexplicable, void, or superfluous.' *Certified Construction Company of Kentucky, LLC*, 15-1 BCA ¶ 36,068 at 176,133.

(Gov't br. at 11) Since FAR 22.404-12 is not incorporated into the "whole" of the contract this contract interpretation law cannot apply. While ambiguities may exist between clauses or language within a contract, I know of no precedent finding an ambiguity between contract clauses within a contract and FAR policy guidance outside of a contract as is the case with FAR 22.404-12 and FAR 52.222-30. There is no ambiguity.

Line Item List

I disagree with the AF's argument that the fact offerors were required to break out prices by line item affords GP the clear warning it believes it is entitled to. I see nothing in line item pricing that informs offerors that the only way to protect themselves from wage determination price increases at option exercise was to increase option prices before award.

Other than FAR 522.222-30(b), the AF did not Inform GP of its Rights and Risks Under FAR 22.404-12(c)(1)

It is undisputed that except for FAR 52.222-30(b), the AF did not inform GP in the solicitation, or otherwise, that its only protection against increases in wages at option exercise was to adjust its bid prices upward to cover the risk. (App. br. at 2- 6) The AF does not point to any evidence, other than the language of FAR 52.222-30(b), providing such notice to GP. (Finding 10) I do not consider FAR 52 222-30(b) to provide such notice.

FAR 52.222-30(b) is Unambiguous

The contract incorporates FAR 52.222-30(b) that read in part:

> (b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of-
>
> (1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(Finding 5) I agree with the AF that FAR 52.222-30(b) is unambiguous for our purposes[13]. It clearly states that the contracting officer "will make no adjustment in contract price" for increases in wages resulting from incorporation of DOL wage determinations at option exercise. However, this case involves other FAR policy provisions that must be complied with.

.

The Obligation to Read the Contract Does not Extend to FAR Policy

The AF argues:

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[13] FAR 22.407(e) directs that FAR 52.222-30 address both the None or Separately Specified Pricing Method. (Finding 4) It says nothing about the Separately Specified Pricing Method, as do FAR 52.222-31 & 32 do for their pricing methods. (Finding 4, 5) This is another flaw in FAR 52.222-30.

> By incorporating the mandatory clause at FAR 52.222-30 and providing "offerors the opportunity to bid or propose separate prices for each option year," Respondent met the requirements of FAR 22.404-12(c)(1). Respondent was not required to highlight a contract clause Appellant should have read.

(Gov't br. at 2, 17) I agree that the AF "was not required to highlight a contract clause Appellant should have read." However, this argument does not apply to FAR 22.404-12(a) & (c) and FAR 22.407 that are not contract clauses and not within the scope of the above quote. They set forth FAR policy, and are not "contract clause[s] that Appellant should have read." I would not impose upon offerors an obligation to review FAR's numerous "Parts" to ferret out and interpret FAR policy guidance such as FAR 22.404-12 and FAR 22.407 that are not contract clauses "within the contract."

Interpreting the First Sentence in FAR 22.404-12(c)(1)

FAR 22.404-12(c)(1), Method (1), selected by the AF for Contract 0002 reads:

> *(1) The contracting officer may provide the offerors the opportunity to bid or propose separate prices for each option period.* The contracting officer *must* not *further adjust* the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

(Finding 3) (Emphasis added) I first deal with the perplexing use of the word "may" in the first sentence. Taken literally it means "may" or "may not." The "may not" interpretation seemingly would allow the CO to prohibit offerors from pricing option years to account for wage determination risk. This is an absurd interpretation because it is totally at odds with the intent expressed in FAR 22.404-12(c) to protect offerors. Offerors have the unilateral right to price their offers any way they want. Contracts should be interpreted so as to avoid such absurd results. *Ash Britt, Inc.*, ASBCA Nos. 55613, 55614, 09-1 BCA ¶ 34,086 at 168,536 ("Contract construction should avoid absurd results." (Citation omitted)); *Applied Companies*, ASBCA No. 50593, 05-2 BCA ¶ 32,986 at 163,478 ("Construction of contract terms should avoid absurd and whimsical results." (Citation omitted)); *C.S. McCrossan Construction, Inc.*, ASBCA No. 49647, 00-1 BCA ¶ 30,661 at 151,381 ("A contract should be construed in a reasonable manner to 'avoid absurd and whimsical results.'" (Citation omitted)) To avoid the absurd result I

will not interpret the word "may" in FAR 22.404-12(c)(1) literally. The word "may" without "may not" excludes any interpretation limiting an offeror's right to price its offer. Therefore, the most reasonable interpretation under these circumstances is to interpret "may" to mean "will." Otherwise, the first sentence might be unenforceably vague. *Metro Machine dba General Dynamics NASSCO Norfolk*, ASBCA No. 61817, 20-1 BCA ¶ 37633 at 182,713. Interpreting "may" to mean "will" resolves this potential "can of worms" and compliments our conclusion that FAR 22.404-12(c) requires the CO to provide notice to offerors of how they can protect themselves from the risks associated with the "none" Method (1). This interpretation deals with an ambiguity, but does not substantially contribute to the interpretation discussed below that I rely upon to reach my suggested decision.

FAR 22.404-12(c) is Unambiguous

Next I consider the language of FAR 22.404-12(c):

> (c) The contracting officer *must* include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of the Government*, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:*

(Emphasis added) The CO "must" afford the offerors and opportunity to "provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract." Not-with-standing FAR 22.404(c)(1)'s interpretation, FAR 22.404(c) is clear and unambiguous and requires notice to bidders of how to mitigate loss from Method (1).

FAR 52.222-30 Does Not Satisfy the Obligation Imposed by FAR 2.404-12(c)

The AF argues that the "no adjustment" language in FAR 52.222-30 provides notice and opportunity to adjust option prices to protect against an increase in the wage determination. The relevant language in FAR 52.222-30 is:

> (b) The Contracting Officer *will make no adjustment* in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of-(1) Incorporation of the Department of Labor's wage determination applicable at the exercise of the option to extend the term of the contract;

(Finding 4). I disagree that this language provides sufficient notice that "The contracting officer may[14] provide the offerors the opportunity to bid or propose separate prices for each option period." This language says nothing about the greater risk imposed by Method (1) or explains when and how offerors may make adjustments to account for this risk. Methods (2), (3), and (4) detailed in FAR 22.404-12(c) and implementing provisions FAR 52.222-31 & -32 explain how the option price will be adjusted, FAR 52.222-30, Method (1), does not. (Findings 3, 4-7) As stated above, FAR 22.404-12(c) requires that a warning about the risk of a new wage determination increasing costs and an opportunity for offerors to address this risk by pricing the options be included in the implementing Part 52 clause. This is particularly important because under "none" Method (1) if wages increase there is no ability to recover increased costs after award as there is with the other three methods. The prohibition against post award option price increase in FAR 52.222-30 is extremely harsh and FAR 22.404-12(c) demands that it be made clear to offerors, in the solicitation, that the only opportunity they have to mitigate the risk is by pricing the option years before award. The AF's interpretation of FAR 52.222-30 is unreasonable and I would not enforce it.

[14] We interpreted "may" to mean "will" above.

CONCLUSION

In accordance with the above I would sustain GP's appeal.

Dated: September 16, 2021

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 61434, Appeal of Gulf Pacific Contracting, LLC, rendered in conformance with the Board's Charter.

Dated: September 16, 2021

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Carothers Construction, Inc.	)	ASBCA No. 62204
	)	
Under Contract No. W91278-12-D-0037	)	

APPEARANCE FOR THE APPELLANT: Ralph B. Germany, Jr., Esq.
Bradley Arant Boult Cummings LLP
Jackson, MS

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Kathleen P. Miller, Esq.
David C. Brasfield, Jr., Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Mobile

OPINION BY ADMINISTRATIVE JUDGE CLARKE

This appeal is submitted pursuant to Board Rule 11. The dispute involves a disagreement over whether the Air Force (AF)[1] specified a proprietary 2 1/2″ thick roof deck product and, if so, was Carothers Construction, Inc. (Carothers) entitled to substitute a 2″ thick roof deck as an equal pursuant to Federal Acquisition Regulation (FAR) 52.236-5, MATERIAL AND WORKMANSHIP. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA) 41 U.S.C. §§ 7101-7109. We sustain the appeal.

FINDINGS OF FACT

1. On December 15, 2015, the Air Force (AF) solicited for the phased replacement of the Maxwell Elementary/Middle School at Maxwell Air Force Base, Alabama by Solicitation No. W91278-16-URGC-0001 (R4, tab 5 at 3).

2. The solicitation included several relevant clauses: FAR 52.243-4, CHANGES (JUN 2007)[2], FAR 52.236-21, SPECIFICATIONS AND DRAWINGS

[1] The Corps of Engineers was also involved, but we use Air Force (AF) to avoid confusion.

[2] We were unable to find FAR 52.243-4 Changes in the contract but, if it is missing, it is included by operation of law. *Tri-County Contractors, Inc.*, ASBCA No. 58167, 15-1 BCA ¶ 36,017 at 175,916 n 2 ("Despite the absence of the

OF CONSTRUCTION (FEB 1997), and FAR 52.236-5, MATERIAL AND WORKMANSHIP (APR 1984) (R4, tab 4 at 94-95). FAR 52.236-5, MATERIAL AND WORKMANSHIP, states in part:

> (a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, *in the judgment of the Contracting Officer*, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(Emphasis added)

3. Phase 2A of the Contract included construction of a new addition to the existing Maxwell Elementary School. This new addition included a performance area and ICC500 Storm Shelter that both feature the acoustical deck roof product. The solicitation, Sheet S-002[3], STEEL DECK NOTES, ¶ 2. MATERIALS, (WRA) 2-1/2″, 20 GA ACOUSTICAL DECK (SR-0.70), required providing a 2 1/2″ thick acoustical roof deck at various locations in Phase 2A. (R4, tab 8 at 1[4], tab 22 at 2 ¶ 5) There were no markings that would indicate the 2 1/2″ deck was proprietary.

4. In a February 12, 2016 email and letter to Zyscovich Architects,[5] Mr. Sean Smith, New Millennium Building Systems, submitted its request to substitute

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required FAR 52.243-4, CHANGES (JUN 2007) clause from this construction contract (finding 7), such clause may be deemed included pursuant to *G.L. Christian & Associates* v. *United States*, 312 F.2d 418, 426 (Ct. C1.), *cert. denied*, 375 U.S. 954 (1963)").

[3] Drawing sheet S-002 General Notes was developed by "Transystems" but "ZYSCOVICH Architects" was printed on the right side of S-002 (R4, tab 8 at 1). We do not know the relationship between Transystems and Zyscovich.

[4] Drawing S-002 was "issued" on October 2015 pursuant to Solicitation No. W91278-16-URGC-0001 (R4, tab 8 at 1).

[5] Zyscovich Architects name appears on the solicitation drawings (R4, tab 8 at 1) and we infer that Zyscovich is the original architect of record.

its deck product Versa-Dek[6] "as a suitable alternate to the specified Toris A (Epic Metals Corporation)" called out in the solicitation structural drawings.[7] Attached to the letter was "side-by-side metal deck product comparisons." (R4, tab 1 at 10-13) In a January 11, 2019 email from Mr. Smith to Mr. Boggs, Carothers' Senior Project Manager, Mr. Smith stated that he had submitted the data to Zyscovich almost three years ago (*id*. at 10). There is no indication in the record that Zyscovich responded to the February 12, 2016 email.

5. The declaration of Mr. Walter Boggs is in the record (app. supp. R4, tab 3). Mr. Boggs was Senior Project Manager for Carothers from the time of bid through February 2020 (*id*. at 1 ¶ 4). He testified that he investigated and found that only one manufacturer (Epic Metals) made such a roof deck (the Toris A roof deck product) that was 2 1/2″ thick (*id*. at 3 ¶ 10).

6. Mr. Boggs also testified:

> On behalf of Carothers, I also investigated whether the Versa-Deck product was an equal to the Toris/Epic Metals product. In that investigation I obtained the emails and letter from Sean Smith with New Millennium Building Systems included in Tab 1 of the Rule 4 file at the pages bates-labeled 1000010-16. As shown by that documentation, Mr. Smith/New Millennium documented how the Versa-Deck product was an equal to the Toris/Epic Metals product. Note this documentation shows it was submitted to the United States Army Corps of Engineers's ("USACE") designer of record (Zyscovich Architects) (the "DOR") prior to bids for the Project, with the expectation that it would be used for bidding on this Project. Carothers provided this information to the USACE as part of Carothers's effort to get approval to use the Versa-Deck product and to recover for not being allowed to use the Versa-Deck product.

(App. supp. R4, tab 3 at 3 ¶ 11)

7. Carothers bid the Contract expecting to use Harrell's Metal Works, Inc. ("Harrell") to supply the roof deck system. Harrell's quote and Carothers' bid for the

[6] The product was called both "Versa-Dek" and "Versa-Deck" in different correspondence. We do not perceive a difference.

[7] Structural drawings are identified by an "S" such as S-002 relevant in this appeal.

Contract were based on using the New Millennium 2″ Versa-Deck LS ES Acoustical roof system. (App. supp. R4, tab 3 at 2 ¶ 7)

8. The Corps of Engineers (COE) Mobile (Alabama) District awarded Task Order No. W91278-12-D-0037-0003 to Carothers on March 28, 2017, in the amount of $39,010,686 (R4, tab 9 at 1).

9. The record includes the Declaration of Mr. Timothy R. Posey, Administrative Contracting Officer (ACO), for this contract (R4, tab 22 at 1). ACO Posey states:

> The U.S. Army Corps of Engineers, Norfolk District entered contract W91236-14-D-0046-0007 with Zyscovich, Inc. ("Zyscovich") on April 27, 2017, to obtain Engineering During Construction Design Services (the "EDC Contract") for the Maxwell Elementary/Middle School Project. The EDC Contract required Zyscovich to provide limited reviews of Carothers' submittal packages and Requests for Information ("RFI's"). The quantity of submittal and RFI reviews was detailed in the negotiated EDC Contract. Any variation in that quantity exclusive of design errors, omissions, or clarifications, would require modification to the EDC Contract by the Norfolk District Contracting Officer. The U.S. Army Corps of Engineers, Mobile District held no contractual authority on the EDC Contract. However, the Mobile District Field Office was responsible to determine which Contract submittals and RFI's would be reviewed by the EDC Contract. The Mobile District Field Office also provided input and analysis for the EDC Contract regarding errors, omissions, and clarifications.

(R4, tab 22 at 2 ¶ 6)

10. Following the award of Task Order No. W91278-12-D-0037-0003, the initial acoustical deck submittal was received by the government on November 7, 2017, under transmittal number 05 30 00-1 (R4, tab 19 at 1, tab 22 at 3 ¶ 8). The submittal contained technical and test information that was not discussed in the record. However, it included the following:

- New Millennium Building Systems drawing D3.1 showing a section of VERSA-DEK®LS ES ACOUSTICAL roof deck having an overall height of 2″.

There is a note in red ink stating, "Note: Refer to sheet S-002 'Steel Deck Notes' for deck height = 2 1/2″." (R4, tab 19 at 25)

- New Millennium New Millennium Building Systems data sheet SECTION PROPERTIES CALCULATIONS listing a 2″ deck height with a red ink annotation 2 1/2″ (*id*. at 30, 32).

- Sound Absorption Test Report for "20 Ga. Versa-Dek® 2.0 with 2″, 3# Insulation and mesh spacers" (*id.* at 34).

11. ACO Posey testified in his Declaration that the submittal was forwarded to the EDC Contractor, Zyscovich, Inc., for review. ACO Posey testified:

> The Contracting Officer's Representative and I reviewed the plans and acknowledged the notes regarding acoustical deck height, made by the EDC Contractor on the Shop Drawings. Contract Drawing S-0002 specifically requires that the acoustical roof deck be 2.5″ in height, while the Shop Drawings specifically call for the height to be 2″.

(R4, tab 22 at 3 ¶ 8)

12. On or about January 3, 2018, Carothers submitted Request for Information (RFI) 0113 asking for approval of 2″ Versa-Dek® LS ES Acoustical deck as a suitable alternative to the specified 2 1/2″ Toris A (Epic Metals Corporation) called out on the structural drawings (app. supp. R4, tab 3 at 31).

13. RFI 0113 was reviewed by Zyscovich Architects that responded on January 19, 2018, as follows:

> Question [RFI-0113]: We are seeking approval of our Versa-Dek® LS ES Acoustical as a suitable alternate to the specified Toris A (Epic Metals Corporation) called out in the Maxwell Elementary and Middle School project's structural drawings. Please find attached side by side metal deck product comparisons, product submittal information and a formal letter outlining what metal deck product we are seeking approval on. Versa-Dek® LS ES Acoustical meets and/or exceeds all load and acoustical value requirements.

> The drawings came back from approval with a stamp saying to re-submit for the Versa Dek. The drawings called for 2-1/2″ Epic deck.
>
> We need to get 2″ Versa Dek approved to move forward on the project without delays. New Millennium Building Systems does not make a 2-1/2″ deck. In fact, the only manufacture we can find that make 2-1/2″ deck is Epic Metals Corporation.
>
> Answer: Based on the loads and spans, a 2″ acoustical deck will not comply. Contractor may submit alternate decking structural and acoustical properties for a 2 1/2″ or possibly a 3″ acoustical deck for review and acceptance.

(App. supp. R4, tab 3 at 31)

14. ACO Posey testified in his Declaration as follows:

> The Contracting Officer's Representative forwarded RFI- 0113 to the EDC Contract for review, noting that the RFI was not associated with a design error, omission, or clarification. A response was returned to the Contracting Officer's Representative by the EDC Contractor disapproving use of the 2″ acoustical deck. No structural analysis was provided by the EDC Contractor, and it is unclear if the RFI was reviewed by their Structural Engineer Subcontractor.

(R4, tab 22 at 5 ¶ 11)

15. By email dated January 22, 2018, Mr. Arlyn Marheine, P.E. COE, sent Mr. Hunter Boggs the following:

> Hunter,
>
> The designer said that the 2″ does not meet the design criteria but that the 3″ might. If you wanted to submit that, then they could review it. Based on the side by side comparison that you provided though, it clearly shows that the Allowable Load on the 2″ decking is less than on the 2 1/2″ decking as well as having a lower acoustical rating on the un-shored spans. I have asked for additional

> clarification on why the 2″ deck doesn't meet the requirement, but as a variation request, it is really on Carothers to demonstrate that the alternate meets the requirements not the DOR to demonstrate that the alternate doesn't. Let me know if you have any questions. Thanks

(App. supp. R4, tab 3 at 50) By email dated January 23, 2018, Mr. Hunter Boggs sent Mr. Arlyn Marheine, P.E. COE, and ACO Posey the following:

> Arlyn,
>
> Please find the attached calculations for the 2″ versa deck. We just got off of the phone with New Millennium's engineer and he stated that the 2″ decking is more than capable of handling the specified loads on this project. Please have the DOR review and let's have a conference call with everyone to discuss after their review.

(App supp. R4, tab 3 at 49)

16. ACO Posey "urged" Carothers to submit the 2″ acoustical roof deck Shop Drawings as a variation to the contract (R4, tab 22 at 5 ¶ 12). Carothers disagreed and in a February 28, 2018, email wrote, "This is not a variation. The deck we proposed meets the spec. This is a huge cost issue, and we are being forced into something that we do not have in the contract. I do not understand why you will not allow the professionals to talk." (R4, tab 13 at 2) ACO Posey responded, "If the deck you are proposing is not 2.5″, then it is a variation. The plans are very clear." (R4, tab 13 at 1) On February 28, 2018, the COE Area Engineer, Mr. McLeod, got involved in this email exchange writing, "Our position is that we identified salient characteristics in the contract including deck thickness and expect them to meet all those requirements, and the only way we could except [sic] a change would be through a variation with a credit mod." (*Id*.)

17. During an owner's meeting on February 2, 2018, Carothers and the government discussed this roof deck issue. At that meeting it was agreed that Carothers would get a third-party structural engineer to review the issue of whether the Versa-Deck product should be accepted. (R4, tab 1 at 21-22; app. supp. R4, tab 3 at 5 ¶ 20).[8] Carothers then engaged LBYD Engineers, and in particular, Mr. Brad Harrison,

[8] The COE does not dispute the fact that the parties agreed that Carothers would hire a third-party structural engineer to evaluate Versa-Deck as an appropriate substitute for the required 2 1/2″ deck specified in the contract, but the COE insisted that the information be submitted as a variation. (COE reply br. at 12-13)

to conduct the structural engineering review (app. supp. R4, tab 3, at 5 ¶ 20, tab 2, at 2 ¶ 11). Mr. Harrison stated in his declaration, he has over 20 years structural design experience, including projects like this one and including roof systems like the one at issue here (app. supp. R4, tab 2 at 2 ¶ 10). Mr. Harrison was provided the same New Millennium Versa-Deck product data identified in the January 19, 2018, submission of RFI-0113 and the January 23, 2018 email with the manufacturer's calculations (app. supp. R4, tab 3 at 05 ¶ 20, tab 2 at 2 ¶ 12).

18. By letter dated February 15, 2018, LBYD, Inc. (Mr. Harrison) reported that based on its review, the 2″ Versa-Deck manufactured by New Millennium "meets or exceeds all of the span/load, and noise reduction requirements specified in the construction documents" and is an "acceptable substation [sic] for the specified deck in the design documents" (R4, tab 1 at 23). The record includes a declaration from Mr. Brad Harrison a licensed professional engineer who conducted the review for LBYD (app. supp. R4, tab 2 at 2). Mr. Harrison verified his calculations and confirmed that "the 2″ Versa-Deck LS ES Acoustical roof system as manufactured by New Millennium should have been considered an equal to the roof system product identified in the Contract documents for the Project"[9] (*id*. at 3-4 ¶¶ 13-15). On February 15, 2018, Carothers delivered that letter to the government (app. supp. R4, tab 2 at 3, 35, tab 2 at 3 ¶ 13, tab 3 at 5 ¶ 20; R4, tab 1 at 23). There is no evidence in the record that the government responded.

19. Carothers submitted a 2.5″ deck for approval in combined transmittal 053000-1.2/1.3 on March 12, 2018. The government returned the submittal to Carothers on March 29, 2018, with the remark "Approved as Noted" and Carothers then provided the 2 1/2″ deck, as specified in the drawings. (R4, tab 22 at 7)

20. On May 16, 2018, Mr. Chad McLeod, US Army CESAM, emailed Mr. Kyle Rogers, US Army CESAM, with copy furnished to ACO Posey, the following:

> Kyle,
>
> FYI, this will be coming your way. This is the situation where we unknowingly specified a material that apparently only one manufacturer could provide. See the e-mail below and the attached.

(R4, tab 17 at 1)

[9] The COE agrees with Mr. Harrison's credentials and does not dispute that this is Mr. Harrison's "opinion" (COE reply br. at 14-17).

21. On April 12, 2019, Carothers filed a certified claim for $319,699.21 via email with the contracting officer. Carothers stated that this $319,699.21 amount constitutes the direct and indirect costs incurred as a result of the disagreement regarding the thickness of the deck. This figure includes the field office overhead and a total of 46 days of alleged compensable time to be added to the contract. (R4, tab 1 at 1)

22. On June 6, 2019, Carothers and the government agreed to Modification No. 2W to the Contract (R4, tab 10 at 2). Modification No. 2W settles any issues or disputes related to time associated with any modifications issued prior to May 1, 2019.

23. On June 28, 2019, the Contracting Officer denied Carothers' claim of $319,699.21 and stated the following:

> The contract drawings plainly specified that a 2 1/2″ deck was required. In your claim you argued that the proposed Millennium 2″ deck met all of the specifications of the contract and was a suitable alternative for the contract indicated 2 1/2″ deck. However, this was not the case. The 2″ deck did not meet the specifications and contract requirements because it is a settled principle of contract law that the specifications and drawings are to be read together in concert. In this case, Section 05 30 00 "Steel Decks", Paragraph 2.3.4 "Composite Deck" states "Fabricate deck used as the tension reinforcing in composite deck of the steel design thickness required by the design drawings." (Tab H) The design drawings clearly indicate and state that the deck is to be 2 1/2″. As a result, Carothers' proposed 2″ New Millennium deck did not meet the drawing and specification requirement. The Government was entitled to the benefit of the deck that it had specified in the contract and should not have to pay Carothers additional compensation for an item which was clearly outlined and required by the contract**.**

(R4, tab 2 at 3-4)

24. On September 18, 2019, in light of Modification No. 2W resolving a large portion of the original claim amount, Carothers submitted a Request for Equitable Adjustment (REA) containing the same facts as its April 12, 2019, claim but in the amount of $69,580.11. The Contracting Officer, citing his original denial letter of June 28, 2019, denied this REA via email on September 19, 2019. (R4, tab 3)

25. Carothers filed this appeal (app. supp. R4, tab 3 at 6 ¶ 26). The Board docketed the appeal as ASBCA No. 62204

DECISION

Position of the Parties

Carothers contends that the AF's specification requiring 2 1/2″ thick roof deck was proprietary and that FAR 52.236-5, Material and Workmanship, entitled it to submit a 2″ thick "Versa-Dek" roof deck product that was equal in all important performance requirements. The AF would not allow substitution and Carothers provided the 2 1/2″ deck at additional cost which Carothers asks to be repaid.

The AF contends that it is entitled to strict compliance with its specifications and that it advised Carothers to submit the 2″ deck as a variation. Carothers refused to submit the variation. The AF maintains that it would only consider the 2″ deck as a variation. It argues Carothers is not entitled to compensation for providing the 2 1/2″ thick deck because it was specified in the solicitation.

The 2 1/2" Deck Specification Was Not "Brand Name or Equal"

An argument not asserted in the briefs that we feel, for the sake of completeness, we should deal with. Late in the game, February 2018, the COE Area Engineer, Mr. McLeod, took the position, for the first time in the record, that the 2 1/2″ deck thickness was a "salient characteristic." (Finding 16) "Salient characteristic" is a "term of art" in the government contracting world that is associated with brand name or equal specifications:

> When the Government uses a brand name or equal specification, it must identify the salient characteristics of the brand name product and use those characteristics in evaluating the equivalency of proposed substitutes. *See KEMRON Environmental Services Corp.*, ASBCA No. 51536, 00-1 BCA ¶ 30,664, 18 November 1999, slip op. at 7. "While the Government may reject a substitute if the salient characteristics are not met, . . . bidders should not have to guess at the essential qualities and the Government cannot reject an item that is functionally equivalent to the brand name product." *Id.*

Southern Systems, Inc., ASBCA Nos. 43797, 43798, 00-1 BCA ¶ 30,762 at 151,924. Mr. McLeod's 2018 characterization of the 2 1/2″ deck thickness as a "salient characteristic" to justify denying equivalency and demanding that Carothers submit the

2″ deck as a "variation with a credit mod" raises the issue of brand or equal (finding 16). It's too late to rely on Brand Name or Equal and "salient characteristic" to deny Carothers' claim because the brand name or equal specification and listing of salient characteristics was not included in the solicitation. There was no notice to bidders and no evidence of AF intent before award to identify the 2 1/2″ as a brand name or equal product.

Carothers' Burden of Proof

We discussed the elements of proof facing Carothers in *Classic Site Solutions, Inc.*, ASBCA Nos. 58376, 58573, 14-1 BCA ¶ 35,647:

> (1) the specifications are proprietary, (2) appellant submitted a substitute product along with sufficient information for the contracting officer to make an evaluation of the substitute, and (3) the proposed substitute meets the standard of quality represented by the specifications. *North American*, 96-2 BCA ¶ 28,496 at 142,299; *Blount Brothers Corp.*, ASBCA No. 31202, 88-3 BCA ¶ 20,878 at 105,575.

Classic Site Solutions, 14-1 BCA ¶ 35,647 at 174,553.

The 2 1/2" Deck Specification was Proprietary

Mr. Boggs, Carothers Senior Project Manager, testified that after investigation he found that only one vendor, Epic Metals, manufactured a 2 1/2″ roof deck system (finding 5). When an item has only one source, it is the very definition of proprietary:

> A specification is proprietary when it describes an item that can only be obtained from one source, even when a brand name is not expressly designated.[10] *See C&D Construction, Inc.*, 97-2 BCA ¶ 29,283 at 145,697; *North American Construction Corp.*, 96-2 BCA at 142,298; *W.M. Schlosser Company, Inc.*, ASBCA No. 44778, 96-2 BCA

[10] We are aware that in *C Construction Co., Inc.*, ASBCA No. 41706, 94-1 BCA ¶ 26,263 we held that "The right of such substitution is limited by the [Material and Workmanship] clause to cases where a product is specified by trade name, make or catalog number" but we also held that a product could be "otherwise restricted to a single manufacturer's product." *Id*. at 130,616. In view of *Southern Systems*, we distinguish *C Construction* interpreting "otherwise restricted" to allow sole source determinations absent markings.

> ¶ 28,297 at 141,289; *Central Mechanical, Inc.*, ASBCA Nos. 29360, 29514, 84-3 BCA ¶ 17,674 at 88,157. "When the evidence is that other manufacturers can meet the specification it, by definition, could not be proprietary or sole source." *J.R. Youngdale Construction Co., Inc.*, ASBCA No. 27793, 88-3 BCA ¶ 21,009 at 106,118.

Southern Systems, 00-1 BCA ¶ 30,762 at 151,923.

When an appellant makes its case that a specification is proprietary, the burden shifts to the government to prove otherwise:

> We conclude that appellant made a prima facie showing that the tilt control requirement was proprietary. It was then incumbent on the Government to come forward with evidence showing that there was another source manufacturing tilt control mechanisms meeting the performance requirements of the contract. The Government has not met this burden. Accordingly, we find that the tilt control mechanism was proprietary and that appellant had a right to submit a substitute control system for evaluation.

North American Construction Corp., ASBCA No. 47941, 96-2 BCA ¶ 28,496 at 142,298-99.

Carothers has made a prima facie case that the 2 1/2″ deck is proprietary. It is now incumbent on the AF to prove there is another source for the 2 1/2″ deck. The AF provided no evidence to rebut Mr. Boggs' conclusion and there is nothing in the record indicating that the AF even tried to locate a second source for the 2 1/2″ roof deck or that challenged the quality of the 2″ deck. Indeed, the evidence before us is that the COE, through Mr. McLeod, recognized that the roofing material was, in fact, proprietary (finding 20). The AF failed to meet its burden in this regard. We hold that the AF's 2 1/2″ specification was proprietary even though it was not marked as such.

Carothers Has a Right to Submit an Equal Substitute

Having found that the 2 1/2″ deck product was proprietary, FAR 52.236-5, Material and Workmanship, allows Carothers to submit an equal substitute. The general rule of strict compliance with the contract specifications does not apply simultaneously with the Material and Workmanship clause – it is one or the other. We

discussed FAR 52.236-5, Material and Workmanship in *Classic Site Solutions*, 14-1 BCA ¶ 35,647:

> Inclusion of the Material and Workmanship clause qualifies the general rule that, after award, the Government is entitled to strict compliance with every technical requirement of the contract's specifications. The clause provides a contractor the right to submit a substitute product for a proprietary item called for in the contract's specification absent a warning that only the proprietary item will be accepted. *North American Construction Corp.*, ASBCA No. 47941, 96-2 BCA ¶ 28,496 at 142,298. Use of the word "shall" is not a sufficient warning. *Minority Enterprises, Inc.*, ASBCA No. 45549 *et al.*, 95-1 BCA ¶ 27,461 at 136,827. Language such as, "*NOTWITHSTANDING* any other provision of the contract, no other product will be acceptable" is sufficient warning to preclude substitution. *Maron Construction Co.*, ASBCA No. 53933, 05-1 BCA ¶ 32,904 at 163,026. The Government did not include such a warning in paragraph 2.3 MIX DESIGN.

Classic Site Solutions, 14-1 BCA ¶ 35,647 at 174,552. The solicitation did not provide any warning to Carothers that the AF would not accept substitutions of equivalent products for the 2 1/2″ deck.

As can be seen from the material and workmanship clause (finding 3) and elements of proof quoted above, the determination of "equality" in performance and quality is assigned to the Contracting Officer but it has limits:

> Since the determination of equality is expressly assigned by the Material and Workmanship clause to "the judgment of the contracting officer," Gibbs must show that the contracting officer's rejection of the proposed equal products was an unreasonable exercise of judgment. *See Trataros Construction Co., Inc*., ASBCA No. 42845, 94-1 BCA ¶ 26,592 at 132,322; *Bruce-Andersen Company, Inc.*, ASBCA No. 29411, 88-3 BCA ¶ 21,135 at 106,714-715.

Gibbs Construction Company, ASBCA No. 44141, 95-1 BCA ¶ 27,368 at 136,370. Carothers must now prove that the AF's refusal to consider the equivalency of the 2″ deck was "an unreasonable exercise of judgment."

Carothers Made a Prima Facie Case for Equivalency

Carothers bears the burden of proof of equivalency:

> The contractor bears the burden of proving that its substitute is equal in quality and performance to the item specified in the contract.

North American, 96-2 BCA ¶ 28,496 at 142,299 (citations omitted).

Evidence that the 2″ deck product was equivalent to the 2 1/2″ deck product was submitted five times to the AF to no avail. First, was on February 12, 2016, before the March 28, 2017, award of Task Order W91278-12-D-0037-0003, (finding 8) when New Millennium Building Systems, manufacturer of the 2″ deck, wrote to Zyscovich Architects, the AF's Designer of Record (DOR), requesting approval to submit the substitute 2″ deck. Attached to the letter was a side-by-side metal deck data comparisons. (Finding 4) Carothers' bid the Contract based on using the New Millennium 2″ Versa-Deck LS ES Acoustical roof system (finding 7). Mr. Boggs testified in his declaration that he reviewed documents submitted by Millennium demonstrating that the two decks were equivalent (finding 6). There is no evidence in the record of a response from Zyscovich Architects.[11] We are not aware of any evidence that Carothers or the AF knew that there was only one producer of the 2 1/2″ deck before award.[12]

The initial acoustical deck submittal was received by the AF on November 7, 2017. The submittal contained technical and test information. (Finding 10) The submittal was forwarded to the EDC Contractor, Zyscovich, Inc., for review (finding 11). Zyscovich noted the fact that the specification required a 2 1/2″ deck but that a 2″ deck was submitted (finding 11). There is nothing in the record indicating Zyscovich investigated equivalency in response to this submittal.

On or about January 3, 2018, Carothers submitted Request for Information (RFI) 0113 asking for approval of 2″ Versa-Dek® LS ES Acoustical deck as a suitable alternative to the specified 2 1/2″ Toris A (Epic Metals Corporation) called out on the structural drawings (finding 12). RFI 0113 included the side-by-side metal deck data

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[11] One problem may be that Mobile District (AL) awarded Task Order W91278-12-D-0037-0003 (finding 8) but the Norfolk District (VA) awarded and funded the EDC contract and was responsible to determine which Contract submittals and RFI's would be reviewed by the EDC Contractor, Zyscovich (finding 9).

[12] We don't believe it would make any difference in the outcome if that issue had been raised before award.

product comparison for the 2 1/2″ and 2″ decks. Zyscovich responded to RFI 0113 stating "[b]ased on the loads and spans, a 2″ acoustical deck will not comply" (finding 13). ACO Posey testified in his Declaration about Zyscovich's response stating that "[n]o structural analysis was provided by the EDC Contractor, and it is unclear if the RFI was reviewed by their Structural Engineer Subcontractor" (finding 14). We will not fill in the blanks left by the AF and conclude that a structural engineer reviewed the technical data submitted in support of the 2″ deck.

On January 22, 2018, Mr. Arlyn Marheine AF PE sent Mr. Boggs the following, "the Allowable Load on the 2″ decking is less than on the 2 1/2″ decking as well as having a lower acoustical rating on the un-shored spans" (finding 15). This is the only place in the record where the AF made any technical comments but we have no idea what analysis went into these comments. On January 23, 2018, Mr. Boggs sent the AF calculations for the 2″ versa deck indicating that New Millennium's engineer stated that the 2″ deck was equivalent to the 2 1/2″ deck (*id*.).

In a February 2, 2018, meeting Carothers and the AF agreed that Carothers would hire an independent third-party structural engineer to evaluate the equivalency of the 2″ deck (finding 17). The engineer, Mr. Harrison, was provided the technical data and documentation submitted earlier by Millennium in RFI 0113 (finding 17). Mr. Harrison reported that his calculations confirmed that the 2″ Versa-Deck LS ES Acoustical roof system as manufactured by New Millennium "should have been considered an equal to the roof system product identified in the Contract documents for the Project" (finding 18). Mr. Harrison's findings were provided to the AF, but there is no indication in the record of a technical analysis or response by the AF (*id*.). The AF's position remained that the 2″ deck did not comply with the specification and Carothers would have to submit its request as a variation with a credit modification (findings 15-16).

Apparently the AF gave no thought to FAR 52.236-5, Material and Workmanship. We hold that Carothers made a prima facie case that the 2″ deck was equivalent to the 2 1/2″ deck.

The AF Failed to Rebut Carothers' Proof

Applying a similar regulation to the present Material and Workmanship Clause, the Court of Claims held that contracting officers lack authority to deny substitute products shown to be equivalent to a specified proprietary product:

> The contracting officer does have to exercise judgment to determine whether the item proposed to be substituted is equal in quality and performance to the designated proprietary product, but his power does not extend to a

> refusal to allow a replacement which is equal in these respects.

Jack Stone Co. v. United States, 344 F.2d 370, 374 (1965).

Other than Mr. Arlyn Marheine's cryptic comment (finding 15) submitted before Mr. Harrison's report (finding 18), there is nothing from the AF indicating a serious consideration of Carothers' evidence that the 2″ deck was equivalent to the 2 1/2″ deck specified in the solicitation. We see no evidence that an AF structural engineer ever evaluated the side-by-side presentation of product data submitted several times by Carothers or would even talk to Carothers about its evidence of equivalency (findings 4, 13, 15). The AF seems to ignore the third party structural engineer, Mr. Harrison, that Carothers hired with the AF's approval to evaluate equivalency of the 2″ deck. Mr. Harrison concluded that the 2″ deck was equivalent to the 2 1/2″ deck. (Findings 17-18) Mr. Harrison's report and testimony is overwhelmingly persuasive in the face of the AF's insistence on strict compliance with the specification (findings 15-16, 23). It may be that the AF could have proven either that there was another source for the 2 1/2″ deck or that the 2″ deck was not equivalent if it had conducted a structural engineering analysis of Carothers' evidence. Instead, the AF stuck with its position it would only consider the 2″ deck as a variation. (Findings 15-16) We interpret the AF's position to be one of strict compliance with the specifications. The AF seems to ignore the rights bestowed on contractors by FAR 52.236-5, Material and Workmanship. This attitude is clearly seen in the Contracting Officer's June 28, 2019, denial of Carothers' claim. (Finding 23) We hold that, in the absence of AF rebuttal based on engineering analysis of the data submitted to it, Carothers has met its burden of proof that the 2″ deck was equivalent to the 2 1/2″ deck. The burden then shifts to the AF. The AF has presented nothing. It failed to rebut Carothers' proof and its reliance on strict compliance with the 2 1/2″ thickness dimension is unpersuasive. Carothers has satisfied the three elements of proof quoted from *Classic Site Solutions* above. We hold that the AF's insistence on the 2 1/2″ deck without any serious effort to evaluate the data submitted by Carothers supporting the equality of the 2″ deck was an "unreasonable exercise of judgment." We hold that Carothers was entitled to substitute the 2″ deck pursuant to FAR 52.236- 5, Material and Workmanship. Carothers is entitled to compensation for the additional costs associated with its installing the proprietary 2 1/2″ deck.

CONCLUSION

Based on the above we sustain the appeal.

Dated: February 11, 2021

CRAIG S. CLARKE
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. 62204, Appeal of Carothers Construction, Inc., rendered in conformance with the Board's Charter.

Dated: February 11, 2021

for Jamnye D. Gates

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Sauer Incorporated	)	ASBCA No. 62395
	)	
Under Contract No. W91278-07-D-0030	)	

APPEARANCE FOR THE APPELLANT: Gina P. Grimsley, Esq.
Counsel

APPEARANCES FOR THE GOVERNMENT: Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
Laura J. Arnett, Esq.
Engineer Trial Attorney
U.S. Army District, Savannah

OPINION BY ADMINISTRATIVE JUDGE STINSON
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant Sauer Inc., (Sauer), appeals a contracting officer's denial of its September 6, 2019, claim, in the amount of $144,780, seeking remission of liquidated damages (R4, tab 2.01). We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. The parties submitted cross-motions for summary judgment, response and reply briefs, and exhibits, to be considered in deciding this appeal.[1] For the reasons stated below, the government's motion for summary judgment is denied and appellant's cross-motion for summary judgment is granted-in-part.

[1] We refer to the parties' motions and briefs as follows: "gov't mot. ___" refers to the government's motion for summary judgment; "app. cross-mot. ___" refers to appellant's memorandum in opposition to respondent's motion for summary judgment and appellant's cross-motion summary judgment; "gov't resp. ___" refers to the government's response to appellant's statement of undisputed material facts and opposition to appellant's cross-motion for summary judgment; "gov't reply ___" refers to the government's reply in support of its motion for summary judgment; and "app. reply ___" refers to appellant's reply in support of its cross-motion for summary judgment.

STATEMENT OF FACTS (SOF) FOR THE PURPOSES OF THE
PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Unless otherwise noted, the following facts are undisputed or uncontroverted.

1. On August 18, 2006, the U.S. Army Engineer District, Mobile, issued Solicitation No. W91278-06-R-0105, contemplating the award of a Multiple Award Task Order Contract (MATOC), a regional geographic multiple awards indefinite delivery type contract in support of military construction in the South Atlantic Division (R4, tab 3.01 at 0004). In 2007, the government awarded Sauer MATOC No. W91278-07-D-0030.[2]

2. On January 12, 2011, the government issued a Request for Proposal (RFP), pursuant to the MATOC, for design and construction of the 82nd Airborne Division Headquarters, in Fort Bragg, North Carolina, Project Number 44968 (the Project) (R4, tab 3.02 at 0002). The RFP stated that "[t]he scope of work for this Design Build project includes construction and design of a standard design command and control headquarters building" (R4, tab 3.02 at 0003).

3. The RFP scope of work identified a "primary facility," which included "command headquarters, a joint operations center, a sensitive compartmented information facility (SCIF), conference rooms, classroom space, equipment storage, general storage, mechanical and communications rooms, installation of intrusion detection system (IDS) and connection to energy monitoring and control system (EMCS)" (*id*.).

4. The RFP scope of work also identified "supporting facilities," which included, "water and sewer service, electric service, paving and walks, fire protection and alarm systems, exterior lighting, storm drainage, erosion control measures, asbestos removal & lead-based paint remediation as part of demolition, information systems, parking and site improvements" (*id.*).

5. Section 3.1.1 of the Task Order Statement of Work provided, in part, "[t]he preferred Command and Control Facility (C2F) is a multi-story stand-alone facility organized around the central core consisting of stairs, elevators, men's and women's restrooms, telecommunication rooms and other support spaces such as break rooms,

[2] In response to the Board's request for a copy of the MATOC, the government submitted a copy of the solicitation that resulted in its award (R4, tab 3.01). In the accompanying March 27, 2020 letter, entitled Respondent's Corrected Rule 4 Submission, the government informed the Board that it "is unable to locate a viable copy of the award document. However, the Government does not anticipate a dispute about Appellant's status as a member of the MATOC pool since it was awarded numerous task orders against the MATOC."

storage, recycle rooms, etc., as depicted in the preferred functional layout included with this RFP" (R4, tab 3.02 at 0035).

6. Section 6.17.1 of the Task Order Statement of Work provided, in part, "[t]he Government will identify buildings and other existing features to be demolished in the site plans, as applicable to the project" (R4, tab 3.02 at 0180).

7. The RFP included a liquidated damages provision based upon the Federal Acquisition Regulation (FAR), which stated, "[i]n accordance with FAR Clause 52.211-12, Liquidated Damages-Construction, liquidated damages in the amount of $4,365.81 per day shall be assessed if the Contractor fails to complete the work within the time specified in this task order" (R4, tab 3.02 at 0007). The RFP set a duration date of 540 days after receipt of the notice to proceed (*id*.).

8. By letter dated February 7, 2011, the government issued RFP Revision No. 02, which included the following:

> A. CONTRACT CHANGES: The phasing requirement for this project is as follows:
>
> 1. Phase I: Construction of new Headquarters (540 days)
>
> 2. Phase II: Installation of furniture and move into new building (60 days)
>
> 3. Phase III: Demolition of existing building and completion of parking lot areas (100 days)
>
> 4. The overall construction duration for this project has changed from 540 calendar days to 700 calendar days. The paragraph below has been revised to reflect contract duration to 700 calendar days.
>
> > a. In accordance with FAR Clause 52.211-10, Commencement, Prosecution, and Completion of Work, the Contractor shall commence work within 5 calendar days after receipt of notice to proceed, shall prosecute the work diligently and shall complete all work ordered under this task order within the time proposed by the offeror, but not to exceed the maximum allowed 700 calendar days after receipt of notice to proceed.

(R4, tab 3.03 at 0001-0002)

9. On March 1, 2011, Sauer submitted a proposal in response to the RFP (R4, tab 3.04 at 0002). Sauer's proposal included the same liquidated damages provision set forth in the RFP (R4, tab 3.02 at 0007, tab 3.04 at 0006; SOF ¶ 7).

10. By letter dated March 28, 2011, the government informed Sauer that its offer was in the competitive range. The government opened discussions for the purpose of allowing clarifications and submission of a revised cost proposal (R4, tab 3.05).

11. By letter dated April 15, 2011, Sauer submitted its revised proposal (R4, tab 3.07). Sauer's revised proposal included the same liquidated damages provision as set forth in, and required by, the RFP, and as contained in Sauer's initial proposal (R4, tab 3.02 at 0007, tab 3.04 at 0006, tab 3.07 at 0003; SOF ¶¶ 7, 9).

12. On June 13, 2011, the government awarded Sauer MATOC Task Order CV02 (the Task Order) (R4, tab 3.08). The Task Order contained a scope of work nearly identical to the one specified in the RFP (R4, tab 3.02 at 0003, tab 3.08 at 0005; SOF ¶¶ 3-4).

13. The Task Order contained three Contract Line Item Numbers (CLINs) (R4, tabs 3.02 at 0006, 3.08 at 0002-0003). The three CLINs were not specifically tied to each of the Task Order's three phases. CLIN 0001 covered the "[d]esign and related services for the complete design of the 82nd Airborne Division Headquarters and supporting facilities," for a unit price of $2,341,000) (R4, tab 3.08 at 0002). CLIN 0002 covered "[c]onstruction of site work and utilities complete to the five foot line of the building and including the antenna tower, temporary parking and all required building demolition," for a unit price of $4,911,000 (*id*.). CLIN 0003 covered "[c]onstruction of Division HQ Building Complete to the five foot line," for a unit price of $26,456,000 (R4, tab 3.08 at 0003).

14. The Task Order specified liquidated damages of $4,365.81 per day (R4, tab 3.08 at 0006). The daily liquidated damages rate applied to completion of the project, and was not tied to the contractor's completion of the three separate Project phases identified in RFP Revision No. 02. (R4, tab 3.03 at 0001-0002, tab 3.08)

15. On July 11, 2011, the government issued the notice to proceed, setting a Task Order completion date of June 10, 2013, based upon a performance period of 700 days (R4, tab 2.02 at 0003; gov't mot., ex. A).

16. Phase I - construction of the 82nd Airborne Division Headquarters building - was completed on July 17, 2013 (R4, tab 2.02 at 0004, tab 4.01; gov't mot. at 4 (gov't Statement of Undisputed Material Fact ¶ 13, stating "[o]n 17 July 2013, Sauer completed Phase I, and USACE accepted the 82nd Airborne Division Headquarters building")). The government executed a Transfer and Acceptance of DoD Real Property DD Form 1354

stating "[t]his is a partial turnover for the facility," and noting the warranty for the headquarters building was July 17, 2013, to July 17, 2014 (R4, tab 8.01 at 0004-0005). On July 18, 2013, the USACE acknowledged it "turned over the 82nd DIV HQ facility to DPW[3] Real Property on Wednesday, July 17, 2013" and likewise transferred interior keys for the building to DPW (R4, tab 4.02).[4]

17. Phase II - installation of furniture and building move in - was completed on September 15, 2013 (gov't mot. at 5 (gov't Statement of Undisputed Material Fact ¶ 18, stating "[o]n 15 September 2013, Phase II involving furniture installation and move into the new facility from the existing facility was complete")).

18. The Task Order completion date was extended a total of 160 calendar days via eight modifications (R4, tabs 5.01, 5.16 at 0002). Modification No. R00034 contained the final time extension, establishing a Task Order performance period of 860 days (R4, tab 5.16 at 0002), and a revised Project completion date of November 17, 2013 (R4, tab 2.02 at 0003).

19. By letter dated November 15, 2013, the government notified Sauer that

> In accordance with our records, your contract completion date is November 17, 2013. As of the 18th of November and in accordance with the provision of our contract and FAR 52.211 - 12 "LIQUIDATED DAMAGES-CONSTRUCTION", you will be assessed liquidated damages in the sum of $4,365.81 for each calendar day of the delay until the project is completed or accepted.

(R4, tab 4.03)

20. According to the government, Phase III - demolition of existing building and completion of a parking lot – was completed on December 20, 2013 (gov't mot. at 5 (gov't Statement of Undisputed Material Facts ¶ 22)). According to appellant, "the

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[3] DPW refers to Director of Public Works (R4, tab 4.01 at 0002).

[4] The MATOC contains FAR 52.236-11, USE AND POSSESSION PRIOR TO COMPLETION (APR 1984), which provides that the government may take possession of any completed or partially completed portion of the work, but that such "possession or use shall not be deemed an acceptance of any work under the contract" (R4, tab 3.01 at 0205). The government does not assert or address this clause as a basis for the government's taking possession of property pursuant to Phase I of the Task Order. Appellant mistakenly argues in its brief that "there was no contract clause specifically stating that possession and use does not constitute acceptance" (app. cross-mot. at 14).

government conditionally accepted the parking lot on December 20, 2013" (app. Statement of Genuine Issues of Material Fact at 5 (app. resp. to gov't Statement of Undisputed Material Facts ¶ 22)). A material issue of fact exists regarding the amount of Phase III work left to be performed, or that was performed, from November 17, 2013, to December 20, 2013 (*see* gov't Statement of Undisputed Material Facts ¶¶ 19-21, and app. resp. ¶¶ 19-21). Both parties provide their own characterization of the work being performed based upon citation to Quality Control Reports prepared by appellant during the course of Task Order performance (*id*. (citing R4, tab 6.01)).

21. On January 28, 2014, via Pay Estimate No. 29, the government informed appellant that it was assessing liquidated damages for the period starting November 17, 2013, through December 20, 2013, for a total of 33 days, in the amount of $144,071.73 (R4, tab 7.06 at 0002).

22. Appellant states that 98.7 percent of the total construction-related costs were placed in Phase I, construction of the new headquarters building (app. Statement of Undisputed Material Facts No. 3 (citing R4, tabs 3.03, 3.07; app. mot. at ex. 1)). Although the government "denies" this allegation, it does not state why appellant's determination is incorrect. Rather, the government "notes that the costs associated with the respective schedule activities were assigned by Sauer in its schedule, not determined by the Government" (gov't resp. to app. Statement of undisputed Material Facts No. 3).

23. Appellant states that 1.3 percent of the total construction-related costs were placed in Phase II and Phase III, representing 1.17 percent of the total Task Order price (app. Statement of Undisputed Material Facts No. 4 (citing R4, tab 3.03; app. cross-mot. at ex. 1)). Although the government "denies" this allegation, it does not state why appellant's determination is incorrect. Rather, the government "notes that the costs associated with the respective schedule activities were assigned by Sauer in its schedule, not determined by the Government" (*see* gov't resp. to app. Statement of Undisputed Material Facts No. 3).

24. By letter dated September 6, 2019, Sauer submitted a certified claim to the government challenging the government's assessment of liquidated damages and requesting a final decision from the contracting officer (R4, tab 2.01). Appellant's claim asserted that "[t]he government improperly assessed liquidated damages after Sauer achieved substantial completion and beneficial occupancy" (R4, tab 2.01 at 0004).

25. By letter dated November 20, 2019, the contracting officer issued a final decision denying Sauer's claim (R4, tab 2.02). The contracting officer did not address appellant's argument that assessment of liquidated damages after substantial completion of the Project was inappropriate. Rather, the contracting officer assessed liquidated damages "[i]n accordance with FAR 52.211-12" based upon appellant's "failure to complete the work within the contract duration" (R4, tab 2.02 at 7).

26. Sauer filed its notice of appeal on February 13, 2020.

DECISION

I. Standard of Review

"Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2007). "The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment." *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

A party challenging a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It does not matter that the parties have cross-moved for summary judgment, both claiming that there exists no material issue of fact. *Osborne Constr. Co*., ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,513 ("[e]ach cross-motion is evaluated separately on its merits, and all reasonable inferences are drawn in favor of the defending party; the Board is not bound to 'grant judgment as a matter of law for one side or the other'" (quoting *Mingus Constructors*, 812 F.2d at 1391).

II. Appellant's Challenge to Assessment of Liquidated Damages is a Government Claim

Appellant seeks remission of liquidated damages, which is a government claim for which "the Government bears the initial burden of proving that the contractor failed to meet the contract completion date and that the period of time for which it assessed liquidated damages is correct." *KEMRON Envtl. Servs. Corp*., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,399. "Once the government has overcome the initial burden, it is incumbent upon appellant to show either that the government incorrectly assessed the damages under the contract, or that appellant's failure to comply with the terms of the contract was excusable." *Chem-Care Co*., ASBCA No. 53614, 06-2 BCA ¶ 33,427 at 165,726.[5]

[5] The Task Order states that liquidated damages "shall be assessed if the Contractor fails to complete the work within the time specified in this task order" (SOF ¶¶ 7, 9, 11). FAR Clause 52.211-12, Liquidated Damages-Construction, includes terms that are somewhat broader (SOF ¶¶ 7, 19). Specifically, it provides that "[i]f the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government . . . for each calendar

It is well established that "after the date of substantial completion or performance, it is improper to assess liquidated damages." *Gassman Corp*., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720 at 151,742 (citations omitted). In its motion, the government states that "[t]his case turns on the question of when a project with three phases . . . achieved substantial completion" (gov't mot. at 1). The government acknowledges that "[l]iquidated damages are not properly assessed on a construction contract after the date the project is substantially completed" (gov't mot. at 8). Although Sauer's certified claim raised the issue of substantial completion, the contracting officer's final decision did not address it (SOF ¶¶ 24-25).

Establishing the date of substantial completion is part of the government's prima facie case, as it bears both on the issue of whether the contractor failed to meet the contract completion date and whether the period of time for which the government assessed liquidated damages is correct. *See Whitesell-Green, Inc.*, ASBCA No. 53938 *et al.*, 06-2 BCA ¶ 33,323 at 165,257 (noting that in discussing whether the government had met its burden "the parties do not dispute the scheduled completion date, the date of substantial completion (beneficial occupancy), and the computation of the amount of liquidated damages"); *Insulation Specialties, Inc*., ASBCA No. 52090, 03-2 BCA ¶ 32,361 at 160,101 (government established a prima facie case where "[t]he parties agree that the extended contract completion date, through all contract modifications, was 30 December 1995; and, that the date of substantial completion was 30 November 1996"). If the government assessed liquidated damages beyond the date of substantial completion, the government has not met its burden of establishing that the period of time for which it assessed liquidated damages is correct.

III. Task Order Completion vs. Substantial Completion

The parties agree that the Task Order completion date was November 17, 2013 (SOF ¶ 18). Appellant argues, however, that the Project was substantially complete on July 17, 2013, when the government obtained beneficial occupancy of the headquarters building, or, alternatively, no later than November 17, 2013, when the government first assessed liquidated damages (app. cross-mot. at 2).

"Whether a contract has been substantially completed is a question of fact and a project is considered substantially completed when it is capable of being used for its intended purpose." *Maruf Sharif Constr. Co*., ASBCA No. 61802, 19-1 BCA ¶ 37,239 at 181,276. In making this determination, we focus "upon the specific provisions in the contract that define the parties' expectations regarding the owner's reasonable use of the

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day of delay until the work is completed *or accepted*." 48 C.F.R. § 52.211-12 (emphasis supplied). The government's November 15, 2013, notification letter includes language contained in the regulation, notifying appellant that liquidated damages will be assessed "until the project is completed or accepted" (SOF ¶ 19).

facility." *Id*. We also focus "upon the character and extent of the contractor's partial failure, i.e., the relative importance of that failure to the party affected by it." *Gassman Corp*., 00-1 BCA ¶ 30,720 at 151,742, citing *Thoen v. United States*, 765 F.2d 1110, 1115 (Fed. Cir. 1985). "'[S]ubstantial completion' and 'beneficial occupancy' are used interchangeably, and signify whether the government can continue to hold liquidated damages." *Strand Hunt Constr., Inc.*, ASBCA No. 55905, 13-1 BCA ¶ 35,287 at 173,188. The "interim usage which occurs prior to the completion of a contract is known as beneficial occupancy." *Id*.

"A finding of substantial completion is only proper where a promisee has obtained, for all intents and purposes, all the benefits it reasonably anticipated receiving under the contract." *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1315-16 (Fed. Cir. 2000). "[T]he doctrine should not be carried to the point where the non-defaulting party is compelled to accept a measure of performance fundamentally less than had been bargained for." *Franklin E. Penny Co. v. United States*, 207 Ct. Cl. 842, 857-858, 524 F.2d 668, 677 (1975).

IV. Substantial Completion of Phase I and Phase II

As originally drafted, the RFP included a 540-day performance period, with no demarcation of Project phases (SOF ¶ 7). The advent of phased construction was a revision to the RFP, which added three phases and three corresponding completion dates, and increased the performance period to 700 days. Under this revised approach, the Project was divided into phases with distinctly-different work items of various sizes and apparent import. (SOF ¶ 8)

The first phase of the Project included work that consumed the vast majority of time and money, i.e., design and construction of the new headquarters building, the Project's "primary facility" (SOF ¶¶ 3, 8, 22). The second and third phases of the Project included distinctly less work in terms of time and money (SOF ¶¶ 8, 23). The second phase included furniture installation in the new headquarters building, along with the government's move into the building, while the third phase included demolition of the old headquarters building and construction of a parking area (SOF ¶ 8). Pursuant to the Task Order statement of work, Phase III included work on "supporting facilities," i.e., "paving and walks" and "parking and site improvements" (SOF ¶ 4).

To the extent RFP Revision No. 02 made no change to the liquidated damages rate in the RFP, i.e., not adding a specific liquidated damages rate for each phase, the dividing of the Task Order into three phases appears to be an artificial edifice, having maintained the single liquidated damages rate set forth in the original RFP (SOF ¶¶ 8, 11). RFP Revision No. 02 likewise did not modify the Task Order CLINs structure, so that the three CLINs corresponded specifically to each of the Task Order's three phases (SOF ¶ 13). Instead, the unit price for design and construction of the headquarters building

encompassed both CLIN 0001 (design of headquarters and supporting facilities - $2,341,000) and CLIN 0003 (construction of headquarters building - $26,456,000) (SOF ¶ 13). CLIN 0002 - $4,911,000 – set the unit price of site work and utilities construction outside the headquarters building, and included "temporary parking and all required building demolition" (*id*.).

The government does not dispute that appellant delivered to the government, and the government accepted, Phase I of the Project, four months prior to the completion date, and appellant delivered to the government, and the government accepted, Phase II of the Project, two months prior to the completion date (SOF ¶¶ 16- 17). Yet, the government argues that "the Project was not substantially complete until Phases II and III were completed in December 2013" and that appellant's argument "completely ignores Phases II and III of the contract" (gov't mot. at 7-8). As we already have found, and as the government admits in its Statement of Undisputed Material Fact, Phase II was completed and accepted by the government on September 15, 2013 – two months prior to the November 17, 2013 completion date (SOF ¶ 17). Accordingly, completion of Phase III appears to be the only allegedly long pole left in what was by November 17, 2013, a considerably much smaller tent.

In support of its argument regarding the import of phased construction in the context of substantial completion, the government cites the Corps of Engineers Board of Contract Appeals' decision in *Formal Mgmt. Sys., Inc*., ENG BCA No. PCC-145, 99-1 BCA ¶ 30,137. The government labels *Formal Management* as "[t]he seminal case[6] that addresses whether a phased construction project can be substantially complete prior to completion of the final phase" (gov't resp. at 10; gov't reply at 12).[7] Quoting *Formal Mgmt. Sys., Inc.*, 99-1 BCA ¶ 30,137 at 149,081, the government states that the decision stands for the proposition that a contractor "has not substantially completed the work where it fails to perform timely a particular aspect of contract work that the parties single out in their agreement and expressly make important to contract performance because of the potential impact on the owner's reasonable use of its facility or on the performance of other owner contracts" (gov't resp. at 10; gov't reply at 13). We agree with the government that *Formal Management* stands for the proposition as quoted, but disagree that the decision supports a finding in its favor.

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[6] As for the seminal nature of the decision, we note that a search of *Formal Management* indicates that the decision has been cited by this Board once, namely, in *Gassman Corp.*, 00-1 BCA ¶ 30,720 at 151,742, for the proposition that the "agreement to liquidated damages clause anticipated potential impact on performance." Our search revealed no citation of the decision by any other board or court.

[7] Contrary to the government's assertion, the project in *Formal Management* was not a "phased construction project," rather, as the government later notes, *Formal Management* "involved phases 1-9 for cleaning the Tug/Miter Gates of the Panama Canal" (gov't reply at 12).

In *Formal Management*, the contractor failed to complete Phase 10 of the contract, the contract's final phase, which required cite cleanup and demobilization. The contractor challenged assessment of liquidated damages for Phase 10, alleging that Phase 9 constituted the primary purpose of the contract, and therefore, having timely-completed that phase of the contract, the contractor had substantially completed the contract. The Engineer Board rejected the contractor's argument that it had substantially completed the work, noting that the contract singled out Phase 10, which expressly was made important because of the impact non completion of that phase would have on the government's use of the project or on the performance of follow-on contracts. *Formal Mgmt. Sys., Inc.,* 99-1 BCA ¶ 30,137 at 149,081.

The government argues that the parties here likewise "singled out" the importance of Phase III, quoting a portion of the *Formal Management* decision which states "[b]y dividing the contract into ten (10) phases, the parties intended to give each phase an equivalent, substantive status as a contract action for determining when Formal completed each contract phase and when it finally completed the contract" (gov't resp. at 11; gov't reply at 13, quoting *Formal Mgmt. Sys., Inc.*, 99-1 BCA ¶ 30,137 at 149,081). Unlike the Task Order here, however, the contract in *Formal Management* assigned a specific liquidated damages rate to Phase 10, which would apply in the event Phase 10 was not timely-completed. Indeed, the contract only assigned liquidated damages to Phase 9 and Phase 10, and not to the first eight phases, specifically, $5,000 per day for Phase 9 and $75 for Phase 10. *Id*. at 149,077.

As for the import and impact of the contractor's failure to timely complete Phase 10 demobilization, the Engineer Board noted that the contractor had failed to remove its equipment from the site, that the contractor "stored its equipment in an area where the Commission intended to commence construction of a warehouse," and that the government "had other contracts to be performed in the area that were potentially subject to adverse impacts by Formal's failure to complete the contract's Phase 10 demobilization." *Id*. at 149,081. In contrast, the record here suggests no follow-on work to be performed that was impacted while Sauer completed Phase III.

The Engineer Board rejected the contractor's substantial completion argument as it "would necessarily require us inappropriately to read out of the contract the parties' clear agreement to a liquidated damages provision regarding the Phase 10 work," noting that "[u]nder Formal's interpretation, the Phase 10 liquidated damages provision would never apply, since Phase 9 had to be completed before Phase 10." *Id*. at 149,082. The Engineer Board therefore "read the parties' agreement to liquidated damage provisions for Phase 9 and for Phase 10 as reflecting their clear intent that substantial completion encompassed full performance of both Phase 9 and Phase 10." *Id*. That simply is not the situation presented in this appeal. The Task Order here did not assign a specific liquidated damage rate to Phase III, nor did it indicate in any way that completion of Phase III impacted the

government's beneficial use of the project, or reflected the parties "clear intent that substantial completion encompassed full performance" of Phase III (*id*. at 149,082). Indeed, the Task Order indicates that Phase III work, included "supporting" activities such as "parking and site improvements," as opposed to construction of the new headquarters, which the government labeled "primary" (SOF ¶ 4).

The government relies also on our decision in *Gassman* for the proposition "that a phased project requires completion of all phases to achieve substantial completion" (gov't reply at 11). The government's reliance upon that appeal is likewise misplaced. *Gassman* concerned a contractor's failure to complete Phase 7 of the contract, which required it to remove a hoisting crane and vacate a staging area prior to another contractor mobilizing on the site for follow-on work. *Gassman Corp*., 00-1 BCA ¶ 30,720 at 151,728. Indeed, the government here, perhaps unintentionally, seems to recognize this important distinction between the facts in Gassman and the facts in this appeal, stating, "the facility was not substantially complete until it was available for its 'intended use' i.e. available for performance of the follow-on contract. Thus, the project achieved substantial completion when the contractor removed the crane and vacated the staging area completing phase 7" (gov't reply at 11). As noted above, the record here indicates no follow-on work waiting to be performed by another contractor at the site, or that the Project was not "available for its 'intended use'" because the parking lot was not complete until December 20, 2013.

The government asserts that, "[b]y parsing the contract into separate distinct phases, the parties agreed that each phase would have functionally equivalent importance regarding performance" (gov't resp. at 12). We disagree. Simply parsing a contract into phases, without more, does not establish the functional equivalence or importance of each phase. The record here contains no evidence supporting a finding that completion of Phase III was functionally equivalent to completion of Phase I or, for that matter, Phase II.

As alleged evidentiary support of its argument as to the import of Phase III completion, the government states that certain "provisions of the contract defined the parties' expectations," namely, the fact that the Task Order work was divided into three phases, each phase had a specific duration, with an overall Project duration of 700 days, and imposition of liquidated damages in the amount of $4,365.81 per day in the event the contractor failed to complete the work at the end of the Project's 700-day duration (gov't mot. at 9).

The government's argument is based, not upon evidence demonstrating the purpose of the Task Order, or an analysis of the cost of performance, or the percentage of work performed, but rather upon the artifice that strict compliance to the completion of all three phases of construction was essential, and all three phases shared equally in significance to completion of the Project. As we already have held, the fact that the Task

Order was parsed into phases does not, without more, establish the functional equivalence or importance of each phase. Other than its bare allegation that the existence of a phased contract establishes the singular import of each phase, the government offers no evidence that strict compliance to completion of all three phases truly was "essential." The Task Order provisions cited by the government do not speak to the parties' expectations regarding the owner's reasonable use of the facility, or whether the Project was capable of adequately serving its intended purpose at the time the government claimed the right to assess liquidated damages.

In an attempt to bolster the importance of the Phase III work, the government cites "contemporaneous project records" in which appellant "consistently acknowledged throughout the Project that all three phases of the project were required to be complete within the Project duration of 700 days and that the Project would be complete upon completion of Phase III" (gov't mot. at 10-11).[8] The government points to appellant's Quality Control Reports, which, according to the government, indicate that "in November 2013, Sauer was performing demolition of the old facility where the new parking lot was to be located" (gov't mot. at 11). However, the fact that appellant acknowledged Project phasing and duration, and that it was performing work in November 2013, does not establish appellant's, or the government's, expectation regarding the owner's reasonable use of the facility or that the work performed in November 2013 was essential to the government's beneficial occupancy of the Project.

The government also argues that "[w]hen Sauer completed Phase I and turned over the Headquarters building on 17 July 2013, the Government executed a Transfer and Acceptance of DoD Real Property DD Form 1354 which noted in block no. 4 that it was 'Partial #2'" (gov't resp. at 7). According to the government, the DD Form "listed construction deficiencies including commissioning of the CRAC units and installation and startup of Power Monitoring and management system in TER, NOC, and G2" (*id.*) (citing R4, tab 8.01). However, the government does not explain how these "deficiencies" impacted in any way the government's beneficial occupancy of the Project. Nor does the government explain their import, having formally accepted Phase I in July 2013, and having moved into the new headquarters building two months later (SOF ¶ 8). The government's argument also conflicts with its admission contained in its Statement of Undisputed Material Fact that Phase I and Phase II were "complete" as of July 17, 2013, and September 15, 2013, respectively (SOF ¶¶ 17-18).

[8] Appellant does not dispute that the Task Order was divided into three phases, with different durations for each phase, an overall Project completion duration of 700 days, and imposition of liquidated damages based upon overall Project duration (*see* app. resp. to gov't Statement of Undisputed Material Facts Nos. 3-4, as set forth in app. Statement of Genuine Issues of Material Fact).

Appellant is entitled to a grant of summary judgment on the issue of substantial completion only if the government "fails to reference . . . sufficient evidence showing that a reasonable fact finder could decide the 'substantial completion' question in" the government's favor. *J.W. Creech, Inc*., ASBCA No. 45317, 94-1 BCA ¶ 26,459 at 131,661 ("[b]ased upon an examination of the evidence presented by the Navy and a drawing of all inferences in favor of the Navy, the nonmovant, as required when evaluating a summary judgment motion, a reasonable fact finder could possibly decide the question of 'substantial completion' in favor of the Navy", citing *Anderson*, 477 U.S. at 248–50 (additional citations omitted)). For the reasons stated above, we find that the government has failed to reference sufficient evidence demonstrating that a reasonable fact finder could decide in favor of the government on the issue of substantial completion of Phases I and II. As we discuss below, however, we are unable to make this same determination, in the context of summary judgment, regarding substantial completion of Phase III.

V. Factual Dispute as to Substantial Completion of Phase III

The government asserts that demolition of the former headquarters building, and paving the former site for a parking lot, was part of the benefit of its bargain (gov't mot. at 8, 12). According to the government, "Phase III could not be performed until Phases I and II were completed," and "[a]t the completion of Phase I, the Government had not received all of the benefits for which it contracted - demolition of the prior facility and construction of parking lot areas to serve the new clinic" (gov't mot. at 13). The government notes that "Phase III required Sauer to demolish the 35,514-square-foot existing headquarters building and pave parking lots" (gov't resp. at 8). The government concludes that it "should not be compelled to accept a measure of performance fundamentally less than that for which it bargained" (gov't mot. at 13).[9]

Appellant alleges that other parking areas were available, including an "East Parking Lot" and a temporary parking facilities constructed during Phase I (app. cross-mot. at 14, n.4, app. reply at 5 n.6), although appellant's allegation includes no record citation in support. Regardless, appellant's allegation alone does not refute the government's argument as to the necessity of the unfinished lot. Although we find that Phase I and Phase II were substantially complete, there remains the issue of Phase III substantial completion, i.e., whether demolition of the prior facility and construction of parking areas was an essential part of the Project, and whether appellant's not yet

[9] The government argues that "Phases II and III represented approximately 23% or 160 days of the 700-day contract duration" and that "[t]he 60 days added for Phase II were critical to allow the customer to vacate the old building and move into the new building so Sauer could demolish the old building" (gov't resp. at 7-8). However, as we already have found, Phase II also was completed in September 2013 – two months before the Task Order completion date.

completing that final task was "fundamentally less than had been bargained for." *Franklin E. Penny Co.*, 207 Ct. Cl. at 857-858, 524 F.2d at 677.

The parties also disagree as to the amount of work appellant performed on Phase III after November 17, 2013, up until December 20, 2013, as well as whether and when that work constituted substantial completion of Phase III (SOF ¶ 20; app. reply at 8; gov't resp. at 9). Both parties offer a different version of facts regarding the work being performed, based upon their respective characterizations of information contained in appellant's Quality Control Reports (SOF ¶ 20 (citing R4, tab 601)). The divergent positions taken by the parties as to the status of work accomplished and performed on Phase III after November 17, 2013, evidences the existence of disputed issues of material fact. *Dunyami Karakoc*, ASBCA No. 58304, 14-1 BCA ¶ 35,780 at 175,035 ("[a] material fact is one that might affect the outcome of a case") (citation omitted).[10]

In considering the parties' summary judgment motions, our function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. Resolution of the status of Phase III work is not possible at this point in the proceedings as it presents a triable issue. *Alderman Bldg. Co., Inc*., ASBCA No. 58082, 15-1 BCA ¶ 35,841 at 175,272 (on summary judgment, "[o]ur task is not to resolve factual disputes, but to ascertain whether material disputes of fact-triable issues-are present." (quoting *Conner Bros. Constr. Co*., ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143, aff'd, *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008))). Accordingly, as to the issue of substantial completion of the Project vis-a-vis Phase III, we are constrained at this point in the litigation from making a determination whether it occurred on December 20, 2013, or at some point prior to that date.

VI. Apportionment of Liquidated Damage

In its reply brief, the government "acknowledges that it did not set different rates for each phase of the Project," and "that the [P]roject had one completion date that was extended when time extensions were granted by modification" (gov't reply at 4). In *Dick*

[10] In its reply brief, the government argues that the Board "can review Sauer's QCRs [Quality Control Reports], elicit the pertinent facts (uncharacterized or colored by either party), and conclude that Sauer was performing Phase III of the project until 20 December 2013" (gov't reply at 3). However, in its response brief, with regard to whether the Project was substantially complete as of November 17, 2013, the government recognizes that the parties "disagree as to the characterization and significance of the facts and application of the law to these facts" (gov't resp. at 9). Weighing of evidence to decide disputed issues of material facts regarding the status of Phase III from November 17, 2013, to December 20, 2013, is not proper in the context of cross-motions for summary judgment.

Pacific Constr. Co., ASBCA No. 57675 *et al.*, 16-1 BCA ¶ 36,196, we considered the issue of whether the government should have apportioned its liquidated damages where a contractor sought remission of liquidated damages on a Project that was divided into three different deliverable items, but specified only one liquidated damages daily rate. In that appeal, the government took beneficial occupancy in three different phases prior to contract completion, and "the project was accepted 'incrementally.'" *Id*. at 176,627. Yet the government "used a single substantial completion date for the entire project to calculate liquidated damages," and "never considered reducing the liquidated damages based on the incremental acceptance of the work." *Id*. In that appeal, we raised *sua sponte* the issue of whether the government should have apportioned liquidated damages, and calculated apportioned amounts. *Id*. at 176,640.

In finding for the contractor, we held that the "daily rate bears no reasonable relation to the probable loss that would be incurred by the government after" substantial completion of the first two contract items, and that "allowing the daily rate of $2,298 to run after the Rev B Infield and Strat Ramp are substantially complete results in a penalty of $1287 ($843 + $444) per day assessed against DPC." *Id.* at 176,641. Accordingly, we rejected as unenforceable the government's assessment of the full amount of daily liquidated damages after substantial completion of the first two items, and remanded the appeal to the parties to decide quantum. *Id*.

The same reasoning applies to this appeal. Although the issue of substantial completion is a question of fact, the record establishes beyond cavil that at the very least appellant substantially completed Phases I and II, given that the government admits Phases I and II were complete as of July 17, 2013, and September 15, 2013, respectively (SOF ¶¶ 16-17).[11] The government's assessment of the full amount of daily liquidated damages after substantial completion and acceptance of the first two phases is unenforceable.

According to the government, were appellant to prevail, "it would render meaningless the phasing requirements of the contract and the Statement of Compliance signed by Sauer and would force the Government to accept a measure of performance that is fundamentally less than that for which it bargained" (gov't mot. at 2). The government could have included different liquidated damage rates for each of the three phases. For example, in *Pete Vicari Gen. Contractor, Inc*., ASBCA No. 54982, 06-1 BCA ¶ 33,136 at 164,211, the contract included a liquidated damages clause, FAR 52.211-12,

[11] The government did not assess liquidated damages for late completion of Phases I and II, nor did the Task Order give the government the right to assess liquidated damages in the event the completion dates of 540, 60, and 100 days for each of the three phases respectively was not met. Indeed, the Task Order only provided for assessment of liquidated damages "if the Contractor fails to complete the work within the time specified in this task order." (SOF ¶ 7)

LIQUIDATED DAMAGES-CONSTRUCTION (APR 1984) - ALTERNATE I (APR 1984), which provided for different liquidated damage daily rates for three different phases of work. The contractor argued that liquidated damages could only be assessed based upon an overall delay in contract completion, and not for untimely completion of individual phases. We rejected the contractor's challenge, finding that the contract "stated that the work was to be performed in three successive phases" with specific days of duration for each phase, and specified different liquidated damages "rates for each phase and not a single rate for the entire contract." *Id*. at 164,211-212.[12]

The government cites *American Int'l Contractors, Inc*., ASBCA Nos. 60948, 61166, 18-1 BCA ¶ 37,061, as an example of when the government did not include separate liquidated damages rates for each phase of a contract, even though the FAR provides a contracting officer "the authority to revise the liquidated damages clause to provide for different rates for separate parts of the work" (gov't reply at 15). Specifically, FAR 11.503(b) provides "[i]f the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause [FAR 52.211–12, LIQUIDATED DAMAGES—CONSTRUCTION] to state the amount of liquidated damages for delay of each separate part or stage of the work." 48 C.F.R. § 11.503(b).

The government's reliance upon *American Int'l Contractors* is misplaced, as the Board there did not reach the issue of whether the contracting officer should have exercised the authority set forth in FAR 11.503(b) and should have included different liquidated damages rates for each contract phase. The appeal concerned whether the government properly could rely upon FAR 52.211-13, Time Extensions, to justify its imposition of liquidated damages where FAR 11.503(c) instructs that the clause may be used if FAR 52.211-12 has been revised to provide for separate liquidated damages for each part or stage of the work. *American Int'l Contractors,* 18-1 BCA ¶ 37,061 at 180,411. The Board held that although "FAR 11.503(c) requires the insertion of FAR 52.211-13 when the liquidated damages clause has been revised to reflect different liquidated damages amounts for the various stages of the work, it does not prohibit its use in other circumstances." *Id.*

Thus, the Board did not address the issue of whether the government should have included a different liquidated damages rate for each phase of the contract. As for the application and import of FAR 11.503(b) in this appeal, however, the plain wording of that provision suggests that when the government issued RFP Revision No. 02 to provide for phased construction with corresponding completion dates, the government should

[12] We also rejected the contractor's challenge to the reasonableness of one of the rates, finding that the appellant "offered no evidence that it was the Phase B rate that was an unreasonable estimate of the damages that might be suffered by the government as a result of delayed completion of the buildings." *Id*. at 164,212.

have revised paragraph (a) of FAR 52.211-12 "to state the amount of liquidated damages for delay of each separate part or stage of the work." The fact that the government did not follow FAR 11.503(b) here is yet an additional argument in favor of a finding that apportionment of the liquidated damages rate is appropriate in this appeal.

We note that the record here does not establish whether the government took beneficial occupancy of any portion of Phase III work prior to December 20, 2013. Assuming the record establishes that Phase III was not substantially complete as of November 17, 2013, the government is entitled to some measure of apportioned liquidated damages from that date, until appellant's substantial completion of Phase III, but no later than December 20, 2013. Appellant is entitled to a reduction of liquidated damages, apportioned, based upon its completion of Phases I and II.

VII. Reasonableness of the Liquidated Damages Rate

Appellant alleges the existence of disputed material issues of fact, specifically "whether the overall rate of $4,365.81/day was reasonable and enforceable as it relates to the completion of Phase III of the project" (app. cross-mot. at 15). Appellant suggests that it "has not yet had the opportunity to engage in discovery regarding USACE's liquidated damages rate, but anticipates being able to demonstrate that USACE's forecast of having the same damages rate for phase I . . . and phase III . . . is excessive and not supportable" (*Id*. at 17). In its reply brief, appellant suggests that discovery is necessary to determine "the factors and circumstances deemed relevant by USACE in calculating the rate used for the entire project, whether USACE followed internal guidelines for establishing a liquidated damages rate, whether the selected guidelines were appropriate for use on the subject Contract, and whether USACE correctly followed such guidelines in calculating a liquidated damages rate for the Project" (app. reply at 4 n.5).

The government responds, stating that the Board lacks jurisdiction to consider the reasonableness of its liquidated damages rate, including "who calculated the rate or how it was derived," because it was not first the subject of a claim submitted by appellant or a contracting officer's final decision (gov't reply at 7-8). The government also argues that this issue is barred by the statute of limitations because six years now have passed since November 15, 2013, when the government notified appellant that it would be assessing liquidated damages for every day after the Task Order completion date of November 17, 2013 (*id.* at 8).[13] Appellant replies that the issue of reasonableness properly is before us, stating that appellant "challenged the entire assessment of liquidated damages in its request for Contracting Officer's Final Decision and Appeal" and that "[t]his is not a materially different claim which has not been raised, but instead a part of the government's liquidated damages assessment that was challenged" (app. reply at 4 n.5).

[13] Six years likewise have passed since January 28, 2014, when the government informed appellant of the amount of assessed liquidated damages (SOF ¶ 21).

As noted above, assessment of liquidated damages is a government claim. For a government claim, the decision of the contracting officer "generally defines not only the scope of that claim but circumscribes the parameters of the appeal as well." *AeroVironment, Inc*., ASBCA Nos. 58598, 58599, 16-1 BCA 36,337 at 177,177-178. In the context of a government claim, the final decision limits the scope of what the government may assert and what relief it may seek. The question presented here, however, is assuming the government has established its prima facie case, whether a contractor may assert as a defense to the government claim evidence that the liquidated damages amount asserted by the government was unreasonable. *KEMRON Envtl. Servs. Corp*., 00-1 BCA ¶ 30,664 at 151,399 (once government established prima facie case that liquidated damages are warranted burden shifts to the contractor "to establish a valid defense").

In *Honeywell, Inc*., ASBCA No. 47103, 95-2 BCA ¶ 27,835 at 138,792, the appellant was permitted to challenge the government's interpretation of a Cost Accounting Standard (CAS) provision and its application to eleven of appellant's business closing segments, even though the final decision on the government's claim covered only one segment. Appellant alleged that the government, in computing its CAS adjustments of appellant's previously-determined pension costs, had "adopted inconsistent positions on different segment closings" and that conclusions reached in various DCAA audit reports were "logically and legally irreconcilable."

We found that, if what appellant alleged was true, it "would affect the merits of the Government's claim and call into question the Government's interpretation and application of the relevant CAS provisions." *Id.* We held, therefore, that although the contracting officer's decision did not support a finding of jurisdiction over pension cost issues related to the closing of other segments not addressed in the decision, the appellant's challenge to the government's interpretation and application of the CAS provision as to all eleven segments could be "litigated as an affirmative defense, without any need to expand the scope of the appeal," and that appellant would be "afforded an opportunity to amend its pleading to assert any defenses it may have to the Government's claim." *Id.*

Our analysis in *Honeywell, Inc*., finds appropriate application to the facts here. Appellant has the right to assert what is, in essence, an affirmative defense to the government's assessment of liquidated damages. Regardless of the discovery appellant claims is necessary as to the reasonableness of government's determination of the liquidated damages rate pre-award, or the government's jurisdictional argument as to that determination, appellant here also challenges the reasonableness of the government's decision not to apportion that rate, even though appellant had completed Phases I and II (app. cross-mot. at 15). On the issue of apportionment of liquidated damages, we have found for appellant. Our decision on the parties' cross-motions for summary judgment

turns not on the reasonableness of the liquidated damages rate as established by the government pre-award (nor are we able to decide that factual dispute on summary judgment), but, rather, on the government's failure to apportion its liquidated damages at the time it assessed those damages.

The government correctly states that appellant's complaint does not address the reasonableness of the government's liquidated damages rate (gov't reply at 8). Board Rule 6(d) provides for amendment of pleadings "upon conditions fair to both parties" and that "[i]f evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided however, that the objecting party may be granted an opportunity to meet such evidence." Given our decision here, appellant must decide what additional steps, if any, are necessary to properly tee up its affirmative defense for resolution in this appeal.

CONCLUSION

For the reasons stated above, the government's motion for summary judgment is denied. Appellant's cross-motion for summary judgment is granted-in-part on the issue of appellant's challenge to the government's assessment of liquidated damages and its failure to apportion liquidated damages based upon appellant's substantial completion of Phases I and II of the Task Order. Appellant's motion is denied-in-part due to the remaining factual issues regarding substantial completion of Phase III and proper apportionment of the liquidated damages rate.

Dated: April 16, 2021

DAVID B. STINSON
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. 62395, Appeal of Sauer Incorporated, rendered in conformance with the Board's Charter.

Dated: April 16, 2021

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

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, for the use and benefit of BALLARD MARINE CONSTRUCTION, LLC, Plaintiff, v. NOVA GROUP INC., et al., Defendants.	CASE NO. C20-5954 BHS-DWC ORDER ON MOTION FOR RECONSIDERATION

THIS MATTER is before the Court on Plaintiff Ballard Marine's Motion for Reconsideration or Clarification, Dkt. 73, of the Court's Order, Dkt. 72, adopting the Magistrate Judge's Report and Recommendation ("R&R"), Dkt. 61. The Court stayed Ballard's Miller Act claim pending resolution of the "upstream" Contracts Dispute Act ("CDA") process, as required in the Prime Contract between the Navy and Nova, which was incorporated into the Subcontract between Nova and Ballard. Dkt. 72 at 16.

Ballard seeks clarification on the extent of the stay, arguing that the Court's Order contemplated that the CDA process, and thus the stay, would conclude when the Navy Contracting Officer issued a final decision on Nova's "pass through" claim to the Navy—

which is expected at the end of this month. Dkt. 79-1 at 1. It argues that if the Court intends to stay the case until all possible appeals of that decision are exhausted, it will potentially force Ballard to wait until 2026 to assert its claims against Nova and the sureties and to obtain payment for the work it has already performed. Dkt. 73 at 2. If that was the Court's intent, it asks the Court to Reconsider its Order granting a stay, arguing it would conflict with the Miller Act's purpose and with fundamental equity. Dkt. 73 at 6–7.

Nova and its sureties reiterate that the Subcontract requires Ballard to await the resolution of the CDA process—the determination of the amount of additional payment to which it is entitled—before pursuing Nova or its sureties for that additional payment. Dkt. 77. They ask the Court to confirm that it stayed the case until that determination is made, and to deny Ballard's motion for reconsideration. *Id.* at 10.

Under Local Rule 7(h)(1), motions for reconsideration are disfavored, and will ordinarily be denied unless there is a showing of (a) manifest error in the ruling, or (b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence. The term "manifest error" is "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary 622 (9th ed. 2009).

Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Est. of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly

discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). Neither the Local Civil Rules nor the Federal Rules of Civil Procedure, which allow for motions for reconsideration, are intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through—rightly or wrongly. *Defs. of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995).

Ballard argues that the CDA process, including appeals, could take years to fully resolve. It claims that the initial "pass through" portion of that process, in which the contractor (here, Nova) submits a claim to the appropriate government agency (here, the Navy) for a "final decision" on payment, is the appropriate length of any stay. It asks the Court to clarify that, in its discretion, that is what the Court ordered when it adopted the Magistrate Judge's R&R. Dkt. 73 at 4.

Ballard emphasizes the multi-step CDA appeals process, on the other hand, involves not just the Navy, but multiple appellate tribunals. In its reply, Ballard argues that after the initial pass-through process, Nova will not be attempting to persuade the Navy—its contracting partner—of the legitimacy of Ballard's claim, but instead must convince an independent tribunal of the right to additional compensation for the differing site conditions it and Ballard encountered. Dkt. 81. Unlike the almost-complete pass-through process, the CDA appeals process could take years, unfairly delaying payment for work it has long since completed. *Id*.

Nova[1] accurately characterizes Ballard's motion as a repeat of the arguments it made in opposition to a stay before the Magistrate Judge and in its objections to the R&R. The sureties emphasize that they moved for a stay of Ballard's claims against them until a final determination of the amount owed under the subcontract, including any potential appeals of the Navy's Contracting Officer's final decision, consistent with the Subcontract. Dkt. 79 at 2. They emphasize that the R&R accurately reflected this request, Dkt. 61 at 9 ("The Sureties move . . . to stay Ballard's claims against them until Ballard's differing site conditions claim is resolved in accordance with the Subcontract between Nova and Ballard, because at present there is no 'amount due' under the contract."), and recommended that this Court grant that motion, which it did, Dkt. 72.

Nova argues, persuasively, that the Miller Act was "never intended to allow subcontractors to bypass the process under which their monetary entitlement is quantified—a claim process under the Contract Disputes Act that controls all claims against a Government owner for Differing Site Conditions." Dkt. 77 at 3. Indeed, it argues, permitting a subcontractor to pursue a claim for payment from the prime contractor's surety before the amount of its additional[2] entitlement is determined (and notwithstanding the contracts' requirements) would turn both the subcontracting and the surety industries "upside down." Dkt. 84 at 3. Ballard explained its view of the procedure in an August 2020 letter to Nova, explaining that its reading of the contracts, the CDA,

[1] Nova's Motion for Leave to File a Surreply, Dkt. 83, is **GRANTED**.

[2] Ballard has been paid both its initial subcontract amount and, recently, an additional $1,947,994.96. *See* Carlson Decl., Dkt. 78, at Exs. 1–4.

and the Miller Act would result in prompt payment, after which Nova and its sureties could pursue "reimbursement" from the government, through the CDA process:

> The bond claim process, if carried out by the sureties reasonably and in good faith, will result in payment to Ballard in the very near future. As such, the claim against the Government will, essentially, be a means for Nova or its sureties to obtain reimbursement for that payment.

Dkt. 78 at 17, Ex. 5. None of the authorities upon which Ballard relies support its claim that this is how the statutes or the contracts work.

As Nova argues, each of the cases Ballard cites for the proposition that a stay pending the CDA appeals process is inconsistent with the Miller Act's purpose involved some sort of unusual fact pattern or "special circumstance" not present in this case. In *Pinnacle Crushing and Constr., LLC v. Hartford Fire Ins. Co.*, No. C17-1980JLR, 2018 WL 1907569, at *2 (W.D. Wash. April 23, 2018), the prime contractor had defaulted on the contract and had been terminated. In *Walton Tech., Inc. v. Weststar Eng'g, Inc.*, 290 F.3d 1199, 1202 (9th Cir. 2002), the subcontractor's claim against the prime contractor and its surety did not appear to be attributable to the government; it was for rent and damage to equipment the prime leased from the subcontractor. In *Apple Valley Commc'ns., Inc. v. Budget Elec. Contractors, Inc.*, No. EDCV 19-1643 PSG (SHKx), 2020 WL 8385651, at *4 (C.D. Cal. Dec. 8, 2020), the prime contractor had failed to diligently pursue the pass-through portion of the CDA process and the government had already denied the claim because the delays were attributable to the prime contractor and other subcontractors. And in each of these cases, a primary issue was whether the subcontractor had validly waived its Miller Act rights. No party in this case has asserted

that Ballard waived its Miller Act rights. Furthermore, none of these authorities hold or otherwise establish that the case upon which Nova, its sureties, and the Court relied, *United States v. Dick/Morganti*, was wrongly decided. No. C07-02564, 2007 WL 3231717 (N.D. Cal. Oct. 30, 2007) (staying Miller Act bond claim where subcontractor agreed to a stay while the CDA process was resolved). There is not case holding that a subcontractor can sue the prime contractor's surety for additional compensation, when the amount of that compensation has not been determined, and when the subcontractor's claim against the prime contractor is not yet ripe.

Nova also disputes Ballard's claim that the entire CDA process will take an additional five years. It asserts that it has been diligently prosecuting Ballard's claim (and its own), with demonstrable success. It correctly asserts that Ballard will necessarily be "involved" in the CDA process, including any appeals, Dkt. 77 at 4–5. In its surreply, Nova also demonstrates that the Navy will similarly continue to be involved, because the Contracting Officer "retains authority to settle any appeal at the Armed Services Board of Contract Appeals ("ASBCA")". Dkt. 84 at 3.

The Court intended to stay the case until the completion of the CDA process, including any appeals. Ballard's Motion for Clarification is, to that extent, **GRANTED**. Ballard's Motion for Reconsideration of that decision is **DENIED**. The case is Stayed pending the resolution of the CDA process, including any appeals.

IT IS SO ORDERED.

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Dated this 22nd day of October, 2021.

BENJAMIN H. SETTLE
United States District Judge

CITATION: **Crosslinx v. Ontario Infrastructure, 2021 ONSC 3567**

COURT FILE NO.: CV-20-00649072-00CL
DATE: 20210517

ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:	)	
	)	
CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP and CROSSLINX TRANSIT SOLUTIONS CONSTRUCTORS	)	*Matthew P. Sammon, Andrea Wheeler, Jacqueline Chan* for the Applicants
Applicants	)	
	)	
– and –	)	
	)	
ONTARIO INFRASTRUCTURE AND LANDS CORPORATION, as representative of the Minister of Economic Development, Employment and Infrastructure, as representative of Her Majesty the Queen in Right of Ontario	)	*Peter Wardle, Sharon C. Vogel and Jesse Gardner,* for the Respondents
and	)	
METROLINX	)	
Respondents	)	
	)	
	)	**HEARD:** February 22, 23, 2021

KOEHNEN J.

OVERVIEW

[1] This application arises out of the effects that the current Covid-19 pandemic is having on a large-scale construction project in the city of Toronto known as the Eglinton Crosstown Light Rapid Transit line. The project involves the construction of a 19 km light rapid

transit line of which 10 km will be underground as will 15 of its 25 station stops. At the time the application was heard, the project employed 1,500 people.

[2] The applicants represent a consortium of four of Canada's largest construction companies that are building the project. The respondents represent agencies of the Crown in Right of Ontario who have commissioned the project. The distinction between each of the two entities that comprise each of the applicants and the respondents, is largely irrelevant to the application before me. As a result, unless otherwise required by the particular circumstance, I will simply refer to the parties as the applicants and the respondents. Where I quote from documents, and the documents refer to Project Co. or CTSC, they are referring to the applicants. Where the documents refer to HMQE (Her Majesty the Queen Entities), they are referring to the respondents.

[3] The core issue between the parties is whether the applicants are entitled to invoke a procedure under the contract that could result in an extension of the time that the applicants have to substantially complete the project.

[4] The legal manifestation of this issue is as follows: The contract calls for the project to be completed by the Substantial Completion Date. There are significant penalties if the applicants do not do so. The contract also contains provisions that permit the respondents to require the applicants to implement "additional or overriding procedures" in the event of an Emergency. If the respondents call for such procedures, the applicants can invoke a process, which the contract refers to as a Variation Enquiry, to determine whether the "additional or overriding procedures" should lead to an extension of the Substantial Completion date.

[5] The applicants say that the Covid-19 pandemic is an Emergency that required them to implement additional or overriding procedures in the form of social distancing measures that slowed down construction. They seek declarations to the effect that they are entitled to a Variation Enquiry under the contract.

[6] The respondents have refused to declare an Emergency because it was not necessary to do so given that the province had already done so. They say that they have not required any "additional or overriding procedures" because the applicants were already taking sufficient measures as a result of the obligation on the applicants under the contract to maintain a safe and healthy workplace.

[7] As a preliminary issue, the respondents move to stay this application. They base their motion to stay on provisions in the contract that require all litigation to be postponed until after Substantial Completion so that all litigation can be addressed in a single, global proceeding.

[8] I dismiss the motion for a stay. Although the contract calls for litigation to be postponed until after Substantial Completion, it also contains exceptions to that general rule and allows the parties to apply to the court for interim protection. In addition, the contract

contains a mechanism to extend the Substantial Completion Date. To defer disputes about the implementation of that mechanism until Substantial Completion has been achieved robs that process of practical effect.

[9] I grant the declarations the applicants' request. I find that the respondents did call for "additional or overriding procedures." If I am wrong in that, the only reason the respondents did not require "additional or overriding procedures" was that the applicants were proactive and implemented such measures without the need for the respondents to direct them. To deny the applicants the benefit of the Variation Enquiry process in the circumstances of this case would be applying the provisions of the contract in a way that is contrary to their underlying purpose.

I. The Motion to Stay

[10] The respondents advanced two reasons for a stay of this application:

A. The contractual provision to the effect that all litigation should be stayed until after Substantial Completion.

B. The applicant's alleged failure to comply with the process leading to a Variation Enquiry

A. Stay of Litigation until after Substantial Completion

[11] Schedule 27 contains the agreement's dispute resolution provisions. Section 10.1 of Schedule 27 embodies the concept that all litigation surrounding the project should be bundled together into a single piece of litigation following Substantial Completion. It provides:

> …all adjudication, arbitral and litigation proceedings between the Parties prior to Substantial Completion shall be stayed and consolidated into, as applicable, a single adjudication, arbitration and a single litigation proceeding, with the adjudication, arbitration and, if applicable, litigation, proceeding promptly and expeditiously after Substantial Completion.

[12] Section 10.1, however, contains a number of exceptions including where:

> (c) the issue in a particular Dispute is such that waiting until after Substantial Completion to resolve that Dispute will cause irreparable harm to one of the Parties;

[13] In addition, s. 13.2 of Schedule 27 allows for access to the courts despite the provisions of s. 10. It provides:

> Nothing contained in this Schedule 27 will prevent the Parties from seeking interim protection from the courts of the Province of Ontario, including seeking an interlocutory injunction where available pursuant to Applicable Law, if necessary to prevent irreparable harm to a Party.

[14] Section 40 of the Project Agreement (the contract) expressly creates a process whereby the applicants can obtain extensions to the Substantial Completion Date during the course of construction. Disputes surrounding that process are to be determined according to Schedule 27. It would make no sense to interpret Schedule 27 as requiring that disputes about extensions to the Substantial Completion Date be deferred until Substantial Completion has been achieved. To do so would deprive the applicants of the benefit of the contractual provision that allows the Substantial Completion date to be extended.

[15] To stay this application until after Substantial Completion has been achieved would subject the applicants to irreparable harm because it would deprive them of a contractual right for which they have bargained namely the right to invoke a process that could lead to the extension of the Substantial Completion Date. Deferring that determination until after Substantial Completion has been achieved would subject the applicants to adverse consequences including payment of liquidated damages, loss of financing, termination of the contract, insolvency and loss of reputation; none of which would have arisen if the Substantial Completion date should have been extended. As a practical matter, one cannot re-institute the contract after it has been terminated and completed by another party. I am satisfied that both the loss of a contractual right and its potential consequences here amount, as a practical matter, to harm that is irreparable.

B. Applicant's Alleged Failure to Comply with The Variation Process

[16] The respondents' second ground for staying the application is the allegation that the applicants have failed to comply with the process leading to a Variation Enquiry. On my

view of the facts, the applicants have complied with the process but it is the respondents who have tried to frustrate it.

[17] The first step for a party that seeks relief under Schedule 27 is to deliver a Notice of Dispute. The parties are then required to make good faith efforts to resolve the dispute through meetings of Party Representatives. Each Party Representative is required to give the other, on a without prejudice basis, frank, candid and timely disclosure of relevant facts, information and documents. If the Party Representatives are unable to resolve the dispute within 10 business days after receipt of a Notice of Dispute, the dispute is elevated to discussions between Senior Officers. If the Senior Officers cannot resolve the dispute, it is referred to an Independent Certifier[1] for resolution. If either party disagrees with the decision of the Independent Certifier, it can proceed to litigation. The Independent Certifier's decision must, however, be complied with unless and until it is overturned in a subsequent proceeding.

[18] On May 11, 2020, the applicants delivered a Notice of Dispute. The key relief sought in the Notice of Dispute was:

(i) A determination that the pandemic constituted an Emergency under the Project Agreement.

(ii) A determination that the respondents ought to have directed additional or overriding procedures in response to the pandemic which should have led to a Variation Enquiry to determine whether the Substantial Completion Date should be extended.

[19] On May 15, 2020 the applicants sent the respondents, a detailed letter which set out the costs and delays that the Covid-19 pandemic created.

[20] On May 26, 2020 the respondents replied denying that the applicants were entitled to a Variation under the Project Agreement. In addition, the respondents asked for detailed additional information about the project including daily labour records, the applicants' actual cost records and copies of invoices and purchase orders supporting amounts already spent. In the same letter, the respondents indicated that they were willing to engage in a meeting of Party Representatives but would refuse to move beyond that to a meeting of Senior Officers unless all of the information requested in the letter was produced.

[1] The Independent Certifier is BTY Consultancy Group Inc., a consulting firm that is obliged to act impartially, honestly, and independently in making certain determinations under the Project Agreement.

[21] The applicants were eager to move negotiations forward so that they could invoke the Independent Certifier procedure if the Senior Officers could not reach an agreement. They were met with two roadblocks. First, the Independent Certifier process could not be initiated until the Senior Officers had met. The respondents refused to have the Senior Officers meet unless they got all of the information they requested. Second, s. 3.4(a) (iv) of Schedule 6 to the Project Agreement provides that the Independent Certifier can only act in accordance with the joint direction of the parties. As a result, if the respondents were not prepared to give a joint direction to the Independent Certifier that defined the issues he or she was to address, the process could not move forward.

[22] In argument before me, the respondents submitted that the applicants could have broken the logjam by filing a separate Notice of Dispute concerning the respondents' request for further production. That too would have had to proceed through the two layers of negotiation envisaged by Schedule 27 and then possibly to an Independent Certifier for a decision on the obligation to produce documents. That too, however, would have depended on both parties directing the Independent Certifier to make a decision about the production of documents. I note that the respondents never served a Notice of Dispute defining that issue.

[23] There is ample room for mischief and delay in this process. By way of example, document requests can be used to frustrate and delay what is intended to be a speedy negotiation process under Schedule 27. The timelines for those negotiations are measured in days, not weeks. That suggests a somewhat high level business approach to the issues as opposed to a granular, autopsy litigation type approach.

[24] It strikes me that the respondents' refusal to move to further discussions in the absence of documentation that satisfied them reflects this sort of mischief. It is difficult to see how any dispute could move forward if it can be held up by one of the parties asserting that it is not satisfied with the documentation it has received. Rather than preventing the dispute resolution process from moving forward because of dissatisfaction with documents, the preferable approach would have been to ask the Independent Certifier to order further production or to argue before the Independent Certifier that the applicants' limited production made it impossible for the Independent Certifier to conclude that the Substantial Completion Date should be extended.

[25] Moreover, although the respondents assert that they required additional information to assess the Notice of Dispute, Andrew Hope, an Executive Vice of Metrolinx, admitted in cross-examination that the dispute between the parties was principally a legal one. As Mr. Hope testified, "the difference of opinion was over whether we were required to issue [ ] additional and overriding procedures."

[26] That testimony was consistent with the respondents' behaviour. The CEOs of the parties engaged in discussions in which the respondents made a substantial settlement offer to the

applicants in relation to their Covid-19 and other claims accompanied by an enforceable term sheet. As a result, it is somewhat difficult to accept the proposition that the absence of the more granular information that the respondents sought was a barrier to discussions between Senior Officers and the subsequent appointment of an Independent Certifier.

C. The Issue of the Allegedly Privileged Email

[27] The parties spent a good deal of time arguing about whether an email dated June 20, 2020 in which the respondents made the settlement offer referred to above is subject to settlement privilege and should not have been produced.

[28] In my view, any privilege over the document has been waived for purposes of this application. The email is, however, of limited importance to the application and its disposition.

[29] I come to the view that privilege has been waived because one of the positions the respondents advance on the application for a stay is that the applicants did not give the respondents enough information to allow them to proceed to the Senior Officers discussions contemplated by Schedule 27. In the June 20, 2020 email, however, the respondents made a material settlement offer to the applicants after discussions between Senior Officers.

[30] Settlement privilege, like other forms of privilege, can be waived either expressly or by implication. The party asserting waiver bears the onus of establishing that waiver has occurred.

[31] The principal here is analogous to the state of mind exception that applies to waivers of solicitor client privilege. Where one party has voluntarily put its state of mind regarding legal advice at issue, it has implicitly waived privilege regardless of whether it intended to do so. The rationale underlying waiver in such cases is the need for fairness and consistency.[2]

[32] By taking the position that they had inadequate information to proceed to Senior Officer discussions, the respondents put their state of mind at issue. Doing so allowed the applicants to test that assertion by referring to the June 20 email.

[33] The respondents submit that there were two streams of without prejudice discussions, one that related to the Covid work and another that related to delays that were not caused by Covid. Even if I accept that proposition, it has no bearing on the analysis because the

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[2]Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 5th Ed., §14.155 – 14.159; *Gale v Halton Condominium Corporation No. 61*, 2020 ONSC 5896 at para 8. *See also R v Campbell*, [1999] 1 SCR 565 at paras 67-75.

respondents connected the two streams in their June 20 email by offering to settle both the Covid and non-Covid claims for a global amount.

[34] I appreciate the respondents' argument that the June 20 email does not tell me whether the settlement offer it contains is larger, smaller or the same as earlier offers to settle the non-Covid claims. Had the settlement in the June 20 email been for the same or a lesser amount than their earlier offers, I expect the respondents would have told me that. Given that the applicants had already disclosed the email, they could hardly take issue with the respondents' disclosure of other information which would put the June 20 email into a different context. The respondents chose not to do so.

D. The Test for a Stay

[35] The court's authority to grant a stay is rooted in section 106 of the *Courts of Justice Act*[3] which provides:

> A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.[4]

[36] Section 106 gives the court broad discretion to stay proceedings unfettered by any specific test.[5] The discretionary power is highly dependent on the facts of each case.[6]

[37] The respondents submit that the test for a stay requires me to weigh the following factors:

a. whether there is substantial overlap of issues in the two proceedings;

b. whether the two cases share the same factual background;

c. whether issuing a temporary stay will prevent unnecessary and costly

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[3] *Courts of Justice Act*, RSO 1990, c C.43
[4] *Courts of Justice Act*, R.S.O. 1990, c. C43, s. 106.
[5] *Hester v. Canada*, [2008] G.S.T.C. 55, [2008] O.J. No. 634 at para 15 (Div Ct); cited with approval in *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2010 ONSC 2911 at para 14 and *Kaye et al. v. Fogler Rubinoff LLP et al*., 2019 ONSC 1289, at para 24.
[6] *Campeau v. Olympia & York Developments Ltd*., 1992 CarswellOnt 185, [1992] O.J. No. 1946 at para 15, citing *Arab Monetary Fund v. Hashim*, [1992] O.J. No. 1330 (Ont Gen Div) at para 17.

duplication of judicial and legal resources; and

d. whether the temporary stay will result in an injustice to the party resisting the stay.[7]

[38] For me, the most relevant factor is the last, namely whether the stay will result in an injustice to the party resisting it. In my view, staying this proceeding would result in such an injustice. It would continue to leave the parties in a deadlock from which there is no apparent exit. As noted earlier, staying the proceeding would deny the applicants the benefit of accessing a dispute resolution mechanism for which they bargained and which could lead to an extension of the Substantial Completion Date. Depriving a party of a contractual right for which they bargained results in an injustice.

II. The Application for Declarations

[39] The nub of the issue between the parties is whether the respondents asked or should have asked the applicants to implement additional or overriding procedures with respect to the project. Had they done so, it would have given the applicants the right to initiate a Variation procedure which could result in an extension of the Substantial Completion date.

[40] The issue arises out of section 62.1 (c) of the Project Agreement which provides:

> If, in respect of any Emergency, HMQ Entities notify Project Co that they require compliance with any additional or overriding procedures as may be determined by HMQ Entities or any other statutory body, then Project Co shall, subject to Schedule 22 - Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures (whether such procedures are specific to the particular Emergency or of general application and on the basis that such procedures shall take precedence to the extent that they overlap with the procedures mentioned in Section 62.1(a) or (b)).

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[7] *Kuchar v Midland (Town – Chief Building Official)*, 2016 ONSC 6777 at para 20, citing *Hollinger International Inc. v. Hollinger Inc*., [2004] O.J. No. 3464 at para 5; and *Catalyst Fund Limited Partnership II v. Imax Corporation*, 2008 CanLII 48809, 92 OR (3d) 430 (ONSC) at para 21.

[41] The concept of "additional or overriding procedures" is not defined in the Project Agreement.

[42] The applicants submit that the respondents called for, or were obliged to call for, additional or overriding procedures. As a result, the applicants seek declarations to the effect that:

i. The Covid-19 pandemic is an Emergency under the Project Agreement;

ii. The respondents have breached their contractual obligations by failing to direct the applicants to implement additional or overriding procedures under section 62.1 (c) of the Project Agreement; and

iii. The respondents have an obligation to provide the applicant with a Variation Enquiry pursuant to Schedule 22 of the Project Agreement with respect to the additional or overriding procedures that are necessary to implement in light of the pandemic.

[43] The respondents say they did not call for and were under no obligation to call for additional or overriding procedures. They argue that the terms of the Project Agreement allocate the risk of the pandemic to the applicants.

[44] I will turn first to the provisions of the Project Agreement on which the respondents rely, then to the events at issue and will then analyse those events in light of the language of the contract.

A. Terms of the Contract

[45] The respondents rely heavily on the words of the contract. They submit that the contract contains numerous provisions that require the applicants to comply with the *Occupational Health and Safety Act*[8] and to take all necessary steps to maintain a safe workplace. The respondents argue that those provisions allocate any pandemic risks to the applicants. The key provisions of the contract on which the respondents rely are set out below.

[46] Section 9.2 of the Project Agreement provides:

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[8] *Occupational Health and Safety Act*, RSO 1990, c O.1

> (a) Project Co shall, at its own cost and risk:
>
> (i) perform all of its obligations under, and observe all provisions of, this Project Agreement in compliance with Applicable Law;
>
> (ii) perform all Project Operations:
>
> (A) in compliance with Applicable Law;
>
> (D) in accordance with Good Industry Practice;
>
> (G) with due regard to the health and safety of persons and property;

[47] Applicable Law is defined broadly to include any statute, by law, regulation or Authority Requirement. Authority Requirement is in turn defined as any "order, direction, directive, request for information, policy, administrative interpretation, guideline or rule of or by any Governmental Authority." The agreement also defines Governmental Authority broadly.

[48] Section 38.1 of the Project Agreement requires the applicants to comply with all changes in law:

> Following any and all Changes in Law, Project Co shall perform the Project Operations in accordance with the terms of this Project Agreement, including in compliance with Applicable Law.

[49] Although there are certain portions of the contract that provide relief for specific types of changes in the law, those are not relevant here.

[50] Section 9.5 of the Project Agreement provides:

> 9.5 Safety and Security
>
> (a) During the Construction Period and following Final Completion solely in relation to Construction Activities, Project Co shall:
>
> (ii) subject to Section 9.5(b), keep the Site … in a safe and orderly state, as appropriate in accordance with the Construction Safety Management Plan and Good Industry Practice, to avoid danger to persons on the Site …

> (iv) comply, and cause each Project Co Party to comply, with Applicable Law relating to health and safety, including the Occupational Health and Safety Act (Ontario) and all regulations thereto;
>
> (v) with respect to the Works, perform, or cause a Project Co Party to perform, all of the obligations of the "constructor", and indemnify HMQ Entities and each other Province Person against any and all of the liabilities of the "constructor", under the Occupational Health and Safety Act (Ontario) and all regulations thereto;

[51] As noted, s. 9.5 and other provision of the Project Agreement refer to the responsibility to comply with the *Occupational Health and Safety Act*.[9] That *Act* creates a broad set of obligations on constructors like the applicants including those in section 23 which provides:

> 23 (1) A constructor shall ensure, on a project undertaken by the constructor that,
>
> (a) the measures and procedures prescribed by this Act and the regulations are carried out on the project;
>
> (b) every employer and every worker performing work on the project complies with this Act and the regulations; and
>
> (c) the health and safety of workers on the project is protected.

[52] In addition, the regulations under the *Emergency Management and Civil Protection Act,*[10] which the government of Ontario invoked in response to the pandemic provide:

> (1) The person responsible for a place of business that continues to operate shall ensure that the business operates in accordance with all applicable laws, including the *Occupational Health and Safety Act* and the regulations made under it.

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[9] *Occupational Health and Safety Act*, RSO 1990, c O.1
[10] *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9

> (2) The person responsible for a place of business that continues to operate shall operate the business in compliance with the advice, recommendations and instructions of public health officials, including any advice, recommendations or instructions on physical distancing, cleaning or disinfecting.[11]

[53] Finally, the respondents rely on the requirement on the applicants to have in place a Construction Safety Management Plan and an Emergency Response Plan. Section 9.2 of Schedule 15-2 of the Project Agreement requires the Construction Safety Management plan to, among other things:

> (i) provide a safe workplace; and
>
> (vi) take every reasonable precaution to protect public health and safety during the execution of the Works.

[54] The Emergency Response Plan is required to address issues that "pose a threat to health and safety of any persons" or that "constitute a state of Emergency." The respondents submit that this indicates that emergencies were contemplated in the agreement and that the applicants were required to bear the risk of emergencies.

[55] The respondents submit that, in addition to the plain words of the contract, several contextual elements suggest that the applicants agreed to assume pandemic risks. First, the contract is a sophisticated commercial agreement. Its main body and key schedules run to over 550 pages. It is used as a template for all public infrastructure projects in Ontario. It reflects a carefully balanced set of risk allocations with which the court should not interfere. Second, the applicants are four of Canada's largest construction companies. They are sophisticated parties who had access to sophisticated legal advice. Third, the contract has a value of over $5.5 billion. In light of a contractual benefit of that size, it is not unreasonable to enforce the applicants' acceptance of pandemic risk.

[11] O. Reg. 119/20 filed under the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9 Schedule 3 Requirements That Apply to Businesses

B. The Factual Context

[56] I turn now to the factual context in which the contractual provisions on which the respondents rely must be interpreted.

[57] By mid March 2020, the Director General of the World Health Organization had declared Covid-19 to be a pandemic. On March 17, 2019 the Premier of Ontario declared a State of Emergency under the *Emergency Management Act*.[12]

[58] On March 23, 2020 the applicants wrote to the respondents asking them to declare an Emergency pursuant to section 62.1 (c) of the Project Agreement, direct the applicants to take "additional and overriding measures" pursuant to section 62.1 (c) and to provide the applicants with a Variation in connection with the additional and overriding procedures. The letter proposed a number of additional and overriding procedures including implementing social distancing on worksites to ensure that workers remain at least 6 feet apart from each other at all times, staggering shifts to facilitate social distancing and implementing self isolation measures for workers with Covid symptoms, those who have travelled outside of the country or those who have household members who are self isolating.

[59] On March 25, 2020 Metrolinx's chief Safety Officer wrote to the applicants indicating that they were still awaiting new Ministry of Labour "Covid-19 "protocols"" for construction sites that the Premier had announced earlier that week. The email continued:

> Once we have these we will include adoption of the requirements in our site visit observations, whilst respecting social distancing and the need to protect our teams and our contractors also.

[60] In other words, Metrolinx would require the applicants to take whatever steps were set out in the anticipated government construction "protocols".

[61] On March 27, 2020, the respondents answered the applicants' letter of March 23 indicating that they had not declared an Emergency under the Project Agreement but that

> the Covid-19 pandemic is serious and that it will likely have significant impacts which must be mitigated under the Project Agreement.

When the respondents wrote this letter, they had already concluded internally that there was an Emergency although they had not declared one.

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[12] *Emergency Management and Civil Protection Act*, RSO 1990, c E.9

[62] On March 29 government authorities issued the construction "protocols" referred to in the March 25, 2020 email from Metrolinx's Chief Safety Officer. The document stated:

> In order to ensure physical distancing on site, employers should consider:
>
> - staggering start times
> - staggering breaks
> - staggering lunches
> - restricting the number of people on-site and where they are assigned to work
> - controlling site movement (by limiting the potential for workers to gather, including personnel in material hoists and site trailers)
> - limiting the number of people who use elevators and hoists at one time
> - holding meetings in an outside or large space to enable physical distancing
> - limiting unnecessary on-site contact between workers, and between workers and outside service providers, and encourage physical distancing in these areas (for example, by removing coffee trucks from site)

[63] The same document noted:

> Physical distancing will result in lower staffing on job sites. In order to keep sites open, employers will need to adjust production schedules as the impacts of physical distancing become clear. Owners and trades will need to collaborate to ensure there is a clear understanding of how production will be impacted.
>
> Schedules should consider:
>
> - limiting number of workers to critical number by staggering work schedules

- sanitation of sites and workspaces
- site planning to facilitate appropriate physical distancing (two metres) between workers during any particular shift
- work-site mobility and transportation, including hoist operations

[64] On April 21, 2020 the respondents again wrote to the applicants with respect to the issue of additional or overriding procedures. In their letter, the respondents took the position that the applicants were required to comply with all obligations under the *Occupational Health and Safety Act* as well as with the guidance of public health authorities, local, provincial and federal governments. The letter continued:

> At this point, HMQE do not require that Project Co implement additional and overriding measures in addition to those presently being undertaken by Project Co in its capacity as the Constructor and Employer under OHSA.

[65] On May 26, the respondents advised the applicants:

> As HMQE has articulated in its previous correspondence on this matter, Project Co's interpretation of Section 62.1(c) is not supported by the language of the PA. Section 62.1(c) permits but does not oblige HMQE to notify Project Co that they require "additional or overriding procedures". Project Co's compliance with its obligations under the Occupational Health and Safety Act ("OHSA"), as required pursuant to the Project Agreement, represent a sufficient response to the Pandemic such that HMQE do not require additional and overriding procedures at this time.
>
> In fact, HMQE have expressly stated that they "do not require that Project Co implement additional and overriding measures in addition to those presently being undertaken by Project Co in its capacity as the Constructor and Employer under the OHSA."

C. Analysis

[66] The respondents raise three basic arguments to support their position that the applicants are not entitled to invoke the Variation procedure under the contract:

(i) The contract allocates health and safety risks to the applicants;

(ii) The applicants' Emergency Response Plan suggests that emergencies are for their account; and

(iii) The respondents did not require "additional or overriding procedures" to be implemented.

i. Contractual Allocation of Health and Safety Risks

[67] The fundamental interpretive question on this application is to determine whether, as the respondents submit, the provisions that require the applicants to comply with the *Occupational Health and Safety Act* mean that the applicants have accepted all risks of the pandemic. I do not believe that such a stark interpretation was intended by the parties when they entered into the agreement.

[68] The contract itself creates the possibility of extending the Substantial Completion Date because of threats to health and safety. Section 62.1(c) provides that:

> If, in respect of any Emergency, HMQ Entities notify Project Co that they require compliance with any additional or overriding procedures as may be determined by HMQ Entities or any other statutory body, then Project Co shall, subject to Schedule 22 - Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures ….

[69] The Variation Procedure is the process by which the applicants can extend the Substantial Completion Date. The first requirement to trigger that procedure is an Emergency. Emergency is defined in s. 1.178 of the Agreement, to include any situation, event, occurrence or circumstances:

(i) That constitutes or may constitute a hazard to or jeopardizes or may jeopardize or pose a threat to health and safety of any persons (including System Users and Province Persons) or any part of or the whole of the Project infrastructure;

(ii) That constitutes a state of emergency declared as such by the HMQ Representative or HMQ Entities (acting reasonably);

(iii) That gives rise to an emergency, as determined by any statutory body.

[70] The broad definition of Emergency to include any hazard that may jeopardize or pose a threat to health and safety coupled with the ability of an Emergency to lead to a delayed Substantial Completion Date would appear to contradict the respondents' starting point that the applicants assumed liability for any delays attributable to health or safety concerns of workers.

[71] The concept of delay in relation to the Substantial Completion Date should be read in light of the purpose of the contractual provision. The purpose of an obligation to substantially complete a project by a given date is to incentivize constructors to keep the project moving forward and to impose a financial penalty if they do not do so. Owners do not want constructors abandoning their projects to work on more profitable ones. Substantial completion provisions incentivize constructors to remain on the job and complete projects in a timely, efficient manner. Imposing financial penalties for delays caused by the pandemic does not further the purpose of including a Substantial Completion Date in the contract. It merely penalizes a contractor who may be working with heroic efficiency to complete the project in a timely manner even though it is impossible to do so because of circumstances beyond the contractor's control. Imposing financial penalties on contractors for failing to meet a substantial completion date in those circumstances only incentivizes them to cut corners and imperil public health and safety.

[72] The respondents recognized that the pandemic would cause delays in their letter of March 27, 2020 which noted that the pandemic was serious and "will likely have significant impacts" on the project. Social distancing on a construction site means one can have fewer workers on site at any one time. While working with staggered shifts may diminish the amount of delay, the risk of significant delay remains.

[73] This is a serious pandemic. Millions have died around the world. At the time of writing these reasons, 24,825 people have died in Canada. New variations of Covid-19 have emerged that are highly infectious. A single infection can have an exponential impact on others. In the circumstances I do not think it appropriate to adopt an interpretation of a contractual provision that runs contrary to its purpose and that incentivizes constructors to imperil public health.

[74] On the facts of this case, using the Variation procedure under the Project Agreement is a far more purposive way of applying the Substantial Completion provisions than is the blanket imposition of all pandemic risks upon the applicants. It is worth bearing in mind that the Variation procedure does not give the applicants automatic relief. They must still demonstrate within that procedure that the delays in respect of which they claim are

attributable to the new construction requirements arising out of the pandemic. The applicants do not simply get a free ride. Given that the parties specifically contemplated a Variation procedure for health and safety emergencies, it strikes me that it is more appropriate to interpret the contract by having the parties follow that procedure than it is to interpret the contract by reading that procedure out of existence.

[75] The respondents' focus on the financial value of the contract to justify the construction they advocate is not persuasive. The simple face value of a contract does not provide any indication about the level of risk that the applicants were assuming under it. A large face value may simply reflect the fact that the contract involves an expensive process. A contract with a large face value may still be one that offers the contracting party very little profit which may in fact suggest that the parties did not intend to allocate much risk to the applicants.

[76] Here, the project could be expected to be one that was expensive to build. As noted earlier, it involves the construction of a 19 km light rapid transit line through a densely populated area of Toronto with10 km and 15 stations being built underground.

[77] For the court to draw inferences about risk allocation from the value of a contract, it would be more relevant to know whether the applicants were expected to earn a materially higher profit on the contract than would otherwise be expected than it is to know about the face value of the contract.

ii. The Emergency Response Plan

[78] As noted, the respondents submit that the requirement for the applicants to have an Emergency Response Plan and to manage the project in accordance with that plan in the event of an Emergency suggest that risks of Emergencies were allocated to the applicants under the contract.

[79] I do not read the contract in that way. The relevant provision is section 62.1 which I reproduce in its entirety here for convenience:

> 62. EMERGENCY MATTERS
>
> 62.1 Emergency
>
> (a) From Financial Close until Substantial Completion Date, **upon the occurrence of an Emergency, Project Co shall comply with the Emergency Response Plan**.
>
> (b) From and after Substantial Completion Date, upon the occurrence of an Emergency, Project Co shall comply with its

> Emergency Response Plan in accordance with the Output Specifications.
>
> (c) **If, in respect of any Emergency, HMQ Entities** notify Project Co that they **require compliance with any additional or overriding procedures** as may be determined by HMQ Entities or any other statutory body, **then Project Co shall**, subject to Schedule 22 - Variation Procedure (if compliance with such procedures constitutes a Variation), **comply** with such procedures (whether such procedures are specific to the particular Emergency or of general application and **on the basis that such procedures shall take precedence to the extent that they overlap with the procedures mentioned in Section 62.1(a) or (b)**). (Emphasis added)

[80] This language appears to do away with the respondents' argument about the Emergency Response Plans suggesting that pandemic risk was allocated to the respondents. The closing words of s. 62 (c) expressly contemplate that the additional and overriding measures required in an Emergency may overlap with the contents of the Emergency Response Plans referred to in sections 62 (a) and (b). In other words, the concept of "additional or overriding procedures" applies even to the extent that some of those procedures are contained in the Emergency Response Plan.

iii. Did Respondents Require Additional or Overriding Procedures?

[81] The relevant contractual provision here is section 62.1 (c), the relevant portions of which I repeat again for convenience:

> If, in respect of any Emergency, HMQ Entities notify Project Co that they require compliance with any additional or overriding procedures as may be determined by HMQ Entities or any other statutory body, then Project Co shall, subject to Schedule 22 - Variation Procedure (if compliance with such procedures constitutes a Variation), comply with such procedures …

[82] The first requirement to trigger section 62.1 (c) is an Emergency. As already noted, the pandemic falls within the definition of Emergency under the contract. The provincial government invoked emergency legislation and Mr. Hope on behalf of the respondents admitted in his affidavit that there was an emergency.

[83] I address here, the second requirement to trigger s. 62.1 (c). Did the respondents, to use the language of the clause,

> notify [the applicants] that they require compliance with any additional or overriding procedures as may be determined by HMQ Entities or any other statutory body …

[84] There seems little doubt that the social distancing measures required on construction sites as a result of the Covid pandemic amount to additional or overriding procedures.

[85] The respondents' own language says as much. As noted in paragraph 64 above, in their April 21, 2020 letter the respondents stated:

> At this point, HMQE do not require that Project Co implement additional and overriding measures in addition to those presently being undertaken by Project Co in its capacity as the Constructor and Employer under OHSA.

[86] In other words, the respondents agree that the applicants have already implemented "additional and overriding measures" that were apparently so effective that the respondents did not require the applicants to do anything beyond what they had already done. That same language was repeated in the respondents' letter of May 26, 2020.

[87] It also seems clear that the respondents "notified Project Co. that they require compliance with" additional or overriding procedures. As noted in paragraph 59 above, the respondents wanted the applicants to comply with the new construction "protocols" that had not yet been published. The respondents intended to include the adoption of those new requirements in their site observations. In other words, to use the language of s. 62.1 (c), the respondents "required the applicants to comply," with "additional" measures contained in those "protocols".

[88] The defendants try to absolve themselves of liability for requiring compliance with these additional measures by submitting that those measures were part of the Applicable Law with which the applicants were bound to comply. Even if the additional measures were not part of Applicable Law, the respondents submit that they were not measures that were "determined by HMQ Entities or any other statutory body" and therefore fall outside of the language of section 62.1 (c).

[89] With respect to the procedures being part of "Applicable Law" under the contract, Applicable Law is, as noted earlier, defined broadly to include any Authority Requirement which in turn is defined as any "order, direction, directive, request for information,

policy, administrative interpretation, guideline or rule of or by any Governmental Authority."

[90] The construction "protocols"[13] in question were issued by the government of Ontario. It is unclear on the face of the document which particular governmental entity issued the document. While the respondents have referred to the contents of the document as "construction "protocols"", the document itself does not ascribe to itself any description or title that would allow one to attribute any sort of legal classification to it. The heading on the document is "Construction site health and safety during Covid 19." The measures that are referred to in paragraphs 62 and 63 above are referred to as "On-site best practices" in the document. Perhaps most importantly for our purposes, the document begins with a boldfaced paragraph stating:

> **This is not a legal document and employers are advised to seek legal advice**.

[91] The applicants submitted in argument that in light of this heading, there was no legal obligation to adhere to the document. The respondents did not contest that proposition in argument.

[92] Although the definition of Applicable Law is broad in the contract, it is difficult to hold that the document falls into the category of Applicable Law when it states on its face that it does not amount to a "legal document".

[93] Moreover, the terms of the document itself belie any force of law. The document does not require the applicants to take any particular steps. Rather, it says that "physical distancing is required to control the spread of Covid-19" and that to " ensure physical distancing on-site, **employers should consider**" the listed suggestions.

[94] The document contains a number of suggestions as opposed to mandatory requirements. As a result, in my view, it does not fall within the Applicable Law with which the applicants would be bound to comply, nor does it reflect any "change in law" for purposes of the contract.

[95] Despite the lack of legal force of the document, the respondents nevertheless required the applicants to comply with those additional measures. In doing so, the respondents, to use the language of section 62.1 (c) "determined' procedures with which they required the applicants to comply.

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[13] See CaseLines pages A1591- A1595.

[96] The respondents appear to be taking the position that the applicants are legally obliged to comply with a document that has no legal force in order to avoid the suggestion that the respondents required additional and overriding procedures to be taken.

[97] The respondents themselves failed to comply with the document. The document stated:

> Physical distancing will result in lower staffing on job sites. In order to keep sites open, employers will need to adjust production schedules as the impacts of physical distancing become clear.
>
> **Owners and trades will need to collaborate to ensure there is a clear understanding of how production will be impacted.** (Emphasis added)

[98] That this is the very issue in this application. That is to say, that the respondents did not collaborate with the applicants as required under the contract to ensure that there was a clear understanding of how production will be impacted. Put another way, if the document has legal force, it also compels collaboration about how production will be impacted. The only way to give legal force to such collaboration is to require the parties to follow the Variation process under the contract.

[99] As noted earlier, the respondents say that they were not required to issue any additional or overriding procedures because the applicants had already implemented them. I would still not allow the respondents to use that as an excuse to avoid the Variation Procedure under the contract.

[100] To hold otherwise would in effect allow the respondents to take a free ride on the applicants' sense of responsibility. The applicants could just as easily have done nothing and waited for the respondents or some other statutory body to demand that the applicants implement additional procedures in which case the procedures would have fallen within s. 62.1(c). The respondents' interpretation in effect punishes the applicants for being responsible.

[101] In its letter of March 27, 2020 Metrolink stated:

> HMQE's priority is the safety of the site and those working on the site.

[102] The respondents' interpretation of the contract would reduce that ostensible concern about worker safety to nothing but window dressing. The safety of workers would be a priority only insofar as it did not delay the project or otherwise inconvenience the respondents. If there were any inconvenience to be borne, it would have to be borne by the applicants. In my view, that is neither a fair nor responsible approach to take to the issue. While

professing to be concerned about worker safety, the respondents would be incentivizing the applicants to ignore worker safety by threatening to punish them for the delays that a concern about worker safety would entail.

[103] The respondents rely on the wording of the contract. I have adopted the same approach but come to a different conclusion than the respondents do about what the contract says and how to interpret and apply it.

[104] The applicants raised other issues in support of their application including principles of good faith and the indivisibility of the Crown. The latter gives rise to the question about the degree to which the respondents, as Crown entities, can take the position that they did not require additional measures when they are relying on the additional measures that another branch of the Crown required by way of the construction "protocols". In light of my reading of the contract and the "protocols," I do not find it necessary to address the concepts of good faith or Crown divisibility.

III. Disposition and Costs

[105] For the reasons set out above, I dismiss the respondents' motion for a stay and grant the following declarations:

(i) The COVID-19 pandemic is an Emergency under section 1.178 of Schedule 1 of the Project Agreement;

(ii) The respondents required compliance with additional or overriding procedures in response to the pandemic to protect public health and worker safety;

(iii) The respondents have a contractual obligation to provide the Applicants with a Variation Enquiry pursuant to Schedule 22 of the Project Agreement, the additional and overriding procedures that are necessary to protect public health and worker safety in light of the Pandemic and the respondents' directions to the applicants that the project continue uninterrupted through the Pandemic.

[106] Any party seeking costs of the application or the stay motion may make written submissions by May 31, 2021. Responding submissions should follow by June 7, 2021 with reply due by June 11.

Koehnen J.

Released: May 17, 2021

CITATION: Crosslinx v. Ontario Infrastructure, 2021 ONSC 3567

ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:

CROSSLINX TRANSIT SOLUTIONS GENERAL PARTNERSHIP and CROSSLINX TRANSIT SOLUTIONS CONSTRUCTORS

Applicants

– and –

ONTARIO INFRASTRUCTURE AND LANDS CORPORATION, as representative of the Minister of Economic Development, Employment and Infrastructure, as representative of Her Majesty the Queen in Right of Ontario

and

METROLINX

Respondents

REASONS FOR JUDGMENT

Koehnen J.

Released: May 17, 2021

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 22, 2020

CBCA 5683

PERNIX SERKA JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

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

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

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

SOMERS, Board Judge.

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

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

Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

In response, DOS stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

I. Standard for Summary Judgment

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

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

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

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

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

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

III. PSJV Attempts to Shift the Risk to the Government

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

A. Cardinal Change

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

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

PSJV asserts a cardinal change occurred here when:

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

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

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

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

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

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

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

B. Constructive Change

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

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

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

C. Constructive Suspension of Work

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

Decision

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

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

PERNIX SERKA JOINT VENTURE,
Appellant

v.

SECRETARY OF STATE,
Appellee

2020-2153

Appeal from the Civilian Board of Contract Appeals in No. 5683, Administrative Judge Patricia J. Sheridan, Administrative Judge Jeri Kaylene Somers, Administrative Judge Joseph A. Vergilio.

JUDGMENT

DOUGLAS LEO PATIN, Bradley Arant Boult Cummings LLP, Washington, DC, argued for appellant. Also represented by RANDOLPH MACPHERSON, Halloran & Sage, Washington, DC.

STEVEN JOHN GILLINGHAM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for appellee. Also represented by BRIAN M. BOYNTON, ROBERT EDWARD

KIRSCHMAN, JR.; ERIN M. KRIYNOVICH, Office of the Legal Adviser for Buildings and Acquisitions, United States Department of State, Washington, DC.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (MOORE, *Chief Judge*, PROST and STOLL, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

June 9, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Presidential Documents

Executive Order 13881 of July 15, 2019

Maximizing Use of American-Made Goods, Products, and Materials

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to promote the principles underlying the Buy American Act of 1933 (41 U.S.C. 8301–8305), it is hereby ordered as follows:

Section 1. *Policy*. (a) As expressed in Executive Order 13788 of April 18, 2017 (Buy American and Hire American), and in Executive Order 13858 of January 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), it is the policy of the United States to buy American and to maximize, consistent with law, the use of goods, products, and materials produced in the United States. To those ends, my Administration shall enforce the Buy American Act to the greatest extent permitted by law.

(b) In Executive Order 10582 of December 17, 1954 (Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act), President Eisenhower established that materials shall be, for purposes of the Buy American Act, considered of foreign origin if the cost of the foreign products used in such materials constitutes 50 percent or more of the cost of all the products used in such materials. He also established that, in determining whether the bid or offered price of materials of domestic origin is unreasonable or inconsistent with the public interest, the executive agencies shall either (1) add 6 percent to the total bid or offered price of materials of foreign origin, or (2) add 10 percent to the total bid or offered price of materials of foreign origin less certain specified costs as follows. Where the foreign bid or offer is less than $25,000, applicable duty is excluded from the calculation. Where the foreign bid or offer is more than $25,000, both applicable duty, and all costs incurred after arrival in the United States, are excluded from the calculation.

(c) The policies described in section 1(b) of this order were adopted by the Federal Acquisition Regulatory Council (FAR Council) in the Federal Acquisition Regulation (FAR), title 48, Code of Federal Regulations. The FAR should be reviewed and revised, as appropriate, to most effectively carry out the goals of the Buy American Act and my Administration's policy of enforcing the Buy American Act to its maximum lawful extent. I therefore direct the members of the FAR Council to consider measures that may better effectuate this policy.

Sec. 2. *Proposed Rules*. (a) Within 180 days of the date of this order, the FAR Council shall consider proposing for notice and public comment:

(i) an amendment to the applicable provisions in the FAR that would provide that materials shall be considered to be of foreign origin if:

(A) for iron and steel end products, the cost of foreign iron and steel used in such iron and steel end products constitutes 5 percent or more of the cost of all the products used in such iron and steel end products; or

(B) for all other end products, the cost of the foreign products used in such end products constitutes 45 percent or more of the cost of all the products used in such end products; and

(ii) an amendment to the applicable provisions in the FAR that would provide that the executive agency concerned shall in each instance conduct the reasonableness and public interest determination referred to in sections 8302 and 8303 of title 41, United States Code, on the basis of the following-described differential formula, subject to the terms thereof: the sum determined by computing 20 percent (for other than small businesses), or 30 percent (for small businesses), of the offer or offered price of materials of foreign origin.

(b) The FAR Council shall consider and evaluate public comments on any regulations proposed pursuant to section 2(a) of this order and shall promptly issue a final rule, if appropriate and consistent with applicable law and the national security interests of the United States. The head of each executive agency shall issue such regulations as may be necessary to ensure that agency procurement practices conform to the provisions of any final rule issued pursuant to this order.

Sec. 3. *Effect on Executive Order 10582*. Executive Order 10582 is superseded to the extent that it is inconsistent with this order. Upon the issuance of a final rule pursuant to section 2 of this order, subsections 2(a) and 2(c) of Executive Order 10582 are revoked.

Sec. 4. *Additional Actions*. Within 180 days of the date of this order, the Secretary of Commerce and the Director of the Office of Management and Budget shall, in consultation with the FAR Council, the Chairman of the Council of Economic Advisers, the Assistant to the President for Economic Policy, and the Assistant to the President for Trade and Manufacturing Policy, submit to the President a report on any other changes to the FAR that the FAR Council should consider in order to better enforce the Buy American Act and to otherwise act consistent with the policy described in section 1 of this order, including whether and when to further decrease, including incrementally, the threshold percentage in subsection 2(a)(i)(B) of this order from the proposed 45 percent to 25 percent. The report shall include recommendations based on the feasibility and desirability of any decreases, including the timing of such decreases.

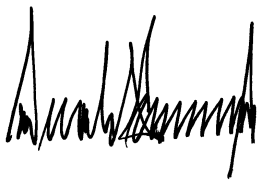
Sec. 5. *General Provisions*. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof, including, for example, the authority to utilize non-availability and public interest exceptions as delineated in section 8303 of title 41, United States Code, and 48 CFR 25.103; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
July 15, 2019.

[FR Doc. 2019–15449
Filed 7–17–19; 8:45 am]
Billing code 3295–F9–P

Presidential Documents

Executive Order 14005 of January 25, 2021

Ensuring the Future Is Made in All of America by All of America's Workers

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* It is the policy of my Administration that the United States Government should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States. The United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America's workers thrive. Additionally, to promote an accountable and transparent procurement policy, each agency should vest waiver issuance authority in senior agency leadership, where appropriate and consistent with applicable law.

Sec. 2. *Definitions.* (a) ''Agency'' means any authority of the United States that is an ''agency'' under section 3502(1) of title 44, United States Code, other than those considered to be independent regulatory agencies, as defined in section 3502(5) of title 44, United States Code.

(b) ''Made in America Laws'' means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to ''Buy America'' or ''Buy American,'' that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Public Law 66–261), also known as the Jones Act.

(c) ''Waiver'' means an exception from or waiver of Made in America Laws, or the procedures and conditions used by an agency in granting an exception from or waiver of Made in America Laws.

Sec. 3. *Review of Agency Action Inconsistent with Administration Policy.* (a) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act, consider suspending, revising, or rescinding those agency actions that are inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act, consider proposing any additional agency actions necessary to enforce the policy set forth in section 1 of this order.

Sec. 4. *Updating and Centralizing the Made in America Waiver Process.* (a) The Director of the Office of Management and Budget (OMB) shall establish within OMB the Made in America Office. The Made in America Office shall be headed by a Director of the Made in America Office (Made in America Director), who shall be appointed by the Director of OMB.

(b) Before an agency grants a waiver, and unless the OMB Director provides otherwise, the agency (granting agency) shall provide the Made in America Director with a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States.

(i) Within 45 days of the date of the appointment of the Made in America Director, and as appropriate thereafter, the Director of OMB, through the Made in America Director, shall:

(1) publish a list of the information that granting agencies shall include when submitting such descriptions of proposed waivers and justifications to the Made in America Director; and

(2) publish a deadline, not to exceed 15 business days, by which the Director of OMB, through the Made in America Director, either will notify the head of the agency that the Director of OMB, through the Made in America Director, has waived each review described in subsection (c) of this section or will notify the head of the agency in writing of the result of the review.

(ii) To the extent permitted by law and consistent with national security and executive branch confidentiality interests, descriptions of proposed waivers and justifications submitted to the Made in America Director by granting agencies shall be made publicly available on the website established pursuant to section 6 of this order.

(c) The Director of OMB, through the Made in America Director, shall review each proposed waiver submitted pursuant to subsection (b) of this section, except where such review has been waived as described in subsection (b)(i)(2) of this section.

(i) If the Director of OMB, through the Made in America Director, determines that issuing the proposed waiver would be consistent with applicable law and the policy set forth in section 1 of this order, the Director of OMB, through the Made in America Director, shall notify the granting agency of that determination in writing.

(ii) If the Director of OMB, through the Made in America Director, determines that issuing the proposed waiver would not be consistent with applicable law or the policy set forth in section 1 of this order, the Director of OMB, through the Made in America Director, shall notify the granting agency of the determination and shall return the proposed waiver to the head of the agency for further consideration, providing the granting agency with a written explanation for the determination.

(1) If the head of the agency disagrees with some or all of the bases for the determination and return, the head of the agency shall so inform the Made in America Director in writing.

(2) To the extent permitted by law, disagreements or conflicts between the Made in America Director and the head of any agency shall be resolved in accordance with procedures that parallel those set forth in section 7 of Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), with respect to the Director of the Office of Information and Regulatory Affairs within OMB.

(d) When a granting agency is obligated by law to act more quickly than the review procedures established in this section allow, the head of the agency shall notify the Made in America Director as soon as possible and, to the extent practicable, comply with the requirements set forth in this section. Nothing in this section shall be construed as displacing agencies' authorities or responsibilities under law.

Sec. 5. *Accounting for Sources of Cost Advantage.* To the extent permitted by law, before granting a waiver in the public interest, the relevant granting agency shall assess whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods. The granting agency may consult with the International Trade Administration in making this assessment if the granting agency deems such consultation to be helpful. The granting agency shall integrate any findings from the assessment into its waiver determination as appropriate.

Sec. 6. *Promoting Transparency in Federal Procurement.* (a) The Administrator of General Services shall develop a public website that shall include

information on all proposed waivers and whether those waivers have been granted. The website shall be designed to enable manufacturers and other interested parties to easily identify proposed waivers and whether those waivers have been granted. The website shall also provide publicly available contact information for each granting agency.

(b) The Director of OMB, through the Made in America Director, shall promptly report to the Administrator of General Services all proposed waivers, along with the associated descriptions and justifications discussed in section 4(b) of this order, and whether those waivers have been granted. Not later than 5 days after receiving this information, the Administrator of General Services shall, to the extent permitted by law and consistent with national security and executive branch confidentiality interests, make this information available to the public by posting it on the website established under this section.

Sec. 7. *Supplier Scouting.* To the extent appropriate and consistent with applicable law, agencies shall partner with the Hollings Manufacturing Extension Partnership (MEP), discussed in the Manufacturing Extension Partnership Improvement Act (title V of Public Law 114–329), to conduct supplier scouting in order to identify American companies, including small- and medium-sized companies, that are able to produce goods, products, and materials in the United States that meet Federal procurement needs.

Sec. 8. *Promoting Enforcement of the Buy American Act of 1933.* (a) Within 180 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council) shall consider proposing for notice and public comment amendments to the applicable provisions in the Federal Acquisition Regulation (FAR), title 48, Code of Federal Regulations, consistent with applicable law, that would:

(i) replace the ''component test'' in Part 25 of the FAR that is used to identify domestic end products and domestic construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity;

(ii) increase the numerical threshold for domestic content requirements for end products and construction materials; and

(iii) increase the price preferences for domestic end products and domestic construction materials.

(b) The FAR Council shall consider and evaluate public comments on any regulations proposed pursuant to subsection (a) of this section and shall promptly issue a final rule, if appropriate and consistent with applicable law and the national security interests of the United States.

Sec. 9. *Updates to the List of Nonavailable Articles.* Before the FAR Council proposes any amendment to the FAR to update the list of domestically nonavailable articles at section 25.104(a) of the FAR, the Director of OMB, through the Administrator of the Office of Federal Procurement Policy (OFPP), shall review the amendment in consultation with the Secretary of Commerce and the Made in America Director, paying particular attention to economic analyses of relevant markets and available market research, to determine whether there is a reasonable basis to conclude that the article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. The Director of OMB, through the Administrator of OFPP, shall make these findings available to the FAR Council for consideration.

Sec. 10. *Report on Information Technology That Is a Commercial Item.* The FAR Council shall promptly review existing constraints on the extension of the requirements in Made in America Laws to information technology that is a commercial item and shall develop recommendations for lifting these constraints to further promote the policy set forth in section 1 of this order, as appropriate and consistent with applicable law.

Sec. 11. *Report on Use of Made in America Laws.* Within 180 days of the date of this order, the head of each agency shall submit to the Made in America Director a report on:

(a) the agency's implementation of, and compliance with, Made in America Laws;

(b) the agency's ongoing use of any longstanding or nationwide waivers of any Made in America Laws, with a written description of the consistency of such waivers with the policy set forth in section 1 of this order; and

(c) recommendations for how to further effectuate the policy set forth in section 1 of this order.

Sec. 12. *Bi-Annual Report on Made in America Laws.* Bi-annually following the initial submission described in section 11 of this order, the head of each agency shall submit to the Made in America Director a report on:

(a) the agency's ongoing implementation of, and compliance with, Made in America Laws;

(b) the agency's analysis of goods, products, materials, and services not subject to Made in America Laws or where requirements of the Made in America Laws have been waived;

(c) the agency's analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act of 1979, as amended, 19 U.S.C. 2511, separated by country of origin; and

(d) recommendations for how to further effectuate the policy set forth in section 1 of this order.

Sec. 13. *Ensuring Implementation of Administration Policy on Federal Government Property.* Within 180 days of the date of this order, the Administrator of General Services shall submit to the Made in America Director recommendations for ensuring that products offered to the general public on Federal property are procured in accordance with the policy set forth in section 1 of this order.

Sec. 14. *Revocation of Certain Presidential and Regulatory Actions.* (a) Executive Order 13788 of April 18, 2017 (Buy American and Hire American), section 5 of Executive Order 13858 of January 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), and Executive Order 13975 of January 14, 2021 (Encouraging Buy American Policies for the United States Postal Service), are hereby revoked.

(b) Executive Order 10582 of December 17, 1954 (Prescribing Uniform Procedures for Certain Determinations Under the Buy-America Act), and Executive Order 13881 of July 15, 2019 (Maximizing Use of American-Made Goods, Products, and Materials), are superseded to the extent that they are inconsistent with this order.

Sec. 15. *Severability.* If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

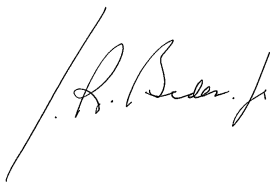
Sec. 16. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 25, 2021.

[FR Doc. 2021–02038
Filed 1–27–21; 11:15 am]
Billing code 3295–F1–P

Federal Register
Vol. 86, No. 93
Monday, May 17, 2021

Presidential Documents

Title 3—

The President

Executive Order 14028 of May 12, 2021

Improving the Nation's Cybersecurity

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* The United States faces persistent and increasingly sophisticated malicious cyber campaigns that threaten the public sector, the private sector, and ultimately the American people's security and privacy. The Federal Government must improve its efforts to identify, deter, protect against, detect, and respond to these actions and actors. The Federal Government must also carefully examine what occurred during any major cyber incident and apply lessons learned. But cybersecurity requires more than government action. Protecting our Nation from malicious cyber actors requires the Federal Government to partner with the private sector. The private sector must adapt to the continuously changing threat environment, ensure its products are built and operate securely, and partner with the Federal Government to foster a more secure cyberspace. In the end, the trust we place in our digital infrastructure should be proportional to how trustworthy and transparent that infrastructure is, and to the consequences we will incur if that trust is misplaced.

Incremental improvements will not give us the security we need; instead, the Federal Government needs to make bold changes and significant investments in order to defend the vital institutions that underpin the American way of life. The Federal Government must bring to bear the full scope of its authorities and resources to protect and secure its computer systems, whether they are cloud-based, on-premises, or hybrid. The scope of protection and security must include systems that process data (information technology (IT)) and those that run the vital machinery that ensures our safety (operational technology (OT)).

It is the policy of my Administration that the prevention, detection, assessment, and remediation of cyber incidents is a top priority and essential to national and economic security. The Federal Government must lead by example. All Federal Information Systems should meet or exceed the standards and requirements for cybersecurity set forth in and issued pursuant to this order.

Sec. 2. *Removing Barriers to Sharing Threat Information.* (a) The Federal Government contracts with IT and OT service providers to conduct an array of day-to-day functions on Federal Information Systems. These service providers, including cloud service providers, have unique access to and insight into cyber threat and incident information on Federal Information Systems. At the same time, current contract terms or restrictions may limit the sharing of such threat or incident information with executive departments and agencies (agencies) that are responsible for investigating or remediating cyber incidents, such as the Cybersecurity and Infrastructure Security Agency (CISA), the Federal Bureau of Investigation (FBI), and other elements of the Intelligence Community (IC). Removing these contractual barriers and increasing the sharing of information about such threats, incidents, and risks are necessary steps to accelerating incident deterrence, prevention, and response efforts and to enabling more effective defense of agencies' systems and of information collected, processed, and maintained by or for the Federal Government.

(b) Within 60 days of the date of this order, the Director of the Office of Management and Budget (OMB), in consultation with the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, shall review the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement contract requirements and language for contracting with IT and OT service providers and recommend updates to such requirements and language to the FAR Council and other appropriate agencies. The recommendations shall include descriptions of contractors to be covered by the proposed contract language.

(c) The recommended contract language and requirements described in subsection (b) of this section shall be designed to ensure that:

(i) service providers collect and preserve data, information, and reporting relevant to cybersecurity event prevention, detection, response, and investigation on all information systems over which they have control, including systems operated on behalf of agencies, consistent with agencies' requirements;

(ii) service providers share such data, information, and reporting, as they relate to cyber incidents or potential incidents relevant to any agency with which they have contracted, directly with such agency and any other agency that the Director of OMB, in consultation with the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence, deems appropriate, consistent with applicable privacy laws, regulations, and policies;

(iii) service providers collaborate with Federal cybersecurity or investigative agencies in their investigations of and responses to incidents or potential incidents on Federal Information Systems, including by implementing technical capabilities, such as monitoring networks for threats in collaboration with agencies they support, as needed; and

(iv) service providers share cyber threat and incident information with agencies, doing so, where possible, in industry-recognized formats for incident response and remediation.

(d) Within 90 days of receipt of the recommendations described in subsection (b) of this section, the FAR Council shall review the proposed contract language and conditions and, as appropriate, shall publish for public comment proposed updates to the FAR.

(e) Within 120 days of the date of this order, the Secretary of Homeland Security and the Director of OMB shall take appropriate steps to ensure to the greatest extent possible that service providers share data with agencies, CISA, and the FBI as may be necessary for the Federal Government to respond to cyber threats, incidents, and risks.

(f) It is the policy of the Federal Government that:

(i) information and communications technology (ICT) service providers entering into contracts with agencies must promptly report to such agencies when they discover a cyber incident involving a software product or service provided to such agencies or involving a support system for a software product or service provided to such agencies;

(ii) ICT service providers must also directly report to CISA whenever they report under subsection (f)(i) of this section to Federal Civilian Executive Branch (FCEB) Agencies, and CISA must centrally collect and manage such information; and

(iii) reports pertaining to National Security Systems, as defined in section 10(h) of this order, must be received and managed by the appropriate agency as to be determined under subsection (g)(i)(E) of this section.

(g) To implement the policy set forth in subsection (f) of this section:

(i) Within 45 days of the date of this order, the Secretary of Homeland Security, in consultation with the Secretary of Defense acting through the Director of the National Security Agency (NSA), the Attorney General,

and the Director of OMB, shall recommend to the FAR Council contract language that identifies:

(A) the nature of cyber incidents that require reporting;

(B) the types of information regarding cyber incidents that require reporting to facilitate effective cyber incident response and remediation;

(C) appropriate and effective protections for privacy and civil liberties;

(D) the time periods within which contractors must report cyber incidents based on a graduated scale of severity, with reporting on the most severe cyber incidents not to exceed 3 days after initial detection;

(E) National Security Systems reporting requirements; and

(F) the type of contractors and associated service providers to be covered by the proposed contract language.

(ii) Within 90 days of receipt of the recommendations described in subsection (g)(i) of this section, the FAR Council shall review the recommendations and publish for public comment proposed updates to the FAR.

(iii) Within 90 days of the date of this order, the Secretary of Defense acting through the Director of the NSA, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall jointly develop procedures for ensuring that cyber incident reports are promptly and appropriately shared among agencies.

(h) Current cybersecurity requirements for unclassified system contracts are largely implemented through agency-specific policies and regulations, including cloud-service cybersecurity requirements. Standardizing common cybersecurity contractual requirements across agencies will streamline and improve compliance for vendors and the Federal Government.

(i) Within 60 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA, in consultation with the Secretary of Defense acting through the Director of the NSA, the Director of OMB, and the Administrator of General Services, shall review agency-specific cybersecurity requirements that currently exist as a matter of law, policy, or contract and recommend to the FAR Council standardized contract language for appropriate cybersecurity requirements. Such recommendations shall include consideration of the scope of contractors and associated service providers to be covered by the proposed contract language.

(j) Within 60 days of receiving the recommended contract language developed pursuant to subsection (i) of this section, the FAR Council shall review the recommended contract language and publish for public comment proposed updates to the FAR.

(k) Following any updates to the FAR made by the FAR Council after the public comment period described in subsection (j) of this section, agencies shall update their agency-specific cybersecurity requirements to remove any requirements that are duplicative of such FAR updates.

(l) The Director of OMB shall incorporate into the annual budget process a cost analysis of all recommendations developed under this section.

Sec. 3. *Modernizing Federal Government Cybersecurity.* (a) To keep pace with today's dynamic and increasingly sophisticated cyber threat environment, the Federal Government must take decisive steps to modernize its approach to cybersecurity, including by increasing the Federal Government's visibility into threats, while protecting privacy and civil liberties. The Federal Government must adopt security best practices; advance toward Zero Trust Architecture; accelerate movement to secure cloud services, including Software as a Service (SaaS), Infrastructure as a Service (IaaS), and Platform as a Service (PaaS); centralize and streamline access to cybersecurity data to drive analytics for identifying and managing cybersecurity risks; and invest in both technology and personnel to match these modernization goals.

(b) Within 60 days of the date of this order, the head of each agency shall:

(i) update existing agency plans to prioritize resources for the adoption and use of cloud technology as outlined in relevant OMB guidance;

(ii) develop a plan to implement Zero Trust Architecture, which shall incorporate, as appropriate, the migration steps that the National Institute of Standards and Technology (NIST) within the Department of Commerce has outlined in standards and guidance, describe any such steps that have already been completed, identify activities that will have the most immediate security impact, and include a schedule to implement them; and

(iii) provide a report to the Director of OMB and the Assistant to the President and National Security Advisor (APNSA) discussing the plans required pursuant to subsection (b)(i) and (ii) of this section.

(c) As agencies continue to use cloud technology, they shall do so in a coordinated, deliberate way that allows the Federal Government to prevent, detect, assess, and remediate cyber incidents. To facilitate this approach, the migration to cloud technology shall adopt Zero Trust Architecture, as practicable. The CISA shall modernize its current cybersecurity programs, services, and capabilities to be fully functional with cloud-computing environments with Zero Trust Architecture. The Secretary of Homeland Security acting through the Director of CISA, in consultation with the Administrator of General Services acting through the Federal Risk and Authorization Management Program (FedRAMP) within the General Services Administration, shall develop security principles governing Cloud Service Providers (CSPs) for incorporation into agency modernization efforts. To facilitate this work:

(i) Within 90 days of the date of this order, the Director of OMB, in consultation with the Secretary of Homeland Security acting through the Director of CISA, and the Administrator of General Services acting through FedRAMP, shall develop a Federal cloud-security strategy and provide guidance to agencies accordingly. Such guidance shall seek to ensure that risks to the FCEB from using cloud-based services are broadly understood and effectively addressed, and that FCEB Agencies move closer to Zero Trust Architecture.

(ii) Within 90 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA, in consultation with the Director of OMB and the Administrator of General Services acting through FedRAMP, shall develop and issue, for the FCEB, cloud-security technical reference architecture documentation that illustrates recommended approaches to cloud migration and data protection for agency data collection and reporting.

(iii) Within 60 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA shall develop and issue, for FCEB Agencies, a cloud-service governance framework. That framework shall identify a range of services and protections available to agencies based on incident severity. That framework shall also identify data and processing activities associated with those services and protections.

(iv) Within 90 days of the date of this order, the heads of FCEB Agencies, in consultation with the Secretary of Homeland Security acting through the Director of CISA, shall evaluate the types and sensitivity of their respective agency's unclassified data, and shall provide to the Secretary of Homeland Security through the Director of CISA and to the Director of OMB a report based on such evaluation. The evaluation shall prioritize identification of the unclassified data considered by the agency to be the most sensitive and under the greatest threat, and appropriate processing and storage solutions for those data.

(d) Within 180 days of the date of this order, agencies shall adopt multi-factor authentication and encryption for data at rest and in transit, to the maximum extent consistent with Federal records laws and other applicable laws. To that end:

(i) Heads of FCEB Agencies shall provide reports to the Secretary of Homeland Security through the Director of CISA, the Director of OMB,

and the APNSA on their respective agency's progress in adopting multi-factor authentication and encryption of data at rest and in transit. Such agencies shall provide such reports every 60 days after the date of this order until the agency has fully adopted, agency-wide, multi-factor authentication and data encryption.

(ii) Based on identified gaps in agency implementation, CISA shall take all appropriate steps to maximize adoption by FCEB Agencies of technologies and processes to implement multifactor authentication and encryption for data at rest and in transit.

(iii) Heads of FCEB Agencies that are unable to fully adopt multi-factor authentication and data encryption within 180 days of the date of this order shall, at the end of the 180-day period, provide a written rationale to the Secretary of Homeland Security through the Director of CISA, the Director of OMB, and the APNSA.

(e) Within 90 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA, in consultation with the Attorney General, the Director of the FBI, and the Administrator of General Services acting through the Director of FedRAMP, shall establish a framework to collaborate on cybersecurity and incident response activities related to FCEB cloud technology, in order to ensure effective information sharing among agencies and between agencies and CSPs.

(f) Within 60 days of the date of this order, the Administrator of General Services, in consultation with the Director of OMB and the heads of other agencies as the Administrator of General Services deems appropriate, shall begin modernizing FedRAMP by:

(i) establishing a training program to ensure agencies are effectively trained and equipped to manage FedRAMP requests, and providing access to training materials, including videos-on-demand;

(ii) improving communication with CSPs through automation and standardization of messages at each stage of authorization. These communications may include status updates, requirements to complete a vendor's current stage, next steps, and points of contact for questions;

(iii) incorporating automation throughout the lifecycle of FedRAMP, including assessment, authorization, continuous monitoring, and compliance;

(iv) digitizing and streamlining documentation that vendors are required to complete, including through online accessibility and pre-populated forms; and

(v) identifying relevant compliance frameworks, mapping those frameworks onto requirements in the FedRAMP authorization process, and allowing those frameworks to be used as a substitute for the relevant portion of the authorization process, as appropriate.

Sec. 4. *Enhancing Software Supply Chain Security.* (a) The security of software used by the Federal Government is vital to the Federal Government's ability to perform its critical functions. The development of commercial software often lacks transparency, sufficient focus on the ability of the software to resist attack, and adequate controls to prevent tampering by malicious actors. There is a pressing need to implement more rigorous and predictable mechanisms for ensuring that products function securely, and as intended. The security and integrity of ''critical software''—software that performs functions critical to trust (such as affording or requiring elevated system privileges or direct access to networking and computing resources)—is a particular concern. Accordingly, the Federal Government must take action to rapidly improve the security and integrity of the software supply chain, with a priority on addressing critical software.

(b) Within 30 days of the date of this order, the Secretary of Commerce acting through the Director of NIST shall solicit input from the Federal Government, private sector, academia, and other appropriate actors to identify existing or develop new standards, tools, and best practices for complying with the standards, procedures, or criteria in subsection (e) of this section.

The guidelines shall include criteria that can be used to evaluate software security, include criteria to evaluate the security practices of the developers and suppliers themselves, and identify innovative tools or methods to demonstrate conformance with secure practices.

(c) Within 180 days of the date of this order, the Director of NIST shall publish preliminary guidelines, based on the consultations described in subsection (b) of this section and drawing on existing documents as practicable, for enhancing software supply chain security and meeting the requirements of this section.

(d) Within 360 days of the date of this order, the Director of NIST shall publish additional guidelines that include procedures for periodic review and updating of the guidelines described in subsection (c) of this section.

(e) Within 90 days of publication of the preliminary guidelines pursuant to subsection (c) of this section, the Secretary of Commerce acting through the Director of NIST, in consultation with the heads of such agencies as the Director of NIST deems appropriate, shall issue guidance identifying practices that enhance the security of the software supply chain. Such guidance may incorporate the guidelines published pursuant to subsections (c) and (i) of this section. Such guidance shall include standards, procedures, or criteria regarding:

(i) secure software development environments, including such actions as:

(A) using administratively separate build environments;

(B) auditing trust relationships;

(C) establishing multi-factor, risk-based authentication and conditional access across the enterprise;

(D) documenting and minimizing dependencies on enterprise products that are part of the environments used to develop, build, and edit software;

(E) employing encryption for data; and

(F) monitoring operations and alerts and responding to attempted and actual cyber incidents;

(ii) generating and, when requested by a purchaser, providing artifacts that demonstrate conformance to the processes set forth in subsection (e)(i) of this section;

(iii) employing automated tools, or comparable processes, to maintain trusted source code supply chains, thereby ensuring the integrity of the code;

(iv) employing automated tools, or comparable processes, that check for known and potential vulnerabilities and remediate them, which shall operate regularly, or at a minimum prior to product, version, or update release;

(v) providing, when requested by a purchaser, artifacts of the execution of the tools and processes described in subsection (e)(iii) and (iv) of this section, and making publicly available summary information on completion of these actions, to include a summary description of the risks assessed and mitigated;

(vi) maintaining accurate and up-to-date data, provenance (*i.e.,* origin) of software code or components, and controls on internal and third-party software components, tools, and services present in software development processes, and performing audits and enforcement of these controls on a recurring basis;

(vii) providing a purchaser a Software Bill of Materials (SBOM) for each product directly or by publishing it on a public website;

(viii) participating in a vulnerability disclosure program that includes a reporting and disclosure process;

(ix) attesting to conformity with secure software development practices; and

(x) ensuring and attesting, to the extent practicable, to the integrity and provenance of open source software used within any portion of a product.

(f) Within 60 days of the date of this order, the Secretary of Commerce, in coordination with the Assistant Secretary for Communications and Information and the Administrator of the National Telecommunications and Information Administration, shall publish minimum elements for an SBOM.

(g) Within 45 days of the date of this order, the Secretary of Commerce, acting through the Director of NIST, in consultation with the Secretary of Defense acting through the Director of the NSA, the Secretary of Homeland Security acting through the Director of CISA, the Director of OMB, and the Director of National Intelligence, shall publish a definition of the term ''critical software'' for inclusion in the guidance issued pursuant to subsection (e) of this section. That definition shall reflect the level of privilege or access required to function, integration and dependencies with other software, direct access to networking and computing resources, performance of a function critical to trust, and potential for harm if compromised.

(h) Within 30 days of the publication of the definition required by subsection (g) of this section, the Secretary of Homeland Security acting through the Director of CISA, in consultation with the Secretary of Commerce acting through the Director of NIST, shall identify and make available to agencies a list of categories of software and software products in use or in the acquisition process meeting the definition of critical software issued pursuant to subsection (g) of this section.

(i) Within 60 days of the date of this order, the Secretary of Commerce acting through the Director of NIST, in consultation with the Secretary of Homeland Security acting through the Director of CISA and with the Director of OMB, shall publish guidance outlining security measures for critical software as defined in subsection (g) of this section, including applying practices of least privilege, network segmentation, and proper configuration.

(j) Within 30 days of the issuance of the guidance described in subsection (i) of this section, the Director of OMB acting through the Administrator of the Office of Electronic Government within OMB shall take appropriate steps to require that agencies comply with such guidance.

(k) Within 30 days of issuance of the guidance described in subsection (e) of this section, the Director of OMB acting through the Administrator of the Office of Electronic Government within OMB shall take appropriate steps to require that agencies comply with such guidelines with respect to software procured after the date of this order.

(l) Agencies may request an extension for complying with any requirements issued pursuant to subsection (k) of this section. Any such request shall be considered by the Director of OMB on a case-by-case basis, and only if accompanied by a plan for meeting the underlying requirements. The Director of OMB shall on a quarterly basis provide a report to the APNSA identifying and explaining all extensions granted.

(m) Agencies may request a waiver as to any requirements issued pursuant to subsection (k) of this section. Waivers shall be considered by the Director of OMB, in consultation with the APNSA, on a case-by-case basis, and shall be granted only in exceptional circumstances and for limited duration, and only if there is an accompanying plan for mitigating any potential risks.

(n) Within 1 year of the date of this order, the Secretary of Homeland Security, in consultation with the Secretary of Defense, the Attorney General, the Director of OMB, and the Administrator of the Office of Electronic Government within OMB, shall recommend to the FAR Council contract language requiring suppliers of software available for purchase by agencies to comply with, and attest to complying with, any requirements issued pursuant to subsections (g) through (k) of this section.

(o) After receiving the recommendations described in subsection (n) of this section, the FAR Council shall review the recommendations and, as appropriate and consistent with applicable law, amend the FAR.

(p) Following the issuance of any final rule amending the FAR as described in subsection (o) of this section, agencies shall, as appropriate and consistent with applicable law, remove software products that do not meet the requirements of the amended FAR from all indefinite delivery indefinite quantity contracts; Federal Supply Schedules; Federal Government-wide Acquisition Contracts; Blanket Purchase Agreements; and Multiple Award Contracts.

(q) The Director of OMB, acting through the Administrator of the Office of Electronic Government within OMB, shall require agencies employing software developed and procured prior to the date of this order (legacy software) either to comply with any requirements issued pursuant to subsection (k) of this section or to provide a plan outlining actions to remediate or meet those requirements, and shall further require agencies seeking renewals of software contracts, including legacy software, to comply with any requirements issued pursuant to subsection (k) of this section, unless an extension or waiver is granted in accordance with subsection (l) or (m) of this section.

(r) Within 60 days of the date of this order, the Secretary of Commerce acting through the Director of NIST, in consultation with the Secretary of Defense acting through the Director of the NSA, shall publish guidelines recommending minimum standards for vendors' testing of their software source code, including identifying recommended types of manual or automated testing (such as code review tools, static and dynamic analysis, software composition tools, and penetration testing).

(s) The Secretary of Commerce acting through the Director of NIST, in coordination with representatives of other agencies as the Director of NIST deems appropriate, shall initiate pilot programs informed by existing consumer product labeling programs to educate the public on the security capabilities of internet-of-Things (IoT) devices and software development practices, and shall consider ways to incentivize manufacturers and developers to participate in these programs.

(t) Within 270 days of the date of this order, the Secretary of Commerce acting through the Director of NIST, in coordination with the Chair of the Federal Trade Commission (FTC) and representatives of other agencies as the Director of NIST deems appropriate, shall identify IoT cybersecurity criteria for a consumer labeling program, and shall consider whether such a consumer labeling program may be operated in conjunction with or modeled after any similar existing government programs consistent with applicable law. The criteria shall reflect increasingly comprehensive levels of testing and assessment that a product may have undergone, and shall use or be compatible with existing labeling schemes that manufacturers use to inform consumers about the security of their products. The Director of NIST shall examine all relevant information, labeling, and incentive programs and employ best practices. This review shall focus on ease of use for consumers and a determination of what measures can be taken to maximize manufacturer participation.

(u) Within 270 days of the date of this order, the Secretary of Commerce acting through the Director of NIST, in coordination with the Chair of the FTC and representatives from other agencies as the Director of NIST deems appropriate, shall identify secure software development practices or criteria for a consumer software labeling program, and shall consider whether such a consumer software labeling program may be operated in conjunction with or modeled after any similar existing government programs, consistent with applicable law. The criteria shall reflect a baseline level of secure practices, and if practicable, shall reflect increasingly comprehensive levels of testing and assessment that a product may have undergone. The Director

of NIST shall examine all relevant information, labeling, and incentive programs, employ best practices, and identify, modify, or develop a recommended label or, if practicable, a tiered software security rating system. This review shall focus on ease of use for consumers and a determination of what measures can be taken to maximize participation.

(v) These pilot programs shall be conducted in a manner consistent with OMB Circular A–119 and NIST Special Publication 2000–02 (Conformity Assessment Considerations for Federal Agencies).

(w) Within 1 year of the date of this order, the Director of NIST shall conduct a review of the pilot programs, consult with the private sector and relevant agencies to assess the effectiveness of the programs, determine what improvements can be made going forward, and submit a summary report to the APNSA.

(x) Within 1 year of the date of this order, the Secretary of Commerce, in consultation with the heads of other agencies as the Secretary of Commerce deems appropriate, shall provide to the President, through the APNSA, a report that reviews the progress made under this section and outlines additional steps needed to secure the software supply chain.

Sec. 5. *Establishing a Cyber Safety Review Board.* (a) The Secretary of Homeland Security, in consultation with the Attorney General, shall establish the Cyber Safety Review Board (Board), pursuant to section 871 of the Homeland Security Act of 2002 (6 U.S.C. 451).

(b) The Board shall review and assess, with respect to significant cyber incidents (as defined under Presidential Policy Directive 41 of July 26, 2016 (United States Cyber Incident Coordination) (PPD–41)) affecting FCEB Information Systems or non-Federal systems, threat activity, vulnerabilities, mitigation activities, and agency responses.

(c) The Secretary of Homeland Security shall convene the Board following a significant cyber incident triggering the establishment of a Cyber Unified Coordination Group (UCG) as provided by section V(B)(2) of PPD–41; at any time as directed by the President acting through the APNSA; or at any time the Secretary of Homeland Security deems necessary.

(d) The Board's initial review shall relate to the cyber activities that prompted the establishment of a UCG in December 2020, and the Board shall, within 90 days of the Board's establishment, provide recommendations to the Secretary of Homeland Security for improving cybersecurity and incident response practices, as outlined in subsection (i) of this section.

(e) The Board's membership shall include Federal officials and representatives from private-sector entities. The Board shall comprise representatives of the Department of Defense, the Department of Justice, CISA, the NSA, and the FBI, as well as representatives from appropriate private-sector cybersecurity or software suppliers as determined by the Secretary of Homeland Security. A representative from OMB shall participate in Board activities when an incident under review involves FCEB Information Systems, as determined by the Secretary of Homeland Security. The Secretary of Homeland Security may invite the participation of others on a case-by-case basis depending on the nature of the incident under review.

(f) The Secretary of Homeland Security shall biennially designate a Chair and Deputy Chair of the Board from among the members of the Board, to include one Federal and one private-sector member.

(g) The Board shall protect sensitive law enforcement, operational, business, and other confidential information that has been shared with it, consistent with applicable law.

(h) The Secretary of Homeland Security shall provide to the President through the APNSA any advice, information, or recommendations of the Board for improving cybersecurity and incident response practices and policy upon completion of its review of an applicable incident.

(i) Within 30 days of completion of the initial review described in subsection (d) of this section, the Secretary of Homeland Security shall provide to the President through the APNSA the recommendations of the Board based on the initial review. These recommendations shall describe:

(i) identified gaps in, and options for, the Board's composition or authorities;

(ii) the Board's proposed mission, scope, and responsibilities;

(iii) membership eligibility criteria for private-sector representatives;

(iv) Board governance structure including interaction with the executive branch and the Executive Office of the President;

(v) thresholds and criteria for the types of cyber incidents to be evaluated;

(vi) sources of information that should be made available to the Board, consistent with applicable law and policy;

(vii) an approach for protecting the information provided to the Board and securing the cooperation of affected United States individuals and entities for the purpose of the Board's review of incidents; and

(viii) administrative and budgetary considerations required for operation of the Board.

(j) The Secretary of Homeland Security, in consultation with the Attorney General and the APNSA, shall review the recommendations provided to the President through the APNSA pursuant to subsection (i) of this section and take steps to implement them as appropriate.

(k) Unless otherwise directed by the President, the Secretary of Homeland Security shall extend the life of the Board every 2 years as the Secretary of Homeland Security deems appropriate, pursuant to section 871 of the Homeland Security Act of 2002.

Sec. 6. *Standardizing the Federal Government's Playbook for Responding to Cybersecurity Vulnerabilities and Incidents.* (a) The cybersecurity vulnerability and incident response procedures currently used to identify, remediate, and recover from vulnerabilities and incidents affecting their systems vary across agencies, hindering the ability of lead agencies to analyze vulnerabilities and incidents more comprehensively across agencies. Standardized response processes ensure a more coordinated and centralized cataloging of incidents and tracking of agencies' progress toward successful responses.

(b) Within 120 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA, in consultation with the Director of OMB, the Federal Chief Information Officers Council, and the Federal Chief Information Security Council, and in coordination with the Secretary of Defense acting through the Director of the NSA, the Attorney General, and the Director of National Intelligence, shall develop a standard set of operational procedures (playbook) to be used in planning and conducting a cybersecurity vulnerability and incident response activity respecting FCEB Information Systems. The playbook shall:

(i) incorporate all appropriate NIST standards;

(ii) be used by FCEB Agencies; and

(iii) articulate progress and completion through all phases of an incident response, while allowing flexibility so it may be used in support of various response activities.

(c) The Director of OMB shall issue guidance on agency use of the playbook.

(d) Agencies with cybersecurity vulnerability or incident response procedures that deviate from the playbook may use such procedures only after consulting with the Director of OMB and the APNSA and demonstrating that these procedures meet or exceed the standards proposed in the playbook.

(e) The Director of CISA, in consultation with the Director of the NSA, shall review and update the playbook annually, and provide information to the Director of OMB for incorporation in guidance updates.

(f) To ensure comprehensiveness of incident response activities and build confidence that unauthorized cyber actors no longer have access to FCEB Information Systems, the playbook shall establish, consistent with applicable law, a requirement that the Director of CISA review and validate FCEB Agencies' incident response and remediation results upon an agency's completion of its incident response. The Director of CISA may recommend use of another agency or a third-party incident response team as appropriate.

(g) To ensure a common understanding of cyber incidents and the cybersecurity status of an agency, the playbook shall define key terms and use such terms consistently with any statutory definitions of those terms, to the extent practicable, thereby providing a shared lexicon among agencies using the playbook.

Sec. 7. *Improving Detection of Cybersecurity Vulnerabilities and Incidents on Federal Government Networks.* (a) The Federal Government shall employ all appropriate resources and authorities to maximize the early detection of cybersecurity vulnerabilities and incidents on its networks. This approach shall include increasing the Federal Government's visibility into and detection of cybersecurity vulnerabilities and threats to agency networks in order to bolster the Federal Government's cybersecurity efforts.

(b) FCEB Agencies shall deploy an Endpoint Detection and Response (EDR) initiative to support proactive detection of cybersecurity incidents within Federal Government infrastructure, active cyber hunting, containment and remediation, and incident response.

(c) Within 30 days of the date of this order, the Secretary of Homeland Security acting through the Director of CISA shall provide to the Director of OMB recommendations on options for implementing an EDR initiative, centrally located to support host-level visibility, attribution, and response regarding FCEB Information Systems.

(d) Within 90 days of receiving the recommendations described in subsection (c) of this section, the Director of OMB, in consultation with Secretary of Homeland Security, shall issue requirements for FCEB Agencies to adopt Federal Government-wide EDR approaches. Those requirements shall support a capability of the Secretary of Homeland Secretary, acting through the Director of CISA, to engage in cyber hunt, detection, and response activities.

(e) The Director of OMB shall work with the Secretary of Homeland Security and agency heads to ensure that agencies have adequate resources to comply with the requirements issued pursuant to subsection (d) of this section.

(f) Defending FCEB Information Systems requires that the Secretary of Homeland Security acting through the Director of CISA have access to agency data that are relevant to a threat and vulnerability analysis, as well as for assessment and threat-hunting purposes. Within 75 days of the date of this order, agencies shall establish or update Memoranda of Agreement (MOA) with CISA for the Continuous Diagnostics and Mitigation Program to ensure object level data, as defined in the MOA, are available and accessible to CISA, consistent with applicable law.

(g) Within 45 days of the date of this order, the Director of the NSA as the National Manager for National Security Systems (National Manager) shall recommend to the Secretary of Defense, the Director of National Intelligence, and the Committee on National Security Systems (CNSS) appropriate actions for improving detection of cyber incidents affecting National Security Systems, to the extent permitted by applicable law, including recommendations concerning EDR approaches and whether such measures should be operated by agencies or through a centralized service of common concern provided by the National Manager.

(h) Within 90 days of the date of this order, the Secretary of Defense, the Director of National Intelligence, and the CNSS shall review the recommendations submitted under subsection (g) of this section and, as appropriate, establish policies that effectuate those recommendations, consistent with applicable law.

(i) Within 90 days of the date of this order, the Director of CISA shall provide to the Director of OMB and the APNSA a report describing how authorities granted under section 1705 of Public Law 116–283, to conduct threat-hunting activities on FCEB networks without prior authorization from agencies, are being implemented. This report shall also recommend procedures to ensure that mission-critical systems are not disrupted, procedures for notifying system owners of vulnerable government systems, and the range of techniques that can be used during testing of FCEB Information Systems. The Director of CISA shall provide quarterly reports to the APNSA and the Director of OMB regarding actions taken under section 1705 of Public Law 116–283.

(j) To ensure alignment between Department of Defense Information Network (DODIN) directives and FCEB Information Systems directives, the Secretary of Defense and the Secretary of Homeland Security, in consultation with the Director of OMB, shall:

(i) within 60 days of the date of this order, establish procedures for the Department of Defense and the Department of Homeland Security to immediately share with each other Department of Defense Incident Response Orders or Department of Homeland Security Emergency Directives and Binding Operational Directives applying to their respective information networks;

(ii) evaluate whether to adopt any guidance contained in an Order or Directive issued by the other Department, consistent with regulations concerning sharing of classified information; and

(iii) within 7 days of receiving notice of an Order or Directive issued pursuant to the procedures established under subsection (j)(i) of this section, notify the APNSA and Administrator of the Office of Electronic Government within OMB of the evaluation described in subsection (j)(ii) of this section, including a determination whether to adopt guidance issued by the other Department, the rationale for that determination, and a timeline for application of the directive, if applicable.

Sec. 8. *Improving the Federal Government's Investigative and Remediation Capabilities.* (a) Information from network and system logs on Federal Information Systems (for both on-premises systems and connections hosted by third parties, such as CSPs) is invaluable for both investigation and remediation purposes. It is essential that agencies and their IT service providers collect and maintain such data and, when necessary to address a cyber incident on FCEB Information Systems, provide them upon request to the Secretary of Homeland Security through the Director of CISA and to the FBI, consistent with applicable law.

(b) Within 14 days of the date of this order, the Secretary of Homeland Security, in consultation with the Attorney General and the Administrator of the Office of Electronic Government within OMB, shall provide to the Director of OMB recommendations on requirements for logging events and retaining other relevant data within an agency's systems and networks. Such recommendations shall include the types of logs to be maintained, the time periods to retain the logs and other relevant data, the time periods for agencies to enable recommended logging and security requirements, and how to protect logs. Logs shall be protected by cryptographic methods to ensure integrity once collected and periodically verified against the hashes throughout their retention. Data shall be retained in a manner consistent with all applicable privacy laws and regulations. Such recommendations shall also be considered by the FAR Council when promulgating rules pursuant to section 2 of this order.

(c) Within 90 days of receiving the recommendations described in subsection (b) of this section, the Director of OMB, in consultation with the Secretary of Commerce and the Secretary of Homeland Security, shall formulate policies for agencies to establish requirements for logging, log retention, and log management, which shall ensure centralized access and visibility for the highest level security operations center of each agency.

(d) The Director of OMB shall work with agency heads to ensure that agencies have adequate resources to comply with the requirements identified in subsection (c) of this section.

(e) To address cyber risks or incidents, including potential cyber risks or incidents, the proposed recommendations issued pursuant to subsection (b) of this section shall include requirements to ensure that, upon request, agencies provide logs to the Secretary of Homeland Security through the Director of CISA and to the FBI, consistent with applicable law. These requirements should be designed to permit agencies to share log information, as needed and appropriate, with other Federal agencies for cyber risks or incidents.

Sec. 9. *National Security Systems.* (a) Within 60 days of the date of this order, the Secretary of Defense acting through the National Manager, in coordination with the Director of National Intelligence and the CNSS, and in consultation with the APNSA, shall adopt National Security Systems requirements that are equivalent to or exceed the cybersecurity requirements set forth in this order that are otherwise not applicable to National Security Systems. Such requirements may provide for exceptions in circumstances necessitated by unique mission needs. Such requirements shall be codified in a National Security Memorandum (NSM). Until such time as that NSM is issued, programs, standards, or requirements established pursuant to this order shall not apply with respect to National Security Systems.

(b) Nothing in this order shall alter the authority of the National Manager with respect to National Security Systems as defined in National Security Directive 42 of July 5, 1990 (National Policy for the Security of National Security Telecommunications and Information Systems) (NSD–42). The FCEB network shall continue to be within the authority of the Secretary of Homeland Security acting through the Director of CISA.

Sec. 10. *Definitions.* For purposes of this order:

(a) the term ''agency'' has the meaning ascribed to it under 44 U.S.C. 3502.

(b) the term ''auditing trust relationship'' means an agreed-upon relationship between two or more system elements that is governed by criteria for secure interaction, behavior, and outcomes relative to the protection of assets.

(c) the term ''cyber incident'' has the meaning ascribed to an ''incident'' under 44 U.S.C. 3552(b)(2).

(d) the term ''Federal Civilian Executive Branch Agencies'' or ''FCEB Agencies'' includes all agencies except for the Department of Defense and agencies in the Intelligence Community.

(e) the term ''Federal Civilian Executive Branch Information Systems'' or ''FCEB Information Systems'' means those information systems operated by Federal Civilian Executive Branch Agencies, but excludes National Security Systems.

(f) the term ''Federal Information Systems'' means an information system used or operated by an agency or by a contractor of an agency or by another organization on behalf of an agency, including FCEB Information Systems and National Security Systems.

(g) the term ''Intelligence Community'' or ''IC'' has the meaning ascribed to it under 50 U.S.C. 3003(4).

(h) the term ''National Security Systems'' means information systems as defined in 44 U.S.C. 3552(b)(6), 3553(e)(2), and 3553(e)(3).

(i) the term ''logs'' means records of the events occurring within an organization's systems and networks. Logs are composed of log entries, and each entry contains information related to a specific event that has occurred within a system or network.

(j) the term ''Software Bill of Materials'' or ''SBOM'' means a formal record containing the details and supply chain relationships of various components used in building software. Software developers and vendors often create products by assembling existing open source and commercial software components. The SBOM enumerates these components in a product. It is analogous to a list of ingredients on food packaging. An SBOM is useful to those who develop or manufacture software, those who select or purchase software, and those who operate software. Developers often use available open source and third-party software components to create a product; an SBOM allows the builder to make sure those components are up to date and to respond quickly to new vulnerabilities. Buyers can use an SBOM to perform vulnerability or license analysis, both of which can be used to evaluate risk in a product. Those who operate software can use SBOMs to quickly and easily determine whether they are at potential risk of a newly discovered vulnerability. A widely used, machine-readable SBOM format allows for greater benefits through automation and tool integration. The SBOMs gain greater value when collectively stored in a repository that can be easily queried by other applications and systems. Understanding the supply chain of software, obtaining an SBOM, and using it to analyze known vulnerabilities are crucial in managing risk.

(k) the term ''Zero Trust Architecture'' means a security model, a set of system design principles, and a coordinated cybersecurity and system management strategy based on an acknowledgement that threats exist both inside and outside traditional network boundaries. The Zero Trust security model eliminates implicit trust in any one element, node, or service and instead requires continuous verification of the operational picture via real-time information from multiple sources to determine access and other system responses. In essence, a Zero Trust Architecture allows users full access but only to the bare minimum they need to perform their jobs. If a device is compromised, zero trust can ensure that the damage is contained. The Zero Trust Architecture security model assumes that a breach is inevitable or has likely already occurred, so it constantly limits access to only what is needed and looks for anomalous or malicious activity. Zero Trust Architecture embeds comprehensive security monitoring; granular risk-based access controls; and system security automation in a coordinated manner throughout all aspects of the infrastructure in order to focus on protecting data in real-time within a dynamic threat environment. This data-centric security model allows the concept of least-privileged access to be applied for every access decision, where the answers to the questions of who, what, when, where, and how are critical for appropriately allowing or denying access to resources based on the combination of sever.

Sec. 11. *General Provisions.* (a) Upon the appointment of the National Cyber Director (NCD) and the establishment of the related Office within the Executive Office of the President, pursuant to section 1752 of Public Law 116–283, portions of this order may be modified to enable the NCD to fully execute its duties and responsibilities.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

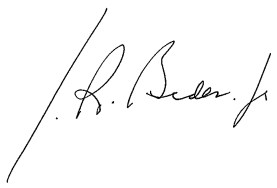
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any

party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(e) Nothing in this order confers authority to interfere with or to direct a criminal or national security investigation, arrest, search, seizure, or disruption operation or to alter a legal restriction that requires an agency to protect information learned in the course of a criminal or national security investigation.



THE WHITE HOUSE,
May 12, 2021.

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