

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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Kings Bay Support Services) ASBCA Nos. 59213, 59532
)
Under Contract No. N69450-11-D-7578)

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OPINION BY ADMINISTRATIVE JUDGE KINNER ON
THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT AND
TO DISMISS FOR LACK OF JURISDICTION

The Navy moves for summary judgment to deny the appeals of Kings Bay Support Services (KBSS). KBSS seeks additional compensation for maintenance work it has performed pursuant to its contract for Base Operating Support at the Naval Submarine Base in Kings Bay and Shellman Bluff, Georgia. We deny the motion because the Navy’s interpretation of KBSS’s contract obligations is not supported by the plain language of the contract. The government also moves to dismiss what it considers a new claim raised in briefing. We deny that motion as well. KBSS had requested summary judgment but withdrew its motion. Shortly after KBSS’s motion was withdrawn, the government filed its motion including its motion to dismiss. The government’s motions have been fully briefed and argument held.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

I. The Contract

The Naval Facilities Engineering Command, Southeast, awarded Contract No. N69450-11-D-7578 for base operating support to KBSS on 15 August 2011 (R4, tab 1). Contract Section C contains the Performance Work Statement which is

organized by Annex. Annex 15 governs Facilities Support which requires KBSS to provide comprehensive maintenance services that will ensure that all the facilities and equipment on the submarine base are always functioning smoothly. Section C-1502000 within Annex 15 characterizes that work as “Facilities Investment” (R4, tab 6 at 132*):

The intent of 1502000 Facility Investment is to specify the requirements for the Sustainment, Restoration and Modernization (SRM) sub-functions only. The SRM requirements within this sub-annex primarily consist of infrastructure sustainment and minimal restoration and modernization work. Sustainment is the maintenance and repair necessary to keep an inventory of facilities and other assets in good working order. Restoration and modernization normally consists of major rehabilitation and capital improvements that is accomplished through other Navy programs. Some major repair, minor construction and stand-alone demolition may be accomplished as part of sustainment.

SRM generally applies to the buildings, building systems and outdoor features of the base described in the Facility Property Inventory attached to the contract (R4, tab 8 at 400-27). The property inventory contains a list of the buildings and other constructed features on the base, such as Facility No. 2022 Warehouse (*id.* at 401); No. 4985 Sewage Treatment Plant 1979 (*id.* at 403); No. 1897 Volleyball Court 1034 (*id.* at 413); No. 4956 Flag Pole (*id.* at 420); and No. 5873 Boat Ramp (*id.* at 423). The inventory also contains systems and equipment, such as No. 4003 Water Treatment Plant Filter (*id.* at 402); three pages that list transformers (*id.* at 406-08); No. 2027 Admin, Military Working Dog (*id.* at 414); No. 3999 Wind Sock, Helipad (*id.* at 419), and No. 7380 Telephone Lines (*id.* at 426).

Specification Item 1.8 further describes SRM as “re-engineering” the Navy’s world-wide approach to contracts for operations and maintenance of its facilities (R4, tab 6 at 85). Specification Item 1.8.1 states that the Navy intends to partner with the contractor to find solutions to contracting problems that are beneficial to both the government and the contractor (*id.*). It also expects the contractor to supply management, skills and resources to achieve the contract’s goals and objectives (*id.*).

KBSS is required to carry out SRM base-wide through three different maintenance methodologies, Integrated Maintenance Program (IMP), Preventative Maintenance (PM) and Service Calls. Specification Item 2.1.6 describes IMP work:

* All Rule 4 cites are to the consecutively-numbered pages.

IMP is a recurring state-of-the-art, reliability-centered inspection, testing, maintenance and repair program that determines best practices for managing the functions and consequences of failures of facilities, equipment and system components. IMP encompasses accepted commercial practices, including reactive, preventative, predictive and proactive maintenance, into one optimal program. The IMP approach gives the Contractor full responsibility to maintain systems and equipment and perform repairs whenever necessary to ensure equipment and systems are operational and remain in a constant state of readiness. Service calls will not be issued for accomplishment of repairs on systems and equipment under the IMP.

(R4, tab 6 at 134)

Specification Item 2.1.9 describes PM work:

PM consists primarily of inspection, testing, cleaning, lubrication, adjustment, calibration, and minor part and component replacement (such as filters, batteries, belts, hoses, fluids, oil and grease) as required to verify proper system operation; minimize malfunction, breakdown, and deterioration of systems and equipment; and maximize useful life.

(*Id.*)

And, Specification Item 2.1.10 describes Service Calls:

Service calls are classified as emergency or routine work requests. Service calls are called into the work reception center by building occupants or generated by designated Government or Contractor representatives; are brief in scope; and do not reasonably require detailed job planning. Multiple maintenance, repair, and minor construction requirements received for the same trade in the same building or structure at the same time will be combined into one service call as long as the service call threshold is not exceeded.

(*Id.*)

The maintenance work under each of these methodologies is performed for a fixed price. The scope of each fixed-price task is established by the limitation of liability within which the work, whether IMP, PM or Service Call, is expected to be accomplished. The firm-fixed-price work is supplemented by indefinite-delivery, indefinite-quantity (IDIQ) work orders whenever the limitation of liability is exceeded. (R4, tab 6 at 109) Accordingly, FAC 5252.216-9310, COMBINATION FIRM FIXED-PRICE/INDEFINITE QUANTITY CONTRACT (MAR 2002), is included in the contract in full text (R4, tab 1 at 55). The clause provides that the quantities provided for indefinite-quantity work are estimates, but “[t]he fixed-price quantities shown in the Schedule and any accompanying exhibits are considered to be accurate estimates for this contract period” (*id.*).

The quantities for the fixed-price requirements are provided as the number of pieces of equipment for each covered system. The pieces of equipment covered by PM or IMP are listed in an inventory of each system. The inventories are provided in Section J as attachments to the contract. (R4, tab 8) The equipment to be maintained by PM is listed in the system inventories in Sections J-1502000-03 through J-1502000-07 (*id.* at 431-39), and equipment maintained by an IMP is listed in the system inventories in Sections J-1502000-08 through J-1502000-12 (*id.* at 441-588). The systems required to be maintained using the contractor’s IMP are identified in Specification Items 3.3 through 3.3.5 as boilers, drydock systems, fire protection, HVAC and refrigeration systems, water treatment services and vertical transportation equipment (R4, tab 6 at 140-46). The Section J inventory for each of those systems is a detailed list by building of each piece of equipment or component in the system. The list for each piece of equipment includes the description, manufacturer, model number and quantity of that equipment. This listing of equipment is important because “[a]s part of the IMP, the Contractor has full responsibility for any individual occurrence or repair, including replacement up to and including the FFP limit of liability of \$5,000 in direct material and direct labor cost for each piece of equipment per incident unless specifically stated otherwise for specific equipment or system” (*id.* at 140-41). Specification Item 3.3 again states that Service Calls will not be issued for accomplishment of repairs on systems and equipment maintained under IMP (*id.* at 140-41).

Section J contains a similar detailed list of systems and equipment subject to PM that identifies every piece of equipment in every building or facility to be covered (R4, tab 8 at 431-40). The fixed-price limit of liability for repairs on equipment covered by PM is \$2,500 for direct labor and direct material cost per occurrence (R4, tab 6 at 138).

In contrast, there are no facilities or equipment identified for maintenance pursuant to Service Calls. Instead, Services Calls are expected to arise from anywhere on the base, other than for IMP systems. “The Contractor shall perform service calls to accomplish any work identified within the entire boundary of the installation and will include a wide variety of work.” (R4, tab 6 at 136) Specification Item 3.1 reiterates that Service Calls will not be issued for accomplishment of repairs on systems and

equipment maintained under IMP (*id.* at 140-41). The description of Service Call work was provided by historical data in Section J-1502000-02 which only indicates the variety of work that can be encountered (R4, tab 8 at 428). The parties agree that KBSS's bid was based upon the projected number of 11,455 Service Calls (gov't mot. at 4; app. opp'n at 4). The fixed-price limitation of liability for Service Calls is 32 direct labor hours and \$2,500 direct material costs (R4, tab 6 at 136). Although KBSS's initial proposal included a description of its estimating methodology for Service Calls that utilized an average time of 5 hours per call (app. supp. R4, tab 22 at 295), its final proposal that was incorporated into the contract acknowledged that it will perform Service Calls anywhere within the boundaries of the base without regard to its labor hour average estimate (R4, tab 1 at 2; app. supp. R4, tab 48 at 1173).

II. The Claims

When the contract was awarded, the inventories in Section J were not complete. From the outset of performance, the government sought proposals from KBSS for the addition of systems and equipment to the PM or IMP specification. These additions are reflected in Modification Nos. 2, 4, 5, 8, 9, 10, 13 and 17 (R4, tabs 10-12, 14-16, 18, 22). Notwithstanding the succession of modifications on 30 August 2012 KBSS submitted to the contracting officer a request for equitable adjustment (REA I) to obtain additional compensation of \$576,864.08 for maintenance it performed on equipment that was not identified in the equipment lists provided in Section J (R4, tab 28). In response to the REA the government issued Task Order No. 0241 on 30 September 2012 (R4, tab 29). Task Order No. 0241 was a continuation of the Navy's effort to refine the system inventories. The Navy assured KBSS that "[t]his is not intended to be a final settlement for the work." And the "Government is still reviewing other aspects of the work." (*Id.* at 1242)

The text of the task order acknowledges that equipment not listed in an inventory was not included in the contract. The task order states that it was issued in response to KBSS's request regarding work that was "not in contract" because it was "not specifically listed in the contract inventory" (R4, tab 29 at 1242). The task order provided payment to KBSS for work that exceeded the limitation of liability for certain Service Calls and IMP work, and "for work on specific items of equipment that the Government agrees were omitted from the equipment systems inventory" (*id.*). Although the government indicated that it would continue to review other aspects of the work, no resolution was forthcoming and KBSS submitted a certified claim for \$394,196, the unpaid portion of REA I, on 29 November 2012 (R4, tab 28 at 1235).

Just days after receipt of the claim, the Navy issued Modification No. P00008 to update the IMP Vertical Transportation Equipment System Inventory and the Vertical Transportation Equipment System Inventory for Inspection, Testing, and Certification.

The modification incorporated items that, having been left off the inventory list at time of award, were “omitted from the contract.” (R4, tab 14 at 939)

The claim pursues the same reasoning as that modification. KBSS relies upon Specification Item 1.5 to assert that equipment not identified in the contract is considered not in contract (R4, tab 28 at 1235). Section 1.5 states:

Throughout the PWS, the workload data is generally referred to as being located in Section J. **Section J provides** data such as **inventories**, maps, floor plans, and tables to **represent** the type, **quantity and location** of services to be provided. However, offerors are encouraged to visit the project site during the site visit for offerors and to visit the technical library during posted hours as part of its due diligence to assess the nature of work and conditions under which work is to be performed.

(R4, tab 6 at 84) (Emphasis added)

In the claim, KBSS states that it relied upon the lists in Section J to bid the contract. The claim was made necessary by the government’s position that it could issue Service Calls for any work within the boundaries of the installation, even where the work called for did not relate to facilities or equipment listed in the contract (R4, tab 28 at 1235). KBSS says that no item in the claim is listed in an inventory in Section J (*id.* at 1236).

The Navy initially considered the claim to have “some merit” (R4, tab 31 at 1288), but on 18 December 2013 a contracting officer’s final decision was issued denying further relief (R4, tab 32 at 1292-97). KBSS appealed from that decision to this Board 14 March 2014 (ASBCA No. 59213, R4, tab 34).

On 10 December 2013, KBSS submitted REA II to the contracting officer for payment of \$1,152,975.38 for work not identified in Section J of the specification that it had not completed at the time of its first REA. KBSS submitted a certified claim for the amount of the second REA on 24 June 2014, and appealed the final decision denying the claim to this Board on 2 September 2014. (ASBCA No. 59532, app. supp. R4, tab 59 at 1212)

According to the letters referenced in the claims, the Navy issued service orders that were of such complexity that the work was equivalent to IMP tasks rather than the simple work KBSS expected to perform as service calls. KBSS accuses the Navy of impermissibly issuing Service Calls on equipment that should be included in an IMP. “The Government’s position that service calls may be issued for similar IMP equipment

is contrary to what is stated in Sections C-1502000 Facilities Investment Spec Item 3.1.” (R4, tab 25 at 1154) The claims contain lists of services ordered by the Navy that KBSS considers improper because the maintenance required was more sophisticated than work suitable for Service Calls, was performed on equipment that is related to an IMP system, or was not included in the contract because the equipment was not identified on a system inventory list in Section J.

On 18 December 2013 the Chief of Contracts, Renee M. Comfort, issued a final decision denying KBSS’s 29 November 2012 claim. The decision describes Service Calls as any service for the types of work included in the contract within the boundary of the installation. (R4, tab 32 at 1292-93) The decision describes IMP work as proactive repair and maintenance of every part of each system designated in Specification Item 3.3 and included in Section J documents, exhibits, and other attachments. “[A]ll mechanically and electronically interlocked ancillary parts, equipment, and components of the system and equipment whether specifically listed or not” are included in IMP work. (*Id.* at 1294) But only “[m]ajor components of IMP systems and equipment are included in Section J” (*id.*). The Navy expects the contractor to determine the parts included in every IMP system using information from the original equipment manufacturer (OEM) for each system component. “The OEM specifications provide the ancillary parts, equipment, and components that pertain to the systems and equipment requiring maintenance in IMP” (*id.*). Therefore, the government would not modify the contract to incorporate the equipment in the claims because it believes those are ancillary parts already included in the IMP systems.

Although the Navy acknowledged in the decision that Service Calls on “IMP type” equipment can cost more than routine maintenance, it concluded that the contractor was aware that the cost of Service Calls would vary. It therefore denied KBSS’s claim for Service Calls issued on IMP-like equipment not identified in Section J that KBSS considered Not In Contract (NIC). The Navy rejected KBSS’s claim for NIC equipment because “[a]ny service for the types of work included in the contract is within the scope of the contract as long as it is within the boundary of the installation” (R4, tab 32 at 1295). Under the Navy’s interpretation of the contract everything on base is covered by Service Calls unless it is part of an IMP-covered system and anything that should be in an IMP-covered system is included “whether specifically listed or not” (*id.*). So equipment that is NIC simply does not exist.

The Navy similarly rejected KBSS’s claim that it has been required to do out of scope non-SRM work. This is the portion of the claim first considered by the Navy to potentially have merit. The Navy agreed in the decision that KBSS had performed non-SRM Service Calls. Upon further review, the Navy determined that this aspect of the claim was also subject to a case-by-case determination by the contracting officer as the work arose whether it should be performed as a Service Call (R4, tab 32 at 1296). The decision explained that tasks beyond the scope of SRM could nonetheless be

within the scope of the contract if the Navy considered the work mission critical and appropriate to be performed under the contract.

DECISION

I. The Government's Motion for Summary Judgment

The Navy asserts that these appeals can be resolved by summary judgment because the questions presented by the complaints are entirely matters of contract interpretation. The Navy argues that the plain language of the fixed-price sections of the contract makes KBSS responsible both for Service Calls anywhere within the boundary of the base and for repair work on IMP equipment. According to the Navy's interpretation, there is no equipment on base that was left out of the contract and KBSS is improperly labeling fixed-price IMP work as Service Calls, which are impermissible on IMP equipment.

Although the Navy's motion discusses the REAs, the complaints and the affidavit KBSS filed with its subsequently withdrawn motion for summary judgment, it does not address the reason KBSS claims the work items in the claims are not within the contract's scope. The Navy dismisses the affidavit of Mr. Gary Barkhurst, president of KBSS, in which he testifies that the contractor relied upon the specific inventory of equipment in Section J to formulate its bid because there is no Section J inventory for Service Calls (gov't mot. at 7). However, Mr. Barkhurst also testified that the Navy issued Service Calls for equipment that he considered IMP equipment, because the work performed was equivalent to IMP-level service (gov't mot. at 7). Ignoring that point, the Navy argues that KBSS is entitled to no relief because each of the work items in the claims is within the fixed price for Specification Item 3.1 or within the fixed price for Specification Item 3.3 because repair of all components is required in every IMP (gov't mot. at 10).

The Navy does not confront the premise of the claims until it argues in its reply brief that "KBSS did not specify in its claims that it also sought payment for the work that it allegedly performed on unlisted components of IMP or PM systems" (gov't reply br. at 11). Even in that argument, the Navy attempts to force KBSS's claims into its interpretation of the FFP contract requirements. The Navy claims that KBSS's characterization of the equipment missing from Section J as "components" was not previously raised as a dispute to the contracting officer. It asserts that KBSS's allegations that it was ordered to perform work on such components should therefore be dismissed as outside the Board's jurisdiction. (Gov't reply br. at 12)

Alternatively, the Navy argues that KBSS's assertion that the components in its claims are not covered in the contract means KBSS is interpreting the IMP specification to cover systems but not the components that make up the system (gov't

reply br. at 14). The Navy argues KBSS's claims were properly rejected because it is required to maintain each IMP system in operating condition. To do so, KBSS must maintain all the constituent parts of each system, even if each part is not listed in a system inventory. (*Id.*) Thus, still refusing to recognize that the claims are not intended to only address equipment that may be part of an IMP-designated system; the Navy asserts KBSS has already been paid for the work in the claims because the IMP repair work KBSS erroneously refers to as Service Calls is actually repair work required within the fixed-price IMP specification.

The Navy also argues that KBSS should have identified whatever equipment was not listed in the system inventories, or at least known such equipment was included in the contract even if not listed (gov't reply br. at 14). "It is undisputed that not all of the components and subcomponents of systems listed in Section J are separately identified there" (*id.* at 12). The Navy concludes therefore that the absence of individual components from a system list was a patent ambiguity. Having failed to inquire with the contracting officer regarding evidently missing equipment, KBSS is responsible for maintaining those parts as well. In either event, the Navy insists the contract must be interpreted to require KBSS to perform any Service Call on equipment that is not included in a Section J inventory under the fixed-price Service Call boundary to boundary specification. (*Id.* at 9, 16)

Contract interpretation is a question of law which the board may resolve by summary judgment. *Certified Constr. Co. of Kentucky, LLC*, ASBCA No. 58782, 15-1 BCA ¶ 36,068; *ThinkQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221. When considering such a motion, we look to Federal Rule of Civil Procedure 56 for guidance. Board Rule 7(c)(2). Pursuant to that rule, summary judgment is only appropriate if there are no material facts in dispute. The government's motion does not raise questions of material fact because it does not require an examination of either the nature of the equipment in KBSS's claims or even the scope of IMP work. Rather we are only asked to resolve whether the specification is defective if the PM or IMP inventories do not include all the equipment in the covered systems. *Bay Decking Co.*, ASBCA No. 33868, 89-2 BCA ¶ 21,834 at 109,847 ("[Q]uestions of contract interpretation and, in particular, whether a specification is defective or not, is a question of law, not fact."). Thus, we can determine whether the Navy is entitled to judgment on the motion before us without a hearing. *Groathouse Constr., Inc.*, ASBCA No. 38418, 90-3 BCA ¶ 23,147.

Appellant argues in response to the government's motion that the parties' conflicting interpretations create an ambiguity which cannot be resolved on summary judgment (app. opp'n at 4). Appellant relies on *Raytheon Company*, ASBCA No. 58212, 15-1 BCA ¶ 35,999 at 175,863, to assert that "[o]n an issue of contract interpretation, summary judgment may only be granted where there is no ambiguity in the contract terms at issue which would require our reliance upon extrinsic evidence to resolve the matter" (app. opp'n at 28). Appellant's citation to *Raytheon*, however, fails

to focus on the determinative element of that analysis, whether extrinsic evidence raises questions of material fact. Instead, appellant's interpretation of *Raytheon* appears to suggest that the mere allegation of ambiguity is sufficient to present a factual dispute that should prevent consideration of summary judgment. Contrary to appellant's broader reading of *Raytheon*, the Board's precedent does not require rejection of a motion for summary judgment upon the appearance of an ambiguity in disputed contract language. *ThinkQ*, 13 BCA ¶ 35,221. Although disputed material facts do not prevent consideration of the government's motion, it is not entitled to judgment. As explained below, the government's argument does not rely on a reasonable interpretation of the contract. Accordingly, the government's motion must fail.

1. Government Misstates the Claims

The Navy's arguments are primarily directed at a claim KBSS has not made. KBSS's claims do not ask for payment for Service Calls on equipment that is part of an IMP-system inventory (gov't mot. at 10-12). Nor are the claims demanding payment simply because Service Calls were issued on equipment not listed in a Section J inventory (*id.* at 12-14). The Navy is correct that KBSS is bound to perform any Service Call work within the boundaries of the base, but that analysis has almost nothing to do with KBSS's claims.

The Navy's analysis is misdirected because it refuses to recognize that KBSS is not requesting payment for Service Calls pursuant to Specification Item 3.1. Specification Item 3.1 does not pertain to the allegedly complex IMP-like maintenance in the claims. KBSS has not asserted in its correspondence, its claims, or its complaints that the Navy was in fact issuing Service Calls on equipment identified in Sections J-1502000-08 through J-1502000-12. Also, KBSS is not requesting payment pursuant to Specification Item 3.3 because it asserts that none of the equipment in the claims is identified in Specification Item 3.3 or in system inventory in Section J. KBSS characterizes the claimed work as IMP work because the work was allegedly of the same complexity as IMP work. KBSS's claims seek to recover the costs it allegedly incurred to perform the same type of repair as that required in the maintenance programs it developed for the equipment listed in Sections J-1502000-08 through J-1502000-12. That work also cannot be ordered by Service Call because Service Calls are prohibited on IMP equipment. Unlike IMP work, Service Call work is simple and requires no advance planning. According to KBSS, any work the Navy orders that is equivalent to IMP maintenance must be on equipment that appears on an inventory in Section J (R4, tab 25 at 1155). There isn't a dispute on this point when the equipment is listed in a system inventory. But it becomes the central contention between the parties if the equipment is not listed in Section J. At that point, KBSS claims the equipment is not included in the contract and any maintenance it has performed is not authorized by the contract.

KBSS has consistently referred to such equipment as Not in Contract (NIC) (R4, tab 28 at 1235-36). In response to the REA, the contracting officer recognized the significance of KBSS's reference to NIC work. While acknowledging the Section J tables are inaccurate, the contracting officer accepted the fact that KBSS's reference to NIC work pertained to equipment it encountered that was not identified in Section J (R4, tab 26 at 1231). The contracting officer understood that KBSS's reference to NIC work does not refer to additional Service Calls (*id.*). In its motion, the government ignores this history to formulate its argument that KBSS is claiming additional payment for repair of IMP equipment or to avoid its broad responsibility for Service Calls (gov't mot. at 10-14; gov't reply at 6-7). It also ignores KBSS's statement that none of the equipment included in its claims is identified in Section J system inventories (R4, tab 28 at 1236). While it maintains these arguments, the Navy also acknowledges that KBSS's claims for NIC work do not refer to equipment that is listed in a Section J inventory (gov't reply br. at 12 n.6). The Navy's contradictory positions arise from its presumption that all equipment on base is covered within the fixed-price specifications, regardless of the nature of the work ordered. That presumption is not supported by those specifications.

2. Unidentified IMP equipment is not in contract

A. Section J Defined the IMP Systems

Section C of the contract states clearly that the systems designated for PM or IMP service are defined by the system inventories in Section J. Each Specification Item that designated a system for PM refers to an associated equipment inventory in Section J (R4, tab 6 at 138-40). Each system identified for IMP maintenance refers to a specific associated inventory. Specification Item 3.3 states that “[t]he systems and equipment, including associated inventories shall be included in the IMP and addressed in the IMP Spec Items below” (*id.* at 140). Specification Item 3.3.1 requires an IMP for boiler systems that is applied to the inventory supplied in Section J -1502000-08 (*id.* at 141). Under Specification Item 3.3.2 an IMP is required for Drydock systems, covering the equipment inventory supplied in Section J-1502000-09 (*id.* at 143). The IMP for Fire Protection systems is required by Specification Item 3.3.3 for the inventory supplied in Section J-1502000-10 (*id.*). Specification Item 3.3.4 requires the IMP for HVAC and refrigeration systems be applied to the equipment listed in the inventory in Section J-1502000-11 (*id.* at 144). And the IMP in Specification Item 3.3.5, for Vertical Transportation Equipment, applies to the inventory of equipment supplied in Section J-1502000-12 (*id.* at 146). There is no provision in the contract for IMP maintenance on equipment outside the systems and inventories identified in Specification Item 3.3.

Each system inventory appears to be a comprehensive list of equipment representing its associated system. The lists include small parts as well as larger

components (R4, tab 8 at 440-588). Based upon the apparently exhaustive lists, the contract could not be read to imply that the Navy intended an IMP to cover additional equipment. *Compare Nissan Motor Mfg. Corp., U.S.A. v. United States*, 884 F.2d 1375, 1377 (Fed. Cir. 1989) (Applying a general rule of statutory construction in interpretation of trade statute, the expression of one thing is the exclusion of the alternative, *expressio unius est exclusio alterius*, the court stated that a comprehensive list of permitted activities means activities left off the list are not permitted.). When nothing in the contract suggests that the inventories are partial or incomplete, a bidder could reasonably rely on the equipment listed in the IMP inventories when formulating its fixed-price bid for each IMP system, as KBSS argues it did. KBSS claims it relied upon the instruction in Specification Item 1.5 to verify the workload required by the contract (R4, tab 28 at 1235). That Item informed the contractor that the Section J inventories describe the type, quantity and location of the work (R4, tab 6 at 84).

KBSS asserts that it was not possible for a contractor to formulate a bid other than by relying upon the Section J equipment lists (R4, tab 25 at 1155, tab 27 at 1232, tab 28 at 1235; compl. ¶ 15). The Navy appears to acknowledge that fact.

Here, the equipment lists in Section J of the Solicitation (incorporated into the contract) are unambiguous, and they are the only equipment lists needed to interpret the contract's facilities investment work requirements. KBSS did not bid the contract work on what the solicitation should have said or what the lists should have contained; it bid the work based on what the solicitation did say, including the contents of the fully integrated (even assuming they contained omissions) lists in the solicitation's J Tables.

(Gov't reply br. at 4-5)

This interpretation was confirmed pre-bid by the Navy's response to bidders' questions. The Navy acknowledges that bidders inquired where the component pieces of the IMP systems were identified (gov't reply br. at 15). The question arose in relation to Section C-1601000, but it also "applies to other Sections/Annexes that require submission of an IMP" (*id.*). The government's responses were either to direct the bidders to the base technical library or to state that detailed system inventories were not in the government's database (*id.*). The parties agree that the base library did not contain lists of system equipment. Such lists were not necessary for formulation of a bid. The system inventories included in Section J of the solicitation eliminated the need for a separate database of IMP system parts. The Navy believes, however, that KBSS had to know, based on its expertise that it could not formulate its IMP price, as it says it did, on servicing only the equipment listed in the Section J inventories (*id.*

at 16). The Navy interprets the contract to place the burden on KBSS to perform an integrated maintenance plan without the component parts of the system being specified in Section J (gov't mot. at 14). According to that interpretation, prior to award the solicitation placed responsibility on KBSS to identify the parts of every system for which an IMP is to be developed. The Navy cannot support this interpretation with language from the contract. Nor can it identify contract terms that placed KBSS on notice that it must define the parts of each IMP system for itself. The contract cannot reasonably be read to impose the requirement to define systems on the contractor. Such a requirement would render the inventories in Section J, and every reference to them in Section C-1502000, superfluous.

The Navy's interpretation is also unreasonable because it would allow only a portion of an IMP system to be identified. The contractor cannot reasonably know all the equipment outside a Section J inventory to be included in an existing IMP-designated system. This is true even in the Navy's interpretation because all the facilities and equipment within the boundary of the base not listed in an IMP inventory are subject to the Service Call requirement. Also, the government insisted at oral argument that no base equipment is inherently IMP. The requirement for IMP-level service can only arise from the government's exercise of its discretion to identify select equipment as subject to an IMP requirement. When KBSS receives a service order to perform IMP-like maintenance on equipment that is not identified in a system inventory the Navy has presumably determined that the equipment in the service order requires an integrated maintenance plan. The IMP level work in a service order necessarily becomes subject to a change order pursuant to Specification Item 1.3 because Annex 15 prohibits Service Calls on IMP equipment (R4, tab 6 at 136). The contract cannot reasonably be interpreted otherwise.

The government asserts that an additional modification to add such equipment is unnecessary because IMP requirements already include all ancillary pieces of equipment in every system. The Navy's argument presumptively includes such equipment in the fixed-price portions of the contract, but it fails to explain how a fixed price determined by the parties based upon a delineated set of equipment could also fairly include a significant amount of equipment unidentified at the time of the price determination.

The government's explanation is that KBSS should find such unidentified equipment performing the maintenance requirements established by the original equipment manufacturer (OEM) (R4, tab 32 at 1294). That is implausible. There is no evidence that there is a single manufacturer of any of the IMP systems. As can be seen in the Section J inventories, the systems in Specification Item 3.3 may be made up of disparate parts with components from different manufacturers (R4, tab 8 at 440-588). Numerous manufacturers are listed for the different pieces of equipment. For example, 13 manufacturers are listed for equipment in one Facility, No. 1028, on a single page of

the fire control system inventory (*id.* at 444). Half a dozen more are listed in the other facilities on that page. Thus, there is no unified source that could identify the parts of an IMP system. To enable the contractor to incorporate the maintenance recommended by all the manufacturers into its IMP those components must be identified as part of that system.

The Navy argues that the specification cannot be defective even when equipment was left out of an inventory because missing equipment may be considered within the scope of the contract. Whether missing equipment may be within the scope of the contract does not resolve the government's liability for additional cost. Work outside the specification is not properly identified for proposal purposes, and cannot be accounted for in a final price. KBSS claims this is the problem here. It alleges it is not being paid for IMP work according to the price for IMP services. By asking the contractor to perform IMP work up to the limit of liability for Service Calls the government may be able to obtain a higher level of performance for a lower price than the contractor otherwise would have agreed to supply those services.

Alternatively, the Navy asserts the absence of numerous parts of IMP systems from Section J inventories was a patent ambiguity which KBSS failed to question before bidding (gov't reply br. at 15-16). The Navy mistakes the nature of this alleged ambiguity. The patent ambiguity doctrine is not applied to every ambiguity because the doctrine has the effect of relieving the government from the consequences of its own poorly drafted contracts. *Triax Pac., Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). The doctrine is applied only to contract ambiguities that are so "patent and glaring" that it is unreasonable for a contractor not to discover and inquire about them. *Id.* Thus, a contractor's obligation to inquire regarding ambiguities before bidding does not include a duty to ferret out things the government has chosen to leave out of an otherwise whole contract. The plain terms of this contract when read as a whole gave no indication to a bidder that the detailed lists of equipment for each IMP-designated system were incomplete. Seeing no ambiguity, KBSS was under no duty to inquire if the government intended to contract for maintenance of more parts than those listed in Section J.

B. Fixed Quantities were Presumed Accurate

KBSS's reliance upon the Section J inventories was also justified based on the Combination Firm-Fixed-Price/Indefinite-Quantity contract clause, FAC 5252.216-9310 (R4, tab 1 at 55). That clause informs the contractor that all fixed-price work is identified in the schedule and the accompanying exhibits. And, "[t]he fixed-price quantities shown in the Schedule and any accompanying exhibits are considered to be accurate estimates for this contract period." (*Id.*)

The only reasonable reading of that provision is that the specific quantities included in the Section J inventories accurately represented the work. Therefore, a bidder may reasonably rely on the inventories to formulate its bid. KBSS claims that it did so because “[n]o other method was available to determine the scope of the fixed-price portion of the work within the time available to bid the contract” (gov’t mot., ex. A, Barkhurst aff. ¶ 7; R4, tab 27). Having chosen to identify the systems to be maintained by IMP by providing lists of the equipment in each, the government cannot deny its responsibility if the specific quantities of equipment listed in the specification are inaccurate (R4, tab 26). Nor can the government force the contractor to perform IMP-level maintenance on equipment that was not identified in the bidding process by fixed-price Service Calls.

C. The Modifications Support KBSS’s Interpretation

The Navy’s motion relies on a contract interpretation in which the contractor is responsible for every part of an IMP system, without regard to the parts listed in the associated system inventory. That interpretation conflicts with the plain language of the modifications and work order. “Interpreting the contract as a whole requires the Board to interpret all documents that are part of the same transaction together.” *Relyant, LLC*, ASBCA No. 58172, 16-1 BCA ¶ 36,226 at 176,748 (citing RESTATEMENT (SECOND) OF CONTRACTS § 202(2)). The changes to the contract added equipment to the specification because that equipment had been “omitted from the contract.” The government agreed that equipment had been omitted because it had not been included in a systems inventory list (R4, tab 14 at 939, tab 29 at 1242). The language of the modification and the task order reflects appellant’s interpretation of the contract. Equipment suitable for IMP work was to be identified in the system inventory lists and, if not, such equipment was “left out of the contract.” The modification and task order show that it was also the Navy’s interpretation that equipment not included on a system inventory list in Section J was “omitted from the contract.” That interpretation was expressly incorporated into the contract pursuant to clause A.2, Amendment Incorporation (R4, tab 1 at 2). Thus, the Navy contractually established that the specification was defective when equipment was not listed in a systems inventory.

This is further illuminated in the pre-claim correspondence. The parties’ letters fully describe the circumstances surrounding the modifications and work order permitting the correspondence to be considered in the context of the entire contract. As with contract interpretation in general, we construe the language in the modifications and the parties’ intentions with regard to those changes by reference to the context of the entire contract, including the modifications, as well as the contemporaneous circumstances. The parties’ understandings when the modifications were executed as well as other pre-dispute actions are afforded great weight in judging the intent of the parties in agreeing to the modifications. *Applied Companies*, ASBCA No. 50593, 04-2

BCA ¶ 32,786 at 162,166. In a 30 August 2012 letter that accompanied the first REA, KBSS asserts that it has performed work on IMP equipment omitted from the contract (R4, tab 25). KBSS characterizes such work as not in contract (NIC). KBSS's REA does not identify service orders as NIC. Instead, it identifies a significant amount of equipment as NIC. Nonetheless, at that time, KBSS promised to perform Service Calls within the boundaries of the installation provided that IMP equipment was understood not to be within the scope of Service Calls.

In its 6 September response, the Navy acknowledged that Section J was inaccurate, but informed KBSS that it could order Service Calls on IMP-like equipment and the restriction on Service Calls pertained to specifically listed IMP-equipment not to a type of work (R4, tab 26). In response, KBSS stated that the contract does not include IMP-like work outside Section J. It considers IMP work outside Section J to be omitted from the contract. According to KBSS, this is the only possible interpretation of the contract because a contractor cannot formulate a bid on maintenance of equipment that is not identified in the contract (app. opp'n at 2, 3, 16). Work on equipment that is not identified necessarily has to be performed under the terms for IDIQ work (*id.*).

Subsequently the Navy again acknowledged that the equipment added by the modification required a different level of service than the work required for equipment maintained by individual Service Calls (gov't reply br. at 17-8; R4, tab 29). In accordance with that change, the government was required to add two separate groups of equipment to the contract: 1) "equipment that clearly exceeded the cost of a Services Call or an [IMP] for the equipment" and 2) the equipment "omitted from the equipment systems inventory" (R4, tab 29 at 1242). Not unlike the situation in these changes, KBSS seeks similar treatment for other equipment it has allegedly serviced outside the contract system inventories.

D. No Service Calls on IMP Equipment

The Navy requests dismissal of KBSS's complaint because it sees no distinction between repairs ordered pursuant to Specification Item 3.1 and the repairs that KBSS claims were complex IMP-like work.

The solicitation did not identify the equipment for which Service Calls could be issued but the scope of Service Calls was otherwise defined in the contract. Specification Items 3.1 and 3.3 unequivocally restrict the Navy from issuing Service Calls on equipment that is part of an IMP-covered system. The contractor therefore knew pre-contract that all the equipment included in Sections J-1502000-08 through J-1502000-12 for which it was required to develop an IMP was excluded from Service Calls. (R4, tab 6 at 136) Despite the 32 direct labor hours and \$2,500 direct material cost limit of liability, the contractor also knew that each call is intended to be brief and accomplished without advanced

planning (R4, tab 6 at 134, 136). Thus the Navy incorrectly relies upon Specification Item 3.1 as a basis to reject KBSS's claims regarding IMP-like work.

The Navy's position rests primarily upon the broad requirement in Specification Item 3.1 for KBSS to perform Service Calls base wide. The Navy combines that obligation with the limitation on Service Calls on IMP equipment, to conclude that KBSS is obligated to perform maintenance by Service Call of every other thing within the boundaries of the base. This application of the Service Call requirement is overbroad and fails to conform to the change order procedure imposed by Specification Item 1.3, "Acquisition of Additional Work." That provision does not merely extend the scope of the contract to any unidentified equipment within the boundaries of the base. It requires newly identified work be added to the contract by modification:

The Government reserves the right to acquire additional services at additional locations in addition to the services and locations identified in the Firm-Fixed Price requirements of this contract. Additional services will be incorporated into the contract in accordance with the CHANGES clause, SECTION I or ordered under the indefinite delivery indefinite quantity provisions of the contract. Items of work not covered by this contract but within the general intent are considered in the scope of this contract.

(R4, tab 6 at 83)

The Navy's position ignores the instruction in Specification Item 1.3 to add newly-identified equipment to the contract because it does not accept responsibility for ill-defined IMP systems. Nor does the Navy recognize a limit on ordering complex IMP-type maintenance by Service Call. The Navy prefers to argue that the contract preserves the contracting officer's discretion to determine how each piece of equipment will be maintained, whether by Service Call, PM, or an IMP (tr. 21-4). According to the Navy, whenever KBSS identifies a piece of equipment that is not listed on a system inventory the contracting officer is free to require KBSS to maintain that equipment by Service Calls regardless its association with other equipment that may be covered by an IMP (*id.*). This aspect of the Navy's position is incorrect. If the parts identified by KBSS are previously unidentified pieces of an IMP-designated system then the actual scope of the IMP work has not been properly specified. Contrary to the Navy's argument, the government may not obtain the complete IMP maintenance program for that system through Service Calls when the contractor's IMP price was unknowingly established based on a smaller system than the one it would be required to maintain. The contracting officer's final decision recognizes that IMP-like work is more costly for KBSS. The parties did not establish a price for Service Calls for IMP-like complex

maintenance. Thus, the contract cannot reasonably be interpreted to allow the Navy to make up for its defective system inventory with service orders.

The same problem arises when KBSS identifies parts from a system that has not been designated for IMP maintenance. If the maintenance required on such parts is simple, requiring no advance planning then the contracting officer may order that work pursuant to Specification Item 3.1. However, if maintenance of the parts of a previously unidentified system require continued IMP-level service, it may be an abuse of discretion for the contracting officer to pursue a *de facto* integrated maintenance program by Service Calls.

To the extent the contracting officer has issued Service Calls for IMP-like work such Service Calls are not the same as Service Calls under Specification Item 3.1, as explained by KBSS. The contract specifies that the Navy cannot issue Service Calls on IMP-like equipment (R4, tab 25 at 1154-55). Despite the Navy's current position, during performance it acknowledged that KBSS's characterization of "Not in Contract Work (NIC)" did not refer to Service Calls under Specification Item 3.1 (R4, tab 26 at 1231). "We accept your clarification that you have identified NIC equipment, not service orders" (*id.*). Thus, the Navy's current insistence that KBSS's claims pertain to Service Calls under Item 3.1 appears to be confusion of its earlier understanding. Despite that confusion, the Navy recognizes that Service Calls may not be issued for IMP-level maintenance (gov't mot. at 10, 14; tr. 18). The application of that prohibition to Service Calls for complex IMP-like work, as KBSS's claims it performed, raises legal and factual issues not addressed by the government's motion. These issues entitle KBSS to a hearing on the merits of its claims.

E. The Navy misreads the contract and the law

1. IMP Is Not Contractor Defined

As discussed above, the Navy argues that every part of an IMP system does not need to be listed in Section J because the IMP requirement mandates a contractor maintenance program that covers the entire system including all its ancillary and interlocked pieces whether listed or not (gov't reply br. at 7, 12). The Navy asserts that KBSS knew that a complete system necessarily includes all the components of the system (*id.* at 13-4; R4, tab 6 at 140). According to that interpretation, KBSS is expected to know from experience what components must be included in every system on this Naval base. The Navy insists that KBSS must perform complex maintenance similar to its work on other IMP systems whenever it encounters such equipment, even if that equipment is not expressly covered under either Specification Item 3.2 or 3.3 (gov't reply br. at 16). That position is in irreconcilable conflict with the clear language of the firm-fixed-price-specifications. Specification Items under 3.3 require complex IMP-level maintenance only on five specified systems and their associated equipment

inventories. Specification Item 3.1 requires simple maintenance on things not listed in either 3.2 or 3.3 inventories. Service Calls are further distinguished from IMP work by the express limitation in Specification Item 2.1.10 that these tasks are “brief in scope; and do not reasonably require detailed job planning.” Contrary to the rules of contract interpretation, the Navy’s interpretation reads those limitations out of the specifications to compel KBSS to perform Service Calls requiring detailed planning and extended time for performance. The interpretation of a contract begins with the language of the written agreement, which must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Creating an obligation on KBSS to perform IMP-level service on equipment that is not within the scope of a fixed-price Service Call or that is not identified in an IMP system inventory renders the contract description of each superfluous. Such an interpretation should be avoided.

2. Incomplete Inventories are Defective

The correspondence preceding Task Order 0241 and Modification 8 reflects that Section J of the specification was known to be inaccurate and the government was working to provide a more accurate list of equipment (R4, tab 26 at 1231; tr. 16). The government also subsequently acknowledged that identification of all pieces of an IMP system is important for the government and the contractor (R4, tab 26 at 1231). Certainly, identification of the equipment subject to an IMP informs government personnel how to request service or repairs on such equipment. They will know, or should know, that maintenance on equipment included in a system designated as IMP should not be requested by Service Call. Nevertheless, the contracting officer asserted that KBSS is responsible for all ancillary parts and equipment of a system covered by IMP even if those parts are not identified in the inventory for that system (R4, tab 32 at 1294). The contract, however, does not shift the burden to define those parts onto the contractor. The Navy chose to establish the parameters of each IMP-designated system by including a list of equipment for every system in Section J (R4, tab 8 at 440-588).

Definition of the complete system inventory ensures more accurate pricing by the contractor and reduces the likelihood of disputes. Conversely, the Navy chose not to identify the potential equipment that is subject to Service Calls under Specification Item 3.1. That item does shift the burden to KBSS to assume the risk to conduct simple maintenance for all equipment outside the IMP systems known or unknown. Having chosen to define the equipment in each IMP system the Navy is responsible for the parts that are missing.

3. Service Calls Do Not Supplement IMP Work

KBSS claims the work it has performed on previously unidentified equipment is equivalent to the IMP maintenance requirements in Specification Item 3.3. Mr. Barkhurst testified that “[t]he Navy also issued Service Calls for equipment that was classified as IMP equipment when the contract specifically stated it would not do so” (gov’t mot., ex. A, Barkhurst aff. ¶ 12). The Navy rejects KBSS’s claims of newly discovered IMP-type work. “[T]here is no question that repair work on components is FFP work: it’s either IMP work, or its service call work. It can’t be both, but it also can’t be neither.” (Gov’t reply br. at 16) This interpretation is based upon a supposition that equipment on base falls on either side of that dichotomy; every part receives either simple service under Item 3.1 or complex service under Item 3.3. This dichotomy breaks down when KBSS encounters equipment requiring IMP-level service that is not identified in an IMP system. At that point, the Navy’s argument that Service Calls necessarily apply to IMP-like work fails because Item 3.1 prohibits complex maintenance by Service Calls. In sum, Service Calls may not be used to avoid the consequences of the defects in the IMP-system inventories. Moreover, when a significant amount of IMP equipment has been left out of the inventories, issuance of Service Calls is problematic because such calls are equally likely to be issued on equipment that is part of an IMP-covered system. In that event, the Service Call violates the oft repeated restriction that “Service Calls will not be issued for accomplishment of repairs on systems and equipment under the IMP” (R4, tab 6 at 134, 136, 141).

Accordingly, the Navy has not shown it is entitled to summary judgment as a matter of law.

II. Motion To Dismiss For Lack of Jurisdiction

KBSS bears the burden of proving the Board's subject matter jurisdiction by a preponderance of the evidence. *Colonna's Shipyard, Inc.*, ASBCA No. 59987 *et al.*, 16-1 BCA ¶ 36,518. It must meet the prerequisite for Board jurisdiction under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (CDA), by submission of a claim in writing for a contracting officer’s decision, and an appeal of the decision. *Envtl. Safety Consultants, Inc.*, ASBCA No. 58221, 13 BCA ¶ 35,329. Once an appeal has been filed, the introduction of additional facts which do not alter the nature of the original claim, or of a new legal theory based upon the same operative facts in the original claim, will not constitute a new claim. *Envtl. Safety Consultants, Inc.*, ASBCA No. 54995, 06-1 BCA ¶ 33,230.

There is no dispute that KBSS has satisfied the CDA requirement for submission of its claims to the contracting officer. In its reply brief, however, the government raises a jurisdictional question based on the terminology used in appellant’s briefs.

Specifically, appellant's CDA claims allege that equipment it serviced was not identified in a system inventory in Section J. Appellant's reply re-characterizes some of the equipment allegedly left out of the contract as "components" (gov't reply br. at 11). The government views appellant's reference to "components" as a new contract interpretation theory. The government suggests the Board does not possess jurisdiction to entertain KBSS's claims because this new contract interpretation has not been submitted to the contracting officer (gov't reply br. at 11-12). The government sums up its argument:

KBSS did not specify in its claims that it also sought payment for the work that it allegedly performed on unlisted components of IMP or PM systems. The word "component" does not appear in the claims or in the Complaints, and none of the line items in the REAs specifies that a given work item is disputed because it was performed on an unlisted component.

(*Id.*) Appellant responds that its demand for additional compensation has always been premised upon equipment that is not listed in the IMP Section J tables (app. sur-reply at 9). It recites numerous passages in the parties' correspondence incorporated in the claims which address the contractor's assertion that it performed work on equipment omitted from IMP system inventories (*id.* at 10-11). It also quotes the contracting officer's final decision which describes which components are included in Section J and which components are not (*id.*).

The contracting officer's decision explains that the Section J tables include major components but may not include ancillary components (R4, tab 32 at 1294). Thus, according to the government, the contracting officer's decision can rely upon "component" terminology, but that same terminology creates a new claim when used in appellant's briefs. There is no distinction between use of the term "component" by the government and use of the same term by the contractor. At best, the government's jurisdictional argument rests upon a semantic difference, the significance of which is apparent only to the government. Worse, the government's jurisdiction argument directly conflicts with its contract interpretation argument that immediately precedes it. The government asserts we cannot exercise jurisdiction because the Navy never understood KBSS's claims to be based upon "components" not listed in the Section J tables (gov't reply br. at 11). Its contract interpretation argument asserts the Navy may issue Service Calls on equipment not listed in Section J tables (*id.* at 7-8). The central point in each argument addresses appellant's claims that equipment was left out of the Section J tables. The only difference in the arguments is referring to the alleged missing parts as "components" or, in the prior argument, as "major" or "minor" parts. Regardless the characterization of the equipment, the government's argument is baseless. Appellant does not raise a new claim simply by referring to "components"

because either argument requires the Board to review “the same or related evidence.” *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). Thus the government’s motion must fail.

CONCLUSION

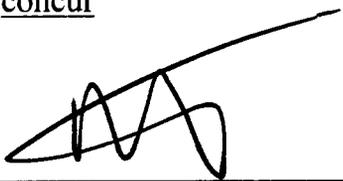
The Navy’s motions are denied.

Dated: 10 July 2017



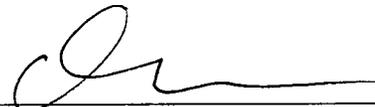
DONALD E. KINNER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting 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. 59213, 59532, Appeals of Kings Bay Support Services, rendered in conformance with the Board’s Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals