

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)	
)	
Unconventional Concepts, Inc.)	ASBCA Nos. 56065, 56066
)	56202, 56217
)	56260, 56776
Under Contract Nos. DAAD16-03-C-0049)	56777
W911QY-05-C-0082)	

APPEARANCES FOR THE APPELLANT: Robert E. Korroch, Esq.
Francis E. Purcell, Jr., Esq.
Williams Mullen
Newport News, VA

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.
Army Chief Trial Attorney
MAJ Carla T. Peters, JA
Robert B. Neill, Esq.
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Unconventional Concepts, Inc. (UCI) appealed from three decisions of contracting officer (CO) Darlene L. Rideout of the U.S. Army Natick Contracting Division under Contract No. DAAD16-03-C-0049 (contract 49) and her four decisions under Contract No. W911QY-05-C-0082 (contract 82). CO Rideout denied UCI's claims in ASBCA Nos. 56065, 56202, 56066, 56217 and 56260 by rejecting and declining to pay 12 UCI invoices for services under contracts 49 and 82 from April through July 2006, and she demanded repayments of amounts previously paid to UCI in her decisions underlying ASBCA No. 56777 (contract 49) and ASBCA No. 56776 (contract 82).

In each of the foregoing appeals, respondent alleged the affirmative defense of fraud. UCI's 4 March 2008 motion to compel sought respondent to identify the basis for that fraud defense. On 3 June 2008 respondent moved to stay Board proceedings for six months because of an ongoing criminal fraud investigation. We granted respondent's motion to stay on 7 August 2008. See *Unconventional Concepts, Inc.*, ASBCA Nos. 56065 *et al.*, 08-2 BCA ¶ 33,934 at 167,931. On 9 December 2008 respondent informed appellant and the Board that the government did not request an extension of the stay of proceedings on the ASBCA appeals under contracts 49 and 82. See Board Order of 9 December 2008. Accordingly, the Board may proceed to decide the contract issues.

Respondent's 16 and 17 June 2009 answers in ASBCA Nos. 56776 and 56777 averred, in essentially identical terms, that UCI knowingly submitted progress or performance reports that contained misrepresentations of its incurred costs and of the extent of services it had performed for the purpose of inducing the government to make contract payments to which UCI was not entitled for performance-based financing payments or invoiced payments for services that had not actually been performed. The answers included counterclaims.

On 10 August 2009 appellant moved for summary judgment, submitted a "Statement of Undisputed Material Facts" (SUMF) and moved to dismiss three of the counterclaims in respondent's pleading in ASBCA No. 56777 for lack of jurisdiction on the ground that they had not been the subject of a contracting officer's decision or claim. On 14 September 2009 respondent submitted an opposition, including statements of undisputed material facts, and the "Government's Response to Appellant's Statement of Undisputed Material Facts" (GRASUMF), and moved to strike statements of Messrs. John Hines and Henry Girolamo in SUMF ¶¶ 137-38, 168-72 and 174. On 28 September 2009 appellant replied to the opposition.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Contract 49

1. On 23 April 2003 the U.S. Army Natick Contracting Division awarded firm-fixed-price contract 49 to UCI for technical and engineering support for the National Protection Center (NPC) and the Defense Advanced Research Projects Agency (DARPA) (SUMF ¶¶ 1-2).

2. Contract 49 had a base year, CLIN 0001, from 1 May to 31 October 2003, and two option years, CLIN 0002, from 1 November 2003 to 31 October 2004, and CLIN 0003, from 1 November 2004 to 31 October 2005. All three CLINs required identical services. (Gov't opp'n ¶¶ 31, 39; ASBCA No. 56777, R4, tab 1 at 2-3)¹

3. Contract 49 contained the FAR 52.246-9 INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984) clause and the following clauses:

¹ Citations to the consolidated Rule 4 file under contract 49 are prefaced "contract 49," to the consolidated Rule 4 file under contract 82 are prefaced "contract 82" and to the Rule 4 file in ASBCA No. 56777 are prefaced by that docket number.

E.1

INSPECTION AND ACCEPTANCE OF TECHNICAL DATA

Final inspection and acceptance of technical data will be at destination. Prior to final acceptance, the submitted technical data shall be reviewed for compliance with the contract requirements. Any nonconformance to requirements or inadequacies in content or format shall require correction by the contractor.

The responsible POC for all inspection and acceptance on this contract shall be Mr. Henry Girolamo, (508) 233-5483....

....

F.1

TECHNICAL DATA

The contractor shall prepare technical data and information in accordance with the requirements, quantities, and schedule set forth in the Contract Data Requirements List [CDRL] (DD Form 1423-2), Exhibit A, found herein. The contractor shall submit technical data and information both electronically by email to Henry.Girolamo@natick.army.mil, and hard copy as directed on the DD Form 1423-2....

Contract 49, § F, specified “technical data and information” as monthly progress, status and management report. (SUMF ¶ 3; contract 49, R4, tab 1 at 8-9, 19)

4. Contract 49, Modification No. P00002 (Mod. P00002) dated 20 January 2004 amended the level of effort for CLIN 0002 by an additional 475 hours to support NPC and DARPA program management efforts and increased CLIN 0002’s price by \$95,000 (contract 49, R4, tab 5; gov’t opp’n ¶ 40). Mod. P00002 did not designate any person to provide the added hours and did not reference an undated statement of work sent to NPC on 11 December 2003 naming “PRINCIPAL INVESTIGATOR” Chance Reichel. (ASBCA 56777, R4, tabs 4, 4A (originally tab 3A) at 1-3).

5. On 25 March 2004, upon learning that Mr. Reichel had given a 30-day notice of termination, NPC’s Gary Zimmer stated, and CO Nelda Casavant concurred, that: “If

Mike [Hopmeier, UCI's President] will just replace his subcontractor for the monetary balance in the existing MOD, then I would see no need for a change." (ASBCA 56777, R4, tab 78 at 1-2)

6. UCI's records include payments of \$24,966.83 to Mr. Reichel from 2 February through 18 March 2004, and of \$5,146.65 to "CNS Technologies" from 5 April through 15 October 2004. Such records do not identify any contract number or CLIN, and do not correlate a person named "Sciarretta" with CNS Technologies. (ASBCA 56777, R4, tab 68 at 1-2)

7. UCI's progress reports and corresponding monthly invoices on contract 49, from April 2004 through February 2005, cited performance of services on "Fire Fighter Requirements" and "PPE studies." CO Nelda Casavant signed receiving reports certifying acceptance of services under CLINs 0002 and 0003 through November 2004. Other persons signed such receiving reports for CLINs 0002 and 0003 services for December 2004 through February 2005. (Contract 49, R4, tabs 48-49; gov't opp'n ¶ 70)

8. On 23 February 2005, UCI submitted a final report on fire fighters' personal protective equipment (PPE) to NSC's Rita Gonzalez, without indicating under what contract and what CLIN it was submitted (contract 49, R4, tab 57; gov't opp'n ¶ 71).

9. Modification No. P00005 dated 16 March 2005 added contract 49, CLIN 0005, for the firm-fixed-price of \$100,000 to support Natick Soldier Center (NSC) and NPC pursuant to a statement of work entitled "Comprehensive Review of PPE Requirements February 28, 2005" (the "fire fighter project"), whose deliverables included a final report and whose inspection and acceptance were to be performed by Ms. Gonzalez (contract 49, R4, tab 8 at 1, 3, 5-12; gov't opp'n ¶ 72).

10. On 18 March 2005 UCI drafted a statement of work for "Comprehensive Review of Law Enforcement Protective Equipment Requirements" for the firm-fixed-price of \$125,000 (contract 49, R4, tab 59; gov't opp'n ¶¶ 76).

11. Modification No. P00006 to contract 49 dated 25 March 2005, *inter alia*, added CLIN 0008 in the fixed price amount of \$3,000,000.00 for "Specialized Technical Support and Assessment of Opportunities for Transition and Applications of Technologies for the DARPA Defense Sciences" from 28 March 2005 through 31 July 2006, as extended by Modification No. P00009, and designated Ms. Riva R. Meade of DARPA to perform inspection and acceptance under CLIN 0008 in lieu of Mr. Girolamo (SUMF ¶¶ 4-5, 9, 19).

12. UCI's 7 June 2005 internal correspondence stated that "[w]e do not need an executed contract with a SOW to start work [on] Law enforcement PPE"; such work

“will be FFP so working on it in advance is not a problem” (ASBCA 56777, R4, tab 60; gov’t opp’n ¶¶ 76-77). UCI’s 8 June 2005 internal correspondence stated that \$41,666.65 remained in “general NPC support effort” through 31 October 2005 in an unidentified “existing contract” whose statement of work was “broad enough to cover ‘International HLS/D Efforts’” (not correlated to law enforcement PPE), so UCI could start billing for such efforts (ASBCA 56777, R4, tab 28 at 1-4; gov’t opp’n ¶ 78).

13. On 13 July 2005 UCI sent respondent another final report on fire fighter PPE under contract 49, and in August 2005 invoiced \$37,500 for fire fighter PPE under CLIN 0005 (contract 49, R4, tab 58, tab 63 at 1, 10, 12; gov’t opp’n ¶ 71).

14. UCI submitted progress reports and invoiced \$16,666.66 for “law enforcement protective equipment” services under contract 49, CLIN 0003, in August and October 2005 and sent a final report on law enforcement PPE in October (contract 49, R4, tab 63 at 1, 5, tab 64 at 2, 5-6; gov’t opp’n ¶ 79). UCI’s 18 March 2006 e-mail stated “Received \$41,666.65 from the SBCCComm Contract” but did not link “SBCCComm” with contract 49 (contract 49, R4 tab 65 at 4). Contract 49 was not modified to specify law enforcement PPE services (contract 49, R4, tabs 11-15).

15. The CO approved UCI’s 23 September 2005 revised payment schedule for CLIN 0008 by which UCI would be paid \$174,069.98 per month, *inter alia*, for April-June 2006 and \$174,069.99 for July 2006 (SUMF ¶¶ 33-35).

16. After UCI submitted its April 2006 progress report under CLIN 0008, on 25 July 2006 UCI received CO Rideout notice of rejection of invoice No. DARPA0406 in the amount of \$174,069.98 because “the contract is being investigated for fraud” (SUMF ¶¶ 41-44). The CO’s final decision of 23 March 2007 denied UCI’s 3 January 2007 certified claim for payment of resubmitted invoice DARPA0406 and stated that her concern was that “the work being billed, may in fact, not have been accomplished” (SUMF ¶¶ 45-47). UCI’s appeal of that decision was docketed as ASBCA No. 56065.

17. On 29 January 2007 UCI submitted to CO Rideout its May, June and July 2006 progress reports and invoices DARPA0506, DARPA0606 and DARPA0706 under CLIN 0008, each in the amount of \$174,069.98, except DARPA0706 was in the amount of \$174,069.99 (SUMF ¶¶ 49-52). On 23 March 2007 UCI received CO Rideout’s notice of rejection of those three invoices because the “contract is currently under investigation for fraud.” Her 6 September 2007 final decision denied UCI’s 9 July 2007 certified claims for payment of those vouchers due to her concern whether “UCI completed the work being billed” and that “the work being billed, may in fact, not have been accomplished.” (SUMF ¶¶ 53-58) UCI’s appeal of that decision was docketed as ASBCA No. 56202.

18. CO Rideout's 5 February 2009 final decision under contract 49 demanded that UCI pay \$2,708,720.07 to the government based on her determination that UCI "has failed to perform the prescribed work" for CLINs 0001 (\$100,000), 0002 (\$195,000), 0003 (\$110,000) and 0008 (\$2,303,720.07), but she did not identify any work UCI failed to perform (gov't opp'n ¶ 62; contract 49, R4, tab 75 at 1). That \$2,708,720.07 included the total prices of CLINs 0001, 0002 and 0003, and all but the unpaid amounts UCI invoiced under CLIN 0008 (contract 49, R4, tabs 1, 4-7, 9). UCI appealed from that final decision, which was docketed as ASBCA No. 56777.

19. Mr. Girolamo stated under oath that he was not aware of any instances when UCI billed for work under contract 49 that it knew it had not completed (SUMF ¶ 169) and, to his knowledge as of May 2006, UCI had performed all of its obligations under the contract 49, CLIN 0008, but he was not managing this CLIN and was dependent on the guidance of DARPA's Riva Mead (SUMF ¶ 172; app. mot. ex. 24 at 24).

20. Ms. Mead stated under oath: "I approved receiving reports...that the [CO] used to process payment.... I signed off on receiving reports for DARPA but I always requested approval from a technical program manager before signing off." She did not identify for which months she signed such receiving reports. (Mot. ex. 22, ¶¶ 7, 9-10) The record contains no evidence of receiving reports for CLIN 0008 for the period April through July 2006 signed by Ms. Mead or by anyone else.

Contract 82

21. On 2 August 2005 the Natick Contracting Division awarded firm-fixed-price contract 82 to UCI in the amount of \$5,760,950 for technical and program management support for DoD, NASA and Army activities from 1 August 2005 to 31 July 2006 (SUMF ¶¶ 66, 67, 69).

22. Contract 82 included, *inter alia*, CLIN 0100 in the amount of \$360,174 for "Technical Services – R&D Task 1 FFP" to be provided to the Deputy Assistant to the Secretary of Defense for Chemical and Biological Defense (DATSD/CBD), and CLIN 0200 in the amount of \$755,753 for "Research and Development (R&D) TASK 2...FFP" to support NASA, DoD, DARPA and DHS medical and biological research (SUMF ¶¶ 70, 72, 74, 82, 84, 88-89).

23. Contract 82 included the FAR 52.232-32 PERFORMANCE-BASED PAYMENT (FEB 2002) clause and schedule of 12 monthly payments for CLINs 0100 and 0200 based on submission of monthly progress reports from 1 September 2005 through 1 August 2006. Monthly payments of \$23,352.67 under CLIN 0100, and of \$44,469.12 (except \$44,469.16 in August) under CLIN 0200, were scheduled for 1 April through 1 August 2006. (SUMF ¶¶ 76-77)

24. Contract 82 contained the FAR 52.246-9 INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984) clause and the following clauses:

E.2 INSPECTION AND ACCEPTANCE OF TECHNICAL DATA

Final inspection and acceptance of technical data will be at destination. Prior to final acceptance, the submitted technical data shall be reviewed for compliance with the contract requirements. Any nonconformance to the contract requirements or inadequacies in format shall require correction by the contractor.

The responsible POC for all inspection and acceptance on this contract is Mr. Henry Girolamo.

Contract 82 included a § F.2 TECHNICAL DATA provision similar to that in contract 49, except that it required electronic submission of reports on Task #1 to COL Joe Palma, the point of contact, and on Task #2 to Dr. John W. Hines, the point of contact, and to Mr. Girolamo on both tasks. Contract 82, § F, specified that technical data and information were monthly progress, status and management reports and final scientific or technical reports. (SUMF ¶ 79; contract 82, R4 tab 1 at 14, 16, 34)

25. In May 2006 UCI requested from Mr. Girolamo a no-cost one-year extension of contract CLIN 0200. On 19 May 2006 Mr. Girolamo advised CO Rideout that he supported such extension request “for the convenience of NASA” since it had been made necessary by government delay, rather than failings in UCI performance. (SUMF ¶¶ 79, 148-51)

26. On 24 May 2006: (a) UCI submitted April 2006 progress reports for CLINs 0100 and 0200 and invoices WOSD0406 and NASA0406 in the amounts of \$23,352.67 and \$44,469.12 for services, plus \$1,001.04 and \$3,943.18, respectively, for travel with documentary support (SUMF ¶¶ 96-105) and (b) Dr. Hines stated to CO Rideout that due to delayed and modified NASA activities, “UCI has...been (and will be) unable to complete all aspects by 31 July 2006 [of subtasks] I, II, IV, V and VI” under CLIN 0200 (contract 82, R4, tab 42 at 15).

27. On 21 June 2006 CO Rideout told Dr. Hines that she did not know what work UCI had been paid for, and UCI may have been paid for work that it had not actually performed and sent him a receiving report form for CLIN 0200 to certify acceptance of UCI work for April 2006 under UCI’s invoice No. NASA0406 (contract 82, R4, tab 36 at

17, 20). Dr. Hines' 21 June 2006 reply to CO Rideout stated that "UCI has adequately and appropriately performed ALL of the activities to date for which they have been contracted. Task III is the only one that I can say that has been fully completed...." (Contract 82, R4, tab 42 at 20)

28. On 3 July 2006 UCI submitted May and June 2006 progress reports and invoices WOSD 0506 and 0606 for CLIN 0100, each in the amount of \$23,352.67 (SUMF ¶¶ 106-11).

29. On 25 July 2006 UCI received CO Rideout's notice rejection of invoices NASA0406, WOSD0406, WOSD 0506 and WOSD0606 "due to the fact that the contract is currently being investigated for fraud" (SUMF ¶¶ 112-13).

30. Dr. Hines stated under oath that "UCI performed all of the work that it was assigned under [contract 82] CLIN 0200" (SUMF ¶ 138) and "UCI had satisfactorily performed all of the tasks that were assigned to them" (SUMF ¶ 153); and informed CO Rideout as of 19 July 2006 "all UCI tasks and deliverables reported to date are complete, and are thus payable.... this effort can be considered completed on time at the end of July [2006]" (SUMF ¶¶ 137, 157).

31. CO Rideout's 23 March 2007 decision on UCI's 3 January 2007 certified claim on contract 82, CLIN 0100, stated that she would forward invoices WOSD0406, -0506 and -0606 on CLIN 0100 to CDR Kenneth A. Cole, the designated technical point of contact, to certify acceptance of the services, and if he did so, she would process the invoices for payment (SUMF ¶¶ 80, 115, 117-20). On 26 July 2007 CDR Cole certified acceptance of UCI's services on CLIN 0100 for April-June 2006, subject of unpaid invoices Nos. WOSD0406, -0506 and -0606 (but not for invoice No. WOSD0706) (SUMF ¶ 123). Notwithstanding CDR Cole's certification, CO Rideout never authorized payment of invoices WOSD0406, -0506 and -0606 (SUMF ¶ 124).

32. CO Rideout's 23 March 2007 decision also addressed UCI's 3 January 2007 certified claim on CLIN 0200. She denied UCI's request for payment of invoice NASA0406 because NASA had failed to support UCI's request for a one month "extension of acceleration of its payments" and NASA's Dr. Hines, designated to receive CLIN 0200 work, had not certified the receiving report for such invoice (SUMF ¶¶ 87, 116). UCI's appeal of that 23 March 2007 decision with respect to CLINs 0100 and 0200 was docketed as ASBCA No. 56066.

33. On 29 January 2007 UCI submitted to CO Rideout for approval progress reports for May, June and July 2006 for CLIN 0200 and invoices NASA0506, NASA0606 and NASA0706, each in the amount of \$44,469.12 (except invoice NASA0606 also included \$1,333.89 for travel) (SUMF ¶ 126-30). On 23 March 2007

UCI was notified that those three invoices were rejected because the “contract is currently under fraud investigation.” CO Rideout’s 28 September 2007 final decision rejected UCI’s 9 July 2007 certified claim for payment of those three NASA work invoices, stating:

- (i) UCI’s extension request for twelve-month [sic] when only three months remained in the period of performance, (ii) the request for accelerated funding by one month (which did get rescinded by UCI), (iii) the lack of information...to support an extension from Mr. Hines, and (iv) Mr. Hines’ request to have the undisbursed amount of \$212,819.46 returned to NASA.

(SUMF ¶¶ 131-35) UCI’s appeal of that decision was docketed as ASBCA No. 56217.

34. On 18 July 2007 UCI submitted its July 2006 progress report for CLIN 0100 and invoice WOSD0706 in the amount of \$23,352.67 to CO Rideout for approval (SUMF ¶¶ 139-42). On 16 October 2007 UCI was notified that invoice WOSD0706 was rejected “due to ongoing fraud investigation.” CO Rideout’s 28 November 2007 final decision denied UCI’s 31 August 2007 certified claim for payment of invoice WOSD 0706 due to such fraud investigation. (SUMF ¶¶ 143-47) UCI’s appeal of that decision was docketed as ASBCA No. 56260.

35. CO Rideout’s 6 February 2009 decision under contract 82 demanded that UCI repay \$583,680.54 to the government because it “failed to perform the prescribed work” for CLIN 0200 (\$577,876.48) and CLIN 0201 (\$5,804.06), but she did not identify any work UCI failed to perform (gov’t opp’n ¶ 30; contract 82, R4, tab 58). \$583,680.54 is the difference between the \$796,500 total fixed prices of CLINs 0200 and 0201 (contract 82, R4, tab 11 at 2), and \$179,210.37 unpaid and \$33,609.09 paid but not demanded. UCI appealed from that final decision, which was docketed as ASBCA No. 56776.

36. With respect to contract 82, CLIN 0200, work performed in April through July 2006 and subject of UCI’s unpaid invoices Nos. NASA0406, -0506, -0606, and 0706, Mr. Girolamo stated under oath that he did not manage CLIN 0200; Dr. John Hines of NASA was the point of contact on CLIN 0200; Mr. Girolamo had no independent knowledge whether UCI performed CLIN 0200; he had no knowledge that UCI did not perform tasks required under the contracts and he was not aware of work billed but not completed (SUMF ¶ 169; app. mot. ex. 24 at 24-28). The record contains no evidence of receiving reports for CLIN 0200 for the period April through July 2006 signed and certified by Dr. Hines or by anyone else.

37. Table 1 correlates the ASBCA and invoice numbers, performance periods, CLINs and amounts claimed and demanded under contract 49 (SOF ¶¶ 16-18):

TABLE 1

<u>ASBCA No.</u>	<u>Invoice No.</u>	<u>Perf. Period</u>	<u>CLIN</u>	<u>Amount</u>
56065	DARPA0406	April 2006	0008	\$174,069.98
56202	DARPA0506	May 2006	0008	174,069.98
56202	DARPA0606	June 2006	0008	174,069.98
56202	DARPA0706	July 2006	0008	<u>174,069.99</u>
	UCI total unpaid:			\$696,279.93
56777	CO demand		0001	100,000.00
	CO demand		0002	195,000.00
	CO demand		0003	110,000.00
	CO demand		0008	<u>2,303,720.07</u>
	CO demand total			\$2,708,720.07

38. Table 2 correlates the ASBCA and invoice numbers, performance periods, CLINs and amounts claimed and demanded under contract 82 (SOF ¶¶ 26, 28-29, 31-35):

TABLE 2

56066	NASA0406	April 2006	0200	\$ 44,469.12
56066	WOSD0406	April 2006	0100	\$ 23,352.67
56066	WOSD0506	May 2006	0100	\$ 23,352.67
56066	WOSD0606	June 2006	0100	\$ 23,352.67
56217	NASA0506	May 2006	0200	\$ 44,469.12
56217	NASA0606	June 2006	0200	\$ 45,803.01
56217	NASA0706	July 2006	0200	\$ 44,469.12
56260	WOSD0706	July 2006	0100	<u>\$ 23,352.67</u>
	UCI total unpaid:			\$272,621.05
56776	CO demand		0200	\$577,876.48
	CO demand		0201	<u>5,804.06</u>
	CO demand total:			\$583,680.54

39. On 11 May 2000 the U.S. Army Medical Research Acquisition Activity awarded to UCI cooperative agreement No. DAMD17-00-2-0033 (CA33) to provide technical support services for NASA (gov't opp'n ¶ 68; contract 49, R4, tab 34).

40. Effective 15 June 2004, Modification No. 25 to CA33 added CLIN 0008 in the amount of \$500,000 to support NASA and NPC technology development on three

tasks. Task 3 was to support “National Protection Center (through Natick Soldier Center)” with respect to “Integrated Extreme Environment Garment” technology. (Gov’t opp’n ¶¶ 68-69; contract 49, R4, tab 38 at 1-3) Respondent has not identified any evidence in the appeal records that either final report on fire fighters’ PPE that UCI submitted to Ms. Gonzalez in February and July 2005 under contract 49 (SOF ¶¶ 8, 13) was also submitted under cooperative agreement CA33.

DECISION

I. Respondent’s Motion to Strike

Respondent moves to strike statements of (i) Dr. Hines in SUMF ¶¶ 137-38 (see SOF ¶ 30), on the ground that “John Hines’ affidavit [was] taken by Appellant in May 2009...without the Government’s consent, approval or coordination” and (ii) Mr. Girolamo in SUMF ¶¶ 168-72 and 174 (see SOF ¶¶ 19, 36) regarding the extent to which UCI completed performing contracts 49 and 82 on the ground that Mr. Girolamo’s “affidavit taken by Appellant’s attorney on May 18, 2009 [was] without the Government’s consent, approval or coordination” (GRASUMF at 30, 36-37).

Dr. Hines’ statement in SUMF ¶ 137 did not derive from his May 2009 deposition and is repeated in SUMF ¶ 157, which respondent has not moved to strike. His statement in SUMF ¶ 138 derived from his 26 May 2009 deposition on written interrogatories (app. mot. ex. 25 at 1-4). Mr. Girolamo’s statements in SUMF ¶¶ 168-72 and 174 derive from his 12 May 2009 deposition on written interrogatories (app. mot. ex. 24 at 1-2, 15-18, 24, 27-29). The parties’ attorneys were not present at those depositions. On 31 March 2009 respondent suggested to appellant depositions by written interrogatories. On 3 April 2009 appellant agreed with that suggestion and sent respondent the written interrogatories for Dr. Hines and Mr. Girolamo, among others, whose receipt respondent acknowledged on 30 April 2009. (App. mot. ex. 31) Those depositions were clearly with the government’s consent, approval and coordination. We deny respondent’s motion to strike.

II. Appellant’s Motion to Dismiss

Under contract 49, appellant moves to dismiss for lack of jurisdiction respondent’s CLIN 0001 \$100,000 claim, which it asserts respondent “abandoned” by failing to mention it in the answer in ASBCA No. 56777 (app. mot. at 6), and three other “claims,” which it asserts respondent first identified in “PART II,” ¶¶ 20-31, of the answer in ASBCA No. 56777 and were not subject to a CO’s decision, namely its counterclaims for: (i) “double billing” of \$100,000 under CLINs 0002 and 0003, and \$100,000 under CLIN 0005, for work which was also billed to CA33; (ii) \$70,033.17 billed under CLIN 0002 but not performed by purported “program management expert” Chance Reichel and

(iii) “unauthorized work” amounting to \$41,665.65 under CLIN 0003 (app. mot. at 5-6). Respondent argues that its claims were adequately discussed in the CO’s 5 February 2009 decision on contract 49 (gov’t opp’n at 28).

As to the alleged abandonment of respondent’s CLIN 0001 claim, it is inaccurate that respondent failed to mention such claim in the answer in ASBCA No. 56777. Appellant’s complaint, ¶ 55, stated: “On February 5, 2009 the CO issued a final decision in which she determined that UCI ‘has failed to perform the prescribed work’ under CLINs 0001, 0002, 0003, and 0008.” Respondent answered: “Admit,” implicitly referencing CLIN 0001. Moreover, appellant cites no legal authority holding that respondent’s failure to include additional averments in its answer regarding its claim, when the claim is referenced in that answer, results in the abandonment of such claim, and none is known to the Board.

As to the motion to dismiss three of the counterclaims in respondent’s answer in ASBCA No. 56777, the relevant legal principles are familiar. Except for deemed denials, 41 U.S.C. § 605(c)(5), the CDA requires that the CO issue a decision on each contractor and government claim. 41 U.S.C. § 605(a). Such decision is required to establish a tribunal’s CDA jurisdiction to entertain a government claim. *See Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273, 1279 (Fed. Cir. 1985). Further, a CDA claim cannot properly be raised for the first time in a party’s pleadings before the Board. *See Consolidated Defense Corp.*, ASBCA No. 52315, 03-1 BCA ¶ 32,099 at 158,668. The test for what constitutes a “new” claim is whether “claims are based on a common or related set of operative facts. If the court will have to review the same or related evidence to make its decision, then only one claim exists.” *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990).

CO Rideout’s 5 February 2009 final decision on contract 49 demanded that UCI pay \$2,708,720.07 to the government based on the determination that UCI has failed to perform the prescribed work for CLINs 0001 (\$100,000), 0002 (\$195,000), 0003 (\$110,000) and 0008 (\$2,303,720.07). The counterclaims in contrast concern alleged double billing, for work which was performed, between CLINs 0002, 0003 and 0005 and CA33 (\$200,000), billing for work performed by other than Mr. Reichel (\$70,033.17), and billing for unauthorized work (\$41,665.65). We agree with appellant that there are new operative facts presented in respondent’s counterclaims. See SOF ¶¶ 4-10, 12-14, 39-40.

With respect to contract 82, UCI moved to dismiss only a “defective cost or pricing data” claim in the answer in ASBCA No. 56776, Part II, n.2, but acknowledged that respondent did not intend to submit any “TINA” claim (app. mot. at 6, ex. 21), and thus is moot. We grant appellant’s motion to strike the government’s foregoing three counterclaims from its answer in ASBCA No. 56777.

III. Appellant's Motion for Summary Judgment

“[Summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The non-moving party must set forth specific facts showing the existence of a genuine issue of material fact; conclusory statements and bare assertions are insufficient. *See* FED. R. CIV. P. 56(e)(2); *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984).

The contractor has the burden to prove its claim to recover payments under a contract that allegedly were withheld improperly. *See Coastal Government Services, Inc.*, ASBCA No. 49621, 02-1 BCA ¶ 31,666 at 156,473, 156,478. When the government asserts a claim against a contractor, it has the burden of proof of its claim. *See Harold Bailey Painting Co.*, ASBCA No. 28443, 84-1 BCA ¶ 17,043 (defective workmanship claim).

ASBCA Nos. 56776 and 56777

Respondent has the burden of proof on its claims demanding repayments under contracts 49 and 82. *Harold Bailey, supra*. Federal Rules of Civil Procedure 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial. A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Rule 56(e) requires the nonmoving party to go beyond its pleadings and affidavits, depositions, answers to interrogatories and admissions on file, and to designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

Respondent argues generally that the contracts were FFP, level-of-effort, and appellant did not expend the required amount of effort (see, *e.g.*, gov't opp'n ¶ 102). Respondent errs. The contracts were firm-fixed-price, but not level-of-effort. They did not include or refer to the requirements of FAR 16.207, Firm-fixed-price, level-of-effort term contracts.

To show a triable issue, respondent needed to identify specifically what work UCI failed to perform under contracts 49 and 82, an essential element of its cases. The CO's conclusory statements about unperformed work in her February 2009 final decisions do not specifically identify any such work (SOF ¶¶ 18, 35). Respondent does not point to

any record evidence identifying such unperformed work in its opposition to the motion. Accordingly, we grant appellant's motion and sustain its appeals in ASBCA Nos. 56776 and 56777.

ASBCA No. 56066, CLIN 0100

UCI has sustained its burden of proving that CDR Cole accepted its work under contract 82, CLIN 0100, performed in April, May and June 2006, subject of unpaid invoice Nos. WOSD0406, -0506 and -0606 (SOF ¶ 31). *See Coastal Government, supra*. Respondent points to no evidence that such acceptance was in error. Accordingly, we grant appellant's motion and sustain its appeal in ASBCA No. 56066 with respect to CLIN 0100, unpaid invoice Nos. WOSD0406, -0506 and -0606.

ASBCA No. 56260, CLIN 0100

CDR Cole did not certify any acceptance report for contract 82, CLIN 0100 work performed in July 2006, subject of unpaid invoice No. WOSD0706 (SOF ¶ 31). We conclude that there is a triable issue as to whether UCI completed the July 2006 work on CLIN 0100. Accordingly, we deny UCI's motion with respect to ASBCA No. 56260.

ASBCA Nos. 56065, 56202, Contract 49, CLIN 0008

DARPA's Riva Meade was designated to accept UCI work under contract 49, CLIN 0008 (SOF ¶ 11). The record contains no evidence that Ms. Meade or anyone else signed receiving reports for CLIN 0008 for the period April through July 2006 (SOF ¶ 20). Mr. Girolamo's statement that UCI performed its obligations under CLIN 0008 is non-specific as to the time period, and Mr. Girolamo did not manage UCI's work under CLIN 0008 and was not designated to accept such work (SOF ¶ 19). Accordingly, we hold that there is a triable issue as to whether UCI completed contract 49, CLIN 0008, work for April through July 2006. We deny UCI's motion with respect to ASBCA Nos. 56065 and 56202.

ASBCA Nos. 56066 and 56217, Contract 82, CLIN 0200

Dr. Hines was designated to receive contract 82, CLIN 0200, work performed by UCI (SOF ¶ 32). Dr. Hines stated under oath that "UCI performed all of the work that it was assigned under CLIN 0200," "UCI had satisfactorily performed all of the tasks that were assigned to them" and on 19 July 2006 reported to CO Rideout that "all UCI tasks and deliverables reported to date are complete, and are thus payable.... this effort can be considered completed on time at the end of July" (SOF ¶ 30). We conclude that the foregoing evidence satisfies UCI's burden of proof of performing the disputed services for April through June 2006.

Respondent argues that Dr. Hines statements to CO Rideout on 24 May 2006 that due to delayed and modified NASA activities “UCI has...been (and will be) unable to complete all aspects by 31 July 2006 [of subtasks] I, II, IV, V and VI” under CLIN 0200 (SOF ¶ 26(b)); on 21 June 2006 CO Rideout told Dr. Hines she did not know what work UCI had been paid for, and UCI may have been paid for work that it had not actually performed (SOF ¶ 27); and Dr. Hines’ 21 June 2006 reply stated that “Task III is the only one that I can say has been fully completed” (*id.*), conflict with his statements quoted in the paragraph above. Each statement respondent cites antedates, and does not conflict with, Dr. Hines’ statements quoted in the paragraph above. We hold that respondent presents no triable fact issue regarding UCI’s performance of contract 82, CLIN 0200, work in April through June 2006, subject of unpaid invoices NASA0406, -0506 and -0606.

Dr. Hines did not sign any receiving report for CLIN 0200 work for July 2006 (SOF ¶ 36); and the appeal records contain scant evidence that UCI completed all CLIN 0200 work in July 2006. Thus, UCI has not shown that respondent accepted its contract 82, CLIN 0200, work performed in July 2006, subject of unpaid invoice No. NASA0706, for the reasons analyzed with respect to CLIN 0100 in ASBCA No. 56260, *supra*. We hold that there is a triable issue as to whether UCI completed contract 82, CLIN 0200, work for July 2006, subject of unpaid invoice NASA0706.

Accordingly, we grant UCI’s motion with respect to CLIN 0200 unpaid invoice No. NASA0406 in ASBCA No. 56066 and Nos. NASA0506 and 0606 in ASBCA No. 56217. We deny UCI’s motion with respect to CLIN 0200 invoice No. NASA0706 in ASBCA No. 56217.

CONCLUSION

We deny respondent’s motion to strike statements of Messrs. Hines and Girolamo. We grant appellant’s motion to dismiss the three government counterclaims in its answer in ASBCA No. 56777. We summarize our rulings on UCI’s motion for summary judgment:

ASBCA No. Rulings

56065	Denied
56066	Granted
56202	Denied
56217	Granted with respect to CLIN 0200 invoices NASA0506, -0606; denied with respect to CLIN 0200 invoice NASA 0706
56260	Denied
56776	Granted
56777	Granted

We sustain the appeals in ASBCA Nos. 56066, 56776 and 56777, and in ASBCA No. 56217 with respect to CLIN 0200 invoices NASA0506 and NASA0606. Appellant is entitled to payment for the unpaid invoices subject of ASBCA Nos. 56066 and 56217 to the extent held above, together with CDA interest on such payments from the date its claims were received by the CO to the time of payment. We remand ASBCA No. 56066 and No. 56217 (in part) to the parties to resolve quantum in accordance with this decision.

Dated: 28 December 2009

DAVID W. JAMES, JR.
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. 56065, 56066, 56202, 56217, 56260, 56776, 56777, Appeals of Unconventional Concepts, Inc., rendered in conformance with the Board's Charter.

Dated:

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