ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
United Launch Services, LLC	)	ASBCA Nos. 56850, 57542, 57661,
	)	
Under Contract No. F04701-98-D-0002	)	

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OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT

This appeal arises from the denial of a claim filed with the contracting officer (CO) for increased costs associated with satellite launch services. The United States Air Force (Air Force or government) has moved for summary judgment to deny Counts I, III[1], and IV, and "a portion of Count II" of the complaint filed in the above-captioned appeals.[2] United Launch Services, LLC (ULS or appellant) opposes the motions. For the reasons stated below, the motions are granted in part with regard to Count II, and the remainder of the motions are denied.

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[1] The government also moved to dismiss Count III of appellant's complaint for lack of jurisdiction, contending that ULS's claim upon which the appeal was based (ASBCA No. 56850) did not allege a mutual mistake of fact. ULS filed a protective claim and appeal (ASBCA No. 57542) to protect its ability to pursue a claim based on mutual mistake. By Order dated 14 March 2013, the Board deferred ruling on the motion until a decision on the merits has been reached.

[2] Although the government styled its filings as motions for partial summary judgment, we interpret them as full motions for summary judgment on all counts.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

The RFP

1. On 19 June 1998, the Air Force issued Request for Proposals (RFP) No. F04701-97-R-0008 for Development and Initial Launch Services under the Evolved Expendable Launch Vehicle (EELV) program. The RFP described the purpose of the EELV Program as follows: "The primary requirement of the EELV program is to execute the government portion (DoD and NASA) of the National Mission Model at lower recurring costs than those of current expendable systems. The program should also maintain or improve reliability, capability, and operability." (R4, tab 24 at 4)

2. The RFP contemplated award of two separate contracts to two offerors. One contract was a Development Agreement under Other Transactions authority to partially fund the completion of the contractor's development of an EELV launch capability. The other contract, referred to as the Initial Launch Services (ILS) Contract, was to procure an initial set of EELV launch services. (R4, tab 21 at 3)

3. The purpose of the ILS Contract was to acquire launch services for all of the launches identified in the government portion of the National Mission Model in FY02-FY05. The anticipated period of performance started in FY98 and ended in FY05. A contractor's actual period of performance would depend on the number and type of launches awarded to that contractor. (R4, tab 21 at 3) The number and type of launches awarded to a particular contractor was to be made on a best value basis (*id.* at 7). Also, the contract was to be awarded utilizing the commercial items procedures set forth under FAR Part 12 (R4, tab 26 at 8).

4. Annex 2 of the RFP contained the government portion of the National Mission Model (NMM), which showed the anticipated government EELV launches during the period 2001-2020. The government portion of the NMM model was set out in total and was also broken out into Mission Model A and Mission Model B. In total, 183 government EELV missions were shown on the complete mission model, which was the sum of the missions shown on Mission Model A and Mission Model B. (R4, tab 23) We find that there were no commercial EELV missions shown on the complete mission model, on Mission Model A, or on Mission Model B.

5. The RFP instructed offerors to propose fixed prices for each contract line item number (CLIN) for each launch service (mission) in FY02-FY05 (R4, tab 21 at 25). Offerors were to submit proposed prices by mission and year on Attachment 6 to the Model Contract, in accordance with Annex 9 (R4, tab 21 at 28, tabs 25, 26 at 43).

6. The RFP required offerors to "provide a file (**COMM.PDF**) which summarizes impacts of the Offeror's commercial launch capture on the Offeror's ability to execute the Government's EELV launch service requirements" (R4, tab 21 at 21).

7. The RFP required offerors to submit a Life Cycle Cost Estimate (LCCE) for the Offeror's EELV system. The LCCE was to reflect the life cycle costs for all of the launches identified in Mission Model A and Mission Model B, provided in the RFP. Offerors were instructed to update the LCCE they had submitted during the predecessor contract, which was referred to as the Pre-Engineering and Manufacturing Development (Pre-EMD) contract. An offeror that did not show at least a 25% reduction from the Launch Cost Baseline (LCB) provided in the RFP would not receive a Development agreement. (R4, tab 21 at 20)

8. The Pre-EMD RFP required offerors who had participated in that earlier phase of the EELV procurement to base their LCCE on the government portion of the NMM and to "[a]ssume a commercial capture of 12 launch vehicles per year (6 Delta class and 6 Atlas class), except for FY01, where you shall assume a commercial capture of 6 launch vehicles (3 Delta class and 3 Atlas class)" (R4, tab 18 at 5).

9. Boeing submitted its initial proposal in response to the ILS RFP on 20 July 1998 (R4, tabs 29-40). Boeing proposed fixed-prices for launch services in Attachment 6 to the Model Contract, as instructed by the RFP (R4, tab 40).

10. Boeing submitted an updated LCCE for the EELV program with its proposal (R4, tab 30 at 6-7). The proposal stated that Boeing's assumptions about its capture of the government and commercial launch markets for pricing ILS launch services were different than the assumptions incorporated into the LCCE as follows: "The LCCE pricing is based on the quantities and vehicle types required by the government's EELV NMMa and NMMb as provided in the request for proposal (RFP), Annex 2. The ILS prices found in ILS ATCH6 ORDERS.DOC are different than the LCCE prices and reflect our competitive analysis for the ILS period of performance and Boeing commercial assumptions." (R4, tab 31 at 9)

11. In its LCCE, Boeing assumed 234 total commercial medium EELV launches for each of "National Mission Model A" and "National Mission Model B." Boeing assumed 6 launches for 2001 and 12 launches per year for 2002-2020 under each mission model. (R4, tab 30 at 6-7)

12. Boeing's proposal did not quantify the assumptions it made about its projected capture of commercial launches in its proposed pricing for ILS launches. However, Boeing's proposal stated that commercial sales during the ILS program would lower government ILS costs (i.e., Boeing's prices), as follows: "Commercial market capture and resulting high production and flight rates will contribute to significantly lowering Air

Force launch services costs throughout the EELV's service life" (R4, tab 29 at 13). Boeing's proposal also indicated that, in its decision to invest in the EELV program, Boeing had made its own favorable projection of the commercial market and its capture thereof: "Our projected commercial capture plan, combined with the EELV program, justified a significant Boeing investment in the EELV/Delta IV program to provide substantial production and launch infrastructure" (R4, tab 36 at 5).

13. Following a government "Downselect Design Review" (DDR) during the Pre-EMD phase of the procurement, Boeing opted not to develop a dedicated launch vehicle for small payloads. Boeing's proposal stated that its rationale for this decision was based, in part, on Boeing's assumption that "by the year 2004, the share of the projected [commercial] launch market for Delta IV will average 24 launches per year. (R4, tab 35 at 15)

14. On 5 October 1 998, Boeing submitted its Best and Final Offer (BAFO) that provided updated prices (R4, tab 47).

The Contract

15. On 16 October 1998, the government awarded to Boeing Contract No. F04701-98-D-0002 (Contract) (R4, tab 50). The Contract incorporated the prices Boeing submitted in its BAFO (R4, tab 58). The Contract awarded 19 launches to Boeing, including the following missions: National Reconnaissance Organization (NROL) A/B-1, Wideband Gap Filler (WGS or WGF), Global Positioning System (GPS) IIF-1, GPS IIF-5, and GPS IIF-9 (R4, tab 50 at 36-37).

16. The contract contained the following clauses and provisions in pertinent part:

> 52.212-4 CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (APR 1998) THIS CLAUSE MAY BE TAILORED IN ACCORDANCE WITH FAR 12.302(b)
>
> ....
>
> (c) Changes/Modifications. Changes in the terms and conditions of this Contract may be made only by written agreement of the parties. Either Party shall have the right to request changes within the general scope of this Contract. Any such requests for changes must be made in writing and signed by an authorized representative of the requesting Party. Within forty-five (45) days of receipt of a change request, the receiving Party shall provide notification to the requesting Party of the cost, schedule, or other terms effected

by the requested change. If any such change causes an increase or decrease in the cost of, or time required for, or both, the performance of this Contract, or otherwise affects any other provision of this Contract, an equitable adjustment shall be negotiated in good faith between the Parties....

(d) Disputes. This Contract is subject to the Contract Disputes Act of 1978.... Failure of the Parties to this Contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this Contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this Contract, pending final resolution of any dispute arising under the Contract.

(R4, tab 50 at 19-20) We find that the contract does not specifically define the term "equitable adjustment."

(6) THE FOLLOWING ADDITIONAL SPECIAL CONTRACT REQUIREMENTS (SCR) ARE APPLICABLE TO THIS CONTRACT:

SCR. 1 REQUIREMENTS

....

(b) Delivery or performance shall be made only as authorized by orders issued in accordance with the following:

(1) The Procuring Contracting Officer (PCO) shall issue orders when requesting the Contractor to furnish any launch services under this Contract....

(2) All orders are subject to the terms and conditions of this Contract. In the event of conflict between an order and this Contract, the Contract shall control.

....

(4) Prior to placing an order, the PCO shall verify the recurring standard launch service Attachment 6

price in accordance with SCR. 19, entitled Most Favored Customer.

....

(d) The Government reserves the right to substitute a payload for an ordered launch service. Before modifying the related order to affect the substitution, the PCO shall consult with the Contractor performing the launch service and request a proposal that provides information regarding any additional costs, impacts to the launch schedule, and other relevant factors. If the Government decides to proceed with the substitution, the proposal will serve as the basis for an equitable adjustment, if any, and the related order will be modified in accordance with the Changes/Modifications clause of this Contract.

(e) No equitable adjustment will be allowed for recurring standard launch services (CLIN 0100) for the substituted payload so long as the substitution remains within the same payload class as defined below. Equitable adjustments for substitutions outside the same vehicle class, mission unique services and mission integration costs incurred to date at the time of payload substitution and launch schedule will be mutually agreed upon....

Vehicle class	**Payloads**
Small	GPS, TSX, SBIRS-LEO, DMSP, SBR/MTI
Medium	DSCS, SBIRS-GEO, Mission A/B, ADV EHF, Wideband Gap Filler
Heavy	DSP, Mission C

(R4, tab 50 at 34, 35) With regard to the GPS payloads, the contract specified that the direct to orbit payload would weigh 2,675 lbs (R4, tab 51 at 8).

The NROL A/B-1 Missions

17. By letter dated 5 November 1999, the government informed Boeing (through its wholly owned subsidiary, Delta Launch Services, Inc.) that it was contemplating modifying the A/B-1 mission launch services to accommodate a heavier payload (Decl. of Steven P. Lehotsky (Lehotsky decl.), ex. 51). The government, by letter dated 5 July 2000, invited Boeing to submit a revised statement of work and cost proposal "to modify

your EELV Initial Launch Service (ILS) contract for anticipated changes to the Mission A/B-1 launch service" (Lehotsky decl., ex. 53).

18. The record indicates that Boeing submitted a proposal dated 10 July 2000, which provided cost information and terms for "a Delta IV Medium (4,2) in place of the Medium (4,0) [launch vehicle] as specified in the original ILS Contract" due to the increased payload weight (Lehotsky decl., ex. 54).

19. The parties entered negotiations and on 18 September 2000, executed Modification No. P00008 which increased the prices for the A/B-1 missions, and contained the following language:

> b. If Boeing is not able to meet the mission requirements, delivering a maximum spacecraft weight of 9,415 lbs.... Boeing will provide an alternative launch service within the EELV family at no additional cost to the Government....
>
> ....
>
> g. In consideration of these contract modifications and associated equitable adjustments agreed to herein, the Contractor releases the Government from any and all liability under this contract for further equitable adjustments attributable to these modifications.

(R4, tab 61 at 2, 3, 43)

The WGS Missions

20. By letter dated 16 May 2001, the government informed Boeing that the WGS payload weight (originally estimated at 11,000 lbs. due to the fact that it was still under development in June of 1998) had increased to 12,500 lbs. Boeing was asked to provide firm prices for the "three (3) WGS" missions under the respective CLINs. (R4, tab 62)

21. On 7 June 2001, Boeing submitted its proposal, upgrading the launch vehicle from a Delta IV Medium to a Delta IV M+ (4,2) (R4, tab 63). Subsequently, on 1 November 2001, the government revised its 16 May 2001 request as follows:

> 2. Since that original request and your proposal submittal (reference a), the WGS requirement has changed. The Contractor should now assume a 13,200 lbs. SV and include a

> 2% performance margin, for a total design mass-to-orbit capability of 13,464 lbs....

Accordingly, Boeing was asked to revise its previous proposal in light of the new information. (R4, tab 64) By letter dated 16 November 2001, Boeing complied with the government's request and proposed that the mission would require a Delta IV M+ (5,4) instead of Delta IV M+ (4,2) (R4, tab 65).

22. The record indicates that the parties continued negotiations and on 29 October 2002 executed Modification No. P00032, which included the increases for the WGF missions (Lehotsky decl., ex. 79).

The GPS Missions

23. By email dated 30 September 2003, the CO forwarded Delivery Order (DO) 0083 and Modification No. P00056. DO 0083 read as follows: "The purpose of this delivery order is to establish CLIN 0103 for GPS-IIF-1 Mission which is being issued as a bilateral agreement due to the late CLIN 0103 start date for GPS-IIF-1." Modification No. P00056 made changes to the contract pursuant to DO 0083 by increasing the GPS IIF CLIN 0103 price due to the aforementioned delays. The CO advised Boeing that if it agreed with the DO and modification, it should sign the documents and return them via facsimile. (R4, tab 85)

24. On the same day, Boeing replied by letter that although DO 0083 reflected a price adjustment based on launch delays, it did not reflect "the launch service price adjustment resulting from GPS IIF-1 Payload growth." Boeing further noted:

> Based on paragraph 3.1.1.1 of [the System Performance Requirement Document, Attachment 1 of the contract], our contractual requirement for GPS IIF-1, is a payload lift off weight of 2,675 lbs. Currently IRS 007 Revision 003...requires a lift-off weight of 3,578 lbs resulting in payload weight growth of 903 lbs.
>
> In order to accommodate this increased weight, the GPSIIF-1 spacecraft will need to be lifted on a Delta IV Medium vehicle. It is our recommendation that the parties defer from signing Delivery Order 0083 until a mutually acceptable price adjustment can be established as a result of the payload class change.

(R4, tab 86)

25. In a subsequent letter, also dated 30 September 2003 which references a teleconference between Boeing and the government, Boeing informed the government that it "has signed the subject modifications with the condition, that Boeing is entitled to an equitable adjustment to CLINs 0100, 0101, 0103 and 0102 should the payload weight grow beyond the lift capability specified in the subject contract" (R4, tab 87).

26. On 16 October 2003, the parties executed Modification No. P00057, which deleted seven launch services. This modification also contained a release which the parties agreed to "mutually release each other from any and all other potential claims...arising under or relating to events that have occurred through the date of this agreement under the EELV contract." This modification also agreed that the above release did not extend to the following:

> (4) The Contractor's Request for Equitable Adjustment (REA) under the "Other Transaction Agreement" (OTA), Group 2, Proposal No. D4-02-019;
>
> (5) Any Contractor REA or claim arising under or relating to the DSCS-2 launch service; and
>
> (6) Any and all other Contractor REAs or claims (in addition to those set forth in subparagraphs (4) – (5) of this paragraph) arising under or relating to the EELV program from October 1998 through the date of this Modification in a total amount not to exceed $20 million.

(R4, tab 90 at 1, 4-5)

27. By letter dated 27 October 2003, Boeing advised the government that it had been informed that the government was intending to order GPS IIF-1 launch services. Boeing requested that the government "provide the current launch weight for the GPS IIF-1 payload, so that Boeing can plan integration activities accordingly." (R4, tab 91)

28. By email dated 23 December 2003, the government forwarded a copy of DO 0086 (GPS IIF-1 launch services) for Boeing to review (R4, tab 96). By letter dated 15 January 2004, Boeing replied as follows:

> As indicated in the referenced letter, the current Space Vehicle (SV) launch weight for the GPS IIF-1 mission is 3758 lbs. This weight represents approximately, a 40% increase to the contractual SV weight of 2675 lbs presently indicated in the System Performance Requirements Document (SPRD) contained in the subject contract. The

> change in SV weight represents a material change to our contract requirements that will result in a "Class of Vehicle Change/LV Class Upgrade and an equitable adjustment, in accordance with the Changes/Modifications clause of the ILS contract. BLS requests that the Government confirm the Space Vehicle weight so we can proceed with our proposal for an equitable adjustment as required.

(R4, tab 98 at 3)

29. On 29 January 2004, Boeing received written confirmation of the payload weight for GPS IIF-1 (3,758 lbs.), as previously requested on 27 October 2003 (R4, tab 100).

30. Boeing responded, by letter dated 5 March 2004, reiterating its position that the new weight of 3,758 lbs. represented a 40% increase to the contractual weight of the GPS IIF-1 payload and, as such, represented "a material change to the contract that requires concurrence by Boeing in accordance with the [Changes] clause." Boeing also stated that it would "prepare a proposal to modify the price for the launch that, once its [sic] agreed upon by the parties, can be included in a contract modification to implement the proposed change to the satellite weight." (R4, tab 100 at 2)

31. On 13 April 2004, Boeing recommended that a Delta IV M+ (4,2) launch vehicle be used to meet GPS IIF mission objectives with the stated payload mass of 3,758 lbs. and indicated that it would provide a firm proposal by 30 April 2004 "utilizing current pricing, for GPS IIF missions IIF-1, IIF-5, IIF-9, and IIF-10" (R4, tab 114).

32. The CO responded, by email dated 14 April 2004, informing Boeing that it should not prepare a proposal to re-price the four GPS missions, as the program office was unclear regarding the price "to add two GEM-60 engines to satisfy a performance problem." Boeing replied that the parties should meet to discuss their contractual concerns and such discussions should include the parties' legal representatives. (R4, tab 115)

33. By letter dated 28 April 2004, the CO reiterated her position from the previous email that Boeing should not prepare a proposal to re-price the four GPS missions. The letter also indicated that technical discussions were ongoing and the CO expected further meetings would be held in order to reach a technical solution. Once the technical solution was agreed upon, the CO advised that the parties can continue contractual discussion regarding the mission. (R4, tab 118)

34. On 3 May 2004, Boeing responded to the CO's 28 April 2004 letter stating:

> Although we understand that GPS IIF technical discussions are on-going, we feel it is important to provide you with our contract position as it relates to ordering missions assigned to the contract, specifically GPS IIF Missions.
>
> Procedure for Ordering the Launch
>
> ....
>
> As indicated by reference (c), the Air Force has adopted a process of ordering launches by contract modification, rather than using the ordering procedure set forth in Part II, paragraph (1), page 2 of the contract. Contract modifications require both parties' approval, and up to this point the Air Force has insisted that the contract modification include a waiver of all claims. Boeing was not able to sign the Air Force's proposed contract modification (reference c) because the Air Force insisted that Boeing waive its right to equitable adjustment for the weight growth.
>
> There are two ways to address this situation. One would be for the Air Force to issue a unilateral order for the launch. Ordering a launch is not, by itself, a contract modification because the contract contemplates such orders. SCR.3 (a) states simply that a Launch Service is ordered by issuance of an order from the Air Force.
>
> The other approach, if the Air Force prefers to use the contract modification method of ordering launches, would be to avoid the use of a waiver to exclude the claim for weight growth.
>
> Equitable Adjustment
> Boeing has prepared and is ready to submit a request for equitable adjustment based on the reference (b) letter. Reference (b) formally notifies Boeing that the GPS IIF satellite weight had increased and is now 40% over the contractually-specified 2675 lbs. The Air Force notice of this weight increase is a change to the contract, as the contract specifies the weight of the satellite with a margin of permitted

> weight increase. The satellite has now grown beyond the weight and margin specified in the contract.
>
> ....
>
> Entitlement
> It is important to understand that the contract is a FAR Part 12 commercial contract, not a FAR Part 15 contract. The prices in the contract were determined commercially, and not on the basis of cost....
>
> ...It is Boeing's position...that if the GPS IIF satellite had been known to weigh in the medium range at the time the contract was signed, the price for the launch would have been higher than it is now.

(R4, tab 120)

35. By letter dated 19 May 2004, the CO advised Boeing that the program office was not in a position to order the GPS IIF mission (R4, tab 124).

36. By letter dated 15 June 2004, Boeing submitted a REA for the GPS IIF mission due to the "Change/Increase in Payload Mass." The letter stated further:

> We consider the increase in payload mass to be a change to our contract requirements, and therefore we interpret the [29 January 2004 payload weight confirmation letter] to be a request to modify our contract. As mentioned above, we are pleased to submit our proposal based on your request during the...meeting. We also consider the submittal of this proposal to be a requirement under the changes clause.

(R4, tab 126)

37. The CO forwarded DO 0086 to Boeing attached to a letter dated 28 June 2004. That letter advised that the "System Performance Requirements Document (SPRD), Attachment 2, Revision 2, will be modified by a separate contract modification for this mission only" and will include that the GPS IIF-1 spacecraft weight will not exceed 3,758 lbs. Boeing was requested to sign the delivery order by 30 June 2004. (R4, tab 129)

38. Boeing responded, by letter dated 9 July 2004, indicating that it executed DO 0086, conditioned upon certain deletions being made from the aforementioned

delivery order. Its basis for conditionally executing the order was, *inter alia*, to reserve its rights to an equitable adjustment due to the increase in satellite weight. Boeing also advised that it intended to satisfy the GPS IIF launch service mission using the Delta IV M+ (4,2) Launch Vehicle due to the increase in payload weight, and had conducted "numerous trades and have concluded that the use of the Delta IV Medium (4,0) Launch Vehicle represents an unacceptable level of risk to The Boeing Company." (R4, tab 132)

39. The parties continued to discuss the GPS IIF mission's technical requirements and contractual implications of the increased payload weight (R4, tab 138 at 2-4). The record reflects that throughout the months of August and September of 2004, the Air Force held numerous briefings on solutions to the mission problems (R4, tabs 137-39, 141). The parties were unable to reach an agreement on the 15 June 2004 REA.

40. By letter dated 7 March 2005, the CO forwarded DO 0086 and Modification No. P00075 for Boeing's signature. The delivery order did not include a price increase for the mission, as the Air Force maintained that the smaller launch vehicle (4,0) met the mission requirements. In addition to removing the release of claims provision from the previous version of DO 0086 and setting the required launch date as "no later than 31 Aug 05" the CO stated the following:

> For the Government to properly evaluate your Request for Equitable Adjustment, you must submit evidence to support the need for a change in vehicle from a medium to a medium plus. Further, you must submit sufficiently detailed evidence of the actual cost increase caused by the growth in space vehicle weight.

(R4, tab 142)

41. The parties met to discuss the DO and Modification No. P00075 on 9 March 2005. The outcome of that meeting was memorialized in a letter date 11 March 2005, wherein the CO provided the revised DO 0086 and advised Boeing that it would not issue Modification No. P00075. The government, however, expected the mission "to be launched on a medium launch vehicle and intends to coordinate a mission specification consistent with the requirements of a medium launch vehicle." The CO reiterated her request that Boeing provide detailed evidence to support its REA and "any request for equitable adjustment must be accomplished in accordance with the Changes clause (Part III 52.212-4(c)) and certified in accordance with DFARS 252.243-7002 Requests for Equitable Adjustment (MAR 1998)." (R4, tab 143)

42. Through letters dated 15 and 18 March 2005, Boeing informed the government that it had signed DO 0086, but using a Delta IV Medium launch vehicle represented an "unacceptable level of mission risk to The Contractor based on the

increased weight." Therefore, Boeing advised that it would use a "Delta IV +(4,2) launch vehicle for the GPS IIF Mission" and submit an REA. (R4, tabs 144, 145)

43. By letter dated 1 April 2005, Boeing requested that the government coordinate with the Space Vehicle Contractor (SVC) that it intended to utilize the more powerful launch vehicle (Medium + (4,2)) to fulfill the mission (R4, tab 147).

44. The government responded, by letter dated 5 April 2005, and reported that it relayed the requested information to the SVC, but the government still intended to coordinate the mission with a medium launch vehicle (R4, tab 148).

45. By letter dated 19 August 2005, Boeing submitted a certified REA for payload increases for the following missions: GPS IIF-1, GPS IIF-5, GPS IIF-9, GPS IIF-10 and SBIRS-GEO). The letter advised the following:

> As a result of increases beyond the contractual baseline for the launch service, the contractor hereby revises the launch service price from [REDACTED] Million to [REDACTED] Million for a net increase to contract price of [REDACTED] Million. We are also providing an estimate for the other three GPS missions and one SBIRS-GEO mission, in the event that the satellite weight exceeds the contractual specified weight at the time these missions are ordered.
>
> ....
>
> The pricing methodology is consistent with the repricing of the NROL-22 and WGS missions similarly resulting from payload increases. In these previous cases the resulting decision to utilize the next higher payload class required a complete re-price of the larger launch vehicle and we continue to base our revised pricing on this accepted approach.

(R4, tab 150)

46. The record further reflects that the parties continued to negotiate while preparing for the upcoming GPS mission. On 16 June 2006, the parties executed a Memorandum of Understanding (MOU) whereby they agreed to enter into a contract (EELV Launch Capability Contract (ELC) FA8816-06-C-0001). The MOU and resultant contract read as follows in pertinent part:

6. **ILS Contract Requirements**

a. The parties agree that Boeing's Requests for Equitable Adjustments (REAs) for GPS IIF-1, GPS IIF-5, GPS IIF-9 and GPS IIF-10 will be removed from this contract negotiation and promptly addressed in a manner consistent with the requirements of the contract. The next GPS IIF mission will not be ordered before the REAs for GPS IIF-1/5/9/10 are resolved. Nonetheless, Boeing will include the appropriate consideration for GPS IIF-1/5/9/10 in the credit/consideration provided to the Government under this Contract. These values must be agreed upon by the parties.

b. Boeing will not be bound by the price in the ILS contract for the SBIRS GEO-3 mission.

(R4, tab 160 at 5)

47. By letter dated 15 September 2006, Boeing proposed non-binding mediation to settle the REA for increased payload weight for the GPS and SBIRS-GEO missions (R4, tab 164).

48. Appellant ULS became the successor in interest to Boeing under the Contract as of 1 December 2006 (gov't mot., attach. 1; compl. and answer ¶¶ 68, 69).

49. By letter dated 18 January 2007, the government counsel responded to Boeing's 19 August 2005 REA, declining it and Boeing's request for non-binding mediation. The government based the denial on the release language contained in Modification No. P00057, which the parties mutually agreed to release each other from claims, etc., arising under or relating to the EELV program from October 1998 through 16 October 2003. As the GPS FII satellite weight growth issues that spurred the REA occurred prior to 16 October 2003, the government concluded that the REA lacked merit. (R4, tab 168)

50. Boeing responded through counsel, by letter dated 12 February 2007, disagreeing with the government's position. Boeing argued that the weight issues arose after 16 October 2003 as well as the issuance of the delivery order for the GPS missions (DO 0086). Thus, Boeing contended that the release was inapplicable to the REA and remained open to the dispute resolution process. (R4, tab 169)

51. By letter dated 17 August 2007, the CO advised Boeing that its 19 August 2005 REA was denied in its entirety (R4, tab 171). Boeing responded, by letter dated 6 September 2007, disagreeing with the decision and vowed to file a certified claim "in the near future" (R4, tab 173).

52. On 17 September 2007, Boeing informed the government that it had received the proposed delivery order and modification relating to the GPS IIF-5 mission and could not execute the proposed contract documents in their current form, as they did not preserve Boeing's REA/claims. The letter also alerted the government to the joint venture agreement between Boeing and Lockheed Martin that spawned the United Launch Alliance (ULA). As the ILS contract had yet to be formally novated, Boeing would remain the contractor and ULA would be Boeing's subcontractor. (R4, tab 175)

53. The parties communicated back and forth throughout the month of September 2007 with no resolution to the GPS IIF-5 mission (R4, tabs 176, 177).

54. By letter dated 8 October 2008, ULS, an authorized agent under limited power of attorney for Boeing Launch Services, notified the CO that it would accept the order for GPS IIF-5 mission (DO 0111) and Modification No. P00118. ULS added:

> [W]e had hope that the issues involving the payload increase on the GPS missions would be resolved prior to the issuance of this order. Since we have been unable to identified [sic] a mutually acceptable closure resolution, we will accept this order and commence work on GPS IIF-5 prior to final resolution of these disputed GPS orders. Our acceptance of this order will not constitute a waiver or any of our rights under this contract or the ELC contract pending final the [sic] resolution of this matter.

(R4, tab 179) Accordingly, on 22 October 2008, the parties executed DO 0111 and Modification No. P00118, with Boeing reserving its right to pursue a claim for additional costs in connection with the delivery order (R4, tabs 181 at 2, 182 at 3). We find that the parties were at an impasse over the pricing for the GPS IIF-5 mission.

55. On 23 December 2008, ULS submitted a certified claim in the amount of [REDACTED] million to the Air Force to re-price the GPS IIF-1 and GPS IIF-5 launches in their entirety, based on Boeing's actual performance costs (R4, tab 183; compl. ¶¶ 4, 76). We find that the claim was submitted pursuant to the Disputes clause of the contract.

56. By letter to ULS dated 16 March 2009, the Air Force CO issued a final decision denying the claim (R4, tab 185).

57. By letter dated 12 June 2009, appellant filed its notice of appeal with the Board. That appeal was docketed as ASBCA No. 56850.

58. On 25 September 2009, the Air Force issued DO 0112 for the launch of GPS IIF-9 (R4, tab 186) and Modification No. P00138 (R4, tab 187). The accompanying letter from the CO indicated that both documents were "fully executed by the contracting officer" and the government expected the mission to be flown on a medium launch vehicle. The CO stated further that "you may voluntarily choose to design a mission specification which exceeds those parameters...as long as it meets the ultimate performance goals of safely delivering the satellite to the desired orbit." Review of mission specifications, the CO cautioned, "does not constitute direction or consent by the Government to change the contract terms or authorize any equitable adjustment." Finally, the CO stated the following:

> 4. The Government has never acknowledged any GPS IIF mission delivery order under this contract, including this one, has required a change of contract terms which would support a claim for additional costs and the Government does not waive any defenses to any claim that might be submitted.

(R4, tab 188)

59. By letter dated 28 October 2009, ULS reiterated its position on executing the mission with the heavier payload and notified the CO that it intended to proceed with the launch under the Disputes clause (R4, tab 190). On 10 September 2010, appellant submitted a certified claim in the amount of [REDACTED] million to the government to re-price the GPS IIF-9 launch based on appellant's actual performance costs (R4, tab 207).

60. Appellant filed a notice of appeal with the Board dated 2 March 2011, citing the CO's failure to issue a final decision within a reasonable time. The Board docketed the appeal as ASBCA No. 57542.

61. Appellant also submitted a claim dated 3 March 2011 in the amount of [REDACTED] million to the CO "solely to protect [ULS's] ability to pursue a claim based on mutual mistake relating to the launch of GPS IIF-1 [[REDACTED] million] and GPS IIF-5 [[REDACTED] million] payloads under the ILS Contract's Disputes clause and the CDA." By letter dated 29 April 2011, the CO denied the claim. (ASBCA No. 57661, Bd. corr. file)

62. By letter dated 22 June 2011, ULS filed an appeal with the Board, which was docketed as ASBCA No. 57661.

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987); *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 08-1 BCA ¶ 33,832 at 167,445. There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the nonmovant. We do not resolve factual disputes but determine whether there is a genuine issue of material fact. The moving party must show that there is no such issue while the nonmovant must counter with facts showing that there is one. *Id.*

Appellant's complaint alleges the following under each count: Count I – appellant alleges that it is entitled to an equitable adjustment pursuant to the Changes clause of the ILS contract resulting from the increased weight of the GPS IIF payloads which is measured by its cost to launch those payloads; Count II – appellant contends that it is entitled to an equitable adjustment, measured by the current launch costs, based on the government's alleged breach of contract resulting from the government's failure to issue delivery orders for the launch of the GPS IIF missions on a basis consistent with the requirements of the ILS and the ELC contracts; Count III – appellant is entitled to relief based upon a mutual mistake regarding the number of launches to be expected in pricing the ILS contract; and Count IV – appellant is entitled to relief based upon a constructive change to the contract resulting from "grossly inadequate estimates of the commercial market that resulted in an unconscionable price for launch services in the ILS contract."

The government moves for summary judgment on appellant's specific counts in its complaint as follows: Count I – the only "equitable adjustment" to which appellant may be entitled must be based on appellant's increased performance costs resulting from the change (incremental costs vs. open-priced item); and Count II – the Changes clause does not require agreement on the equitable adjustment amount, and appellant waived material breach damages by performing. The government also moved for summary judgment on Count III (mutual mistake) contending that there was no mistake because it did not concern a "fact" under the mutual mistake doctrine and was not a belief mutually held by appellant's predecessor in interest (Boeing) and the government, and the contract allocated the risk of such a mistake to Boeing; and Count IV (Boeing's proposed prices were not unconscionably low).

Appellant counters as follows: Count I – summary judgment is inappropriate because the government's arguments relate to quantum and the hearing in the matter will deal with entitlement only, thus the motion is premature; Count II – issues relating to causation of a material breach of contract presents questions of fact and is therefore inappropriate for resolution on summary judgment; Count III under the mutual mistake doctrine, there are genuine issues of material fact regarding the parties' beliefs about commercial demand for launch services; and Count IV – the record contains sufficient

evidence to raise issues of disputed fact regarding appellant's claim that the prices in CLIN 0100 are unconscionably low.

Count I

Appellant contends in its complaint that it is entitled to an equitable adjustment pursuant to the Changes clause of the ILS contract resulting from the increased weight of the GPS IIF payloads, which is appropriately measured by the existing commercial market for launch services (compl. at 53). The government moves for summary judgment arguing, *inter alia*, that the Changes clause unambiguously provides that appellant's exclusive remedy for a change is an equitable adjustment consisting of the cost of the additional work caused by the change plus profit (gov't br. at 8). The term "equitable adjustment", the government alleges, is a term of art in government contracts meaning the cost of the additional work plus a reasonable profit (*id.* at 9).

Although the term "equitable adjustment" has been considered a term of art, that conclusion arises from its use in non-commercial items contracts where the government has a right to direct a unilateral change. In that context, the term is generally limited to requiring those "corrective measures utilized to keep a contractor whole when the Government modifies a contract." *Pacific Architects & Engineers, Inc. v. United States*, 491 F.2d 734, 739 (Ct. Cl. 1974). However, this customary understanding of the term need not be followed in the event of a significant change in context. *General Builders Supply Co. v. United States*, 409 F.2d 246, 249-50 (Ct. Cl. 1969). The Changes clause in this commercial items contract dictates that it can only be changed with the agreement of the parties. It requires the parties to negotiate an equitable adjustment in the event they agree upon a change causing an increase or decrease in contract costs, performance time, or that otherwise affects any other contract provision, but it does not define the limitations of the equitable adjustment. The government cites no authority defining the term in this context.

Appellant has produced evidence that the parties negotiated equitable adjustments under this contract based upon changed market conditions, and not merely upon changed costs, showing the term was intended to permit such action. The government contends that we must ignore this evidence, relying upon the Parole Evidence Rule. That rule bars the use of extrinsic evidence to interpret an integrated agreement containing terms that are clear and unambiguous. *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004). We find the term to be undefined and unclear in this context and therefore appellant's course of performance evidence to be relevant. *See Id.* (recognizing that evidence of course of performance is relevant to interpret an ambiguous contract). A genuine issue of fact exists regarding the parties' intent as to the meaning of the term "equitable adjustment" in this contract, dictating that we deny the government's motion with regard to Count I of appellant's complaint.

Count II

Appellant alleges that the government breached the ELC and ILS contracts by failing to issue delivery orders for the launch of the GPS IIF payloads on a basis consistent with the requirements of the ILS and ELC contracts (compl. at 55). Because the parties did not reach agreement on equitable adjustments to the contract price for the increased payloads in the GPS missions prior to performance, appellant contends that the issuance of the delivery orders breached the ordering limitation in the ELC contract which states that the Air Force would not order the next GPS IIF mission until the REAs had been resolved. Thus, because the Air Force "breached the ordering limitation in the ELC Contract, a contract that was interdependent with the ILS Contract," appellant avers that the Air Force is liable for the "reasonable value" of the launch services actually ordered with respect to the GPS IIF-5 mission. (Compl. ¶¶ 108-09)

The government moves for summary judgment with regard to Count II, contending that the Changes clause did not require a bilateral agreement on the equitable adjustment amount. Rather, the government contends that once the contractor agrees to perform the work, the contractor is required by the Disputes clause to continue to perform the changed work even if the parties dispute the amount of the equitable adjustment for the change. (Gov't br. at 17) Appellant counters that the government's position is contradicted by the plain terms of the agreement (i.e., it permits changes to the contract only by written agreement of the parties). Appellant argues that if the parties were unable to reach an agreement on the amount of the price adjustment for the heavier payloads, the government was free to hold Boeing to the parties' original bargain (i.e., launch the payload or substitute payload at the contractual weight). Thus, according to appellant, the government breached the contract when it directed Boeing to perform the changed scope of work absent a bilateral agreement on the consideration owed for performing the change. (App. br. at 54, 55) We disagree.

The record does not support appellant's contention that the government breached the contract by directing Boeing to perform the changed work absent a bilateral agreement on the change. The evidence shows that the parties were at an impasse over the pricing of the GPS IIF missions due to the heavier payloads. Boeing and ULS agreed to proceed with the changed work, while reserving their rights to pursue an equitable adjustment/claim. (SOF ¶¶ 42, 54, 59) As the parties were unable to reach an equitable adjustment for such prices, the Disputes clause, which specifically incorporated the full FAR clause (52.233-1), gave appellant the process to seek resolution (i.e., file a claim) and directed that the contractor must continue performance. This action preserved appellant's rights while ensuring that the price dispute did not hamper the government's operations. Thus, the government's conduct did not equate to a breach of contract. Appellant's arguments to the contrary are not legally tenable.

Counts III and IV

With regard to the government's motion to deny Count III of appellant's complaint (mutual mistake about the commercial demand for EELV launch services) and Count IV (unconscionably low prices) both relate to reformation of the contract and contain fact-intensive issues that, based on the current record, are unable to be resolved by summary judgment. *Cooley Constructors, Inc.*, ASBCA No. 57404, 11-2 BCA ¶ 34,855 at 171,457. Accordingly, the government's motion with regard to Counts III and IV is denied.

CONCLUSION

For the reasons set out above, the government's motion for summary judgment is granted in part with regard to Count II of appellant's complaint relating to breach of contract, the remainder of the government's motions are denied.

Dated: 21 November 2013

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

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

MARK A. MELNICK
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56850, 57542, 57661, Appeals of United Launch Services, LLC, rendered in conformance with the Board's Charter.

Dated:

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