

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Hamilton Acquisition Corp.)
t/a Stallings Group) ASBCA Nos. 55901, 56321
)
Under Contract No. N00140-02-D-N718)

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT (55901)
AND APPELLANT'S MOTION FOR SUMMARY JUDGMENT (56321)
AND THE PARTIES' MOTIONS TO DISMISS

Hamilton Acquisition Corp. t/a Stallings Group (SG or appellant) seeks compensation in ASBCA No. 55901 for work it performed, known as the Orthopedic Project, for the Department of the Navy, Fleet and Industrial Supply Center Norfolk (hereinafter FISC or Navy or government), and for which it alleges it has not been fully paid. In ASBCA No. 56321 SG seeks compensation for alleged changed work in the form of various analyses performed at the request of the Navy contracting officer. The cases have been consolidated and a consolidated Rule 4 file is in the record.

The Navy has moved for summary judgment in ASBCA No. 55901. SG opposed the Navy's motion and filed a cross-motion for summary judgment. SG also moved for summary judgment in ASBCA No. 56321 and the Navy has opposed SG's motion. Simultaneously, the Navy moved to dismiss both appeals for lack of jurisdiction on the

ground that SG's current arguments were not presented to the contracting officer for decision.

SG then filed a memorandum of law which contained: (1) its motion to dismiss the Navy's motion for summary judgment (55901) on the basis that it is "fatally defective" because, allegedly contrary to the Board's Guidance for Summary Judgment Motions, the "Statement of Material Facts" attached to the Navy's motion did not contain citations to supporting evidence nor was it separately signed; (2) SG's response to the Navy's motion to dismiss the appeals; and, (3) SG's reply to the Navy's opposition to SG's motion for summary judgment (56321). With respect to SG's motion to dismiss, the Navy's summary judgment motion included citations to the record in a supporting memorandum and was signed. We consider that the motion sufficiently complied with the Board's Guidance and do not discuss SG's first argument further. *See AEON Group, LLC*, ASBCA Nos. 56142, 56251, slip op. dated 24 September 2009. SG's motion to dismiss is therefore denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 31 October 2001 Contract No. N00140-02-D-N718, an indefinite delivery/indefinite quantity contract, was awarded to SG under Federal Acquisition Regulation (FAR) Part 12 Commercial Item procedures to provide services in support of the Digital Imaging Network—Picture Archiving and Communications System (DINPACS¹) at the Radiology Department of the Naval Medical Center in Portsmouth, Virginia (NAVMEDCEN). The contract was awarded for a base period to end 30 September 2002 with four 12-month options. (R4, tab 2)

2. The contract specified that:

(c) The COR will act as the Contracting Officer's representative for technical matters, providing technical direction and discussion as necessary with respect to the specification or statement of work, and monitoring the progress and quality of contractor performance. The COR is not an Administrative Contracting Officer and does not have authority to take any action, either directly or indirectly, that would change the pricing, quantity, quality, place of performance, delivery schedule, or any other terms and

¹ "DINPACS is a system that allows medical professionals to store and evaluate digital images produced for diagnostic purposes. The digital system eliminates the need for x-ray film" (app. mot., Statement of Undisputed Material Facts (SUMF), ex. 1, ¶ 5).

conditions of the contract (or delivery order), or to direct the accomplishment of effort which goes beyond the scope of the statement of work in the contract (or delivery order).

(d) It is emphasized that only a Contracting officer has the authority to modify the terms of the contract, therefore, in no event will any understanding, agreement, modification, change order, or other matter deviating from the terms of the basic contract between the contractor and any other person be effective or binding on the Government. When/if, in the opinion of the contractor, an effort outside the existing scope of the contract (or delivery order) is requested, the contractor shall promptly notify the PCO in writing. No action shall be taken by the contractor under such direction unless the PCO or ACO has issued a contractual change or otherwise resolved the issue.

(R4, tab 2 at 34) The contract further provided that:

Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (MAY 2001).

3. The Navy exercised the options for all four option years (R4, tab 3 at 6, 13-14, 21-22, 32-33).

4. Gianni “Jay” Venturi, currently SG’s Senior Vice President, was employed by SG in November 2001 as the project manager for the DINPACS contract. (App. mot., SUMF, ex. 1, Venturi Declaration)

5. On 11 April 2003 CAPT Marko, director of clinical support services for NAVMEDCEN, advised LCDR VanWay (then-COR) that CAPT Unger, head of the Orthopedic Department, was very interested in integrating DINPACS into the Orthopedics Department (R4, tab 12 at 1; supp. R4, tab 42; app. mot., SUMF, ex. 2, Martin dep. at 22, 23).

6. On 17 July 2003 Modification No. P00006 identified the COR as LCDR James Martin, replacing LCDR VanWay (R4, tab 3 at 12).

7. From April through October 2003 numerous and frequent meetings took place between Navy personnel and SG on the subject of the “Orthopedic Project” (app. mot, SUMF ex. 1, ¶¶ 7-9). It is undisputed by the parties that:

During the summer, fall and winter of 2003, Appellant attended numerous meetings with various personnel from the Medical Center concerning extending the DINPACS services into the orthopedics, emergency medicine and nuclear medicine departments. The contracting officer was generally aware in August 2003 that such meetings were occurring.

(Gov’t Statement of Material Facts (GSMF), ¶ 6; app. opp’n, Appellant’s Statement of Genuine Issues of Material Fact (ASGIMF), ¶ 6) SG’s president, Raleigh Hamilton, stated that:

In October of 2003 Stallings Group (SG) was asked to provide a quote for the “Orthopedic Project”. The project included work in the departments of Orthopedics, Nuclear Medicine and the Emergency Room. SG provided the requested quote (\$370,000) to Mr. Jim Martin. Mr. Martin later negotiated the amount downward to \$200,158 and \$55,004 for annual maintenance costs. SG indicated that the work would be done for the agreed amount subject to a PO being issued for the work.

Mr. Martin, who was the COR of our contract at the time, indicated that the work would be done as a mod to our existing contract. SG indicated that the work would commence as soon as appropriate documents were provided.

(R4, tab 23) The Navy has not disputed Mr. Venturi’s or Mr. Hamilton’s statements concerning negotiations between SG and COR Martin relative to the Orthopedic Project.

8. DO No. 0004 was issued on 1 October 2003 in the amount of \$1,431,617.12. The DO included \$1,210,085.28 for CLIN 0007 “Services of Personnel in Support of DINPACS at the Radiology Department”, \$201,531.84 for CLIN 0008 “Additional Services” and \$20,000 for travel. On 31 October 2003 DO No. 00004 was bilaterally modified to delete CLIN 0008, stating that CLIN 0008 was “inadvertently included” and that “Additional Services in support of the DINPACS contract will be ordered by separate task order.” (R4, tab 7)

9. On 14 October 2003 SG's Venturi was advised by an e-mail from CDR Leclair that a meeting was requested to discuss "PACS layout for ORTHO. Our archive migration is on track, and we may be able to move on the Ortho deployment as early as next week." (R4, tab 12 at 3-4) On 20 October 2003 CDR Leclair advised that, while SG was "developing the workstation package," construction ("electrical, additional cable drops and possibly HVAC") would be undertaken to prepare the area for DINPACS integration in the Orthopedics Department. (R4, tab 12 at 6)

10. On 19 November 2003 ACOR Collins advised SG's Venturi, with a copy to COR Martin, that:

I had a meeting...this evening to review the final IT requirements [of...DINPACS/Orthopedics].... Once I receive your approval I will then submit the final hardware list to LCDR Martin for processing.

(Supp. R4, tab 43) On 21 November 2003 CDR Leclair advised Venturi:

Please revise the shopping list for [COR] Martin as soon as you can.

(R4, tab 12 at 7)

11. On 20 November 2003 Contract Specialist Tierney advised CO Sweetra by e-mail with the subject line "DIMPACS [sic]" that:

Talked to Jay [Venturi],

....

Jay also told me that yet another upgrade is enroute to you for the orthopedics department. Jay estimates the cost of the upgrade will be 201K.

(App. supp. R4, tab 45)

12. On 7 December 2003 SG submitted a final detailed proposal to COR Martin for the added work of integration of DINPACS in the Orthopedic, Emergency Medicine and Nuclear Medicine departments (the Orthopedic Project) to be "posted" against the DINSPAC contract. The proposed firm fixed-price for installation of the system in the first year was \$200,158.00 with proposed annual maintenance costs after the first year of \$55,004.00 as negotiated by SG and COR Martin (*see* SOF ¶ 7). The work was proposed to be complete within 60 days. (R4, tabs 13, 37 at Section 1) After submission of the

proposal, SG waited for authorization to perform the work. As stated by Mr. Venturi in his declaration:

While we waited for authorization to proceed, I helped [ACOR] Jim Collins identify the hardware that would be needed and the Navy purchased all of the hardware that would be required to complete the Orthopedic Project.

The Orthopedic Department began structural modifications to the spaces in anticipation of the project. As renovations progressed, the Orthopedic Project became essential because previously existing capabilities were being removed or degraded.

(App. mot., SUMF ex. 1)

13. There is no documentary evidence in the record to show that SG provided its proposal to the CO or other FISC contracting personnel and the Navy avers that neither the CO nor any other contracting personnel ever saw the proposal (GSMF, ¶ 7). However, then-COR Martin testified under oath that he personally e-mailed the proposal to CO Sweetra and Contract Specialists Slegel and Tierney between Thanksgiving 2003 and January 2004. He further testified that Ms. Slegel had the document during his conversation with her just before Christmas 2003 when they discussed the Orthopedic Project (app. mot., SUMF ex. 2 at 40-43). There is no evidence in the record before us that Ms. Slegel had a contracting officer's warrant or other delegation of contracting authority and, therefore, we find on the record before us on the motions that she was not authorized to address the proposal absent CO direction.

14. On 10 December 2003 SG's Venturi advised COR Martin that:

1. Ortho is curious as to when I'm going to get started in the QC and server room. I expressed that I needed to wait until I got an official go ahead.
2. Chief Bunkers asked me what I'm doing about cardio. I asked him to email you on it and that you would do the tasking. As a "vendor", I really should not go up there without you.

Ortho would be the more immediate concern. Please let me know. I have to build the QC room/server/database library before I can start on the PODS.

(R4, tab 14 at 1) Due to ongoing construction at NAVMEDCEN which re-configured work areas to increase efficiency, the proposed work under the Orthopedic Project was divided into three Phases: A, B and C (R4, tab 29; app. mot., SUMF at 6).

15. Internal Navy emails on 6-7 January 2004 show that NAVMEDCEN personnel were anxious to have DINPACS installed in Phase A and Phase B of the Orthopedics Project as soon as possible (R4, tab 14 at 7-14; app. mot., SUMF ex. 1, ¶ 13; app. mot., SUMF ex. 2 at 47-48). SG “resisted because we had not received direction from an authorized contracting official” (app. mot., SUMF ex. 1, ¶ 13). In a telephone conference on or about 6-7 January 2004 in which SG’s Venturi, Ms. Slegel, COR Martin, ACOR Collins and CAPT Marko participated, SG’s Venturi has declared “Ms. Slegel stated that Stallings Group should not perform any work on the Project until she advised LCDR Martin of the appropriate CLIN to which the work should be charged” (app. mot., SUMF ex. 1, ¶ 14).

16. It is undisputed that on 8 January 2004, COR Martin had a telephone conversation with Contract Specialist Slegel. During the conversation, according to COR Martin, “Ms. Slegel said you can start the ortho project” (app. mot., SUMF ex. 2 at 54). Ms. Slegel recalls neither having the telephone conversation with COR Martin about the Orthopedic Project on that date nor the specifics of any such call (gov’t opp’n, ex. 2). We have already found that, on the record before us on the motions, there is no evidence that Ms. Slegel had contracting authority (SOF ¶ 13). After the phone conversation with Ms. Slegel, COR Martin advised SG’s Venturi by e-mail that “FISC has authorized payment of the Ortho DINPACS work under order 4 Clin 7” (R4, tabs 15, 19 at 1, 23; app. mot., SUMF ex. 1, ¶¶ 15-16; app. mot., SUMF ex. 2 at 42). This notification by COR Martin to SG that it could proceed with the Orthopedic Project is at the heart of the dispute which is the subject of ASBCA No. 55901. The Navy does not dispute that a conversation took place, nor that COR Martin advised SG that it was authorized to proceed; the Navy only disputes that Ms. Slegel or COR Martin were authorized to bind the Navy in contract. SG’s Venturi declared that, shortly after the notification from COR Martin on 8 January 2004, he received telephone calls from both Admiral Burkhardt, the NAVMEDCEN Commander, and CAPT Marko that SG had been authorized to proceed with performance of the Orthopedic Project (app. mot., SUMF ex. 1, ¶ 17). SG’s Venturi also declares CAPT Marko came to his work space at NAVMEDCEN later that day and reiterated that SG was to “proceed immediately” (app. mot., SUMF ex. 1, ¶ 18). LCDR VanWay also reiterated the same in a meeting that day (app. mot., SUMF ex. 1, ¶ 19). The Navy does not dispute the occurrence of these various contacts by NAVMEDCEN personnel regarding the Orthopedic Project (gov’t mot. at 3).

17. Immediately after the discussions of 8 January 2004, SG commenced work on Phase A of the Orthopedic Project where preparatory construction work had been completed and space was available (app. mot., SUMF ex. 1, ¶ 20).

18. In a 1 February 2004 letter SG invoiced for Phase A integration in the amount of \$88,740.00 stating that \$111,418.00 of the negotiated \$200,158.00 remained unbilled (R4, tab 16 at 1).

19. On 23 February 2004 ACOR Collins advised SG that:

We got the go ahead to move forward with the installation in the Phase “B” spaces starting 2/24/2004. Orthopedics would like to have the “3” spaces completed by this Friday.

(R4, tab 16 at 2; supp. R4, tab 44; app. mot., SUMF ex. 1, ¶ 22) The record does not identify who gave the “go ahead.”

20. On 1 March 2004 SG submitted an invoice for Phases A and B additional work in the amount of \$82,824.00, stating that \$28,594.00 of the negotiated \$200,158.00 remained unbilled (R4, tab 17). On the same date, SG submitted an invoice for Phase B of the integration in the amount of \$5,916.00, stating that \$22,678.00 of the negotiated \$200,158.00 remained and would be completed in Phase C (R4, tab 18).

21. On 5 May 2004 SG’s Venturi contacted CAPT Marko and advised that he had “submitted Phase A and B complete to [COR] Martin back on March 1, however DFAS shows no record of it. I have been unable to get a hold of Kevin Sweetra on it.” He requested that CAPT Marko or COR Martin look into the matter. (R4, tab 19 at 2-3) Venturi also advised CAPT Marko that “[a]ll of Ortho is working well; the only remaining stuff (Phase C) is dependent on Ortho’s construction schedule. Phase A and B, Nuclear Medicine and ER were [sic] completed in February” (*id* at 2). The Navy agrees that the Phase A and B work was completed in January and February 2004 (gov’t mot. at 1; gov’t opp’n at 6). CAPT Marko responded with a request:

Can you look for your copy of an email from Kathleen Slagel [sic] giving permission to go forward with the Ortho, ED, Nuc Med work? I am in need of a copy to help clear up misunderstandings. LCDR Martin is looking for his copy, but is not sure he still has it as he changed commands.

(R4, tab 19 at 2)

22. On 6 May 2004 SG's Venturi forwarded to CAPT Marko and CO Sweetra a copy of COR Martin's 8 January 2004 email along with his own comments:

Jim Martin said it was authorized by Kevin [Sweetra]. He said it was already in my contract schedule and that FISC approved it for the work under the same order. He said the command need [sic] only move the money to the order. Here is the copy of his email, it is attached to the internal email I sent you and Kevin Sweetra....

Capt. Marko, after that, LeClair and Unger said that I was approved to go. Jim said only the order had to be paid for. We completed Phase A and B and all of Nuc and ER.

(R4, tab 19 at 1) SG received a payment of \$25,000 which it understood to be partial payment for Phase A and B work (R4, tab 23). The Navy later issued a separate task order for the Phase C work (*see*, SOF ¶ 34).

23. A meeting was held on 12 May 2004 with CO Sweetra, SG's Hamilton and Venturi and ACOR Collins in attendance by phone. The minutes prepared by ACOR Collins state that the CO "clearly indicated that he has to treat this situation as an 'Unauthorized Commitment'" and the CO requested documentation from SG for the work performed. SG asked if the CO would authorize it to "continue supporting Ortho, ER and Nuc Med" while the CO reviewed SG's request and provide a reply by close of business that day. The record indicates that CO Sweetra authorized SG to continue (*see* SOF ¶ 27). Another meeting was scheduled for 14 May 2004. (R4, tab 19 at 7)

24. Later in the day on 12 May 2004 COR Martin advised ACOR Collins, CO Sweetra, CDR LeClair, and CAPT Marko by e-mail that he could not attend a meeting on 14 May and further stated "I must disagree with Mr. Sweetra's treating this as an Unauthorized Commitment since the verbal approval was received from his office via Kathleen Slegel and forwarded in writing to Mr. Venturi [f]ollowing that Telcon" (R4, tab 19 at 8-9).

25. Also on 12 May 2004, after COR Martin's e-mail, CO Sweetra e-mailed Ms. Slegel:

[LCDR Martin is] claiming that you gave them some sort of verbal authority to do work under Order 0004. The only thing I could find in the files is a note of a telcon you had with Martin on 1/8/04 where you discussed something about Order 0004 and he requested a copy which you then faxed to him.

(R4, tab 19 at 10) CO Sweetra then sent the following e-mail to ACOR Collins, CDR LeClair, COR Martin and CAPT Marko:

One correction and one update.

The documentation from the Stallings Group that you forwarded with “estimated” hours and costs is not all that I had requested. As I had said to you and the Stallings folks in our phoncon of earlier today, since the work has been done already I am required to look at the “actual” costs that the contractor may have incurred to accomplish the additional work. For example, I told the Stallings Group during our call that I will need to see payroll records, or similar documentation, showing additional hours and costs worked on these projects. The information you faxed is just Stallings’ previously proposed estimated prices.

For the ongoing maintenance and support services for the DINPACS now in Ortho, Nuc Med and ER, I will be sending a modification to the Stallings Group no later than Thursday morning that will add these departments to the already covered Radiology Dept. This will only cover future work and not address the implementation piece addressed above. I will be sending this mod out for their signature since I am not increasing the cost of the contract for this. If they will not sign and claim additional costs, then I will issue a unilateral mod to ensure that there is coverage and have them demonstrate what these costs might be.

(R4, tab 19 at 12) CO Sweetra sent yet another e-mail late in the day on 12 May 2004 to COR Martin, ACOR Collins, CDR LeClair and CAPT Marko:

Ms. Slegel is a very bright and conscientious negotiator and knows full well that she has no authority to either verbally or in writing commit the government to expend funds for anything. If a request of that nature were to be made of her, she would immediately talk with me about it. She did not talk to me about this nor did she give any form of “approval” in this case. And I find it even more unimanginable [sic] that she would have done something like that here since neither she, nor I, had ever seen an official requirement or a contractor’s proposal for this work or had checked if funds

were available for it or any of the other myriad [sic] things we have to do to write a \$200,000.00 order. As the contract clearly states, only a Contracting Officer has the authority to modify that contract. Since I did not, nor am I aware of any other warranted Contracting Officer who did, then this should properly be treated as an Unauthorized Commitment.

(R4, tabs 19 at 14, 20)

26. On 12 May 2004 Sue Smith, Acting Head, Materiel Management Department, NAVMEDCEN Portsmouth, sent two e-mails. The first was directed to CO Sweetra in which she stated: "At least for now, I understand the threats of Mr. Venturi removing the applications has ceased." (R4, tab 20 at 5) Ms. Smith's second e-mail stated:

Kevin [Sweetra],
I have spoken to CDR Martin at great length this afternoon to try and understand all this confusion. The following represents my understanding on the chain of events. Please keep in mind that I do not have a copy of the contract and will speak to CLINs (on the contract) without knowing the exact verbiage nor do [I] have associated dates involved. This really gets down in the weeds folks:

The original contract, effective 1 OCT 03, had a CLIN 8 for \$201K for additional integration work (not sure of verbiage). This verbiage is what CDR Martin acted on for the work performed for the ORTHO, OR, & ER (CDR Martin mentioned ER vice NucMed, although Jim Collins mentioned NucMed but not OR). Therefore, the 'additional integration work' on CLIN 8 was the installation and application installation.

When CDR Martin prepared to process payment for CLIN 8 for the above work[] performed, CDR Martin noticed that CLIN 8 had been removed from the contract and CDR Martin attempted to contact Kevin Sweetra concerning the issue. Kevin was unavailable, so CDR Martin contacted Ms. Kathleen Slegel concerning the missing CLIN 8. Ms. Slegel said she wasn't sure why CLIN 8 was removed and she was unable to touch base with Kevin at the time, so she authorized CDR Martin to use order 4, CLIN 7, because although the CLIN 8 was missing, the funds were still

available. Therefore, she informed CDR Martin to have charges placed under order 4, CLIN 7.

- 1) What is your interpretation of the original CLIN 8 for performance?
- 2) Was CLIN 8 meant for something else other than the type of work performed in ORTHO, ER, OR?
- 3) Why was CLIN 8 removed?
- 4) Did Ms. Kathleen Slegel misdirect CDR Martin?
Certainly, there could not have been such a huge disconnect in their verbal conversation.
- 5) If all this is accurate, then a UAC^[2] is not applicable, correct?
- 6) If this is not accurate, what was the disconnect? Did CDR Martin misinterpret AND how should this be handled from here?

Appreciate any clarity to those of us with inquiring minds that want to know.

(R4, tab 20 at 4-5) There is no evidence in the record before us of responses to Ms. Smith's questions.

27. Later on 13 May 2004 CO Sweetra provided the following information to Ms. Smith, ACOR Collins and CAPT Marko:

I don't think a meeting is necessary right now. The main impetus for the meet[ing], I thought, was to make sure that Stallings didn't try to "abandon" support for the expanded DINPACS pieces and to have a plan for where we go with paying for the work already done. After our second conversation yesterday I had gathered from Raleigh Hamilton that they would continue performance as long as I told them to. The attached letter and mod that I faxed to Stallings a little bit earlier should do that. My letter also starts the process to get work already done officially on contract. I will continue to work directly with Stallings and keep you all apprised of any major developments.

² Unauthorized Commitment

One thing I will need right away is written confirmation from your budget folks that funds are still avail[ab]le for these actions. I think you said that the \$200K was still good, but I'd like that confirmed please.

The only other major issue I see is whether we process this action as an unauthorized commitment or not. I'm still exploring with my legal folks if there are any other alternatives. We think we can fit this under "claims" or some such, but I don't have the final answer. I should know for sure by tomorrow.

(R4, tab 20 at 9-10)

28. On 17 May 2004 CO Sweetra advised Ms. Smith, ACOR Collins and CAPT Marko that:

Ju[s]t to let you all know that I did talk with Raleigh Hamilton this morning and he agreed to include maintenance of the systems in the Ortho, ER & Nuc Med at no cost for the period of three weeks while we try and work out a price for the already completed installation/integration in those areas. He has a modification to that effect for his signature and ret[urn].

(R4, tab 20 at 8)

29. In Modification Nos. P00008, P00009 and P00010, dated May through July 2004, SG agreed to provide maintenance and support services for the Orthopedic Project to 15 August 2004 and at no cost to 19 July 2004 (R4, tab 3).

30. In the summer of 2004, SG was directed by the CO to "perform an analysis of the value added by the Orthopedic Project" (app. mot., SUMF ex. 1, ¶ 33; gov't opp'n at 8, 27).

31. On 2 September 2004 CAPT Marko advised SG's Venturi by e-mail "[d]on't forget to send me the email you got so we the Navy can do our submission for the Value Added package" (R4, tab 20 at 11). It appears from the record that the referenced e-mail was sent to SG's Hamilton by the Contract Specialist Tierney and contained "part of FAR clause 52.248-1 entitled Value Engineering that you need to complete and send to us" (R4, tab 21).

32. On 6 September 2004 SG submitted its “weighted benefit analysis,” also referred to as a Value Added Statement, to CDR Johnson, OIC, FISC Norfolk Det. Philadelphia (R4, tabs 22, 23; app. mot., SUMF ex. 1, ¶ 34). On 10 September 2004 LCDR Brian Clement submitted to FISC CDR Johnson, CPT Marko and CO Sweetra his “VALUE ASSESSMENT OF PHASE A AND B IMPLEMENTATION OF ORTHOPEDIC DINSPAC SYSTEM” (app. supp. R4, tab 46).

33. On 8 September 2004 Task Order (TO) No. N00183-04-P-0928 in the amount of \$6,000.00 was awarded to SG for on-site maintenance and support services of the DINPACS system located in the ER, Nuclear Medicine and Orthopedics Departments at NAVMEDCEN from 8 September 2004 through 30 September 2004 (supp. R4, tab 41; app. mot., SUMF ex. 1, ¶ 26).

34. On 9 September 2004 TO No. N00183-04-P-0930 in the amount of \$22,600.00 was awarded to SG for the Phase C work of the Orthopedics Project (supp. R4, tab 40; app. mot., SUMF ex. 1, ¶ 30). The Phase C work was completed and paid in full in the amount of \$22,600 (R4, tab 23; app. mot., SUMF, ex. 1, ¶ 32).

35. DO No. 0005³ was issued on 1 October 2004 (R4, tab 8). The DO was modified on 6 October 2004 to “incorporate maintenance requirements in support of the separate stand-alone PAC systems, which is commonly known as the ‘Ortho Project’” (R4, tabs 8, 23; app. mot., SUMF ex. 1, ¶ 27). A later modification of the DO identified the performance period of DO No. 0005 as 1 October 2004 through 28 February 2005 (R4, tab 8).

36. DO No. 0006 was issued for CLIN 0015 services and maintenance in support of the Ortho project, and identified the performance period of the DO as 1 March 2005 through 30 September 2005 (R4, tab 9; app. mot., SUMF ex. 1, ¶ 28).

37. On 4 April 2005 SG submitted a Request for Equitable Adjustment (REA) to Thomas Smith, ACO, Defense Contract Management Agency (DCMA). The REA sought payment of \$152,558 as the balance of the negotiated \$200,158 price of the Orthopedic Project not yet paid. (R4, tab 23) On 6 April 2005 ACO Smith advised CO Sweetra by letter that, after review of SG’s request package, he believed SG “should be paid in full immediately” (app. supp. R4, tab 47). As of July 2005 ACO Smith reported to SG that CO Sweetra’s office had not returned his calls (R4, tab 24).

³ DO No. 0004 issued on 1 October 2004 was corrected due to administrative error and re-issued as DO No. 0005 on 6 December 2004. (R4, tab 8 at 3, 11)

38. DO No. 0007 was issued for services and maintenance in support of the Ortho project and identified the performance period of the DO as 1 October 2005 through 30 September 2006 (R4, tab 10; app. mot., SUMF ex. 1, ¶ 29).

39. On 7 November 2005, seven months after submission of SG's REA to DCMA, CO Sweetra reiterated to SG his position that there was no basis for consideration of SG's request for payment in the absence of actual cost information (R4, tab 27 at 3).

40. On 22 February 2006 DCMA provided to CO Sweetra a technical evaluation of SG's REA based upon CO Sweetra's "instructions" to provide him with a "Should Cost Analysis" of the DINPACS expansion work effort (R4, tab 29 at 2, 4).

41. On 4 April 2006 CO Sweetra advised SG that:

I have reviewed the DCMA input and I see no basis on which to pay you any additional compensation over and above the \$25,000.00 authorized by DCMA [see SOF ¶ 22] and the \$22,600.00 from NAVMEDCEN Portsmouth Purchase Order N00183-04-P-0930 [SOF ¶ 34] that you have already received for this effort.

(R4, tab 30) The parties continued to correspond with CO Sweetra maintaining his position that no amount could be paid to SG without proof of actual costs and SG maintaining its position that its proposed firm fixed-price of \$200,158 had been negotiated and agreed to by the Navy (R4, tabs 33, 34, 38, 39). CO Sweetra has "never disputed that [SG] performed additional work" (R4, tab 34).

42. On 31 May 2006 SG submitted its certified claim to CO Sweetra in the amount of \$152,558.00. This amount consisted of the \$200,158 in SG's proposal less the payments received of \$25,000 and \$22,600. The claim submission also included November 2005 letters to CO Sweetra and a member of Congress in which SG argued that CO Sweetra's after-the-fact acceptance of SG's work was evidenced by his purchase of Phase B and C work as well as maintenance of the work in all three phases. (R4, tab 37; SOF ¶¶ 12, 22, 34)

43. DO No. 0008 was issued on 1 October 2006 for maintenance and support services for the Ortho system for the period from 1 October 06 through 31 March 07 (R4, tab 11).

44. In a final decision dated 22 February 2007 CO Sweetra denied SG's 31 May 2006 claim (R4, tab 1). SG's timely appeal from the final decision was docketed as ASBCA No. 55901.

45. On or about 10 December 2007 SG submitted a request for equitable adjustment, certified as a claim within the same document, for compensation in the amount of \$21,684.89 for added work in the form of various analyses performed by SG as directed by CO Sweetra (gov't opp'n, ex. 1). The government did not respond to SG's submission and on 18 February 2008 SG appealed to the Board from a deemed denial of its claim. The appeal was docketed as ASBCA No. 56321.

DECISION

Navy's Motion to Dismiss

The Navy moves to dismiss both appeals for lack of jurisdiction on the ground that SG, in its motions for summary judgment in both appeals, allegedly presented the new basis of entitlement to payment to be a "separate and distinct" Orthopedic Contract, a position that had never been presented to the contracting officer for decision and, the Navy argued, abandoned SG's position presented in its REA and claim that the Orthopedic Project work was performed as an agreed modification to the existing DINPACS contract (gov't opp'n at 5, 11-14).⁴

We agree with the Navy that SG's REA and claim submissions base SG's theory of entitlement to payment for the Orthopedic Project work upon the alleged existence of an agreed modification to the original DINPACS contract (R4, tabs 23, 37). We also agree that, in its motions for summary judgment, SG refers to the existence of a "valid supplemental agreement," which SG calls the "Orthopedic Contract," for services other than those called for by the original DINPACS contract "as written" (app. mot. at 2-3). The Navy argues that SG's use of the term "valid supplemental agreement" necessarily refers to a new contract, wholly separate from the original DINPACS contract. On this basis, the Navy takes the position that we have no jurisdiction to entertain SG's claim of constructive change under the allegedly "separate and distinct" Orthopedic Contract. (Gov't opp'n at 11-14) Appellant replies that its "legal theories are based on the same operative facts" as the claim (app. memo at 4). We believe the Navy's interpretation of the term "supplemental agreement" is incorrect as a matter of law and that appellant's reply is correct.

⁴ If the Navy's argument were meritorious, it would not form a basis for dismissing the appeals as opposed to striking SG's new arguments.

A “supplemental agreement” is a term of art, defined in the FAR as “a contract modification that is accomplished by the mutual action of the parties.” FAR 2.101, *Definitions*. A formal bilateral contract modification reduces a supplemental agreement to writing. FAR 2.101; FAR 43.103; see also *Texas Instruments Inc. v. United States*, 922 F.2d 810, 814 (Fed. Cir. 1990). The fact that SG elected in its motions to refer to the supplemental agreement as the “Orthopedic Contract” does not require this Board to elevate form over substance and find, as argued by the Navy, that SG’s name for the Orthopedic Project work outweighs the legal import of the parties’ actions. For the foregoing reasons, the Navy’s motion to dismiss the appeals is denied.

The Parties’ Motions for Summary Judgment

We evaluate the parties’ motions for summary judgment under the well-settled standard that:

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.... The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment.

Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In the course of our evaluation, the Board’s role is not “to weigh the evidence and determine the truth of the matter,” but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial.” *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)), *aff’d* 57 Fed. Appx. 870 (Fed. Cir. 2003). A material fact is one which may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party meets its burden of establishing the absence of any genuine issue of material fact, the non-moving party must then set forth specific facts showing the existence of a genuine issue of material fact for trial; conclusory statements and bare assertions are insufficient. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

ASBCA No. 55901

In ASBCA No. 55901 SG seeks compensation for the Orthopedic Project work it performed for the Navy and for which it claims it has not been fully paid. The Navy argues in its motion for summary judgment that it is entitled to judgment in its favor as a matter of law on two grounds: (1) the agreement alleged by SG was not authorized or ratified by anyone with authority to bind the Navy in contract; or, in the alternative, (2) SG has failed to demonstrate that performance of the work caused it to incur costs over and above those incurred in performance of the Radiology Department work which was the subject of Contract No. N00140-02-D-N718 (gov't mot. at 5).

SG opposed the Navy's motion and cross-moved for summary judgment on the basis that the fully-performed work for which it seeks payment was performed pursuant to a valid supplemental agreement binding upon the Navy because it was entered into by Navy personnel with authority to do so (app. mot. at 2). Specifically, SG argues that Contract Specialist Slegel had either express or implied contracting officer authority when she authorized SG's performance of the Orthopedic Project work on 8 January 2004 (app. opp'n at 2, 3; app. mot. at 3-4). In the alternative, SG argues that CO Sweetra ratified the agreement when, with knowledge of the work performed by SG, CO Sweetra accepted the benefit of SG's performance (app. mot. at 3).

On the record before us, it is undisputed that the NAVMEDCEN sought, received, kept and maintained the work performed by SG for the Orthopedic Project (SOF ¶¶ 7, 9-10, 12, 14-17, 19, 22-23, 25-29, 33-36, 38, 43). However, the record presented to us for purposes of the motions is unclear as to: specific agreements made by the parties before, during and after the work was completed; under what circumstances any agreements were made and by whom they were made; and, the respective roles, actions and authority of CO Sweetra and DCMA ACO Smith as they relate to the issues presented in the appeals. A trial is necessary to fully develop the record. The Navy also has neither demonstrated the appropriateness of requiring actual cost information under a commercial item contract nor the existence of undisputed facts as to SG's incurrence of costs. We therefore deny both parties' motions for summary judgment in ASBCA No. 55901.

ASBCA No. 56321

At the same time SG filed its cross-motion for summary judgment in ASBCA No. 55901, it also filed a motion for summary judgment in ASBCA No. 56321. In that appeal, SG seeks from the Navy what it has alleged to be its costs of providing several value added analyses. In its motion for summary judgment in this appeal, SG argues that there is "no genuine dispute that the Value Added Analysis and DCMA Review were a constructive change to the Orthopedic Contract, for which [SG] is entitled to its incurred costs of \$21,684.89" (app. mot. at 7). SG has failed to allege, much less provide

evidence of, any specific contract terms alleged to have been constructively changed by the Navy.

The Navy opposes SG's motion for summary judgment on the basis that "any costs incurred in connection with the value added or should cost analyses are claim preparation costs, that are not allowable as a matter of law" (gov't opp'n at 5, 26-28). The Navy has not provided any factual support for its bare assertions and argument that the costs involved are claim preparation costs "incurred to promote prosecution of a Contract Disputes Act (CDA) claim against the Government" (gov't opp'n at 26-27).

We deny SG's motion for summary judgment in ASBCA No. 56321.

CONCLUSION

Both parties' motions to dismiss are denied. The Navy's motion for summary judgment in ASBCA No. 55901 is denied. SG's cross-motion for summary judgment in ASBCA No. 55901 is denied. SG's motion for summary judgment in ASBCA No. 56321 is denied.

Dated: 26 October 2009

DIANA S. DICKINSON
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. 55901, 56321, Appeals of Hamilton Acquisition Corp. t/a Stallings Group, rendered in conformance with the Board's Charter.

Dated:

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