

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Northrop Grumman Corporation) ASBCA Nos. 52178, 52784
) 52785, 53699
Under Contract No. N00024-92-C-6300)

APPEARANCES FOR THE APPELLANT: Richard J. Vacura, Esq.
Stanley S. Soya, Esq.
Holly Emrick Svez, Esq.
Morrison & Foerster LLP
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
Richard A. Gallivan, Esq.
Assistant Director
Robert C. Ashpole, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Navy has moved for reconsideration of our decision in *Northrop Grumman Corporation*, ASBCA Nos. 52178, 52784, 52785, 53699, 04-2 BCA ¶ 32,804 (*Northrop Grumman*). The cases involved defective transducers. Our decision assigned fault to appellant for more than 25 percent of the transducers ultimately rebuilt. Appellant does not seek reconsideration, but opposes all facets of the Navy's motion. The Navy assigns multiple errors of both fact and law to the Board's decision. The underlying dispute involves a government claim and appellant's claims for recovery of costs for essentially rebuilding thousands of transducers. The appeal record includes the transcripts of the three-week hearing, thousands of Rule 4 documents and exhibits, and many hours of videotapes. The Navy assails virtually every aspect of the decision. Most of the specific requests for reconsideration of legal holdings and findings of fact offer little or no record or legal citations.¹ The extensiveness of the motion amounts to retrying these cases and a request for rewriting the decision. It also seeks "clarification" of six "aspects of its decision" that are in several instances so broad in scope as to require us to rewrite the

¹ In 14 pages arguing 10 alleged errors of law the Navy cites 3 cases (gov't mot. at 1-14).

opinion, *e.g.*, “**Third Request.** For each of appellant’s claims, what elements of proof were used to decide entitlement?” (Gov’t mot. at 32) Our opinion here is lengthy in an attempt to address the Navy’s motion, but we believe the motion’s scope goes beyond the purpose of reconsideration in some particulars. Where appropriate, we follow the Navy’s subject headings.

Timeliness

Appellant challenges the timeliness of the motion. The decision is dated 8 November 2004 and the motion is dated 10 December 2004. The motion was received by the Board on that date. However, Board records—specifically, the certified mail receipt—indicate the Navy received the original decision on 10 November 2004. The Navy has also submitted a copy of a date and time-stamped page from the decision showing receipt on 10 November 2004. Counsel represents that is the date it was received by his office. This representation is further supported by an affidavit evincing there was no ASBCA activity by the Navy’s courier service on 9 November 2004 (22 February 2005 submission). Accordingly, we conclude the motion is timely.

Overview

It should be noted at the outset that we believe the crux of the Navy’s disagreement with our opinion is our assignment of the burden of proof. As discussed at length below, we made no error in assigning the burden of proof. Related not only to burdens of proof but to the assessment of which party presented the preponderance of the credible evidence are several relevant issues the Navy overlooks. First, the Navy abandoned its pursuit of the transducer boot as an issue. *See Northrop Grumman* at 162,257 n.10. However, the Navy stipulated to the transducer boot as a leak path (stip., ¶ 41). Secondly, the counterbores were the largest source of leaks according to the Navy’s tests. *Northrop Grumman*, findings 47-48. The Navy’s expert ultimately concluded that contamination by RTV or Tectal was a viable cause of the leakage, but samples did not confirm the presence of either. *Id.*, finding 78. Thus, in addition to the paint and the cable element leaks argued by the Navy, at least two other causes of leakage are confirmed by the record in this case. The Navy has failed to prove that either was the fault of appellant. Further, the Navy initiated the 944 repair because it could not qualify a source for new cable elements quickly enough. *Id.*, finding 56. The 944 repair was successfully tested, but the Navy dropped the 944 repair (*id.*, finding 57) because it concluded that the process would not work if paint was the problem. *Id.*, finding 62. According to Commander Carlson, “[i]f you don’t have paint sticking to the can before you squeeze a transducer pigtail against it . . . you don’t have anything.” *Id.*, finding

63.² The testimony of Commander Carlson and the Navy's actions in stopping the 944 repair weigh against the Navy's argument here that it proved the cable element was the source of leakage that caused performance failure of a magnitude warranting replacement of the pigtail in nearly all the transducers procured.

The Navy also seems to think the Board was remiss in its review of the evidence. This is simply not true. As appellant states:

The Navy repeatedly complains that the Board "ignored" or "omitted" certain facts in reaching its decision (*see, e.g.*, Navy's Mot. at 8, 13, 18, 19, 23, 24, 25, 26, 27, 31). Obviously the Board had to sift through a voluminous record, weigh competing evidence, and ascertain which facts it found credible and relevant to the issues before it. This is the normal process by which judges render decisions. By necessity, not every piece of evidence that is considered is relied upon. The Navy's displeasure with the Board's determinations as to the quality or relevancy of particular portions of the Navy's evidence does not constitute legal error. *See, e.g., Sermor, Inc.*, ASBCA No. 29798, 94-1 BCA ¶ 26,303, *recon. denied*, 96-1 BCA ¶ 27,946 (while movant placed interpretations on evidence that lead it to altered findings, the Board's decision was based on a preponderance of the credible evidence and it was not persuaded to change its findings). The Navy's dilemma appears quite simple: it does not seem to have reconciled to the reality that its view of the "facts" is neither the only view nor the objectively correct one.

In strenuously arguing that the Board committed errors in its Findings, the Navy is simply attempting to substitute its judgment for the Board's concerning how the Board weighed and considered the evidence. Rather than attempting to base

² The Navy offered little or nothing in the way of analysis as to the specifics of how water leaked under the paint and got inside the transducer, yet criticizes the Board's use of the term "leak path" in describing the effect of poorly bonded paint (gov't mot. at 21-22). Clearly, Mr. Watrous described leakage under the paint (tr. 3/118-19) and we relied on his testimony (findings 47, 48). In answer to the question "did you find any consistent leak paths," he answered in part "[l]ack of paint bonding would let the water in that way, too" (tr. 3/119).

its allegations of error on the Record as required by the law, the Navy appears to base its alleged errors of fact on some perceived overriding truth the Navy believes exists outside the Record.

(App. opp'n at 2)

It is also well to note that the rejection of all transducers after most had been accepted was a severe action. While the handling of events leading to the litigation left neither party covered in glory, the overall context was less favorable to the Navy than appellant. Not all of that context was expressly included in the opinion as it is not generally necessary for the trier of fact to articulate all particulars regarding credibility, but such matters affect the probative value of evidence. For example, testimony and evidence that were not referenced specifically in the findings revealed that there were conflicts between the Navy and DCMC (*see, e.g.*, tr. 4/66-67), as well as allegations of internal “backstabbing” and mistrust between Navy personnel at two of the Navy installations involved and competition between those installations for the transducer work (tr. 2/242-47). In assessing the reliability of witnesses and evidence, the trier of fact is entitled to consider matters in the record affecting, *inter alia*, the motivation for actions. We did so here. Perhaps we should have articulated this, but we know of no requirement that all the bases for credibility determinations be set forth in an opinion. Indeed, to do so would result in interminable and unreadable decisions. Thus, the Navy’s characterization of the Board as “ignoring” evidence is a misperception. We rejected evidence when we thought its trustworthiness had been called into serious question and analyzed evidence and argument thoughtfully and thoroughly in determining appropriate evidential weight.

Finally, and most tellingly, we based our holdings on the relatively small number of transducers actually tested and found to have defects. For example, in the critical issue of the cable element, or pigtail, the Navy tested 64 transducers. Of the first 24, we found that two, 11868 and 12625, “leaked through the counterbores, the pigtail, or both.” *Northrop Grumman*, finding 47. Both were from the two ships, DDG-68 and DDG-70, where the large scale leakage was originally encountered (*id.*, finding 41; R4, tab 310). In the second group of 40 transducers tested 4 leaked through the counterbores and pigtail and 6, of which 4 were from DDG-68, leaked through the pigtail (*id.*, finding 48). Thus, potentially a maximum of 12 leaked through the pigtail, although just six were shown to leak *only* through the pigtail. We are aware of no basis on which to uphold the post-acceptance reconstruction of thousands of items on a statistical sample that small.

Allegations of Legal Error

The Board improperly required the Navy to prove that a transducer had a latent defect that caused a performance failure to recover.

We cited the relevant portion of the Inspection clause and stated the law regarding latent defects as paraphrased below:

Under that clause, acceptance by the Navy was not conclusive if there were latent defects;³

A latent defect is a defect not discoverable by observation made with ordinary care;⁴

The defect must have existed at the time of acceptance;⁵

A testing procedure for establishing the defect may not be more stringent than that set forth in the contract;⁶ and

The proponent of a latent defect claim must show liability, causation and resultant injury.⁷

Northrop Grumman at 162,252-53. We believe our statement of the law is correct.

The Navy apparently disagrees with our application of the law. It argues specifically that we improperly required the Navy to show that inadequate surface preparation caused the paint to delaminate and rust, citing *Newark Boneless Meat Products, Inc.*, ASBCA No. 22132, 78-2 BCA ¶ 13,229 as standing for the proposition that a defect's effect on serviceability is immaterial. As we read that case, however, we find it stands for the unremarkable proposition that the government is entitled to strict compliance with specifications. *Id.* at 64,703. Here, after an exhaustive review of the considerable record in this case, we found that appellant had not adequately prepared the surface of *some*, but not all, transducers. We stand by that finding, as discussed *infra*.

³ *Kaminer Construction Corp. v. United States*, 488 F.2d 980 (Ct. Cl. 1973).

⁴ *Id.*

⁵ *Herley Industries, Inc.*, ASBCA No. 13727, 71-1 BCA ¶ 8888.

⁶ *United Technologies Corp. v. United States*, 27 Fed. Cl. 393 (1992).

⁷ *Roberts v. United States*, 357 F.2d 938 (Ct. Cl. 1966). *See also* discussion of burden of proof, *infra*.

We are not able to fully reconcile the Navy's position. In its reply brief, it stated it "is not . . . pursuing 'paint adhesion' as a defect." It goes on to argue that failure to follow industry standards on surface preparation was a failure to comply with specifications. (Gov't reply br. at 19-20) In our analysis we went through the process of ascertaining how much paint delamination (defective paint adherence) had been established. We examined the expert testimony to ascertain why the delamination happened. We concluded it was caused by the very failure to comply with the surface preparation requirement that the Navy cited as one of the bases for its claim. *Northrop Grumman* at 162,250-52. We did not have to reach a conclusion concerning whether faulty paint adhesion was a defect, because the Navy told us it did not seek recovery for faulty paint adhesion. Thus, we looked at the faulty paint adhesion (delamination) as persuasive evidence of inadequate surface preparation. If that is error, then we would be left only with the specific tests of surface preparation which were so small in number that they could not possibly support the Navy's actions here or justify the partial relief we granted the Navy. Moreover, while the Navy complains about our reasoning on page 46 of the slip opinion (*Northrop Grumman* at 162,251), that reasoning results in a holding in the Navy's favor.

The Navy complains that our statement on page 162,252, where we described the issue regarding pigtails as whether there was "a latent defect that caused the leakage and performance failure," is an error of law. Counsel misunderstands what the decision says. Read in context, we were addressing the question of whether a performance specification, as well as a design specification, can give rise to a sustainable latent defect claim. *Id.* Failure to meet a performance specification is, *ipso facto*, demonstrated by a performance failure. Our discussion contains no errors of law. Moreover, the proposition discussed is squarely in the Navy's favor in this case, and if it was error to hold that a performance specification can give rise to a sustainable latent defect claim, it could only have redounded to the Navy's benefit. Similarly, the Navy's complaint about our reference to "the leakage issue" (*id.*) ignores a basic element of the case. Leakage gave rise to the dispute and was at its center. Indeed, the first conclusion of the Navy's chemical expert, Robert Megill, was that the flange was "a possible pathway for water intrusion." *Northrop Grumman*, finding 80. Further, all of this discussion is at least in part an analysis of the Navy's argument that appellant "had the burden of establishing that [Type W] . . . would meet . . . Note 8's requirement regarding cold water operation" (gov't reply br. at 14). If a sufficient quantity of cable elements was leaking in cold water, the performance requirement of Note 8 (*Northrop Grumman*, finding 25) was not being met. It is difficult for the Board to understand why on motion the Navy ascribes error to our action in analyzing and resolving an issue it raised, or why it sees our analysis as requiring "more than proof of a latent defect" (gov't mot. at 1). Our analysis addressed the *defect* aspect, which must be proved before a latent defect can be found.

The Board prematurely decided quantum issues depriving Respondent of the rights to present evidence and to be heard.

We disagree. The issues decided are entitlement issues. The decision speaks for itself.

The Board misinterprets the Inspection clause to limit Respondent's rights and remedies for latent defects.

The Navy argues that our interpretation renders toothless paragraph (l) of the Inspection clause. Apparently, the Navy believes we have improperly taken away the Navy's right to common law damages it believes it is entitled to under paragraph (l). We note that we granted the Navy some recovery under that paragraph. *Northrop Grumman* at 162,258. As appellant states, no right to common law damages was asserted. We cannot, therefore, agree with the Navy's contention.

The Board erroneously placed the burden of proof on the Navy for appellant's claims.

This is, we believe, the heart of the Navy's motion. Although, for the most part, appellant established the positions objected to in the motion by a preponderance of the evidence, we did place the burden of proof on the Navy. We did not err. The Navy does not appear to challenge that the burden is on the government for government claims. *Roberts, supra*. With respect to affirmative claims by the contractor arising from the contractor's efforts in complying with the government's direction to remedy alleged defects, the government also bears the burden of proof on entitlement. *Southwest Welding & Manufacturing Co. v. United States*, 413 F.2d 1167, 1176 n.7 (Ct. Cl. 1969). In that decision, the contracting officer had, after acceptance, ordered the contractor to "replace all welds accomplished by [a particular] procedure." *Id.* at 1776. The case is therefore a latent defects case. The contractor did as the contracting officer instructed, but informed the contracting officer it expected to be paid and the contract to be extended. *Id.* at 1176-77. The contracting officer responded in a letter that the parties treated as a final decision appealable under the Disputes clause, and which informed the contractor "all repairs are to be accomplished at your expense." The contractor appealed. *Id.* at 1177-78. The Court did not, therefore, adjudicate a government claim. The Court rejected the government's argument that the contractor was obliged to prove that it had complied with the specifications and straightforwardly placed the burden on the government. *Id.* at 1176 n.7. It treated the principle as a variation of the implied warranty of specifications seen in impossibility and defective specifications cases and characterized it as the government "putting in issue the sufficiency of its own specifications." *Id.* at 1183. The Court went on to state that "[t]he burden is clearly upon the Government, if it seeks to elevate [the suspicion of non-compliance] to the level of a

fact.” The order to replace all welding was, the Court said “a clear case of ‘overkill,’ a case of swatting a fly with a sledge hammer.” *Id.* at 1185. We therefore understand appellate precedent to place the burden of proof on the government when the contractor’s claim arose from the government’s rejection of work under the Inspection clause, including work it had previously accepted. Our decision here is consistent with prior Board decisions interpreting *Southwest*. See, e.g., *Ace Precision Industries, Inc.*, ASBCA No. 40307, 93-2 BCA ¶ 25,629 at 127,552 (the appeal arose from an affirmative claim of the contractor for rejected work and places the burden of proof on the government); *Dale Ingram, Inc.*, ASBCA No. 12152, 74-1 BCA ¶ 10,436 (the government had the burden of proof for work rejected under the Inspection clause).

With respect to burden of proof under the Warranty clause in a contractor claim, Board precedent is clear. We held, where the dispute arose from an affirmative contractor claim and the cause of failure was not proved:

Having required appellant to reseal joints pursuant to the warranty provisions of the contract, the Government bears the burden of establishing by a preponderance of the evidence either that appellant employed defective material or that it provided improper workmanship. And the failure of materials within the guarantee period does not create a presumption of improper workmanship. *Triangle Painting Company*, ASBCA No. 23643, 80-1 BCA ¶ 13,434, and cases cited therein.

The Government has not met its burden in this appeal. To the contrary, appellant has convinced us that it performed its work in accordance with all contract requirements which the Government had initially prescribed and subsequently monitored. The Government must therefore accept responsibility for the failure which occurred.

A determination of the precise cause of sealant failure on the record before us can only be based on suspicion, speculation or surmise and would consequently be unsound and improper. We therefore must eschew such an exercise.

Ed Dickson Contracting Co., ASBCA No. 27205, 84-1 BCA ¶ 16,950 at 84,311-12.

Case precedent places the burden of proof on the government for both latent defect and warranty cases.

The Board erroneously interpreted the Contract as providing that the warranty expired two years after the signing of the DD 250 for the respective transducers, contrary to the clear language of the Contract.

The Warranty clause states the warranty shall run for two years from acceptance (R4, tab 1/Bates 000134). The Navy's argument relies on a contract provision that starts the warranty period, *inter alia*, as early as the date shipment is authorized (R4, tab 1/Bates 000106). The relevant clause provides:

The Government reserves the right to require the Contractor to Deliver-in-Place or otherwise store, at no additional cost to the Government, any or all Items (CFE/GFE) until required for final delivery to the installation activity. In addition phased delivery shall be accompanied and supported by the Contractor as required by the Government.

NOTE: In the event these items are delivered to and accepted by the Government prior to the required delivery dates (RDDs) specified in Attachment 16, the warranty period shall commence from the date of acceptance of these items and extend for a period of two years from either (1) the RDD specified in Attachment 16, or (2) the date when the Government authorizes shipment of these items, whichever is earlier.

(*Id.*)

The Navy argues that we ignored testimony from a Navy witness (Ms. Rustameyer's testimony, tr. 6/62-69) and Rule 4, tab 2358. Ms. Rustameyer testified as to the document at Rule 4, tab 2358 (a one-page list showing the DD 250 date, the required delivery date or RDD, and the "ship to" date for 16 shipsets). That document also states at the bottom "WARRANTY – 2 YRS FROM EITHER THE CONTRACT RDD OR THE DATE OF THE SHIPPING LETTER, WHICHEVER IS EARLIER." Ms. Rustameyer testified that the list represented her attempt to establish transducers still within the warranty period. She concluded 14 shipsets were under warranty. (Tr. 6/62-69) However, the DD 250's plainly accept the transducers. Each of the DD 250's has the words "PARTIAL SHIPMENT CONSISTING OF ONE SET" on its face. Each of the DD 250's also has a date in Block 3, "DATE SHIPPED." Each DD 250 has Block 11, "SHIPPED FROM" filled with the address of appellant's plant.

Block 13, "SHIPPED TO," is filled in with "SHIP IN PLACE." (R4, tabs 2289-93, 2295, 2297-98, 2300, 2302, 2304, 2306, 2309, 2311-12, 2314-15)

We construe the "Deliver-in-Place" reference in the quoted clause and "SHIP IN PLACE" on the DD250's to be the same. The question is whether "SHIP IN PLACE" constitutes authorization of shipment. We concluded that it did. We have in the past had this to say about "SHIP IN PLACE:"

The delivery provisions seem straightforward and unambiguous. Under the terms of the subcontract, MDC was required to deliver the hardware items and services listed in the SOW's ATTACHMENT II and the data items set forth in ATTACHMENT III in accordance with ARTICLE VIII PACKAGING AND DELIVERY. Under the SOW's paragraph 5.0, PREPARATION FOR DELIVERY, MDC was responsible for the preservation, packaging and packing of all items to be delivered. These provisions contemplated the physical transfer of possession at TRW's Redondo Beach, CA facility. The only items which MDC was not required to deliver F.O.B. to TRW's Redondo Beach, CA facility were the test sets and cables identified in the SOW's ATTACHMENT II as "SIP," or Ship in Place, deliverable items under subparagraph 4.1.1 of the SOW. SIP was a form of constructive delivery under which the items, once acquired by MDC, were deemed delivered to TRW ("Buyer-owned property") and turned over to MDC, in "AS IS" condition, for MDC's use in performing the subcontract.

TRW Inc., ASBCA No. 51003, 00-2 BCA ¶ 30,992 at 153,025. Accordingly, we construed the DD 250's to show constructive delivery, which required government authorization.

Our resolution on this was reached in part because the parties left us with no information about the shipping letters on which Ms. Rustameyer relied in creating Rule 4, tab 2358 and because the matter was not addressed in their briefs. We could find no mention of shipping letters or their role in the acceptance process in the relevant clauses and all we know about their derivation is that Ms. Rustameyer got them from support contractors (tr. 6/64). With nothing more to go on, we interpreted the terms in the DD 250's and the contract differently than did Ms. Rustameyer, and we considered the

DD 250's to trump the otherwise unidentified "shipping letters" in Tab 2358⁸ about which she testified.

Moreover, in referencing the above-cited evidence, the Navy offers the following observation:

. . . Although there is undisputed evidence in the record comparing the shipping letter dates with the contract's delivery dates, the parties did not even prepare findings of fact or present argument on these issues, which is the apparent reason for the Board's errors in resolving something not disputed.

(Gov't mot. at 6)

The Navy dismisses its own failure to address this on brief as evincing that the matter was not in dispute. Appellant argues that it was disputed (app. opp'n at 11). If the issue is of sufficient significance to be raised in a motion for reconsideration, why indeed was it not presented during the case-in-chief? The Navy presented theories of recovery based on the warranty provision and on the Inspection clause. It seems obvious to the Board that it needed to resolve *which* transducers were covered by warranty.⁹ We confronted the vacuum created by the parties' lack of address and resolved it in accordance with our interpretation of the contract and the record.

Finally, the burden of proof is on the Navy under either a latent defect or warranty theory, and as we said in *Northrop Grumman* at 162,254, we considered the applicable principle under a warranty theory to be the same as with the latent defect theory. The outcome would not change even if we were to now accept Ms. Rustameyer's testimony that 14 shipsets were under warranty. We affirm our holding.

⁸ R4, tab 2358 is a document prepared after this dispute arose (tr. 6/62-63).

⁹ Even under Ms. Rustameyer's approach, it would have been difficult, if not impossible, to identify many specific transducers, as the only array maps in the record are for DDG-68 and DDG-70 (R4, tab 310).

The Board erred in interpreting the meaning of equivalent in Note 1
of the pigtail drawing.

The Board erred in holding that the Navy failed to prove that the pigtails were defective.

Under this section we address the above-quoted alleged errors of law and the alleged errors of fact the Navy sets forth at pages 28-31 of its motion. According to the Navy, we were “confused” about the meaning of “equivalent” as it applied to Note 1. The Navy has now submitted a page from a dictionary. (Gov’t mot. at 6, tab A) That dictionary and its definition were available to the Navy at trial, but it did not present it. The definition would have been more appropriately presented at trial when Mr. Megill could have been questioned on it. The definition of “equivalent,” is as follows: “*chem* : having the same combining capacity <~ quantities of two elements>.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, s.v. “equivalent.” The Navy also argues we erroneously rejected the testimony of its chemical expert, Mr. Megill, who testified that the contract’s provision that the cable element flange should be “TYPE WRT NEOPRENE OR EQUIVALENT TO MEET MIL-R-3065 AND ASTM D2000-2BC415A14F17Z” (*Northrop Grumman*, finding 23), meant chemically equivalent to Type WRT Neoprene. Appellant used Type W Neoprene, which in Mr. Megill’s view, crystallized too quickly. We held that the provision could not be reasonably interpreted to require only Type WRT. *Northrop Grumman* at 162,252-53. The lack of support in the literature for Mr. Megill’s testimony that the meaning of equivalent is interpreted as chemically equivalent in the industry was one of the reasons for our holding. According to the Navy, its submission of the dictionary definition removes one of our reasons for not adopting Mr. Megill’s testimony.

Appellant argues:

The Navy is merely rearguing its flawed and completely unsupported position that equivalency as used in the pigtail drawing required chemical equivalency. Navy Post-Hearing Brief, ¶¶ 206, 267, 408-411, 414, 435, and at 141, 143-144, 146, 152; Navy Post-Hearing Reply Brief at 13-16. Moreover, the Navy ignores the testimony of its own Contracting Officer, who testified that, in his view, a fair reading of the Note 1 language was that equivalent referred to a functional equivalent, and that as long as the contractor passed all of the specified testing, the contract requirements were satisfied. [fn omitted] *See* Watts, Tr. Vol. 6, 151.

The Navy also seeks to reopen the record and introduce an additional document that clearly is not newly discovered evidence. The Navy attached to its motion an extract of Webster's Dictionary that includes a definition of "equivalency," which (1) existed at the time of trial, (2) is not something of which the Navy was excusably ignorant, (3) is not something that was just discovered since the trial, (4) is not material and is merely cumulative, and (5) is not of sufficient consequence that its admission would produce a different result. *See Genisco Technology Corp.*, ASBCA No. 49664, 99-1 BCA ¶ 30,145, *recon. denied*, 99-1 BCA ¶ 30,324.

(App. opp'n at 13)

It is fundamental federal acquisition policy to promote full and open competition. 10 U.S.C. § 2304. At the time of this procurement, when the government specified a brand name, such as Type WRT neoprene, or equivalent, FAR 10.004 provided (48 C.F.R. § 10.004 (1992)):

10.004 Selecting specifications or descriptions for use.

(a) (1) Plans, drawings, specifications, standards, or purchase descriptions for acquisitions shall state only the Government's actual minimum needs and describe the supplies and/or services in a manner designed to promote full and open competition.

(2) Items to be acquired shall be described (i) by citing the applicable specifications and standards or (ii) by a description containing the necessary requirements.

(3) Specifications and standards shall be selectively applied and tailored in their application.

....

(b) (1) When authorized by 10.006(a), or when no applicable specification exists, agencies may use a purchase description, subject to pertinent restrictions on repetitive use. An adequate purchase description should set forth the

essential physical and functional characteristics of the materials or services required. As many of the following characteristics as are necessary to express the Government's minimum requirements should be used in preparing purchase descriptions:

- (i) Common nomenclature.
- (ii) Kind of material; i.e., type, grade, alternatives, etc.
- (iii) Electrical data, if any.
- (iv) Dimensions, size, or capacity.
- (v) Principles of operation.
- (vi) Restrictive environmental conditions.
- (vii) Intended use, including—
 - (A) Location within an assembly, and
 - (B) Essential operating condition.
- (viii) Equipment with which the item is to be used.
- (ix) Other pertinent information that further describes the item, material, or service required.

(2) Purchase descriptions shall not be written so as to specify a particular brand name, product, or feature of a product, peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, unless—

(i) The particular brand name, product, or feature is essential to the Government's requirements, and that other companies' similar products, or products lacking the particular feature, would not meet the minimum requirements for the item; and

(ii) The authority to contract without providing for full and open competition is supported by the required justifications and approvals (see 6.302-1).

(3) Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words “or equal.” This technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than inspection and analysis in time for the acquisition under consideration. Agencies should provide detailed guidance and necessary clauses for use by contracting activities when using this technique.

We construe the regulation in effect when the contract was awarded to require that brand name or equal specifications set forth physical and functional characteristics so as to express the government’s minimum requirements. Thus, to be in compliance with the FAR, the standard to be specified was functional, not chemical, equality. According to Mr. Megill, only two products (Type WRT and WD, both made by DuPont and both proprietary) met the test of chemical equivalency. Mr. Megill testified that the composition thereof had never been published. (Tr. 4/204-05) Our reading of the characteristics of WD is that it was superior, not equal, to Type WRT, and more expensive (ex. G-6 at 27, app. F at 1). The chemical equivalency of WD is hard to reconcile with Mr. Megill’s reported test results, as the time to crystallize for WD is roughly 10 times that of WRT (ex. G-6 at 27). This would indicate a greater quantity of a chemical called DCBD (*id.* at 26-27). Accordingly, we conclude that there was no product identified for which “chemical equivalency” with WRT was credibly demonstrated.

Case precedent, as well as the FAR, supports our view that functional equivalency was the standard to be enforced. The context in which brand name specifications most often arise is in construction contracts containing a Material and Workmanship clause.¹⁰

¹⁰ The principles set forth in the construction contract decisions, but involving other areas of federal contracting, most often arise in protest disputes. For example, in *Datacomm Management Sciences, Inc.*, B-261089, 95-2 Comp. Gen. Proc. Dec. ¶ 259, an award made on an automated switching control system was upheld where the awardee’s product was found to be functionally equivalent. In *To the Administrator, NASA*, B-162113, 47 Comp. Gen. 409, the agency had used a brand name specification. The Comptroller General, while allowing the contract award to stand, admonished the agency for restricting competition and instructed

Precedent under that clause treats brand name specifications as calling for functional equivalents. For example, in *Urban Plumbing & Heating Co. v. United States*, 408 F.2d 382 (Ct. Cl. 1969), *cert. denied*, 398 U.S. 958 (1970), the Court stated that the “or equal” provision of the Material and Workmanship clause did not “mean that the proposed substitutes had to comply with every detail of the specifications (which were based on particular brands, without naming them). The ‘or equal’ clauses were designed to establish a ‘standard of equality’ and meant only that the proffered ‘deviation’ had to *function* as well as the specified equipment.” *Id.* at 386 n.3 (emphasis supplied). Consistent with FAR 10.004, the Court held that the requirement for equivalency was for functional equivalency.

In construing brand name specifications, we have held:

When the Government chooses to use a brand name or equal specification, it must identify the essential or “salient characteristics” of the brand name product, and use those salient characteristics to evaluate the equivalency of substitute items. *North American Construction Corp.*, ASBCA No. 47941, 96-2 BCA ¶ 28,496; *Blount Brothers Corp.*, ASBCA No. 31202, 88-3 BCA ¶ 20,878. While the Government may reject a substitute if the salient characteristics are not met, *J.K. Richardson Co.*, ASBCA No. 46309, 94-2 BCA ¶ 26,900 at 133,951, bidders should not have to guess at the essential qualities and the Government cannot reject an item that is *functionally equivalent* to the brand name product. *Blount Brothers*, 88-3 BCA at 105,574-75. [Emphasis supplied]

KEMRON Environmental Services Corp., ASBCA No. 51536, 00-1 BCA ¶ 30,664 at 151,400. It is not disputable that the drawing note failed to use “chemical” or “chemically” to describe the equivalency to Type WRT sought in the flange. Appellant’s interpretation of the note as describing functionality was reasonable, given the content of Note 1, the regulatory prescription of FAR 10.004, and the above-cited requirement to provide sufficient information to evaluate functional equivalency.

Further, in our decision we stated that “the specific language used, the placement of key words and their plain meaning lead to a reasonable interpretation that means an acceptable equivalent is one that meets the requirements of MIL-R-3065 and ASTM

the agency that performance specifications should be drafted for future procurements. The Comptroller General thus, in construing a brand name provision, equated open competition with functionality.

D2000-2BC415A14F17Z.” *Northrop Grumman* at 162,253. In finding 82 (*id.* at 162,243-44) we explained our understanding of the ASTM requirements as Mr. Megill explained them. We discussed the differences between the positions of Mr. Megill and Dr. Grossman regarding the ASTM requirements in finding 86. We have reviewed the record and do not believe the belated submission of a dictionary definition should alter our conclusion that the ASTM callouts militate against an interpretation requiring a chemically identical product. The words that follow “Type WRT neoprene or equivalent,” and particularly the words “to meet” that precede the ASTM references, give the provision a meaning focused on functionality. In this regard, the very use of ASTM (American Society of Testing Materials) standards indicates the intent to require a product that can meet the listed tests. Dr. Grossman testified that “[t]he most common influence of equivalency in the rubber industry is functional” (tr. 9/13). Indeed, that is how the drawing note was understood by the contracting officer before this litigation (tr. 6/151). It is axiomatic that the intent of the parties is an essential ingredient in contract interpretation and, in discerning what the parties intended, evidence of an interpretation held before a dispute arises is of much greater weight than what parties do or say thereafter. *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl. 1982); *Macke Co. v. United States*, 467 F.2d 1323, 1325 (Ct. Cl. 1972); *Ver-Val Enterprises, Inc.*, ASBCA No. 43766, 95-1 BCA ¶ 27,334 (concurrent interpretation prior to a dispute entitled to great, if not controlling, weight). We find the contracting officer’s pre-litigation interpretation entitled to considerable weight in finding that the only reasonable interpretation is a call for functional equivalency.

Moreover, if the dictionary definition now advocated had been part of the Navy’s contemporaneous interpretation in its contentious dealings with appellant, the matter would have been raised by the Navy throughout. It was not. Note 1, read as requiring functional equivalency, allows manufacturers other than the manufacturer of Type WRT to qualify their products and thereby provide competition to obtain lower prices. This was how the contracting officer understood it prior to the litigation and what the FAR required.

There are additional reasons why we did not accept Mr. Megill’s testimony on chemical equivalency as the basis for interpreting Note 1 in other testimony he offered. For example, he testified that he would not draft the specification as the Navy had (tr. 4/206). He also testified that the main reason for his conclusion that appellant’s product did not meet the specifications was based on performance in the field as gleaned from documents the Navy provided comparing pigtailed from other years made with Type WRT with those made with Type W (tr. 4/196-97). He did not see data from transducers supplied by appellant that did not leak through the pigtail (tr. 4/197-98), even though testing done for the Navy resulted in a significant number of tested transducers that did

not leak through the pigtail and the USS Thorn was still in service in 2002. *Northrop Grumman* at 162,237 (findings 47, 48), 162,254.

Moreover, Mr. Megill was not familiar with how “equivalent” is used in government contracts (tr. 4/205). He was not from an ideal background for analyzing the reasonableness of a contractor’s situation vis-à-vis Note 1, as he was a career employee of DuPont in a unique position to know formulations (tr. 4/204). Indeed, the Navy argues its case as follows: “When a rubber chemist is reading a note on a drawing saying that an equivalent to a particular chemical can be used to make a chemical compound, it is obvious from the context that the note means chemically equivalent” (gov’t mot. at 6-7). This overlooks the long-standing paradigm of the “reasonable and prudent contractor.” *Turner Construction Co. v. United States*, 367 F.3d 1319, 1324 (Fed. Cir. 2004); *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971). We think it unreasonable in the circumstances to impose on appellant the requirement to employ the level of detailed expertise of a rubber chemist in assessing whether appellant acted as a reasonable and prudent contractor here. For all of the foregoing reasons we conclude that the Navy’s interpretation of the contract as requiring chemical equivalency with Type WRT neoprene is not reasonable, and appellant’s interpretation as requiring functional equivalency is reasonable.

The Navy cites *R.D. Lowman General Contractor, Inc.*, ASBCA No. 36961, 91-1 BCA ¶ 23,456. That case is inapposite, as it deals with the rejected submittal of a shop drawing and not a latent defect or Inspection clause issue. We are not persuaded to place the burden of proof on appellant. Accordingly, we find the Navy’s argument unpersuasive.

As to whether we erred by holding that the Navy failed to prove the pigtails were defective, we did not ignore everything but the lack of test data and the test fixture issues, as the Navy charges. As we have explained above, we consider Note 1 to apply to the functionality of the flange. As best we can ascertain, the flange has one function – to prevent leakage. This is apparent in the report of Mr. Megill (ex. G-6 at 4). Bearing in mind both the function (sealing off the tube to prevent leaks) and the alleged defect (leaking), we set forth below the evidential matters we considered and which weigh heavily in our conclusion that the Navy did not carry its burden of proof.

1. As stated at the beginning, there were two leak paths that are not in dispute and neither has been shown to be the fault of appellant. We consider this to be critical in proving, or not proving, whether and to what extent the pigtail flange was a significant cause of leakage.

2. The grooved design of the flange and the metal transducer parts into which it fit (*see, e.g.*, ex. A-6, app. A) was such that it acted as an additional deterrent to leakage, in part because the design took advantage of hydrostatic pressure to tighten the seal (*Northrop Grumman* at 162,245, finding 87; tr. 9/21-22).

3. The flange was a *static* seal, with no moving parts. The only movement was from thermal expansion and contraction. *Northrop Grumman* at 162,253. Indeed, there was no apparent dispute that the most logical culprit with regard to leakage was contraction caused by cold water. *Id.* at 162,252. The only evidence that we could extrapolate to actual measured deflection was that a variation of 2-3 mils (deflection actually observed) would not cause a leak (tr. 9/38-39). We believed these factors to militate against a finding that the flange was a major cause of leaks. As Dr. Grossman testified, given the design and the static nature of the sealing function, it made little difference whether Type WRT or W was used (tr. 9/36).

4. There were no calculations presented to show what amount of thermal expansion and contraction were involved in the temperature ranges within which the flange was to function. *Northrop Grumman* at 162,245 (finding 88), 162,253. Therefore, although finding the softer WRT preferable, we could not determine whether the compression set was a problem with Type W. *Id.*¹¹

5. While we were well aware of documents in the record that showed a dispute among appellant's personnel, with some positions potentially damaging (*see, e.g.*, *Northrop Grumman*, finding 53) we felt the positive evidence from appellant that emerged from appellant's investigation (*see, e.g.*, tr. 8/74-75) effectively neutralized the negative evidence from the early internal debates. We chose not to articulate that process in the decision and placed little reliance on the evidence one way or the other.

Finally, as to the Navy's complaint that we did not consider tests and appellant's internal documents that it believes showed the pigtailed were non-conforming, that is just not true. We considered the documents and cited some of them in finding 53. However, most of the negative commentary came from Mr. Eynck, who was deceased at the time of the hearing (tr. 2/80). Moreover, in one of the documents Mr. Eynck stated the flange may meet contract specifications (R4, tab 2208). The lack of certitude in the documents and the presentation of experts by both parties militated against relying on those documents. As to the tests, we considered them in finding 54. By way of analogy, we

¹¹ The Navy now argues on motion (without citing to the record) that compression set improves with age (gov't mot. at 8). As the material hardens with age, the softer Shore A 40 called for in the contract may, as Dr. Grossman testified (*Northrop Grumman*, finding 87), have created a less effective seal.

note that Mr. Strozeski still appeared to believe even at time of trial that the hot compression test was an indicator of how the flange would perform in cold water, notwithstanding the opposite view held by the Navy's expert (tr. 2/216-18). We think no competent trier of fact would have relied on Mr. Strozeski over Mr. Megill on that point, but it is comparable to the fault the Navy finds with the Board's factual analysis, which was based on the experts' analysis of the data.

Accordingly, we affirm our holding that the only reasonable interpretation of Note 1 is appellant's interpretation that functional (not chemical) equivalency is called for, and that the Navy failed to prove that the pigtail flange did not meet the specifications.

The Board's interpretation of the Contract in Fact No. 5 is erroneous.

The Navy offers several arguments on this finding, while offering no record citations or cases. Finding of fact no. 5 merely states what the record amply supports – that the contract was a build-to-print contract. The Navy's own witnesses support this, and support the proposition as stated. In addition to the transcript citations in the decision, there are numerous others. (*See, e.g.*, tr. 6/35, 145-46, 180, 7/12-15, 130) As to the Navy's argument that we appear to be imposing an implied warranty in derogation of the contract's express warranty, “[w]henver the government uses specifications in a contract, there is an accompanying implied warranty that these specifications are free from errors.” *Robins Maintenance, Inc. v. United States*, 265 F.3d 1254, 1257 (Fed. Cir. 2001). We affirm finding of fact no. 5.

The Board erred in holding that the Navy only had the right to reject 2,500 of the 10,000 transducers for latent defects.

The Navy presents as facts matters not of record and for the most part makes no attempt to provide record citations from which the Board might have gleaned the information. The record citations that are provided are to documents that are undecipherable without further elucidation, at least for the purposes advanced by counsel. For example, the Navy argues:

The Board also limited our remedy to some of the transducers in service. Of course delaminated paint was on only about 4000 [sic] of the transducers. They were the only ones we had used before the failures started. Of course, there was more delamination found on some of those 4,000 transducers, because they were the ones installed longer. See Rule 4 [sic] Tab 2344, pp. 4-7, compare Figures 1 and 2; Tab

2334, especially Figure 22. The Board is in effect punishing Respondent for mitigating the damage by uninstalling the ones in use and not putting any more in service.

(Gov't mot. at 10)

Rule 4, tab 2344 at 4-7, Figures 1 and 2, are charts titled "Required and Actual Delivery Dates for Transducers" and "Costs for Transducer Removal and Re-Installation in Affected Ships." From this obscure reference, not cited in briefs, we were supposed to deduce that the delaminating transducers were the ones installed longer. Similarly, Rule 4, tab 2334 at 25, Figure 22, is a chart titled "DDG Sonar Domes Filled/Problems Found." Figure 22 at p. 25 is not referred to in the surrounding text. We assume the reference to Figure 23 in the text of p. 25 is a misprint and should be Figure 22. In any event, as best we can determine, it deals with the flooding discovered in DDG-68 and DDG-70. We address the reference to 4,000 transducers *infra*.

Moreover, as appellant argues in response:

. . . It is somewhat ironic for the Navy to complain that only 2,550 transducers were found to be defective as it [the Navy] never actually proved at the hearing or identified Record evidence in its post-hearing briefs that even all of the 2,550 transducers were defective.¹⁰ Rather, the Board conducted its own sampling based on evidence in the record and determined that 2,550 transducers were defective. Slip Op. at 46-48. . . .

. . . .

¹⁰ The Navy improperly concludes without support in the record that there were 4,000 transducers with delaminated paint. *Id.* [Underlining in original]

(App. opp'n at 18) Indeed, confronted with insufficient test data but visual evidence we could not ignore, the Board attempted to find a fair and equitable resolution of this dispute.

Further, to amplify appellant's footnote, the Navy gives no insight into where in the record the 4,000 delaminating transducers referred to by the Navy are documented. The only place where a number close to 4,000 comes into play is in our discussion at pages 162,251-52. There, we explain that 711 transducers were observed in tapes or addressed in expert testimony over a range of 4,139 *serial numbers*. We found a total of 102 delaminating transducers in that group, but the 102 transducers were clumped within a range of 2,550 serial numbers. We thus considered the representative sample to be 2,550, not 4,139. If that is what the Navy is relying on in its allegation of 4,000 delaminating transducers, it has sorely misread the decision. Indeed, the Navy either misperceives the Board's holding or has no evidence to support its assertion. In any case, the argument that the Board "is in effect punishing" the Navy for mitigating damages by not putting more transducers in service makes no sense (gov't mot. at 10).¹² The Navy has the burden of proof. What the Navy needed to do was to establish defects over a wider spectrum, in service or not. It did not attempt to do so.

Of all the contentions raised by the Navy none is more perplexing than its assertion that the Board committed legal error when it did not rely on profilometer readings documented in what the Navy refers to as "ACL Test Data Part II" (gov't mot. at 13). That compilation is identified in the record as "exhibit A-37." Exhibit A-37 was offered by appellant to show discrepancies in the testing done by Mr. Kapoor, one of the Navy's experts. It was, in effect, a challenge to the trustworthiness of Mr. Kapoor's testimony. The Navy, to overcome the challenge to its expert, represented that some of the data was not prepared by Mr. Kapoor, but by an employee of the firm that repainted the transducers (tr. 5/209-15). It became the subject of a stipulation signed by counsel for both parties and submitted on 8 January 2004 with appellant's brief that established that Mr. Kapoor did not prepare or rely on the data in ex. A-37. Appellant argues "[t]he Navy's difficulty lies not with the Board's alleged failure to consider them, but with the Navy's own failure to include the results of any alleged testing of these 30 tubes in its expert report" (app. opp'n at 19). As appellant correctly perceives, we concluded that if Mr. Kapoor did not rely on it, neither should we. We relied instead on Mr. Kapoor's report (ex. G-5).¹³ We were consistent in doing so. The data in ex. A-37 that the Navy would have us rely on deals with the adequacy of surface preparation. While we relied on our own visual examination as to the evidence of delamination through which we determined the number of delaminating transducers, we turned to the experts as to the cause, *i.e.*, surface preparation. *Northrop Grumman* at 162,251. The Navy would now have us rely on the data in ex. A-37 to broaden the group of delaminating transducers.

¹² The Navy's reliance on Rule 4, tabs 2334 and 2344 is misplaced. Even assuming, *arguendo*, they show what the Navy contends, they do not show defects within a larger sample.

¹³ We referred to the 30 tubes in footnote 20. *Northrop Grumman* at 162,257.

We decline to do so as we find it unreliable, but note that were we to accommodate the Navy and re-examine ex. A-37, we would necessarily have to appraise the evidentiary effects of discrepancies on Mr. Kapoor's conclusions. That would, at this late date, open the process to untold opportunities for misunderstanding.

The Navy also argues that we misapplied the holding in *Baifield Industries, Division of A-T-O, Inc.*, ASBCA Nos. 14582, 14583, 72-2 BCA ¶ 9676. The Navy again raises the unsupported contention that 4,000 transducers failed. It then argues that the size of the sample in *Baifield* was much smaller than the sample here. To grant the relief the Navy seeks on reconsideration we need substance, and the unsupported assertions of counsel are not of substance. In this regard, the Navy makes an argument it did not make previously, for which it does not cite to the record, and in connection with which it does not attempt to tie-in legal precedent that would change the outcome:

Obviously the vast majority of paint delamination occurred on only 4000 transducers--the rest were still in the warehouse or on the factory floor. That is tantamount to denying the Government a remedy--for the failure to perform the contractually required grit blasting--because the transducers in the warehouse hadn't leaked yet. In other words, the Board erred in inferring that the fact that most of the paint stayed on the transducers in the warehouse meant that they must have been surface prepped unlike the ones taken from the ships and examined.

(Gov't mot. at 11-12)

In the first place, there is no evidence, and the Navy cites no evidence, of 4,000 delaminating transducers. As stated, *supra*, we assume the reference is to the range of serial numbers observed. Similarly, we are unaware of evidence of how many transducers were in the warehouse or on the factory floor. (*See, e.g.*, finding 52—"It is unclear where the shipsets of transducers sent to NSWC came from. Mr. Bartlett did not know.") The Navy certainly did not tell us in its briefs or in testimony, and if it is somewhere in this vast record, we were unable to locate it. As finding 52 demonstrates, we tried. Regarding the assertion that we denied a remedy because transducers in the warehouse had not yet leaked, it overlooks several relevant points. It does not face up to the fact that the Navy did not even tell its own expert, Mr. Kapoor, where the transducers provided for testing came from (tr. 5/185-86). It does not face up to the fact that we included in our consideration the transducers Mr. Kapoor tested without regard to where they came from and without regard to whether they had leaked (finding 92). It does not face up to the fact that the 1991 transducers were also rated unsatisfactory (finding 91).

It does not face up to the fact that only by reviewing countless hours of videotapes could the Board ascertain the extent of the demonstrated delamination, and that it was the extent of that delamination, and not the Navy's nine profile measurements set forth in Mr. Kapoor's report, that provided *evidence* of inadequate surface preparation which we found persuasive. *Northrop Grumman* at 162,250-52. It is on this latter point that the Navy wholly misperceives the Board's holding; as noted *supra* we did not hold that defects could only be proved through leaks and delaminations. Indeed, a representative number of profilometer readings from samples throughout remanufacture would have gone far to carrying the day for the Navy. The Navy did not present that evidence. Contrary to what the Navy argues, the delamination was, in our view, proof of inadequate surface preparation. ("The cause of the delamination is a matter calling for expert testimony. . . . The Navy's experts testified, and we have found, that the substantial paint delamination observed is attributable to inadequate surface preparation Further, the defect of inadequate surface preparation must have existed at the time of acceptance.") It was also proof of injury, as was leakage and rust. *Id.* at 162,251. Injury is an element of the Navy's burden of proof. *Roberts v. United States, supra*. The suggestion that the Board inferred that warehoused transducers must have been properly surface prepared misses the point entirely. The Navy's presentation, implicitly if not expressly, sought an inference that nine measurements by its expert proved inadequate surface preparation of all the transducer tubes. The Board refused to make that inference. We also did not infer that they were adequately prepared. *Cf. Southwest Welding; Ed Dickinson Contracting Co., supra*. As the burden of proof is the Navy's, we considered that proof limited to a range of 2,550 transducers. Indeed, the unacceptable failure rate was 10 percent. *Northrop Grumman*, finding 41. We observed 711 transducers, which is less than 10 percent of the 9,792 deliverable units in the 1992 contract, and of that 711 there were 102 observed with delaminating paint. Aside from not meeting the *Baifield Industries* standard, 10 percent was the fleet measure for unsatisfactory performance of units. The Navy has not shown by any measure that 10 percent of the 9,792 transducers performed unsatisfactorily. We affirm our holding.

Regarding appellant's claims, the Board erred in granting any relief because appellant breached its duty to cooperate by withholding information about the defects from the Government.

The Navy argues that appellant falsely told the contracting officer that it had investigated and found that all transducers were conforming. The Navy does not cite to the record. It also argues, without record citation, that appellant tendered the 17th shipset knowing of defects in the pigtails. We decline to re-review this vast record in an attempt to address "facts" that the Navy offers in the form of bare assertions.

The Navy cites *Christopher Village, L.P. v. United States*, 360 F.3d 1319 (Fed. Cir. 2004), for the proposition that an unknown prior breach excuses an agency breach. There the submission of false data was admitted.¹⁴ Here, the Navy has not supplied the necessary factual predicate for the holding in that case to apply. We affirm our holding.

Allegations of Factual Error

According to the Navy, the Opinion included many factual errors. Indeed, appellant has addressed the Navy’s allegations in tabular form consuming some 21 single-spaced pages (app. opp’n, ex. 1). The Navy provides few record citations. Moreover, the Navy even accuses the Board of error on facts to which it stipulated and the Board included the stipulation verbatim in its decision (*cf.* gov’t mot. at 25; 6 August 2003 STIPULATION OF FACTS; *Northrop Grumman*, findings 59, 60). Typical is the first allegation:

A. In Fact No. 3, the Board has mistakenly described the location of the pigtail flange as near the stack.

The pigtail flange fits between the seal plate and the end cap forming a seal for the center hole in the end cap, called the chimney. The Board has mistakenly referred to the stack instead of the seal plate. The stack generally refers to the ceramic stack, consisting of eight ceramic rings, which is located on the other end of the transducer, *i.e.*, the boot end.

(Gov’t mot. at 15)

The Navy seems to think the Board confused the seal plate with the ceramic stack because we used “the stack” as shorthand. We find this hard to fathom, but while we do not think finding 3 is confusing we acknowledge that painting a word picture, as we tried to do in finding 3, may lend itself to misunderstanding. To illuminate the matter further, we offer what follows. Finding 2 defines the Board’s shorthand for the interior transducer assembly, to wit: “[t]he interior contains the transducer assembly, consisting of a ceramic stack and other electronics, which are mounted on a metal frame (hereinafter sometimes ‘*the stack*’).” *Northrop Grumman* at 162,229 (emphasis supplied). Thus, the Board set forth its intended use of the term “the stack” as shorthand for the interior assembly, which includes the seal plate. An example of what we explained to the reader we would sometimes refer to as “the stack” is shown at ex. G-23. Moreover, in finding 3

¹⁴ We note that Mr. Strozski’s attempt to have appellant criminally investigated was rejected (R4, tab 3420).

we cited to the relevant drawing at Rule 4, tab 319, which shows rods that screw into an elongated piece that has interior threads at each end. The threaded piece is referred to as a “standoff” in a report titled “Bolt Torque Pattern” (R4, tab 2115 at NG010514). That report refers to what we called the “transducer assembly” or “the stack” in finding 2 as “the transducer’s inner subassembly” (*id.*). The rods and standoffs are part of what we called “a metal frame.” We cited to Rule 4, tab 2115 in finding 3. As may be seen from ex. G-23, the rods and standoffs appear to be brass. As set forth in Rule 4, tab 2115 and may be observed from ex. G-23, as well as other tabs, exhibits and testimony too voluminous to cite here, three bolts screw into the standoffs to join the endcap and the “inner subassembly,” for which we used the shorthand term “the stack,” and three thread into the seal plate to seal the flange. We describe that process in finding 3 and do not think the description lends itself to misunderstanding. Also, in finding 3 we referred to the flange as “designed to fit between the endcap and the *metal frame* of the stack.” *Northrop Grumman*, finding 3 (emphasis supplied). A cross-section showing endcap, flange, bolts, and plate is illustrated at ex. G-26. Examples of how the flange is positioned in relation to what we referred to as “the stack” is shown, *inter alia*, at ex. G-17, transducer no. 11868, commencing at 5:00 and ex. G-6, app. A, second page. All are consistent with our description. There is no error in finding 3.

We have reviewed the remaining allegations, appellant’s responses, the record, and our decision. Appellant’s responses, including the response to challenged findings in tabular form, offer record support and, in part as a result of the record support, are more persuasive. As illustrated by the foregoing example, we think it unreasonable to expect us to go through a similar exercise for all of the Navy’s allegations of factual error, the vast majority of which are not supported by citations to the record. Therefore, we do not specifically address those facts that have not been addressed (at least implicitly), *supra*. Instead, we merely affirm the findings. In not addressing all findings raised by the Navy, we are motivated in no small measure by the observation that many of the alleged errors are not material.¹⁵

As to the requested clarifications, we decline to offer explanations not already provided in the texts of this and the original opinion. We think we have explained ourselves adequately. In balancing interests, we must consider the need to bring

¹⁵ For example, the Navy asserts, without citing to the record, that we erred in referring to Mr. Paschal as a “counterbore” expert when he was an epoxy expert (gov’t mot. at 22). Mr. Paschal was presented and accepted as an expert in plastics engineering and failure analysis (tr. 4/91, 93). Since that is a mouthful, we identified him as follows: “James Paschal offered expert reports . . . and expert testimony on the counterbore leak path for the Navy. He focused on the epoxy in the counterbores.” *Northrop Grumman* at 162,242.

litigation to a close and the need to render a just decision on the basis of the relevant facts. *Minton v. NASD*, 336 F.3d 1373, 1379 (Fed. Cir. 2003). We think we not only analyzed the applicable law and relevant facts properly, but that we have balanced the equities of the parties. We also think a party seeking to have us reverse ourselves owes us specific record and case citations in greater quantity than the Navy's motion has provided.¹⁶ Accordingly, we affirm our earlier decision.

Dated: 6 June 2005

CARROLL C. DICUS, 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. 52178, 52784, 52785, 53699, Appeals of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

¹⁶ We do note a typographical error in *Northrop Grumman*, 04-2 BCA at 162,256. After the cite of *Luria Bros.*, we left out the word "not" after the word "do." The sentence should read "Here, we do not even have books and records."

Dated:

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