ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
KiSKA Construction Corp.-USA and	)	
Kajima Engineering and Construction, Inc.,	)	
A Joint Venture	)	ASBCA Nos. 54613, 54614
	)	
Under Contract No. 1E0023	)	

APPEARANCE FOR THE APPELLANT: Jerome Reiss, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DELMAN

Under ASBCA No. 54613, KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture (appellant) seeks the release of retainage under the subject contract in the amount of $650,000.00. Under ASBCA No. 54614, appellant seeks an equitable adjustment in the contract price in the amount of $596,017.74. The Washington Metropolitan Area Transit Authority (the Authority or WMATA) denies all liability. Our jurisdiction is predicated upon the Disputes article of this contract. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, does not apply. Appellant's claims are before us on entitlement and quantum.

FINDINGS OF FACT

Background

1. By notice of award dated 25 February 1994, WMATA awarded this contract to appellant for the construction of twin, single-track earth tunnels, an access shaft, fan shaft, vent shaft and related work as part of a Metrorail system for the Washington, DC metropolitan area. The notice of award was issued by Mr. F.X. Watson, contracting officer (CO), 600 Fifth Street, NW, Washington, DC. (R4, tab 9)

2. Disputes arose during performance of the contract. On 10 November 1997, appellant filed an action against WMATA in the United States District Court for the District of Columbia, *KiSKA Construction Corp.-U.S.A. and Kajima Engineering and Construction, Inc., A Joint Venture v. Washington Metropolitan Area Transit Authority*, No. 1:97CV02677 (the court action). Appellant sought damages from WMATA for (1) fraudulent misrepresentation; (2) negligent misrepresentation; (3) quantum meruit; (4) unilateral mistake and (5) material breach of contract. (App. supp. R4, tab 10) It is undisputed and we find that the court dismissed the first two causes of action above, granted summary judgment for WMATA on the third cause of action and held over the latter two for trial.

3. Paragraph 185 of appellant's complaint in the court action stated as follows:

> Despite repeated requests by KiSKA-Kajima throughout Contract performance for change orders and appropriate time extensions to compensate KiSKA-Kajima for the additional costs and delays to the Project schedule caused by WMATA, WMATA continuously refused to accept responsibility for its numerous acts and omissions.

(App. supp. R4, tab 10) Appellant did not identify the alleged change orders referenced above.

4. In Count IV of the complaint, "Material Breach of Contract," appellant alleged as follows:

> 248. WMATA materially breached the Contract, including express and implied warranties, in at least the following ways:
>
> a. WMATA failed to disclose necessary and vital information to KiSKA-Kajima relating to the performance and safety of the work to be performed;
>
> b. The Contract plans and specifications and directed construction methods prepared by WMATA were defective, misleading, incomplete and unfit for their intended purpose;
>
> c. WMATA breached its duty to cooperate with KiSKA-Kajima and not hinder or interfere with KiSKA-Kajima's performance;

d. WMATA failed and refused to grant time extensions for excusable and/or compensable delays encountered by KiSKA-Kajima;

e. WMATA directed that extra work beyond the scope of the Contract be performed and has failed and/or refused to pay for such extra work;

f. WMATA failed and refused to administer the Contract in accordance with its terms and with good faith and fair dealing;

g. WMATA failed to coordinate the Project with the numerous Washington, D.C. utility companies and permit-granting agencies;

h. WMATA failed to coordinate the work of its other contractors, including Blake Construction;

i. WMATA failed to obtain necessary permits for construction in a timely manner;

j. WMATA failed and refused to review and approve shop drawings in a timely manner;

k. WMATA failed to provide timely and complete access to the jobsite;

l. WMATA directed the acceleration of the work without compensating KiSKA-Kajima;

m. WMATA arbitrarily and unreasonably directed pervasive changes to the Contract which constituted a cardinal change.

(*Id*.) Appellant did not aver that WMATA wrongfully withheld the balance of the contract price or that its failure to timely pay the contract retainage was a breach of contract. With respect to paragraph 248(e), above, appellant did not identify the alleged extra work directed by WMATA.

5. During discovery in the court action, it appears that counsel for the parties sought to exchange information regarding certain unidentified open pending change orders (PCOs), and a letter from appellant's counsel to WMATA counsel dated 10 November 1998 to this effect appears in the record (R4, tab 7). The record does not show that any such documents were used as evidence in the court action. Appellant's counsel also stated in this letter that appellant was seeking all costs incurred "as a result of, among other things, WMATA's fraudulent and negligent misrepresentations and material breaches of contract" and as of the date of the letter "there are no outstanding claims" relating to the contract (*id*.).

6. Prior to trial WMATA filed a motion to dismiss the suit, contending that appellant's claims should not be before the court because they were disputes arising "under" the contract for which the Disputes article of the contract provided an administrative remedy.[1] The court addressed the unique framework of contract dispute resolution under WMATA contracts and denied the Authority's motion, concluding, *inter alia*, that appellant had asserted a cause of action for breach of contract for which the court had jurisdiction. (App. resp. to WMATA mot. sum. judg., Akyuz aff., ex. A)

7. At the trial in the court action appellant introduced into evidence an updated quantification of damages report prepared by Mr. Jeffrey E. Fuchs, P.E., CPA. The report claimed damages using the modified total cost approach, seeking all contract costs less adjustments not relevant here, plus overhead, profit, bond premium, interest and lost profit, for a subtotal of $46,955,313. Mr. Fuchs also added a claim for the balance of the contract price or the retainage, in the amount of $650,000.00, for a total claim of $47,605,313. (R4, tab 6 at iv)

8. Mr. Fuchs testified that the retainage represented the portion of progress payments retained by WMATA for work performed by appellant during the course of the contract (R4 supp., tab 23 at tr. 2609). Mr. Fuchs also stated that the retainage amount was in the nature of an "accounting adjustment" that was not disputed and to which appellant was entitled (*id*. at 2641). The record is unclear what position, if any, WMATA took with respect to this testimony or on the issue of retainage in general. Appellant's counsel sought recovery of breach of contract damages as well as the contract retainage in closing argument to the jury (R4, tab 5 at tr. 4669).

9. After the close of the evidence, the court provided the jury a comprehensive set of instructions. The court identified the claims or causes of action before the jury as follows:

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[1] In filing this motion, WMATA acknowledged the unique disputes framework for the resolution of disputes under WMATA contracts. *See KiSKA II, infra,* 06-1 BCA at 164,770 (finding 18) and our Decision herein.

INSTRUCTION NO. 33

GENERAL INSTRUCTION REGARDING
KISKA-KAJIMA'S COMPLAINT

In its Complaint, the Plaintiff, KiSKA-Kajima, has filed two causes of action or claims against the Defendant, Metro:

(1) First, KiSKA-Kajima claims that Metro materially breached the contract by, among other things, failing to provide design plans and specifications that were accurate, complete and fit for their intended purpose, failing to disclose vital information that Metro possessed regarding the adequacy of its Contract plans and specifications, and failing to cooperate and not interfere with KiSKA-Kajima and otherwise act in good faith in its administration of the Contract.

(2) Second, KiSKA-Kajima claims that it entered into the contract with Metro on the basis of a unilateral mistake regarding the adequacy of Metro's plans and specifications and the ability to safely and efficiently perform the work as required in the Contract.

I will now instruct you as to each cause of action separately.

(App. supp. R4, tab 12) The court provided no instruction regarding a claim for the wrongful withholding of retainage or WMATA's failure to pay equitable adjustments for the matters claimed in the complaint before this Board.

10. With respect to appellant's claim of material breach of contract, the court instructed as follows:

INSTRUCTION NO. 40

BREACH OF CONTRACT – ELEMENTS

There is agreement between the parties that a valid and enforceable contract existed pursuant to which KiSKA-Kajima agreed to perform the construction work

necessary to complete the 14th Street Tunnels for the agreed price of $42,920,000.00. KiSKA-Kajima claims that Metro materially breached the contract in a number of ways that I will explain to you in separate instructions.

Under the law, if one party, without legal excuse fails to fully perform a duty owed under a contract, then that party has breached the contract.

If you find, by a preponderance of the evidence, that Metro breached any of its contractual duties that I describe to you related to KiSKA-Kajima's claims that Metro failed to provide design plans and specifications that were accurate, complete and fit for their intended purpose or that Metro failed to disclose vital information, then you must return a verdict in favor of KiSKA-Kajima on its breach of contract claim.

Or, if you find, by clear and convincing evidence, that Metro acted in bad faith in the administration of the Contract or that Metro failed to cooperate with or prevented, hindered or interfered with KiSKA-Kajima's performance of the contract, then you must return a verdict in favor of KiSKA-Kajima on its breach of contract claim.

(App. supp. R4, tab 12)

11. The court also provided the following Instruction:

INSTRUCTION NO. 50

BREACH OF CONTRACT –

DUTY OF GOOD FAITH & FAIR DEALING --DEFINITION

A party to a contract acts in good faith if the party's conduct is faithful to the common purpose of the contract and is consistent with the justified expectations of the other party to the contract. It is impossible to list every act that violates the duty of good faith and fair dealing, however, it is generally accepted that a party to a contract breaches its duty of good faith if it:

1) does not uphold the spirit of the contract,
2) does not exercise diligence in performing its contractual obligations,
3) interferes with the other party's contract performance, OR
4) fails to cooperate with the other party during the performance of the contract.

A party to a contract must perform his or her obligations in good faith even if the contract does not provide for such a duty in writing. *To find that Metro did not act in good faith requires a finding, by clear and convincing evidence, that Metro acted with specific intent to injure KiSKA-Kajima, or that Metro took actions which were motivated by malice or ill-will towards KiSKA-Kajima, or that Metro took actions that were designedly or intentionally oppressive to KiSKA-Kajima*.

(Emphasis added) *(Id.)*

12. The jury returned two general verdicts, finding in favor of WMATA on the claim of breach of contract and on the claim of unilateral mistake. The jury provided no further particulars. (App. supp. R4, tab 13)

13. The court entered judgment on the verdicts for WMATA (R4, tab 8). Appellant's motion for new trial was denied, and on appeal the judgment was affirmed. *KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, 321 F.3d 1151 (D.C. Cir. 2003), *cert. denied,* 540 U.S. 939 (2003).

14. By letter to the CO dated 5 January 2004, appellant requested payment under the Disputes article of the contract, insofar as pertinent as follows:

RETAINAGE
Pursuant to paragraph (d) of Article 7, "Payments to Contractor," there remains due and owing KiSKA for work performed under the contract, the retainage of $650,000 which has never been paid. (See, Exhibit 1, Pay Estimate No. 38, attached hereto).

CHANGES

Pursuant to paragraphs (a) and (b) of Article 3, "Changes", equitable adjustments are requested for the following:

I. Approved Modifications:

1. Modification NO. 33. The parties agreed that KISKA was entitled to an increase of $6,042 of the contract price for test pitting to determine the extent of shallow utility ducts for restoration of the streets. . . .
2. Modification NO. 49. WMATA unilaterally issued this Modification in the sum of $6,994 for PCO 49 to cover the additional water connection performed by KiSKA. . . .

II. Agreed Change Orders Pending Modifications:

1. PCO NO. 45 WMATA issued this PCO for the removal of the old street tracks on 14th Street. Following agreement on the final quantity, WMATA was to issue a Modification in the sum of $192,005.10. It has not done so. . . .
2. PCO NO. 60. The parties agreed upon the issuance of a change order in the sum of $5,920 for grouting weep holes in the tunnel, but no Modification was ever issued for this work.
3. PCO NO. [sic] WMATA directed the installation of additional railings at the intersection of Euclid and 14th Streets to prevent pedestrians from walking into the street there. The parties agreed to add $5,839 to the contract price, but WMATA failed to issue a Modification.

III. Agreed Pending Change Orders:

1. PCO NO. 4. WMATA directed that the Access Shaft where the tunnel machines were launched be reduced in size. The reduction required that the high-tension power utilities affected by the reduction be relocated. The problem was substantial and KiSKA submitted a cost proposal in the sum of $208,399.91 for this change. . . .
2. PCO NO. 29. WMATA directed KiSKA, for safety reasons, to install steel posts in lieu of the wood wedges specified in the contract when the system was changed from two gap system to a one gap system in the precast concrete section of the tunnel. . . .

> 3. PCO NO[.] 34. WMATA directed a change by requiring KiSKA to install barriers in the Fan Shaft. KiSKA submitted a cost estimate of $131,825.64. The amount of the change Order remains open.
> 4. PCO NO[.] 56. WMATA directed that a safety walk handrail be installed in the tunnels which will be used by workers and visitors to walk in and out of the heading of the tunnel. KiSKA's proposal of $247,392 was negotiated by WMATA down to $77,000, but no Modification was issued. . . .

(R4, tab 3)

15. By letter dated 15 April 2004, WMATA declined to issue a CO decision on appellant's claim, contending that all of appellant's claims were adjudicated in the court action (R4, tab 1). Appellant construed this letter as a deemed denial of its request and appealed to this Board under the Disputes article of the contract. The appeal related to the amount of retainage withheld under the contract pursuant to the article entitled "Payments to Contractor" (hereinafter "Payments" article) was docketed as ASBCA No. 54613, and the appeal related to the request for equitable adjustment pursuant to the Changes article was docketed as ASBCA No. 54614. The Board consolidated the appeals.

16. Appellant filed a complaint in accordance with the Board's rules.[2] Insofar as pertinent, appellant's complaint sought the net retainage under the contract in the amount of $650,000.00. It also sought recovery to perform work directed by WMATA under Modification No. 33 ($6,042) and Modification No. 49 ($6,994). The complaint also alleged as follows:

> 24. In the instant Contract, WMATA issued a number of PCOs for which the work was performed by KISKA but no Modification was issued nor was any payment made.
>
> 25. Upon information and belief, the unpaid PCOs are as follows:
>
> a. PCO 45 for streetcar track quantity overruns in the sum of $192,005.10.

[2] In the complaint appellant chose to pursue only some of the claims it filed with the contracting officer in January, 2004. Accordingly, we consider only the claims specifically raised in the complaint and detailed herein to be properly before us.

b. PCO 60 for grouting weep holes in the tunnel in the sum of $5,920; and for additional pedestrian railings at Euclid Street in the sum of $5,839. Together, the two extra work items total the sum of $11,759.

c. PCO 34 for barrier modifications at the fan shaft in the sum of $131,825.64.

d. PCO 56 for a temporary tunnel safety walk in the sum of $247,392.

26. The total amount due and owing by reason of the above PCOs is the sum of $582,981.74.

27. The total amount due by reason of the amount withheld as retainage, together with the Modifications and PCOs above described issued by WMATA for work acknowledged by WMATA to have been performed pursuant to the Contract provisions is the sum of $1,246,017.74, no part of which has been paid though duly demanded.

17. In lieu of filing an answer to appellant's complaint, WMATA filed a letter with the Board dated 19 July 2004, stating the Authority had initiated an action for declaratory judgment in the U.S. District Court for the District of Columbia seeking a judgment that the ASBCA claims were barred by *res judicata* and/or *collateral estoppel*. The Authority moved to suspend the Board appeals until the court addressed the declaratory judgment motion. The Board denied WMATA's motion. *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., A Joint Venture,* ASBCA Nos. 54613, 54614, 05-1 BCA ¶ 32,922 (*KiSKA I*).

18. WMATA then moved to dismiss these appeals, or alternatively moved for summary judgment contending that appellant's claims before the Board were barred primarily on the grounds of *res judicata* and/or *collateral estoppel*. We also denied these motions. *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, A Joint Venture,* ASBCA Nos. 54613, 54614, 06-1 BCA ¶ 33,244, *recon. denied,* 06-2 BCA ¶ 33,442 (*KiSKA II*).

19. Thereafter, appellant moved for summary judgment. The Board also denied this motion. *KiSKA Construction Corp.-USA and Kajima Engineering and Construction, A Joint Venture,* ASBCA Nos. 54613, 54614, 07-1 BCA ¶ 33,445 (*KiSKA III*). The appeals went to hearing.

Substantial Completion and Retainage

20. During the hearing, WMATA offered into evidence Certificate No. 003, entitled "Substantial Completion." The "Description of Work Being Accepted" was specified in detail in the certificate as follows:

> Description of Work Being Accepted:
>
> (a) This facility or the integral parts of this facility noted above has been completed according to the contract documents and all modifications as of May 22, 1997 (Date).
> (b) All remaining work is noted on the punch list attached.
> (c) All documents submitted are in proper order and all items not submitted are listed on attachment B.
> (d) I recommend release of all but $650,000.00 in retainage, which the dollar amount stated is not less than the minimum required to be retained by the contract.
> (e) The current status of all unresolved contract issues is indicated on the attached contract status sheet (applies only to final certificates).

With respect to (e) above, there was no "contract status sheet" attached to this certificate as would apply if the certificate was for final completion. Rather, there was attached, as indicated, the punch list, change order requests and a document transfer letter. The description statement above was signed by Mr. Patrick Cummings, Resident Engineer, on 18 September 1997 and by Mr. John Dickson, Assistant Project Manager on 21 October 1997. (Ex. WMATA-1) Neither Cummings nor Dickson testified at the hearing.

21. In the middle section of the certificate, appellant's project manager, Mr. Steven Price, executed the following statement on 9 October 1997:

> I, as the Authorized Representative of the contractor on this contract, agree to:
>
> (a) Complete the Punch List by October 20, 1997 (Specified Date).

(b) Perform any incomplete contract work or required PCO work not indicated on the Punch List if discovered prior to Final Acceptance.
(c) Continue any coverage or responsibility for Insurance, Maintenance, Heat and Utilities as described in the contract.
(d) The current status of all unresolved contract issues is indicated on the attached contract status sheet (applies only to final certificates).

(Id.)

22. Appellant did not complete the punch list by 20 October 1997. In accordance with "Agenda Items" identified by WMATA for contract closeout meeting no. 6 on 17 December 1997, the parties continued to discuss the status of punch list work as of this date (app. supp. R4, tab 18). In accordance with "Agenda Items" identified by WMATA for contract closeout meeting no. 7 on 22 January 1998, the parties continued to discuss the status of punch list work as of this date (ex. A-6). In accordance with "Agenda Items" identified by WMATA for contract closeout meeting no. 8 on 30 April 1998, the parties continued to discuss the status of the punch list (app. supp. R4, tab 19).

23. With respect to the punch list, Mr. Price testified as follows:

> JUDGE DELMAN: And do you have any personal knowledge as to whether that punch list was completed by KiSKA?
>
> THE WITNESS: As I recall, most of the punch list work was completed. I think there was some punch list work that could not be completed for a various number of reasons, interfacing with other contractors. And as I recall, there was some discussion about deleting a few of the punch list items to allow another contractor to do it and, therefore finish our punch list. But I think those negotiations stopped. So we completed a large part of the punch list work *but those incomplete items are still out there because that negotiation stopped. I don't know who finished the work at that point*.

(Tr. 1/32-33) (Emphasis added). Appellant did not establish the amount or value of the punch list work that remained to be accomplished. Nor did it show the CO waived completion of the balance of the contract work or backcharged appellant for same.

24. With respect to the Substantial Completion certificate, the following statement appears towards the bottom of the certificate:

> Substantial Completion is granted on this contract for the above described work. It is further agreed that:
>
> (a) Liquidated damages will not be charged for this work subsequent to the date indicated in line (a) of the Resident Engineer's block.
> (b) Retainage will be released to a level which will not jeopardize the Authority.
> (c) This date is the start date of warranties and guarantees on this work.
> (d) Damage caused by WMATA Personnel, third parties or other means are not to be charged to this Contractor in the area accepted or occupied.

(Ex. WMATA-1)

25. The above statement was signed by Mr. Ralph Lusher, User Representative, on 19 November 1997 and by Mr. F.X. Watson, CO, on 24 December 1997 (*id*). Neither Lusher nor Watson testified at the hearing.

26. Mr. Patrick Yerdon, Resident Engineer, testified about this certificate on behalf of WMATA. Mr. Yerdon testified and we find that a certificate evidencing final completion would be stamped "FINAL" or would contain the typewritten word "FINAL" (tr. 2/141). Neither marking appears on this certificate. However, WMATA asserts that Mr. Lusher's signature on the certificate dated 19 November 1997, on behalf of the User, is indicative of a final acceptance (tr. 2/152-53).

27. Based upon the above evidence, we find that the subject certificate confirmed the substantial completion of the project as of 22 May 1997. The record does not contain a certificate for the final acceptance of the contract work.

28. WMATA processed Progress Payment No. 039 for appellant on or about 30 July 1998, in the amount of $330,380.92, for work performed through 23 June 1998 (ex. A-4; app. supp. R4, tab 22). The computer printout sheets attached to the progress payment documentation, entitled "contract payment estimate," do not indicate that all the contract work had been completed as of 23 June 1998 (*Id*.). The record does not show that appellant furnished WMATA with a properly executed voucher for final payment of the contract price, in accordance with the Payments article, ¶ 7(f) (*see* finding 56).

29. WMATA made no payments to appellant after Progress Payment No. 039 (tr. 1/42), and WMATA retained $650,000.00 of the contract price (ex. A-4 at 3). It is undisputed and we find that this retainage remains withheld to the present date.

30. By letter to WMATA counsel dated 8 May 2003, appellant's counsel demanded release of the contract retainage in the amount of $650,000.00. This letter also refers to a similar demand made by appellant in May, 2001. (Ex. A-10) The record contains no reply from WMATA. Appellant reiterated its demand for release of the retainage by claim letter to the CO dated 5 January 2004 (finding 14). The CO did not issue a decision on this matter.

Pending Change Orders (PCOs)

31. As circumstances required, WMATA would issue PCOs to appellant. Generally, a PCO was the device used by WMATA to describe what it considered to be changed work and to seek the contractor's proposal for price and/or time to perform it. A PCO for a proposed contract modification was typically signed by and issued at the recommendation of the WMATA resident engineer whose authority to bind the Authority in contract was generally limited to $25,000 (tr. 2/82; see also R4, tab 9, CO delegation ltrs. dtd. 5/4/94, 9/6/95, 11/9/95, 6/18/98). Appellant contends that the Authority issued PCOs for a number of the claims before us. Appellant did not introduce any of these PCOs into evidence.

Removal of Streetcar Tracks

32. Under Section 201, ¶ 3.3 of the specifications, appellant was to remove streetcar tracks from the project site as part of the base contract work (R4, tab 9). Under the unit price schedule, line item no. 22, WMATA provided an estimated quantity of track to be removed in the amount of 1,860 linear feet. Based upon this estimate, appellant provided a unit price to perform this work of $63.00 per linear foot for an estimated total of $117,180. (App. supp. R4, tab 21)

33. Article 53, General Provisions, "Variations in Estimated Quantities" (VEQ) provides as follows:

> 53. VARIATIONS IN ESTIMATED QUANTITIES:
>
> a. Where the quantity of a pay item in this Contract is an estimated quantity and where the actual quantity of such pay item varies more than 15 percent above or below the estimated quantity stated in this Contract, an equitable adjustment in the Contract price shall be made upon

> demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contracting Officer shall, upon receipt of a written request for an extension of time within 10 days from the beginning of such delay, or within such further period of time which may be granted by the Contracting Officer prior to the date of final settlement of the Contract, ascertain the facts and make such adjustment for extending the completion date as in his judgment the findings justify.

(R4, tab 9)

34. It is undisputed, and we find that the amount of track removed by appellant exceeded the amount estimated in the unit price schedule. It appears that WMATA used the designation PCO No. 45 as the vehicle to pay appellant for the track removal that exceeded the contract estimate.

35. During an internal briefing of the CO on 23 July 1997, there was discussion amongst WMATA contract personnel about PCO No. 45 and other matters. The minutes of this meeting were prepared and signed by WMATA's contract administrator. Insofar as pertinent, the minutes indicate that the estimated quantity for track removal in the contract schedule was inaccurate and may have been a typographical error, and that "Funding action" and "Modification" were to be prepared by WMATA to pay appellant for the quantity overrun based upon the unit price in the bid schedule. It appears that WMATA planned to take the overrun amount (actual quantity of track removed less estimated original bid quantity), and multiply the overrun by the unit bid price of $63.00 per linear foot. (Ex. A-8)

36. During a closeout meeting between the parties on 19 November 1997, WMATA advised appellant that a modification was "being processed" for this work (app. supp. R4, tab 17), but no further detail was provided. The record does not show that WMATA actually sent such a modification to appellant for approval and/or signature at or about this time. It is unlikely that such a modification was so furnished because PCO No. 45 was still an open item well into 1998. The "Agenda Items" for closeout meeting no. 8 on 30 April 1998 indicate that the matter under PCO No. 45 was "to be included in Final Qty MOD." (App. supp. R4, tab 19)

37. On or about 14 May 1998, the parties executed an "Agreement of Final Quantity" in the amount of 4907.7 linear feet (app. supp. R4, tab 20). This agreement

was signed on behalf of WMATA by its resident engineer, Mr. Cummings. Insofar as pertinent, WMATA's resident engineer was assigned by the CO to inspect the work under the contract and to certify the quantities of work performed for progress payment purposes (R4, tab 9, ltr. dtd 11/9/95). We find that Mr. Cummings was authorized to execute this document for purposes of determining the amount of track actually removed by appellant. It is undisputed and we find that appellant was never paid for this work.

38. Appellant's claim seeks payment of $192,005.10 for its removal of 4907.7 linear feet of streetcar track (R4, tab 3). Appellant's claim did not request an equitable adjustment in the contract unit price under the VEQ article, nor did appellant offer any evidence at trial in support of such an equitable adjustment.

Tunnel Walkway

39. Insofar as pertinent, Section 101, General Requirements, Paragraph VII (A) required appellant to comply with "OSHA provisions pertaining to the safe performance of the work" (R4, tab 9). Insofar as pertinent, OSHA provisions at 29 CFR § 1926.800(b) provided as follows:

> 1. The employer shall provide and maintain safe means of access and egress to all work stations.
> 2. The employer shall provide access and egress in such a manner that employees are protected from being struck by excavators, haulage machines, trains and other mobile equipment.

40. By CO letter dated 8 June 1995, WMATA issued a stop work order on the job for a number of reasons, one of which was that appellant had not installed a walkway for its employees for access to and egress from the tunnels as required by the contract. The CO stated in this letter that when the WMATA resident engineer was satisfied with appellant's compliance, the stop work order would be lifted at his discretion. (Ex. WMATA-5) By letter dated 8 June 1995, appellant disputed WMATA's position and advised that it requested a change order to do this work. Appellant contended that the "flat invert" in the tunnel provided safe access for its employees. Appellant did not explain in this letter or at the hearing how the flat invert met these OSHA provisions. (R4, tab 3, ex. 5)

41. WMATA replied by letter dated 12 June 1995. Insofar as pertinent, ¶ 3 of this letter cited OSHA regulation "1926.800 Subpart S" (above). WMATA stated the flat invert did not provide adequate safety because this was the area where the muck train traveled and employees could be struck by that train. (R4, tab 3, ex. 5)

42. The matter of responsibility for this tunnel walkway was debated with WMATA for many months (tr. 1/53). Appellant agreed to construct the subject tunnel walkway and the stop work order was lifted. Appellant, however, did not drop its contention that the matter was an extra under the contract. Appellant filed a cost proposal dated 11 February 1997, seeking $247,392 to perform this work (R4, tab 3, ex. 5).

43. On 23 July 1997, WMATA conducted a meeting identified as "E2c Closeout, Contracting Officer's Briefing." Insofar as pertinent, the meeting minutes state that WMATA was to issue a pending change order/ PCO on the tunnel walkway. (Ex. A-8 at WM 015667) On 19 November 1997, the parties held a closeout meeting. Insofar as pertinent, the minutes of that meeting state as follows:

> *2*. Status of Change Order Negotiations & Contract MODs
>
> . . . .
>
> PCO-056; WMATA action to review proposal and set up negotiations. PROC action.

(App. supp. R4, tab 17) A WMATA document entitled "Agenda Items" for a closeout meeting on 17 December 1997 refers to "PCO 56 – temporary tunnel safety walk" under the heading "Status of Change Order Negotiations & Contract MODS" and states "PROC Action" (app. supp. R4, tab 18). A WMATA document entitled "Agenda Items" for a closeout meeting on 30 April 1998 refers to a "PCO 56 – temporary tunnel safety walk" under the heading "status of change order negotiations and contract mods" and states "PROC Action/Neg. Required" (app. supp. R4, tab 19). Appellant's project coordinator, Mr. Ulgur Aydin, testified that the parties entered negotiations on PCO No. 56, but no agreement was ever reached (tr. 2/42).

44. At the hearing WMATA provided evidence from its resident engineer, consistent with the position taken by the CO during the performance period (finding 40), that the tunnel walkway was required by the contract and that appellant had not met this requirement (tr. 2/67-71). Appellant's witnesses did not address how appellant's planned performance complied with the OSHA requirements, thereby making the CO's direction a change order. Appellant contends, in essence, that the CO reversed course since WMATA issued PCO No. 56. However, PCO No. 56 was not a binding contract modification. The CO did not testify, and appellant offered no probative evidence explicating any change in the CO's interpretation of the contract requirements.

Grouting Weep Holes in Tunnel; Additional Pedestrian Railings at Euclid Street

45. Appellant's project coordinator, Mr. Aydin, testified that WMATA issued and negotiated PCO No. 60 for these work items, that WMATA agreed to pay appellant $5,920 and $5,839 respectively for these items, and that it failed to pay these amounts (tr. 2/39-40). Other than appellant's claim letter, the record contains no contemporaneous project evidence to substantiate this testimony or the nature of this work. PCO No. 60 is not of record.

Barrier Modification Around Fan Shaft

46. During the construction, WMATA directed appellant to modify the concrete structure around the fan shaft to accommodate the future installation of fire doors (tr. 1/64). This work was identified by WMATA as PCO No. 34 (see below). PCO No. 34 is not of record, but there is considerable evidence of record relating to PCO No. 34.

47. The record contains contemporaneous project records that indicate that this work was performed in 1996; entries on these documents indicate that this work was charged to PCO No. 34 (R4, tab 3, ex. 4 *passim;* finding 51). At the CO briefing on 23 July 1997, the minutes of meeting note that a "revised" proposal from appellant was expected on PCO No. 34 (ex. A-8 at 3, entitled "Contractor Actions"). Appellant's original proposal is not of record. During a closeout meeting between the parties on 19 November 1997, it was again noted in the minutes of meeting that appellant was to submit a revised proposal on PCO No. 34 (app. supp. R4, tab 17 at 1, ¶ 2). Appellant did in fact furnish a revised proposal dated 10 December 1997, and the proposal specifically referenced and was in response to PCO No. 34 (R4, tab 3, ex. 4). In accordance with "Agenda Items" identified by WMATA for contract closeout meeting no. 7 on 22 January 1998, WMATA noted as follows under ¶ 2 "Status of Change Order Negotiations & Contract MODs- PCO No. 34 – Barrier Modification at Fan Shaft – Proposal Received PROC Action" (ex. A-6). An identical statement is found in the "Agenda Items" identified by WMATA for contract closeout meeting no. 8 on 30 April 1998 (app. supp. R4, tab 19). Based upon the foregoing, we find that WMATA issued and appellant received PCO No. 34 with respect to this work.

48. Appellant's revised proposal on PCO No. 34 dated 10 December 1997 sought $131,825.64. This figure included a claim for appellant's labor ($6,334.34); subcontractor work by Joseph B. Fay Co. (Fay) ($83,326.30) and by Eastern Steel Constructors, Inc. (Eastern Steel) ($10,076.39); material cost ($5,163.01); and equipment cost ($3,927.44), for a total direct cost claimed of $108,827.48. Appellant added overhead (6%), G&A (3.92%), profit (10%) and bond (0.63%) to arrive at the total of

$131,825.64[3]. Appellant included a number of subcontractor and supplier invoices and KiSKA audit vouchers to substantiate its claimed costs. (R4, tab 3, ex. 4)

49. WMATA provided no evidence to dispute any of the claimed amounts or rates. WMATA's brief argues that a number of appellant's entries were unsupported by billings or other documentation (br. at 37-38).

50. With respect to appellant's claimed labor ($6,334.34), we see no record support for roughly 50% of the amount claimed. With respect to amounts claimed for the subcontract work of Fay ($83,326.30), the documents of record show that appellant used Fay's actual invoices/bills to appellant for labor, material, equipment and overhead charges during the relevant time period and allocated those charges, by estimate, to the work performed under PCO No. 34 and other work activities. These estimates were entered on appellant's audit voucher sheets, dated contemporaneously with the Fay invoices, and were signed or initialed by multiple job representatives. (R4, tab 3, ex. 4)

51. With respect to amounts claimed for the subcontract work performed by Eastern Steel ($10,076.39), appellant provided "extra work sheets" (EWS) signed and dated by Eastern Steel that identified the PCO No. 34 work contemporaneous with the performance of the work, along with invoices to appellant seeking recovery for this work. WMATA points to a number of EWS forms in small dollar amounts (EWS 147, 149, 151, 153) that appear to reflect charges to claims other than PCO No 34. We also find no supporting documents for EWS 154 and 176.

52. As for material charges, WMATA questions as unsupported the claimed amount for steel provided by Eastern Steel ($961), specifically, the claimed amount of steel used in the amount of 4,241 pounds. It does not dispute, however, that steel was required for this work. It appears that this figure was based upon an estimate, as was appellant's claimed equipment cost ($3,927).

53. Appellant's proposal and the estimates therein were prepared under the supervision of Mr. Price. Mr. Price reviewed all the proposed costs and stated they were fair and reasonable (tr. 1/66). As far as this record shows, WMATA did not respond to appellant's revised proposal, nor did it pay for this work (tr. 1/66-67).

Contract Modification No. 49

54. By contract modification dated 18 February 1998, WMATA issued Modification No. 49, a unilateral change order to appellant in the amount of $6,994 to

[3] Appellant erred in calculating bond cost at 0.63% of $131,742.64; the bond cost claimed should have been $830.00, not $83.00.

make necessary changes to the water service line at the NCBA building that was going to a senior citizen's complex at the north end of the project (app. supp. R4, tab 15; tr. 1/48). This change order was signed by Mr. Patrick Cummings as the authorized representative of the CO. WMATA does not dispute Mr. Cummings' authority to issue the change order and we find that he was so authorized. WMATA does not dispute that this work was performed and we find that it was performed. Appellant was not paid for this work.

Contract Modification No. 33

55. During construction, WMATA directed appellant to excavate test pits to locate certain underground telephone duct banks and appellant performed this work (tr. 1/42). It is undisputed and we find that this excavation work was not part of the base contract, and the parties signed a contract modification for the additional work in the amount of $6,042. Modification No. 33 was executed by Mr. Price for the appellant on 11 June 1997 and by Mr. Cummings for WMATA on 13 June 1997. (R4, tab 9) WMATA does not dispute and we find that the signatories were authorized to sign this modification. Appellant was not paid the agreed upon amount for this modification (tr. 1/42).

56. We find the following articles in the General Provisions pertinent in these appeals:

> 3. CHANGES:
>
> a. The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract including, but not limited to, changes:
>
> (1) In the Specifications, including Drawings and designs;
>
> (2) In the method or manner of performance of the work;
>
> (3) In the Authority-furnished facilities, equipment, materials, services, or site; or
>
> (4) Directing acceleration in the performance of work.

b. Any other written order or an oral order, which terms as used in this Paragraph b. shall include direction, instruction, interpretation or determination from the Contracting Officer, which causes any such change, shall be treated as a change order under this article, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances and source of the order and that the Contractor regards the order as a change order.

c. Except as herein provided, no order, statement or conduct of the Contracting Officer shall be treated as a change under this article or entitle the Contractor to an equitable adjustment hereunder.

d. If any change under this article causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this Contract, whether or not changed by any order, an equitable adjustment shall be made and the Contract modified in writing accordingly: Provided, however, that except for claims based on defective specifications, no claim for any change under b. above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice. . . .

e. If the Contractor intends to assert a claim for an equitable adjustment under this article, he must, within 30 days after a receipt of a written change order under a. above or furnishing of a written notice under b. above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Authority. The statement of claim hereunder may be included in the notice under b. above.

f. No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this Contract.

....

6. DISPUTES:

a. Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Board of Directors. The decision of the Authority Board of Directors or its duly authorized representative for the determination of such appeals shall be final and conclusive unless in proceedings initiated by either party for review of such decision in a court of competent jurisdiction, the court determines the decision to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.[4]

7. PAYMENTS TO CONTRACTOR:

a. The Authority will pay the Contract price as hereinafter provided.

b. The Authority will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer.…

....

d. In making such progress payments, five percent of the estimated amount of work completed shall be retained until final completion and acceptance of the Contract work. Also, whenever the work is substantially complete, and the Contractor is in compliance with all provisions of the Contract, if the Contracting Officer considers the amount retained to be in excess of the amount adequate for the

[4] It is undisputed that the ASBCA is the duly authorized representative of the Authority Board of Directors for purposes of decision-making under the Disputes article.

protection of the Authority, he may, at his discretion, release to the Contractor all or a portion of such excess amount. Furthermore, upon completion and acceptance of each separate building, public work, or other division of the Contract, on which the price is stated separately in the Contract, the Contracting Officer may direct the payment to be made without retention.

Where the time originally specified for completion of this Contract exceeds one year, the Contracting Officer, at any time after 50 percent of the work has been completed if he finds that satisfactory progress (satisfactory progress includes prosecution of physical work, adherence to DBE, SAP, quality assurance and all other provisions of the Contract) is being made, may reduce the total amount retained from progress payments to the minimum level necessary to protect the interest of the Authority.

....

f. *Upon completion and acceptance of all work, the amount due the Contractor under this Contract shall be paid upon the presentation of a properly executed voucher* and after the Contractor shall have furnished the Authority with a release, if required, of all claims against the Authority arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the Contract has been assigned, a release may also be required of the assignee. [Emphasis added]

57. AUTHORIZED REPRESENTATIVE OF THE CONTRACTING OFFICER:

a. The work will be conducted under the general direction of the Contracting Officer. The Engineer is the Authorized Representative of the Contracting Officer with authority to take all actions authorized herein and as may be delegated by the Contracting Officer in separate actions, which can lawfully be taken by the Contracting Officer, including the following:

(1) Inspection of the work for compliance with the Contract.

(2) Issuance of orders to stop and/or resume work where such orders are authorized by the Contract, excluding suspension of work under the SUSPENSION OF WORK article in these General Provisions.

(3) Negotiation with the Contractor without dollar limitation as to adjustment of Contract price and/or time and recommendation of acceptance or rejection of negotiation results.

(4) Preparation of the Authority estimate for Contract modifications.

(5) Modification of the Contract in accordance with the CHANGES article or other articles of these General Provisions, in each instance not to exceed the dollar amount authorized by the Contracting Officer by separate correspondence, including the preparation of and furnishing to the Contractor sketches and clarification within that limitation.

(6) Preparation and signing of payment estimates. In those cases releasing retained percentage or remitting liquidated damages, the Engineer will make his recommendations thereon in writing to the Contracting Officer.

....

64. PRICING OF ADJUSTMENTS:

....

b. *Notwithstanding any interpretation of the aforementioned contract cost principles and procedures to the contrary, the Authority shall not be liable for interest,* however represented, on or as part of any claim, request, proposal or adjustment (including equitable adjustments)

> whether said claim, request, proposal or adjustment (including equitable adjustments) arises under the Contract or otherwise. [Emphasis added]

(R4, tab 9)

DECISION

ASBCA No. 54613 – Contract Balance/Retainage

Jurisdiction

According to WMATA, we must dismiss this appeal because our jurisdiction in this non-CDA appeal is limited to disputes under the contract, and this contract lacks the necessary contract provision that grants a CO the authority to adjust the contract or to afford the remedy requested by appellant (br. at 26-8).

Prior to the CDA, the law was well settled that the jurisdiction of a board of contract appeals, as the representative of the procuring federal agency to decide disputes under the Disputes clause of a government contract, was limited to those disputes that could be resolved under a contract clause providing the remedy sought by the contractor. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *Edward R. Marden Corp. v. United States*, 442 F.2d 364 (Ct. Cl. 1971). As we noted in *KiSKA II*, this limitation was also adopted by the courts to define and limit the jurisdiction of boards under the Disputes article in WMATA procurements.

In accordance with the foregoing, this Board, as representative of the Secretary of Defense under the Disputes clause, exercised jurisdiction over contractor appeals on claims seeking equitable adjustments under contract clauses that specifically provided for such equitable adjustments, but it also heard appeals on contractor claims where the availability of the relief requested by the contractor was necessarily implied by the contract. *See, e.g., Bell County Water Control and Improvement District*, ASBCA No. 22843, 78-2 BCA ¶ 13,446; *Sea Tankers, Inc.*, ASBCA No. 22294, 78-1 BCA ¶ 13,150; *Sea-Land Service, Inc.*, ASBCA No. 17068, 73-1 BCA ¶ 10,022.

Under ASBCA No. 54613, the relief requested by the contractor is the payment of the full amount due under the contract, *i.e.*, the contract price under the Payments article. Appellant does not seek breach of contract damages or any other relief unavailable under the contract. The relief requested by appellant is not only necessarily implied under the Payments clause, it is specifically addressed therein (finding 56).

WMATA cites no cases in support of its position that we have no jurisdiction over such a claim. On the other hand, the case law supports the position that we do have jurisdiction. *See Green International, Inc.*, ENGBCA Nos. 5706 *et al.*, 98-1 BCA ¶ 29,684 at 147,105 (Board addresses the unpaid contract balance/retainage due a contractor under a WMATA contract); *Nomikos Painting Co.,* ASBCA No. 13286, 69-1 BCA ¶ 7,682 (sustaining contractor claim for return of unpaid contract balance); *Charles H. Shepherd, Inc.*, ASBCA No. 13412, 70-2 BCA ¶ 8,416 at 39,179 (sustaining contractor claim for unpaid balance of the contract price); s*ee also Roy F. Weston, Inc.*, ASBCA No. 17490, 73-2 BCA ¶ 10,188 at 47,978:

> [T]here is no jurisdictional problem insofar as appellant's claim is concerned [$6,500 withheld from contract price and sought under the payment provisions] as it is clearly a claim that appellant performed the contract in accordance with its terms and thereunder is entitled to the full contract price.

Based upon the foregoing, we conclude we have jurisdiction over appellant's claim for the full contract price and the release of the retainage under the Payments article, and we believe that our exercise of that jurisdiction is consistent with the limited nature of our jurisdiction prior to the CDA.

Affirmative Defenses

In *KiSKA II*, we denied WMATA's motion to dismiss and/or motion for summary judgment and held that WMATA failed to show that appellant was barred from litigating its claim for retainage before this Board as a matter of law. We addressed WMATA's affirmative defenses of *res judicata* and *collateral estoppel* and concluded that WMATA failed to meet its burden to show a bar.

With respect to the affirmative defense of *res judicata*, WMATA reiterates the same legal arguments that we previously considered and rejected in *KiSKA II*. WMATA's position, *i.e.*, that *res judicata* bars the presentation of a request for equitable adjustment at a board once a breach claim is decided by a court and *vice-versa,* ignores the well established and unique contract disputes framework that existed prior to the enactment of the CDA, wherein a contractor's various claims under the same contract were *required* to be presented in different forums – claims of breach of contract before a court and requests for equitable adjustment handled administratively before a board of contract appeals as the representative of the agency. We conclude that *res judicata* does not bar appellant's request for equitable adjustment at this Board under these unique circumstances. *See KiSKA II*, 06-1 BCA at 164,770-71, for further discussion.

As for *collateral estoppel*, also known as "issue preclusion," we noted in *KiSKA II* that this principle is generally defined in the RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), and has been applied by the District of Columbia Court of Appeals. *KiSKA II*, 06-1 BCA at 164,771. *See also Ali Baba Co. v. WILCO*, 482 A.2d 418 (D.C. 1984). Insofar as pertinent, these authorities provide that in order to prove a bar the moving party must show that the matter was actually litigated and determined by a valid, final judgment and that the determination was essential to that judgment.

We believe that WMATA has failed to meet this standard. First, WMATA has not shown that the matter of retainage was litigated by the parties in the court action. The claim was not included in appellant's complaint, and appellant's complaint is the best evidence of what was litigated in the court action. It is true that appellant presented evidence at the trial seeking payment of retainage, but the record does not show that WMATA contested the matter. Indeed, Mr. Fuchs testified to the effect that the matter of retainage was *not* disputed by the parties (finding 8) and it is unclear on this record how, if at all, WMATA addressed this matter. One of the salutary purposes behind the affirmative defense of *collateral estoppel* or issue preclusion is to protect a defendant from having to repetitively defend against disputed facts or issues upon which it has prevailed. WMATA fails to show – through its pleadings in the court action, through the evidence it presented to the jury or otherwise – that it contested and litigated the issue of retainage in the court action.

Assuming *arguendo*, that the matter of retainage was contested and litigated in the court action, WMATA must also show that the matter was submitted for determination to the jury and was so determined as part of a valid, final judgment. While appellant's closing argument included a request for retainage, among other things, the best evidence of what was submitted for determination to the jury is not reflected in a closing argument but rather in the court's instructions to the jury.

There was no jury instruction that addressed a contractor claim for retainage or the balance of the contract price. In addressing appellant's claims and the jury's obligation to decide them, the court issued instructions based upon appellant's complaint and appellant's surviving causes of action, *i.e.*, breach of contract and unilateral mistake. Appellant's complaint did not address retainage. Insofar as pertinent, the grounds for breach of contract cited by the court included an asserted breach for defective specifications, the failure to disclose vital information, violating the duty of good faith and fair dealing and a lack of cooperation and interference with contract performance. The matter of retainage was not included by the court, expressly or impliedly.

Based upon the court's instructions, the jury issued general verdicts of non-liability on behalf of WMATA on breach of contract and unilateral mistake. We must presume that the jury acted upon the instructions provided by the court. Since the court's

instructions did not clearly present the claim of retainage to the jury for determination, it must follow that the jury's general verdicts did not actually decide the issue.

We hear WMATA to argue that the jury's general verdicts "necessarily" included a determination that WMATA was not liable for the retainage. We do not agree. Assuming, *arguendo*, that the court's instructions were sufficiently broad to include the matter of improperly withheld retainage under appellant's claim of breach of contract, *i.e.*, for violating a duty of good faith and fair dealing, the court instructed the jury that in order for appellant to prevail on such a cause of action it needed to prove by *clear and convincing evidence* that WMATA acted with specific intent to injure appellant, or took actions that were motivated by malice or ill will towards appellant or that were designedly or intentionally oppressive to appellant (finding 11). As a result of this instruction, the jury could have believed that WMATA was responsible to pay the retainage, yet it was compelled to find in WMATA's favor because appellant failed to prove by clear and convincing evidence that that WMATA acted with specific intent to injure appellant, or took actions motivated by malice or ill will or that were designedly or intentionally oppressive to appellant.

Hence, the jury's general verdict of non-liability on breach of contract did not necessarily include a determination that WMATA was not liable for the retainage. As we stated in *KiSKA II*, if the basis for the first judgment is uncertain or unclear, there can be no bar. *KiSKA II*, 06-1 BCA at 164,771.

We conclude that WMATA has not proven its affirmative defense that appellant should be barred from litigating its contract right to the release of retainage under this contract based upon *collateral estoppel*. We shall address the merits of this claim.

The Merits

Under the Payments article, ¶ 7(f), appellant had the right to the full amount due under the contract based upon the completion and the acceptance of all contract work and upon the presentation of a properly executed voucher seeking such payment to WMATA (finding 56). Appellant has failed to show that it satisfied any of these elements under the Payments article. Appellant has failed to show that it fully completed the contract work or that WMATA finally accepted the contract work or agreed to something less than full performance, and also failed to show that it submitted a properly executed voucher for final payment. Indeed, we have found based upon the testimony of appellant's program manager that there were still incomplete work items by the end of the job (finding 23). Appellant failed to put a credible value on the contract work remaining to be performed.

Appellant, as claimant, has not shown by a preponderance of the evidence that it is entitled to the retainage, in whole or in part. Accordingly, we must deny ASBCA No. 54613.

ASBCA No. 54614 – Request for Equitable Adjustment

Appellant seeks an equitable adjustment under the contract for the following: removal of streetcar tracks in excess of the estimated quantity in the contract; WMATA-directed changes pursuant to the Changes article for tunnel walkway; the grouting of weep holes in the tunnel; additional pedestrian railing at Euclid Street; barrier modification around fan shaft; and for Contract Modification Nos. 33 and 49. WMATA also asserts affirmative defenses that the jury's general verdicts in the court action bar appellant from seeking an equitable adjustment for this work before the Board.

As for *res judicata*, we reject this argument for the same reasons we rejected this argument regarding the retainage claim under ASBCA No. 54613 above. As for *collateral estoppel*, we believe that WMATA has failed to meet its burden for reasons stated below.

WMATA has not shown that these specific requests for equitable adjustment were contested in the federal court action. WMATA has not shown that these equitable adjustments were included in appellant's complaint in the court action. WMATA also has not shown that the parties presented any evidence on any of these matters. Appellant's use of the modified total cost method to calculate its "breach of contract" damages (finding 7) does not constitute the actual litigation of these requests for equitable adjustment. WMATA also has not shown that the court's instructions to the jury served to submit any of these equitable adjustments to the jury for determination, nor has WMATA shown that these matters were actually and necessarily determined by the jury's general verdicts. Accordingly, we reach the merits on these requests.

Removal of Streetcar Tracks

Under the VEQ article, an equitable adjustment in the contract price must be based upon "*any increase…in costs* due solely to the variation above 115 percent…of the estimated quantity" (finding 33). Appellant did not offer any evidence – through project records, testimony or otherwise – to substantiate any increased costs due to the variation in the work as defined by the VEQ article, and hence is not entitled to an equitable adjustment in the contract unit price for the work it performed. However, the record shows that appellant performed work beyond the quantity estimated in the contract, and appellant is entitled to be paid for this contract work at the contract unit price. *See Foley Co. v. United States*, 11 F.3d 1032 (Fed. Cir. 1993). Appellant is entitled to recover for the quantity of the work performed, 4907.7 linear feet, less 1860 linear feet, the estimated

quantity in the schedule, multiplied by the unit price in the schedule of $63.00, for a total of $192,005.10. This calculation is consistent with WMATA's planned modification under PCO No. 45 (finding 35) and is consistent with the case law above.

For reasons stated, we sustain this claim.

Tunnel Walkway

Under the contract appellant was obligated to comply with relevant OSHA provisions regarding the safe performance of the work, which included a requirement that it provide access to and egress from the tunnels in such manner that employees were protected from being struck by excavators, haulage machines, trains and other mobile equipment. Appellant had the burden to show by a preponderance of the evidence that its performance complied with this contract requirement and that WMATA directed appellant to perform additional work. It did not meet its burden. Appellant failed to offer any persuasive evidence showing that its performance provided the protection to its employees that was required by the contract.

While appellant relies upon WMATA's issuance of PCO No. 56 to support its position, PCO No 56 was not a binding contract modification. Its existence, standing alone, does not dispose of appellant's burden of proof.

For reasons stated, we must deny this claim.

Grouting Weep Holes in Tunnel; Additional Pedestrian Railings at Euclid Street

Appellant's project coordinator testified that WMATA agreed to pay appellant $5,920 and $5,839 respectively to perform these work items. WMATA disputes this. This testimony was unsupported by any contemporaneous project records, and we do not find it persuasive.

Appellant failed to address the nature of these work items and the extent to which they changed the basic contract work. It also failed to show any contemporaneous project documentation regarding quantum or from any authorized persons of WMATA regarding the purported settlement of these claims. Appellant primarily relies on its claim letter dated 5 January 2004 to support its contentions, but a claim letter is not evidence. *Cascade General, Inc.*, ASBCA No. 47754, 00-2 BCA ¶ 31,093 at 153,531.

We conclude that these requests for equitable adjustment must be denied for lack of proof.

Barrier Modification Around Fan Shaft

The record shows that appellant was directed by WMATA to perform this additional work, the work was performed and appellant was not paid for the same (findings 46, 53). WMATA contends, *inter alia*, that appellant failed to provide WMATA with prompt notice of this claim when the work was done. However, WMATA issued PCO No. 34 to appellant on this matter (finding 47), and WMATA cannot seriously argue surprise or prejudice due to lack of notice. We believe the record supports appellant's entitlement to an equitable adjustment for this work.

As for quantum (findings 48-53), we find generally persuasive Mr. Price's testimony regarding the preparation of appellant's proposal and his belief that the amount requested was fair and reasonable. However, we are mindful of a number of discrepancies and unsupported claim items. Based upon the evidence and the circumstances of this case, we have made adjustments to all claimed cost categories, reducing appellant's claimed labor cost by roughly 50% (finding 50); reducing the estimates (findings 50, 52) by 10% to account for estimating uncertainties; and eliminating unsupported EWS sheets from the charges of Eastern Steel (finding 51). In sum, we reduce appellant's claimed direct costs from $108,827 to $94,975,[5] which we believe is a fair and reasonable equitable adjustment under the evidence presented. To this figure we add the undisputed mark-up rates as follows:

Direct Costs	$ 94,975
Total Overhead (6%)	5,699
Subtotal	100,674
Home Office G&A (3.92%)	3,946
Subtotal	104,620
Profit (10%)	10,462
Subtotal	115,082
Bond (0.63%)	725
TOTAL	$115,807

We conclude that appellant is entitled to an equitable adjustment in the amount of $115,807 to perform this work under the Changes article.

[5] The breakdown of the amount awarded for direct costs in the amount of $94,975 is as follows: Appellant's Labor $3,167; Fay $74,993; Eastern Steel $8,214; Material $5,067 (Eastern Steel material $865; Greenwald Industrial $2,690, Opportunity Concrete $1,512); Equipment $3,534 (CONESCO $2,265, KK Equipment $1,269).

Contract Modification No. 49

We have of record Contract Modification No. 49, a unilateral change order issued by WMATA through its authorized resident engineer, in the amount of $6,994, to change the water connection going to a senior citizen's complex at the north end of the project. WMATA does not dispute and we find that this work was performed. (Finding 54) WMATA argues that appellant did not agree to sign this change order, but this does not detract from the fact that an authorized WMATA person ordered this extra work in the amount stated and that the work was performed.

We grant appellant an equitable adjustment in the amount of $6,994 for this work under the Changes article.

Contract Modification No. 33

Contract Modification No. 33 was executed by authorized representatives of both parties. The parties agreed that appellant was to excavate certain test pits for the amount of $6,042. Appellant performed this work but was not paid the agreed amount. (Finding 55) We conclude that appellant is entitled to an equitable adjustment in the amount of $6,042 to perform this additional work under the Changes article.

Interest and Legal Fees

In its post-hearing briefs, appellant claims entitlement to interest on its claims and legal fees. To the extent these claims are properly before us, appellant has not shown any contractual or legal basis to obtain interest or legal fees. The contract prohibits the payment of interest (finding 56), and we have enforced such contract language. *Guarino Corp.*, ASBCA Nos. 55015, 55028, 06-2 BCA ¶ 33,426, *recon. denied*, 07-1 BCA ¶ 33,473. Nor can appellant recover interest on its claims under the CDA, since the CDA does not apply to these appeals. The contract also makes no provision for the payment of legal fees to appellant. WMATA is not a federal agency, and the Equal Access to Justice Act, 5 U.S.C. § 551, has no application. *Earth Science & Technology Corp.*, ENGBCA No. 6350, 99-1 BCA ¶ 30,335. Appellant's claims for interest and legal fees are denied.

CONCLUSION

ASBCA No. 54613 is denied. ASBCA No. 54614 is sustained in part, and we award appellant a recovery for removal of street car tracks ($192,005.10), the barrier modification around the fan shaft ($115,807), Modification No. 49 ($6,994) and Modification No. 33 ($6,042), for a total of $320,848.10.

Dated: 19 February 2009

JACK DELMAN
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

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion of the Armed Services Board of Contract Appeals in ASBCA Nos. 54613, 54614, Appeals of KiSKA Construction Corp.-USA and Kajima Engineering and Construction, Inc., a Joint Venture, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals