

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
DLT Solutions, Inc.) ASBCA Nos. 54812, 55362
)
Under Contract No. DAAB15-99-A-1002)

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MAJ Kris M. Gawin, JA
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OPINION BY ADMINISTRATIVE JUDGE JAMES

These consolidated appeals arise from the contracting officer's (CO) deemed denials of DLT Solutions, Inc.'s (DLT) 5 July 2004 and 19 December 2005 claims under Delivery Order No. 29 (DO 29) under the captioned U.S. Army blanket purchase agreement. DO 29 dated 28 February 2003 was a lease for Oracle software. Respondent terminated DO 29 for convenience on 30 March 2004. The claims alleged that respondent breached DO 29's "non-substitution" clause, misrepresented facts with respect to DO 29 and terminated DO 29 in bad faith. The 2005 claim reduced claimed damages from \$8,167,328 to \$6,978,328. The appeals were docketed, respectively, as ASBCA Nos. 54812 and 55362. In addition to disputing the merits of the claims, respondent moves to dismiss the appeals in whole or in part for lack of jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. § 607. After a five-day hearing, the parties submitted post hearing and reply briefs. The Board is to decide entitlement only (tr. 1/25-26).

FINDINGS OF FACT

Agency Needs and Expectations

1. On 27 May 1999 the Army Communications-Electronics Command Acquisition Center-Washington (CECOM-W) and Oracle entered into blanket purchase agreement No. DAAB15-99-A-1002 (BPA) for Oracle products (R4, tab 2 at 1, 11-16). CECOM-W was renamed the "Information Technology E. Commerce and Commercial Contracting Center" (ITEC4) at a later date (*see* R4, tab 48 at 1).

2. BPA Modification No. P00003 dated 25 May 2000 added DLT as a party and reseller of Oracle software and licenses under the terms and conditions of DLT's FSS Contract No. GS-35F-4543G (the DLT FSS contract) (R4, tab 45 at 1-2).

3. Option 2 of the DLT FSS contract stated in pertinent part:

Each ordering office placing a delivery order under the terms of this option intends to... extend the lease until completion of the Lease Term so long as the need of the ordering office for the product or functionally similar product continues to exist and funds are appropriated....

Option 2 also spelled out the government's liability pursuant to FAR 52.212-4, CONTRACT TERMS AND CONDITIONS—COMMERCIAL ITEMS in the event of a termination for convenience. (R4, tab 1 at 15-16)

4. The Department of the Navy's Office of Civilian Human Resources (OCHR) provides the Navy's human resources (HR) programs, policies and operations. The Department of Defense (DoD) Civilian Personnel Management Service (CPMS) manages the Defense Civilian Personnel Data System (DCPDS). (R4, tab 3 at 1)

5. "Modern" DCPDS, first deployed in November 1999, reached full operational capacity in September 2002. DCPDS managed civilian HR functions and employee records for DoD (including Navy) civilians, using version 10.7 Oracle Federal HR, which was commercial-off-the-shelf (COTS) software customized to support federal statutory and regulatory reporting requirements. (R4, tab 53 at 7-11) Modern DCPDS included Oracle Federal HR, Resumix, and Oracle Training Administration (OTA) applications (supp. R4, tab 61 at 9).

6. OCHR's October 2000 "functionality assessment" (FA) sought to identify more efficient, commercially available, web-based information technologies (IT) in order to reduce Navy HR manpower and costs and to overcome delayed deployment of the non-integrated, non-automated, DCPDS "Modern System." OCHR envisioned HR "re-engineering" processes to access integrated IT data of HR training, benefits, resumes, organizations and positions on a self-service basis by a single "portal" or "sign-on" via a "Navy-wide web infrastructure" of programs that interfaced the Modern DCPDS. (Supp. R4, tab 60 at 39, 59, tab 61 at 7-9; tr. 3/42-45, 254, 307, 5/12, 206) OCHR's functionality assessment led to the eventual award of DO 29 to DLT (finding 21).

7. The 17 October 2001 memorandum of Under Secretary of Defense David Chu to the Military Departments, among others, stated (ex. A-3 at 1; tr. 3/265):

As we approach full operating capability of the modern [DCPDS], the Department must ensure that it maintains an enterprise-wide civilian human resources (HR) system that is standardized across all of DoD....

In order to support attainment of these goals and objectives...DoD policy requires that any systems or support structure changes require...(CPMS) review and approval. DoD Components should not pursue any initiative to acquire or develop Component-unique automated civilian HR systems, modules or applications or change their approved support structure configuration, unless expressly approved by CPMS.

DoD memoranda have a “shelf life of 180 days” after which “they need to be replaced” by DoD Instructions (tr. 3/293). The Chu memorandum expired on or about 17 April 2002 (tr. 3/294), and on 30 December 2004 was included in the DoD Civilian Personnel Manual (supp. R4, tab 374).

8. Prior to the award of DO 29 on 28 February 2003, OCHR used 26 HR software applications, including the following 17 (supp. R4, tab 380 at 3-4):

<u>Application</u>	<u>Function(s)</u>
1 Autorif	Manage and select employees for reduction in force
2 Customer Support Unit (CSU)	Provide civilian personnel data to supervisors and managers
3 DCPDS	Enterprise system to manage civilian HR functions across DoD, including Navy
Resumix:	
4 Operator’s Desktop	Process resumes received
5 Recruiter’s Desktop	Create and maintain requisition information, search and track candidates’ (applicants’) progress and open positions and schedule interviews
6 Resumerge	Transfer resume from intake to Resumix database
7 Priority Placement Program (PPP)	OPM Priority Placement WebSite for recruitment
8 UIC Codes	Look up unit identification codes in DoD database

9	Accutrax	Track official personnel folders Cognos:
10	Access Administration	Administer system for query and reporting
11	Impromptu	Develop/execute reports
12	Powerplay	Develop/execute statistical summary reports
13	Web-Reports	Web-based front end for reports
14	SCD Calc	Calculate service computation date
15	GRB* Assist	Produce retirement estimates, salary averages, service computation dates, social security benefits, electronic forms
16	GRB EBIS	Administer employee benefits
17	GRB IVRS	Voice help desk for information on retirement and other benefits

* Government Retirement Benefits, Inc.

OCHR continued to use all of the foregoing applications through 31 March 2005 except for UIC Codes (eliminated December 2004) and GRB IVRS (eliminated August 2004). There were nine other applications which are not material to the dispute.

Negotiations, Funding and Representations

9. From November 2002 through February 2003 OCHR and Oracle discussed 13 Oracle software items, prices, terms and conditions to effectuate OCHR's major HR re-engineering goals, including the Navy's upgrade of HR software from the Oracle 10.7 version to the 11i version, "based on CPMS['] inability to deliver Oracle 11i upgrade" (supp. R4, tabs 81-82, 100 at 2, tab 112; tr. 1/174, 3/215; ex. A-79 at 10 of 12). On 3 December 2002 Oracle demonstrated to OCHR Oracle's E-Business Suite "solution" to meet the Navy's requirements (supp. R4, tab 72).

10. In December 2002 OCHR and Oracle understood that Oracle's COTS HR software was not within the "governance" of CPMS since it would not duplicate the customized HR software in DCPDS. OCHR did not submit the proposed HR software acquisition to CPMS because CPMS' approval procedures were not yet published officially. (Supp. R4, tabs 69-70, 73-74, 76; tr. 2/268-69, 3/87-90, 190-91, 194, 265, 268-69, 291, 4/31, 42, 59, 92)

11. Change No. 67 of 12 December 2002 to the Navy "Financial Management Policy Manual" stated that "DoD no longer recognizes...lease to ownership type of lease agreements" (supp. R4, tab 215 at 3-7, 3-8). Neither OCHR nor DLT specifically knew of Change No. 67 prior to 28 February 2003 (tr. 1/113-15, 3/335-37; supp. R4, tab 122).

12. Oracle's January 2003 summary of the license of 13 software items to OCHR stated: "The Navy [OCHR] perceives that they have already been licensed for HR and OTA and will be licensed for Self-Service [under DCPDS]. The Navy, however, desires to implement a stand-alone HR system...with additional functionality." (Supp. R4, tab 90 at 2, tab 92 at 2)

13. OCHR disclosed its funding types and amounts to Oracle and DLT (tr. 1/167-68, 3/171-76, 202, 245-56). Oracle and DLT knew that OCHR did not have sufficient "other procurement, Navy" (OP,N) funds to purchase Oracle software "up-front," and Oracle also knew that OCHR could not purchase, but could lease, such software with "operation and maintenance, Navy" funds (O&M,N) (supp. R4, tabs 89, 122, 166 at 2; tr. 1/99, 112, 117-18, 167, 4/71-73).

14. On 21 and 27 January 2003 DLT sent Oracle "lease to ownership" quotations on 13 Oracle software items with amounts and dates for down and final payments (supp. R4, tabs 93, 104 at 1572-74; tr. 1/113, 117-18) and in February 2003 negotiated contract type, price, type of funding and payment terms of an OCHR Oracle software contract with CO William Huber of the Naval Inventory Control Point, Mechanicsburg, PA (supp. R4, tabs 93, tab 108 at 3-5, tab 109 at 2; tr.1/98, 100-02, 112-13, 4/15-17).

15. In February 2003 OCHR investigated with Mr. Huber, Oracle and DLT the legality of using O&M,N funds to lease or to purchase the Oracle software (supp. R4, tabs 120-26, 128-29, 132, 166).

16. On 24 February 2003 Oracle contacted ITEC4's CO Robin Baldwin to handle the Navy contract under the Oracle BPA because CO Huber could not meet Oracle's schedule (supp. R4, tab 133; tr. 1/105-06, 4/154-55).

17. DLT submitted to OCHR quotation No. 13-2035 dated 25 February 2003 on a lease to ownership basis for the 13 Oracle software items DLT had quoted in January, with a \$2,880,000 down payment due upon acceptance and \$8,639,000 "Payment Due December 31, 2003 for Ownership of Software" (R4, tab 59). OCHR knew that DLT would need financing, if Oracle software payments were extended over time (tr. 3/80-81).

18. The 27 February 2003 sole source justification by OCHR's Director of HR Reengineering, Lawrence West, to select Oracle HR software stated (R4, tab 3 at 1, 4):

...The [Navy's] HR Reengineering strategy [envisioned an] enterprise architecture that would seamlessly integrate the technical requirements of multiple functional areas onto one...platform. The desire to utilize the Oracle, E-Business Suite of applications to realize this vision is predicated on Oracle's ability to interface with the Department's HR

transaction platform -- the...DCPDS. DCPDS is built on an Oracle HR platform so using a common platform significantly minimizes integration challenges....

19. Mr. West's 27 February 2003 memorandum regarding the DLT contract for Oracle software stated (supp. R4, tab 148 at 2; tr. 3/205):

Acquisition will require a combination of OPN and OMN monies as follows:

FY 03 OPN 2.9M (Licenses) FY 03 OMN 1.25M
(Consulting)

**FY04 OPN 9.04M (Licenses)....

**FY 04 OPN money is currently not available. Plan is to request DON [Navy Comptroller] to exchange ONM money for OPN money in FY03 and FY04 to purchase the required licenses.... The FY03 and FY04 license purchases are a package. Therefore, per Oracle, if OMN money cannot be changed, the FY03 2.9M license purchase will revert to lease status and licenses will no longer be owned by the [Navy].

Mr. West's foregoing statement was consistent with CO Baldwin's belief that if OCHR decided not to purchase the software licenses, it would have no duty to pay the \$8,639,000 payment on 31 December 2003, but would have to return that software to Oracle/DLT (tr. 3/169, 253, 321, 4/165).

20. CO Baldwin's 28 February 2003 e-mail to DLT's Adam McDowell and Oracle's Anne Ballengee mentioned that she felt bombarded and harassed by their incessant calls and e-mails, Mr. West told her he had the same impression and she had a long memory and the experience would not be forgotten (supp. R4, tabs 161, 178). Some time later, CO Baldwin met and hugged Mr. McDowell and Ms. Ballengee at an Army computer conference (tr. 4/175-77). We find no evidence that CO Baldwin or Mr. West had a specific intent to harm DLT.

Contract Terms

21. On 28 February 2003 ITEC4 issued DO 29 under the BPA to DLT for "Oracle Lease to Own Licenses" in the amount of \$2,880,000.00. DO 29 called for delivery of Oracle Application 11i CD packs containing the following items:

Item Description

1. Marketing Applications, Marketing Online
2. iSupport
3. TeleService Financial Applications
4. Balanced Scorecard
5. Human Resources (HR)
6. Self Service Human Resources
7. HR Intelligence
8. iRecruitment
9. Training Administration
10. Advanced Inbound
11. Scripting
12. Tutor for Application
13. Self Service Tutor for Applications

DO 29 further stated: “Down payment due upon acceptance \$2,880,000.00 Payment due by 12/31/03 for ownership of software \$8,639,000.00” and “Period of Performance Date of Award through 31 December 2003.” (R4, tab 4 at 1-3)

22. The 13 Oracle applications licensed under DO 29 performed the following functions (ex. E at 11-14; tr. 5/167, 169-70, 172, 174, 176):

<u>Description</u>	<u>Function(s)</u>
Marketing Application/ Marketing Online	Provide ability to develop marketing packages by powerpoint or chart presentation for electronic delivery
iSupport	Provides on-line service for Navy employees
TeleService Financial Appl'ns	Obtains voice-activated telemarketing help
Balanced Scorecard	Provides web-based statistical reports and assessment of Navy civilian data
Human Resources	Performs core HR personnel data processing functions of the Oracle 11i software applications to maintain personnel records and demographic data, document positions and pay grades and track EEOC complaints
Self Service Human Resources	Allows controlled access to and updating capability for employee's own HR records and information

HR Intelligence	Queries, reports and statistical analyses of applicants' and workforce data
iRecruitment	Attaches applicants' resumes to Resumix and Resurmerge software for selecting and filling vacancies
Training Administration	Administers training
Advanced Inbound	Allows employees to obtain general and personal retirement and other benefit information via touch-tone phone
Scripting	Provides ability for customers to develop personal, hands-on training tool on a regulatory form or application
Tutor for Application	" " " " " " "
Self Service Tutor for Appl'ns	" " " " " " "

23. By unilateral Modification No. 1, dated 7 March 2003, to DO 29 the CO added: "Lease terms and conditions are in accordance with Option 2 to ...Schedule GS-35F-4543G and Attachment A dated February 25, 2003...." (R4, tab 5 at 1-2).

24. DO 29 Attachment A, added by Modification No. 1, stated (R4, tab 5 at 3):

1. DEFINITIONS

Government: Navy OCHR....

2. PRICING

This is a Lease to Ownership for Software....

3. It is the intent of the Government by placing this Order to exercise each renewal option and to extend the lease until completion of the full Lease Term so long as the bona fide needs of the Government for the products or functionally similar products continues [sic] to exist. If (i) an Order expires prior to the expiration of the...full Lease Term... or (ii) the Government terminates the Order pursuant to a Termination for Convenience, the Government agrees not to replace the equipment and/or software leased under this Order with functionally similar equipment and/or software for a

period of one (1) year succeeding such expiration or termination.

The parties called the final sentence of ¶ 3 quoted above the “non-substitution clause.”

Contract Performance, Assignments

25. On 18 March 2003 Mr. Adam McDowell of DLT delivered to Mr. West a box of compact disks of Oracle software and licenses pursuant to DO 29 at the Tyson’s Corner, VA, shopping area. Mr. West signed a printed form, presented by Mr. McDowell, that stated:

FEDERAL SOFTWARE ACCEPTANCE CERTIFICATE

Madam/Sirs:

In accordance with the terms of Order Number 0029 dated 2/28/03 issued under contract No. DAAB15-99-A-1002 (the “Prime Contract”) between DLT Solutions, Inc. (Contractor), and the undersigned Information Technology E-Commerce and Commercial Contracting Center (User), the User hereby certifies and represents to the Contractor as follows:

1. All of the computer software, accessories and licenses (“Software”) defined in the Prime Contract have been delivered and installed in accordance with the Prime Contract, and have been accepted on the date indicated below.

2. User has conducted all inspection and/or testing of the software required by the Prime Contract or, otherwise, deemed necessary or appropriate by User, and User hereby acknowledges that User accepts the Software for all purposes.

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4. Contractor is hereby authorized to invoice User for the Down Payment of \$2,880,000.00 set forth in the Prime Contract for the lease term, commencing as of the acceptance date set forth below.

5. User acknowledges that the Software and related services set forth in the above Delivery Order are considered essential for the daily operations of [ITEC4] located at the below-named Software location.

USER: Signature: Lawrence West
Name & Title: Lawrence West, DIR, HR
Reengineering

Software Location: [ITEC4], 2461 Eisenhower Avenue,
Hoffman I, Room 284, Alexandria, VA 22331-1700

SOFTWARE ACCEPTANCE DATE: 18 MARCH, 2003

(R4, tab 6; tr. 1/181-83, 265, 3/76-77, 216) We find that since Mr. West signed this certificate at the same time he received the DLT CDs, DLT could not reasonably understand that the disks had been installed and inspected as of that date.

26. On 18 March 2003 DLT invoiced respondent for the \$2,880,000 down payment under DO 29 (R4, tab 7) and executed: (a) a "Purchase Order" that assigned the "payment of \$8,639,000.00 due on 12/31/03" under DO 29 to FSM Leasing, Inc. (FSM), with the \$2,880,000 down payment to be remitted to DLT, (b) a "Consent to Assignment" of DO 29 payments from FSM to Citizens Leasing Corp. (Citizens) and (c) an "Instrument of Assignment" of all payments from ITEC4 accruing under DO 29 to Citizens (supp. R4, tab 181 at 2963, 2968-69).

27. According to Marybeth Corriente, a loan officer of Citizens, on 20 or 21 March 2003 OCHR's Mr. West told her that the DO 29 software "is not yet fully implemented, but [he] is confident that it will be integrated...based on the initial implementation" (R4, tab 33 at 6, 10). Mr. West's 21 March 2003 e-mail to Ms. Corriente about the DO 29 transaction included the following questions and answers (R4, tab 36 at 2):

Is the software installed? If not, what is the implementation schedule?

Answer: The software has not been installed yet. We conducted an implementation strategy session last week with final deliverables due by close of business, March 21, 2003. Our plan is to hire a system integrator that will assist the Navy in our requirements refinement and implementation or [sic] the Oracle E-Business suite.

Is the software performing to expectations?

Answer: N/A....

Is there any reason the software would not be needed during the lease term (term is through December 2003)?

Answer: No. This software is slated to become the core of the HR functional support for the Department of Navy....

Ms. Corriente relied on Mr. West's foregoing representations for purposes of financing DLT's second contract payment (tr. 2/41, 100-01). We find that none of Mr. West's foregoing statements were untrue.

28. On 25 March 2003 Citizens notified ITEC4 of DLT's assignment of DO 29 payments and asked that payments to become due be made to Citizens Bank (R4, tab 9 at 1-2, tab 38). On 29 March 2003 FSM re-assigned to Citizens the right to receive the DO 29 \$8,639,000 payment due on 31 December 2003 (R4, tab 41 at 1).

29. Ms. Corriente's 29 March 2003 e-mail to Mr. West posed a "last question": "The acceptance certificate that you executed states that the equipment is essential for the operations of [ITEC4]. Can I assume that is a typo and that the software is essential for Navy, OCHR?" On 1 April 2003 Mr. West replied to Ms. Corriente, "Your assumption is absolutely correct" (R4, tab 37; tr. 1/288-89, 291-93).

30. On 1 April 2003 CO Baldwin unilaterally issued DO 29 Modification No. 3 (Mod. 3), changing the payee's name and address to Citizens Bank (R4, tab 10). There is no allegation or evidence that respondent failed to comply with Mod. 3.

Potential Anti-Deficiency Act Violation

31. The \$8,639,000 in OP,N funds OCHR needed for the 31 December 2003 payment "for ownership of software" under DO 29 were "unfunded" (supp. R4, tab 203; tr. 3/357-58). On 7 and 11 April 2003 OCHR sought Navy Financial Management Division's (AAUSN) authorization to offset \$8,639,000 of OCHR's fiscal year 2003 O&M,N funds for OP,N funds (supp. R4, tabs 203, 217; tr. 3/252-54, 5/13).

32. On 11 April 2003, AAUSN's David Nugent told OCHR that he did not understand DO 29's term "down payment," procurement appropriation (OP,N) has "full funding characteristics," DO 29 gave the government no "option" to pay the \$8.6 million balance due 31 December 2003, OCHR "has been obligated for this unbudgeted OPN balance" (supp. R4, tab 214) and he was concerned about a potential Anti-Deficiency Act

(ADA) violation (tr. 5/83, 92). On 17 April 2003 Mr. Nugent notified the Navy Comptroller of a Potential ADA violation on DO 29 (tr. 5/31, 34).

33. From May 2003 through 7 August 2003 AAUSN, OCHR, COs Baldwin and Roddy, Oracle, DLT and Citizens discussed how to resolve the potential ADA violation issue, including convenience termination, if the parties did not agree on a contract modification, and Mr. West continued to assure DLT and Citizens that OCHR still wanted the DO 29 software (R4, tab 35; supp. R4, tabs 236-37, 240, 244-46, 248-54, 256-57, 261-65, 267-68, 270-72, 275-77; ex. A-73; tr. 1/206, 209, 140, 3/236-37, 4/112-13, 5/21, 31, 54, 90). The Navy did not determine that DO 29 violated the ADA (tr. 5/92), and did not mention to DLT any concern about whether OCHR needed to obtain CPMS approval of Oracle 11i software licenses (app. ex. A-72 at 5 of 8, ex. A-79 at 10-11 of 12).

34. On 11 July 2003 Charles Schefer, an OCHR contractor, sent to Kathleen Ott, then Deputy Director of OCHR Reengineering, a draft “HR Reengineering Program Strategy” briefing that stated, *inter alia* (ex. A-79 at 3-4, 11 of 12; tr. 3/264, 279-81):

- OCHR does not have the authority to implement self-service applications envisioned in the Functionality Assessment (FA)

....

- Maturity of IT infrastructure does not support technology-drive HR Reengineering approach

....

- Civilian Personnel Management Service (CPMS)
 - ◆ Mandated HR platforms: Defense Civilian Personnel Data System (Oracle HR)....

35. Mr. Schefer’s statements were not facts but rather his opinions and assumptions with which Mr. West and Ms. Ott did not concur because they thought that the challenges of lack of OCHR authority or CPMS governance could be overcome and would not impact or preclude installation or implementation of DO 29 software (tr. 3/230-31, 282-83; ex. A-72 at 5 of 8).

Upgrade of Modern DCPDS

36. From 18 July to 3 August 2003 Oracle upgraded CPMS’ Oracle Federal HR version 10.7, client-based, to version 11i, web-based. At that point, Federal HR version

11i was available to OCHR through Modern DCPDS. (R4, tab 53 at 41; supp. R4, tab 273 at 9 of 11; tr. 5/178-79)

37. CPMS stated that the Oracle 11i upgrade provided “improved functionality” of Modern DCPDS (R4, tab 53 at 41). Brooks L. Hilliard, appellant’s expert in evaluating the functionality of software, opined that the 11i upgrade “has considerable...functionality that 10.7 doesn’t have.” It has “increased functionality” and “major new functionality.” He explained that the Oracle 11i upgrade made major improvements to internet usability, self-service functionality, the integration of various software modules and the addition of new modules. (Tr. 2/185, 188, 223-24, 245) Diane J. Bergeron, respondent’s expert in functional comparison of HR software, opined that functionality meant what a product does, each of the DO 29 items or modules was a “functionality” and the 11i upgrade made no functionality changes, but the 11i OTA software, if implemented, would have changed DCPDS’ functionality (tr. 5/143, 179, 184-85, 209). By the preponderance of evidence, we find that the Oracle Federal HR software upgrade from version 10.7 to version 11i changed its functionality.

Modification No. 5

38. Bilateral Modification No. 5 (Mod. 5) to DO 29, dated 7 August 2003, converted DO 29 to a “Step Lease (Operating Lease),” modified the appropriation data “to reflect the correct funding for an operating lease,” added Oracle software items 14-17 -- Database Enterprise Edition (9iDB), Internet Application Server (9iAS-EE), Real Application Cluster and Balanced Scorecard -- and specified six lease payments (two base and four option) totaling \$16,178,328 (R4, tab 12; supp. R4, tab 324 at 4).

39. On 12 August 2003 Mr. West advised Ms. Corriente of DO 29’s Mod. 5 restructuring (R4, tab 32). She thought Mr. West said “that the software is implemented and working smoothly,” emphasized that the restructure was due to a “color of money” issue and said that OCHR intended “to acquire a perpetual license in the software.” Citizens decided to finance Mod. 5 based on such advice and Ms. Corriente’s assumption that the software was still essential (tr. 2/5-9, 11). Mr. West denied telling Ms. Corriente that the DO 29 software was installed or implemented (tr. 3/168-69), and we so find.

Software Implementation Efforts

40. On 13 August 2003 OCHR issued DLT a Statement of Work (SOW) to “install and configure Oracle eBusiness components,” most of which were among the Oracle items leased under DO 29, as amended (supp. R4, tab 278 at 2-3).

41. On 25 August and in September 2003 DLT/Oracle submitted to OCHR proposals to install, configure, test and interface the Oracle 11i HR and other applications (supp. R4, tabs 282, 286, 293-95, 297-98 at 20, 41-42).

42. On 29 September 2003, ITEC4 exercised the First Option to Renew Lease for the period 1 October 2003 through 30 September 2004, subject to availability of funds. On 12 October 2003, ITEC4 removed that restriction, increasing the total amount of DO 29 by \$3,500,000 to \$9,200,000. (R4, tabs 13, 14)

43. In October 2003 Mr. West left OCHR employment (tr. 3/237).

44. On 9 October 2003 OCHR told CPMS that OCHR entered into the lease to “assess whether Oracle would meet our needs while keeping within the mandated CPMS platform,” it was reassessing its implementation approach based on CPMS and Navy initiatives, and it proposed to implement the DO 29 OTA “using Marine Corps as a pilot” (supp. R4, tab 308).

45. In a draft presentation sent to Ms. Ott and Debra Edmonds, OCHR’s Director in December 2003, Mr. Schefer listed various HR functions and compared the “Oracle eBusiness Tool,” *i.e.*, the relevant DO 29 software item, with an “Alternative Tool” for each function. One group of DO 29 items, “where improvements are required, but OCHR does not have governing authority to implement solution,” included item 5, HR; item 6, Self-Service, item 8, iRecruitment and item 9, OTA. Alternative Tools Mr. Schefer listed for that group were “DCPDS (Upgrade)” and “Integrated DoD Solution (Resumix-based).” He recommended that OCHR not install the DO 29 software, and separately acquire the best tools for functions that could be performed by items such as iSupport and Balanced Scorecard. (Supp. R4, tab 317 at 5, tab 324) As of 23 December 2003, OCHR had not decided whether or not to proceed with the foregoing recommendations (supp. R4, tab 326 at 1).

Termination for Convenience

46. On 11 March 2004, when CPMS delayed approval of OCHR’s OTA pilot implementation, OCHR requested CO Baldwin to terminate DO 29 (supp. R4, tab 341).

47. On 22 March 2004 CO Baldwin issued to DTL a Notice of Termination for the Convenience of the Government of DO 29 effective 31 March 2004 (R4, tab 15).

48. We find that OCHR terminated DO 29 because it had an inadequate hardware platform on which to install and implement the DO 29 software, CPMS declined to authorize OCHR to interface the DO 29 software with DCPDS, CPMS planned to expand its Oracle Self-Service HR and OTA software whose capability OCHR could enhance (“leverage”) to achieve its FA goals and --

[b]ased on coordination with CPMS, it was determined that the Staffing, Training and Processing features of the Oracle

HR application could not be fully leveraged due to current and future CPMS initiatives that would overlap those efforts. Although the licenses could be used to accomplish non-core functions over which Navy does have governance, that solution was not deemed cost effective.

(Supp. R4, tabs 332, 355; tr. 2/283, 3/59-60, 4/212-13, 257)

Claims, Modifications and Appeals

49. On 5 July 2004 DLT submitted to the CO an \$8,167,328 certified claim alleging that it had breached DO 29's "non-substitution clause" by replacing DO 29 software with functionally equivalent DCPDS software and its implied covenant of good faith and fair dealing by misrepresenting facts, in connection with the March 2003 assignment of payments by DLT to Citizens and Mod. 5, and the replacement of DO 29 software with CPMS software, with respect to the essential nature, status of installation and operation, and the government's use and intended use, of the DO 29 software. DLT did not allege that the convenience termination was done in bad faith, or seek rescission or reformation of Mod. 5. (R4, tab 16)

50. Bilateral Modification No. 8 to DO 29, dated 28 July 2004, deleted software items 14-17 (added by Mod. 5) for a \$479,150 price decrease from \$9,200,000 to \$8,720,850, since DoD had Oracle software licenses for such items (R4, tab 17; tr. 4/207).

51. On 3 November 2004: (a) CO Baldwin returned to DLT 140 compact disks and software documentation relating to DO 29, whose receipt, signed by CO Baldwin and Mr. McDowell, stated that the DO 29 "software was never installed" (R4, tab 34), (b) DLT appealed from the CO's failure to issue a decision on DLT's 5 July 2004, \$8,167,328 claim (R4, tab 19), which the Board docketed as ASBCA No. 54812 and (c) CO Baldwin issued a final decision denying DLT's July 2004 claim (R4, tab 20).

52. In DO 29 bilateral Modification No. 9 (Mod. 9), of 19 November 2004, DLT released respondent with respect to the convenience termination settlement of \$1,283,075 and reserved its claims relating to the facts and circumstances of DO 29 (R4, tab 21).

53. On 16 June and 19 December 2005, DLT submitted to the CO a revised claim under DO 29 in the amount of \$6,978,328, which added allegations of misrepresentation, deceit and fraud in the inducement of the assignment to Citizens and of Mod. 5 and of bad faith termination for convenience (R4, tabs 22, 24).

54. The CO refused to issue a decision on DLT's revised claim, because it changed no operative facts (R4, tabs 23, 25). On 21 February 2006 DLT appealed from

such failure to decide its revised claim. The Board docketed that appeal as ASBCA No. 55362.

Expert Investigations and Opinions

55. In April 2005 DLT retained Mr. Hilliard to compare the functionality of the DO 29 software and OCHR's software then in use (tr. 2/115, 178). Appellant offered, and the Board accepted, Mr. Hilliard as an expert in the examination of software and the determination and evaluation of the functionality of software and whether two different software applications are functionally similar (tr. 2/128-29, 132).

56. On 5 May 2005 Mr. Hilliard attended a demonstration at the Washington Navy Yard, where respondent gave him a list of two dozen software applications in use by OCHR in May 2005 (tr. 2/116, 134, 160). He was shown the beginning screens, but little or no functionality, of most of those software applications (tr. 2/134-36).

57. In June-August 2005 Mr. Hilliard had an Oracle installer install, and an Oracle trainer demonstrate to Mr. Hilliard fifteen DO 29 COTS software applications and, based on what Mr. Hilliard had gleaned from product manuals and website data for the OCHR software, show him the functionality of the DO 29 applications that corresponded to OCHR software (tr. 2/142-43, 218-20; ex. A-E at 23, item 49).

58. Based on his review of 50 items of documents and material, including OCHR's software in use on 5 May 2005, Mr. Hilliard opined (ex. E at 3, 22-23):

Opinion #1: The software used by OCHR to handle its [HR] data processing during the one-year period after termination of the DLT...contract, is substantially similar to the Oracle 11i software acquired by OCHR under that contract.

Opinion #2: Several applications included as part of the Oracle 11i software are identical or nearly identical to the software used by OCHR during the one-year period after termination of the DLT...contract, including applications to perform database management, job applicant services and [HR] management. These applications comprise the crucial core of the Oracle 11i HRMS system covered by the DLT...contract and are, by definition, substantially similar to the software in use by OCHR during the one-year period after termination of the DLT...contract.

Opinion #3: Nearly all of the software applications used by OCHR during the one-year period after termination of the DLT...contract that are not identical to the applications included in the Oracle 11i software operate in a manner that is substantially similar to the Oracle 11i software.

59. Mr. Hilliard also opined that: (a) “One software application is substantially similar to another software application if both applications...perform the same or very nearly the same functions, ...are usable by personnel with the same qualifications and training and ... have comparable ‘ease of use’” (ex. E at 8) and “substantially similar” was the same as “functionally similar” (tr. 2/166-67, 178); (b) “functionality” is the way software operates, how it performs its functions (tr. 2/114); (c) the functionality of the DO 29 software modules must be determined as delivered to OCHR “out-of-the-box” (tr. 2/150); (d) DO 29 item 5 (HR), the Navy’s “core of the HR functional support,” once implemented, and DO 29 item 9 (OTA) would be functionally similar to DCPDS Oracle HR software (ex. E at 9; tr. 2/173-74, 228-31); (e) DO 29 software cannot function without Oracle 9i Database and Applications Server modules (tr. 2/192-97); (f) an application’s customization is not directly or necessarily related to its functionality (tr. 2/235-36) and (g) DO 29 Oracle 9i/11i software performs functions substantially similar to the functions of the following OCHR software during DO 29’s non-substitution period (ex. E at 8 n.10, 11-15; tr. 2/231, 260-61, as tabulated by the Board):

OCHR software	DO 29 software, Item #
iComplaints GRB Assist SCD Calc HR 11i (DCPDS)	HR, # 5 w/user set-up w/user set-up
EBIS MyPay Self-Service (HR) 11i (DCPDS)	Self-Service HR, # 6
Resumix Resumerge	iRecruitment, # 8
CSU (DCPDS) Cognos	HR Intelligence, # 7
UIC Codes Accutrax	9i Database, # 14
OTA (DCPDS)	Training Administration, #9
IVRS	Advanced Inbound, # 10
Autorif PPP	iRecruitment, # 8 + HR Intelligence + 9i Database, # 14 w/user set-up

60. Ms. Diane J. Bergeron worked in OCHR's Regional Operations Department, Data Management Branch and Information Systems Division, was currently its Director, HR Systems Division and is experienced in Oracle software applications (tr. 5/106-11). Respondent offered, and the Board accepted, Ms. Bergeron as an expert in federal HR information technology and systems and functional comparison of HR software (tr. 5/102, 115). Ms. Bergeron did not install the DO 29 software, but did use the DCPDS software, for her analysis (tr. 5/127-30).

61. Based on her experience, expertise, review of Mr. Hilliard's 50 documents (finding 58) and discussions with DCPDS program managers, Ms. Bergeron opined that: (a) prior to DO 29, 28 February 2003, OCHR provided for its HR/IT requirements by 26 software applications (supp R4, tab 380 at 3-4 (see finding 8); tr. 5/214-15); (b) each DO 29 software module represents a different function (tr. 5/209); (c) from 31 March 2004 through 31 March 2005 OCHR continued to use those same 26 software applications, except for IVRS, which was eliminated in August 2004, UIC Codes which was eliminated in December 2004, and two other applications not material to the dispute (supp. R4, tab 380 at 3-4); (d) from 1 April 2004 through 31 March 2005 DCPDS had a customized version of Oracle HR 11i software available to OCHR on an individual module basis, but DCPDS' Oracle Marketing Application/Marketing Online, HR Self Service, iSupport and iComplaints modules were not available in that time period; (e) CPMS customized the Oracle Federal HR 11i module to conform to federal and DoD regulatory and business process conventions, enabling OCHR to process 23% of Navy civilian employees it otherwise could not have processed, but respondent did not show that the customized Oracle Federal HR 11i application performed any function different from the DO 29 HR 11i application (supp. R4, tab 380 at 6, 9-12; tr. 5/117-18, 121, 124, 132, 143-44, 163, 166-67, 209); and (f) DO 29's Oracle 11i COTS software products would require significant modifications, programming, coding and customization to meet the functional and regulatory requirements found in DCPDS (supp. R4, tab 380 at 12).

62. Ms. Bergeron disagreed with Mr. Hilliard's: (a) definition of "substantially similar" software applications because such applications cannot be "functionally similar" unless they met OCHR's envisioned end product--an integrated system with single sign-on capability (supp. R4, tab 380 at 8-11), and (b) conclusion that OCHR's Accutrax, Resumix, Resumerge, Autorif and Priority Placement Program applications were substantially similar to DO 29 software items due to differences in their functionality and customization, though she agreed that Resumix and Resumerge were functionally similar to the Oracle iRecruitment application with a "CHART front-end intake module" (supp. R4, tab 380 at 13; tr. 5/177-78).

63. We find that the 13 Oracle software items under DO 29 were not sufficient by themselves to achieve OCHR's re-engineering objective to enable Navy employees and

managers to access an integrated IT data base of HR training, benefits, resumes, organizations and positions on a self-service basis by a single portal to a Navy-wide web of programs that would interface with a “Modern DCPDS.” The successful performance of the separate task of installing, customizing, developing, integrating and interfacing those Oracle items (or modules or applications) with DCPDS, while overcoming many existing DCPDS deficiencies, was necessary to achieve OCHR’s objective. DO 29 did not include that separate task, for which OCHR foresaw the need for approximately \$7 to \$10 million in added funding (R4, tab 4; tr. 4/131-32, 5/155-56).

DECISION

Appellant rephrased its claims -- that respondent breached DO 29’s non-substitution clause, misrepresented facts with respect to DO 29 and Mod. 5 and terminated DO 29 in bad faith -- in the following counts of its complaints in the captioned appeals, which we analyze and decide hereafter:

- I – Breach of Contract (Non-Substitution Clause)
- II – Breach of Implied Covenant of Good Faith and Fair Dealing
- III – Misrepresentation, Deceit and Fraud in the Inducement Relating to the Assignment Agreement
- IV – Misrepresentation, Deceit and Fraud in the Inducement Relating to Modification 5
- V – Bad Faith Termination for Convenience

I. JURISDICTIONAL ISSUES

A. Counts I-V. We first address respondent’s argument that DLT’s claims and appeals must be dismissed in their entirety because DLT cannot pass through a claim of Citizens Bank, a second tier assignee, which cannot itself prosecute a claim against the government, and since DLT has no financial liability to Citizens, the claim is barred by the “*Severin* doctrine” (gov’t br. at 89-96).

There is no dispute that Citizens was not a party to DO 29 and is not a party to these appeals. However, it does not follow that the appeals must be dismissed in their entirety. The facts that Citizens financed parts of the DO 29 payments following the initial \$2,880,000 down payment under an assignment permitted under 41 U.S.C. § 15 (findings 26, 28, 30) and that any recovery DLT may receive may be payable to Citizens, do not bar DLT’s right to maintain these appeals. *See Keco Industries, Inc.*, 157 Ct. Cl. 691, 693-94 (1962) (contractor that assigned contract proceeds to SBA pursuant to 41 U.S.C. § 15, and paid assignee \$19,992.934 previously found due by ASBCA, is proper party entitled to sue for any additional amount that may be due under the contract, provided that any such recovery is applied to payment of balance due to the assignee).

The *Severin* doctrine limits the government's exposure to pass-through suits to situations in which a prime contractor is liable for a subcontractor's costs. *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370 (Fed. Cir. 1999). Respondent has not cited, and the Board's research has not uncovered, any legal authority that applied the *Severin* doctrine to an assignee financing institution such as Citizens (finding 26), whose assignment of contract payments was recognized by the CO (findings 28, 30) and which assignee provided no goods or services to DLT, the prime contractor. Respondent's *Severin* argument is inapplicable.

B. Counts III-IV. Respondent argues that DLT's allegations of misrepresentation, deceit and fraud in the inducement in Counts III and IV are torts which this Board has no jurisdiction to entertain (gov't br. at 125-27).

Count III alleged that respondent's misrepresentations about the implementation and use of the DO 29 software made by Mr. West on 18 and 21 March 2003 induced Citizens to provide financing to DLT and concluded: "The execution of the Assignment Agreement was to the detriment of Citizens" (compl. ¶ 77). The Assignment Agreement was the agreement between FSM and Citizens dated 29 March 2003 pursuant to which FSM re-assigned to Citizens the right to receive the payment due on 31 December 2003 (compl. ¶ 28; finding 28).

Neither respondent nor DLT was a party to the Assignment Agreement. Assuming solely for purposes of analyzing jurisdiction that there were misrepresentations, respondent's role was at most that of a third-party tortfeasor. *See* PROSSER AND KEETON, THE LAW OF TORTS, § 105 at 727 (5th ed. 1984). Accordingly, jurisdiction does not arise under the CDA. We strike Count III.

Count IV alleged that Mr. West's representations made on 18 and 21 March and 12 August 2003 were not true when made; respondent intentionally or negligently failed to inform DLT and Citizens of facts material in the context of Mod. 5; Mr. West's foregoing representations induced DLT to execute and Citizens to consent to Mod. 5; DLT and Citizens relied on Mr. West's foregoing representations in executing and consenting to Mod. 5; execution of Mod. 5 was to the detriment of DLT because respondent would have been required to pay the full contract price on termination of DO 29 for convenience if Mod. 5 had not been executed; and that DLT is entitled to a rescission or reformation of Modification 5 as a result of the government's misrepresentations or omissions (compl. ¶ 80-85).

Insofar as Count IV encompasses Citizens, we strike it for the reasons analyzed above with respect to Count III. Insofar as Count IV encompasses DLT, the issue is whether the claim alleges a tortious breach of contract or an independent tort. DLT relies primarily upon representations made to the third party financier and does not seek breach damages. We conclude that the gravamen of Count IV is deceitful inducement.

Therefore, Count IV sounds in tort and must be stricken. *See National Gypsum Co.*, ASBCA Nos. 53259, 53568, 03-1 BCA ¶ 32,054 at 158,455 (fraudulent inducement is a tort claim over which ASBCA lacks jurisdiction).

II. THE MERITS

Count I. DO 29's non-substitution clause provided that if the government terminated that order for its convenience, "the Government agrees not to replace the equipment and/or software leased under this Order with functionally similar equipment and/or software for a period of one (1) year succeeding such expiration or termination" (finding 24). DO 29 defined "the Government" as OCHR. The CO terminated DO 29 for convenience effective 31 March 2004, establishing a one-year period from 1 April 2004 to 31 March 2005. (Findings 46, 47)

Appellant argues that the non-substitution clause requires one to compare the functions of the DO 29 software and the software available to OCHR during the non-substitution period. Based on such comparison, several DO 29 Oracle software items were functionally similar to software applications in OCHR's HR database from 1 April 2004 through 31 March 2005. Thus, OCHR breached the "non-substitution clause" in DO 29 and is liable for expectation damages. (App. br. at 41-42)

Respondent argues, *inter alia*, that (1) it did not use any DO 29 software, and, therefore, could not have replaced it (gov't br. at 102-04); (2) OCHR used the same software applications during the prohibition period that it used on 31 March 2004 (immediately before that period) and, therefore, could not have replaced any applications (gov't br. at 104-05); and (3) during the non-substitution period OCHR did not implement or use software functionally similar to the leased DO 29 software, namely, self-service software that could seamlessly integrate into a single platform and interface with the DCPDS (gov't br. at 106-07).

Decisions interpreting non-substitution clauses include *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43 (1984), and *Northrop Grumman Computing Systems, Inc.*, GSBCA No. 16367, 06-2 BCA ¶ 33,324. *Municipal Leasing* involved a non-replacement clause similar to DO 29's non-substitution clause that provided: "The Air Force shall not replace the leased equipment with functionally similar equipment during the term of this contract." The Court held that the Air Force's actions not to exercise the second lease option and to adopt an alternative it had considered but rejected before contracting with Municipal, namely, to obtain replacement chips for the malfunctioning Hazeltine terminals previously in use, essentially replaced the Municipal equipment with repaired Hazeltine equipment and contravened the non-replacement clause. 7 Cl. Ct at 47.

In *Northrop*, GSA's Delivery Order for a storage area network (SAN) was amended to state:

The Government warrants that the use of, requirement for, and maintenance of the Asset(s) are essential to the Government's [sic] proper, efficient and economic operation for the full 3-year term of the lease.... The Government agrees not to replace any such non-renewed equipment or otherwise terminate the equipment (through non-appropriation, termination for convenience or otherwise) with functionally similar equipment or services.

The Board denied GSA's motion for summary judgment, holding that although GSA had a *bona fide*, continuing need for a functionally similar SAM, it did not use its best efforts to extend the lease, but instead substituted an existing, upgraded Clarion equipment for the Northrop SAN in violation of the above-quoted non-replacement clause. 06-2 BCA at 165,267. *Municipal* and *Northrop* are not controlling precedents at the Board. Nevertheless, we find them persuasive, and supportive of the Board's conclusions below.

(1) Respondent argues that "the software being 'replaced' must have been previously used" and, according to the Merriam-Webster Dictionary, the term "replace" "implies a filling of a place once occupied by something lost, destroyed, or no longer usable or adequate" (gov't br. at 102-03). The foregoing definition does not support respondent's proposition that, to be replaced, an item must have been previously used.

We do not agree that OCHR never used the DO 29 software. OCHR used the DO 29 software by analyzing and evaluating whether it could install and implement such software so as to interface with DCPDS HR software, a key element of OCHR's original vision (findings 6, 40-42, 44-45). Moreover, even if OCHR did not use the software, the non-substitution clause was part of the bargained-for consideration for DO 29. Respondent effectively interprets the DO 29 non-substitution clause to say that the government shall not replace the software leased thereunder with functionally similar software for a period of one year after convenience termination, *only if the government installs and implements the DO 29 software*. We disagree with this unreasonable interpretation of the DO 29 non-substitution clause to allow the government to avoid its non-substitution duty by the artifice of failing to open the product's package. DO 29 did not so provide, expressly or by reasonable inference.

(2) Respondent argues that throughout the non-substitution period, OCHR used the same 26 software applications that it used immediately before that period and, therefore, could not have replaced any applications. Oracle Federal HR, version 10.7, available to OCHR before 18 July 2003, was upgraded to version 11i from 18 July to 3 August 2003, which upgrade changed the functionality of the Oracle Federal HR 11i software (findings 36-37). From the time of the upgrade through 31 March 2005 the

Oracle HR 11i software (DO 29 item 5), “the core of the HR functional support” for the Navy and OTA 11i (DO 29, item 9), were both functionally similar to the Oracle HR software in DCPDS (finding 59(d)). Although respondent asserted that the Oracle Federal HR 11i software application was “customized” to conform to federal and DoD business process conventions and thus was not functionally similar to the DO 29 HR application, there was no evidence that the customized Oracle Federal HR 11i application performed any function different from the DO 29 HR 11i application (finding 61(e)).

We reject respondent’s argument that OCHR’s use of DCPDS Oracle Federal HR 10.7 version software before July 2003, and the upgraded Federal HR 11i version after July 2003, did not constitute a replacement of DO 29 software and hence could not violate the non-substitution clause of DO 29. The *Municipal* and *Northrop* analogies support our conclusion: the repair of pre-existing computers violated the non-replacement clause in *Municipal* and the substitution of upgraded, existing equipment violated the non-replacement clause in *Northrop*.

(3) To determine the extent to which the software applications used by OCHR from 1 April 2004 through 31 March 2005 were “functionally similar” in accordance with DO 29’s non-substitution clause (finding 24) to the Oracle software applications leased in DO 29, we must compare the functionality of each of the Oracle products leased under DO 29 with the functionality of OCHR’s software applications used during such period. The key criterion in the non-substitution clause is “functionally similar,” not identical.

Appellant’s expert opined that 18 software applications used by OCHR during the non-substitution period (iComplaints, GRB Assist, SCD Calc, HR 11i (DCPDS), EBIS, MyPay, Self-Service HR 11i (DCPDS), Resumix, Resumerge, CSU, Cognos, UIC Codes, Accutrax, OTA (DCPDS), IVRS, Autorif, PPP and Applications Server (DCPDS)) were functionally similar to DO 29 items HR (# 5), Self-Service HR (# 6), HR Intelligence (# 7), iRecruitment (# 8), Training Administration (# 9), Advanced Inbound (# 10), 9i Database (# 14) and 9i Internet Applications Server (# 15) (*see* finding 59(g)).

As to these 18 items, respondent’s expert argues that OCHR’s Accutrax, Resumix, Resumerge, Autorif and PPP applications were not substantially similar to any DO 29 software items due to differences in functionality and customization (*see* finding 62(b)); that DO 29’s iComplaints and HR Self Service were not available to OCHR as of 31 March 2005 and that DO 29’s Oracle 11i COTS software would require significant modifications, programming, coding and customization to meet DCPDS functional and regulatory requirements (*see* finding 61(d),(f)).

Based on Mr. Hilliard’s comparison, five of the applications (UIC Codes, Accutrax, Autorif, PPP and 9i Applications Server) available to OCHR are functionally similar to DO 29 items 14 and 15. Items 14 and 15 were eliminated from DO 29 by Mod.

8 (finding 50), so we exclude the foregoing five applications from consideration. Moreover, we have found that the DO 29 HR Self Service and iComplaints applications were not available to OCHR via DCPDS from 1 April 2004 through 31 March 2005 (finding 61(d)). Accordingly, we exclude from consideration the four OCHR applications which relate to them: EBIS, MyPay, Self-Service HR 11i (DCPDS), and iComplaint.

With respect to respondent's remaining contentions as to the 18 items, respondent's expert did not identify differences in functionality and customization of OCHR's Resumix and Resumerge applications to support respondent's conclusion that they were not substantially similar to DO 29 software applications (finding 62(b)). The significant modifications, programming, coding and customization to meet DCPDS functional and regulatory requirements pertain not to the DO 29 "out-of-the-box" applications but rather to such applications if they had been installed and implemented to interface with DCPDS (finding 59(c)). Respondent's criterion of whether the DO 29 software or OCHR's software in use from 1 April 2004 to 31 March 2005 satisfied OCHR's goal of self-service software that would seamlessly integrate into a single platform and interface with the DCPDS is immaterial because that goal required the successful performance of a separate task of installing, customizing, developing and integrating those Oracle applications to interface with DCPDS and such separate task was not specified by DO 29 (finding 63).

As described by the expert witnesses, the functions performed by OCHR's software used from July 2003 through 31 March 2005 (finding 8) and the functions performed by the Oracle 11i software licensed under DO 29 (findings 22, 55, 57, 59(g)), were similar in part. We hold that the following OCHR applications used during the non-substitution period, namely, HR 11i (DCPDS), GRB Assist, SCD Calc, Resumix, Resumerge, CSU, Cognos, OTA 11i (DCPDS) and IVRS, were functionally similar to DO 29 applications HR (# 5), HR Intelligence (# 7), iRecruitment (# 8), Training Administration (# 9) and Advanced Inbound (# 10). We have considered respondent's other arguments and do not find them persuasive. We sustain the appeal with respect to Count I to the foregoing extent.

Count II sought damages on behalf of DLT for respondent's alleged breach of the implied covenant of good faith and fair dealing. DLT argues that respondent misrepresented, and failed to disclose, material facts, namely, an intent, prior to issuance of Mod. 5, to terminate DO 29 for convenience, prior knowledge of the color of money issues, the need for CPMS approval of DO 29 which could not be granted, the need to avoid duplication where CPMS had the same Oracle software and licenses as DO 29 encompassed, the lack of a hardware platform to support the DO 29 software, and the fact that respondent could make full payment under DO 29 without Mod. 5, all with the specific intent to harm appellant by inducing it to enter into DO 29 and Mod. 5 (app. br.

at 42-43). Respondent argues that it acted in good faith throughout performance of DO 29 (gov't br. at 111-25).

Appellant's arguments about misrepresentations conflict with the record facts. We address the argument about termination for convenience in connection with Count V, *infra*. With regard to the propriety of using OP,N appropriations to fund DO 29's \$2,880,000 down payment and its \$8,639,000 payment for ownership of software by 31 December 2003, DLT, OCHR and Oracle were all knowledgeable about the types and amounts of funds available to OCHR in February 2003 and the proper use of OP,N and O&M,N appropriations and that OCHR did not have sufficient OP,N funds to pay the down payment and the 31 December 2003 payment for the software (findings 13, 15). DLT authored the "lease to ownership" quotation to OCHR that was incorporated in DO 29 (findings 14, 17, 21). As of 28 February 2003 no CPMS approval of DO 29 was required (findings 7, 10).

Respondent did not represent to DLT that OCHR had or did not have any of the software applications specified in DO 29. In January 2003 Oracle knew that DO 29 would procure Oracle software duplicating HR and OTA software already licensed by OCHR, albeit the 10.7 version rather than the 11i version of that software (findings 12, 37). Whether OCHR had an adequate hardware platform to support the DO 29 software is immaterial to DLT's obligations under DO 29 (finding 63). The record contains no evidence that CO Baldwin or Mr. West had a specific intent to harm DTL (finding 20).

The foregoing facts negate appellant's contentions of breach of the implied covenant of good faith and fair dealing and misrepresentations or omissions. We hold that DLT has not carried its burden of proof. We deny the appeal with respect to Count II.

Count V. DLT alleged in its claim that led to ASBCA No. 55362 that respondent terminated DO 29 in bad faith because before execution of Mod. 5 respondent intended to terminate the contract, and Mr. West's March and August 2003 representations were made for the purpose of misleading DLT and Citizens into believing that the government did not intend to terminate DO 29 (compl. ¶¶ 88, 89).^{*} There is no record evidence that prior to execution of Mod. 5, respondent intended to terminate DO 29. During the parties' May-August 2003 discussions about resolving the potential ADA violation issue, respondent considered termination, if the parties could not agree on a contract modification (finding 33), but such consideration was mooted by their agreement on Mod. 5 (finding 38). OCHR's recognition in December 2003 that DCPDS actually or potentially made available the Oracle 11i HR, Self-Service HR, OTA and iRecruitment software to OCHR (finding 45) and CPMS' refusal from 9 October 2003 through

^{*} The claim which led to ASBCA No. 54812 did not include this allegation (finding 49). Accordingly, we strike Count V as to that appeal.

22 March 2004 to authorize OCHR's pilot implementation of the OTA application and to permit the DO 29 applications to connect with DCPDS (findings 44-48) were changed conditions that supported the CO's March 2004 decision to terminate DO 29 for convenience. OCHR's later recognition that DoD had licenses to the four Oracle applications added by DO 29's Mod. 5 and deleted by Mod. 8 (findings 38, 50), was consistent with that termination decision. The foregoing facts may evince OCHR's considerable ineptitude in managing the DO 29 procurement, but clearly do not substantiate DLT's contention that such termination was in bad faith. We deny the appeal with respect to Count V.

CONCLUSION

We sustain the appeals with respect to Count I to the extent set forth above, strike Counts III and IV from ASBCA Nos. 54812 and 55362, and Count V from ASBCA No. 54812, for lack of jurisdiction, and deny the balance of the appeals.

Dated: 26 January 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. 54812, 55362, Appeals of DLT Solutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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