ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Odyssey International, Inc.	)	ASBCA Nos. 62085, 62145, 62193
	)	
Under Contract No. W912HN-19-C-3005	)	

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL ON THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Appellant, Odyssey International, Inc., appeals from (1) the May 2019 default termination of its construction contract for failure to secure bonding (ASBCA No. 62085), (2) the government's assessment against Odyssey of $1,991,320 in allegedly excess reprocurement costs (ASBCA No. 62145), and (3) a related Contractor Performance Assessment Reporting System (CPARS) evaluation rating Odyssey's performance "Unsatisfactory" (ASBCA No. 62193). On January 17, 2020, the government filed its first motion for summary judgment in these appeals. In *Odyssey International, Inc.*, ASBCA No. 62085 *et al.*, 20-1 BCA ¶ 37,623 at 182,655, we granted that motion in part, and entered summary judgment in favor of the government that Odyssey defaulted on the contract by failing to provide to the government the required performance and payment bonds. Familiarity with that opinion is presumed. The parties now request summary judgment regarding whether: (1) Odyssey's failure to perform was excusable (ASBCA No. 62085); (2) the government is entitled to $1,991,320 in excess reprocurement costs, plus interest (ASBCA No. 62145); and (3) the contracting officer abused his discretion in issuing Odyssey's CPARS evaluation (ASBCA No. 62193) (gov't mot. at 25; app. mot. at 9).

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The following is not in genuine dispute. As early as May 2018, the United States government was conducting a criminal investigation of Odyssey for alleged HUBZone violations (*see* Feb. 18, 2020 Declaration of Whitney McBride ¶¶ 2-4)[1]. On March 27, 2019, the parties contracted for Odyssey to construct an air traffic control tower at Seymour Johnson Air Force Base in North Carolina, for the amount of $19,832,000 (gov't mot. at 3 ¶ 6; app. resp. at 3 ¶ 6; app. mot. at 2 ¶ 1; gov't resp. at 1 ¶ 1; R4, tab 3.08). The contract provides that Odyssey submit performance and payment bonds to the government within 10 days after award (gov't mot. at 4 ¶ 8; *see* app. resp. at 3 ¶ 8). In addition, the contract incorporates by reference Federal Acquisition Regulation (FAR) 52.249-10, DEFAULT (Fixed-Price Construction) (APR 1984) (gov't mot. at 4 ¶¶ 9-10; *see* app. resp. at 3 ¶¶ 9-10).

On April 10, 2019, Odyssey's insurance agent wrote to Odyssey:

> We have made vigorous efforts to market your account to these standard-market sureties CNA, Great American, Zurich, and NAS, and one of the leading specialty market sureties, HCC Toyoko Marine. Even with the $1,000,000 capitalization from Whitney's home refinance, none of these sureties will bond the [] project. The primary reason with each surety is way too little working capital in the company. To support a $40-50,000,000 backlog, the minimum working capital number is $2,500,000, and usually that is with a hefty bank line of credit and substantial net worth from personal indemnitors. While your profit projections for 2019 are very encouraging, it doesn't fix working capital soon enough for surety support on this size of work program.
>
> Additionally, . . . [t]he potential Hub-Zone violation is a big cloud until you are absolved of liability . . . .

(App. supp. R4, tab 24 at 30 (alterations added); gov't mot. at 9 ¶ 46; *see* app. resp. at 6 ¶ 46, 8 ¶ 8; gov't reply at 7 ¶ 8) On April 16, 2019, one surety wrote to Odyssey's insurance agent:

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[1] Whitney McBride is Odyssey's president and principal shareholder (McBride decl. ¶ 1; gov't mot. at 8 ¶ 40; app. resp. at 6 ¶ 40). The McBride declaration is attached to Odyssey's February 18, 2020 opposition to the government's January 17, 2020 motion for summary judgment, the motion granted in part in *Odyssey*, 20-1 BCA ¶ 37,623 at 182,655. We may consider not only cited materials, but other materials in the record. Fed. R. Civ. P. 56(c)(3).

> Although the account is thin, the main reason we have to pass on this is due to the Hub Zone investigation in place. The law underlying the false claim (the false claim act) has no individual Hub Zone designation which would mean the company is subject to investigation. So even though the FBI has indicated it is not focusing on the company, there is still a potential that can occur and a surety who issues any bonds for the company who after the fact is found are not what the [sic] claim to be (Hub Zone compliant) are subject to triple damages.
>
> We, as a company, have seen this in the past and will not consider any requests with anything pending regarding Hub Zone claims. We would not be willing to consider anything for the account until this issue is completely resolved.

(App. supp. R4, tab 30 at 40-41; *see* app. resp. at 9 ¶ 10; gov't reply at 8 ¶ 10). On April 18, 2019, Ms. McBride procured a $1 million bridge loan on her home, which was used to provide Odyssey with additional working capital (app. resp. at 9 ¶ 11; *see* gov't reply at 8 ¶ 11). On April 22, 2019, Odyssey wrote to contracting officer, Andrew Page indicating Odyssey's inability to obtain performance and payment bonds (gov't mot. at 3-4 ¶¶ 6, 12; app. resp. at 3 ¶¶ 6, 12; app. mot. at 3 ¶ 4; gov't resp. at 2 ¶ 4, 4 ¶ 1 (citing, and quoting in part, R4, tab 4.01); app. reply at 2-3 ¶ 1). Odyssey wrote:

> It is with great disappointment that I must inform you of our firm's inability to acquire and deliver the proper payment and performance bonds for the referenced project. Immediately upon being notified of the award of this project on March 27, 2019, we contacted our bonding agency, Dale Barton Agency in Salt Lake City, UT, who then informed our then-surety (CNA) of the need for the bonds. Our bonding agency indicated that there were several things that CNA would need in order to provide the bonds. Those items in terms of priority were: 1) audited financial statements from 2018, increased working capital and detail of existing backlog. *We provided the information requested and began our efforts to bring additional capital into the company (which we ultimately accomplished prior to the expiration of the deadline for the bonds).* Because our backlog had grown in excess of $50 million (including the referenced project) the increased working capital was deemed to be the most

> important and the most difficult to achieve within the 10-day period granted to us. For that reason, I asked for and received another 10-day extension of time to deliver the bonds by April 18, 2019. CNA ultimately declined to provide the bonds, but neither CNA nor Dale Barton provided any feedback as to the reason for the denial. We then sought to obtain the bonds through other sureties through three different agencies working simultaneously. *It wasn't until April 16th that we became aware of the true reason for multiple sureties denying our account. As it turns out, a note in our 2018 audited financial statements that originated from our attorney's representation letter to our auditor was the cause for bonds being denied. The note reads, "In the summer of 2018, the Company was informed that their former chief financial officer was a prime target in a criminal investigation by the US Attorney's Office. The investigation is ongoing and involves a potential HUB Zone violation and fraud.* The Company and its sole shareholder have not been a target of this investigation and are cooperating with the US Attorney's Office." Despite the statement that "the Company and its sole shareholder have not been a target of this investigation," *every single surety who could have provided a bond for us on this job decided not to do so because of the perceived risk that they could be subject to treble damages if the company was ever deemed to have been party to the fraud or HUB Zone violation*. Despite all of our efforts, including verbal reassurances from our attorney of the company's and president's non-involvement, *the specter of the HUB Zone violation and fraud allegedly committed by our former CFO was the straw that broke the camel's back in the eyes of the sureties*.

(R4, tab 4.01 at 261) (emphasis added) Ms. McBride would later declare that "even if Odyssey resolved other issues (like working capital; all of which were ultimately resolved), the Government's investigation would nevertheless preclude Odyssey from obtaining bonding for the project" (McBride decl. ¶ 18).

On April 25, 2019, Mr. Page issued a cure notice requiring Odyssey to produce performance and payment bonds by May 6, 2019 (gov't mot. at 4-5 ¶ 13; app. resp. at 3 ¶ 13; app. mot. at 3 ¶ 6; gov't resp. at 2 ¶ 6). On May 3, 2019, Mr. Page received an email from Odyssey and a May 1, 2019 letter from Odyssey's insurance agent, both re-iterating Odyssey's inability to obtain performance and payment bonds for the contract

(gov't mot. at 5 ¶ 14; app. resp. at 3 ¶ 14; *see* R4, tab 4.03). In the letter from the insurance agent, the insurance agent wrote:

> In the summer of 2018, Odyssey was informed that their former chief financial officer was a prime target in a criminal investigation by the US Attorney's Office. The investigation is ongoing and involves a potential HUB Zone violation by Odyssey and fraud by the former chief financial officer . . . . With all the sureties we approached, the "cloud" of this investigation materially impairs Odyssey's ability to obtain bonds on new projects until the case is settled.

(R4, tab 4.03 at 265)

As of May 6, 2019, Odyssey had not provided to the government the performance and payment bonds required by the contract for Odyssey to proceed with performance of the contract (gov't mot. at 5 ¶ 16; app. resp. at 3 ¶ 16). On May 6, 2019, Mr. Page issued a notice terminating the contract for default for failure to provide performance and payment bonds, "effective immediately upon receipt of this Notice" (R4, tab 2.01; *see* gov't mot. at 5 ¶ 16; app. resp. at 3 ¶ 16). On May 8, 2019, Mr. Page issued a modification terminating the contract for default "in conjunction with the Notice of Termination dated May 6, 2019" (R4, tab 5.01; *see* gov't mot. at 5 ¶ 16; app. resp. at 3 ¶ 16).

In its February 18, 2020 opposition to the government's first, January 17, 2020 motion for summary judgment, Odyssey states that "the Government's [investigation] is now more than two years old with no indictments issued and no end in sight" (app. resp. at 12 n.9). However, on August 26, 2020, a federal grand jury indicted Ms. McBride and Odyssey on charges of conspiracy to commit wire fraud, wire fraud, and major fraud against the United States related to alleged HUB Zone violations (gov't mot. at 10-11 ¶ 51, ex. 5 ¶¶ 1-3; app. resp. at 7 ¶ 51). On September 8, 2020, former Odyssey Chief Financial Officer (CFO) Kin Shing Lee pled guilty in federal court to wire fraud, money laundering, and aiding or assisting in the preparation of a false document (gov't mot. at 11 ¶ 52; app. resp. at 7 ¶ 52). Also on September 8, 2020, former Odyssey Chief Operating Officer (COO) Michael Tingey pled guilty in federal court to wire fraud (gov't mot. at 11 ¶ 53; app. resp. at 7 ¶ 53). In his plea agreement, Mr. Tingey admitted:

> In May of 2011, I was an officer or employee of Odyssey International, Inc. I knew that Odyssey was not a business qualified as a small business in a historically underutilized business zone ("HUB Zone"). I participated in conversations with other officers of Odyssey concerning this, even as we anticipated bidding on a federal contract set aside for HUB

> Zone businesses and bid upon such a HUB Zone contract for Fort Drum. For purposes of attempting to support the false claim that the business qualified as a HUB Zone, I participated with other officers of Odyssey in generating documents that would support false claims about who was and who was not an employee of Odyssey, and whether or not they resided in a HUB zone. We knew those documents were to be presented to persons considering Odyssey's qualification for the HUB zone contract. We gathered them for purposes of submitting them in order to secure the contract and the payments under the contract. We were eventually successful in securing and retaining the Fort Drum contract for Odyssey and received many payments on that contract, including a wire of $59,513.26 (which was caused by submission of an invoice in furtherance of this plan) and was directed and transmitted through the use of interstate wire communications on March 30, 2017.

(Gov't mot., ex. 7 at 3-4 ¶ 11) In his plea agreement, Mr. Lee admitted:

> In May of 2011, I was an officer or employee of Odyssey International, Inc. I knew that Odyssey was not a business qualified as a small business in a historically underutilized business zone ("HUB Zone"). I participated in conversations with other officers of Odyssey concerning this, even as we anticipated bidding on a federal contract set aside for HUB Zone businesses and bid upon such a HUB zone contract for Fort Drum. For purposes of attempting to support the false claim that the business qualified as a HUB zone, I participated with other officers of Odyssey in generating documents that would support false claims about who was and who was not an employee of Odyssey, and whether or not they resided in a HUB zone. We knew those documents were to be presented to persons considering Odyssey's qualification for the HUB zone contract. We gathered them for purposes of submitting them in order to secure the contract and the payments under the contract. We were eventually successful in securing and retaining the Fort Drum contract for Odyssey and received in excess of $90 million in payments on that contract, including a wire of $59,513.26 (which was caused by submission of an invoice in furtherance of this plan) and was directed and transmitted through the use of interstate wire communications on March 30, 2017.

(Gov't mot., ex. 6 at 4-5 ¶ 11) On September 23, 2020, Odyssey admitted in a Utah state court civil complaint that it filed against Mr. Lee and Mr. Tingey that the actions of those men led to the criminal investigation against Odyssey, causing Odyssey's inability to bond projects:

> The investigation by the United States has not been without its toll on Odyssey and Whitney, both economically and reputationally.
>
> *With the investigation hanging over its head, Odyssey has been unable to bond new projects*, and at least one agency of the United States has threatened to withhold funds on existing projects for fear Odyssey will go out of business.
>
> Because of that, Odyssey has been deprived of millions of dollars in profits that it otherwise would have received, *but for the acts of Lee and Tingey which led to the investigation*.

(Gov't mot. at 11 ¶ 54, ex. 8 at 14-15 ¶¶ 118-20 (emphasis added, paragraph numbers omitted); *see* app. resp. at 7 ¶ 54)

Regarding the disputed CPARS, on June 12, 2019, a government assessing official reported that Odyssey had performed "0%" of the contract work, rated Odyssey's performance on the contract in the area of bonding as "Unsatisfactory," and stated:

> Given what I know today about the contractor's ability to perform in accordance with this contract or order's most significant requirements, I would not recommend them for similar requirements in the future.

(Gov't mot. at 7 ¶¶ 29, 31; app. resp. at 5 ¶¶ 29, 31; app. mot. at 4 ¶ 13; gov't resp. at 4 ¶ 13; R4, tab 6.01 at 1-2) As the reviewing official, Mr. Page concurred on June 17, 2019, that "this area [bonding] should be rated unsatisfactory due to lack of performance and payment bonds on the project" (gov't mot. at 7 ¶ 32; app. resp. at 5 ¶ 32; app. mot. at 4 ¶ 14; gov't resp. at 4 ¶ 14; R4, tab 6.01 at 3).

On June 28, 2019, Mr. Page reprocured the contract, after receiving updated pricing from three offerors (gov't mot. at 5-6 ¶¶ 18-23, ex. 1 ¶¶ 12-14; app. resp. at 3-4

¶¶ 18-23; app. mot. at 4 ¶ 12; gov't resp. at 3-4 ¶ 12).[2] The lowest offer was from Walsh Federal JV, in the amount of $21,823,320. Walsh Federal was responsive and responsible, and its price was fair and reasonable (gov't mot. at 5-6 ¶¶ 18-23, ex. 1

[2] Exhibit 1 to the government's January 17, 2020 motion is the January 16, 2020 affidavit of Mr. Page. In its December 23, 2020 opposition to the government's motion for summary judgment, Odyssey says, citing Fed. R. Civ. P. 56(d), and that it hasn't had the opportunity to depose Mr. Page (*e.g.*, app. resp. at 4-5 ¶¶ 19, 32-33, n.2). In addition, attached to its opposition to the government's summary judgment motion, Odyssey attaches the December 23, 2020 declaration of its attorney, who declares that Odyssey had reviewed the bidding materials relating to the government's re-procurement efforts, as well as past testimony of Mr. Page, and believes that "certain qualitative factors may have played a role in artificially inflating the Government's re-procurement costs," and that Odyssey "may also elect to retain an expert to testify about the impact these qualitative factors had on the Government's re-procurement costs" (Dec. 23, 2020 decl. of Spencer W. Young ¶¶ 2-5, 8).

Nevertheless, Odyssey has not opposed the Page affidavit with any of its own; nor has it set out the specific evidence that would necessitate a hearing on the matters set forth in the Page affidavit. The first of these three appeals was filed on May 29, 2019, and a stay of the first two appeals was lifted on October 1, 2019, after the filing of the third appeal on September 23, 2019. On January 17, 2020 the government filed its first motion for summary judgment, and on January 23, 2020, we stayed proceedings (except for briefing) pending a decision on that motion. The stay was effectively lifted with our June 2, 2020 decision on that motion, and on June 24, 2020, we adopted a proposed schedule for further proceedings that included a February 5, 2021 close of discovery. On November 9, 2020, we granted the government's request for a protective order against discovery requests concerning communications between the Army Corps of Engineers and the U.S. Department of Justice, the U.S. Army Criminal Investigation Command (CID), two Assistant United States Attorneys for the District of Utah, "or any other agency of the United States of America" regarding the criminal investigation of Odyssey; we held that the discovery requests were "not relevant to any party's claim or defense."

On February 1, 2021, Odyssey deposed Mr. Page (app. reply, ex. A). We conclude that the parties have had adequate opportunity to engage in discovery necessary to support or oppose the cross-motions for summary judgment, and we accept the facts asserted in the Page affidavit as undisputed. Board Rule 7(c)(2) ("The Board may accept a fact properly proposed and supported by one party as undisputed, unless the opposing party properly responds and establishes that it is in dispute."); *see* Fed. R. Civ. P. 56(e)(2).

¶¶ 12-14; app. resp. at 3-4 ¶¶ 18-23). Mr. Page awarded the reprocured contract to Walsh in the amount of $21,823,320, for the same scope of work that had been awarded to Odyssey under Odyssey's terminated contract (*id.*; gov't mot. at 6 ¶ 20; app. resp. at 4, ¶ 20; R4, tab 3.10 at 1). On July 15, 2019, Mr. Page issued a claim against Odyssey in the amount of $1,991,320 (gov't mot. at 6 ¶ 23; app. resp. at 4 ¶ 22; R4, tab 2.03).

DECISION

Summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,067 at 176,127 (citing Fed. R. Civ. P. 56(a)). At the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Id.* at 250. A non-movant must set out, usually in an affidavit, what specific evidence could be offered at trial. *Kirk/Marsland Advert., Inc.*, ASBCA No. 51075, 99-2 BCA ¶ 30,439 at 150,407. A non-movant runs the risk of a grant of summary judgment by failing to disclose the evidentiary basis for its claim. *Id.* Here, the parties' submissions demonstrate that there is no genuine dispute over the material facts, and that there is no issue for trial; more specifically, neither party has set out any specific evidence that necessitates a hearing (*see* gov't mot. at 3-12; app. resp. at 2-10; gov't reply at 5-9; app. mot. at 2-4; gov't resp. at 1-5; app. reply at 2-5).

ASBCA No. 62085

In ASBCA No. 62085, Odyssey contends that the contracting officer abused his discretion in terminating the contract for default (app. mot. at C 4 ¶¶ 1, 6-7). That issue is not properly before us. In *Odyssey International*, 20-1 BCA ¶ 37,623 at 182,655, we granted summary judgment in the government's favor that Odyssey defaulted on the contract. However the contracting officer arrived at the default termination decision, the government may rely upon Odyssey's failure to do *its* job to justify the termination. *Aerospace Facilities, Inc.*, ASBCA No. 61026, 20-1 BCA ¶ 37,668 at 182,877; *HK&S Constr. Holding Corp.*, ASBCA No. 60164, 19-1 BCA ¶ 37,268 at 181,352 (citing cases); *aff'd*, 825 F. App'x 921 (Fed. Cir. Oct. 7, 2020) (per curiam, unpublished opinion); *see also Watts Constructors, LLC*, ASBCA Nos. 61518, 61961, 19-1 BCA ¶ 37,382 at 181,728 (citing and parenthetically quoting *HK&S* with approval). Therefore, the only issue left in ASBCA No. 62085 is whether Odyssey's default is excusable. *See HK&S*, 19-1 BCA ¶ 37,268 at 181,352 (having found a default, stating "[n]ow it's up to appellant to demonstrate that its default is excused."). FAR 52.249-10(b) provides:

> The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if . . . The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . acts of the Government in either its sovereign or contractual capacity . . . .

48 C.F.R. § 52.249-10(b) (1984). Where a contractor claims that its failure to perform is due to the government action, the burden is on the contractor to establish that the government action was the primary or controlling cause of the contractor's default. *Cf. TGC Contracting Corp. v. United States*, 736 F.2d 1512, 1515 (Fed. Cir. 1984) ("When, as in this case, the contractor claims that his financial inability to perform is due to the government's failure to make the required progress payments, the burden is on the contractor to establish that the progress payments were erroneously withheld and that the withholding of such progress payments was the primary or controlling cause of the contractor's default."); *Highland Al Hujaz Co., Ltd.*, ASBCA No. 58243, 16-1 BCA ¶ 36,336 at 177,170 ("The government's failure or delay to make payments can constitute a defense to a default termination only if they rendered the contractor financially incapable of continuing performance; are the primary or controlling cause of appellant's default; or are a material, rather than insubstantial or immaterial, breach of the contract."); *Ricmar Eng'g, Inc.*, ASBCA No. 44260, 98-1 BCA ¶ 29,463 at 146,245 ("if the financial inability to perform was caused by the Government's action, the default will be set aside . . . . The burden rests with appellant to prove the alleged Government failure to negotiate an equitable adjustment was the 'controlling cause' for appellant's financial difficulties which prevented completion of the contract.").

Here, there is no genuine dispute that Odyssey has judicially admitted in state court that but for the actions of Mr. Tingey, its former chief operating officer, and Mr. Lee, its former chief financial officer, Odyssey would have been able to bond new projects. In view of that judicial admission, there is no genuine dispute that the actions of Mr. Tingey and Mr. Lee are the primary or controlling cause of Odyssey's failure to provide bonding. Therefore, there is no genuine dispute that the actions of Odyssey, through Mr. Tingey and Mr. Lee, and not the actions of the government, were the primary or controlling cause of Odyssey's default. *See generally Raytheon Co.*, ASBCA No. 57743 *et al.*, 16-1 BCA ¶ 36,335 at 177,147 (explaining evidentiary admissions and judicial admissions); *GSC Constr., Inc.*, ASBCA Nos. 59402, 59601, 21-1 BCA ¶ 37,751 at 183,245-46 (McIlmail, J., concurring and collecting cases). *Cf. Preuss v. United States*, 412 F.2d 1293, 1302 (Ct. Cl. 1969) (finding substantial evidence that contractor's non-performance was not due to defects in government-furnished microfilm but to plaintiff's poor financial condition, which was due to other causes for which the government was not responsible); *TGC*, 736 F.2d at 1515 (where contractor claimed that

its financial inability to perform was due to the government's failure to make required progress payments, upholding Board's finding that the failure to complete the work was the direct result of contractor's lack of working capital, its negligence, and its own actions); *Highland Al Hujaz*, 16-1 BCA ¶ 36,336 at 177,170 ("While the government's withholding of the two progress payments might have exacerbated appellant's financial difficulties, appellant has not shown that it was the primary or controlling cause . . . . appellant has given us no reason to depart from the normal rule that the contractor's financial difficulties are not a legitimate excuse for its default."); *Ricmar Eng'g, Inc.*, 98-1 BCA ¶ 29,463 at 146,245 (primary cause of contractor's financial difficulties was employee embezzlement of funds); *United Schools of America, Inc.*, ASBCA No. 38628, 90-3 BCA ¶ 23,199 at 116,426 (contractor is responsible for the unexplained failures of its subcontractors). In addition, there is no suggestion that the government prohibited, precluded, or otherwise affirmatively prevented bond providers from providing bonding for the contract; that is, there is no suggestion that a bonding company could not have bonded the contract despite the knowledge that Odyssey was under investigation. *Compare Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 743-44 (1980) ("[Plaintiff contractor] may not recover . . . [consequential] damages which allegedly resulted when, because of [the government's] actions, the bonding company or others refused to issue bonds on behalf of plaintiff on other contracts or work, thus crippling the contractor's ability to obtain new contracts or new work. Even if proven, these damages would be too remote and speculative to be recoverable" (alterations added)) *with Orlosky Inc. v. United States*, 68 Fed. Cl. 296, 309 (2005) (government liable for damages stemming from its denial of contractor's access to worksite).

We reject the argument (app. resp. at 14) that the actions of Mr. Lee and Mr. Tingey should not be imputed to Odyssey. Corporations act through their employees; the general rule is that an agent's knowledge is imputed to the principal when employees are acting within the scope of their authority or employment. *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1369 & n.24 (Fed. Cir. 2013), *opinion corrected on denial of reh'g*, 563 F. App'x 769 (Fed. Cir. 2014). Where employees act as a contractor's employees under the contractor's contract, they act within the scope of their authority or employment. *See id.* at 1370 n.25. There is a narrow exception to that general rule—the adverse-interest exception—when the agent's conduct is "entirely" in the agent's interest without even incidental benefit to the principal. *Id.* at 1369. In view of their plea agreements, there is no genuine dispute that Mr. Lee and Mr. Tingey were acting as Odyssey employees (or, more precisely, officers of Odyssey) in obtaining and then performing under an Odyssey contract (the Fort Drum contract), and, therefore, within the scope of their authority or employment. Moreover, the adverse-interest exception does not apply here; rather, in view of the plea agreements there is no genuine dispute that Odyssey benefitted from the illegal actions of Mr. Lee and Mr. Tingey, by obtaining a government contract and receiving payments under that contract. *Cf. id.* at 1370 (reversing trial court's determination that knowledge of KBR's

employees should not be imputed to KBR because "whatever motivation [the employees] had to accept kickbacks from [subcontractor], KBR received a benefit").

Regarding Odyssey's contention that its "inability to perform its bonding obligations under the Contract" included "a working capital issue arising from a separate contract with the Government" (app. mot. at 7), there is no genuine dispute that, as of April 18, 2019, Ms. McBride procured a $1 million bridge loan on her home, which was used to provide Odyssey with additional working capital, and that Odyssey admitted in its April 22, 2019 letter to the government that (1) Odyssey had brought additional capital into the company prior to the expiration of the deadline for the bonds, (2) "every single surety who could have provided a bond for us on this job decided not to do so because of the perceived risk that they could be subject to treble damages if the company was ever deemed to have been party to the fraud or HUB Zone violation," and (3) "the true reason for multiple sureties denying [Odyssey's] account" and "the straw that broke the camel's back in the eyes of the sureties" was "the specter of the HUB Zone violation and fraud allegedly committed by [Odyssey's] former [chief financial officer]"; that is, Mr. Lee. Indeed, Odyssey admits in its motion for summary judgment that "the *primary* obstacle it faced in procuring the bonding was [the] investigation by the Government into alleged HUBZone-related violations" (app. mot. at 3 ¶ 5 (emphasis added)), which defeats the contention that a lack of working capital caused Odyssey's failure to provide bonding. *Cf. Ricmar Eng'g, Inc.*, 98-1 BCA ¶ 29,463 at 146,245 ("Ricmar did incur financial difficulties which . . . we have established the primary cause as the embezzlement of funds Ricmar suffered at the hands of its employees . . . . Ricmar has failed to prove that the Government's action was the 'controlling cause' of Ricmar's financial difficulty."). For these reasons, Odyssey's contention regarding a "working capital issue" does not present a genuine issue for trial. For all these reasons, the government is entitled to judgment as a matter of law that Odyssey's default is not excused. Accordingly, ASBCA No. 62085 is denied.

ASBCA No. 62145

In ASBCA No. 62145, Odyssey challenges the government's claim to $1,991,320 in alleged excess reprocurement costs, plus interest, and the government moves for summary judgment that it is entitled to that amount, plus interest under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (app. mot. at 9; gov't mot. at 21, 25). FAR 52.249-10(a) provides:

> If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable

> part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

48 C.F.R. § 52.249-10(a) (1984).

To recover excess reprocurement costs the government must show: (a) the work it procured is the same as or similar to that which was to be performed under the contract terminated; (b) it has incurred costs in excess of those under the original contract for performance of the work; and (c) it acted reasonably when reprocuring the work to minimize excess costs resulting from the default. *FFR-Bauelemente + Bausanierung GmbH*, ASBCA No. 52152 *et al.*, 07-2 BCA ¶ 33,627 at 166,558-59. In view of the unrebutted Page affidavit, there is no genuine dispute that, less than two months after terminating the contract, and after receiving updated pricing from three offerors, the government awarded a reprocurement contract in the fair and reasonable amount of $21,823,320 to Walsh Federal, a responsive and responsible contractor, for the same scope of work that had been awarded to Odyssey under Odyssey's terminated, $19,832,000 contract. Consequently, there is no genuine dispute that (1) the work the government procured is the same as or similar to that which was to be performed under the contract terminated, (2) the government has incurred costs in excess of those under the original contract for performance of the work, and (3) the government acted reasonably when reprocuring the work to minimize excess costs resulting from the default. Accordingly, the government is entitled to judgment as a matter of law in ASBCA No. 62145 to excess reprocurement costs in the pre-interest amount of $1,991,320 (the difference between the original, $19,832,000 contract and the $21,823,320 reprocurement contract). We do not include CDA interest; although the government claims interest under the CDA, the CDA provides for interest on contractor claims, not government claims. *See* 41 U.S.C. § 7109(a)(1). ASBCA No. 62145 is denied.

ASBCA No. 62193

In ASBCA No. 62193, the government says its rating of Odyssey's performance as "Unsatisfactory" was appropriate and not an abuse of discretion, and Odyssey says the rating was an abuse of discretion because the contracting officer "had no basis upon

which to conclude whether Odyssey's non-performance was excused under the Contract" (gov't mot. at 23, 25; app. mot. at 2, 8). Odyssey also says that "because per the undisputed facts the contracting officer abused his discretion to terminate the contract for default, Odyssey is entitled to judgment in its favor as a matter of law . . . remanding to the contracting officer for reevaluation in CPARS accordingly" (app. reply at 11). We can assess whether the contracting officer acted reasonably in rendering the disputed performance rating or was arbitrary and capricious and abused his discretion. *Cameron Bell Corp. d/b/a Gov. Sols. Grp. (GovSG)*, ASBCA No. 61856, 19-1 BCA ¶ 37,323 at 181,537. In other words, we may determine whether the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation. *Id.*

Regarding whether Odyssey's contention that the CPARS should be remanded because "the contracting officer abused his discretion to terminate the contract for default," whether the termination was an abuse of discretion is not properly before us. Again, the government may rely upon a contractor's failure to do its job to justify a default termination however the contracting officer arrived at the termination decision, *HK&S*, 19-1 BCA ¶ 37,268 at 181,352, and we have held in ASBCA No. 62085 that the government is entitled to judgment that Odyssey defaulted on the contract.

Odyssey also says that "where the contracting officer failed to conduct any investigation whatsoever of the proffered reasons for Odyssey's non-performance, but instead selected and/or affirmed a rating of 'Unsatisfactory' that by definition is arbitrary and capricious in perfunctory fashion, he abused his discretion" (app. mot. at 8). Odyssey cites FAR 42.1502, but the only regulatory violation that Odyssey alleges appears to be that Odyssey's past performance was not "Unsatisfactory" because "Unsatisfactory" means that "[p]erformance does not meet most contractual requirements" (app. mot. at 7-8), a definition found at FAR 42.1503. However, the note to that definition provides that (emphasis added):

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

It makes sense that where a contractor failed to perform the only contract task it attempted to perform, that failure is a singular problem of such serious magnitude that it alone constitutes an "Unsatisfactory" rating. Here, it is undisputed that Odyssey failed to perform the only task that it attempted: bonding. Consequently, the assessment of Odyssey's performance as "Unsatisfactory" is consistent with FAR 42.1503. Accordingly, the government is entitled to judgment as a matter of law that its CPARS rating of Odyssey's performance as "Unsatisfactory" was appropriate and not an abuse of

discretion; in other words, that Mr. Page acted reasonably in rendering the disputed performance rating.

For all these reasons, ASBCA No. 62193 is denied.

CONCLUSION

We have considered the parties' other arguments, but, in view of our decisions in these appeals, we find those arguments unnecessary to address. The government's motion for summary judgment is granted in part. Odyssey's cross-motion for summary judgment is denied. The appeals are denied.

Dated: May 11, 2021

TIMOTHY P. MCILMAIL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

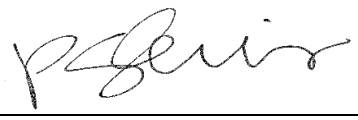
RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
Administrative Judge
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. 62085, 62145, 62193, Appeals of Odyssey International, Inc., rendered in conformance with the Board's Charter.

Dated: May 12, 2021



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