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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
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Sungwoo E&C Co., Ltd.) ASBCA Nos. 61144, 61219
)
Under Contract No. W91QVN-14-D-0034)

APPEARANCE FOR APPELLANT: Yong Eui Song, Esq.
Central IP & Law
Seoul, Korea

APPEARANCES FOR THE GOVERNMENT: Dana J. Chase, Esq.
Army Chief Trial Attorney
LTC Julie A. Glascott, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STINSON

In Appeal No. 61144, appellant Sungwoo E&C Co., Ltd. (Sungwoo), a Korean Company, challenges as improper the government's Contractor Performance Assessment Report System ("CPARS")¹ ratings under a Multiple Award Task Order Contract (MATOC) for three task orders issued during the MATOC base year (R4, tab 79). In Appeal No. 61219, Sungwoo raises several issues concerning the government's June 2, 2016, overall CPAR under the MATOC, the government's failure to award task orders, a challenge to a stop-work order, allegations the Army committed fraud, an allegation the Army improperly suspended or debarred Sungwoo, and an allegation that the Army's decision not to exercise various contract options was improper. Sungwoo also sought monetary damages of ₩2,050,656,763 (Korean Won) (R4, tab 78 at 4307).

Our decision in *Sungwoo E&C Co.*, ASBCA Nos. 61144, 61219, 19-1 BCA ¶ 37,449, addressed several motions filed by the government which, as resolved, narrowed the scope of these appeals.² Our decision struck all but Sungwoo's claim in

¹ "CPARS" refers to the rating system, while an individual rating is referred to as a "CPAR," and the plural of a CPAR is "CPARs." *St. Michael's Inc.*, ASBCA No. 62226 *et al.*, 25-1 BCA ¶ 38,757 at 188,389 n.1.

² These appeals were docketed as ASBCA Nos. 61144 and 61219. The Board granted the government's unopposed motion to consolidate the appeals, and in a decision dated April 27, 2022, dismissed a third appeal, ASBCA No. 62738, as duplicative of claims already before the Board. *Sungwoo E&C Co.*, ASBCA No. 61144 *et al.*, 22-1 BCA ¶ 38,125 at 185,209.

ASBCA No. 61144 concerning Sungwoo's challenge to the "unsatisfactory" CPARs under the MATOC and Sungwoo's challenge in ASBCA No. 61219 to the Army's decision not to exercise various contract options, and the alleged monetary impact. We determined that although Sungwoo frequently used the term "fraud" in its characterization of the government's actions, the two remaining issues in these appeals concerned whether "the government acted arbitrarily and capriciously, or in bad faith, when it evaluated appellant's performance as being 'unsatisfactory' and when it refused to exercise the options and award additional work under the various contracts." *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,976. We also reduced Sungwoo's monetary claims. *Id.* at 181,973, 181,976. Familiarity with these decisions is presumed.³

The parties agreed to submit these appeals on the record without a hearing pursuant to Board Rule 11. For the reasons stated below, the appeals are denied.

FINDINGS OF FACT (FOF)

1. The government awarded Sungwoo several MATOCs for construction services in the Republic of Korea (ROK) (R4, tabs 5-10). Pertinent to this appeal is MATOC W91QVN-14-D-0034, a general construction, multiple award, indefinite delivery/indefinite quantity (IDIQ) task order contract (R4, tab 10 at 381, 390).⁴

2. The MATOC performance period was 12 months from August 14, 2014, through August 13, 2015, renewable at the option of the government for two additional 12-month periods (*id.* at 390). The MATOC required the contractor to (1) comply with the 2014 Standard Technical Specifications for O&MA (Operation and Maintenance Army) Projects, Korea (sometimes referred to as OMA) (R4, tab 10 at 392; tab 40; tab 44 at 3998), (2) submit preliminary, initial, and progress work schedules in accordance with the O&MA specifications, (3) submit within seven calendar days of notice to proceed the requisite ENG Form 4025 submittals (prior to ordering or purchasing any material(s) requiring government approval), and (4) submit within seven calendar days any resubmission or revisions of material submittals after receipt of any disapproved/rejected material submittal packages (R4, tab 10 at 396).

3. The MATOC included the following clauses:

5152.232-4030 PAYMENTS – ROK MND – FUNDED
CONTRACTS:

³ On February 26, 2025, these appeals were reassigned to another administrative judge for decision.

⁴ All references to specific page numbers in the government's Rule 4 file are to the Bates-labeled pagination. Any prefixes and leading zeroes have been removed.

(a) Responsibility for Payment: Pursuant to Memorandum of Agreement (MOA) between United States Forces Korea (USFK) and the Republic of Korea Ministry of National Defense (ROK MND) concerning this contract, the ROK Government shall make payment directly to the contractor for performance rendered and accepted under any contract part, or delivery or service order identified as “MOA contract, funded by ROK MND.”

...

5152.233-4008, DISPUTES, MINISTRY OF NATIONAL DEFENSE FUNDED CONTRACTS, ROK:

(This clause applies only to ROK-funded acquisitions or parts of acquisitions.)

...

(d) Procedures

(3) Individuals (i) If the contractor is an individual, the certification shall be executed by that individual.

(ii) If the contractor is not an individual, the certification shall be executed by – (A) A senior company official in charge at the contractor's plant or location involved; or (B) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(R4, tab 10 at 405, 419) The MATOC also incorporated Federal Acquisition Regulation (FAR) 16.505, Ordering, promising the successful contractor a fair opportunity to propose on projects unless the contracting officer (CO) determined that an exception was appropriate (*id.* at 407).

4. Sungwoo was awarded eleven task orders under the MATOC, three of which, 0001, 0002, 0004, are at issue here (R4, tab 70 at 4272, 4276; tabs 16-18).

Logistics Cost Sharing Program

5. Sungwoo's contracts were awarded utilizing the ROK Logistics Cost Sharing (LCS) Program, and included requirements specific to that program (R4, tab 5 at 114-19; tab 6 at 163-68; tab 7 at 217-22; tab 8 at 271-76; tab 9 at 335-44; tab 10 at 411-20).

6. The LCS program derives from an international agreement between the United States Armed Forces and the ROK, and provides for cost sharing between the two countries, managed by the United States Forces Korea (USFK) J4 Directorate and the ROK MND (R4, tabs 1–4, 20, 28, 41, 94).

7. On October 21, 2009, the United States and ROK entered into an implementing agreement covering the LCS program from 2009 through 2013 (R4, tab 2 at 33, 41). The agreement provided that under the LCS program “all equipment and supplies that are to be acquired with ROKG funds shall be manufactured in the ROK, and that all LCS service work shall be carried out by Korean contractor(s)” (R4, tab 2 at 35).

8. Although, the LCS implementing agreement requires products be manufactured in the ROK, a waiver is available to contractors if ROK-made materials are not available. The process requires the contractor to submit a request to the USFK J4 Directorate which then will process the request with the ROK MND. (R4, tabs 94–94c)

9. The W91QVN-14-D-0034 MATOC task orders at issue here, 0001, 0002, and 0004, were issued under the LCS program, were funded by the ROK MND, and incorporated pertinent ROK MND clauses (R4, tab 10 at 406; tab 16 at 456, 463–68; tab 17 at 482–88; tab 18 at 505–10). Task Order Nos. 0001 and 0004 expressly stated they are LCS projects funded in accordance with a memorandum of agreement between the United States and the ROK (R4, tab 16 at 463; tab 18 at 505). Task Order No. 0002 stated it is an MOA Contract, funded by ROK MND (R4, tab 17 at 482).

10. Task Order Nos. 0001, 0002, and 0004, included the following clauses: 5152.232-4028 FUNDING OF ROK-FUNDED CONTRACTS; 5152.232-4030 PAYMENTS – ROK MND-FUNDED CONTRACTS; and 5152.233-4008 DISPUTES, MINISTRY OF NATIONAL DEFENSE FUNDED CONTRACTS, ROK (R4, tab 16 at 464–68; tab 17 at 482, 484–88; tab 18 at 505, 507–10).

11. Task Order Nos. 0001, 0002, 0004 incorporated FAR 52.211-10 COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984) by full text, which stated: The Contractor shall be required to (a) commence work under this contract within 10 calendar days after the date the Contractor received the notice to proceed, (b) prosecute the work diligently, and (c) **complete the entire work ready for use not later than 120 calendar days after Notice to Proceed (NTP) is issued**. The time stated for completion shall include final cleanup of the premises. (R4, tab 16 at 462; tab 17 at 481; tab 18 at 504) (emphasis in original)

MATOC Task Order No. 0001

12. Prior to the award, Sungwoo submitted a price proposal that included use of offshore items (app. supp. R4, tab 14 at 4-6). By email dated October 29, 2014, a government contract specialist requested Sungwoo explain the “need for off-shore items in your proposal for LCS project” (*id.* at 1). By emails dated October 30, 2014, Sungwoo responded it could change all the items offered to local materials, and subsequently provided an updated proposal with only local materials (*id.* at 1–2, 9; R4, tab 100 at 4696-97).

13. On December 1, 2014, the government awarded Sungwoo Task Order No. W91QVN-14-D-0034-0001 (Task Order 0001) in the amount of \$608,710.91, to repair Building No. 2253 at Camp Stanley, ROK. Task Order 0001 included a statement of work and completed design, requiring Sungwoo to supply the listed materials meeting the contract requirements and necessary labor. (R4, tab 16 at 452-54, 456-60, 463)

MATOC Task Order No. 0002

14. On December 17, 2014, the government awarded Sungwoo Task Order No. W91QVN-14-D-0034-0002 (Task Order 0002) in the amount of \$1,217,776.50, to repair Building Nos. 1251 and 1256 (two dining facilities and kitchen installation) located at Camp Casey, ROK (R4, tab 17 at 472-73). Task Order 0002 included a statement of work and completed design, requiring Sungwoo to supply the listed materials and necessary labor (*id.* at 475-79).

MATOC Task Order No. 0004

15. On December 17, 2014, the government awarded Sungwoo Task Order No. W91QVN-14-D-0034-004 (Task Order 0004) in the amount of \$579,420.86, to repair Building No. 247 at Camp Red Cloud, ROK (R4, tab 18 at 497-98). Task Order 0004 included a statement of work and completed design, requiring Sungwoo to supply the listed materials and necessary labor (*id.* at 500-02).

Additional IDIQ MATOCs

16. Sungwoo was awarded several other MATOC IDIQ contracts: Nos. W91QVN-12-D-0114, W91QVN-12-D-0119, W91QVN-12-D-0130, W91QVN-12-D-0132, W91QVN-13-D-0064, as well as task orders issued thereunder for paving and other work (R4, tabs 5-9). These contracts included 5152.232-4030 and 5152.233-4008 (R4, tab 5 at 111-13, 118-20; tab 6 at 167-69 (W91QVN-12-D-0119 did not include 5152.232-4030 PAYMENTS); tab 7 at 214-16, 221-23; tab 8 at 268-70, 275-77; tab 9 at 341-44). These contracts also included the promise of a fair opportunity to

compete for additional awards and options to renew the contracts for four additional 12-month periods (R4, tab 5 at 106, 124; tab 6 at 155; tab 7 at 209; tab 8 at 263; tab 9 at 322).

Contract No. W91QVN-12-D-0119 - Task Order No. 0034

17. On September 12, 2014, Sungwoo was awarded W91QVN-12-D-0119-0034 (Task Order 0034) in the amount of \$143,740, to repair paving at 10th Corps Boulevard, United States Army Garrison, Yongsan (Yongsan Garrison) (R4, tab 12). Repair was to be completed “within 45 days after contract award/NTP was issued” (*id.* at 442).

Contract No. W91QVN-14-D-0034 - Task Order No. 0016

18. On February 12, 2016, the government awarded Sunwoo Task Order No. W91QVN-14-D-0034-0016 (Task Order 0016), in the amount of \$363,822.13, to “Correct Critical Life, Health, Safety (LHS) Deficiencies, Area II,” in housing located at Yongsan Garrison (R4, tab 44).

19. Task Order 0016 incorporated FAR 52.211-10 (*id.* at 4003) and required work to conform with the O&MA specifications, the contract drawings listed in the task order, and the O&MA standard detailed drawings (*id.* at 3998, 4005).

Sungwoo’s Performance Under Task Order No. 0001

20. On March 3, 2015, the government issued Sungwoo Contract Deficiency Report (CDR) No. 411CSB-L2-15-0021, stating, “as a result of severe construction progress delays,” Sungwoo had not met its submitted progress schedule, and that as of March 2, 2015, construction was 60.3 percent complete as compared to Sungwoo’s scheduled completion of 78.8 percent. The CDR noted various delays in Sungwoo’s submission of ENG Form 4025 submittals, as well as Sungwoo’s failure to submit lot materials (groups of materials submitted by type). The CDR also noted that the contract completion date (“CCD”) of March 31, 2015, was not attainable. (R4, tab 22)

21. On March 8, 2015, Sungwoo submitted its response stating that its lack of construction progress was caused by the Korean lunar holiday, which reduced the number of days Sungwoo could perform work, and that its delay in submitting ENG Form 4025s was “because only local materials are required in this project and we need time to search applicable local items for mechanical & electrical work” (*id.*). However, Sungwoo’s proposal submitted prior to issuance of Task Order 0001 had identified all local items for performing the task order (FOF ¶ 13; app. supp. R4, tab 14 at 1-2). Sungwoo’s response also requested a 24-day extension of the CCD (R4, tab 22).

22. On March 8, 2015, the CO determined Sungwoo was responsible for all holidays and non-workdays set forth in its schedule. The CO noted that Sungwoo was required to provide its material submittals seven days after issuance of the NTP, and that Sungwoo was currently 95 days late in submitting its remaining submittals. The CO also noted that (1) the government released the requisite building on December 10, 2014, and (2) Sungwoo's schedule forecasted work to commence on December 21, 2014, with construction materials available or arriving in sufficient time so as not to delay project completion. Sungwoo was directed to submit a revised project schedule, all material submittals, and a corrective action plan (CAP). Sungwoo also was warned that the failure to comply may result in issuance of a cure notice or show cause notice. (*Id.*)

23. Sungwoo failed to complete Task Order 0001 within the original CCD, and, on May 15, 2015, the government issued Modification No. 01 to Task Order 0001 extending the CCD date from April 15, 2015, to May 15, 2015 (R4, tab 33).

Sungwoo's Performance Under Task Order No. 0002

24. On March 6, 2015, the government issued Sungwoo CDR No. 411CSB-L2-15-0024, for Task Order 0002, labeling it a "[m]ajor CDR that could result in severe contract performance" issues delaying the completion of the project, and stating that Sungwoo had failed to submit ENG Form 4025s within the contractually required seven calendar days from the NTP. The CDR further stated that as of February 2015, Sungwoo had submitted only 70 percent of its material submittals. (R4, tab 24)

25. On March 9, 2015, Sungwoo responded, offering the same justification it provided regarding Task Order 0001, i.e., it could not submit all its material submittals within seven days of the NTP because it still was searching for local items that met the task order requirements and that the items it submitted on February 17, 2015, were not approved by the government as meeting the task order requirements (FOF ¶ 21). Sungwoo stated that based on its progress as of February 28, 2015, Sungwoo would not meet the CCD of April 15, 2015 (*id.*).

26. The CO determined that Sungwoo failed to timely submit its material submittals, as well as timely submit its "resubmission or revisions of material submittals [which were to] be accomplished within seven (7) calendar days after receipt of any disapproved/rejected material submittal packages." The CO noted that, by March 13, 2015, Sungwoo's submittals would be 79 days late and that Sungwoo had failed to demonstrate any government-caused delay impacting Sungwoo's schedule. (R4, tab 24)

27. Sungwoo was directed to submit a revised project schedule, all material submittals, and a CAP. Sungwoo was warned that failure to comply may result in issuance of a cure notice or show cause notice. (*Id.*) Sungwoo failed to submit its material submittals by the required date of March 13, 2015, and continued providing material submittals well into June 2015 (R4, tab 31). Sungwoo's submittals dated March 10, 2015, and March 13, 2015, were rejected as not meeting task order requirements; the government in response provided Sungwoo information regarding an approved local manufacturer to supply the required material (*id.* at 3772–79).

28. On May 15, 2015, the government issued Modification No. 01 to Task Order 0002 extending the CCD date from April 15, 2015, to May 22, 2015 (R4, tab 34), and on May 26, 2015, the government issued Modification No. 02 removing the kitchen installation requirement and de-obligating the labor costs (R4, tab 35).

Sungwoo's Performance Under Task Order No. 0004

29. On March 3, 2015, the government issued Sungwoo CDR No. 411CSB-L2-15-0022, stating that (1) the project had encountered several construction delays, (2) Sungwoo had not met its submitted progress schedule, and (3) Sungwoo had delayed submitting its material submittals. The CDR concluded that the CCD was not attainable. (R4, tab 23)

30. On March 8, 2015, Sungwoo responded, stating it was behind schedule due to the Korean lunar holiday. Regarding its failure to provide timely material submittals Sungwoo offered the same justification it asserted regarding Task Orders 0001 and 0002 (it was still searching for local materials that met the task order requirements), and that it needed a 50-day extension of the CCD (R4, tabs 23-24; FOF ¶¶ 21, 26).

31. The CO determined that Sungwoo was responsible to account for holidays in its progress schedule, stating that the schedule would not be extended if there were holidays or non-workdays within the task order performance period. The CO also determined that Sungwoo did not submit its material submittals within seven days of the NTP as required, that Sungwoo was 79 days late in submitting its remaining material submittals, and Sungwoo had not demonstrated any government-caused delays impacting Sungwoo's performance. (R4, tab 23)

32. The CDR required Sungwoo submit its revised project schedule by March 13, 2015, as well as its material submittals and a CAP. The CDR noted that failure to timely provide a CAP plan could result in issuance of a cure notice or show cause notice. (*Id.*) On May 14, 2015, Modification No. 01 to Task Order 0004 was issued, extending the CCD from April 15, 2015, to May 15, 2015 (R4, tab 32).

Sungwoo's Performance Under Contract No. W91QVN-12-D-0119-0034

33. On October 14, 2014, the government issued Sungwoo CDR No. 411CSB-L1-14-0040 regarding Task Order 0034, stating that Sungwoo performed paving work without approved pre-construction submittals as required by the O&MA specifications (R4, tab 13; tab 19 at 532, 538, 556, 627).

34. On November 10, 2014, Sungwoo responded that (1) it was unaware until after the project was completed that all material submittals were to be reviewed prior to work being performed and (2) it submitted all preconstruction material submittals after it was made aware of the requirement (R4, tab 13).

35. The government rejected Sungwoo's response, noting that Sungwoo had submitted a signed acknowledgement of the O&MA specifications which sets forth the pertinent preconstruction submittal requirements (R4, tab 13). The CDR included a "warning notice," noting that during a Department of Public Works ("DPW") meeting on December 2, 2014, Mr. Charlie Yang, Sungwoo's Vice President, had stated that all "documents specified in this CDR were approved by DPW prior to commence [sic] of this project and [that he] will provide hard copies of the approved submittals the following day." Yet, based upon the government's review of "the hand carried documents provided by Mr. Yang on 3 Dec 14, none of these documents substantiate[d] Sungwoo's position." (*Id.*)

36. On December 12, 2014, the government issued a second CDR No. 411CSB-L2-14-0047, noting that approximately one month after project final inspection, the installed pavement had started to fail. The CDR required that Sungwoo explain the reason why pavement failed so soon after completion of the project and provide "all required test reports and other supporting documentation that validates that all work associated with this task order has been completed." (R4, tab 14)

37. On January 3, 2015, Sungwoo responded to the CDR, asserting that (1) it had performed the pavement work in accordance with the statement of work and specifications, and (2) the pavement failed because of rainy weather (*id.*).

38. The government requested Sungwoo submit a CAP to replace the damaged pavement, including subbase, base, asphalt/concrete surfaces (*id.*).

39. On March 5, 2015, Sungwoo responded to the government's request for a CAP, indicating that Sungwoo would replace only the asphalt/concrete under warranty, rather than the subbase and base as requested by the government (R4, tab 25 at 3714-15; tab 26 at 3723; tab 27 at 3734).

40. On April 14, 2015, the government issued Sungwoo a cure notice stating that Sungwoo had failed to comply with the O&MA specifications when it performed only two density tests (the O&MA specifications require a minimum of 22). The cure notice detailed the corrective action Sungwoo was to perform. (R4, tab 29) Ultimately, Sungwoo “re-accomplished the entire project as per the Cure Notice” (R4, tab 40 at 3980).

Sungwoo’s Performance Under Task Order No. W91QVN-14-D-0034-0016

41. On June 1, 2016, the government issued Sungwoo CDR No. 411CSB-L2-16-0103, stating that Sungwoo failed to comply with certain safety standards (R4, tab 51). On June 6, 2016, Sungwoo submitted documentation correcting the safety issues, and stating that Sungwoo would prevent further safety issues by performing daily safety inspections and safety training. The CO found this corrective action acceptable. (*Id.*)

42. On June 7, 2016, the government issued Sungwoo CDR No. 411CSB-L2-16-0104, citing improper performance of task order requirements, damage to existing underground utility lines, and installation of nonconforming material (R4, tab 53 at 4135). On June 16, 2016, Sungwoo provided a CAP, which the government rejected on June 23, 2016, because it did not identify actions Sungwoo would “take to prevent future occurrences” and noted that Sungwoo had not corrected the safety issue identified in the previous CDR (R4, tab 53 at 4136-40; tab 54 at 4186-88).

43. On June 8, 2016, the government issued Sungwoo CDR No. 411CSB-L2-16-0105, citing Sungwoo’s difficulty in meeting safety requirements, including the need to provide means of exit for workers performing excavation, fall prevention systems, access planks, and proper trenching and excavating methods (R4, tab 55 at 4196).

44. On June 16, 2016, Sungwoo submitted a CAP (*id.* at 4197-98), which the government rejected on June 23, 2016, “because it [did] not state what action the contractor [was] going to take to prevent future occurrences in sufficient detail” (*id.* at 4195, 4199). The government’s rejection listed several deficiencies in Sungwoo’s work and its failure to comply with drawings and specifications (*id.* at 4199).

45. On June 16, 2016, the government issued Sungwoo CDR No. 411CSB-L2-16-0110, for improper (1) material installation, (2) permitting for use of government property, and (3) site protection (R4, tab 59 at 4226-27). On June 23, 2016, Sungwoo submitted a CAP, which the government subsequently rejected as unacceptable because it did not address all the issues raised in the CDR (R4, tab 56 at 4200, 4202-03; tab 67 at 4256).

46. On June 28, 2016, the government issued Modification No. 01 to Task Order 0016, extending the CCD from June 28, 2016, to September 2, 2016 (R4, tab 58).

47. On July 5, 2016, the government issued Sungwoo CDR No. 411CSB-L2-16-0127, for failure “to properly protect the worksite from the elements,” which had caused “significant damage to the surrounding structures” and was a “serious violation[] of” specifications (R4, tab 60 at 4244). On July 13, 2016, the government issued a stop work order (R4, tab 61 at 4245), and on July 14, 2016, Sungwoo responded, noting that the government had descoped the task order on July 8, 2016 (R4, tab 60 at 4244).

48. On August 5, 2016, the government issued a show cause notice, citing Sungwoo’s failure to perform satisfactory workmanship. The show cause order noted Sungwoo’s “continual prevarication, demonstrated lack of competence necessary to perform, contract regards and disregards of fundamental requirements for Safety and Quality Control,” as well as the issuance of six CDRs “over a three month period that consisted of unacceptable project schedules/delays, non-compliance of safety standards, improper excavation/shoring, non-conforming materials, significant damage to surround[ing] structures and inability to complete electrical and fire alarm work in Government Quarters.” (R4, tab 69 at 4268) The government also informed Sungwoo of its intention to terminate the contract for default (*id.*).

CPARS Evaluations

49. Pursuant to FAR Table 42-1 EVALUATION RATING DEFINITIONS, marginal performance is defined as:

Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified correct actions. The contractor’s proposed actions appear only marginally effective or were not fully implemented.

To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government.

50. Pursuant to FAR Table 42-1 EVALUATION RATING DEFINITIONS, unsatisfactory performance is defined as:

Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.

To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating.

The Paving Contract No. - W91QVN-12-D-0119-0034 CPAR

51. On July 19, 2015, the government issued a CPAR on Task Order 0034 assessing Sungwoo's performance as unsatisfactory in quality, marginal in schedule, unsatisfactory in management, satisfactory in regulatory compliance, and unsatisfactory in quality control (R4, tab 40 at 3979). Sungwoo completed paving work on October 15, 2014, however, the paving surface failed, with cracks appearing two to three months after completion (*id.*; FOF ¶¶ 36-37).

52. The unsatisfactory rating for quality was based upon Sungwoo's failure to produce documentation establishing that it performed the paving work in accordance with the task order requirements and specifications, as well as its failure to produce a Quality Control Plan or other evidence of testing as required under the task order (R4, tab 40 at 3979). The marginal rating for schedule acknowledged that Sungwoo adhered to the schedule to complete the paving in October 2014, but that after defects became apparent, and the government issued a CDR, Sungwoo's incoherent response resulted in a six-month delay in repairs (*id.* at 3980). The unsatisfactory rating for management noted that Sungwoo performed paving work without government approval of its pre-construction submittals, which is required pursuant to the O&MA specifications. The unsatisfactory management rating also noted that Sungwoo failed to provide, when requested by the government, required testing results, or other evidence demonstrating that the paving completed in October 2014 was performed in accordance with the task order specifications. The unsatisfactory rating for quality control stated that Sungwoo's "Quality Control appears to have been totally ineffective." (*Id.*).

53. The CPAR concluded that Sungwoo should redo the entire paving project per the CO's cure notice and noted that the repaved road appeared to have been completed "satisfactory pending [the] submission of all required tests/reports." The assessing official recommend that Sungwoo not be awarded similar, future requirements. (*Id.*)

54. Sungwoo responded to the CPAR stating it had followed the government's instructions and submitted all requested test results and that final inspection was approved based upon the test reports. Sungwoo's response complained that the DPW did not provide any submittals, did not request the submission of test reports in accordance with the O&MA specifications, that project schedule approval authority was unavailable, and that Sungwoo followed instructions of the COR and the Director of Emergency Services to perform work it believed was contrary to the specifications (*id.* at 3980-81).

55. The reviewing official, Mr. Ronald Ware, Division Chief, Construction & Supply Division, 411th Contracting Support Brigade ("CSB") made no changes to the CPAR, noting that Sungwoo was required to meet all task order terms and conditions, including the O&MA specifications, "to insure a solid base for the paving," and that "[i]f these steps were followed, early degradation [sic] would not have surfaced and the repaving would not have been necessary" (*id.* at 3982).

The MATOC Task Order No. 0001 CPAR

56. On January 19, 2016, the government issued a CPAR on Task Order 0001, assessing Sungwoo's performance as satisfactory in quality, unsatisfactory in schedule, marginal in management, satisfactory in regulatory compliance, marginal in material submittal procedures, and marginal in communication (R4, tab 42 at 3985-86, 3988).

57. The unsatisfactory rating for schedule stated that Sungwoo "did not adequately schedule the work," "did not meet administrative milestone dates," failed to take "appropriate corrective action of its own volition," failed to complete in a timely manner construction activities (administrative and physical), submitted late submittals, was "continually behind schedule," and, that "[c]ommunication between project management and COR and Government [was] not effective," with late decisions causing even more delays (*id.* at 3986). The marginal rating for management criticized as "lacking" the capacity of Sungwoo's on-site and home office personnel "to adequately plan, schedule, resource, organize, and otherwise manage the work," and labeled as marginal Sungwoo's "risk management practices, especially the ability to identify risks, and to formulate and implement risk mitigation plans" (*id.*).

58. The marginal rating for “other areas” noted delays caused by Sungwoo’s “inability to identify acceptable local materials,” suggesting Sungwoo did not “understand Compliance [ENG Form 4025] timeliness making the CCD unattainable,” did not “fully understand[] Material submittals were the main issue for falling behind in execution,” and that “[i]nteraction between the Contractor and the Government is marginal and contractor needs improvement.” The CPAR also noted that the government revised the CCD of May 15, 2015, and on June 25, 2015, allowed completion of punch list items because some material items “changed to offshore material because of electrical UL ratings and critical regulations,” as well as a labor strike in Long Beach, California, which “caused additional delays.” The CPAR noted, however, that “this does not excuse the contractor from submitting several submittals late.” The CPAR recommend Sungwoo not be awarded contracts for similar requirements in the future. (*Id.*)

59. Sungwoo non-concurred with the CPAR. Sungwoo’s comments, however, failed to address late submission of the material submittals and poor communications with the government, instead focusing on material submittals the design engineer did not approve, resulting in discussions further delaying the project. (*Id.* at 3987)

60. Mr. Ware, the reviewing official, concurred with the government’s assessment and made no changes to the CPAR, stating, “[b]ased on the government’s evaluation of the contractor’s performance, the contractor was late on the first submission for most of the material submittals,” and “was at least 20 days late on the first submission of the architecture submittals,” was 78 days on other architecture submittals, “was at least 52 days late on the first submission of all the mechanical submittals,” and “at least 77 days late on the first submission of the electrical submittals.” Mr. Ware summarized his findings, stating, “[b]ased on my review of the assessor’s evaluation and of the contractor’s response, I have determined that the root cause of the schedule delays was the late submission of the material submittals,” and “that communication and cooperation with this contractor’s management continues to hinder performance on their contracts even though these concerns had been expressed by the government.” (*Id.* at 3988)

The MATOC Task Order No. 0002 CPAR

61. On October 8, 2015, the government issued a CPAR on Task Order 0002, assessing Sungwoo’s performance as satisfactory in quality, unsatisfactory in schedule, marginal in management, satisfactory in regulatory compliance, marginal in material submittal procedures, and marginal in communication (R4, tab 39 at 3974–76). The unsatisfactory rating for schedule stated that Sungwoo did not adequately schedule work, meet administrative or physical milestone dates, take appropriate corrective action of its own volition, timely submit or respond to submittals, and that communication between project management and COR was not effective (*id.* at 3975).

The basis for the CPAR marginal rating for management was stated as: “[l]acking Contractor management, on-site, and home office personnel exhibiting the capacity to adequately plan, schedule, resource, organize, and otherwise manage the work,” and that Sungwoo’s “risk management practices, especially the ability to identify risks, and to formulate and implement risk mitigation plans were marginal” (*id.*). The marginal rating for “other areas” noted the same problems Sungwoo experienced with Task Order 0001, regarding Sungwoo’s inability to identify acceptable local materials, and its misunderstanding of ENG Form 4025, thereby making the CCD unattainable (*id.*; FOF ¶ 58). The CPAR also noted the labor strike in Long Beach, California, which caused additional delays, but did not excuse Sungwoo’s from submitting several late submittals (R4, tab 39 at 3975). The assessing official summarized, stating “[g]iven what I know today about the contractor’s ability to perform in accordance with this contract or order’s most significant requirements, I would not recommend them for similar requirements in the future” (*id.*).

62. Although Sungwoo concurred with the evaluation and provided some comments in response, Sungwoo’s comments failed to address late submission of material submittals and poor communication with the government, instead focusing on materials that Sungwoo submitted that were not approved by the design engineer, resulting in discussions with the design engineer that further delayed the project (*id.* at 3976).⁵

The MATOC Task Order No. 0004 CPAR

63. On January 19, 2016, the government issued a CPAR on Task Order 0004, assessing Sungwoo’s performance as satisfactory in quality, unsatisfactory in schedule, marginal in management, satisfactory in regulatory compliance, marginal in material submittal procedures, and marginal in communication (R4, tab 43 at 3989–90, 3992). The unsatisfactory rating for schedule was based upon the same issues that Sungwoo experienced in performing Task Order 0002, such as inadequate scheduling, failure to meet milestones, and failure to complete construction in a timely manner (*id.* at 3990; FOF ¶ 61). The marginal rating for management stated that Sungwoo was “[l]acking Contractor’s management, on-site, and home office personnel exhibiting the capacity to adequately plan, schedule, resource, organize, and otherwise manage the work.” Regarding risk management practices, the CPAR noted that Sungwoo’s “ability to identify risks, and to formulate and implement risk mitigation plans were marginal.” (R4, tab 43 at 3990) The marginal rating for “other areas” noted the same problems Sungwoo experienced with Task Orders 0001 and 0002, regarding Sungwoo’s inability to identify acceptable local materials, and misunderstanding of ENG Form 4025, thereby making the CCD unattainable (*id.*; FOF ¶¶ 58, 61). The

⁵ The CPAR for Task Order 0002 neither identifies, nor contains comments of, the reviewing official (R4, tab 39 at 3976).

CPAR again noted the labor strike in Long Beach, California, which caused additional delays, but did not excuse Sungwoo from submitting several late submittals (*id.* at 3990). The assessing official summarized, stating, “[g]iven what I know today about the contractor’s ability to perform in accordance with this contract or order’s most significant requirements, I would not recommend them for similar requirements in the future” (*id.*).

64. Sungwoo non-concurred with this CPAR and again provided comments that did not address the issue of the late submission of the material submittals, or poor communications with the government, and instead focused on materials that Sungwoo submitted that were not approved by the design engineer, resulting in discussions with the design engineer that further delayed the project (*id.* at 3991).

65. Mr. Ware, the reviewing official, concurred with the government’s assessment and made no changes to the CPAR, citing the same “root cause” concerns he expressed in his review of Task Order 0001 such as schedule delays, late submittals, and issues with communication and contractor management (*id.* at 3991–92; FOF ¶ 60).

The MATOC Contract Base Year CPAR and Subsequent CPAR Revision

66. On March 1, 2016, the government assessed Sungwoo’s performance for the MATOC base year as satisfactory. The government subsequently determined this assessment to be a patent error because Sungwoo received unsatisfactory ratings on three of the four task orders rated in CPARS (R4, tab 81 at 4402; tab 95 at 4683). Although Sungwoo performed 11 task orders during the base year, only four met the then dollar threshold of \$700,000 for CPARS assessment set forth of in FAR 42.1502(e) (R4, tab 95 at 4683).

67. The MATOC base year CPAR assessment could not be re-opened at the agency level to correct the patent error, so the government created a second CPARS entry and rating, which was sent to Sungwoo for review. After Sungwoo’s May 30, 2016, review of the assessment, the CPAR was modified on June 1, 2016, to correct the patent error. The government mistakenly did not transmit the modified CPAR to Sungwoo before final review and closure by Mr. Ware. (R4, tab 81 at 4402–03)

68. The revised MATOC base year CPAR was issued to correct a clear and patent error in rating Sungwoo’s performance as overall satisfactory because three of the four CPARS assessed contained unsatisfactory ratings (R4, tab 95 at 4683).

69. The government deleted the June 1, 2016, CPAR and issued a corrected CPAR on June 7, 2017 (R4, tab 84; tab 95 at 4683). The corrected CPAR assessed Sungwoo as satisfactory in quality, unsatisfactory in schedule, marginal in

management, satisfactory in regulatory compliance, marginal in material submittal procedures, and marginal in communication. The basis for these ratings was the same basis set forth in the MATOC task order CPARs. (R4, tab 84 at 4409–10; FOF ¶¶ 56–65) Mr. Michael Jones, the assessing official, stated, “[g]iven what I know today about the contractor's ability to perform in accordance with this contract or order's most significant requirements, I would not recommend them for similar requirements in the future (*id.* at 4410).

70. Sungwoo provided comments, but did not address the issues related to late submission of its material submittals, mismanagement, or marginal communications with the government (R4, tab 84 at 4410–20). Mr. Unhui Ko, Chief, Construction & Supply Division, concurred “with the accessing official[']s comments” (*id.* at 4420).

71. Mr. Ware’s declaration states that, as the reviewing official, he “determined that Sungwoo’s response in disagreement with its CPAR ratings did not indicate that the information contained in the CPAR rating was not factually correct” (R4, tab 95 at 4683). Mr. Ware stated that “Sungwoo was consistently behind on completing its work within [the] schedule because it did not submit its material submittals within the time periods required by the terms of the contract as reflected in the statement of work,” which is “the basis for the rating of Unsatisfactory under Schedule and Marginal ratings under Management, Material Submittal Procedures, and Communication.” Mr. Ware also stated “[i]t is the responsibility of the contractor to update the progress schedule to be always current and to have discussions during its performance whenever there are issues that may impact schedule,” and that untimely submittal of ENG Form 4025 and “the Bill of Materials (BOM) listed in Sungwoo’s proposal indicate[d] that Sungwoo failed to procure the approved materials upon contract award.” (*Id.*) Mr. Ware noted that “[i]nstead of providing the BOM listed in the proposal as awarded, Sungwoo changed the BOM during performance, which a contractor cannot do unless there are changes in the scope of the contract. As a result of Sungwoo changing the BOM approved for the project as awarded, it did not timely submit the ENG Form 4025 and fell behind schedule.” (*Id.* at 4684).

Determination Not to Exercise the Option Years or Award Additional Contracts

72. On June 27, 2016, the CO decided not to exercise the second option year on Sungwoo’s MATOC (R4, tab 57). The CO’s determinations and findings excluded Sungwoo from receiving the option extension based upon Sungwoo’s “unsatisfactory performance,” and listed by contract and task order, Sungwoo’s many performance deficiencies over the previous year (*id.* at 4218) (identifying eight specific contracts and task orders, as well as corresponding CDRs and CPARs)).

73. In his May 23, 2020, declaration, Mr. Ware set forth his decision approving the CO's determination not to exercise the option years under Sungwoo's contracts, stating:

In general, Sungwoo's performance was deteriorating resulting in multiple contractor discrepancy reports to which Sungwoo did not adequately respond or resolve and its multiple unsatisfactory CPARS ratings. Sungwoo's declining performance ultimately lead [to] the issuance of a show cause notice for task order 0016 under the MATOC contract. The task order was ultimately descope. However, based upon the multiple issues identified with Sungwoo's performance, Sungwoo was determined not to be a responsible contractor under FAR 9.103, 9.104 and 9.105 and any future award consideration to Sungwoo would impose unnecessary risk that such projects would be completed satisfactorily given their performance issues.

(R4, tab 95 at 4683)

74. Mr. Ware further explained the circumstances surrounding the CPAR, as well as the government's decision to not exercise contract options, stating:

The decision not to exercise the option years on Sungwoo's contracts was based upon Sungwoo's demonstrated inability to perform satisfactorily on those task orders awarded under the subject contracts. Additionally, the modifications to the 2014-2015 Base Year CPARS rating for the MATOC contract was [sic] based upon Sungwoo's three Unsatisfactory CPARS ratings for three of four task orders that were rated in CPARS. The Satisfactory CPARS rating was contrary to the CPARS ratings in the system and required modification to correctly reflect the CPARS rating given to Sungwoo. At no time did I or anyone else in the contracting office take any of these actions or any action with the specific intent to harm Sungwoo. All actions taken were proper and reasonable administration of government contracts in accordance with policy, regulation, and law. Sungwoo's actual performance and documented deficiencies clearly define them to be a contractor that meets almost all the expectations of a non-responsible contractor per FAR 9.104, Standards.

(R4, tab 95 at 4684)

75. On July 13, 2016, the government notified Sungwoo of the government's determination not "to extend your General Construction Multiple Award Task Order Contract Indefinite Delivery Indefinite Quantity requirements," specifically, 4th Year options for contracts Nos. W91QVN-12-D-0110, W91QVN-12-D-0114, W91QVN-12-D-0119, W91QVN-12-D-0130, W91QVN-12-D-0132, W91QVN-12-D-0143 and W91QVN-13-D-0064 (R4, tabs 62, 63), as well as the government's determination not to exercise the MATOC second year option (R4, tabs 64, 65).

Sungwoo's Allegations Regarding ENG Form 4025

76. Sungwoo alleges that the government instructed and forced it to make false entries on the ENG Form 4025 and instructed and forced it to procure offshore materials rather than utilize local materials (app. br. at 3). In support of these allegations, Sungwoo cites to statements of its employees Yi, Chin Chuk and Cho, Myng Hyun.

77. Mr. Chuk's statement provides:

In the mid of January, 2015, I attended in the meeting at Camp Red Cloud Conference Room. The other attendees are Daniel Hong, Kichong Seo, Hongil Pyun, Taechong Kim, Chunhyuk Kwon, Project Mangers from each MATOC Contractor such as Deokdong Co, Elim Co, Seongril Co, etc. I was told that all projects should be completed before CCD and that offshore materials (OM & OE) should be entered as local materials (LM & LE) in ENG Form 4025.

(App. supp. R4, tab 40 at 2)

78. Mr. Cho's statement also addresses a meeting in mid-January 2015 at the Camp Red Cloud conference room, hosted by Mr. Daniel Hong, with attendees, "Jangmuk Yun (Engineer) Taechong Kim, Sunhuk Kwon, Hongil Pyun, Kichong Seo (COR) About fifteen (15) Project Managers of MATOC Contractors" (app. supp. R4, tab 42 at 2). The "subject" of the meeting was "[a]ll project [sic] should be completed before CCD," and "[o]ffshore items should be entered as local items in the 'Item No.' column of Form 4025, Material submittal because these LCS projects should be local material only" (*id.*).

79. Sungwoo also cites the following September 8, 2016, statement of Mr. Yang:

In mid of January, our project manager (DO#0001: Cho, Myong Hyun / DO#0002: Yi, Chin Chuk) reported to me that they was [sic] ordered to make false entries in the submittal identification column of material submittal stating OM to LM in the meeting with DPW. Also, they were told that off-shore materials should be designated to local materials due to LCS project.

I believed that DPW Area I forced MATOC contractors to commit a forgery. Therefore, I instructed our project managers not to engage in this misconduct and informed COR that we would not order off-shore materials.

(App. supp. R4, tab 43 at 1) Mr. Yang also stated: “In the meeting of March 9, 2015, I complained Mr. Song [sic] that DPW Area I did not coordinate 100% local material usage. Also, I asked Mr. Hong if it was right decision as Government employee to force all contractors [sic] committing a forgery” (*id.*).

Government Declarations Regarding ENG Form 4025 Allegations

80. In a subsequent declaration dated May 27, 2022, Mr. Yang “revoked” his September 8, 2016, statement:

Sungwoo also claims that it was ordered by Mr. Daniel Hong to forge its Eng. Form 4025 and identify offshore material as local material. Sungwoo bases this claim on three statements. One statement I made and two made by other Sungwoo employees. I have no knowledge of a meeting in January 2015 with Sungwoo's employees. However, my statement says that Mr. Hong forced myself and all LCS contractors to forge documents and that I was instructed to order offshore materials for installation to complete task order W91QVN-14-D-0034-0001 at a meeting on March 9, 2015. No such thing happened. Rather, I was upset that Sungwoo had fallen behind schedule and the materials we had wanted to install did not meet the engineering requirements of the task order. It was quicker for Sungwoo to obtain the offshore materials as it had already intended on using them at the time Sungwoo submitted its proposal. I wanted someone to blame for the issues that were occurring and Mr. Daniel Hong in trying to enforce the engineering requirements for the project was

the target of my frustration. Therefore, I revoke my statement dated September 8, 2016.

(R4, tab 101 at 4699)

81. Mr. Daniel Hong, Chief of the Engineering Division, DPW, Yongsan Garrison, provided a declaration stating that he signed ENG Form 4025s based upon the recommended approval of the project designers, and that he did not have the time nor the expertise to verify each construction material submittal to determine whether the materials were local materials or offshore materials. Mr. Hong also stated that he never ordered Sungwoo or any LCS contractor to falsify information on ENG Form 4025s. (R4, tab 91 at 4514–15)

82. Mr. Todd Hill, current Chief of the Engineering & Services Division, DPW, Yongsan Garrison (now Garrison Yongsan-Casey) stated that “no one in DPW specifically examines the material submittal packets for purposes of determining whether items are manufactured locally or offshore.” Additionally, Mr. Hill stated that the backup materials provide specifications of listed items consisting of catalog cuts, brochures, manuals and other manufacturer information, but that the information is not reliable as to whether the material is local or offshore, and that DPW relies on the contractor’s certification that the materials comply with the contract requirements. (R4, tab 96 at 4687–88)

83. Other DPW Area I personnel also stated that they do not review material submittals to verify whether the materials are local or offshore nor do they recall any meeting in January 2015 at which LCS contractors were allegedly told to identify offshore material as local material on the ENG Form 4025 (R4, tabs 97–99). Kim, Tae Chong and Kwon, Chun Hyok, both DPW construction inspectors, Garrison Yongsan-Casey, stated in their declarations that they were “not responsible for review or approval of ENG form 4025 documents,” “do not recall any such meeting in January 2015 and it was not Mr. Hong’s practice to meet with a contractor to discuss Eng. Form 4025 entries,” and that “[t]hose issues were usually dealt with by the applicable engineer depending on discipline” (R4, tab 98 at 4693; tab 99 at 4695).

84. Mr. Seo, Ki Chong, DPW Civil Engineer/COR, Garrison, Yongsan-Casey, in his declaration stated that he reviews ENG Form 4025 “material submittals to ensure the materials meet the project’s engineering requirements,” does “not review the material submittals to ensure that the materials are properly identified as offshore or local materials[,] . . . [does] not verify whether the material submittals accurately identify whether the materials are properly identified as offshore or local materials,” and that a review to identify “offshore materials or local materials would be [a] time-consuming and difficult task as the information is not always readily identifiable on the material submittals received from the contractors” (R4, tab 97 at 4690-91).

Mr. Seo also stated that he does not “have any information that [sic] Mr. Hong’s practice to meet with a contractor to discuss the Eng. Form 4025 entries,” and does “not recall and attend [sic] any such meeting in January 2015” (*id.* at 4691).

85. Mr. Song, Ho Chun, a CO at Camp Casey, ROK, in his declaration stated that, as procuring CO for Task Order 0001, he “informed Sungwoo that its materials list in its offer contained material identified as offshore, and that because the task order was part of the Logistical Cost Sharing (LCS) program, materials listed to complete the project needed to be local materials” (R4, tab 100 at 4696). Mr. Song also stated that “[i]f Sungwoo believed it could not perform the task order without the use of offshore materials, it should have withdrawn its proposal” (*id.*). In addition, Mr. Song stated he does “not recall anyone telling Sungwoo that it could order offshore materials to complete the task order,” and that “[t]o do so, would have not been in compliance with . . . the contract” (*id.* at 4697).

Sungwoo’s Complaints to the Contract Ombudsman

86. By letter dated April 18, 2016, Sungwoo submitted a “Complaint about Award Exclusion of Three Government Contracts” to Colonel Americus M. Gill, III (COL Gill), the 411th CSB Commander and Ombudsman for the MATOC (W91QVN-14-D-0034). Sungwoo alleged that Mr. Ware, the reviewing official, excluded Sungwoo from task order awards and did not exercise option years on Sungwoo’s contracts based upon an alleged falsified CPAR, and that the government directed Sungwoo and other LCS contractors to falsify entries on the ENG Form 4025 by identifying offshore materials as local materials. (R4, tab 48 at 4037-39)

Contract Ombudsman’s Response to Sungwoo’s Complaint

87. On July 14, 2016, COL Gill responded to Sungwoo’s April 18, 2016, letter, stating that Sungwoo’s allegations alleging falsification of entries on ENG Form 4025 were referred to the Major Procurement Fraud Unit (MPFU) for “further investigation into potential occurrences of procurement fraud” (R4, tab 66 at 4253). COL Gill also informed Sungwoo that the MPFU investigation had found insufficient evidence of fraud and addressed Sungwoo’s allegations concerning Mr. Ware excluding Sungwoo from task order awards and Sungwoo’s unsatisfactory CPARs (*id.*). COL Gill explained that Sungwoo was not awarded additional task orders under Solicitation Nos. W91QVN-16-R-0008, W91QVN-15-R-0026, and W91QVN-15-R-0081, because Sungwoo was determined not to be the lowest-priced, technically acceptable offeror, and in the case of Solicitation No. W91QVN-15-R-0026, Sungwoo had informed the CO that it could not perform the work until other task orders were completed. Thus, COL Gill concluded that Mr. Ware’s conduct was not unfair towards Sungwoo. (*Id.* at 4253–54)

88. COL Gill also determined that CPARs for the MATOC task orders were reasonable, finding that Sungwoo was required to provide all local materials per the terms of the task orders, and that it refused to obtain the materials from local manufacturers that were recommended by the government because the local materials were too costly compared to the offshore materials. Because Sungwoo continued to delay in obtaining the approved material from local sources, the government provided government-furnished material to meet the contract schedule. (*Id.* at 4254–55) COL Gill’s response also noted Mr. Ware’s statement that although the government provided Sungwoo information as to “where local materials compliant with the contract specification could be purchased,” that “despite the government providing the name and phone numbers for the local companies that could provide materials meeting the contract specification, Sungwoo instead insisted on obtaining materials from offshore” (R4, tab 95 at 4684).

89. Sungwoo submitted to COL Gill additional complaints and letters, dated August 10, 2016 (R4, tab 70), September 12, 2016 (R4, tab 71), September 17, 2016 (R4, tab 72), November 15, 2016 (R4, tab 75),⁶ and December 7, 2016 (R4, tab 77), reasserting allegations set forth in Sungwoo’s April 18, 2016, letter, and challenging the government’s CPAR for the MATOC base year and Sungwoo’s exclusion and alleged debarment from engaging in future contracts.

MPFU Interviews Regarding ENG Form 4025 Allegations

90. In October 2016, the MPFU interviewed Mr. Ware regarding the procedures by which ENG Form 4025s were processed under LCS contracts, during which he stated that local materials should be utilized but that offshore material (OM) could be used if a waiver was submitted and approved prior to contract award (R4, tab 74 at 4295). Mr. Ware also stated:

Sungwoo kept trying to utilize OMs for parts which were going into boilers in Area 1. The 411th CSB provided a local manufacture Hansung which had parts that qualified and met requirements for Sungwoo to purchase parts from. However, Sungwoo persistently tried to use OMs due to the fact the parts were cheaper than Hansung's parts. As the construction was being pushed to the right and was about to pass the deadline[,] the government provided Government Furnished Materials (GFMs) for the boiler in order to meet the construction timeline.

⁶ Sungwoo’s November 15, 2016, letter was addressed to Army legal counsel, LTC Robert Nelson and Mr. Justin Paulette (R4, tab 75 at 4300).

(*Id.* at 4295-96)

91. In November 2016, the MPFU interviewed Mr. Yang regarding his allegations that Sungwoo was forced to falsify information on ENG Form 4025s submitted for LCS funded contracts, by identifying offshore material as local material (*id.* at 4297). During his interview, Mr. Yang, stated that, in reviewing ENG Form 4025s submitted by contractors, CORs were not comparing the contractors' documentation to items submitted by the contractors, and that if a listed item indicated it was local material the COR would sign the document (*id.* at 4298). Mr. Yang then admitted to falsifying information on the ENG Form 4025 by identifying offshore material as local material and submitting it to the COR for processing (*id.*).

Sungwoo's Claims

92. On December 17, 2016, Sungwoo submitted a claim to the CO certified by Mr. Song Yong Eui, Sungwoo's attorney, asserting that Sungwoo suffered losses due to the 411th CSB's "improper and discriminatory acts" (R4, tab 78 at 4307). Sungwoo also asserted that the government failed to award it contracts under Solicitation Nos. W91QVN-16-R-0091 and W91QVN-16-R-0119, and to exercise options under the MATOC and Contract Nos. W91QVN-13-D-0064, W91QVN-12-D-0114, W91QVN-12-D-0119, W91QVN-12-D-0130 (R4, tab 78 at 4308).

93. On December 18, 2016, Sungwoo submitted a claim to the CO, also certified by Mr. Song, asserting that Sungwoo's CPAR was fabricated and, that based upon that CPAR, the 411th CSB suspended or debarred Sungwoo (R4, tab 79). Sungwoo requested that "the Report be either nullified or revised from an 'Unsatisfactory' to a 'Satisfactory' rating," and that the government lift "the suspension/debarment imposed on Sungwoo" (R4, tab 79 at 4384).

94. Sungwoo disputes the government's evaluation of its performance (R4, tab 78 at 4309-10, 4320, 4325-26; ASBCA No. 61219, compl. ¶¶ 12-14; ASBCA No. 61144, compl. ¶¶ 1-4). Sungwoo alleges the government engaged in fraudulent acts,⁷ including requiring contractors to forge documents and retaliated against Sungwoo when it refused to participate in the alleged scheme, by (1) giving it "unsatisfactory" CPARs and (2) by imposing a de facto suspension or debarment when

⁷ As noted above, our previous decision clarified that although Sungwoo frequently used the term "fraud" to characterize the government's actions, the issues remaining in these appeals concern whether "the government acted arbitrarily and capriciously, or in bad faith, when it evaluated appellant's performance as being 'unsatisfactory' and when it refused to exercise the options and award additional work under the various contracts." *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,976.

the government refused to exercise options under the MATOC and paving contract and award additional work to Sungwoo (ASBCA No. 61114, compl. ¶¶ 129-43; ASBCA No. 61219, compl. ¶¶ 12, 16, 17; R4, tab 78 at 4309–10, tab 79 at 4384 85).

Quality Assurance Team Memorandum

95. On February 21, 2017, the 411th CSB Quality Assurance Team (QAT) issued a memorandum for record addressing its “Review of material submittal forms 4025 from LCS contracts at DPW” (R4, tab 82 at 4405). The QAT found that the term “local materials” was not defined in the Special Measures Agreement, the LCS Implementing Arrangement, or the Amendment to the LCS Implementing Arrangement, that current procedures place the burden of compliance with the local materials requirements on the contractor, and that no one from DPW is responsible for reviewing the ENG Form 4025 for compliance with the LCS requirements (*id.*). The QAT recommended that an inspection item be added “in the COR's Surveillance Activity Checklist to inspect ENG 4025 forms to ensure contractor identification of materials as local or off-shore” (*id.*).

CO Final Decision

96. On March 17, 2017, the CO issued a final decision recognizing that “[t]he evidence shows a series of administrative errors on the part of 411th CSB personnel in the management of CPARS,” but denying Sungwoo’s claims, explaining that the MATOC CPAR was modified to correct a patent error; however, the attempts to modify the CPAR resulted in an administrative error in which Sungwoo was not provided an opportunity to comment on the modified CPAR. The final decision also informed Sungwoo that the decision not to exercise the option years on Sungwoo’s Contract Nos. W91QVN-12-D-0114, W91QVN-12-D-0119, W91QVN-12-D-0130, W91QVN-12-D-0132 and W91QVN-14-D-0034, was reasonable based on Sungwoo unsatisfactory performance on task orders issued under Sungwoo’s contracts. (R4, tab 81 at 4402-03)

Additional Findings by Contract Ombudsman

97. On April 7, 2017, COL Gill responded to Sungwoo’s “previous complaints” (R4, tab 83). In response to Sungwoo’s allegation that DPW Area I personnel “directed Contractors to create the false submittal register stating that all material items were local materials from Korea,” COL Gill again informed Sungwoo that the MPFU declined to open an investigation (*id.*). COL Gill closed his response, stating that the 411th CSB was conducting a quality assurance review of contract administration procedures related to the LCS program with DPW (*id.*).

Sungwoo Debarment

98. On August 10, 2017, Sungwoo was notified of its proposed debarment based upon its admission that it falsified entries on its ENG Form 4025 (R4, tab 87). Sungwoo admitted to falsifying documentation provided to the government in response to its debarment notice (R4, tab 89 at 4433; FOF ¶ 91). Sungwoo ultimately was debarred for a period of four years and its requests to lift its debarment were denied (R4, tabs 87, 90).

Sungwoo's Request for Relief

99. Sungwoo seeks relief in ASBCA No. 61144 in the form of an order directing the government to change the CPARs ratings from “unsatisfactory” to “satisfactory” and in ASBCA No. 61219 in the form of damages in the amount of ₩2,050,656,763 for failure to award it additional contracts and exercise options (ASBCA No. 61144, compl. ¶ 2; ASBCA No. 61219, compl. first ¶ 1). Included in the total amount claimed in ASBCA No. 61219 is ₩1,000,000,000, described as “punitive damages” (ASBCA No. 61219, compl. ¶18).

100. The damages, other than the “punitive damages,” asserted in ASBCA No. 61219 total ₩1,013,084,498.⁸ Solicitation Nos. W91QVN-16-R-0008, W91QVN-16-R-0091 and W91QVN-16-R-0119 are the three solicitations for which Sungwoo asserts it was the lowest offeror but received no award (R4, tab 93 at 4597).

DECISION

I. Contentions of the Parties

Sungwoo argues (1) that “the government acted arbitrarily and capriciously and engaged in bad faith when the government evaluated the 3 Task Orders . . . as unsatisfactory and revised the March 1 Base Year CPAR . . . from satisfactory to unsatisfactory,” (2) that “the government acted arbitrarily and capriciously and engaged in bad faith when the government instructed and forced Sungwoo to make false entries in Eng Form 4025s and instructed and forced Sungwoo to procure offshore materials,” and (3) “the government is liable for the loss and damage incurred by [Sungwoo] when the government declared [Sungwoo] as a non-responsible contractor based on the improperly issued unsatisfactory evaluation of the CPARs” (app. br. at 3).

⁸ The specific damages other than the “punitive damages” asserted in ASBCA No. 61219 are set forth in a table that appears in our previous decision, *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,974.

The government counters, stating that (1) Sungwoo has failed to establish “by clear and convincing evidence that the government acted arbitrarily and capriciously, or in bad faith, when it both evaluated [Sungwoo’s] performance as ‘unsatisfactory’ under the MATOC Contract and in its decision not to exercise [Sungwoo’s] options under its various contracts,” and (2) Sungwoo has provided “no evidence to support its assertions of bad faith and provide[d] no case law in support” (gov’t br. at 2-3; gov’t reply br. at 2).

In its sur-reply brief, the government argues that Sungwoo failed to address its “bad faith claim concerning the government’s decision not to exercise the option years on the subject Contracts” (gov’t reply br. at 1-2). The government asserts that rather than address its remaining claims, “appellant’s brief focuses on an unsupported conspiracy theory regarding the requirements of the [LCS] Program and the purported orders to falsify information on the ENG Form 4025 material submittals by a Department of Public Works employee,” and that “appellant has failed to meet its burden of proof” (gov’t br. at 2-3). The government also argues in its sur-reply brief that Sungwoo’s briefs fail to address its monetary claims and, it is therefore abandoned (gov’t reply br. at 2-5).

The government also challenges this Board’s jurisdiction (1) to review Sungwoo’s debarment “[t]o the extent Sungwoo’s assertion is that Sungwoo’s debarment was arbitrary and capricious or in bad faith” (gov’t br. at 66-67), (2) to consider Sungwoo’s request for specific performance as “the Board does not have jurisdiction to grant appellant’s requested relief” (gov’t br. at 72), and (3) to consider Sungwoo’s monetary claim, stating that Sungwoo’s certification did not comply with the MATOC requirement that the certification be executed by a “senior company official in charge at the contractor’s plant or location involved,” or an “officer or general partner of the contractor having overall responsibility for the conduct of the contractor’s affairs” (gov’t br. at 76; FOF ¶ 3). Sungwoo’s reply brief does not address these jurisdictional arguments.

II. Proceedings Pursuant to Board Rule 11

Board Rule 11 provides the parties the option of waiving their right to a hearing and instead submitting the appeal for a decision on the written record; with the Board issuing factual findings on disputed facts. *Trade West Constr., Inc.*, ASBCA No. 61068, 22-1 BCA ¶ 38,214 at 185,596. Pursuant to Board Rule 11(d), the weight given to evidence contained in the written record rests “within the discretion of the Board.”

III. Sungwoo Has Failed to Establish the Government's CPARs Ratings Were Arbitrary and Capricious, an Abuse of Discretion, or in Bad Faith

Pursuant to FAR 42.1501(b), "CPARS is the official source for *past performance information*" (original italics). The Board has jurisdiction to address inaccurate and unfair CPARs, wherein we "assess whether the CO acted reasonably in rendering the disputed performance rating or was arbitrary and capricious and abused his [or her] discretion." *Cameron Bell Corp. d/b/a Gov Sols. Grp.*, ASBCA No. 61856, 19-1 BCA ¶ 37,323 at 181,537. Sungwoo argues that the government's unsatisfactory CPARs regarding Task Orders 0001, 0002, and 0004, and the revised MATOC CPAR (from satisfactory to unsatisfactory), were arbitrary, capricious, and in bad faith (app. br. at 2). Sungwoo requests that the government change the CPARs ratings from "unsatisfactory" to "satisfactory" (FOF ¶ 99). Although we cannot "order the government to revise a CPARS rating, we may remand to require the CO to follow applicable regulations and provide [the contractor] a fair and accurate performance evaluation." *Cameron Bell Corp.*, 19-1 BCA ¶ 37,323 at 181,537.

Our jurisdiction to address inaccurate and unfair CPARs is constrained by practical considerations regarding the age of the CPARs being challenged. "CPARs are active and usable as past performance data for three years from 'completion of performance of the evaluated contract or order.'" *St. Michael's Inc.*, 25-1 BCA ¶ 38,757 at 188,390 (citing FAR 42.1503(g)). Under this regulatory scheme, there is "a rolling three-year window when each CPAR can be used to evaluate a contractor for future awards," and, at least in the context of the government agency at issue in *St. Michael's*, "[a]fter three years CPARs are archived and become functionally invisible and inaccessible to all users." *Id.*

The principle espoused in *St. Michael's* applies equally here. The government's CPARs assessing Sungwoo's performance were issued in 2015 and 2016 (FOF ¶¶ 51, 56, 61, 63, 66). Sungwoo's challenge to the propriety of those ratings for purposes of effecting a change in those ratings is now moot. However, Sungwoo's appeals still present a live issue. As we previously held, were we to find that the CO's actions were arbitrary, capricious, an abuse of discretion, or undertaken in bad faith, Sungwoo might be entitled to monetary damages were we also to determine that because of the government's inaccurate or unfair CPARs, Sungwoo was not awarded option year extensions of its contracts. *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,976 ("We do have jurisdiction to consider and rule on whether the government's performance evaluations and decision to not exercise the options were arbitrary and capricious actions or undertaken in bad faith"); see *St. Michael's Inc.*, 25-1 BCA ¶ 38,757 at 188,391 (noting that appellant presented "no evidence in the record that [the CPARs] were ever 'used against' [appellant] in any contract award decision"); *Nexagen Networks, Inc.*, ASBCA No. 60461 19-1 BCA ¶ 37,258 at 181,328 (contractor may be entitled to breach damages for failure to exercise option

where contractor proves bad faith, an abuse of discretion or that the CO acted in an arbitrary or capricious manner in failing to exercise option). Accordingly, we still must determine whether the government's ratings were arbitrary, capricious, an abuse of discretion, or undertaken in bad faith. *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,976.

Unfortunately for Sungwoo, the answer to that inquiry is a resounding "no." Sungwoo has the burden of proof and must establish by a preponderance of the evidence its claims that the CO's decision was arbitrary and capricious, or abuse of discretion. *Peter Bauwens Bauunternehmung GmbH & Co. KG*, ASBCA No. 44679, 98-1 BCA ¶ 29,551 at 146,497, *aff'd*, 194 F.3d 1338 (Fed. Cir. 1999). Overwhelming record evidence establishes that Sungwoo's performance on the contracts and task orders at issue here was riddled with unsatisfactory and marginal performance in areas such as schedule, submission of submittals, contract management, and communication between Sungwoo and the government (FOF ¶¶ 51-52, 56-58, 61, 63, 66, 68-74, 87). The government detailed Sungwoo's performance issues in CDRs issued on its contracts and task orders (FOF ¶¶ 20, 24, 29, 32, 33, 35-37, 41-43, 45, 47-48), as well as in the resulting CPARs and the documents issued by the CO and the reviewing officials, all in accordance with the FAR (FOF ¶¶ 49-51, 53-56, 58-61, 63-69, 71-74). The MPFU investigation into potential occurrences of procurement fraud, and COL Gill's determination finding no impropriety regarding the government's CPARs, are yet additional record evidence refuting Sungwoo's allegations of government impropriety (FOF ¶¶ 87, 90-91).

The record likewise establishes that the government's reissuance of the MATOC CPAR to correct what the CO termed "a series of administrative errors" was proper based on what the government admits was a "patent error" such that the original CPAR did not comply with regulatory requirements (FOF ¶¶ 66-68, 96). After balancing and weighing the totality of the evidence presented by both parties, we conclude that Sungwoo has failed to establish by a preponderance of the evidence that the government's actions in correcting that error were either arbitrary and capricious, or an abuse of discretion.

Regarding Sungwoo's allegation that the government's actions evidence bad faith, it is beyond cavil that government officials are presumed to act in good faith. *Puget Sound*, ASBCA No. 58828, 16-1 BCA ¶ 36,435 at 177,597 (citing *Road and Highway Builders, LLC v. United States*, 702 F.3d 1365, 1368 (Fed. Cir. 2012)). To establish that a government official acted in bad faith, a contractor "must show a 'specific intent to injure' by clear and convincing evidence." *Id.* (quoting *Road and Highway*, 702 F.3d at 1369). Such a showing requires "well-nigh irrefragable proof of malice or a specific intent to injure." *Tristana R. Harvey Career Planning & Consulting Series LLC*, ASBCA No. 60927, 17-1 BCA ¶ 36,826 at 179,478. Given our determination that Sungwoo has failed to establish by preponderant evidence that the government's CPARs were arbitrary and capricious, or an abuse of discretion, or

that the government's actions were otherwise improper in correcting the patent error in the original MATOC CPAR, we likewise conclude that Sungwoo has failed to establish by clear and convincing evidence that the government acted in bad faith.

IV. Sungwoo has Failed to Establish that the Government Instructed or Forced Sungwoo to Make False Entries on Its ENG Form 4025s

Sungwoo argues that it was “instructed and forced” by the government to make false entries on its ENG Form 4025s, and “instructed and forced” to procure offshore materials, arguing that the government's alleged actions were arbitrary and capricious, and in bad faith (app. br. at 3). As support, Sungwoo offers conclusory declarations of two of its employees wherein during a meeting in January 2015, an unidentified individual allegedly stated that offshore materials should be entered as local materials on ENG Form 4025s (FOF ¶¶ 76-78). The proffered statements cited by Sungwoo, however, fall far short of offering any specific detail necessary to qualify as sufficient evidence of the alleged government wrongdoing. This especially is true when considered in light of evidence offered by the government (FOF ¶¶ 80-85).

Perhaps the most telling is conflicting record evidence regarding Sungwoo's former vice president, Mr. Yang. In his September 8, 2016, written statement, Mr. Yang asserts that he was informed by two Sungwoo employees “that they was [sic] ordered to make false entries in the submittal identification column of material submittal stating OM to LM in the meeting with DPW” and that during a meeting in March 2015, Mr. Yang “asked Mr. Hong if it was right decision as Government employee to force all contractors [sic] committing a forgery” (FOF ¶ 79). In his November 2016 interview, Mr. Yang again stated that Sungwoo was forced to falsify information on the ENG Form 4025 (FOF ¶ 91).

However, in his May 22, 2022, declaration Mr. Yang refutes his earlier statements, declaring:

I have no knowledge of a meeting in January 2015 with Sungwoo's employees. However, my statement says that Mr. Hong forced myself and all LCS contractors to forge documents and that I was instructed to order offshore materials for installation to complete task order W91QVN-14-D-0034-0001 at a meeting on March 9, 2015. No such thing happened.

(FOF ¶ 80) Indeed, in his statements to MPFU, Mr. Yang admitted to falsifying information on the ENG Form 4025 by identifying offshore material as local material and submitting it to the COR for processing (FOF ¶ 91).

Declarations of government employees provide yet additional evidence supporting a conclusion that the government neither forced, nor instructed, Sungwoo to make false entries in its ENG Form 4025s or to procure offshore materials. For example, Mr. Hong stated that he never ordered Sungwoo or any LCS contractor to falsify information in the ENG Form 4025 (FOF ¶ 81). In addition, DPW personnel, several of whom (according to Sungwoo) allegedly attended the January 2015 meeting,⁹ stated in their declarations that they did not recall any such meeting in January 2015, and that “it was not Mr. Hong’s practice to meet with a contractor to discuss Eng. Form 4025 entries” (FOF ¶ 83).

The record establishes that it was not the practice of the government, in approving ENG Form 4025s, to verify whether material submittals accurately identified whether the materials are properly listed by the contractor as offshore or local materials, and that such a verification would be a time-consuming and difficult task (FOF ¶¶ 81-85, 88, 95). Moreover, the QAT memorandum issued in response to COL Gill’s inquiry found “that the term ‘local materials’ was not defined” by any of the pertinent LCS agreements, “that current procedures place the burden of compliance with the local materials requirements on the contractor, and that no one from DPW is responsible for reviewing the ENG Form 4025 for compliance with the LCS requirements” (FOF ¶ 95).

Considering the record evidence presented, including the statements and declarations offered by both parties, we conclude that Sungwoo has failed to establish by preponderant evidence that the government instructed or forced Sungwoo to make false entries on its ENG Form 4025s or to procure offshore materials. As noted above, to establish bad faith, a contractor “must show a ‘specific intent to injure’ by clear and convincing evidence.” *Puget Sound*, 16-1 BCA ¶ 36,435 at 177,597. Given our determination that Sungwoo failed to establish by preponderant evidence that government officials directed it to falsify information on ENG Form 4025s or procure offshore materials, we likewise conclude that Sungwoo has failed to meet its higher burden of establishing by clear and convincing evidence that the government acted in bad faith.

V. The Government Properly Decided to Not Exercise Option Year Contracts

Sungwoo alleges that the government’s improper CPARs deprived it from receiving other contracts as well as additional option years on contracts it already held (app. br. at 4, 8, 25-27). Sungwoo’s arguments challenging the propriety of the government’s decision not to award it other contracts and other certain option years is based upon its argument that the CPARs issued to Sungwoo were unlawful and in bad

⁹ Mr. Chuk’s statement identifies Daniel Hong; Kim, Tae Chong; Kwon, Chun Hyok; and Seo, Ki Chung as attending the January 2015 meeting (FOF ¶ 77).

faith).¹⁰ We already have determined that Sungwoo failed to establish by preponderant evidence that the government's CPARs were arbitrary and capricious, or an abuse of discretion. In addition, record evidence establishes that the government's decisions not to exercise option years under the MATOC properly took into account the import of Sungwoo's CDRs and CPARs. For example, the CO's determination and findings detailed the decision to exclude Sungwoo from receiving additional option period contracts based upon Sungwoo's unsatisfactory performance of the MATOC base year (FOF ¶ 72). Indeed, the CO listed by contract and task order numerous examples of Sungwoo's many performance deficiencies (*id.*). The CO's final decision not to exercise option years on Sungwoo's other contracts, i.e., Contract Nos. W91QVN-12-D-0114, W91QVN-12-D-0119, W91QVN-12-D-0130, W91QVN-12-D-0132 and W91QVN-14-D-0034, was likewise reasonable based on Sungwoo unsatisfactory performance on the task orders issued under Sungwoo's contracts (FOF ¶¶ 51-55, 96).

The reviewing official likewise detailed a litany of reasons why Sungwoo should not receive further contracts or task orders noting that "Sungwoo's performance was deteriorating resulting in multiple contractor discrepancy reports to which Sungwoo did not adequately respond or resolve and its multiple unsatisfactory CPARS ratings" (FOF ¶¶ 73-74). Sungwoo has failed to meet its burden of establishing by preponderant evidence that the government's decision not to award additional contracts and task orders was either arbitrary and capricious, or an abuse of discretion. Nor has Sungwoo established by clear and convincing evidence that the government's actions were somehow in bad faith.

VI. The Board Lacks Jurisdiction to Review Propriety of Sungwoo's Debarment

Sungwoo challenges its debarment, alleging that the government's actions were motivated by Sungwoo's refusal to follow the government's alleged instructions to falsify entries on various ENG Form 4025 (app. br. at 29-30). The government

¹⁰ Sungwoo alleges it is entitled to lost profits and other monetary damages because it did not receive contracts on other solicitations in which it alleges it was the lowest offeror but was determined by the government to be non-responsible (app. br. at 25) (citing Solicitation Nos. W91QVN-16-R-0008, W91QVN-16-R-0091, and W91QVN-16-R-0119), offering nothing in support other than its bare allegations. However, even assuming Sungwoo's offered more than bare allegations of impropriety, this Board lacks jurisdiction to award Sungwoo such consequential damages. *Nexagen Networks*, 19-1 BCA ¶ 37,258 at 181,328 ("Even if a contractor succeeds in showing bad faith, it is not entitled to consequential damages, such as lost profits on other contracts") (footnote omitted).

responds, stating that Sungwoo “mischaracterizes the basis for its debarment, ignoring Mr. Yang’s statement to investigators which indicates that appellant admitted to falsifying the information on the ENG Form 4025 because it knew the government was not going to verify whether the materials were offshore or local,” and that, “[t]o the extent Sungwoo’s assertion is that Sungwoo’s debarment was arbitrary and capricious or in bad faith, the Board lacks jurisdiction to review Sungwoo’s debarment” (gov’t br. at 67). We agree. As we previously held in our earlier decision, “we do not have jurisdiction to consider appeals from suspension or debarment orders, whether actual or *de facto*.” *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,977. To the extent Sungwoo seeks review of the government’s debarment decision, we lack jurisdiction to consider such a challenge.

VII. Sungwoo is Not Entitled to Monetary Relief

As noted above, pursuant to our decision in *Sungwoo*, 19-1 BCA ¶ 37,449 at 181,976, the monetary claims concerning the government’s decision not to exercise the options under six contracts remain in dispute. As discussed above, however, Sungwoo has failed to meet its burden of proof regarding its challenge to the government’s CPARs and the government’s decisions not to award Sungwoo additional contracts or options. Accordingly, Sungwoo is not entitled to any monetary damages.

The government argues that Sungwoo “failed to support its monetary claim asserting the government’s decision not to exercise [Sungwoo’s] option years on [Sungwoo’s] Contracts was in bad faith” and, as such, Sungwoo has abandoned that claim (gov’t br. at 73). In its sur-reply brief, the government argues again that “appellant’s monetary claim should be dismissed because [Sungwoo] failed to address its monetary claim in its initial brief and in its reply to the government’s Rule 11 brief” (gov’t reply br. at 3). Although Sungwoo’s Rule 11 briefs do not present a fulsome argument in favor of its monetary claims, Sungwoo does mention the factual basis for these claims in its briefings and requests monetary relief (app. br. at 1-2, 4, 13, 25-27; app. reply br. at 16).

Given our conclusion that Sungwoo failed to meet its burden of proof regarding its monetary claim, we need not decide whether Sungwoo complied with the MATOC requirement that the certification be executed by a “senior company official in charge at the contractor’s plant or location involved,” or an “officer or general partner of the contractor having overall responsibility for the conduct of the contractor’s affairs” (gov’t br. at 76; see FOF ¶ 3). Moreover, we note that our previous decision in these appeals already held that Sungwoo’s certification satisfied the requirements of the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, the statute that provides this Board its jurisdiction. See *Sungwoo*, 22-1 BCA ¶ 38,125 at 185,209.

VIII. The Board Lacks Jurisdiction to Grant Specific Performance

Sungwoo requests that this Board issue an order changing the ratings for both the base year MATOC CPAR and the individual task orders CPARs from unsatisfactory to satisfactory (app. br. at 2). The government argues in response that we lack jurisdiction to grant specific performance (gov't br. at 72). The government is correct. It is well established that this Board lacks jurisdiction to order specific performance. *BR Group*, ASBCA Nos. 63507, 63744, 24-1 BCA ¶ 38,699 at 188,159.

CONCLUSION

The appeals are denied.

Dated: June 3, 2025



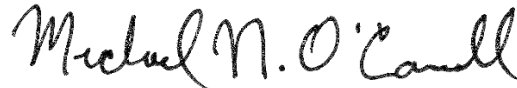
DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below is subject to an ASBCA Protective Order.

This version has been approved for public release.

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. 61144, 61219, Appeals of Sungwoo E&C Co., Ltd., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals