

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Sinil Co., Ltd.) ASBCA Nos. 55819, 55820
)
Under Contract Nos. DABP01-03-D-0049)
DAJB03-00-D-0087)

APPEARANCE FOR THE APPELLANT: Byoung Kook Min, Esq.
Bando Law & Notary Office
Seoul, Korea

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
CPT Marlin D. Paschal, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TING
ON MOTION FOR SUMMARY JUDGMENT

The U.S. Army Contracting Command Korea (USACCK) entered into two Indefinite Delivery/Indefinite Quantity (IDIQ) contracts with Sinil Co., Ltd. (Sinil). One contract was for repair and replacement of existing deteriorated security fences and replacement of existing deteriorated concrete retaining wall and related work. The second contract was for repair and construction of asphalt concrete pavement. Both contracts were to be performed in Korea. As a result of an audit by the Army Audit Agency, the contracting officer (CO) issued two decisions seeking to recoup overpayments for work ordered by delivery orders (DOs) issued under the contracts but allegedly not performed. Sinil appealed the decisions, and the appeals were docketed as ASBCA No. 55604 (paving contract) and ASBCA No. 55629 (fence contract).

To offset the government’s claim, Sinil submitted a certified claim, contending that it was underpaid under the contracts because the government through its contracting officer’s representative (COR) authorized changed and substituted work under the various DOs issued under the two contracts. The CO denied the claim and Sinil appealed. The Board docketed Sinil’s appeal under the paving contract as ASBCA No. 55819 and its appeal under the fence contract as ASBCA No. 55820.

The government has moved for summary judgment on Sinil’s claim (ASBCA Nos. 55819, 55820). From its motion papers, we do not understand the government to have moved for summary judgment on its claims against Sinil (ASBCA Nos. 55604,

55629). However, since Sinil's claim was precipitated by the government's recoupment claims, how the government's claim arose provides the backdrop for Sinil's claim which is the focus of the government's motion for summary judgment.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. In September 2000, USACCK awarded Contract No. DAJB03-00-D-0087 (Contract 0087) to Sinil. Contract 0087 was an IDIQ Delivery Order (DO) contract under which Sinil was required to "provide all labor, tools, equipment, supplies and all other resources to accomplish the scope of work...as listed in the schedule for all U.S. Forces installations throughout Area I to Area IV in accordance with the drawings, Statement of Work (SOW), specifications and terms and conditions contained herein." The contract was for the repair/replacement of existing deteriorated security fences and related work and the replacement of an existing deteriorated reinforced concrete retaining wall as listed in the Bidding Schedule (ASBCA No. 55629 (55629), R4, tab 1 at 11). The contract was for a base year plus four option years ending in September 2005 (*id.* at 10).

2. In September 2003, USACCK awarded Contract No. DABP01-03-D-0049 (Contract 0049) to Sinil. Contract 0049 was an IDIQ Delivery Order contract for repair and construction of asphalt concrete pavement for U.S. Forces installations, Korea Wide. The contract was for a base year plus four option years ending in September 2008. (ASBCA No. 55604 (55604), R4, tab 1 at 19) The contract states in Section B that "[i]ndividual delivery orders shall be issued which specifically defines [sic] the scope of work to be performed herein. Pricing for the work to be performed shall be taken from the Sub-Clins associated with each line item that are incorporated into the contract (See Section J)" (*id.* at 11).

3. Contracts 0087 and 0049 both incorporated by reference FAR 52.243-4, CHANGES (AUG 1987) (55629, R4, tab 1 at 23, 55604, R4, tab 1 at 30). This clause provides at (a) that "the Contracting Officer may...by written notice designated or indicated to be a change order, make changes in the work within the general scope of the contract." The clause also provides at (f) that "[n]o proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract."

4. Both contracts contained the full text DFARS 252.201-7000, CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991) which provides:

(a) "Definition. Contracting officer's representative" means an individual designated in accordance with subsection 201.602-2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(55629, R4, tab 1 at 25-26, 55604, R4, tab 1 at 23)

5. Contracts 0087 and 0049 were managed by the Directorate of Public Works (DPW) (mot., ¶ 2). Department of the Army Pamphlet 420-06 (15 May 1997) entitled "Directorate of Public Works Resource Management System" provides guidance to the DPW on managing resources (mot., tab 1, subtab A at 1). Chapter 6-3 of the pamphlet explains the roles of the DPW, the CO and the CORs:

The DPW nominates Contracting Officer Representatives (CORs) to support the KO [contracting officer]. The amount of authority delegated by the KO to the CORs varies among installations, but the KO is the only individual who can obligate Government funds. The authority delegated to the CORs and procedures for administering the contract are documented in an administration plan.

(*Id.* at 13)

6. After Contract 0087 was awarded in 2000, a post-award conference was held with representatives of Sinil. At this conference, Sinil was told "only the Contracting Officer has the authority to change the contract if there were any quality, quantity, price, or delivery time changes," and that those changes "had to be in writing by the Contracting Officer." Sinil was also told "if Sinil performed any work without the Contracting Officer's approval, the Government would not be responsible for that work." (Decl. of Kyong S. Lee, mot., tab 1, ¶ 3)

7. In support of its motion for summary judgment, the government provided an 18 July 2001 memorandum in which the CO for Contract 0087 designated a COR for Kunsan Air Base. This standard COR designation included Paragraph 6 which provides:

6. You are not empowered to award, agree to or sign any contract (including delivery orders) or contract

modification or in any way to obligate the payment of money by the Government. You may not take any action that may affect contract or delivery order schedules, funds, quality, quantity, scope, or other terms and conditions of the contract. You may be personally liable for unauthorized acts. You may not re-delegate your COR authority.

(Mot., tab 1, attach. B)

8. Although the administrative contracting officer (ACO) for Contract 0087 is unable to produce a copy of each COR designation issued under the contract, he states in his declaration that “[w]henver a COR is designated it is standard procedure to issue a memorandum designating the Contracting Officer’s Representative and the extent of his or her authority. This memo is supplied to the COR, customer and the contractor... This is a standard designation memo that was supplied to Sinil and would have been reissued to Sinil each time a new COR was designated” (decl. of Kyong S. Lee, mot., tab 1, ¶ 5). In opposing the government’s motion for summary judgment, Sinil has not disputed this fact.

9. Between 2002 and 2004, 27 DOs were issued under Contract 0087, including DO Nos. 2006, 2015, 2020, 2024, 2071, 2073, 2074, 2076, 2078, 2079, 2080, 2081, 2082, 2083, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2115, 2124, 2126, 2134, 2139 (55629, R4, tabs 2-23, 25-29). Modifications to some of the DOs were issued (*id.*, tabs 24, 30-45).

10. In 2003 and 2004, a number of DOs were issued under Contract 0049, including DO Nos. 0015, 0027, 0028, 0029, 0030, 0034, 0035 and 0037 (55604, R4, tabs 2-9).

11. Each DO and modification issued by the government provided a detailed scope of work, broken down by line items. Each order also stated a specific “negotiated” price for each line item. (Mot. at 4, ¶ 5)

12. From time to time, as work under each DO was completed, Sinil would submit its payment request. The payment requests were certified by Sinil’s manager stating that the payment requested “is correct and just, and that the payment has not been received.” Some of the payment requests were accompanied by a Material Inspection and Receiving Report (MIRR) which was signed off by a DPW inspector, the COR, and the Director of DPW. The payment requests have a “Verified” signature block for the COR and an “Approved” signature block for the CO. The COR and the CO certified to the following:

I certify that the supplies and services called for under the terms of this contract have been received/rendered and are proper for payment as invoiced. I further certify that all shop drawings and record drawings as required for work covered under this invoice has [sic] been received and approved.

(Mot., tab 12, *passim*)

13. At the request of the former Director, Installation Management Office, Korea Regional Office (IMO-KORO), the United States Army Audit Agency (AAA) audited two DPW operations under the Area I-Support Activity. The second of the two audits focused on DPW's contract operations at Camp Falling Water (Uijongbu) and Camp Giant (Munsan). AAA's draft audit report was made available to USACCK in March, 2005. ASBCA Nos. 55819 (55819), 55820 (55820), R4, tab 54; mot., tab 13) The draft report identified at least \$2 million in overstated requirements allegedly due to DPW personnel computing and applying DO requirements incorrectly, and identified at least \$851,600 in potential overpayments because of alleged inadequate contract inspections and monitoring (R4, tab 54).

14. At the time Sinil submitted its payment requests, it also provided a signed release with each request. The signed release states:

The undersigned contractor for the following listed contract hereby release the United States of America, it's officer [sic], agents, and employees from any and all claims arising under or by virtue of said contract or any modification or change thereof.

(Mot., tab 11) The government has not been able to locate the releases for DO Nos. 2024, 2090, 2126, 2134 and 2139 under Contract 0087, and the release for DO No. 0015 under Contract 0049 (mot. at 5, n.2). Sinil, however, has admitted in response to the government's Requests for Admissions that it gave a release for each of the DOs (mot., tab 29 at 6, ¶¶ 18, 19).

15. All of the payment requests were for the amounts stated in the DOs. None of the requests for payment accounted for additional or substituted work (mot. at 4-5, ¶¶ 6, 7). In opposing the government's motion for summary judgment, Sinil has not disputed this assertion.

16. The AAA draft report recommended that IMO-KORO take steps to recoup a number of overpayments, among them:

- \$1,116,300 on the 27 delivery orders with the Security Fence Contractor in the Uijongbu Enclave -- \$317,900 due to overstated measurements, \$396,300 due to overstated construction debris, \$258,000 due to the wrong contract line item being used and \$144,100 for fencing not received.
- \$113,000 on 5 delivery orders with the Paving Contractor -- \$60,700 for overstated measurements, about \$18,500 in overstated construction debris, and \$33,800 for items not received in the Uijongbu Enclave.

(55819, 55820, R4, tab 54 at 23)

17. DPW's Director responded to the AAA draft report in a memorandum dated 31 May 2005. He took the position that the audit created the impression that Sinil was overpaid because AAA "did not take into consideration those items which were not part of the original delivery order or substituted items." The DPW Director acknowledged that "DPW is responsible for this since modifications were not processed to reflect the additional work, changed scope of work and substituted line items." (Mot., tabs 13 at 2, ¶ 6)

18. DPW subsequently re-estimated the paving contract (Contract 0049) and the fence contract (Contract 0087). The estimate included "all additional work, and substituted line items which were not listed in the original DO[s]." As reflected in its 31 May 2005 memorandum to USACCK, including all additional work, DPW found that Sinil was underpaid by \$25,968 on the paving contract (Contract 0049), and that Sinil was underpaid either \$44,823 or \$279,356 under the fence contract (Contract 0087) depending on whether the L-Work definition or the K-Work definition was used. (Mot., tab 13 at 2, ¶¶ 6, 7)

19. Kyong S. Lee was the ACO (ACO Lee) for the fence contract (Contract 0087) (mot., tab 1). He issued DO Nos. 2006 and 2015. He states in his declaration that at no point did he delegate his authority to any CORs in DPW. He states that until AAA issued its draft report, he believed Sinil was completing work in accordance with the line items specified in the DOs and was invoicing the government accordingly. He states that he had no reason to believe DPW employees were directing Sinil to perform "unapproved" projects and Sinil was billing the government for "omitted and replaced" work. (*Id.*, ¶ 7)

20. Sin Su Yong was CO (CO Yong) for both the fence contract and the paving contract from 12 May 2003 to 30 April 2004 (mot., tab 2, ¶ 1). CO Yong issued DO

Nos. 2071, 2073, 2074, 2076, 2078, 2079, 2080, 2081, 2082, 2083, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2115, 2124, 2126, 2134 and 2139 under the fence contract (Contract 0087), and DO Nos. 0027 and 0028 under the paving contract (Contract 0049). CO Yong's declaration states that DPW did not have authority to modify the contracts and at no point did he delegate his authority to DPW or any COR. (*Id.*, ¶ 4) He states that as far as he was aware, Sinil was completing work as specified in the line items of the DOs and invoicing the government accordingly. He states that until AAA issued its draft report, he had no reason to believe DPW employees were directing Sinil to perform "unapproved" projects, and that Sinil was billing for "omitted and replaced" work. (*Id.*, ¶ 5)

21. Un Hui Ko was CO (CO Ko) on the paving contract (Contract 0049) from 2005 to 2006. CO Ko issued DO Nos. 0029 and 0030 under that contract. (Mot., tab 3, ¶¶ 1, 4) His declaration states that at no point during the course of contract performance did he delegate his authority to any CORs in DPW (*id.*, ¶ 4). He states that he had no reason to believe DPW was directing Sinil to complete "unapproved" projects, that as far as he was aware, Sinil was completing work as specified in the line items in the DOs and billing the government accordingly. He states that until AAA issued its report, he was not aware that Sinil was billing for "omitted and replaced" work. (*Id.*, ¶ 5)

22. Geoffry A. Lohsl was CO (CO Lohsl) for the fence contract (Contract 0087) from October 2002 to July 2003. He issued DO No. 2020 under the contract. His declaration states that he never delegated his authority to any CORs in DPW. He also states that as far as he was aware, Sinil was performing work as specified in the line items of the DOs and billing the government accordingly. He also states that until AAA issued its draft report, he was not aware that Sinil was billing for "omitted and replaced" work ordered by the CORs. (Mot., tab 4)¹

23. ACO Lee, CO Yong, CO Ko and CO Lohsl all state in their declarations that each DO issued under Contracts 0087 and 0049 was considered complete when Sinil provided a release and when final payment was made. Each of the declarations also stated that Sinil never mentioned that it was entitled to additional money before AAA issued its report. (Mot., tab 1, ¶ 11; tab 2, ¶ 7, tab 3, ¶ 7; tab 4, ¶ 5)

24. In January 2006, the Army Criminal Investigation Command (CID) initiated an investigation into the conduct of several Sinil and DPW employees. The investigation focused on allegations of bribery, theft, fraud, conspiracy, and providing false official statements. (Mot. at 11, ¶ 28; mot., tab 5) The CID investigation was conducted in coordination with the White Collar Crime Section of the Korean National Police (KNP) with CID as the lead agency (mot., tab 5 at 1; *id.*, ex. 1 at 2).

¹ The government did not provide a declaration for one CO (Ms. Sliger). She was CO for DO. No. 2024 under the fence contract (mot. at 5, ¶ 9, n.3).

25. By letter dated 12 January 2006, the CO (Mun, Son Cha) (CO Mun) for Contracts 0049 and 0087 terminated the appointment of the COR who ordered the unauthorized work, signed off on the MIRR's and verified Sinil's payment requests (55819, 55820, tab 56).

26. Relying on the "report from US Army Audit Agency," USACCK's 20 January 2006 letter identified 26 DOs under Contract 0087 as showing "shortage of quantities." The letter told Sinil that the government was considering terminating Contract 0087 for default and asked Sinil to present any excusable reasons within 10 days of receipt of the letter. (55629, R4, tab 46)

27. Sinil's president and CEO responded by letter dated 27 January 2006. The letter explained that Sinil had provided "additional and substituted work for any Deficiency on other delivery orders to the DPW" and asked the CO to confirm that with the DPW inspector. (55629, R4, tab 47) The letter did not indicate Sinil would cure the deficiencies identified.

28. CO Mun advised Sinil by letter dated 27 March 2006 that after reviewing the 26 DOs² under Contract 0087, it was discovered that "your firm submitted final invoices based on the Delivery Order quantities instead of actual quantities delivered to fulfill requirements." The letter asserted that Sinil was overpaid \$1,402,428.00. Sinil was told the government intends to recoup the amount and to repay this amount to the U.S. Government by 28 April 2006. The letter stated that if Sinil was not in agreement, to "please provide justification with supporting documentation...by 15 April 2006." (55629, R4, tab 48)

29. CO Mun advised Sinil by a similar letter dated 27 March 2006 that it was discovered that Sinil submitted invoices under Contract 0049 "based on the Delivery Order quantities instead of actual quantities." The letter asserted that Sinil was overpaid \$98,781.00 for the five DOs under the contract. The letter told Sinil that the government intends to recoup the \$98,781.00 and to repay this amount to the U.S. Government by 28 April 2006. The letter stated that if Sinil was not in agreement, to "please provide justification with supporting documentation...by 15 April 2006." (55604, R4, tab 10)

30. In response to the CO's demand letter on Contract 0087, Sinil's 28 April 2006 letter asserted that it was "underpaid a total amount of \$290,370 under the referenced 26 delivery orders." The letter contended that the government "did not take into consideration those items that were not part of the original delivery order or substituted

² According to the government's motion, the letter misstates the government's claim because the audit "actually showed discrepancies in 27 delivery orders" under Contract 0087 (mot. at 8, ¶ 17 and n.5).

items,” and that “CCK and DPW are responsible for these since modifications were not processed to reflect the additional work, changed...work and substituted line items.” Sinil’s letter stated that “we have provided all kind [sic] of resources related...[to] additional and substituted work...to the DPW, Uijongbu,” and the DWP inspector at the Uijongbu enclave would be able to confirm its contention. (55629, tab 51)

31. Sinil also separately responded to the CO’s demand letter on Contract 0049. Its 28 April 2006 letter asserted that it was underpaid \$25,965 for the five DOs due to CCK and DPW’s failure to process additional work, changed work and substituted line items. The letter went on to say that DPW inspector at Uijongbu enclave would be able to confirm that Sinil provided “all kind [sic] of resources related...[to] additional and substituted work for any deficiency on...delivery orders to the DPW from early March to April 2005.” (55604, R4, tab 14)

32. In April 2006, USACCK sent a Quality Assurance (QA) Team to various sites to verify the work Sinil said it performed. The QA Team was unable to verify the work because many of the DPW employees responsible for the disputed DOs had “either resigned or quit.” Documents showing where work was performed no longer existed within DPW. Moreover, access to some of the installations was not possible because they had already been turned over to the Korean government. According to ACO Lee “the work Sinil says it completed could not be independently verified by CCK.” (Decl. of Kyong S. Lee, mot., tab 1, ¶ 10)

33. The CO issued a decision by letter dated 28 June 2006. The decision cited the AAA finding that Sinil had been overpaid \$1,402,428.00 in connection with 27 DOs under the fence contract (Contract 0087).³ The decision said that “[a]lthough the Government has made final acceptance for the work in question, the disparity between the stated quantities and actual work performed indicates fraud, or gross mistake amounting to fraud, in that you invoiced the government for work not performed.” The decision said that in re-examining the data contained in the AAA report and after reviewing Sinil’s response to the 27 March 2006 demand letter, it was determined that Sinil was overpaid W1,518,194,050 “for work not actually performed under the 27 DOs.” The decision did not address Sinil’s allegation that it performed work outside the scope of the 27 DOs which, if considered, could have resulted in \$290,370.00 in underpayment. In that connection, Sinil was told it could submit a claim. (55629, R4, tab 52)

34. In seeking to recoup from Sinil, the government relied on the measurements taken by AAA (55629, R4, tab 52). Whether AAA’s measurements were correct has not been established. For example, DO No. 2134 was for replacing 650 feet of security fence

³ The \$1,402,428.00 amount does not match the amount cited in AAA’s draft or final report (see SOF ¶¶ 16, 36). No explanation was given for the adjustment.

at the east corner of Camp Essayons, Korea. The AAA report identified W103,456,300 as having been overpaid to Sinil. According to the statement provided to the KNP on 1 August 2006 by the DPW inspector who conducted a re-measurement of the work performed, Sinil was overpaid W74,819,628. Discrepancy in measurement also occurred in the case of DO No. 2139. (Mot., tab 16 at 2) As reflected in the transcript of the DPW inspector's interview by KNP at the Uijongbu Police Station on 25 July 2006, other DO discrepancies existed (mot., tab 15).

35. The CO issued a separate decision on Contract 0049 on 28 June 2006. The decision cited the AAA finding that Sinil was overpaid \$98,781.00 on five DOs, and stated after considering Sinil's response and re-examining the data available, it was determined that Sinil was overpaid W123,970,524.⁴ The decision did not address Sinil's contention that it performed work outside the scope of the five DOs which, if considered, could have resulted in \$25,965.00 in underpayment. In that connection, Sinil was told it could submit a claim. (55604, R4, tab 15)

36. AAA issued its final Audit Report (A-2006-0194-FFP) on 24 August 2006. As in the draft report, the final report recommended that the government recoup a number of overpayments, among them:

- \$1,116,300 on the 27 delivery orders with the Security Fence Contractor in the Uijongbu Enclave - \$317,900 due to overstated measurements, \$396,300 due to overstated construction debris, \$258,000 due to the wrong contract line item being used and \$144,100 for fencing not received.
- \$113,000 on 5 delivery orders with the Paving Contractor - \$60,700 for overstated measurements, about \$18,500 in overstated construction debris, and \$33,800 for items not received in the Uijongbu Enclave.

(55819, 55820, R4, tab 70 at 27)

37. By letter dated 19 September 2006, Sinil timely appealed the CO's decisions. The Board docketed Sinil's appeal on Contract 0049 (the paving contract) as ASBCA No. 55604, and its appeal on Contract 0087 (the fence contract) as ASBCA No. 55629.

⁴ The \$98,781.00 amount does not match the amount stated in the AAA draft or final report (*see* SOF ¶¶ 16, 36). No explanation was given for the adjustment.

38. By letter dated 14 September 2006, Sinil, through its counsel, submitted a certified claim to the CO. The claim covered both Contract 0087 and Contract 0049. The claim was essentially an offset claim against the government's June 2006 decisions asserting claims of W1,518,194,050 (ASBCA No. 55629) and W123,970,524 (ASBCA No. 55604) against it:

The U.S. government is alleging that the U.S. government overpaid the contractor by an amount of 123,970,525 won on the 0049 Project and is also alleging that the U.S. government overpaid the contractor by an amount of 1,518,198,050 won on the 0087 Project. Deducting the overpayment of 123,970,524 from the claim amount of 156,058,411, the U.S. government still owes 32,047,887 won to the contractor on the 0049 Project. Regarding the 0087 Project, the U.S. government owes the contractor an amount of 441,118,858 won if the overpayment of 1,518,194,050 won is deducted from the claim amount of 1,959,312,908 won. Rather than the contractor owing the U.S. government money, the U.S. government still needs to pay the contractor a sum of 473,166,745.

(55819, 55820, R4, tab 73 at 1-2) As support for its offset claim, Sinil referred to the DPW "internal study" and the DPW Director's memorandum and cost evaluations of Contracts 0087 and 0049. Sinil also identified by name the COR who "ordered the works outside the scope of the contract" and maintained that "[a]dditional work, additional quantities, and substitution of work were provided by my client at DPW's instruction and request related to the 0049 Project and 0087 Project" (*id.* at 3).

39. In a decision issued on 19 December 2006, the CO denied Sinil's claim. Referring to 41 U.S.C. § 605(a), the decision explained that the CO was prohibited from adjusting any claim involving fraud. According to the CO, Sinil "knowingly billed the Government for work you did not perform"; DPW employees colluded in the fraud when they "accepted your work and forwarded your work and forwarded the MIRRs for payment"; and there was evidence of bribery and collusion between DPW personnel and some Sinil employees which was "being investigated by the Criminal Investigations Command." The CO also invoked FAR 52.246-12(i)⁵ as the government's right "to avoid acceptance of all disputed delivery orders." (55819, 55820, tab 78)

40. CID issued its report on 11 January 2007. The report found there was probable cause to believe that DPW personnel conspired with Sinil personnel to "submit

⁵ FAR 52.246-12(i) states "[a]cceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud...."

fraudulent claims to the U.S. Government for payment to Sinil Corporation on work which was not done,” and there was probable cause to believe that the Director of DPW and the COR provided false statements “when they signed the Material Inspection and Receiving Reports (DD Form 250) and relevant documents without verifying the inspections and contract work were completed correctly.” CID did not come up with sufficient evidence to support a case for theft, fraud and conspiracy because neither the Director nor the COR “personally conduct[ed] the inspections or work directly with...Sinil Corporation personnel.” CID found probable cause to believe bribes from Sinil personnel led a DPW inspector not to conduct thorough inspections on the security fencing construction in Uijongbu Enclave during fiscal year 2003 and 2004, and he conspired to submit false claims to the government for work not performed. (Mot., tab 5 at 3) The government notified Sinil by letter dated 27 June 2007 that it was debarred from government contracting and government-approved subcontracting until 27 October 2009 (mot., tab 28 at 2). We have not been told that the U.S. government is currently pursuing prosecution of anyone implicated in the performance or administration of Contracts 0087 and 0049.

41. On 27 February 2007, the KNP investigation determined that the DPW inspector and his immediate supervisor as well as a Sinil subcontractor had not committed any criminal violations under Korean law. Consequently the Korean government declined prosecution (mot. at 18, ¶ 42; mot., tabs 26-27).

42. Sinil timely appealed the CO decision on its claim by letter dated 7 March 2007. The appeal asserted that the payments made to the DPW inspector “were only on three occasions and in small amounts, which normally are considered as customary payments made during traditional Korean holidays.” Sinil asserted that the Korean prosecutor had acquitted the DPW inspector, his superior, and Sinil’s subcontractor for breach of trust based on bribery. The appeal complained that because of the bribery and collusion issues, the “U.S. government did not bother to address those issues...raised in my client’s claim.”

43. On 12 March 2007, the Board docketed the appeal arising out of the CO’s 19 December 2006 denial of Sinil’s claim under the paving contract (Contract 0049) as ASBCA No. 55819, and the appeal arising out of the CO’s denial of Sinil’s claim under the fence contract (Contract 0087) as ASBCA No. 55820.

DECISION

We understand the government to be seeking summary judgment on Sinil’s claim (ASBCA Nos. 55819, 55820), and not on its claim against Sinil (ASBCA Nos. 55604, 55629). In moving for summary judgment, the government tells us that regardless of the DPW inspector’s involvement, for purposes of the motion, “the Government is not raising the affirmative defense of fraud” (mot. at 18-19). With respect to Sinil’s claim

against the government (ASBCA Nos. 55819, 55820), the government contends that DPW employees who authorized the changed and substituted work outside the scope of the DOs issued had no express or implied authority to do so (mot. at 20-24). The government also contends that “there is...no evidence that the alleged work was ratified by anyone with the authority to do so” (mot. at 24-25). Lastly, the government contends that Sinil received “final payment for each delivery order, but did not reserve any rights to make further claims,” and therefore its claim is discharged by release (mot. at 27).

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). “[S]ubstantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006). 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 the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984). “A non-movant runs the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim.” *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984). Moreover, statements made by counsel in briefs are not normally accepted by a court as being a part of the factual record. *J. G. Watts Constr. Co. v. United States*, 161 Ct. Cl. 801, 808 (1963).

I. Authority to Order Additional and Substituted (Changed) Work

The governing law relating to government officials’ authority to enter into binding contracts is straightforward. A contract with the United States requires that the government representative who entered or ratified the agreement had actual authority to bind the United States. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). One who enters into an agreement with the government assumes the risk of ascertaining the authority of the agents who purport to act for the government, and this risk remains with the contractor even when the government agents themselves may have been unaware of the limitations of their authority. *Id.*; *Federal Crop Ins. Corp. v. Merrill*, 322 U.S. 380, 384 (1947). The party alleging the existence of a contract bears the burden of showing “a mutual intent to contract.” *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1432 (Fed. Cir. 1998); *Trauma Service Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997).

The Federal Circuit decision in *Winter v. Cath-DR/Balti Joint Venture*, 497 F.3d 1339 (Fed. Cir. 2007), is on point here. In that case, the contractor entered into a fixed price contract to renovate a Navy dental research facility. The contract incorporated a CONTRACTING OFFICER AUTHORITY clause (NAVFAC 5252.201-9300 (JUN 1994)) which reserved authority to the CO to bind the government to any “contract, modification, change order, letter or verbal direction to the contractor.” The contract also included a GOVERNMENT REPRESENTATIVES clause (NAVFAC 5252.242-9300 (JUN 1994)) which allowed the CO to designate the Engineer in Charge to monitor performance but reserved to the CO the right to bind the government by modification. *Id.* at 1341. In addition, at a preconstruction conference, the contractor was told “[n]o work is to be performed beyond the contract requirements without *written notification from the ROICC*,”⁶ and to submit a request for equitable adjustment to the ROICC, and if the ROICC did not agree to entitlement, to ask for a CO decision. *Id.* at 1342. After substantial completion of the project, the contractor submitted requests for equitable adjustment. Even though the Navy initially found entitlement to several claims, it later denied all claims and contended on appeal that the CO did not direct the work claimed and only the CO had the authority to change the scope of work or authorize compensable changes under the contract. *Id.* at 1344. Pointing to the Contracting Officer Authority and the Government Representatives clauses, the Court held when the contract “explicitly and exclusively” assigned the duty to modify the contract to the CO, the ROICC did not have implied authority to direct changes in the contract in contravention of the unambiguous contract language. *Id.* at 1346.

As in *Cath-DR/Balti*, Sinil’s contracts included a Contracting Officer Representative clause which provided that “[t]he COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract” (SOF ¶ 4). Moreover, at a 2000 post-award conference, Sinil was told that only the CO had authority to change the contract, that changes had to be in writing, and that the contract would have no recourse against the government if it performed work without the CO’s approval (SOF ¶ 6). Also, Sinil was provided a standard designation memorandum whenever a COR was designated. The standard designation memorandum told Sinil that CORs were not empowered to take any action that may affect the “scope, or other terms and conditions of the contract.” (SOF ¶¶ 7, 8)

In opposing the government’s motion, Sinil has not raised any genuine issue of material fact. Sinil acknowledged that “only the contracting officer had a proper authority to modify or change the contract.” It also acknowledged that “the additional work...was performed at the order of the DPW personnel who definitely knew that they did not have an authority to modify the contract.” (Opp’n at 4, ¶ 3) Moreover, Sinil’s

⁶ In Naval Facilities Engineering Command parlance, ROICC means “Resident Officer in Charge of Construction.”

opposition states that it is “not challenging” the “several legal issues” as framed by the government in moving for summary judgment (*id.* at 5). Rather, Sinil’s opposition suggests that the government should pay for the unauthorized work because the government, as represented by its DPW employees, was itself at fault: “[I]t is the Appellant’s position that the U.S. government can not and should not be relieved of its responsibility to make a payment for the additional work which was ordered by the U.S. government” (*id.*). For the reasons explained above, however, this position is not tenable.

II. Ratification

We address next the issue of ratification. The governing law says that agreements made by government agents without authority may be subsequently ratified by those with authority. *Harbert/Lummas*, 142 F.3d at 1433. Ratification by those with authority can only occur if the ratifying officials have actual or constructive knowledge of the unauthorized acts. *United States v. Beebe*, 180 U.S. 343, 354 (1901) (“ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken... Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them.”).

In support of its motion for summary judgment, the government provided the declaration of four COs (ACO Lee, CO Yong, CO Ko and CO Lohsl). Their declarations all state that as far as they were aware, Sinil was completing work as specified in the line items in the DOs and billing the government accordingly. They state that until AAA issued its draft report, they were unaware that Sinil was billing for “omitted and replaced” work. (SOF ¶¶ 19-22) When the government became aware that Sinil was billing for work not actually performed, the CO terminated the appointment of the COR who ordered the unauthorized work, signed off on the MIRRs and verified Sinil’s payment requests (SOF ¶ 25). Shortly thereafter, the CO initiated recoupment actions against Sinil (SOF ¶¶ 28, 29).

In opposing the government’s motion, Sinil provided no declarations or affidavits in contravention of the COs’ declarations. Sinil questions why the CO sent a QA team to verify its work when the CO had already rejected its claim on the basis it was “tainted by fraud” (opp’n at 7). Sinil, however, does not dispute that the CO attempted to verify its claimed work and was unable to do so (SOF ¶ 32). The fact that the CO sought to verify its claim supports a conclusion that those with authority to order work did not have full knowledge of all the facts relating to the additional and substituted work it claimed it was performing. We conclude that there was no ratification.

III. Release

Referring to an earlier version of the Changes clause which contained a similar provision as subparagraph (f) of the Changes clause in Contracts 0087 and 0049 (*see* SOF ¶ 3), the Court in *Mingus*, summarized the law with respect to final payment and release:

...under the terms of the contract, the government releases final payment due under the contract only upon execution of a release by the contractor of all claims against the government, except those specifically excepted. If there are outstanding claims excepted on the release, then final payment will not necessarily bar resolution of those claims. If there are no claims excepted on the release or if the “claims” excepted on the release are not legally cognizable as claims, then final payment will act as a bar to their subsequent submittal on the basis of the release signed by the contractor.

812 F.2d at 1391.

In this case, it is undisputed that each of the DOs under the two contracts were separately issued and invoiced. With Sinil’s executed release in hand, final payment in the amount invoiced was made on each DO. (SOF ¶¶ 4, 15) Sinil has not alleged or shown that it took any exception to the release it signed to receive final payment for each DO.

In opposing the government’s motion, Sinil tells us that when it sought DO payments, it “was in no position and also did not wish to make claims for equitable adjustment at the time of final payment” because doing so would have “delayed the final payment” and created a cash flow problem. Sinil also tells us that, at the time, “the equitable adjustment amount would not have been sufficiently large to justify making claims,” and it submitted its equitable adjustment claim only after the U.S. government sought to recoup a large sum of money. (Opp’n at 7-8) Despite the justifications it now provides, it has not come forward with specific facts or evidence showing there is an evidentiary conflict on any genuine issue of material fact relating to the discharge of the government from further equitable adjustment through release. We conclude there is no triable issue of material fact with regard to release.

IV. Further Development of Issues and Access to Individuals and Investigative Reports

Finally, in urging us to deny the government’s motion for summary judgment, Sinil tells us “there are several issues which still need to be addressed more fully for the resolution of this appeal.” Sinil says it needs “access” to those individuals who were

directly involved with Contracts 0087 and 0049, and needs all investigative and interview reports involving contracting officers and DPW personnel related to the appeals.
(Opp'n at 1)

Sinil has had ample time for discovery. The complaints for ASBCA No. 55819 (claim on the paving contract) and ASBCA No. 55820 (claim on the fence contract) were filed in March 2007. Moreover, Sinil has not told us what issues it still need to address and what evidence it expects to find. We need not deny summary judgment on the basis of such general and non-specific representations. *KSC-TRI Systems, USA, Inc.*, ASBCA No. 54638, 06-1 BCA ¶ 33,145 at 164,261 (no need to deny summary judgment when appellant does not “explain what issues the discovery would relate to or what evidence it expects to find.”); *Scientific Management Associates, Inc.*, ASBCA No. 50956, 00-1 BCA ¶ 30,828 at 152,154 (denial of summary judgment not required if discovery is merely to satisfy a litigant’s speculative hope of finding some evidence that might tend to support a complaint); *Padilla v. United States*, 58 Fed. Cl. 585, 593 (2003) (a party opposing summary judgment must set forth with some precision the evidence it hopes to obtain, how the evidence would likely disclose issues of material fact, and why it is unable to access such evidence without further discovery).

CONCLUSION

In moving for summary judgment, the government has carried its burden in demonstrating that there are no genuine issues of material fact with respect to (1) the DPW COR’s lack of actual or implied authority to order changed and substituted work on DOs issued under Contracts 0087 and 0049; (2) the lack of ratification on the part of any one with authority to do so on the changed and substituted work; and (3) Sinil’s release of the government from claims arising under or by virtue of the DOs issued under the contracts. Inasmuch as Sinil has failed to come forward and show any evidentiary conflict on the material facts in support of the legal theories which formed the bases of the government’s motion for summary judgment, we hold that the government is entitled to summary judgment as a matter of law in ASBCA Nos. 55819 and 55820. These

appeals are denied.

Dated: 23 July 2009

PETER D. TING
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 55819, 55820, Appeals of Sinil Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals