ARMED SERVICES BOARD OF CONTRACT APPEALS

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| Appeal of - | ) | |
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| Fluor Federal Solutions, LLC | ) | ASBCA No. 61543 |
| | ) | |
| Under Contract No. N69450-12-D-7582 | ) | |

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS

Appellant, Fluor Federal Solutions, LLC (Fluor), appeals from a contracting officer's final decision denying its claim originating in a regional base operations support contract at four Naval installations in the Jacksonville, Florida area. Fluor seeks $50,584,810 for extra-contractual work generally falling within three broad categories. First, Fluor alleges that respondent, the Department of the Navy (Navy or government), failed to provide Fluor with contractually-required data from the Navy's computerized maintenance management system, known as Maximo. As a result, Fluor contends that it was forced to compile and populate the database itself. Second, Fluor alleges that the contract's inventory of equipment, buildings, facilities, and other Navy assets that Fluor was required to service was inaccurate and incomplete. Fluor contends it was directed to perform work on numerous assets not within the scope of the contract. Third, Fluor alleges that the Navy misrepresented the condition of the assets. Fluor asserts that it was directed to perform services substantially exceeding contract requirements on assets that were beyond their useful lives, improperly designed or installed, severely deteriorated, or otherwise not maintainable. As a final matter, Fluor challenges the Navy's performance evaluations.

Base Operation Support Services (BOSS) contracts have evolved over the past few decades as the armed services have moved from performance by government employees to performance by contractor employees. Following the Reagan-era privatization movement, many facilities used a most efficient organization (MEO) strategy allowing contractors to compete with the in-house government employees to perform the services. These efforts generally resulted in increased efficiency and more flexibility in staffing. However, relying on a contractor creates a conflict between the incentives of the government and the incentives of the contractor. Following privatization, the Navy (like most services) generally issued cost-type contracts. The cost-type contracts were relatively simple for the government to draft, but they resulted in less control over the contractor's costs. Simply put, contractors were incentivized to perform in a manner that generated additional payments to the contractor. More recently, the government has moved to fixed-price BOSS contracts. A fixed-price contract shifts performance risk to the contractor and incentivizes the contractor to minimize costs. The tradeoff is that the government must draft exactingly detailed specifications to ensure that the contractor performs the work expected. The need to draft detailed specifications is further complicated by the fact that a large military base is essentially a small city. During the long process of preparing a solicitation, issuing the solicitation, evaluating offers and awarding the contract, not to mention possibly dealing with pre- and post-award protests, the facilities subject to the BOSS contract are being added to, demolished, replaced, upgraded, and repaired. Out of necessity, the Navy has resorted to listing the systems to be maintained, but not itemizing each relevant asset. As detailed below, the contractors were required to offer a fixed price, without a detailed inventory of the assets to be maintained, on contracts with "as-is" clauses whereby the government makes no representation as to the condition of the assets. Thus, contractors are, to some extent, buying a "pig in a poke."

In this appeal, the disputes between the parties mostly apply to the building maintenance work. To deal with the risk to the contractor, the fixed-price work contains a number of limitations of liability (LOL). Thus, an offeror on a BOSS contract knew that it would not need to replace every system on the base for the price of its fixed-price offer. The BOSS contract divided the maintenance work into three categories. The first category, integrated maintenance program (IMP) work, required the contractor to essentially take ownership of the system. The contractor was required to determine the best and most cost-efficient manner of maintaining these systems and was subject to the highest limitation of liability, between $700 and $10,000 per occurrence, depending on the system. For the second category, preventative maintenance, the contractor was subject to a lower limit of liability of $250 and was generally required to follow the maintenance recommendations of the equipment manufacturer or other maintenance guides. Finally, for the third category

of other repairs, the government could use a service call, purchased in advance by the government for a set price, with a limit of liability of 32 hours or $2,000 of materials.

We determine that Fluor has established entitlement with regard to its constructive change claim for the Navy's failure to provide a populated Maximo database, but deny the appeal with regard to Fluor's other maintenance-based claims. We return the performance evaluation claim to the Navy.

## FINDINGS OF FACT

### I. Fluor's Contract and Procedural Background

#### A. The Contract

The Naval Facilities Command Southeast (NAVFAC-SE) awarded Contract No. N69450-12-D-7582 to Fluor on December 13, 2011, for regional base operations support at four Naval installations near Jacksonville, Florida (R4, tab 17 at GOV12440, 12443, 12459). The parties refer to the contract as the RBOS I contract. The RBOS I contract contemplated a period of performance of a base year, four option years, and three award option years, for a total period of performance not to exceed 96 months (*id.* at GOV12450). The contract expired by operation of law on June 30, 2017. However, Fluor provided services for an additional 18 months pursuant to two unilateral modifications executed by the Navy, both of which the Board subsequently found to be invalid. *Fluor Fed. Solutions, LLC*, ASBCA No. 61353, 19-1 BCA ¶ 37,237 at 181,253; *Fluor Fed. Solutions, Inc.*, ASBCA No. 62343, 23-1 BCA ¶ 38,302 at 185,956.

The contract required Fluor to maintain and support approximately 30,000 pieces of equipment, buildings, facilities, and other Navy assets spread across four installations, covering more than 7,000 acres (App. Proposed Finding of Fact (APFF) ¶ 49; gov't resp. to APFF ¶ 49). The installations covered by the contract were: Naval Air Station (NAS) Jacksonville, Naval Station (NS) Mayport, the Bureau of Medicine and Surgery (BUMED), and Blount Island Command (BIC) Jacksonville (R4, tab 17 at GOV12459). The installations vary in size. Of the four, NAS Jacksonville is the largest. Occupying 3,986 acres, hosting more than 100 tenant commands, and employing approximately 23,000 active duty and civilian personnel, NAS Jacksonville is the third largest naval installation in the United States (R4, tab 17.56 at GOV31524). NS Mayport is only slight smaller. At 3,409 acres, NS Mayport is the third largest naval facility in the continental United States (*id.*). By comparison, BUMED and BIC are smaller installations (*see id.* at GOV31524-25).

The contract incorporated Federal Acquisition Regulation (FAR) FAR 52.233-1, DISPUTES (JUL 2002) (R4, tab 17 at GOV12468), FAR 52.215-8, ORDER OF PRECEDENCE—UNIFORM CONTRACT FORMAT (OCT 1997) (*id.* at 12466), and FAR 52.243-1, CHANGES—FIXED PRICE (AUG 1987) (*id.* at 12468). The contract also incorporated two clauses addressing government-furnished property, FAR 52.245-1, GOVERNMENT PROPERTY (AUG 2010), and NAVFAC Clause 5252.245-9300 GOVERNMENT-FURNISHED PROPERTY, MATERIALS AND SERVICES (FEB 2009) (R4, tab 17 at GOV12468, 12490-92).

FAR 52.245-1 provides in relevant part:

(a) Definitions. As used in this clause-

. . .

*Government-furnished property* means property in the possession of, or directly acquired by, the Government and subsequently furnished to the Contractor for performance of a contract. Government-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification.

…

*Government property* means all property owned or leased by the Government. Government property includes both Government-furnished and Contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property and software.

…

(d) *Government-furnished property*. (1) The Government shall deliver to the Contractor the Government-furnished property described in this contract. The Government shall furnish related data and information needed for the intended use of the property.

. . .

(ii) In the event property is received by the Contractor, or for Government-furnished property after receipt and installation, in a

> condition not suitable for its intended use, the Contracting Officer (CO) shall, upon the Contractor's timely written request, advise the Contractor on a course of action to remedy the problem. Such action may include repairing, replacing, modifying, returning, or otherwise disposing of the property at the Government's expense. Upon completion of the required action(s), the CO shall consider an equitable adjustment to the contract (see also paragraph (f)(1)(ii)(A) of this clause).
>
> (iii) The Government may, at its option, furnish property in an "as-is" condition. The Contractor will be given the opportunity to inspect such property prior to the property being provided. In such cases, the Government makes no warranty with respect to the serviceability and/or suitability of the property for contract performance. Any repairs, replacement, and/or refurbishment shall be at the Contractor's expense.

(R4, tab 17 at GOV12468; FAR 52.245-1)

NAVFAC 5252.245-9300 states:

> In accordance with FAR clause 52.245-1, Government Property (JUN 2007), Section I, the Government will provide the Contractor the use of Government-owned facilities, equipment, materials, and utilities for use only in connection with this contract. All such facilities, equipment, and materials will be provided in "as is" condition and their use is at the option of the Contractor. The use of Government-furnished property and services for other purposes is prohibited.
>
> (a) Government-Furnished Facilities. The Government will furnish or make available to the Contractor the facilities described in Attachment J-0200000-06.
>
> . . .
>
> (b) Government-Furnished Equipment. The Government will provide the Contractor the use of existing and available Government-owned equipment as listed in Attachment J-0200000-06.
>
> . . .

> (c) Government-Furnished Material. The Government will furnish the material described in Attachment J-0200000-06 to the Contractor on a one-time basis.

(R4, tab 17 at 12490-91)

The RBOS I contract was principally fixed-price. Prior to the issuance of the solicitation, the Navy documented its rationale for the selected contract type, explaining that the majority of services are known and well-defined and that "a wealth of historical information is available":

> Explain how the recommended contract type, pricing structure, and type of source selection benefits the government?
>
> The recommended contract type provides maximum flexibility to the Government for supporting Base Operations Support Services. *The majority of services are known, well defined, recurring, and have been contracted by the Government for a long period of time with a wealth of historical information available*. Therefore, these requirements lend themselves to the application of [Firm-Fixed Price (FFP)] provisions. The [indefinite delivery/indefinite quantity (IDIQ)] provisions are incorporated for work that is over and above the FFP requirements or unforeseen at the time of acquisition planning. Work to be provided under the IDIQ provisions are bound to occur in a contract of this scope, complexity and magnitude. *The estimates are based on historical factors* and other indicators as discussed within the [Independent Government Cost Estimate (IGCE)] responses provided herein.

(App. supp. R4, tab F2093 at NAVSP52197-98) (emphasis added) Although the contract also included IDIQ contract line items, the ordered IDIQ work was performed on a fixed-price basis (R4, Tab 3.1 at GOV3074; tab 17 at GOV12450; tr. 1/74, 76-77; tr. 4/90-92).

Section C of the RBOS I solicitation set forth the Performance Work Statement (PWS) (R4, tab 1 at GOV18). The PWS was organized into "Annexes" (*id.*).

The RBOS I Solicitation included four separate sets of Section C Annexes—one for each RBOS I site (*id.*; R4, tab 1.1 (NAS Jacksonville), tab 1.2 (NS Mayport), tab 1.3 (BUMED), tab 1.4 (Blount Island)). The Annexes were organized by Specification Items.

The following Solicitation Section C Annexes, among others, contained the "service requirements" or "technical requirements" "peculiar to that technical annex":

Annex 0600000 Port Operations
Annex 1502000 Facility Investment
Annex 1503010 Janitorial
Annex 1503020 Pest Control
Annex 1503030 Refuse Collection and Recycling
Annex 1503040 Other (Swimming Pools)
Annex 1503050 Grounds Maintenance
Annex 1602000 Electrical
Annex 1604000 Wastewater
Annex 1605000 Steam
Annex 1606000 Water
Annex 1700000 Base Support Vehicles and Equipment
Annex 1800000 Environmental

(R4, tab 1 at GOV83; tab 1.1 at GOV126, GOV185, GOV199; tab 1.2 at GOV339, GOV403, GOV416; tab 3.1 at GOV3074-75, GOV3079; tab F2096.214 at F1679774; tab F2096.254 at F1796431). The technical requirements were set forth in the PWS "performance objectives and standards" (R4, tab 1 at GOV83). Section A – Solicitation/Contract Form, Proposal Incorporation, of the contract incorporated appellant's technical proposal and price proposal (R4, tab 17 at GOV12441).

B. Requests For Information

The RBOS I Solicitation permitted potential offerors to submit "specific questions" or Requests for Information (RFIs) regarding the solicitation (tr. 1/104-05). During the solicitation period, potential offerors submitted 810 RFIs and an additional 64 unnumbered RFIs (R4, tab 489; tab 13.4).

The RFIs and the government's answers were subdivided into 8 amendments: "Amendment 0001" (RFIs 1-100), "Amendment 0002" (RFIs 101-200), "Amendment 0003" (RFIs 201-398), "Amendment 0004" (RFIs 399-565), "Amendment 0005" (RFIs 566-611), "Amendment 0006" (RFIs 612-744), "Amendment 0007" (RFIs 755-760), and "Amendment 0008" (RFIs 717 revised, 761-810) (R4, tab 3 at GOV3056; tab 3.3; tab 4 at GOV4445, tab 4.3; tab 5 at GOV5340; tab 5.1; tab 6 at GOV5435, tab 6.3; tab 7 at GOV6816; tab 7.2; tab 8 at GOV7639; tab 8.3; tab 9 at GOV8913, tab 9.1; tab 10 at GOV8927; tab 10.2).

The government's responses to the RFIs were issued as amendments to the solicitation and the final solicitation containing each amendment with attachments was published on the Navy's Electronic Commerce website. The CO testified that the RFIs and answers were "formally incorporated via amendment" and the final solicitation "required the contractors to acknowledge receipt of them." (Tr. 6/35-36; tr. 16/20)

Under the "AWARD" section of the contract, Box 19 states "ACCEPTED AS TO ITEMS NUMBERED 0001-0016, Amendments 1-14" (R4, tab 17 at GOV12440). These were the amendments that included the RFI answers. Amendment No. 0001 with an effective date of May 18, 2010, states that "[t]his amendment provides modifications to Sections B, C, E, F, H, I, J, L, M and *responses to RFIs*" (R4, tab 17.1 at 12523) (emphasis added). Similarly, Amendment Nos. 3-8 also specifically state that they include responses to RFIs (*id.* at 12525-30).

C. Fluor's Request for Equitable Adjustment, Claim, and Appeal

The facts specific to Fluor's claims are discussed below; however, we first present the procedural facts common to all discussions. After Fluor submitted claims regarding withholdings pertaining to the July and August 2012 invoices, the Navy found in a March 2013 final decision that there was some merit to the claims (app. supp. R4, tab F33 at F782). By letter dated May 1, 2013, the Navy noted that "the issues with the Computerized Maintenance Management Systems" provided a basis for refunding the withholdings not pertaining to unfilled positions (app. supp. R4, tab F35 at F793).

On June 30, 2015, Fluor submitted a consolidated Request for Equitable Adjustment (REA) seeking a price adjustment in the amount of $39,220,823 and the modification of specific Navy evaluations included in the Navy's Contractor Performance Assessment Reporting System (CPARS) (app. supp. R4, tab F1 at F48). By letter dated February 3, 2016, the Navy denied the consolidated REA (*id.* at F49).

By letter dated September 30, 2016, Fluor submitted a certified claim seeking (i) an equitable price adjustment of $50,584,810 plus interest, and (ii) the modification of specific Navy evaluations included in the CPARS for the Base Year, Option Year 1, Option Year 2, and Option Year 3 (app. supp. R4, tab F1 at F48-49). The claim was an update to the consolidated REA (*id.* at F49).

On November 22, 2017, Fluor petitioned the Board to direct the Navy to issue a final decision on the claim. The Board docketed Fluor's petition as ASBCA No. 61431-983. By Order dated December 28, 2017, the Board directed the Navy to

issue a contracting officer's final decision (COFD) on the Claim by January 31, 2018. *Fluor Federal Solutions, LLC*, ASBCA No. 61431-983, 18-1 BCA ¶ 36,943 at 179,977. By letter dated January 19, 2018, the Navy issued a COFD, denying Fluor's claim in its entirety after "determ[ining] that the claims cannot be adequately evaluated as submitted" (R4, tab 1160 at GOV2361).

On February 21, 2018, Fluor timely filed a notice of appeal with the Board, appealing the contracting officer's denial of the claim. On February 23, 2018, the Board docketed the appeal as ASBCA No. 61543.

The Board bifurcated the proceedings to decide entitlement only, reserving the issue of dollar recovery for remand (Bd. mem. dtd. Aug. 7, 2020). The Board held a 28-day hearing on entitlement. The Board conducted the hearing in installments or tranches by "issue":

a. Installment 1 – Foundational/Background Matters and "Maximo" Issues

b. Installment 2 – "Condition" Issues

c. Installment 3 – "Inventory" Issues

d. Installment 4 – "CPARS" Issues

(*See* Bd. Order dtd. June 23, 2021)

## II. Facts Pertaining to Fluor's Maximo Claim

### A. Maximo

As noted above, Fluor's first allegation is that the Navy failed to provide Fluor with contractually-required data from the Navy's computerized maintenance management system (CMMS) or database. Consequently, Fluor contends that it was forced to compile and populate the database itself. Contractors performing large BOSS contracts typically rely on a CMMS to efficiently manage the work. For its CMMS, the Navy uses Maximo. More precisely, the Navy uses IBM's proprietary Maximo software, which is referred to as the "Single Platform Maximo (SPM)" to differentiate the Navy's version of Maximo from the commercially available versions (tr. 3/11; tr. 6/177-78; R4, tab 1.1 at GOV108; tab 6.3 at GOV6194; tab 34 at F1586693).

Maximo is a comprehensive, multi-purpose database long used by the Navy to identify and locate assets at bases across the country, track their maintenance history (including preventative maintenance, reactive maintenance, and service calls), issue work orders, make purchasing decisions, approve the payment of invoices, and monitor contractor performance (tr. 1/123-27, 206, 216-24; tr. 2/6-13; tr. 3/186; tr. 5/85-86; tr. 6/128-29; tr. 7/123; R4, tab 6.3 at GOV6194). Maximo, or more precisely the data contained within Maximo, is needed to identify, locate, and schedule maintenance for the 30,000 assets subject to the contract (*see, e.g.* tr. 1/34, 211; tr. 4/147).

During the hearing, numerous witnesses testified credibly regarding the importance of Maximo data in performing base operations support services. For instance, Mr. Daryl Flowers, Fluor's information technology (IT) manager, testified:

> [Maximo is] used to manage all functions involved in asset management, all the way from keeping records about the details of assets and sales of the equipment that's to be maintained, where those assets are physically located . . . . [Maximo is] used to manage scheduled and unscheduled maintenance activities, preventative maintenance, work order information, detailing specific occurrences of work [that has been] done on assets and equipment.
>
> It also contains functionality associated with the management of [parts] and supplies and materials that are used in maintenance management, maintenance information, maintenance job plans. All this data is in the Maximo system and is integrated together to . . . facilitate effective and efficient maintenance management.

(Tr. 1/211)

Mr. Randy Sherwood, Fluor's site manager at NAS Jacksonville, described Maximo as follows:

> [Maximo is] the backbone of how you do day-to-day business. It's how you receive your calls, it's how you issue your calls, it's how you issue your maintenance. You track your warehouse through Maximo.

(Tr. 4/147)

Mr. Wes Avritt, Fluor's site manager at NS Mayport, testified regarding the importance of the Maximo data at the start of a new base operations support contract:

> [Maximo] plays probably the largest role [in transition] . . . . [I]t's one thing to have somebody walk around and show you everything, but you got to actually have it documented somewhere . . . . [T]he CMMS clarifies everything else that you wouldn't have gotten in a hand-to-hand or physical walk-though. And probably to me, with a quality background, the most important piece of that is, you get the life-cycle history of [the assets].

(Tr. 4/15-16) Mr. Avritt further testified that a contractor, like Fluor, performing a base operations support contract cannot "really do anything without Maximo" (tr. 4/19). He explained that Maximo is used "to run basically the entirety of the job" (tr. 4/83). "It's supposed to track everything cradle-to-grave" (*id.*). Many of NAVFAC's 30,000 assets across the four RBOS I sites are recorded within Maximo. It would be nearly impossible to successfully manage that sheer volume and equipment complexity with a pencil and paper (tr. 1/123-24).

Mr. Dave Barry, Fluor's Operations Program Manager, testified that it "would not be possible" to perform a base operations support contract of the size and complexity of the RBOS I contract without Maximo data (tr. 4/212). Mr. Henry Fuentes, Fluor's Project Manager echoed this sentiment, testifying that "I'm not sure how you can run a BOSS contract without some type of CMMS program" (tr. 5/88).

Maximo stores data regarding assets—data that is necessary to perform maintenance and repair. A Maximo database will typically include information about the asset, such as the location, equipment manufacturer, model number, serial number, and associated ancillary equipment connected to the asset, as well as information about the history of the asset such as when the asset was initially installed and the asset's maintenance history. Maximo may also contain inventory information for spare parts or backup units. (Tr. 5/85-96)

Maximo can manage equipment schedules, which may require inspections at various intervals, such as daily, weekly, monthly, yearly, or longer, depending on the asset. For example, in a predictive and preventative maintenance scenario, HVAC filters might need checking on a monthly or multi-month basis. Maximo can i) create reminders to prompt system users to inspect or replace filters, ii) provide the location

and type of each filter, iii) track current filter inventory, iv) indicate if new inventory has been ordered, v) show expected arrival dates for ordered inventory, vi) and automatically populate work orders for filter inspection or preventative maintenance (tr. 5/87-89). Similarly, Maximo can manage critical infrastructure systems, such as drinking water and wastewater systems, which may require daily inspections, as opposed to other equipment, like air conditioners, which may only need quarterly checks for preventative maintenance (tr. 5/90).

The asset data within Maximo can be compiled into reports that provide users with insight into "the condition [of] the equipment" and whether the "equipment was past its useful life" (tr. 1/126). This information helps predict equipment failures and supports both short-term and long-term capital improvement planning. For example, if the sites' fire hydrants were 45 years old, and the historical failure rates suggest they typically last less than that, Maximo could prompt users to replace them as they are beyond their useful life. (Tr. 5/86) Additionally, the historical data within Maximo can assist the users in determining whether a patch or a complete repair should be made (tr. 1/126), and it can indicate whether removed equipment should be discarded or retained as an emergency backup.

Maximo helps to reduce equipment downtime, extend asset lifespan, improve efficiency, and lower maintenance costs. At the core of maximizing operational efficiency is preventive maintenance, which involves taking proactive steps to prevent equipment failures before they occur (tr. 4/212-15). Maximo can also help manage and predict both short- and long-term budgets for the maintenance, repair, and replacement of assets and employee resources. Its Business and Analytics module tracks the number of hours worked and labor hours performed on each asset, providing valuable data for budget management and determining the useful life of assets. (Tr. 1/126-27) We find that a populated Maximo database is necessary to perform this contract, and that the failure to provide the data was material to Fluor's ability to perform the contract.

B. The Contract Required Fluor to "Maintain" the CMMS System

The RBOS I Solicitation defined and limited the services the contractor would be required to provide under the contract for facilities investment, specifying that the contractor would be "maintaining":

> The Contractor shall be responsible for *maintaining* all facilities, systems, and equipment, identified in this technical sub-annex [for Facilities Investment], to a standard that prevents deterioration beyond that which

> results from normal wear and tear and corrects deficiencies in a timely manner to assure full life expectancy of the facilities, systems, and equipment.

(R4, tab 1.1 at GOV129, Section C, Annex 1502000, Spec Item 2.3, Workmanship and Material Standards) (emphasis added)

The RBOS I solicitation also explained that IMP was to *maintain and repair* equipment to OEM specifications:

> Systems and equipment are *maintained and repaired* to sustain a fully functional and operable condition in accordance with OEM specifications.

(*Id.* at GOV139) (emphasis added)

Of the over 810 RFIs asked by prospective offerors, three questions were directed towards application of the Navy's CMMS database. In response to a question regarding Maximo, the Navy responded: "There are eight Modules in [the Navy's] Single Platform Maximo, they are: Work Orders, Preventative Maintenance, Inventory, Equipment, Purchasing, Plans, Resources, and Business Analysis & Reporting. We use all eight modules." (App. supp. R4, tab F323 at F2405156)

In Annex 0200000, Spec Item 2.6.4, entitled "Government's Computerized Maintenance Management Systems (CMMS)" provides:

> The Contractor shall maintain records stored in the Government's CMMS current and accurate. The Government will make these systems available for the Contractor's use in managing the effort required under this contract. The computer network is not controlled by NAVFAC SE so that speed and availability cannot be predicted. Limitations of the network do not relieve the Contractor from the responsibility of completing the service described in the performance work statement in a timely manner. The Contractor will be required to convert to any current or future system at no additional cost to the Government.
>
> All data pertaining to Public Work assets must be entered into SPM by one of the following methods:

> **-Direct Entry into SPM**
> • Requires both teaming between the Contractor and the Government to ensure that access is both enabled and authorized.
>
> **-Flat File**
> • Requires government to provide a template for information required, including mandatory fields, field lengths, etc.
>
> **-Real Time Two-way Interface**
> • Via Maximo Enterprise Adapter (MEA)
> • Also requires Contractor to provide mandatory information per SPM template.

(R4, tab 1.1 at GOV108 (NAS Jacksonville); tab 1.2 at GOV311-12 (NS Mayport); tab 1.3 at GOV531 (BUMED); tab 1.4 at GOV599 (BIC)) (emphasis in original)

Spec Item 3 stated that the "Contractor shall maintain current all facility maintenance data and warranty records in the technical library and CMMS per Annex 2." (R4, tab 1.1 at GOV131 (NAS Jacksonville); tab 1.2 at GOV344 (NS Mayport), tab 1.3 at GOV555 (BUMED), tab 1.4 at GOV623 (BIC)).

The term "maintain" is defined by Section C - 0200000 Management and Administration as, "[t]o keep in a state of repair and efficiency, to preserve from failure or decline" (R4, tab 1.1 at GOV97 (NAS Jacksonville); tab 1.2 at GOV301 (NS Mayport); tab 1.3 at GOV521 (BUMED); tab 1.4 at GOV589 (BIC)).

The phrase "make these systems available," as used in Spec Item 2.6.4, was understood to mean the following:

> [T]he system itself or the data contained in the system would be available for the contractors use. . . . It's the data that's contained in the system that contains the intelligence, that is required by the contractor in order to maintain records, current and complete . . . . It's just the information that's inside the system is where the value is.

(Tr. 3/34, 148)

The Navy stated that the equipment, components, and systems were in "as-is condition" (R4, tab 17.58 at GOV32026, Section C, 02000000 - Management and Administration, Spec Item 2.1.7; R4, tab 5.1 at GOV5364).

C. Fluor's Proposals Described Using the Navy's Existing Maximo Data To Manage and Improve the Maintenance Program

Fluor submitted price and technical proposals to the Navy, which were incorporated into the contract (R4, tab 17 at GOV12441). In its proposal, Fluor outlined its approach to performing the contract. Although the term Maximo is mentioned nearly 100 times, at no point does Fluor state that it will create, from scratch, the CMMS database for the RBOS I contract. Rather, Fluor clearly anticipated maintaining and updating an *existing* and populated Navy Maximo.

For example, Fluor explained that a key task would be to create an interface between Fluor's CMMS and the Navy's Maximo:

> **Implementing Fluor's CMMS**. One of the key phase-in tasks for this new contract is the implementation and testing of Fluor's EMS, which includes Maximo as our CMMS, and the interfacing of EMS with the Government's [Single Platform Maximo (SPM)]. . . . Appendix B provides a detailed explanation of our approach to using Maximo on RBOS I.
>
> Fluor's working knowledge of Maximo and SPM and our experience interfacing the two systems provides the Navy with a proven and effective approach to updating information in SPM.

(App. supp. R4, tab F272 at F80617)

Fluor further describes its goal of "interfacing to the Navy's Single Platform Maximo (SPM)" and "maintain[ing] records in the Navy's SPM CMMS through an interface with Fluor's Maximo system" (app. supp. R4, tab F272 at F80548, F80595, F80617). Fluor states that the integration of the Navy's Maximo system with Fluor's Maximo will "help[] automate all aspects of operations and maintenance, including asset history; scheduling; preventive and corrective maintenance" and this design ensures Fluor "do[es] not control a client-owned Maximo configuration" (*id.* at F80742).

Fluor also describes its strategy of going from a "repair-focused" to a "reliability-focused philosophy" through "provid[ing] a strategic assessment of RBOS I existing maintenance and reliability programs and compar[ing] these to established maintenance management best practices and benchmarks" (app. supp R4, tab F272 at F80765). To accomplish this, Appendix B, Figure B-1 of Fluor's technical proposal describes how the Navy's Maximo system will interface with Fluor's Maximo. Fluor describes taking the Navy's Maximo historical data from the "Maintenance Technical Library," "Asset Maintenance History & Cost," and "Preventative Maintenance Planning" and bringing that data over to Fluor's Maximo so Fluor can perform "Analysis" on "Asset and Equipment Maintenance," measure "Key Performance Indicators and Metrics," provide "Management, Analysis, Query, and Ad-Hoc Reporting," and provide "Analysis" on "Preventative, Proactive, Predictive, Reactive, and Condition-Based" metrics. (*Id.* at F80740)

Fluor states in its proposal that "Maximo provides the ability to manage and track the entire life cycle of any one asset or group of assets. . . . Our integration of [] Maximo is designed to work with our Maximo and integrates with the Navy's Maximo" (app. supp. R4, tab F272 at F80742). Fluor's proposal repeatedly states that, to achieve its goals, Fluor must assess the Navy's historical asset data, "[a]ssess current predictive maintenance (PM) program and develop implementation strategies for new technologies." Key to Fluor's plan is understanding each asset's historical maintenance data: "Assess the current status of the preventive maintenance (PM) program as compared with benchmark reliability maintenance programs" in an effort to "analyze gaps and implement best practices to establish proactive, reliability-focused maintenance." (*Id.* at F800765)

During the procurement, Navy evaluators rated Fluor's technical approach, which, as highlighted above, repeatedly referenced Fluor's intent to utilize the historical data in the Navy's Maximo database, as "Good" (app. supp. R4, tab F2077at NAVSP27916). According to the solicitation, a good rating is defined as demonstrating a clear understanding of requirements, with technical considerations and capabilities significantly exceeding performance and capability standards. The rating indicates a high probability of success with overall low degree of risk in meeting the Government's requirements. (*Id.* at NAVSP27827)

The Navy evaluators further described Fluor's proposal as "provid[ing] a technical approach that demonstrates a clear understanding of requirements. Overall technical considerations and capabilities exceed performance and capability standards. Fluor's technical approach represents a strong probability of success with overall low degree of risk in meeting the Government's requirement" (app. supp. R4, tab F2077 at NAVSP27916). The NAVFAC Technical Evaluation Board's Executive

Summary rated Fluor's "overall technical rating," which incorporates all the evaluation factors as "good" (*id.* at NAVSP27832).

D. Maximo Was Used During The Predecessor Contract

In the solicitation, the Navy represented that the RBOS I contract was a follow-on to a previous contract performed by IAP-Hill LLC.[1] The IAP-Hill contract, which had a period of performance from 2000 through 2010, was a base operations support contract "for similar services," i.e., the predecessor contract (N62467-00-D-2451) (tr. 1/193-94; R4, tab 1 at GOV2; app. supp. R4, tab F321 at F40232).

Under the predecessor contract, IAP-Hill was required to maintain the Navy's assets and to monitor and record asset conditions (R4, tab 22 at 287 ("Establish a log and record date and time of monitoring, system condition and performance . . . and all comments, problems, and identification of Corrective Maintenance required."); *id.* at 389 ("Inspect both interior and exterior of facilities and equipment at substations weekly. Establish and maintain a log at each substation and record date and time of inspection, substation condition and performance . . . and all comments and problems.")). The services IAP-Hill performed included PM programs and service calls, i.e., "similar services" to those called for under the RBOS I contract (R4, tab 1 at GOV2; tab 22 at 240).

Importantly, the predecessor contract also required IAP-Hill to continuously update the Navy's Maximo (R4, tab 22 at 253 ("The Government will provide User licenses for the Maximo Software to the contractor . . . . It is the Government's intent to utilize all of the Maximo system module. The Contractor . . . shall be required to have system interface compatibility with the Maximo Software Module.")). Ms. Forsman, who served as a Work Control Supervisor for IAP-Hill from 2001 to 2012, testified that she used Maximo "every day" during the performance of the predecessor contract to schedule and document the services IAP-Hill provided (tr. 7/74 ("We would collect all the data necessary to perform the work required by the Government and report on it to the Government."); tr. 7/75 (used Maximo "every day")). Moreover, within 15 days of contract completion, IAP-Hill was required to turn over all records and documents resulting from the performance of the contract to "IAP-Hill CMMS [] successor contractor and advise Quality Manager so this effort can be managed" (app. supp. R4, tab F465 at NAVJV92763; R4, tab 22 at 256-57). IAP-Hill, in fact, provided this data to Fluor (tr. 6/145-46).

[1] IAP-Hill is referred to in various places in the record and hearing transcript as "IAP/Hill." For consistency, all references have been modified to read IAP-Hill without the change being noted in quotations.

Although Fluor used the IAP-Hill data to help build the PM program (tr. 7/83 ("[W]e took IAP-Hill's [J Table] list because [it] had the list of the . . . asset information and where they were located")), the Maximo data provided by IAP-Hill was incomplete. It was missing assets, some historical data, certification dates, and included non-existent assets or incorrect asset metrics (tr. 7/84). Although IAP-Hill's Maximo data was somewhat useful, the assets listed in the contract's J Tables did not align with IAP-Hill's Maximo data (tr. 7/86-87).

E. The Navy Did Not Provide A Current And Accurate Maximo Database

Shortly after contract award, the Navy and Fluor established a weekly working group to discuss the process by which the Navy would provide the necessary data to Fluor, and the procedures by which Fluor would transmit information to "maintain" the Navy's Maximo as "current and accurate" (tr. 2/69-76; tr. 3/88; app. supp. R4, tabs F20-F24, F26). On May 3, 2012, the parties had a meeting to discuss the "[i]ntial setup of Maximo to match Navy BOS," and the Navy recognized that "the asset list will need to be vetted" (App. Supp. R4, tab F20 at F747). Fluor provided a list of tables to the Navy that would be useful in "setting up Fluor's Maximo to match RBOS Maximo," but the Navy would have to "scrub" the assets table first (*id.*). In addition, in the May 4, 2012 transition meeting minutes the Navy stated "[b]ased on the IT meeting held with Fluor and CIO, Fluor will get the data from the Government Maximo" (app. supp. R4, tab F457 at NAVSP47553).

The Navy obtained IAP-Hill's Maximo data, as it was believed to be more accurate than the Navy's own Maximo data (tr. 7/133). However, it was discovered that the IAP-Hill data was not configured the same way as the government system, requiring review before it could be imported into the Navy's Maximo (tr. 6/146). As a result, the IAP-Hill data had to be "scrubbed" to ensure the databases had similar field names and data contents, allowing the databases to synchronize and be properly loaded into the Navy's Maximo" (tr. 6/147). This scrubbing process was tedious and time-consuming, requiring the former Navy Maximo Program Manager, Mary Harmon, to manually review and enter each asset into the system (tr. 7/137). A joint team from both the Navy and Fluor worked together to reconcile the data and make it usable (tr. 4/218-19).

After the Navy scrubbed the data, a team of approximately ten Navy summer interns manually entered it into the Navy's Maximo (tr. 7/136). The scrubbing process was continual through the summer of 2012 and was not completed before Fluor's go-live date of July 1, 2012 (tr. 2/86-93; tr. 7/136-37; app. supp. R4, tab F22 at F751-52). The Navy provided the data piecemeal to Fluor from April to July 2012 (tr. 6/148).

In June 2012, the Navy provided Fluor a Maximo "data dump" for two sites (app. supp. R4, tab F503 at NAVTM667). The following week, the Navy provided an additional "raw dump" to Fluor (app. supp. R4, tab 510 at F1079492). There were issues with this data, as several months had elapsed since the preventative maintenance work had been performed. In addition, the asset numbers in the "raw dump" file did not match those in the RBOS I contract because the Navy used a different asset numbering convention than IAP-Hill. (Tr. 2/100-04, 107-12) If the asset numbers differed between IAP-Hill's Maximo data and the Navy's Maximo data, then the "scrubbed" data had "very little value" (tr. 2/111-12). "If an asset record does not have the correct location, . . . when a Work Order is generated for work to be done on that asset, the technician . . . [will] go to that location [and the] asset number won't be there." Accordingly, this "creates a lot of confusion and delays." (Tr. 2/110) Similarly, mistakes were observed in the asset description:

> [If] the description isn't consistent with the asset that's in the real world when they go to where that location is to locate that asset, and now the description is different, is that really the asset that they need to work on or is there some mistake with the asset number and it really is representing a different piece of equipment, the one that is actually there that would have a different description.

(Tr. 2/110-11)

The Navy provided a revised data dump for the NAS Jacksonville on June 27, 2012 (app. supp. R4, tab F522 at NAVEP3879). The next day, three days before Fluor's go-live date, the Navy provided Fluor with a "Whole Asset List." It was reported that the "IAP-Hill data has a [Paying Activity Number (PAN)] number which could be linked back to the [Exhibit Line number (ELIN)]" and the Navy "validate[d] that the ELIN list is good." (App. Supp. R4, tab F26 at F763) Again, Fluor identified that the Whole Asset List data was out of date and included assets that were not part of the RBOS I contract. In addition, for some assets, the data provided by the Navy contained nonsensical numbers in the location field, offering no useful information about the asset's location. (Tr. 3/94-95)

On July 13, 2012, Fluor's Business Manager, Greg Ahlstrom sent an email to other Fluor employees summarizing Fluor's meeting with the Navy the previous day, reporting that "everyone is re-thinking the approach of trying to mess with the data we received from the Navy" (R4, tab 198 at F1083373).

Mr. Ahlstrom described the ongoing issues with the data, noting that the Navy's asset list was received four days before Fluor was expected to go-live. Of the 36,000 assets, only 10,600 assets could be matched to an ELIN, with an accuracy rate of around 80%. Additionally, approximately 1,500 assets were unrelated to the RBOS I contract. Around 35% of the IAP-Hill source data lacked PAN numbers, and another 64,000 assets listed their location as the Department of Defense Activity Address Code, which is not a physical location. Finally, some entries labeled assets as "inspection," which is a type of work, not an asset name. (R4, tab 198 at F1083374)

Mr. Ahlstrom noted that the outcome of the joint meeting with the Navy was to suspend the current efforts with the Maximo data. He described the two proposed options to move forward. The first option was to continue attempting to manipulate the Navy's Maximo data to fit Fluor's job plans and to reconcile those assets with the RBOS I contract. The second option was to start with the assets listed in the RBOS I contract, load those assets into Maximo, and manually reconcile them with the Navy's data dump (e.g., using serial numbers), attaching job plans accordingly. This would be followed by manually confirming the data through on-site visits to each asset. (R4, tab 198 at F1083373-74; tr. 2/118-20; tr. 3/93-96)

The IAP-Hill transition plan included sending Maximo data to the Navy (app. supp. R4, tab F465 at NAVJV92762; tr. 7/53). A Memorandum To File dated July 19, 2012, prepared by Navy Contract Specialist Josephine ("Jay") Vissers, documented the on-going discussions between the Navy and Fluor regarding the start of the RBOS I contract. The Memorandum emphasized that the Navy "is not looking to fix the Government Maximo issue." (App. Supp. R4, tab F28 at F768) As a result, Fluor was limited to pursuing the second option outlined in Mr. Ahlstrom's July 13 email: using the Section J Tables from the contract to populate Fluor's Maximo" (tr. 3/96-98; tr. 4/219-20; app. supp. R4, tab F28 at F768).

By this point, the go-live date of July 1, 2012, had passed, and the Maximo asset data provided by the Navy to Fluor contained so many errors, inaccuracies, and missing information that Fluor was unable to use it (tr. 4/168-70; *see also* tr. 1/137; tr. 2/129-30; tr. 4/61, 215; tr. 5/116-17; tr. 7/104-05, 145; tr. 8/101).

F. Fluor Created A Maximo Database For The Navy

Due to the circumstances described above, Fluor proceeded to create a Maximo database from scratch, starting with the assets listed in the RBOS I contract Section J tables (R4, tab 198 at F1083374; app. supp. R4, tab F28 at F768). Therein lay another problem. The Section J tables were assembled in a manner that included only a list of systems, not all assets. Thus, the information was insufficient for actual contract

performance (tr. 5/57 (testifying that the J tables did not contain sufficient information to perform the contract, but Fluor assumed that it would be able to manage the project through access to the Navy's Maximo)). The Section J table data was problematic due to several issues, including: i) incorrect location codes, ii) vague location descriptions, iii) asset numbers not associated with the equipment, iv) missing installation dates, v) inventories that did not identify the last time the equipment received preventative maintenance, vi) no record of the last asset certification, and vii) a lack of maintenance history (tr. 7/111-12).

As a result of not having a fully populated, reasonably accurate Maximo database reflective of the RBOS I assets, Fluor was unable to perform maintenance in a timely and efficient manner:

> [S]howing up to a building . . . not knowing the correct manufacturer [of the] equipment, not having the historical values of the maintenance, not having the correct locations. These are all things that [we should know] when we would schedule work . . . . All the while other work is piling up.

(Tr. 4/117) Consequently, Fluor could not, as it typically would, print work orders from Maximo and distribute the work to the technicians (tr. 4/149).

Instead of relying on Maximo to track when preventative maintenance was due, Fluor's technicians had to spend time locating equipment and manually recording each asset's information, condition, location, and any other relevant details. This information was then manually entered into Maximo. For months, technicians used blank forms to help determine the maintenance frequency. (Tr. 4/158-63) With "tens of thousands of pieces of equipment," this resulted in a significant amount of handwriting and paperwork (tr. 4/160).

The handwritten notes from the technicians were given to a separate Fluor team to input the information into Maximo. If the Fluor Maximo team found discrepancies between the Maximo database and the handwritten notes, the Fluor "scheduler" had to go into the system to correct the errors. (Tr. 4/164) Due to the lack of historical preventative maintenance data for the assets, Fluor technicians had to create their own files and schedule work and maintenance at the most basic level—monthly—since, without any history, a monthly schedule was considered the safest starting point (tr. 4/162-63).

Fluor's RBOS I Project Manager, Mr. Fuentes, testified:

> There was a lot of time expended going out doing inventories, going out and doing your PMs and then finding that you can't – something's not working right, just to start crawling on your belly in an attic to find that, oh, there's a couple of components up here that no one ever mentioned, or that type of thing. So, there was a lot of impact, and we spent a lot of time putting those together.

(Tr. 19/27-28)

Fluor's RBOS I Quality Manager and later the NS Mayport Site Manager, Mr. Avritt, described the effect of what Fluor contends were Section J inventory deficiencies on Fluor's contract performance:

> [W]hen you have to find something or look for something that nobody knows is there, you're – you're kind of chasing your tail a little bit. You – you expect to go somewhere and be able to within a reasonable amount of time be able to, you know, enact a repair of some sort. And when you have to take 10, 20, 30 times that amount of time and effort, you're – something else is not getting corrected, fixed, whatever term you'd like to use.

(Tr. 20/167)

By email dated March 8, 2013, the Navy's Supervisory Information Systems Analyst described the ongoing issues surrounding the scrub of the IAP-Hill Maximo data:

> Every record which is rejected must be "touched" individually to correct. An example: One invalid location can affect several, even hundreds of records. Each record would have to be "manually" touched via the front-end of MAXIMO. This is extremely tedious and time consuming. If there are multiple invalid locations then there would be even more rejects. These records will stay in a rejected state until each record can be worked. Sites and customers will not be able to see accurate updated records. With

> customers being added, we lose creditability to provide data integrity and we will continue to have issues.
>
> . . .
>
> If another site deletes these, then the corrections cannot be made and we lose the rejected records. If we lose the rejected records, then we lose the update provided by the contractor. Again we are faced with loss of data integrity.

(App. supp. R4, tab F737 at NAVTM264)

G. Fluor's Pensacola BOS Contract

In addition to the RBOS I contract sites, Fluor previously provided BOS services for the Navy at NAS Pensacola, Naval Hospital Pensacola, Naval Support Facility, Saufley Field, Corry Station, Bronson Field, and tenant commands, under Contract No. N69450-07-D-0770 (Pensacola contract). The period of performance was from October 1, 2007, through March 31, 2018. (App. supp. R4, tab F1 at F60; tab F272 at F80376-81; tr. 5/53; tr. 3/71) Fluor provided similar services at Pensacola as it did under the RBOS I contract, including a requirement that Fluor develop an integrated maintenance program for Navy assets, provide monitoring, preventive maintenance, and repairs (tr. 5/53; gov't resp. to ASOF ¶ 27 (the government admitting that the RBOS I sites and the Pensacola naval "bases are similar," but not identical)).

Although no two naval bases are identical, the Pensacola and the RBOS I sites are similar in size and the facilities at the bases are comparable: the average age of the facilities under each contract was approximately thirty years; the bases operate in humid environments near salt water; and involve hurricane and tornado contingency planning (tr. 1/65; 4/215; 10/84-86; 14/43-44).

The Pensacola contract required Fluor to "employ a computer management information system [e.g., Maximo] to manage the work of this contract" and provide government personnel "full access" to the Maximo data (R4, tab 34 at F1586688). Relevant to the issues in this appeal, the Pensacola Contract required the contractor to "*create* and maintain a detailed [Maximo] inventory of the systems, equipment, and facilities components . . . . This data shall be entered into the [Maximo], kept up-to-date throughout the term of this contract, continuously be available for Government use, and provided to the Government upon completion of the contract" (*id.*

at F1586760) (emphasis added). Thus, under the terms of the Pensacola contract, Fluor was expressly required to create the Maximo database, not simply maintain it.

In contrast to the RBOS I contract, the Pensacola contract specifically required the contractor to "create a CMIS [computer maintenance information system] systems equipment [] and facilities components inventory" and to "validate" the supplied inventory technical libraries. This was to be completed during an initial assessment phase within the first 180 days of the contract. (R4, tab 34 at F1586757, F1586766, Spec Items 2.1.2 and 3.2)

During performance of the Pensacola contract, Fluor's Project Manager encountered issues with the accuracy of the Section J inventories. The Project Manager showed the discrepancies to the Navy contracting officer's representative (COR), highlighting the differences between the Section J inventory list and the physical building. For example, the Section J inventory listed 24 air handlers for a particular building, but the building actually had 54, and many of the listed items were different types of equipment, not air handlers. (Tr. 19/25-26) After the COR confirmed that some assets did not match the Section J inventory, the COR and CO collaborated with Fluor to conduct joint inventory inspections to correct discrepancies, which Fluor described as "a big partnering effort" to resolve the inaccuracies and "make it right" (tr. 19/26).

## DECISION

### I. Preliminary Matters

Before addressing the merits of the appeal, we address several procedural matters.

#### A. Navy's Objection to a Hearing Conducted in Installments

As explained above, the Board conducted the 28-day hearing in this appeal in installments. Because Fluor's claim consisted of four relatively distinct issues, the Board organized the installments by issue. With respect to each issue, Fluor presented its evidence, followed by the Navy. At the conclusion of the final phase of the hearing, the Board provided the parties an opportunity for limited rebuttal testimony regarding any previously presented issue. This procedure was ordered over the objection of the Navy. In this regard, the Navy objected "to any trial format that requires the Navy to present evidence before Fluor has rested following the presentation of its case in chief" (gov't corr. dtd. January 25, 2021). During the

pendency of the appeal, we addressed the Navy's objection in written orders. The government did not raise this issue in its post-hearing brief, and we consider it waived.

B. Navy's Motion to Strike Dated October 14, 2021

During the hearing, on October 14, 2021, the Navy orally moved to strike portions of the testimony of Mr. Wes Avritt, a Fluor employee. On October 15, the Navy submitted a memorandum in support of its request. The Navy contended that Mr. Avritt testified about work orders that were not previously identified by Fluor during discovery as being evidence supporting its claim. Before any responsive briefing occurred, the Board issued an order deferring resolution of the motion until after the parties received the transcript and the Navy could identify, with specificity, those portions, if any, of Mr. Avritt's testimony that it contended should be stricken (Bd. Order dtd. October 28, 2021). In our order, we stated that the Navy could renew its request in its post-hearing brief and that Fluor could respond in its post-hearing reply. We have reviewed the Navy's post-hearing brief and see no further mention of this issue. Accordingly, we conclude that the Navy has abandoned its request. We deny as moot the Navy's October 14, 2021 motion.

C. Fluor Motion *in Limine* Dated October 25, 2021

In an order dated December 3, 2021, the Board deferred consideration of Fluor's motion *in limine*, dated October 25, 2021, pending the hearing testimony of the Navy's expert witness, Mr. Couchman (Bd. Order dtd. December 3, 2021). Fluor asserts that Mr. Couchman's rebuttal report should be excluded because it contains conclusions on issues of law and does not meet the standards for reliability and admissibility of Rule 702 of the Federal Rules of Evidence (app. mem. in support of mot. in limine at 1). Having reviewed Mr. Couchman's rebuttal report, we find that it does not provide any useful expert opinions, and we do not rely upon the conclusions of the rebuttal report. To the extent Mr. Couchman presented any useful citations to factual material, this information was presented by counsel in examining or cross-examining other witnesses at the hearing. We consider Mr. Couchman's summation of factual information to be the equivalent of a demonstrative exhibit. Accordingly, Fluor's motion *in limine* is denied as moot. In the end, we conclude that Mr. Couchman's rebuttal expert report suffers from many of the same defects as the report of Fluor's expert HKA (discussed below). In essence, Mr. Couchman's expert opinion is that if the Board were to adopt the Navy's assumptions about things that Mr. Couchman is not an expert in, rather than Fluor's assumptions about things that HKA is not expert in, we would arrive at a different conclusion. We conclude that both experts were of limited relevance.

D. Navy's Motion to Strike Dated August 26, 2022

After the conclusion of post-hearing briefing, the Navy moved to strike the 15 additional statements of fact Fluor included in its reply brief (gov't mot. at 1-2 (referencing app. reply at 53-57 (ASOF ¶¶ 1090-1104))). The Navy argues that "Fluor was obliged to identify all of the relevant facts it believed necessary to prove its case in its opening post-trial brief" (*id.*). Having allegedly failed to do so, the Navy asserts that Fluor's additional statements of fact are "waived," and that Board should strike them (*id.* at 1). We deny the Navy's motion.

It is not uncommon for parties to include additional facts in reply briefs. The inclusion of such facts is appropriate where necessary to rebut arguments made by the opposing party in the response brief. Indeed, that is the primary function of a reply brief—to "reply to arguments made in the response brief." *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002); *see also APTIM Fed. Servs., LLC*, ASBCA No. 62982, 22-1 BCA ¶ 38,127 at 185,218 (concluding that "the reply brief is the place for one party's opposition to the other party's arguments"). Fluor contends that the additional statements of fact included in its reply brief directly respond to arguments contained in the Navy's post-hearing briefing (app. resp. to gov't mot. at 1). We agree.

Moreover, the Navy fails to show that it was prejudiced by the inclusion of the additional statements of fact. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006); *Brooks Range Contract Servs., Inc. v. United States*, 101 Fed. Cl. 699, 708 (2011). Further, the Navy has not sought leave to file a sur-reply to respond to the additional facts.

II. The Contract Required Fluor to Maintain the Maximo Database and not to Create a Maximo Database for the Navy

Fluor alleges that the Navy's actions under the RBOS I contract provide multiple, overlapping bases for relief (app. br. at 417). Specifically regarding the Maximo data, Fluor contends that the Navy's requirement for Fluor to perform the contract without the promised Navy Maximo data is compensable under the contract's Changes and Government Property clauses. Fluor further contends that the Navy breached the contract by not furnishing the Maximo data.

As always, we start our analysis by interpreting the plain language of the contract. However, here, the parties dispute whether the RFIs and responses were incorporated into the contract. Thus, we first determine the four corners of the contract.

A. The RFIs and Responses Are Incorporated Into the Contract

The parties dispute the significance of the RFIs, and the Navy's responses to them. The government contends that the RFIs and responses were incorporated into the contract (gov't br. at 6-8), while Fluor contends they were not, and therefore, should be considered extrinsic evidence that cannot be used to interpret the contract (app. br. at 469-71). Based on a review of the applicable case law and the record, we hold that the RFIs and the Navy's responses were issued as amendments to the solicitation and, as such, were incorporated into the contract. *See CSI Aviation, Inc. v. Dep't of Homeland Sec.*, 31 F.4th 1349, 1356 (Fed. Cir. 2022); *see also* R4, tab 3 at GOV3056 tab 3.3; tab 4 at GOV4445, tab 4.3; tab 5 at GOV5340, tab 5.1; tab 6 at GOV5435; tab 6.3; tab 7 at GOV6816, tab 7.2; tab 8 at GOV7639; tab 8.3; tab 9 at GOV8913 tab 9.1; tab 10 at GOV8927, tab 10.2; R4 tab 17 at GOV12440 (contract AWARD Standard Form 33, Box 19 states "ACCEPTED AS TO ITEMS NUMBERED 0001-0016, Amendments 1-14").

B. The Contract Required Fluor to "Maintain" the Maximo Database

A contract is interpreted "in terms of the parties' intent, as revealed by language and circumstance." *United States v. Winstar Corp.*, 518 U.S. 839, 911 (1996) (Breyer, J. concurring). Generally, this process begins and ends with the language of the contract. *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006). In reviewing this language, the Board should read the contract "as a whole and [interpret it] to harmonize and give reasonable meaning to all its parts," if possible, leaving no words "useless, inexplicable, inoperative, insignificant, void, meaningless or superfluous." *Precision Dynamics, Inc.*, ASBCA No. 50519, 05-2 BCA ¶ 33,071 at 163,922 (citations omitted); *see also Hercules, Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002) ("contract must be construed to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract"); *Hunkin Conkey Constr. Co. v. United States*, 461 F.2d 1270, 1272 (Ct. Cl. 1972) (rejecting contract interpretation that would render a clause in the contract meaningless). If a contract provision is "susceptible to more than one reasonable interpretation, it is ambiguous." *TEG-Paradigm*, 465 F.3d at 1338 (citing *Edward R. Marden Corp. v. United States*, 803. F.2d 701, 705 (Fed. Cir. 1986)).

The contract addressed the Maximo database at Spec Item 2.6.4, which provided in relevant part: "[t]he Contractor shall maintain records stored in the Government's CMMS current and accurate. The Government will make these systems available for the Contractor's use in managing the effort required under this contract" (R4, tab 1.1 at GOV108). The contract defines "maintain" as "[t]o keep in a state of repair and efficiency, to preserve from failure or decline" (R4, tab 1.1 at GOV97).

The Navy contends that Spec Item 2.6.4 did not require the Navy to provide any data to Fluor, rather "limiting the Navy's responsibility to making the [CMMS] system 'available' for Fluor's use" (gov't br. at 4-5). The government interprets Spec Item 2.6.4 as requiring Fluor "to maintain the Navy's Maximo and provide the Navy with updated Maximo data so that the Navy could *monitor* Fluor's work" (gov't br. at 3) (emphasis added). Conversely, Fluor interprets Spec Item 2.6.4 as requiring it to maintain a database already populated with asset information (app. br. at 419-23). The Board agrees with Fluor based on the language of the solicitation, Fluor's offer, and all of the surrounding circumstances.

As we described at length in our findings of fact, the solicitation informed offerors that the contract was a follow-on to a contract performed by IAP-Hill. IAP-Hill had used and updated Maximo during its performance and was required by the terms of its contract to turn-over the Maximo data to the successor contract.

In its proposal, Fluor did not offer to create a Maximo database. Fluor's technical proposal did not include time, resources, or costs for building a Maximo database from scratch (tr. 4/214). Rather, the proposal conveyed Fluor's intent to rely upon the existing database that had been maintained by IAP-Hill. If this had been contrary to the Navy's expectations, we expect the Navy would have said so. But the Navy did not attempt to correct Fluor's interpretation of Spec Item 2.6.4 and the solicitation terms concerning full access to an up-to-date Navy Maximo. Rather, the Navy rated Fluor's technical approach as "good." Fluor's proposal was then incorporated in the contract.

Accordingly, the contract lacks both a specific requirement for Fluor to create a Maximo database as well as an offer by Fluor to create the database. As we have also found, on at least one prior contract between the parties, NAS Pensacola, when the Navy expected Fluor to create a Maximo database it explicitly stated so in the contract.

To be sure, this contract also lacked a promise by the Navy that the Maximo database would be 100% accurate. But we believe that the only reasonable interpretation of a contract that requires the contractor to "maintain" rather than "create" is that there will be something in existence that can actually be maintained. But, as we have found, what both IAP-Hill and the Navy provided to Fluor was simply unusable, forcing Fluor to create the database.

Finally, the pre-dispute actions of the parties indicate that both the Navy and Fluor expected the Navy to provide a functioning database. For example, the government stated in an early transition meeting that Fluor would get its CMMS data from the government's Maximo (app. supp. R4, tab F457 at NAVSP47553).

In addition, the Navy previously acknowledged that "the issues with the Computerized Maintenance Management Systems" justified refunding some of the withheld funds (app. supp. R4, tab F35 at F793). The Navy's position that it was only required to provide the software capability and not a populated database appears to have first been asserted after this dispute arose (R4 tab F457 at NAVSP47553 ("Fluor will get the [IAP-Hill] data from the Government Maximo.")). Pre-dispute interpretations are typically afforded greater weight in determining the intent of the parties. *Applied Cos.*, ASBCA No. 50593, 04-2 ¶ 32,786 at 162,166.

The contract, including Fluor's incorporated proposal are clear that Fluor will be required to maintain but not create a Maximo database. When a contract provision permits only one reasonable interpretation, that interpretation must be followed. *TEG-Paradigm*, 465 F.3d at 1338; *SCM Corp. v. United States*, 675 F.2d 280, 284 (Ct. Cl. 1982). The course of performance evidence confirms that both parties shared this interpretation until the dispute arose.

C. The RFIs and the Navy's Responses Do Not Change Our Interpretation

The government argues that the contract did not require it to provide Fluor with CMMS data, because "Fluor was informed, well before it submitted a proposal, that the Navy would not provide offerors with historical workload data" (gov't br. at 3). The government argues that the Navy's responses to RFIs were incorporated into the contract and that all prospective offerors were on notice that "historical repair and maintenance data was not available" and "that the Navy was not going to provide [the contractor] with workload data" (*id.* at 7-8; R4, tab 489, Navy's responses to RFI numbers 7, 14, 20-22, 190, 193, 197, 205, 207, 239, 266).

The government points to 10 RFIs and the Navy's responses that it contends notified offerors that "the Navy was not going to provide [the contractor] with workload data" and that the "Navy was only responsible for providing a system to which [the contractor] could transfer that data" (R4, tab 489, Navy's responses to RFI numbers 14, 19, 22, 76, 190, 193, 197, 205, 239, and 266; gov't br. at 8). However, most of these RFIs are directed to the "Integrated Maintenance Program." The Navy's responses provided, in general terms, that data would not be provided in response to the specific question and directed the offeror to "refer to the definition of IMP" (R4, tab 489, Navy's responses to RFI numbers 190, 193, 197, 205, 207). The Navy's responses do not inform offerors that "the Navy was only responsible for providing a system to which [the contractor] could transfer that data" (gov't br. at 8). Instead, the responses can be interpreted as saying, in essence, that the Navy wants offerors to develop their own maintenance strategy for IMP and so the Navy will not provide information on the incumbent's maintenance practices. This would be consistent with

hearing testimony that the schedule of maintenance tasks for IMP assets was normally created by the contractor, while the schedule for preventative maintenance was created by the government (tr. 4/149).

Of the 800 plus RFIs submitted, only six (256, 257, 318, 405, 534, 542) pertained to the government's CMMS, including what version of Maximo is the Navy using, when will the Navy migrate to a new version of Maximo, and clarification of acronyms used with CMMS system. In response to a question regarding the version of Maximo used by the Navy, the Navy responded that it used all eight modules (app. supp. R4, tab F323 at F2405156). The fact that the modules were in use would also reasonably lead offerors to believe that there was a functioning and populated Maximo database.

Accordingly, we determine that the Navy's RFI responses did not put prospective offerors on notice that the Navy would not make its Maximo data available to the contractor. (*See* R4, tab 489, RFIs 256, 318, 534). The government cites the RFI responses for the proposition that the data are not available; however, this also overlooks the added direction to "refer to the definition for IMP." To the extent that the government expected the contractor to develop its own best practices to maintain the equipment, this can be read as the government indicating it would not dictate specifics, such as how many filters to change or how many inspections to perform. However, this does not imply that the government had no knowledge of past maintenance work due to the lack of usable Maximo data.

We note that none of the RFIs directly addressed the interpretation of Spec Item 2.6.4. The Navy's responses to the RFIs did not clarify Spec Item 2.6.4, nor did they state that the Navy would not be providing any asset data or not providing historical asset data to the contractor. There is no RFI on this portion of the solicitation, and no Navy response suggests that the Navy did not intend to provide the contractor with up-to-date Maximo data.

D. The Navy's Failure To Provide a Populated Database Constitutes A Change to the Contract

Where, due to the government's misinterpretation of contract provisions, a contractor is required to perform more or different work not called for under the contract terms, the contractor is entitled to an equitable adjustment under the changes clause. *Emerson-Sack-Warner Corp.*, ASBCA No. 6004, 61-2 BCA ¶ 3,248 at 16,827; *see also Grumman Aerospace Corp.*, ASBCA No. 46834 *et al.*, 03-1 BCA ¶ 32,203 at 159,243; *Kos Kam, Inc.*, ASBCA Nos. 34682, 35440, 92-1 BCA ¶ 24,546 at 122,490. To recover under a constructive change theory, a contractor has the

burden of showing that the work performed was not "volunteered" but was performed under government direction. *See S-Tron*, ASBCA Nos. 45893, 46466, 96-2 BCA ¶ 28,319 at 141,397 (citing *Len Co. & Assocs. v. United States*, 385 F.2d 438, 443 (Ct. Cl. 1967)); *Grumman Aerospace Corp.*, 03-1 BCA ¶ 32,203 at 159,243.

We have already concluded that Fluor performed work not called for under the contract terms when it created the Maximo database. The only remaining question is whether Fluor performed that work voluntarily. *Innoventor, Inc.*, ASBCA No. 59903, 17-1 BCA ¶ 36,798 at 179,355. "In the absence of a direction by the Government, there can be no reliance by appellant even though it incurred increased costs." *Dan G. Trawik III*, ASBCA No. 36260, 90-3 BCA ¶ 23,222 at 116,541.

The Navy, in its post-hearing brief, does not appear to assert that Fluor "volunteered" to create a Maximo database. Rather, the government argues that Fluor "assumed" the Navy would provide Maximo data, and the evidence shows that the Navy tried to help Fluor. The government claims it was Fluor who undertook the pathway of its "technical performance plans" even though "Fluor had the workload data that it used to populate its database." (Gov't br. at 11-12)

The Navy's characterization of the facts is inconsistent with the record. Fluor did not have the workload data to populate its database, as the government argues. Unsurprisingly, after issues were quickly discovered with the Navy's data, Fluor raised the issue, and the Navy put together a team of government personnel to manually enter and scrub the asset data (tr. 6/146-47; tr. 7/136; app. supp. R4, tab F737 at NAVTM264). The government describes the Navy's efforts as "[a]ffirming the axiom that no good deed goes unpunished" (gov't br. at 11). After months of unsuccessful efforts, the parties met and brainstormed pathways to move forward (R4, tab 198 at F1083373). However, following the parties' joint meeting, the Navy decided to suspend its efforts, which left Fluor with limited options (app. supp. R4, tab F28 at F768). It is clear Fluor did not volunteer to recreate the Navy's Maximo database. As a result of the Navy's failed effort to scrub its data, Fluor spent a significant portion of the contract period recreating the Navy's Maximo database from scratch, starting with the assets listed in the RBOS I contract Section J inventories (R4, tab 198 at F1083374; app. supp. R4, tab F28 at F768). Thus, in conjunction with the interpretation of Spec Item 2.6.4, the Navy's behavior to fix and scrub its asset data reflects the importance of the Maximo data, and a complete Maximo database was not optional. Moreover, there is a presumption that contractors generally do not voluntarily do more work than their contracts require. *Advanced Eng'g & Planning Corp.*, ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,806 at 162,286; *Johnson & Son Erector Co.*, ASBCA No. 23689, 86-2 BCA ¶ 18,931 at 95,573 n.14 ("Normally contractors do not volunteer to do work beyond the scope of their contracts.");

*Gholson, Byars & Holmes Constr. Co. v. United States*, 351 F.2d 987, 995-96 (Ct. Cl. 1965). In the face of the present record, it would be a rather unusual situation for a base operations services contractor voluntarily to do substantially more work (to recreate a current asset management database) than is required by the terms of the contract, thus, only to increase its costs.[2]

We hold that Fluor did not volunteer to recreate the Navy's Maximo database system. Fluor has shown that the additional work resulting from not having an up-to-date Navy asset database stemmed from the Navy's misinterpretation of the solicitation and contract. In addition, Fluor has shown its obligation under the contract was to "maintain" the asset database, not "create" one as directed by the Navy. *See generally NavCom Def. Elecs., Inc.*, ASBCA No. 50767 *et al.*, 01-2 BCA ¶ 31,546 at 155,733, *aff'd in part and rev'd in part on other grounds*, 53 Fed. Appx. 897 (Fed. Cir. 2002) (nonprecedential). The Navy's misinterpretation of the contract and solicitation expanded Fluor's contract performance requirements.

Fluor relies upon *Apex Int'l Mgmt. Servs., Inc.*, ASBCA No. 38087 *et al.*, 94-2 BCA ¶ 26,842, for the proposition that the Navy's failure to provide access to Maximo data was a constructive change (app. br. at 419-23). The contract in *Apex Int'l* involved a combination of firm-fixed-price and indefinite quantity tasks for the Navy's base operation, maintenance, repair, and construction services at the Naval Air Station, Jacksonville, Florida. *Apex Int'l*, 94-2 BCA ¶ 26,842 at 133,518. The contract provided that Apex would have access to a government computer terminal to track maintenance records. *Id.* at 133,543. However, prior to the start of the contract, the Navy removed the computer from Apex's work area, and required Apex to schedule appointments with government personnel to use the system. *Id.* Apex had to file a Freedom of Information Act request to determine the software version, purchase its own computer, reenter all of the Navy's data, and input its own information. *Id.* at 133,543-44. The Board held that the Navy had denied Apex the unrestricted access to the computer system contemplated by the contract, causing Apex to incur additional costs for scheduling, performing work, and replacing the system. *Id.* at 133,552.

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[2] "We are sensitive to the need to protect the government from bearing the cost of contractors performing extra work[,] which is beyond the government's determined need, i.e., the volunteer. So far as those additions here were to correct defects in the device, the Government had a need and a duty to correct the defect. So far as the Government has notice of the added work before it was done, it had the opportunity to determine whether the particular cure was to its liking. It had the opportunity to choose a more suitable cure if one existed. Here, of course, there is no suggestion that a better or cheaper cure might have been found." *U.S. Fed. Eng'g & Mfg., Inc.*, ASBCA No. 19909, 75-2 BCA ¶ 11,578 at 55,299.

Here, as in *Apex Int'l*, the Navy promised access to the Navy's Maximo for "use in managing the effort required under this contract" but failed to provide Fluor with up-to-date asset data (R4, tab 1.1 at GOV108; app. supp. R4, tab F28 at F768). Instead, the Navy repudiated its obligation to provide the data, indicating that it was "not looking to fix the Government Maximo issue" (app. supp. R4, tab F28 at F768) and simply provided two data dumps to Fluor (app. supp. R4, tab F503 at NAVTM667; app. supp. R4, tab F510 at F1079492).[3] The situation in *Apex Int'l* is similar to Fluor's case, as the lack of access to asset data caused Fluor to incur additional costs in scheduling and performing the work.

The government challenges Fluor's citation to *Apex Int'l*, arguing that "nothing in the facts in Apex are remotely similar to the facts here" (gov't br. at 36). The government contends that, unlike *Apex Int'l*, in which the Board found that the contractor was subjected to numerous bad acts by the government, "the Navy actively attempted to aid Fluor with regard to its Maximo database, but Fluor repudiated that effort." Fluor knew it would be responsible for developing integrative and maintenance programs. (*Id.*) We disagree, as noted above the Navy indicated that it was "not looking to fix the Government Maximo issue" (app. supp. R4, tab F28 at F768).

Having determined that Fluor is entitled to recover pursuant to a constructive change theory, we need not reach Fluor's alternative theories regarding the CMMS database, including superior knowledge, government property, cardinal change, and good faith and fair dealing.

## III. Extra-Contractual Services

### A. Facts Pertaining to Fluor's Claims for Extra-Contractual Services

The contract defined the assets to be maintained in asset inventories contained in a series of appendix J tables. Examples of asset inventories for NAS Jacksonville are noted in the Solicitation, Section C, Annex 100000, Spec Item 1.4, which stated: "Throughout the PWS, the workload data is generally referred to as being located in Section J. Section J provides data such as maps, floor plans, and tables to represent the type, quantity, and location of services to be provided" (R4, tab 3.1 at GOV3077, tab 17.56 at GOV31525).

[3] We explicitly do not hold that the Navy was required to provide a Maximo database in "turn key" condition and recognize that a contractor may need to update the database to reflect changes in asset coverage between the old and new contract, and that the database will likely contain some number of errors.

The RBOS-I solicitation itemized the assets in a series of Section J tables:

In Section C – 1502000 – Facility Investment:

> Spec Item 3, firm-fixed price work; provides that "[t]he current facility inventory for [Sustainment, Restoration and Modernization] is provided in J-1502000-01;"
>
> …
>
> Spec Item 3.1 "Service calls;" provides that "J-1502000-03 provides historical data;"
>
> . . .
>
> Spec Item 3.2 "Preventive Maintenance (PM Program)" provides that "[t]he systems and equipment, including associated inventories, that shall be included J-1502000-04;"
>
> . . .
>
> Spec Item 3.3.1 "HVAC Systems" provides that "[t]he HVAC systems inventory is provided in J-150200-08;"

(R4, tab 1.1 at GOV 131, GOV134, GOV141)

In Section C – 1602000 Electrical:

> Spec Item 3 "FFP Work" provides that "[t]he current Electrical Power Transmission and Distribution Systems Description and Inventory is provided in J-1602000-01;
>
> Spec Item 3.2 "Maintenance" provides that "[m]aintenance shall include Integrated Maintenance Program (IMP); Electrical Power Distribution System Description and Inventory identified in J-1602000-01"

(*Id.* at GOV189, GOV192)

In Section C – 1604000 Wastewater:

> Spec Item 3 "FFP Work" provides that "[t]he current Wastewater Treatment Plant and Collection system Description and Inventory are provided in J-1604000-01;"
>
> . . .
>
> Spec Item 3.2.3 provides that "[t]he Contractor shall provide all equipment to completely do an annual inspection of all sanitary manholes identified in J-1604000-01;"

(*Id.* at GOV201, GOV208)

In Section C – 1605000 Steam:

> Spec Item 3 "FFP Work" provides that "[t]he current Steam Generation Plant, Steam Distribution Systems, and Condensate Return System Description and Inventory are provided in J-1605000-01;"
>
> . . .
>
> Spec Item 3.3.4 "Pits and Manholes" provides "[t]he Contractor shall inspect steam pits and manholes monthly shown in J-1605000-01;"
>
> . . .

(*Id.* at GOV215, GOV225)

In Section C – 1606000 Water:

> Spec Item 3 "FFP Work" provides "[t]he current Raw Water Supply, Water Treatment Plant and Distribution System Description and Inventory are provided in J-1606000-01 and J-1606000-02;"
>
> . . .

> Spec Item 3.2 Integrated Maintenance Program (IMP) provides that "Historical Continuous Maintenance Work, which has achieved a satisfactory level of operation, is provided in J-1606000-01;"
>
> . . .
>
> Spec Item 3.3.4 Meter Reading provides that "[a]ll meters are listed on J-1606000-01;"
>
> . . .

(*Id.* at GOV231, GOV239, GOV243)

In Section C – 1700000 Base Support Vehicles and Equipment:

> Spec Item 2.2.1 Established Priorities provides that "J-1700000-01 indicates the Priority assigned to each piece of [Base Support Vehicles and Equipment (BSVE)] in the fleet;"
>
> . . .
>
> Spec Item 2.2.5.3 GSA Fleet Management provides that [t]he GSA Inventory is provided in J-1700000-07;"
>
> . . .
>
> Spec Item 3 Contract Work Firm Fixed Price (FFP) provides that "J-1700000-01 describes the inventory to be maintained. The contractor shall furnish all labor, parts and materials to perform BSVE operations, support, and maintenance functions."
>
> . . .

(*Id.* at GOV247, GOV250, GOV252)

Section C – Environmental Spec Item 3.5 Inspection of Fuel Storage Tanks and Facilities provides that "[t]ank inventory and locations are listed in J-1800000-10" (*id.* at GOV294).

Under "Other Recurring Services," Spec Item 3.5 identifies asset sub-categories and the J-Table, which list exterior lighting, including traffic control lights (R4 tab 1.1 at GOV164-167; tab 1.29 at GOV2306; app. supp. R4, tab F2096.122 at F1924526; tab F2096.173).

Similar to NAS Jacksonville, inventories for the other sites were "provided in J" tables (gov't resp. to ASOF ¶¶133-34).

Prospective offerors asked the Navy for historical maintenance data or maintenance schedules directed towards certain equipment systems (*see, e.g.,* HVAC system, electrical power transmission and distribution system, septic tank, boiler and steam distribution, swimming pool, wastewater treatment plant and collection system, steam plant, water distribution, facility investment, and large equipment) (R4, tab 489, Navy's responses to RFI numbers 7, 14, 20-22, 190, 193, 197, 205, 207, 239, 266). For many responses, the Navy explained that historical information could not be provided:

> Please provide historical workload data on repairs to the Electrical Power Transmission and Distribution System.
>
> [Navy's response] This data is not available as the limits of liability were different on previous contracts.

(*Id.*, Navy's response to RFI number 14);

> Please provide historical workload data on repairs to the Wastewater Treatment Plant and Collection System.
>
> [Navy's response] No data is available in regards to repairs and replacements for the wastewater treatment plant and collection system under IMP. Refer to the definition of IMP.

(*Id.*, Navy's response to RFI number 197);

> Please provide maintenance history information on repairs and replacements for the steam plant.

> [Navy's response] No data is available in regards to repairs and replacements for the steam plant under IMP. Refer to the definition for IMP.

(*Id.*, Navy's response to RFI number 205);

> It is noted that the equipment inventory provided in J-1606000-01 do not provide identify [sic] equipment that might be contained in the water treatment plant, such as but not limited to softeners, fluoride saturator, pH control, filters, etc. The Government's computerized maintenance Management System (CMMS) should not only provide a complete and comprehensive inventory of all equipment [sic] in the plant and distribution system, but also provide repair and replacement history, both of which are needed by bidders to develop an accurate estimate of this requirement. It is not realistic for the Government to expect bidders to guess at the inventory, guess at the repair and replacement history, guess at the effects of local environmental conditions (such as raw water hardness and pH) upon maintenance requirements [sic] and guess at the effectiveness of the current maintenance program in order to determine the exposure resulting from the $5,000 limit of liability.
>
> [Navy's response] (a) The Contractor is responsible for ALL systems and ALL auxiliary equipment related to the system. Attachment J-1606000-01 is not intended to be an inventory of each item in the plant, but as an inventory of major components to allow the Contractor to submit a bid. (b) No data is available in regards to repairs and replacements for the water plant and distribution under IMP. Refer to the definition for IMP.

(*Id.*, Navy's response to RFI number 207)

B. Fluor Believed that There Were Discrepancies Between The Contract's Section J Tables And The Information Contained in its Maximo Database

By letter dated May 29, 2013, Fluor wrote to Ms. Vissers, Contract Specialist, that an inventory of HVAC IMP systems located at the Jacksonville site identified an additional 2,148 pieces of equipment not identified in section J-15020000-8, which Fluor was now maintaining and providing preventative maintenance. Fluor requested a proposal to be issued to incorporate these assets into its IMP maintenance program. (App. supp. R4, tab F835 at NAVJC27511) The Navy responded on June 4, 2013, and stated "[t]his is a significant issue/concern. We are reviewing the details and trying to settle a bit before responding. Will advise shortly" (*id.* at NAVJC27510). The CO responded by letter on June 13, 2013, stating that the "requirements of Section C, Sub-annex 1502000 Facility Investment, Specification Item 3.3.1 HVAC Systems: 'Systems commence at the utility isolation point of connection and terminate at the point of delivery to the building environment and includes all supplies, returns and makeup air.'" The CO concluded, "[a]t this time, the Government does not intend to issue a Request for Proposal until a comprehensive review of the HVAC inventory listed in J-1502000-08 is completed and [a] determination is made that a Request for Proposal is warranted." (App. Supp. R4, tab F43 at F843) By letter dated July 1, 2013, Fluor requested "a joint review team to systematically review each Specification Item of the Contract and proactively address the discrepancies in the Section J tables with an accurate inventory of the equipment associated with each Spec Item" (app. supp. R4, F37 at F803). The Navy did not respond (tr. 18/83-84; *see also* tr. 19/222).

By letter dated July 26, 2013, Fluor submitted an REA (discussed infra), which explained that the Maximo database is incomplete, and Fluor requested a complete inventory to populate Maximo:

> Even with the work performed by Fluor to date, Fluor's CMMS database is incomplete. This lack of information about the assets to be maintained has a continuing effect on future maintenance abilities and costs. What is needed is a complete inventory of all Government equipment and assets to more clearly identify the items, collect pertinent information on each, mark or tag them, input this information into the Government CMMS database, and then upload it into the Fluor CMMS database.

(App. Supp. R4, tab F61 at F962)

In a letter dated October 31, 2013, responding to a request from the Navy, Fluor provided examples of HVAC equipment that it contended were either missing from the Contract J tables, missing location information, missing quantity numbers, or missing essential associated equipment information (app. supp. R4, tab F64 at F979).

Again, Fluor informed the Navy and identified purported inventory discrepancies from the Contract's J tables for the NAS Jacksonville HVAC Systems by letters dated November 29, 2014, June 30, 2015, and September 30, 2016 (app. supp. R4, tab F66 at F996; tab F1 at F48, F62-64; tab F2 at F139-42). The Navy acknowledged Fluor's concerns but determined "[t]he additional information provided . . . has not warranted the Government to reverse its original position in the denial of [Fluor's request]" in a series of Navy letters dated June 13, 2013, March 11, 2015, and February 3, 2016 (app. supp. R4, tab F43 at F843; tab F67 at F1003; tab F2219 at F2374314).

Over the course of performance, Fluor and the Navy executed many bilateral modifications to add and delete systems and equipment from the contract (tr. 23/16-17; R4, tabs 18.6 through 18.206).

C. Fluor's Allegations Regarding Extra-Contractual Work

The contract provided at Spec Item 1.1 of Annex 1502000 that the "Contractor shall perform maintenance, repair, alteration, demolition and minor construction" for the listed types of assets (R4, tab 1.1 at GOV126). The contract further defined "alteration" as:

> The work required to adjust interior arrangements or other physical characteristics of an existing real property facility so that it may be more effectively adapted to or utilized for its designated purpose. The erection, installation, assembly, addition, expansion, extension, conversion, or replacement of component parts of an existing real property facility. Alteration includes equipment installed in and made a part of such facilities.

(R4, tab 1.1 at GOV93)

The contract provided in Spec Item 2.1.10.1 that Fluor was to provide "Emergency service call [] work requiring immediate action to correct or prevent loss or damage to Government property and assets, restore disrupted essential services, or

eliminate life-threatening hazards to personnel or property" (R4, tab 17.47 at GOV31197; tab 17.58 at GOV32062).

The contract provides in Spec Item 2.3.7, "Access to Work Areas," that "[t]he Contractor shall make all arrangements through the appropriate office necessary to obtain access to buildings, facilities and other work areas, and when necessary, arrange for them to be opened and closed by the controlling authority" (R4, tab 17.47 at GOV31163; tab 17.58 at GOV32037).

Pursuant to the contract, Fluor was required to perform four different maintenance methodologies: Integrated Maintenance Program (IMP), Preventative Maintenance (PM), service calls, and other recurring services. The distinctions between the programs are relevant to the appeal, and we briefly describe them below.

Specification Item 2.1.6 describes the Integrated Maintenance Program:

> 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, preventive, 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 maintained under IMP.

(App. supp. R4, tab F2096.122 at F1924487) Thus, IMP shifted the most performance risk to the contractor. The contractor assumed the highest levels of liability for IMP assets and had the most control over maintenance practices. Thus, the contractor was responsible for determining the optimal level of preventative maintenance.

The contract identified the assets subject to IMP in the Section J inventories (app. supp. R4, tab F2096.157; tab F2096.187 at F1924738-40; tab F2096.188 at F1924743; tab F2096.091 at F1945205-07; tab F2096.092 at F1945209-10; tr. 4/35-36). With respect to IMP assets, Fluor was responsible for performing the following services: (1) Preventive Maintenance, which consisted "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;" (2) Reactive Maintenance, which consisted of repairing and correcting assets due to unplanned failures or damage, including unscheduled adjustments to equipment or components as a result of inspections; (3) Proactive Maintenance, which consisted of monitoring, inspection, and corrosion control; and (4) Predictive Maintenance, which consisted of testing to help detect faults in advance of operational deterioration or failure (R4, tab 1.1 at GOV128; tab 1.2 at GOV341; app. supp. R4, tab F2096.122 at F1924487; tab F2096.004 at F1944891; tr. 4/33-35).

Specification Item 2.1.9 describes Preventative Maintenance programs:

> 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 operations; minimize malfunction, breakdown, and deterioration of systems and equipment; and maximize useful life.

(App. supp. R4, tab 2096.122 at F1924487) For each facility investment asset not covered by an IMP, Fluor was required to develop and execute PM programs based on standard maintenance recommendations (R4, tab 1.1 at GOV134-36; tab 1.2 at GOV347-49; app. supp. R4, tab F2096.122 at F1924493-95; tab F2096.004 at F1944897-99). The Section J inventories identified the assets subject to PM (R4, tab 1.1 at GOV134; tab 1.2 at GOV347; app. supp. R4, tab F2096.122 at F1924493; tab F2096.004 at F1944897; tr. 5/58; tr. 18/24-25). Thus, relative to IMP work, the contractor accepted less performance risk but also had less control over the maintenance practices.

Finally, Spec 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.

(App. supp. R4, tab 2096.122 at F1924487) The contract contemplated that service calls could be issued for all facility investment assets, with the exception of assets covered by IMP (R4, tab 1.1 at GOV128, GOV131-32, GOV141; tab 1.2 at GOV341, GOV353; app. supp. R4, tab F2096.122 at F1924487, F1924490-91, F1924500; tab F2096.004 at F1944891, F1944903). Service calls were limited in number, with the contractor proposing a set price for a fixed number of service calls in a 12-month period (tr. 16/45-49). If the government used all of its service calls in a contract year, it could purchase more service calls by modification (tr. 16/48-49). When the Navy modified the contract to add service calls for some customers, Fluor was able to renegotiate the price of the additional service calls (tr. 16/49-51, 182-83; tr. 10/40-41).

Fluor was responsible for providing services under each of these three maintenance methodologies under the contract's fixed-price CLIN up to a specified limitation of liability and a specific number of service calls. In this regard, the scope of each task was set by the limitation of liability within which the work—whether IMP, PM, or service call—was expected to be accomplished. Where the scope of work was expected to exceed the applicable limitation of liability, the Navy could order the services under the IDIQ CLIN or obtain them through a different contract. (R4, tab 1.1 at GOV128, GOV131-34, GOV139-41,184; R4, tab 1.2 at GOV341, 344-47, 351-54, 396; app. supp. R4, tab F2096.122 at F1924490-93, F1924498-500, F1924544; tab F2096.004 at F1944894-97, F1944901-04, F1944947) Fluor also provided "other recurring services" for a few systems like lighting (R4, tab 17.58 at GOV32098) that are generally not at issue in the appeal.

For IMP assets, the contract specified different limitations of liability depending on the asset. The limitations of liability ranged from $700 to $10,000 (R4, tab 1.1 at GOV143). The typical amount for IMP assets was $5,000 and applied to an "individual occurrence of repair . . . for each piece of equipment" (R4, tab 1.1 at GOV139, GOV143; tab 1.2 at GOV357; app. supp. R4, tab F2096.122 at F1924502; tab F2096.123 at F1924553; tab F2096.124 at F1924567; tab F2096.004 at F1944907; tab F2096.007 at F1944967, tab F2096.008 at F1944983). For assets in the PM program, the limitation of liability was $250 per occurrence for direct labor and direct material cost (R4, tab 1.1 at GOV135; tab 1.2 at GOV348; app. supp. R4, tab F2096.122 at F1924494; tab F2096.004 at F1944898; R4, tab 1.2 at GOV348; tr. 9/93-94). The limitation of liability for service calls was 32 direct labor hours or $2,000 direct material cost (R4, tab 1.1 at GOV128, 131-34; tab 1.2 at GOV341, GOV344-47; app. supp. R4, tab 2096.122 at F1924487, F1924490-93; tab F2096.004 at F1944891, F1944894-97; tr. 4/36-37; tr. 9/51-52).

The systems to be maintained by IMP were identified in Spec Items 3.3.1 through 3.3.10 as Integrated Maintenance Program, Facility Investment 1502000, which included HVAC (heating, ventilation, and air conditioning), HVE (high voltage electric) transmission and power distribution, vertical transportation equipment systems,[4] and utilities related to water, wastewater, steam, and compressed air (R4, tab 1.1 at GOV139-59).

The inventory for each system was provided in Section J as attachments to the contract. Specifically, the systems to be maintained by IMP were identified in Sections J-1502000-08 through J-1502000-18, J-1602000-01, and J-1604000-01 (R4, tab 1.27 at GOV2011-25, GOV2081; tab 1.28 at GOV2133-74; tab 1.29 at GOV2230-96, GOV2325-32; tab 1.30 at GOV2678-2713, GOV2766-72). The Section J inventory for each system included a list, by building, of the major equipment or components in the system; however, the listing was for systems and did not include every component of the system. The list for each piece of equipment includes the description, manufacturer, model number, and quantity of that piece of equipment. This listing is important because, as part of IMP, the contractor had full responsibility for any individual occurrence or repair, including replacement up to and including the limit of liability (R4, tab 1.1 at GOV139-159, GOV192-96, GOV206-09).

Section J contained lists of equipment subject to PM (R4, tab 1.27 at GOV1993-2008; tab 1.28 at GOV2111-61; tab 1.29 at GOV2212-23; tab 1.30 at GOV2658-73). In contrast, there were no systems identified for maintenance performed pursuant to a service call. Instead, service calls could arise from anywhere on the base and be performed on any system or equipment other than those included in IMP. (R4, tab 1.1 at GOV128, GOV131-34; tab 1.2 at GOV341, GOV 344-47; app. supp. R4, tab F2096.122 at F1924487, F1924490-93; tab F2096.004 at F1944891, F1944894-97; tr. 4/36-37; tr. 9/51-52) Fluor was required to notify the Navy if Fluor expected a service to exceed the Service Call Threshold (either exceed the dollar limit or exceed the hours) and provide an estimate or proposal for the repair or work. Unlike the IMP limit of liability, if the work exceeded the Service Call Threshold, the Navy was required to pay for the entire scope of work, without a limit of liability, through "Proceed Call Units" (PCUs), "category calls" (CAT calls), or task orders issued under the IDIQ section of the Contract, or through contracts or task orders issued to third parties. (R4, tab 1.1 at GOV128, GOV131-34; tab 1.2 at GOV341, GOV344-47; app. supp. R4, tab F2096.122 at F1924490-93; tab F2096.004 at F1944894-97; tr. 4/36-37; tr. 19/52-53)

[4] More commonly known as elevators and escalators.

Prior to submitting its proposal, Fluor acknowledged that it was aware that Section J did not include all the major components of the systems to be maintained under IMP (tr. 18/145-46). For example, in RFI 34 to the draft solicitation, the Navy responded to an RFI asked by Fluor as follows:

> Question: The HVAC inventories for NAS Jacksonville and NS Mayport are listed by system, but do not include all of the major components that will be required to be maintained within a system. Will the detailed inventory be provided?
>
> Answer: The HVAC inventories are not intended to include all of the major components. A detailed inventory will not be provided; the Contractor will be responsible to develop a detailed inventory to meet their IMP requirements.

(R4, tab 96.16, RFI 34; tr. 18/145-46)

Similarly, RFI 21, another question posed by Fluor, asked:

> It is noted that J-1605000-01 does not identify many of the components mentioned in the related information, such as but not limited to heat recovery steam generators, pumps, valves, steam traps, etc.
>
> Question: (a) Is the Contractor's responsibilities for an Integrated Maintenance Program (IMP) limited to the equipment specifically identified in J-1605000-01 inventory? (b) If additional equipment is identified that the Government wished to be included in the IMP, will an equitable adjustment be issued to cover the additional equipment?
>
> Answer: The Contractor is responsible for ALL systems and ALL auxiliary equipment related to the system. a) Refer to Section C and Section J of Annex 1605000 for Steam Requirements and Steam Generation Distribution System and Descriptions. (b) Refer to the performance objectives and performance standards of Section C: Annex 1605000, Spec Item 3 and [its] sub-Spec Items, "The

> Contractor shall efficiently operate and maintain the Steam Generation Plants, Distribution Systems, and Condensate Return Systems to safely produce and distribute quality, reliable steam such that all steam requirements are continually met."

(R4, tab 3.3 at GOV3661)

Fluor also submitted RFIs asking about the wastewater treatment plant and collection system that recognized that the section J listings were not complete inventories. In RFI 700, Fluor asked:

> Question: We recognize that Attachment J-1604000-01 [etc.] is not intended to be an inventory of each item in the plant, but as an inventory of major components to allow the Contractor to submit a bid. However, we are concerned that Contractor's bids cannot be evaluated equally as bidders may make different assumptions about the content of the inventory list below the level of major components. We request a [sic] either a detailed inventory list of all the electrical, steam, water, and wastewater systems, other than piping, for which we would assume responsibility, or guidance as to the assumptions we should make in pricing this portion of the proposal.
>
> Answer: Answer and inventories will remain the same.

(R4, tab 489, RFI 700)

According to Fluor, the NAS Jacksonville and NS Mayport Section J inventory deficiencies most affected assets in the following principal categories: HVAC, HVE substations, wastewater lift stations, and NAS Jacksonville traffic lights. (tr. 19/11, 215; app. supp. R4, Tab F73 at 45-46). Fluor also contends that the Section J inventory issue affected the NS Mayport Ship to Shore electrical, NS Mayport airfield lighting, and "other recurring services" for lighting and relamping (exterior and interior lighting) and plumbing fixtures. At the hearing, Messrs. Barry, Fuentes, Sherwood, and Avritt provided representative examples of what Fluor contends to be Section J inventory deficiencies (tr. 19/30; tr. 20/13-14; 20/166).

Fluor's expert witnesses, HKA, prepared a "work order analysis" that was based upon the work of two Fluor employees, Mr. Randy Sherwood and

Mr. Wes Avritt, reviewing Fluor's CMMS database (app. supp. R4, tab F73 at 4; app. supp. R4, tab F76 at 179-80 (attach. 3A-R); tr. 12/102-03, 106-07; 15/12-13, 25-26, 161). The Fluor employees looked at service calls for buildings that they perceived as having been sources of extra-contractual work (app. supp. R4, tab F73 at 51; tr. 12/104-05, tr. 15/193-95). Messrs. Sherwood and Averitt developed a list of purportedly extra-contractual work and used a set of codes to group the work into related categories (app. supp. R4, tab F76 at 179-80; tr. 15/11-25; *see also* tr. 12/105; tr. 13/140).[5] Mr. Sherwood tagged approximately 13,000 work orders for NAS Jacksonville and Mr. Avritt tagged approximately 8,400 work orders for MS Mayport (tr. 11/15; 12/105; tr. 13/140; app. supp. R4, tab F73 at 57).

In tagging the work as "extra-contractual," Messrs. Avritt and Sherwood did not consider whether the work was outside the scope of the contract, and HKA did not provide an opinion as to whether the work was beyond the scope of the contract (app. supp. R4 tab F73 at 51; tr. 12/1-7-08; tr. 15/15, 179-80, 184, 187). In fact, Mr. Sherwood testified that his issue tagging was not intended to represent work that was outside the scope of the contract and that none of the categories were based upon an interpretation of the contractual provisions (tr. 15/14, 81). Mr. Sherwood testified at the hearing that he did not review the contract specifications for the purpose of the work order analysis and did not review the RFIs and answers (tr. 15/21-23). In addition, Mr. Avritt testified that he did not consider whether the Navy and Fluor had reached an agreement on an IDIQ basis to compensate Fluor for the work. Thus, some of the tasks tagged by Mr. Avritt as being beyond the contract, were, in fact, the subject of separate IDIQ agreements (tr. 12/147-49). HKA's expert witness, Kelsey Bonner, testified that she had no opinion as to what was in the contract, and that her use of the term "extra-contractual" was just shorthand for "issues that Fluor faced on the contract that it shouldn't have faced" (tr. 15/184).

The Fluor employees reviewed 213,645 work orders at Jacksonville out of 532,512 total work orders and 116,085 work orders from Mayport out of 303,605 total (app. supp. R4, tab F73 at 53-54). They coded the orders using 24 codes. The codes were: access (Fluor responded but could not access the relevant area); age/condition (Fluor considered the asset to be beyond its useful service life and needing replacement); bundling (Fluor believed that the government had improperly combined two or more distinct tasks into one service call); capital improvement (Fluor believed

[5] As discussed later in the decision, only entitlement is before the Board, thus, the non-random sample does not matter (*see* gov't br. at 37; Gov't. Proposed Findings of Undisputed Fact (GPFUF) ¶¶ 301-05). At this stage, Fluor only needs to demonstrate that it was forced to do work not required by the contract and does not need to prove the amount of its damages.

that the call involved an upgrade or improvement rather than repair); design flaw (design issue or poor engineering of asset); duplicate (work was already included on another work order); faulty install (another contractor installed equipment incorrectly and Fluor was called to remedy the mistake); force majeure (work related to hurricane, lightning or storm damage); GCR (work performed by Government Contracting Resources (GCR), a Fluor subcontractor); government-furnished equipment (installation of government-furnished equipment that Fluor contends should have been accomplished by IDIQ task orders); incrementing (a single task that would be over the limit of liability was split into two or more tasks to stay under the limit of liability); infrequent issues (a catch-all for items that were coded on fewer than 10 work orders such as fuel, abuse and bundling [also listed as a separate code]); labor (work that Fluor contends should not have been performed under the fixed-price portion of the contract, such as weekend work that could have been performed during the week); negligence (requests to perform what Fluor contends was unjustified work like retrieving keys or a phone dropped down an elevator shaft); not in contract (work on assets that Fluor contends were not within the scope of the contract); nuisance (Fluor responds to a call but there is nothing for them to repair); other (miscellaneous calls that are somehow different from "infrequent issues" above); other contractors (calls where Fluor was tasked with work that it contends should have been assigned to other government contractors); pre-existing (work that Fluor contends should have been addressed before it started performance of the contract); reset (Fluor was required to reset an asset, like air conditioning); roof leak (leaks from roofs or skylights leading to interior damage); set points (calls for Fluor to adjust temperature in buildings); Turbocor (work performed on Turbocor brand components that Fluor contends were improperly installed); and warranty (Fluor performed work on assets with existing warranty coverage) (app. supp. R4, tab F76 at 179-80).

HKA additionally performed an "inventory analysis" that attempted to inventory certain categories of equipment and then compare the inventory to the quantities of equipment identified in the contract's J tables (app. supp. R4, tab F74 at 39-139 (ex. 3-10)). The inventory analysis was primarily focused on traffic control lights, electrical substations, wastewater lift stations, and HVAC systems (*id.*). As with the "work order analysis," HKA relied upon Fluor employees to prepare the field inventories that were the basis for analysis (tr. 21/161, 173). However, instead of reviewing the inventories prepared by the Fluor employees, HKA instead reviewed a spreadsheet prepared by Fluor's counsel, aggregating the field inventories (tr. 22/63; R4, tab 1673; tab 1675).

This methodological quirk became relevant in hearing testimony regarding the inventory of traffic lights. The Section J inventory reported 82 traffic lights on NAS Jacksonville, counting each signal head as a "traffic light." HKA found that Fluor was

required to service multiple traffic lights that were not in the contract, inventorying 264 lights. However, HKA's inventory counted each bulb in a signal head as a "traffic light" such that a single signal head was three or more "traffic lights" (red, yellow, green, and possibly turn arrows) (R4, tab F74 at 136). Significantly, Mr. Torrey, the Fluor employee charged with inventorying traffic lights, counted each signal head as one "traffic light" rather than counting the number of individual bulbs (R4, tab 1653.07). The counsel-provided spreadsheet similarly reported the number of signal heads rather than individual bulbs as the number of traffic lights (R4, tab 1673). Ms. Bonner of HKA denied making the decision to count individual lightbulbs in the traffic signals and speculated that the change was directed by Mr. Torrey or another Fluor employee, Mr. Barry (tr. 21/195-96). Mr. Barry testified that he did not know who made the decision to count individual lightbulbs (tr. 18/186).

HKA's inventory analysis also reported that Fluor was required to maintain assets not included in the Section J inventories for electrical systems, wastewater lift stations and HVAC systems (R4, tab F73 at 44-46). HKA's methodology was to assume that any asset in its field inventory that was not specifically listed in a Section J table was not in the contract; however, HKA had no opinion as to whether the assets identified as "not in contract" were, in fact, covered by the contract (tr. 21/183-84 ("that's the language here, yes, to summarize the difference between the contract Section J and Fluor's inventory")). Thus, HKA did not consider whether the contract specified that Fluor was responsible for maintenance of an entire system, or just the specifically identified assets.

With regard to lift station pumps, the Section J inventories did not specify the number of pumps in each lift station (app. supp. R4, tab F74 at 139; tr. 18/122-23). Thus, Mr. Barry assumed that there was one pump at each lift station and considered any additional pumps to be not in the contact (tr. 18/122-23). Mr. Fuentes testified that lift stations would normally contain a minimum of two and up to five pumps (tr. 19/160).

At the hearing, and in post-hearing briefing, Fluor limited its argument to the following issues: a) age and condition; b) pre-existing; c) capital improvement; d) not in contract; e) other contractors and power outage support to the Facilities, Engineering and Acquisition Division; f) negligence; g) incrementing; h) bundling; i) misuse of emergency service calls; j) service calls on assets under warranty; k) service calls for repairs covered by insurance; l) stacking of limits of liability;

m) nuisance; n) force majeure; and o) access. We summarize the testimony regarding each alleged category of extra-contractual work below:

a) Age and Condition

Fluor defined the "Age and Condition" issue as: "[t]he work order includes repair on assets that were old or beyond their useful service life and should have been replaced" (app. supp. R4, tab F76 at 179). According to Fluor, the Navy often issued work orders for repairs on assets that could not be restored to function properly in accordance with OEM specifications (tr. 9/47). Mr. Sherwood testified that "older equipment takes more maintenance and repairs" (tr. 13/146) and that there were more age and condition issues at NAS Jacksonville than he had encountered at other installations, both in terms of number of occurrences and severity of repairs (*id.*). Similarly, Mr. Avritt testified that for "Age and Condition" he considered (among other things) how old the equipment was and whether it needed to be replaced, with reference to available industry standards regarding the age or useful service life of an asset (tr. 11/21-24). Mr. Avritt explained that maintaining outdated or deteriorated equipment frustrated Fluor's ability to perform maintenance and repairs (tr. 11/24-25).

According to Fluor, the Navy failed to replace equipment that needed to be replaced. In those instances, Fluor could only attack "a symptom of a disease" (tr. 11/25), and the Navy's direction to "limp" the equipment along without replacing it circumvented the contractual limit of liability (tr. 9/112-13). Fluor contends that it had to continue to return to a unit multiple times to make multiple repairs, all below the limit of liability (tr. 9/113). Mr. Fuentes testified that other Navy facilities did not require maintenance of obsolete equipment (tr. 9/113) and that Fluor informed the Navy of the need to replace equipment and that "[t]he fact that you don't have funds to make the repair, I should not keep accruing cost against the unit. Your lack of funds is not reason for me to be subsidizing the government's financial situation. And that's what happened in many, many units, not just air conditioning. That happened on generators, that happened on fire protection, that happened on a lot of units." (Tr. 9/113-14)

Fluor also contends that the Navy directed it to perform significant overhaul, rehabilitation, restoration, or replacement of its assets that was in excess of the maintenance work required by the contract, and that the asset condition affected Fluor's performance (tr. 9/125). According to Mr. Fuentes:

> The main purpose of the contract was maintenance and -- and normally they would say that you would maintain its OEM standards. But in many cases, right from the very

> beginning of the contract, and even when they added equipment into the contract, it couldn't be maintained until it was rebuilt or -- or overhauled in some -- to some degree to meet the OEM standards or to meet even basic operational standards.

(Tr. 9/127) Fluor cites specifically to CHT risers at NS Mayport being in a "state of corrosive disrepair" and requiring "major overhaul" (tr. 11/194); a chiller in Building 919 at NAS Jacksonville that had been abandoned in place and had not run in years (tr. 14/10; app. supp. R4, tab F77 (Work Order (WO) No. 189480 dated September 11, 2013); app. supp. tab F1235 at NAVSE314054 (April 2, 2015 CIR referring to chiller "abandoned in place for the last six to eight years")); equipment that should have been overhauled, but that the Navy required Fluor to maintain in its deteriorated state, such as a fire protection system at NAS Jacksonville Building 101 (FRC), that was obsolete and replacement parts were no longer available (tr. 14/200-02); and occasions where the Navy might choose to "limp" systems along, and where customers sought to have assets that had not been maintained added to the contract, requiring Fluor to "get [the asset] up to working condition" (tr. 23/21); and the Navy requiring Fluor to perform maintenance and repairs on assets that were beyond their useful life, that were not operating within OEM specifications, and that were severely corroded (tr. 17/56-58).

b) Pre-Existing

Fluor defined the "pre-existing" issue as: "[t]he work order includes condition issues that apparently originated before Fluor began contract performance (e.g., excessive early contract maintenance reflecting lack of maintenance or repairs not made, or missing items that would have originated under the prior contract)" (app. supp. R4, tab F76 at 179). Mr. Avritt testified that he applied the "pre-existing" issue tag where equipment "had physically been in a state of disrepair prior" to the start of Fluor's contract (tr. 11/48-49). Fluor referenced instances where the Navy's work order request acknowledged pre-existing problems, such as stating early in the contract that something had been broken for several months, indicating that the problem likely existed at the start of the contract (tr. 11/49). When the issue arose early in the contract, Mr. Sherwood applied the pre-existing condition tag to work orders though he could have applied the age and condition tag (tr. 13/147). Fluor asserts that it often had to make bigger repairs or repair collateral damage because the problem had not been timely addressed before Fluor's contract (tr. 11/50-51). Fluor also cited to equipment that had been so neglected that it could not be maintained to OEM standards (tr. 9/106-07), and equipment that had not been maintained because no one even knew it existed (9/106-07), such as heat recovery units at the Fleet Readiness Center (tr. 9/107-08). Fluor had to "do the maintenance on them as part of firm fixed

price," without "additional funds for that" (tr. 9/108). Fluor contends that the deteriorated assets and related extra-contractual services were far beyond the fixed-price contract scope Fluor reasonably anticipated in its proposal (tr. 11/24-25; 14/224-25).

c) Capital Improvement

Fluor defined a capital improvement to include:

> The work order includes areas that relate to abuse of contract to improve facility (e.g., painting that exceeded the 200 square foot limit or not incidental to maintenance work); client request to replace an asset with something different (e.g., replace water fountain with updated model when the previous one had no problems); or adding new assets/equipment (e.g., installing an asset that should have been there but never was or had been removed).

(App. supp. R4, tab F76 at 179; tr. 11/28-30) Messrs. Avritt and Sherwood testified that a capital improvement occurred when the Navy required Fluor to replace an otherwise operating asset with a new or improved asset or to install a new asset where none previously existed (9/44-45, 47 ("replace things like ceiling tiles, because somebody didn't like their ceiling tiles . . . add, extend outlets, give new outlets because they've got new computers . . . install coffee machine . . . sometimes it was just build a new wall. We just like to separate this room and have, build a new wall here . . . Sometimes even change out a system. For instance, a water fountain didn't work, they gave us a service call, but they wanted it upgraded to one for refillable bottles"); tr. 11/29 (replacing functioning water fountains with new water fountains designed to fill water bottles), 11/30 (changing the wall color paint from blue to white), 11/31-32 (installing an HVAC window unit), 11/33-35 (installing HVE transformer purchased by the Navy); tr. 14/204 ("if there's nothing there for me to maintain you're actually wanting something new, to me that's capital improvement")).

Fluor cited the following examples of capital improvements requested pursuant to work orders: "install two eyewash station[s] in the TF-34 shop area" (app. supp. R4, tab F77 (WO No. 279666); "refurbish or replace front door at central tool room to include a safety window" (app. supp. R4, tab F77 (WO No. 454095)); and install a new sink in NS Mayport Building 1488 (app. supp. R4, tab F78 (WO No. 451774)). Mr. Avritt objected to the new sink and elevated the matter to Navy personnel, who agreed with Mr. Avritt and cancelled the work order (tr. 11/240). Fluor further cited multiple service calls requesting wall painting to change or freshen the existing paint

color, which were not incidental to other wall repairs or maintenance (tr. 12/22). Additionally, Fluor referenced service calls to redesign parking lot grid layouts, requiring Fluor to black out existing striping and paint a new stripe pattern (tr. 12/22-23, 30).

d) Not in Contract

Fluor defined "Not in Contract" as follows: "[t]he work order relates to a type of asset that is not covered by the contract or the nature of the work order was not in the scope of the contract" (app. supp. R4, tab F76 at 179). According to Fluor, assets not included in the Section J inventories fall within the "Not in Contract" category (tr. 14/208). Fluor asserts that the Navy issued service calls for assets covered by IMP and other recurring services, e.g., HVAC and lighting, not listed in the Section J inventories for HVAC IMP or lighting assets (tr. 4/37-38; 12/189-91; tr. 14/209; 19/238-39; 20/102-03 140-41; 21/61-62).

Fluor asserts that the Navy improperly issued service calls to Fluor to work on assets that were not covered by Annex 1502000 Facilities Investment (tr. 9/83). Fluor cited examples such as changing water filters on drinking fountains (tr. 9/84), pumping water from a boat (tr. 14/209-11), and repairing potholes (tr. 12/32-33; app. supp. R4, TAB F78 (WO No. 356919) (January 27, 2015 service call to repair "several large potholes")). The Navy subsequently conceded that "roadways were not part of any of the service request items" and issued Fluor CAT calls for pothole repairs, and then only to address smaller potholes up to approximately two feet in diameter (tr. 12/32-33).

Fluor additionally asserts that the issued service calls for assets covered under Annex 1800000 Environmental were not in the contract (tr. 9/84). Fluor cites work orders for fuel tanks, requiring Fluor to address a leak, replace a gauge, or paint the fuel tank (tr. 9/84-85), and "beautification" projects such as performing corrosion control on entire assets, power-washing the base front gates on the weekend, and painting bollards (tr. 9/81-83). Fluor also cited service calls to work on assets not covered by the contract (tr. 14/209; app. supp. R4, tab F77 (WO No. 359256)) and to pump water from a sinking small craft boat (tr.14/210; app. supp. R4, tab F77 (WO No. 417739)). Fluor asserts that the Navy refused to compensate Fluor for its efforts regarding the boat, claiming the boat did not belong to the Navy (tr. 14/210-11). Although Mr. Sherwood testified that Fluor was not compensated, the Navy used one of its service calls to pump water from the boat, and Fluor's Maximo recorded the cost of the service call as $353.97 (app. supp. R4, tab F93).

e) Other Contractors and Power Outage Support to the Facilities, Engineering and Acquisition Division (FEAD)

Fluor contends that the Navy improperly issued work orders to Fluor to repair damage caused by other Navy contractors or to support construction work performed by them (tr. 9/85; tr. 14/205-08). Fluor defined the "Other Contractors" category as: "[t]he work order is caused by or should have been addressed by other government contractors (e.g., damage by or in support of government construction contractors)" (app. supp. R4, tab F76 at 179; tr. 14/205-06). Mr. Sherwood explained: "If somebody else damages something they should repair it. They shouldn't be calling me to do it. If the other contractor -- and during his construction contract damages some of the equipment that I'm responsible for maintaining, he should make those repairs, not me" (tr. 14/206). The Navy also required Fluor to provide FEAD with power outage support, which, according to Mr. Sherwood, was required "[j]ust about every weekend" (tr. 14/207; *see also* tr. 9/201, 205). This weekend support typically required two Fluor high-voltage tradespersons to make multiple trips to the installations to turn the power on and off on a Saturday and Sunday, working overtime (tr. 14/207-08). The Navy similarly required Fluor to provide fire protection system shutoffs for other Navy contractors that performed construction work (tr. 9/87). For example, on September 4, 2014, Fluor received a work order stating: "Power Outage - Request assistance to secure the electrical power on 23 September . . . this is for FEAD support at a yet to be determined date due to outage requirements" (app. supp. R4, tab F152 (WO No. 307794)). Mr. Sherwood explained: "this should not even be Fluor's work. If you don't want me – if you've got construction contractors on your base working and they require outages, somebody needs to pay for those outages. That is not part of firm fixed price" (tr. 14/206-07). Mr. Fuentes confirmed that Fluor "did a lot of support of other contractors doing work such as FEAD work or retrofit work" (tr. 9/202). Mr. Fuentes described Fluor's effort as "free labor" for the Navy contractors while Fluor incurred overtime costs for its tradespersons (tr. 9/202-04).

Fluor additionally cited the example of repairing damage caused by a Navy contractor at an air handler at NAS Jacksonville Building 2070 (Child Development Center) (app. supp. R4, tab F1634 at F139431; tr. 9/172-74). Mr. Fuentes described how the Navy erroneously attributed this damage to Fluor, alleging Fluor "had worked on the unit, cut out the insulation and . . . had not restored the insulation on this unit properly" (tr. 9/173). By contrast, Mr. Fuentes explained how a different Navy contractor cut the insulation to retrofit the unit with a sensor and then failed to repair

the insulation (tr. 9/173). Mr. Fuentes testified this example was not a limited instance:

> [T]his was fairly common at [NAS Jacksonville and NS Mayport] where a contractor would come in, put in, either tear something out and replace it, but not completely replace everything. It happened a lot of times on the like chilled waterlines. They would do a repair at a new valve, whatever it might be, but not re-insulate the pipe. I mean, that's just examples. But there [were] other items that would take place in either electrical systems that maybe weren't properly grounded or whatever.
>
> And then we would end up having to come back and -- and make the repairs or take a hit for it and then tell the government, point out to the government, that had nothing to do with us and that sometimes they get the contractor to come back and actually fix it . . . ."

(Tr. 9/175-76)

Mr. Fuentes described an instance where the Navy contracted with a contractor to install a new boiler but omitted the installation of an emergency stop button from the contractor's scope of work (tr. 9/86). Rather than requiring the contractor to install the emergency stop, the Navy issued Fluor a service call for the emergency stop button installation (tr. 9/86-87).

f) Negligence

Fluor defined the negligence category as "[t]he work order relates to an unjustified call where Fluor personnel performed unnecessary work (e.g., asking Fluor to close a vent, retrieve keys or cell phone someone dropped in the elevator, or plug things in)" (app. supp. R4, tab F76 at 179). Fluor testified that the Navy's requirement for Fluor to perform corrective work due to the negligence of others was a "constant problem" for Fluor (tr. 14/212). Mr. Sherwood testified that the Navy did not help to limit these problems, unlike his experience on a similar contract at the Naval Academy (tr. 14/212-13).

Fluor testified to multiple work orders to repair aircraft hangar doors damaged by the Navy's own negligence in operating the doors or running forklifts into the doors. For example, on March 14, 2013, the Navy issued a work order for the hangar

doors at NAS Jacksonville Building 511 (Maintenance Hangar) for "Pulley support on mullion have broken welds and bent I-beams" (app. supp. R4, tab F77 (WO No. 130397)). Mr. Sherwood testified that Navy personnel operating forklifts were "constantly running into the mullions of these doors getting the mullions up" (tr. 14/214). Fluor also testified to numerous work orders for plumbing clogged by foreign objects (tr. 14/217). Mr. Sherwood testified that Fluor "found all kinds of things" in the plumbing, including tools, eyeglasses, keys, shirts, shop rags, paper towels, and a hamburger patty (tr. 14/216-17; app. supp. R4, tab F77 (WO No. 368672)).

g) Incrementing

Fluor defined incrementing as where "[t]he work order entails breaking up work to stay under the Limitation of Liability (e.g., identifying issues but calling in half, then the other half a few days or weeks later)" (app. supp. R4, tab F76 at 179; tr. 9/61-62). Fluor presented testimony that incrementing "was quite common" (tr. 9/62). Fluor described a typical instance of incrementing as "when you would get . . . same day, maybe a day apart . . . multiple service calls to repair a same or like item," which "seemed to happen frequently in the Government" (tr. 11/46). Fluor submitted an example from NS Mayport Building 1343 (Helicopter Maintenance Hangar), where the Navy submitted a work order to replace some doors in the morning, and a second work order to replace more doors in the afternoon, despite knowing in the morning that they needed to replace all 12 doors and only split the calls to get around the service call limit (tr. 11/46-48). Fluor cited a second example where it was required to replace stained ceiling tiles on three service calls, instead of issuing a task order (tr. 9/62-63).

One of the Navy contract specialists working on the RBOS I contract, Ms. Vissers, testified that "splitting requirements and using multiple service calls to stay within the threshold" was "something that's addressed in the contract" and that she had to "police" (tr. 16/96-97). She stated some Navy customers did "not understand how service calls work and what they could be used for" (tr. 16/97). As an example, Ms. Vissers explained that if a customer needed five office doors replaced it should be one service call, not five separate calls to stay under the service call dollar limit. She testified:

> [T]hat's where I'd have to go in and police and educate the customer and say, no, that's really just one service call. That's not five separate service calls.

> So that's where it would be officially multiple service calls to stay within the threshold because if they did more than one door, it probably – you know, depending on the type of door, it might have been more than the limitations specified for a service call.

(Tr. 16/97) Mr. Fuentes testified that he had seen instances "where [the Navy] would get $10,000, $12,000 worth of work done by issuing three service calls where [Fluor's] responsibility was almost $4,200" for each service call (tr. 9/63-64).

Fluor specifically cited incrementing as a problem with service calls issued for roof repairs (tr. 9/64). Mr. Fuentes testified that "almost all" of the roofs had "far exceeded their usefulness" or "service life" (tr. 9/64-65). The roofs "sometimes were quite large," such as "FRC [the Fleet Readiness Center] or some of the older hangar areas," and "[the Navy] would break that into sections of roof" (tr. 9/65). Mr. Fuentes testified that, if all the sections of roof were leaking after a rainstorm, the roof repair should be viewed as "one requirement," but the Navy would arbitrarily subdivide the roof and issue separate service calls for different sections: "[t]hey do that half, make the repairs on that half, and we'll give you another service call for this half" (tr. 9/65). If Fluor discovered a gutter needing repair, "which normally would be done along with the roof repair," he testified that the Navy would issue yet another service call (tr. 9/65).

Fluor received a series of work orders in June of 2015 that it contends should have been combined into a single work order (app. supp. R4, tab F78 (WO Nos. 414756, 414959, 415158, and 415169)). Mr. Avritt testified "[i]n the span of 96 hours, the government called in four electrical service calls all to install new outlets" (tr. 12/19). Mr. Avritt identified this as "incrementing": the Navy customer "knew how much it would cost per service order to install and run an outlet and in this case a new circuit. So they broke it up into four separate calls so they could call each in again to get them under the threshold of a single service call" (tr. 12/20). However, on cross-examination, Mr. Avritt admitted that one of the work orders was a duplicate and that the sum of the three remaining work orders totaled less than 32 labor hours and less than $2,000 and thus, that Fluor actually could have been required to perform all the work under a single work order (tr. 12/197-98).

h) Bundling

Bundling is the inverse of incrementing. Fluor defined bundling as "[t]he work order includes multiple tasks that should have been performed across multiple work orders (e.g., the original call was to repair sink faucet but also repaired a light fixture)"

(app. supp. R4, tab F76 at 179; tr. 11/25-28). Rather than issuing a work order when a discrete requirement arose, Fluor asserts that the Navy would wait and try to combine multiple requirements within the service limit to "[g]et the best bang for the buck out of their service calls" (tr. 9/69-70). Mr. Avritt testified that bundling typically involved combining multiple trades in one work order, which was not permitted under the contract and was problematic because it required multiple Fluor tradespeople to respond to the same service call (tr. 11/26, 28; app. supp. R4, tab F2096.122 at F1924487 (stating "[m]ultiple 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")). Bundling also encompassed "stacking," where the Navy would hold off submitting calls for a single trade to increase the amount of work performed on a service call (tr. 11/27). If a light needed relamping, "many of the building managers told us that they were actually directed, wait till you have enough of them out so that you can . . . maximize the dollar value of your service calls" (tr. 9/63).

i) Misuse of Emergency Service Calls

Fluor contends that the Navy used emergency service calls for "many other things" that were not emergencies (tr. 9/54). Fluor received emergency service calls for "command interest," such as a call on a Friday night to repaint the front gate bollards in advance of a visit from senators and admirals (tr. 9/54-56). Fluor contends that the use of emergency service calls for non-emergencies affected its performance because it bid emergency calls lower than routine service calls because the types of services required on emergency work orders could be addressed in a short amount of time with minimal labor hours (tr. 9/54-55). For example, fixing a tripped circuit breaker, or resetting a triggered fire alarm panel (*id.*). Routine service calls for non-emergencies were typically more involved (tr. 9/55).

When emergency calls were received during normal working hours, Fluor had to divert resources from other work to address the emergency (tr. 9/56-57). The Navy required Fluor to perform routine service calls outside of regular working hours, such as requiring Fluor to restripe a parking lot on a Saturday (tr. 9/58-59). Mr. Fuentes testified that the contract did not permit the Navy to issue routine service calls outside of regular working hours (tr. 9/58). Responding to non-emergencies after hours resulted in increased costs for Fluor because Fluor had to compensate the tradespeople responding at time-and-a-half pay (tr. 9/57-58). The Navy also issued Fluor service calls to perform services at a particular scheduled day and time, which the contract also did not allow (tr. 9/59-61).

j) Service Calls on Assets Under Warranty

Fluor contends that the Navy commonly used service calls to require Fluor to perform work on assets that were within the asset's warranty period, such as recently replaced roofs (tr. 9/74-75). If the installing contractor went out of business, or if the Navy did not want to go to the trouble of using the warranty, the Navy would issue Fluor service calls even though the asset was still under warranty (*id.*).

k) Service Calls for Repairs Covered by Insurance

Fluor also contends that the Navy required Fluor to make repairs that were covered by insurance (tr. 9/75). In one instance, after a storm, an insurance company sent a contractor out to trim trees, but as the contractor was leaving the site, they knocked out traffic lights (tr. 9/75-76). The Navy required Fluor to repair the traffic lights under a service call and instructed Fluor to seek reimbursement for the work directly from the insurance company (tr. 9/76). Fluor did not have a contract with that other contractor, and Fluor contends that the Navy should have paid Fluor and sought reimbursement from the insurance company (tr. 9/77). Fluor asserts that this happened regularly with other property damage, such as "at Mayport where someone ran into the side of a building and then they told us to work with the car insurance," or where someone "hit fire hydrants, knocked them over and then [the Navy directed Fluor] to get reimbursed from them" (tr. 9/76-77).

When a contractor dug up the buried high-voltage lines underneath the runway, the Navy directed Fluor to refuel a generator for the contractor and seek reimbursement directly from the contractor (tr. 9/77). According to Fluor, the Navy did not want to pay Fluor directly, because that money would come out of the Navy's operational funds. Fluor "got burned . . . because sometimes the contractors didn't want to pay," and the Navy did not always assist Fluor in seeking repayment from these third parties (tr. 9/77-78). When Fluor pursued reimbursement from an insurance company, "it was always a battle on getting paid," requiring Fluor to spend time and money researching the issues and interacting with the insurance company (tr. 9/79).

l) Stacking of Limits of Liability

Fluor contends that the Navy sometimes issued Fluor service calls on PM equipment if the work exceeded the PM dollar limit instead of issuing an IDIQ task order or PCUs, as Fluor contends was required by the contract (tr. 9/94). This practice, which Fluor disagreed with, had the effect of "stacking" limits of liability (tr. 9/95). Fluor would "take a limit of liability on the PM and then . . . take another

limit of liability on the service call," adding the $250 PM limit to the service call limit (*id.*). Instead, Fluor contends that the Navy should have issued a task order or PCU (tr. 9/95).

m) Nuisance

Fluor defined nuisance calls as "[t]he work order is created, and when Fluor personnel arrives, there is nothing for them to repair" (app. supp. R4, tab F76 at 179). This category included duplicate or cancelled work orders (tr. 14/203). For example, Fluor received a work order on July 25, 2016, stating "Roof leaking on electrical panel in fiberglass shop . . . . Cancel dupl of 577004" (app. supp. R4, tab F77 (WO No. 577133)). Mr. Sherwood said, "[w]ell, here it's actually a duplication which there were a lot — there were a lot of cancellations and duplication of work orders. So, I'm like a dog chasing its tail. I got a ton of work and I'm having to deal with things like this" (tr. 14/203). The RBOS I contract was the Navy's first use of the Regional Call Center (RCC) to field work order calls, which may have contributed to the higher volume of nuisance calls (tr. 14/222).

n) Force Majeure

Fluor defined force majeure calls as "[t]he work order includes repairs attributable to hurricane, lightning, or storm damage" (app. supp. R4, tab F76 at 179). Mr. Sherwood stated the force majeure tag was "mainly for hurricanes," as there were two major hurricanes that occurred during the contract (tr. 14/217). On other maintenance contracts, Fluor received IDIQ task orders for repairs due to hurricanes, but at NAS Jacksonville the Navy required Fluor to perform these repairs as part of its fixed-price work (tr. 14/217-18). The Navy also gave Fluor work orders to clean up storm debris after hurricanes (app. supp. R4, tab F77 (WO No. 612947) (requiring Fluor to "pick up storm debris from sawtooth roof area" after a hurricane)). Mr. Sherwood said he was personally involved in responding to the hurricanes, and that Fluor "probably had 25 to 30 calls at the night of the storm" (tr. 14/218).

o) Access

Fluor defined access calls as "[t]he work order is created, and when Fluor personnel arrive, they cannot perform the work because they are unable to access the asset (e.g., an aircraft was blocking access to a light fixture)" (app. supp. R4, tab F76 at 179). Mr. Sherwood described the issue as "I've gone there, tried to do the work. Now you won't let me do it. I wasted all this time. And I got to leave and come back at some other point" (tr. 14/219).

For example, on December 5, 2016, Fluor received a work order to "inspect/repair/replace high bay lighting in all 6 bays" (app. supp. R4, tab F77 (WO No. 629107)). The Navy later specified, however, "work to be performed during Christmas shut-down (December 26 thru 30 – 2016)" (*id.*). On another work order, dated July 31, 2014, Fluor was required to address a fancoil unit at NAS Jacksonville Building 409 that was not maintaining set point (app. supp. R4, tab F77 (WO No. 299239)). The tradesperson noted: "Can not access equipment due to access door being locked customer does not, or cannot locate key" (*id.*). Frequently, Fluor's lighting repairs were delayed due to access issues, such as when lights needed to be relamped in the hangars, but Fluor could not access the lights unless the hangars were empty of aircraft, which rarely happened (tr. 9/117-18).

Decision On Purportedly Extra-Contractual Work

As noted above, Fluor's claim for purportedly extra-contractual work is based upon the issue coding performed by Messrs. Avritt and Sherwood based upon their subjective interpretation of the CMMS call data. The fact that the coding was performed without reference to the terms of the contract means that the analysis is of little, if any, value. As the hearing was limited to entitlement, Fluor need only establish that it was required to perform work not required by the contract but need not establish the amount of such work. *See, e.g., Aegis Def. Servs., LLC, d/b/a GardaWorld Fed. Servs.*, ASBCA No. 62442 et al., 22-1 BCA 38,099 at 185,029.

A. Age and Condition

Fluor's first category of purportedly extra-contractual work is work that Fluor contends it was not required to perform due to the age and condition of the assets. We reject Fluor's assertion that some of its work was beyond the scope of the contract due to the age and condition of the assets because the contract provided that Fluor would accept the assets in "as-is" condition (e.g., R4, tab 17.58 at GOV32026, Section C, 02000000 – Management and Administration, Spec Item 2.1.7). When the provisions of an agreement are clear and unambiguous, they must be given their plain and ordinary meaning, and a tribunal may not resort to extrinsic evidence to interpret them. *See, e.g., Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003).

B. Pre-Existing

For the same reason as we deny the age and condition claim, we reject Fluor's claims with regard to pre-existing conditions. The contract provided that Fluor would accept the assets in "as-is" condition (R4, tab 17.58 at 32026, Section C, 02000000 –

Management and Administration, Spec Item 2.1.7). In addition, the Navy clearly informed offerors in response to an RFI that the equipment was in "as-is" condition. (*see* R4, tab 6.3 at GOV6189, RFI #507 "Question: Is all equipment included in the IMP spec item in proper working order according to specs and is it in a maintainable condition? Does it operate and function as designed? Answer: All equipment in all inventories is to be accepted in 'as is' condition.").

C. Capital Improvement

We also deny Fluor's claims pertaining to the capital improvement code. The contract required Fluor to "perform maintenance, repair, alteration, demolition and minor construction" (R4, tab 1.1 at GOV126), and the contract further defined "alteration" in part as "[t]he erection, installation, assembly, addition, expansion, extension, conversion, or replacement of component parts of an existing real property facility. Alteration includes equipment installed in and made a part of such facilities" (*id.* at GOV93). Fluor complains that it was required to perform work beyond the scope of the contract such as painting a room to change the color or installing an upgraded water fountain. However, we find that these tasks fall within the definition of "alteration" cited above., Applying the plain meaning of the contract (*Coast Fed. Bank*, 323 F.3d at 1040) we find that the tasks were alterations permitted by the contract and deny Fluor's claim.

D. Not in Contract

As explained above, Fluor defined "not in contract" as work orders that "relate[] to a type of asset that is not covered by the contract or the nature of the work order was not in the scope of the contract" (app. supp. R4, tab F76 at 179). Fluor further coded any asset not listed in the Section J inventories to be "not in contract" (tr. 14/208). Fluor's testimony on the "not in contract" coding included work on elements of the HVAC systems, traffic lights, CHT Risers and other IMP components of the contract. As noted above, the Section J inventories listed systems rather than individual components (R4, tab 96.16, RFI 34; tr. 18/145-46). The evidence that Fluor cites does not establish that it was required to perform work on *systems* that were not identified in the contract, including systems added by amendments, or separate IDIQ agreements not considered as part of Fluor's analysis, and we deny Fluor's claim.

Fluor cites to our holding in *Kings Bay Support Servs.*, ASBCA Nos. 59213, 59532, 17-1 BCA ¶ 36,815, requiring additional compensation when a contractor is forced to perform maintenance on equipment that is not enumerated in the contract's section J inventory of assets included in the fixed-price maintenance (app. br. at 424-29). Like the RBOS contract at issue here, the contract in *Kings Bay* was issued by the

same Navy office just a few months earlier. Thus, the *Kings Bay* contract has a similar structure, and shares similar or identical contract language for many provisions (app. br. at 425-26). While there are similarities between the contract in *Kings Bay* and the contract in this appeal, Fluor ignores an important distinction. In *Kings Bay*, the Navy admitted that the Section J inventories were inaccurate, but the solicitation failed to put offerors on notice of the inaccuracy. Key to the holding in that appeal was the statement that "[w]hen 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 [Kings Bay] argues it did." *Kings Bay*, 17-1 BCA ¶ 36,815 at 179,423. Here, the Navy repeatedly informed offerors that that the Section J inventories listed systems and did not list every component.

In response to RFI number 34, a question from Fluor requesting a detailed inventory of the HVAC systems, the Navy stated that the "HVAC inventories are not intended to include all of the major components. A detailed inventory will not be provided; [Fluor] will be responsible to develop a detailed inventory to meet their IMP requirements." (R4 Tab 96.16, RFI 34) Further in RFI number 21, Fluor asked if the contractor's IMP responsibilities were limited to the equipment specifically identified in the Section J inventories. The Navy responded that the contractor was responsible for "ALL systems and ALL auxiliary equipment related to the system." (R4, Tab 3.3 at GOV3661) In addition, Fluor's questions in RFI number 700, recognized that the Section J inventories were "not intended to be an inventory of each item in the plant, but as an inventory of major components to allow the Contractor to submit a bid" (R4, tab 489, RFI 700). As we held above, the RFIs and the Navy's responses were incorporated into the solicitation by modification and are part of the contract. In addition, hearing testimony from Fluor's employee, Mr. Barry, established that Fluor knew that the Section J inventories did not list all of the components that Fluor would be required to maintain (tr. 18/251). Thus, unlike in *Kings Bay*, the contract explicitly provided that the Section J inventories were incomplete and listed only systems and did not list all the components to be maintained.

E. Other Contractors and power outage support to FEAD

Fluor's argument relies upon the testimony of its witnesses, without citations to its CMMS database, that it performed work not required by the contract. We note that Fluor complains of repeated calls to restore the electrical grid. This was a requirement of the contract (R4, tab 17.58 at GOV32120, Section C – Annex 1602000 Electrical, Spec Item 1). Similarly, Fluor complains of repairs to various HVAC systems. Once again, the contract required Fluor to maintain and repair these systems (R4, tab 17.58 at GOV32075-77, Section C – Annex 1502000 Facility Investment, Spec Item 3.3.1).

With regard to Mr. Fuentes's testimony regarding the Navy's use of a service call to install an emergency stop button on a boiler that Fluor contends should have been done by the contractor that installed the boiler (tr. 9/86), the contract permitted the Navy to use service calls anywhere on the base. Thus, the Navy was permitted to use a service call to install the switch. Fluor has not alleged that the installation of the switch exceeded the limit of liability for a service call. We find that Fluor has not established that the Navy required it to perform work not required by the contract with regard to other contractors and power outage support.

F. Negligence

Once again, we note that the contract required Fluor to perform work within the limits of the base, up to the limit of liability for service calls, and we deny Fluor' claim. Fluor was compensated on a firm-fixed-price basis for a set number of service calls. The fact that Fluor considers the calls to involve negligence on the part of the Navy is irrelevant. For the hangar door issue, Fluor was compensated on an IDIQ basis using a PCU (app. supp. R4, tab F83 (WO No. 130397)).

G. Incrementing

Fluor's claim pertaining to the incrementing code is a harder question. Fluor alleges that the government divided large tasks into two or more smaller tasks to get around the limit of liability on service calls. The contract does not specifically prohibit incrementing, but neither does it specifically permit it. The contract specialist, Ms. Vissers, testified that she sometimes had to "police" and educate the customer to tell the customer that their multiple service calls were really just one service call (tr. 16/97). Fluor also presented testimony with examples of work that was split between service calls, such as replacing twelve doors, but splitting the work into two service calls for six doors each (tr. 11/46-48) and replacing stained ceiling tiles split into three service calls (9/62-63). However, this testimony is not tied to the service call records in the record (*see* APFF ¶¶ 530, 533-34). Given that Fluor's witnesses did not review the contract and did not consider whether Fluor had been compensated on an IDIQ basis when they issue tagged the work orders, we hold that Fluor has not demonstrated by preponderant evidence that it was required to perform extra-contractual work.

The only specific service calls cited by Fluor as evidence of incrementing were Work Order Nos. 414756, 414959, 415158, and 415169 for installation of new electrical outlets, with the calls submitted over a period of 96 hours (app. supp. R4, tab F78; tr. 12/19). On cross-examination, Mr. Avritt testified that one of the four work orders, number 415158, was a duplicate record, and that the three remaining work

orders combined totaled less than the work order limit of liability of $2,000 and totaled less than the work order limit of 32 labor hours, according to Fluor's CMMS data (tr. 12/197-98). Even if Fluor is correct that the government split the job into three work orders, rather than submitting it as a single work order, Fluor has not established that it was injured. In fact, Fluor appears to have benefited because the government used three work orders for a task that could have been accomplished by a single work order. The Navy purchased a set number of service calls each year of the contract; thus, the Navy had two fewer service calls to use on other assets after using three orders to install the new outlets. We find that Fluor has not established that the government breached the contract by incrementing work orders.

H. Bundling

We similarly deny Fluor's claim related to bundling because the contract expressly provides that service calls can be combined (app. supp. R4, tab 2096.122 at F1924487, "[m]ultiple 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."). Fluor has not established by preponderate evidence that the service calls coded as bundling were not the same trade and building. When the Navy made a service call to the service call reception operators at Fluor, they were supposed to screen for validity and if Fluor did not agree that it was a valid service call, they were required to bring it to the attention of the Navy CO (tr. 13/21-23). In fact, there was testimony that Mr. Avritt objected to a service call and the Navy rescinded the service call (tr. 11/240). If Fluor disagreed with a work order being accomplished under a service call, it would be documented either "in the facility meeting minutes with the government that they kept or it would be in some kind of communication from Fluor's contract management . . . ." (tr.13/15). Fluor has failed to provide documentary support that this issue was ever brought to the attention of the Navy, let alone that it performed tasks involving different trades.

I. Misuse of Emergency Service Calls

Fluor's allegation regarding misuse of emergency service calls is again based upon the testimony of its witnesses, without citations to its CMMS database, or other contemporaneous evidence, that it performed work not required by the contract. Further, Fluor's witness testified that he did not consider whether Fluor was compensated on an IDIQ basis for the work (tr. 12/147-49). Fluor states that it was required to perform emergency service calls for tasks such as painting bollards in advance of a visit by senators and admirals (APFF ¶ 539). The contract required Fluor to provide "Emergency service call [] work requiring immediate action to correct or

prevent loss or damage to Government property and assets, restore disrupted essential services, or eliminate life-threatening hazards to personnel or property" (R4, tab 17.47 at GOV31197; 17.58 at GOV32062). Fluor was also required to perform service calls anywhere on base. Fluor was not *required* to perform routine service calls outside of government regular working hours (R4, tab 17.47 at GOV31202; tab 17.58 at GOV32067, Section C – Annex 1502000, Spec Item 3.1.2). Fluor has not cited to any evidence that it objected to the direction. We find that Fluor has not established that the Navy *required* it to perform work beyond that required by the contract.

J. Service Calls on Assets Under Warranty

As noted above, repeatedly, the contact permitted the Navy to use service calls for any work within the boundary of the installation, subject to the limitations on liability (R4, tab 17.47 at GOV31200; tab 17.58 at GOV32065). Fluor's belief that the government should not use its service calls for this work fails to establish a breach of the terms of the contract that Fluor agreed to. Whether the Navy *should have* used service calls for work that could have been performed under warranty is a policy question and not one for us to resolve.

K. Service Calls for Repairs Covered by Insurance

Fluor once again relies upon testimony of its witnesses without any citation to the CMMS database or contemporaneous documentation to establish that the Navy forced Fluor to seek reimbursement from a third party. As repeatedly noted above, the contract permitted the Navy to issue service calls for any work within the boundary of the installation, subject to the limit of liability (R4, tab 17.47 at GOV31200; tab 17.58 at GOV32065). We find that Fluor has not established that the Navy required it to perform work beyond the terms of the contact.

L. "Stacking" Limits of Liability

Fluor asserts that the Navy "stacked" liability limits by using service calls for repairs on preventative maintenance equipment that was over the limit of liability. As we understand this argument, if a piece of equipment was in preventative maintenance with a $250 limit of liability and required a $1,000 repair, the Navy issued a service call rather than directing Fluor to use PCUs or issuing an IDIQ task order. Fluor is correct that the contract provides that work in excess of the PM limit of liability should be performed pursuant to PCUs or an IDIQ contract (R4, tab 1.1 at GOV134-36); however, Fluor cites only to testimony of its witnesses and does not cite any evidence from its CMMS or other contemporaneous documentation to establish that the limits of liability were improperly applied. We find that Fluor has

not established that the Navy required it to perform work beyond the terms of the contact.

M. Nuisance

Fluor complains of nuisance calls, which it defined as cancelled or duplicate service calls. Once again, the contract permitted the Navy to issue service calls for any work within the boundary of the installation. In response to a question from the Board, Mr. Avritt admitted that Fluor was paid for service calls where no work was performed (tr. 11/52-53). In addition, Mr. Sherwood testified on cross-examination that he was able to eliminate duplicate service calls by reviewing the work orders before they were delivered to the craftsmen (tr. 14/204). Thus, we find that Fluor has not established that it was required to perform work beyond the requirements of the contract with regard to nuisance calls.

N. Force Majeure

Fluor's claim regarding tasks coded force majeure is also denied. The contract was a fixed-price contract where the contractor accepts the performance risks. Fluor cites to no contractual provision shifting the risk of hurricanes and lightning to the government. *See, e.g.*, FAR 16.202-1 (firm-fixed-price contracts are not adjustable based on contractor's cost experience).

O. Access

We deny Fluor's claim for purportedly extra-contractual work related to access issues because the contract explicitly provides that Fluor was to arrange for access to the worksite (R4, tab 17.47 at GOV31163; tab 17.58 at GOV32037 ("The Contractor shall make all arrangements through the appropriate office necessary to obtain access to buildings, facilities and other work areas, and when necessary, arrange for them to be opened and closed by the controlling authority.")). As the contract required Fluor to arrange for access, Fluor did not perform extra-contractual work when it was unable to access assets because it had not coordinated access in advance.

IV. Facts Pertaining To Fluor's Allegations Regarding Asset Condition

Separate from its allegations regarding extra-contractual work, Fluor also asserts that the Navy misrepresented the condition of installation assets. In essence, Fluor's argument is that the solicitation implied that the base assets were maintained to manufacturer specifications, and thus could be maintained to the contractually-required condition. Instead, according to Fluor, the assets had been neglected and

needed major repair or replacement. This argument overlaps the prior argument (purportedly extra-contractual work) to the extent that Fluor has alleged that it was not required to make repairs based on "age and condition," "pre-existing," and "condition" codes. We denied Fluor's appeal with regard to its argument that these specific repairs were not required by the contract. In this section, we consider Fluor's arguments of superior knowledge and breach of the duty of good faith and fair dealing, and other allegations of misrepresentation of the general condition of the facilities.

Fluor's price proposal was a "bottom's up" estimate which identified the contract requirements and staffed the project based on those requirements. Fluor went through the PWS and Section J to identify all the requirements that were within the contract and took that information to create an estimate using a computer program and database, known as RSMeans, to create cost estimates. For example, the RSMeans is utilized by contractors to calculate how long it would take to perform the maintenance and calculate the labor that would be required to complete the maintenance tasks. (Tr. 4/204-05; tr 18/21)

Fluor did not include time or costs in its proposal for building a Maximo database from scratch (tr. 4/214). In addition, Fluor's proposal did not account for deficits created for critical, missing data such as maintenance history, failure rates, and "when the last maintenance was performed on individual pieces of equipment" (tr. 4/213-14). That is, Fluor's proposal was reflective of the "assets identified in the J-Tables" (tr. 18/21, 82).

Fluor's proposal assumed that the assets had been maintained by the predecessor contractor consistent with standards required in the RBOS I Solicitation and were in operable condition (tr. 10/96, 158). Fluor's proposal did not include contingencies for maintenance of assets that had not been maintained to OEM standards, or for work associated with overhauling, rehabilitating, restoring, and replacing assets improperly designed or installed, inadequately maintained, or beyond their useful lives (tr. 10/95 - 96).

Mr. Barry, who served as a Fluor estimator, transition manager, and Project Manager for the RBOS I contract, testified that Fluor was unable to achieve planned performance efficiencies because it was understaffed due to what Fluor characterized as the Section J inventory deficiencies: "the actual equipment that we were performing maintenance on was significantly larger than what was provided to us in the J-tables that we utilized to build up our staffing. So we were understaffed . . . ." (tr. 18/48).

As required by the RBOS I Solicitation, Fluor included a detailed Basis of Estimate (BOE) with its price proposal, broken down by Solicitation Annexes, Spec

Items, and asset type (app. supp. R4, tab F268; tr. 18/43). Fluor's BOE contained estimated hours and full-time equivalents (headcount or FTEs) to maintain the type and quantity of Navy assets specified in the Solicitation Section J inventories (app. supp. R4, tab F268; tr. 4/204-05). As an example of how Fluor's BOE used the Section J inventories and RSMeans for scheduled maintenance, Fluor estimated the annual hours of preventive maintenance for 481 air-cooled heat pumps at NAS Jacksonville based on the type and quantity of assets in the Section J inventories and the corresponding tasks, frequencies, and level of effort in RSMeans specification number "D3055 310 1950" (tr. 18/43-46; app. supp. R4, tab F268 at F78912). Although Section J identified systems rather than components, Fluor based its estimate on what was essentially the minimum possible number of components based upon the systems identified in the J tables (tr. 18/113, 237, 252-53). As a comparison and for some RBOS I assets, Fluor used "raw data from Pensacola" associated with specific scheduled maintenance tasks to develop efficiency factors based on "the amount of effort that was used in Pensacola to perform the preventative maintenance" (tr. 5/12-14; tr. 18/47-48). In addition, Fluor utilized real-time data from the Pensacola project because it assumed the similarities between the two projects would make its experience at Pensacola relevant in making estimations in the RBOS I proposal (tr. 4/215).

During the solicitation period, on May 3 through 5, 2010, potential offerors had the opportunity to participate in a three-day site visit (R4 tab 85 at NAVSP29728). From Fluor, Mr. Barry, Bob Funkhouser, and Mr. Ahlstrom participated, along with representatives from certain of their subcontractors (tr. 1/79). The parties disagree regarding the information conveyed by the site visit. The Navy relies upon the testimony of its employee, James Ray, who led the team that developed the specifications for the RBOS I contract and was responsible for the development of the agenda for the site visit (tr. 23/78-79, 104-05). According to Mr. Ray, the purpose of the site visit was to give potential offerors a "chance to look at the sites that they would be supporting, to give a general overview of the kinds of facilities and assets in the locations that they would be providing the services required by the contract to" (tr. 23/77). Mr. Ray testified that he directed his team to prepare a site visit agenda that would show offerors the bases that they would be supporting and to

> [P]rovide them a good representative sample of the kinds of things that they would support in the contract, that was from administrative types of buildings to utilities, sewer plants and water plants … to give a good representative sample so that they have some understanding as to the

> scope of things that they were to undertake in the performance of the contract.

(Tr. 23/77) During the site visit, potential offerors saw equipment that was in a variety of conditions and "saw a good representative sample of what was included in the contract from facilities . . . to utilities and so on" and the feedback from the site visit was good (tr. 23/78).

Conversely, Fluor's witnesses characterized the site visit as a "windshield tour" with limited opportunity to determine the condition of the assets. According to Fluor, the Navy preselected the route and stops without input from the offerors and, with limited exceptions, did not allow offerors off the bus, and did not allow offerors to ask questions on the spot (tr. 3/84-85; 10/100, 103). According to Fluor, the participants were not permitted to perform an inventory, or to view most of the HVAC systems, the water treatment plant, or the wastewater lift stations (tr. 3/85-87; 10/101-06). The site visit stopped at the NAS Jacksonville HVE Substation No. 2, but offerors were not permitted to enter the substation (tr. 3/86, 10/102-03). The offerors were permitted to view the mechanical room at the TVQ Complex and a mechanical room at NS Mayport, which featured equipment in good condition (tr. 10/104-06). And, according to Fluor's witnesses, none of the assets viewed on the tour revealed unusual deterioration, decay, damage, or assets beyond their useful lives (tr. 10/106). Fluor does not allege that it protested the lack of access at the time of the site visit and the record does not contain evidence of a protest by any party.

As discussed above, the contract provided that Fluor would receive the equipment in "as-is" condition. In addition to the contract language cited above, various RFIs during the solicitation period addressed the condition of systems and equipment at the installations. The government told contractors that systems and equipment were in "as-is" condition and made no assurances regarding the current state of equipment (R4, tab 96.16, RFI 50; tab 489, RFIs 138, 368, and 507). In particular, RFI 50 asked about repair and replacement requirements for equipment that was identified as "Near Failure" or "Beyond Service Life – Not Repairable." The government told offerors that "[a]ll equipment will be subject to the Limit of Liability from start of the contract" and that equipment was in "as-is" condition (R4, tab 96.16, RFI 50). RFI 368 asked whether the equipment was free of corrosion and rust, and the Navy responded that the equipment and systems would be in "as-is" condition and not guaranteed to be free of corrosion and rust (R4, tab 5.1 at GOV5364; tr. 10/169-70; tr. 16/160-61).

In RFI 507, the Navy again indicated that systems and equipment would be in "as-is" condition:

> Question: Is all equipment included in the IMP spec item in proper working order according to specs and is it in a maintainable condition? Does it operate and function as designed?
>
> Answer: All equipment in all inventories is to be accepted in "as is" condition.

(R4, tab 6.3 at GOV6189; *see also* tr. 10/13-15)

The term "as-is" condition means that at the time of the contract award, the equipment is turned over to the contractor in whatever state it is in at that moment, without any guarantee of its condition. The government was not warranting as to the specific condition for any of the equipment subject to the RBOS I contract. (Tr. 16/31-33, 161) "As-is" condition was defined in Spec Item 2.1.7 of the contract as "[t]he present state of the vehicle/equipment/component/system at the time it is issued, evaluated, or exchanged" (R4, tab 17.47 at GOV31152; tab 17.58 at GOV32026; tr. 16/32). Spec Item 2.1.7 applied to everything in Section C of the contract (tr. 16/35-36, 99-101).

Fluor did not ask any questions about the condition of systems or equipment at the installations during the solicitation process (R4, tab 489; tr. 10/173).

Obviously, the installations of the RBOS I contract were located on or near corrosive salt water in areas with high humidity, and those conditions would make it unusual for equipment and assets to be free of corrosion and rust, and a reasonable offeror would expect there to be corrosion and rust, and this was known to Fluor (tr. 10/12-13). Tommy Surrency, a consultant for Fluor who served as the lead for Fluor's RBOS I proposal development, knew the condition of systems and equipment at the installations to be covered under RBOS I as he had spent years with the Navy and specifically at NAS Jacksonville prior to joining Fluor to support Fluor's efforts to win the RBOS I contract (tr. 5/6-7; tr. 10/161-63; tr. 23/90-91). The condition of the equipment at NAS Jacksonville and NS Mayport was similar to the typical condition of equipment at other Navy bases. Doug Ayars, Fluor's Project Manager from October 2013 through June 27, 2014, testified that what he saw was "fairly typical situations of variety of equipment condition" (tr. 24/11-12, 18-20, 22-23, 31).

Section J provided building information, including the size and age of the buildings (R4 Tab 17.32 at GOV28848-59; R4 Tab 17.76 at GOV33773-87). Certain Section J attachments provided further information about the age of systems. For example, Section J Attachment J-1606000-01 described that the potable water treatment plant was constructed in the 1960's for NAS Jacksonville and 1940's for NS Mayport (R4, tab 17.32 at GOV28989; R4, tab 17.76 at GOV33911; tr. 12/174-75).

The parties also disagree regarding the condition of the base assets. In general, Fluor relies upon the issues identified in the purportedly extra-contractual work discussion above. The government introduced testimony attempting to demonstrate the condition issues were the result of Fluor's failure to maintain the base assets properly. The government relied upon the testimony of Lawrence Ossi, an electrical engineer in the Public Works Product Line, who previously served as a Public Works Department Commodity Manager for the electrical system at NS Mayport (August 2010 through December 2012) and then NAS Jacksonville, until returning to NS Mayport to again serve as the Public Works Department Commodity Manager for the electrical system there (tr. 16/129-32). Mr. Ossi testified that NS Mayport is located right on the water, and thus metal objects deteriorate much more rapidly than they do inland (tr. 16/132). The prior contractor, IAP-Hill, subcontracted the maintenance of the electrical system to JEA, a commercial utility service based in Jacksonville (tr. 16/132-33). According to Mr. Ossi, JEA was proactive in their maintenance program and kept things "very well maintained" (tr. 16/135). When Fluor took over as BOS contractor around July 2012, according to Mr. Ossi, the condition of the electrical systems and equipment was functional, operational, and in very good shape (tr. 16/135-36). However, Fluor brought in two electricians to perform that role previously served by JEA, and they did not have the ability to do all the operating required of the electrical system and were not regularly performing preventative maintenance. Mr. Ossi testified that, "I never saw them get out in the field and do any kind of preventative maintenance and they definitely were not able to operate the system." (Tr. 16/136) Mr. Ossi testified that preventative maintenance stopped under Fluor (tr. 16/139-40).

Mr. Wayne Jensen, the Navy's facility support contract manager, stated that the Navy required Fluor to perform maintenance and repairs on assets that were beyond their useful life, not operating within OEM specifications, and severely corroded (tr. 17/56-58). He does not think the Navy was obligated to provide "full disclosure" to Fluor regarding the condition of the assets that were the subject of the RBOS I contract (tr. 17/63, 93). He also agreed that from 2012 to 2015, when he had some responsibility associated with several NAS Jacksonville facilities, the Navy did not have sufficient funding to address all asset conditions at those facilities (tr. 17/82-83). Ms. Vissers testified the RBOS I contract included "old, worn assets" (tr. 16/46, 81).

Fluor also asserts that the Navy violated its contractual obligations pursuant to the government-furnished property clause. The Government Property clause defines Government-Furnished Property as "spares and property furnished for repair, maintenance, overhaul, or modification" and provides that if the government provides property that is not in suitable condition the CO should consider an equitable adjustment. FAR 52.245-1.

Decision On Fluor's Allegations Regarding Asset Condition

Fluor alleges that the government possessed superior knowledge regarding the true condition of the base assets that it did not share with offerors, that the government violated the government-furnished property contract clause, and that the government violated its duty of good faith and fair dealing.

As a general rule, a contractor performing a fixed-price contract assumes the risk of unexpected costs. *See, e.g., Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774, 777-78 (Ct. Cl. 1963). However, the government has an implied duty to "disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Scott Timber Co. v. United States,* 692 F.3d 1365, 1373 (Fed. Cir. 2012) (quoting *Giesler v. United States,* 232 F.3d 864, 876 (Fed. Cir. 2000). Superior knowledge generally applies when:

> (1) a contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

*Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994) (quoting *American Ship Bldg. Co. v. United States*, 654 F.2d 75, 79 (Ct. Cl. 1981)).

Fluor contends that the government's conduct satisfies the four requirements enumerated above (app. br. at 440-41). Fluor cites generally to the HKA report as evidence that the purportedly extra-contractual work was "significant and pervasive" (app. br. at 216-354). As noted above, the HKA report is not based upon a statistical sample, but rather problems identified by Messrs. Sherwood and Averitt in buildings that they perceived to be a source of problems (app. supp. R4, tab F73 at 51; tr. 12/104-105; tr. 15/193-95). Messrs. Sherwood and Averitt developed a list of

purportedly extra-contractual work and used a set of codes to group the work into related categories (app. supp. R4, tab 76 at 179-80; tr. 12/105; tr. 13/140; tr. 15/11-25). Mr. Sherwood tagged approximately 13,000 work orders for the NAS Jacksonville and Mr. Sherwood tagged approximately 8,400 work orders for MS Mayport (tr. 11/15; tr. 12/105; tr. 13/140; app. supp. R4, tab 73 at 57). Messrs. Sherwood and Averitt reviewed the work orders for 55 buildings at Jacksonville and 46 buildings at Mayport (tr. 15/207-08; R4 Tab F73 at 52). These buildings represented only about 10% of the buildings and structures at the facilities (R4, tab 17.32 at GOV28848-59; tab 17.76 at 33773-87).[6] We accepted the HKA report while considering Fluor's allegations of extra-contractual work because Fluor only needed to establish that it performed some extra-contractual work. Here, Fluor attempts to use the statistically biased (non-random) sample to imply that the condition of the sampled assets applied to all the assets in the contract. Discounting the HKA analysis, we are left with conflicting testimony from Fluor employees that the condition of the equipment was worse than they had expected or seen on other Navy facilities and testimony of Navy employees that the condition was similar to that of other Navy facilities. The most compelling testimony was that of Mr. Ayres, a former Navy employee later employed by Fluor as the Project Manager from October 2013 through June 27, 2014. He testified that what he saw was "fairly typical situations of variety of equipment condition" (tr. 24/11-12, 18-20, 22-23, 31).

Given that Fluor's argument is premised on a non-random sample of buildings and given the deficiencies in the coding process discussed above, and the conflicting testimony regarding the overall condition of the assets, we find that Fluor has not established that the assets were in worse than expected condition, let alone that the Navy *knew* that the assets were in worse condition than apparent from the "windshield tour." Fluor relies on the Navy's access to the IAP-Hill database for knowledge of the condition – the same database that Fluor contends in its Maximo claim did not contain sufficient information to perform the contract.

Even if we were to assume that Fluor had established that the government *knew* that the base assets were in worse condition than represented, we would still find that Fluor had not established a superior knowledge claim because Fluor cannot establish that a contract specification misled the contractor or did not give it a reason to inquire. The contract, and the questions and answers, specifically and repeatedly warned offerors that they were accepting the assets in "as-is" condition (R4, tab 17.47 at GOV31152; tab 17.58 at GOV32026; tr. 16/32). Spec Item 2.1.7 applied to

[6] Admittedly, the reviewed buildings probably represented far more than 10% of the work since the list of buildings and structures included structures like picnic shelters that likely represented a very small amount of work.

everything in Section C of the Contract (tr. 16/35-36, 99-101; R4, tab 5.1 at GOV5364; *see also* tr. 10/169-170; tr. 16/160-61; R4, tab 5.1 at GOV5364). Although not directly on point, the Board has found that an "as is" provision puts a contractor on notice to inquire. *See Steelcraft Indus. and Dev. Corp.*, ASBCA No. 50825, 00-2 BCA ¶ 30,993 at 153,037 (finding that contractor failed to establish that a sales contract with an "as is" provision was misleading or failed to put contractor on notice to inquire). We hold that Fluor has not established that the Navy failed to disclose superior knowledge.

Fluor additionally asserts that the government violated the government-furnished equipment provisions of the contract. Fluor asserts that FAR 52.245-1(d) required the Navy to furnish equipment that was suitable for its intended purpose and the Navy failed to comply with the clause because the Navy supplied assets that were in a "deteriorated" condition (app. br. at 443-47). The Government Property clause defines Government Furnished Property as "spares and property furnished for repair, maintenance, overhaul, or modification." FAR 52.245-1(a). The clause also provides that, if the government furnishes the property in an unsuitable condition, "the CO shall . . . consider an equitable adjustment to the contract . . . ." FAR 52.245-1(d)(i). Thus, according to Fluor, the government violated the government-furnished property clause by providing equipment in a condition that was "not suitable for its intended purpose" and is entitled to an equitable adjustment (app. reply at 79-80).

The contract contained Spec Item 2.4, "Government-Furnished Property, Materials and Services," which provided that the government-furnished property was the property referenced in table J-0200000-06 (R4, tab 1.1 at GOV104). The contract contained the J-0200000-06 table for each of the sites (R4,tab 18.036.2 at NAVSE 102846-48; tab 18.6.11 at GOV17192; tab 18.116.1 at GOV18748; tab 18.151.11 at GOV22303; tab 18.190.01 at NAVSE121184-85). These J tables enumerated specific items being provided, such as storage buildings or specific pieces of equipment, such as a welder, a lathe and a radial arm saw (R4, tab 18.151.11 at GOV22303) but did not list the equipment that Fluor complains about such as HVAC systems, building roofs, and CHT risers. Thus, it is clear that the facilities and equipment to be maintained in the ROBS I contract are not government-furnished equipment within the meaning of FAR 52.245-1(d).

Fluor additionally contends that the Navy breached the duty of good faith and fair dealing in its actions under the contract (app. br. at 455-57). Fluor asserts that the government breached the duty of good faith and fair dealing with regard to the Maximo database, the section J inventories, and equipment with pre-existing condition issues (app. br. at 456).

Every contract "imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (quoting Restatement (Second) of Contracts § 205 (1981)). However, this duty of good faith and fair dealing "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Id.* at 991 (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010)). The implicit duty prevents a contracting party from "interfer[ing] with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Id.* (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (emphasis deleted)). "[T]he doctrine imposes duties that fall within the broad outlines set forth by the express terms of the contract, approximating the parties' intent, as divined by the express terms of the contract, for addressing circumstances not specifically set forth by the contract." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,085 at 180,539.

Here, Fluor simply asserts that the same actions we have already reviewed are breaches of the duty of good faith and fair dealing. We already found a constructive change with regard to the Maximo database, so the alleged breach of the duty of good faith and fair dealing is duplicative. Similarly, we already held that Fluor misinterpreted the contract with regard to the Section J inventories and that the contract's "as-is" clause prevented recovery for the pre-existing issues with equipment. We address Fluor's CPARs claims below but deny the remainder of Fluor's good faith and fair dealing claim.

Fluor additionally asserts entitlement to compensation because of a purported cardinal change to the contract. Once again, we found a constructive change with regard to the Maximo database so need not reach the cardinal change issue with regard to the CMMS. Fluor additionally asserts a cardinal change due to the amount of work required due to unlisted assets and assets not in their expected condition (app. br. at 448-55).

A cardinal change occurs when the government changes the performance required under the contract to require materially different work. *See, e.g., Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1332 (Fed. Cir. 2003). A cardinal change is so dramatic, that it cannot be remedied through the changes clause and constitutes a breach of contract by the government. *See, e.g.*, *AT&T Commc'ns, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (quoting *Allied Materials & Equip. Co. v. United States*, 569 F.2d 562, 563-64 (Ct. Cl. 1978)). Here, we found above that Fluor had not established that it was required to perform work not required the contract. Thus, there was no change, let alone a cardinal change.

V. Facts Pertaining to the Navy's CPARS Ratings of Fluor

The government maintains a database of contractor performance under previously awarded contracts for use in future source selections. *See* FAR 42.1500. The relevant information, as set forth in FAR Subpart 42.15, includes a contractor's record of –

(1) Conforming to requirements and to standards of good workmanship;
(2) Forecasting and controlling costs;
(3) Adherence to schedules, including the administrative aspects of performance;
(4) Reasonable and cooperative behavior and commitment to customer satisfaction;
(5) Reporting into databases (see subpart 4.14 and 4.15);
(6) Integrity and business ethics; and
(7) Business-like concern for the interest of the customer.

FAR 42.1501 General (OCT 2010).

The FAR requires that the agency's evaluation of the contractor's performance be submitted to the contractor and also requires the agency to afford the contractor an opportunity to submit comments, rebutting statements, or additional documentation. FAR 42.1503. The FAR further provides that "[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency." FAR 42.1503(d) Procedures (OCT 2010).

The contract in this appeal described performance assessment criteria in the Award Option Plan using adjectival ratings of unsatisfactory to exceptional (R4 Tab 18.4.1 at GOV17098-101). The Award Option Board used the Award Option Plan criteria to evaluate Fluor's performance in determining whether to award contract options. The people who comprised the Board were not contracting personnel, but the actual clients or representatives of the paying tenant activities being supported under the RBOS I contract. However, the Award Option Plan ratings did not necessarily relate back to the contract requirements, and the Award Option Plan criteria were different from the CPAR criteria contained in the FAR, despite using the same adjectival ratings (tr. 28/54-55). Relevant to this appeal are the definitions of Marginal and Unsatisfactory. The government defined Marginal as "[p]erformance does not meet some contractual requirements. The element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions." Unsatisfactory was defined as "[p]erformance does not meet most contractual requirements and recovery is not likely in a timely manner. The element being

assessed contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective." (*See, e.g.,* app. supp. R4, tab F57 at F918)

The Base Year Interim CPAR evaluation assessed the period July 1, 2012 through December 31, 2012 (app. supp. R4, tab F2231). For Quality of Product or Service, Schedule, and Business Relations, the Navy rated Fluor Satisfactory (*id.*; tr. 27/193). The Navy did not include comments regarding Fluor or the Navy's Maximo systems (app. supp. R4, tab F2231 at F612640-641; tr. 27/193-94).

The Base Year Final CPAR evaluation assessed the period January 1, 2013 through June 30, 2013 (app. supp. R4, tab F57 at F917; tr. 27/196). The Navy submitted the Base Year Final evaluation on February 11, 2014, roughly seven months after the evaluated period ended, and the day after the Navy denied Fluor's Maximo REA (app. supp. R4, tab F57 at F922; tab F65 at F982; tr. 27/196). For Quality, Schedule, and Business Relations, the Navy rated Fluor Unsatisfactory (app. supp. R4, tab F57 at F918; tr. 27/196-97). For Quality, the Navy asserted: "Fluor failed to maintain records stored in the Government's Computerized Maintenance Management Systems current and accurate, as required by Annex 0200000 Management and Administration, Specification Item 2.6.4 Government's Computerized Maintenance Management Systems (CMMS)" (app. supp. R4, tab F57 at F919). Regarding Business Relations, the Navy stated:

> The contract requires the Contractor to maintain records stored in the Government's Computer Maintenance Management System (CMMS) current and accurate. The Contractor may choose to accomplish this requirement by Flat File or Direct Entry. Fluor chose the Flat File. As of May 29, 2013 (11 months after start of contract performance) Fluor continued to find bugs in their system and with the Flat File.

(*Id.* at F921)

The base year final CPAR evaluation also asserted that Fluor's Quality rating was Unsatisfactory because of deficiencies in its Quality Control Program; failure to provide personnel with the qualifications, technical knowledge, experience and skills to efficiently operate the base; a failure to develop and implement an integrated maintenance program, and the government's issuance of 15 contract discrepancy reports (app. supp. R4, tab F57 at F919-20). The government's Unsatisfactory rating for schedule does not reference the CMMS issue (*id.* at F920). The Unsatisfactory rating for business relations was based on the CMMS issue, as noted above, but also

the fact that the government increased its level of withholdings and also deficiencies in Fluor's proposals for estimating over and above work (*id.* at F921).

The Option Year 1 Interim CPAR evaluation assessed the period July 1, 2013 through December 31, 2013 (app. supp. R4, tab F58 at F924). Fluor submitted rebuttal comments, disputing the Navy's Option Year I Interim evaluation (*id*. at F929-34). For Quality, the Navy rated Fluor Marginal (*id.* at F925). The rating was, again, based in part on the government's belief that Fluor had failed to maintain the records in the CMMS current and accurate (*id.* at F927). The rating was also based on other deficiencies that Fluor contends were the result of the government's failure to provide a populated CMMS database, including failure to implement the necessary work control procedures to ensure timely completion of the work requirements and to permit tracking and reporting of work in progress and to plan and schedule work to assure material, labor, and equipment are available to complete work requirements within the specified time limits (*id.* at F926). However, the rating was also based upon what appear to be unrelated issues, such as failure to establish a quality management system; failure to provide personnel with the qualifications, technical knowledge, experience and skills required; failure to maintain the NS Mayport water system in accordance with EPA requirements; failure to perform scheduled maintenance on water supply equipment; failure to develop and implement an integrated maintenance plan for the NS Mayport wastewater treatment plant; failure to maintain electrical equipment; failure to read and record data from electric meters; contract work being performed without accepted wastewater treatment procedures; failure to submit certified payrolls; the government issuing eight contract discrepancy reports; failure to provide shore steam at NS Mayport; failure to notify the customer of completed work; failure to perform proper maintenance; failure to perform adequate maintenance of the installation DDC system; and five validated customer complaints relating to cranes at Jacksonville (*id.* at 926-27). The Navy also determined that Fluor failed to meet contractual requirements, resulting in a "Marginal (+)" rating for business relations. The Navy noted that the government increased its level of withholdings, and that "[a]dditional Government resources had to be redirected to manage this effort" (*id.* at 928). The Navy additionally cited significant turnover in key personnel and deficiencies in Fluor's proposals for additional work (*id.*).

The Option Year 1 Final CPAR evaluation assessed the period January 1, 2014 through June 30, 2014 (app. supp. R4, tab F69 at F1007). The Navy submitted the Option Year 1 Final CPAR at the end of September or the beginning of October 2014 (tr. 27/204). The Navy rated Fluor Satisfactory for Quality, Marginal for Schedule, Satisfactory for Management, Marginal for Utilization of Small Business, and Satisfactory for Safety (app. supp. R4, tab F69 at F1008). Fluor did not agree with

these ratings and submitted rebuttal comments asserting it was entitled to a rating of Very Good at least (*id.* at F1009- 11).

The Option Year 2 Interim CPAR evaluation assessed the period July 1, 2014 through December 31, 2014 (app. supp. R4, tab F70 at F1013). Fluor again submitted rebuttal comments, disputing the Navy's evaluations (*id.* at F1015-17). For Quality, the Navy rated Fluor Marginal (*id.* at F1013). The Navy determined that Fluor had satisfied the contractual requirements for most of the contract, but had not met contract requirements in the Facility Investment, Water, and Wastewater annexes (*id.* at F1014). The Navy also determined that Fluor's quality management system was deficient (*id.*).

The Option Year 2 Final CPAR evaluation assessed the period January 1, 2015 through June 30, 2015 (app. supp. R4, tab F2237 at NAVSE65179). The Navy submitted the Option Year 2 Final CPAR evaluation at the end of March 2016, roughly nine months after Fluor completed Option Year 2 performance (*id.* at NAVSE65185). Fluor submitted rebuttal comments, disputing the evaluations (*id.* at NAVSE65181-84). For Quality, Schedule, and Management, the Navy rated Fluor Marginal (*id.* at 65180). Fluor disputed these ratings and Fluor's self-assessment from Option Year 2 was not reflected in the Navy's CPAR ratings (app. supp. R4, tab F1303).

The Option Year 3 Interim CPAR evaluation assessed the period July 1, 2015 through December 31, 2015 (app. supp. R4, tab F2240 at F2375549). Fluor submitted rebuttal comments, disputing the evaluations (*id.* at F2375551-53). For Quality, the Navy rated Fluor Marginal (*id.* at F2375550). The Navy determined that Fluor failed to meet some contract requirements in Management and Administration, Facility Investment and Water annex/sub-annexes (*id.*at F2375550). The Navy additionally determined that Fluor failed to provide an acceptable inspection system, failed to ensure compliance with attendance and personnel certification requirements, and failed to implement the BestPLANT asset performance improvement process from its proposal (*id.*).

The Option Year 3 Final CPAR evaluation assessed the period January 1, 2016 to June 30, 2016 (app. supp. R4, tab F1706 at F1331007). The Navy submitted the Option Year 3 Final CPAR on June 7, 2017, roughly one year after Fluor completed performance in Option Year 3 and roughly two months after the Navy's Award Option Board issued its March 2017 memorandum for the first six months of Option Year 4 performance (*id.* at F1331009; tab F2249 at NAVSE65386). For Quality, Schedule, and Management, the Navy rated Fluor Marginal (app. supp. R4, tab F1706

at F1331008). Fluor disagreed, submitted rebuttal comments, and requested reevaluation (tr. 27/157).

The Navy did not conduct an interim CPAR evaluation for Option Year 4 (tr. 27/155). The Option Year 4 Final CPAR assessed the period July 1, 2016 through June 30, 2017 (app. supp. R4, tab F2244 at 1). The Navy issued the Option Year 4 Final CPAR on April 27, 2020, nearly three years after Fluor completed performance on Option Year 4 (*id.* at 3). The Navy rated Fluor Satisfactory, and the Navy's recommendation stated that the Navy "would recommend [Fluor] for similar requirements in the future" (*id.* at 2-3).

The Navy issued a CPAR evaluation for the period July 1, 2017 through June 30, 2018 (Invalid Option) on April 22, 2020, roughly two years after Fluor completed performance on the Invalid Option (app. supp. R4, TAB F2245 at 1, 3; tr. 27/163-64). The Navy rated Fluor Satisfactory, and the Navy's recommendation stated that the Navy "would recommend [Fluor] for similar requirements in the future" (R4, tab F2245 at 2-3).

The Navy issued a CPAR evaluation for the six-month extension period of July 1, 2018 through December 31, 2018, on April 27, 2020, more than a year after the performance period ended (app. supp. R4, tab F2246 at 1-3). The Navy rated Fluor Satisfactory, with a "Very Good" for regulatory compliance; the Navy's recommendation stated that it "would recommend them for similar requirements in the future" (*id.* at 2-3).

Decision on CPARS Issue

Fluor asserts that the CPARS ratings were inaccurate because the government incorrectly determined that Fluor had not performed work that Fluor contends was not part of the contract—specifically populating the Maximo database, performing work on assets not listed in the J tables, and performing work on assets that had not been properly maintained. In our decision above, we held that the Navy had constructively changed the contract by requiring Fluor to create a Maximo database but denied Fluor's other claims. Given that the Navy's statements regarding the Maximo database are not valid, we must review the CPARS to see if the Navy's ratings were supported by the evidence. However, the briefing by the parties does not address how the Board should evaluate a CPARS rating that is based, in part, on legally or factually incorrect information. Our jurisdiction allows us to determine whether a CPARS rating is arbitrary and capricious, but we cannot direct the government to revise a CPARS evaluation in a particular manner, or to assign a specific rating. *See, e.g.*, *MicroTechnologies, LLC*, ASBCA Nos. 59911, 59912, 15-1 BCA ¶ 36,125,

at 176,348; *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34,437, at 169,959. Our review of the decisions to date involving CPARS evaluations leads us to believe that this is a question of first impression. Here, we have held that the government failed to provide a populated Maximo database, as contemplated by the contract. However, we also denied Fluor's appeal with regard to the equipment inventories and the general condition of the assets.

Pursuant to *Todd Constr., L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011), we review CPAR ratings pursuant to an arbitrary and capricious standard. As such, it is similar to our review of a contracting officer's decision to terminate a contract for default. Thus, the question is whether the Board can sustain a CPARS rating where some of the purported deficiencies upon which it is based have been found to be unsupported or legally erroneous by the Board.

*Todd* was on appeal from a dismissal by the trial court for lack of standing and failure to assert a claim. *Todd*, 656 F.3d at 1310. The contractor complained of issues related to the timeliness of its performance. *Id.* at 1316. The Federal Circuit noted that the performance evaluations did not specify how much of the delay was attributable to the contractor, but that the contractor had to at least allege facts asserting that all of the substantial delays were excusable. *Id.* at 1316-17. Finding that Todd had not even alleged facts that would excuse the delays caused by its subcontractors and noting that Todd had pleaded in its complaint that it had timely submitted "the majority"—that is, not all—of the submittals to the government, the Federal Circuit affirmed the trial court's dismissal of Todd's CPAR's cause of action for failure to state a claim. *Id.* However, the Federal Circuit's upholding of the CPAR rating was apparently due, in part, to the performance standard applicable in *Todd*. In that appeal, Todd's performance was reviewed pursuant to Engineer Regulation 415-1-17 (Mar. 26, 1993). *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 235, 246 n.7 (2009). That regulation provided that "[u]nsatisfactory performance on one or more of the elements to be rated, may be sufficient to justify an overall unsatisfactory rating." ER 415-1-17 (5)(c)(2) (Mar. 26, 1993).

Here, we conduct our review of Fluor's evaluation following a decision on the merits. Thus, we can determine whether the CPARS evaluation is supported based upon our factual findings, rather than whether Fluor has alleged a set of facts that all of the substantial delays were excusable. However, the standard for "Unsatisfactory" performance in Fluor's contract is markedly different from the standard at issue in *Todd*. In *Todd*, an "Unsatisfactory" rating could be upheld based on "unsatisfactory performance on one or more of the elements to be rated" while in Fluor's contract "Unsatisfactory" was defined as performance not meeting "most contractual requirements" where, additionally, "recovery is not likely in a timely manner" and the

element being rated contains "a serious problem(s) for which the contractor's corrective actions appear or were ineffective." Thus, just finding that Fluor was responsible for some, but not all, of the cited deficiencies would have been sufficient to uphold a "Unsatisfactory" rating pursuant to ER 145-1-17 in *Todd*, but it is not sufficient in this appeal. To find that the "Unsatisfactory" ratings here were supported, the Board would need to determine that Fluor 1) failed to meet "most contractual requirements;" 2) that "recovery is not likely in a timely manner;" and 3) that the element being rated was "a serious problem" for which Fluor's corrective actions "appear or were ineffective" (app. supp. R4, tab F57 at 918). While the record supports a finding that Fluor did not satisfy all of the contractual requirements, we are without measurable criteria to determine if "most contractual requirements" were met. Moreover, our finding that the Navy constructively changed the CMMS requirement likely contributed, at least to some degree, to Fluor's difficulty meeting scheduling requirements and possibly to the development of the maintenance plans.

Finally, we note that, to the extent the government could have put on evidence that an Unsatisfactory rating was still justified, even if the Board granted Fluor's appeal with regard to the CMMS system, it failed to do so. Fluor noticed a Rule 30(b)(6) deposition of the Navy regarding the CPARS ratings. In response, the Navy designated Ms. Vissers; however, she failed to perform adequate preparation to answer Fluor's questions regarding the deposition topics. Fluor filed a motion for sanctions that was denied by the Board, but we granted alternative relief that the Navy was bound by its designee's answers (Bd. Order dtd. April 1, 2021 at 7 [dkt. 169]). For questions regarding CPARS, those responses were generally "I don't know" (*id.*). Thus, we conclude that the Navy did not know whether recovery was likely in a timely manner or whether that element was a serious problem.

The analysis is the same for the marginal ratings. The contract provided that "Marginal" means that "[p]erformance does not meet some contractual requirements. The element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions" (app. supp. R4, tab F57 at F918). While we could determine that performance did not meet some contractual requirements, we are without a basis to conclude that the deficiencies, absent the impact of the CMMS issue, were 1) a serious problem, and 2) that Fluor had not identified corrective actions. Similarly, we find that the Navy did not know whether that was the case.

Accordingly, we conclude that we cannot uphold the CPARS ratings and return the matter to Navy to prepare a rating consistent with this decision.

## CONCLUSION

For the reasons stated above, we sustain Fluor's appeal in part with regard to the Maximo issue and return the appeal to the Navy to review its CPAR ratings consistent with the Board's decision. We deny the remainder of Fluor's appeal.

Dated: February 13, 2025

DAVID D'ALESSANDRIS
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

I concur

ELIZABETH WITWER
Administrative Judge
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 No. 61543, Appeal of Fluor Federal Solutions, LLC, rendered in conformance with the Board's Charter.

Dated: February 13, 2025

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