ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Boeing Company	)	ASBCA No. 54853
	)	
Under Contract Nos. AF33(657)-16584	)	
F33657-70-C-0876	)	
F33657-71-C-0918	)	
F33657-73-C-0006	)	
F33657-73-C-0734	)	

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER ON APPELLANT'S MOTIONS FOR SUMMARY JUDGMENT REGARDING AFFIRMATIVE DEFENSES SIX AND SEVEN

In this appeal of a sponsored claim, appellant The Boeing Company (Boeing) seeks indemnification for the costs of investigation and remediation of groundwater pollution, and for the costs of toxic tort litigation. Boeing received contracts between 1966 and 1973 relating to a missile program and awarded subcontracts to the predecessor of Lockheed Martin Corporation to develop and produce the missile's propulsion system. The contracts and subcontracts contained indemnification clauses against "unusually hazardous" risks, citing Public Law (Pub. L.) No. 85-804, codified in relevant part at 50 U.S.C. § 1431. Boeing, on behalf of Lockheed, seeks recovery under these clauses for the environmental cleanup costs, and the toxic tort litigation costs, related to Lockheed's production facility for the subcontracts. We previously denied an Air Force motion to

dismiss the appeal. *The Boeing Co.*, ASBCA No. 54853, 06-1 BCA ¶ 33,270. After extensive discovery, both parties filed a series of motions for summary judgment. In the motions decided here, Boeing seeks summary judgment regarding affirmative defense six, alleging lack of authority to include an indemnification clause in one of the contracts, and regarding affirmative defense seven, alleging a misrepresentation that specified insurance had been obtained. We deny Boeing's motion regarding affirmative defense six and grant Boeing's motion regarding affirmative defense seven.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

A. *Background*

1. The government awarded Boeing a contract to design, develop, and test a short range attack missile (SRAM) with a nuclear payload in 1966. The government later awarded four contracts for production of the SRAM to Boeing. In turn, Boeing awarded a subcontract to a Lockheed Corporation subsidiary, Lockheed Propulsion Company (LPC), to develop the propulsion system for the SRAM and then four subcontracts to produce propulsion systems. Lockheed Martin Corporation (LMC) is the successor in interest to Lockheed Corporation. (Appellant's Second Rule 4 Supplement (app. 2nd supp. R4), vol. 57, tab 1D, Appellant's First Set of Requests for Admissions to Respondent, and vol. 61, tab 3, Respondent's Reply to Appellant's First Request for Admissions (RFA&R) ¶¶ 1, 3, 4, 5; compl. and answer ¶¶ 6, 9) We refer to Lockheed Corporation, LPC, and LMC collectively as "Lockheed."

B. *Development Prime Contract and Subcontract*

2. By date of 9 September 1966, an assistant secretary of the Air Force executed a Memorandum of Approval (MOA) authorizing the inclusion of an indemnification clause in a contract for the development of the SRAM. The indemnification clause approved was against "third party liability claims...and loss of and damage to property of the contractor resulting from unusually hazardous risks...arising from direct performance under [proposed] contract AF 33(657)-16584, to the extent such claims are not compensated by insurance...." This indemnification was to be effected by including in the contract the then-current version of the clause entitled INDEMNIFICATION CLAUSE UNDER ASPR 10-703. The indemnification was authorized under the authority of 10 U.S.C. § 2354, Pub. L. No. 85-804 and Exec. Order No. 10789. (App. 2nd supp. R4, vol. 1, tabs 1, 2)

3. In November 1966, the government awarded Boeing the prime contract, No. AF33(657)-16584, for development of the SRAM (the development prime contract) (app. 2nd supp. R4, vol. 1, tab 4; RFA&R ¶¶ 10, 11; Joint Stipulations of Fact (Stip.)

¶ 17). The development prime contract contained PART XXXVI – DEFINITIONS FOR INDEMNIFICATION CLAUSE, which provided in part:

> (a) For the purpose of the clause of this contract entitled (Indemnification Clause Under ASPR 10-703," [sic] it is agreed that all risks resulting from or in connection with the explosion and/or detonation or impact of a missile, simulated missile or component thereof, utilizing the material delivered or services rendered under this contract are unusually hazardous risks regardless of whether the harm caused by such risk or liability resulting from such risk occurs before or after delivery to the Government of equipment or materials under this contract, or before or after acceptance of contract performance by the Government, or within or outside the United States.
>
> ....
>
> (d) For purposes of the clause of this contract entitled "Indemnification Clause under ASPR 10-703", a claim, loss or damage shall be considered to have arisen out of the direct performance of this contract if the cause of such claim, loss or damage occurred during the period of performance of this contract or as a result of the performance of this contract.

(Stip. ¶ 17)

4. The development prime contract also contained the clause INDEMNIFICATION CLAUSE UNDER ASPR 10-703. It provided in part:

> (a) Pursuant to the authority of 10 U.S.C. 2354 and Public Law 85-804 (50 U.S.C. 1431) and Executive Order 10789, and notwithstanding any other provisions of this contract, but subject to the following paragraphs of this clause, the Government shall hold harmless and indemnify the Contractor against
>
> (i) claims (including reasonable expenses of litigation or settlement) by third persons (including employees

of the Contractor) for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;

(ii) loss of or damage to property of the Contractor, and loss of use of such property, but excluding loss of profit; and

(iii) Loss of, damage to, or loss of use of property of the Government;

to the extent that such a claim, loss of [sic] damage (A) arises out of the direct performance of this contract; (B) is not compensated by insurance or otherwise; and [C] results from a risk defined in this contract to be unusually hazardous.

....

(d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous. Such a subcontract shall provide the same rights and duties, and the same provisions for notice, furnishing of papers, and the like, between the Contractor and the subcontractor as are established by this clause.... The Government shall indemnify the Contractor with respect to his obligations to subcontractors under subcontract provisions thus approved by the Contracting Officer....

(e) If insurance coverage maintained by the Contractor on the date of the execution of this contract is reduced, the liability of the Government under this clause shall not, by reason of such reduction, be increased to cover risks theretofore insured, unless the Contracting Officer consents thereto in consideration of an equitable adjustment to the Government, if appropriate, of the price in a fixed-price contract, or the fee in a cost-reimbursement type of contract, in such amount as the parties may agree.

(f) The Contractor shall (i) promptly notify the Contracting Officer of any occurrence, action or claim he learns of that reasonably may be expected to involve indemnification under this clause, (ii) furnish evidence or proof of any claim, loss or damage in the manner and form required by the Government, and (iii) immediately furnish to the Government copies of all pertinent papers received by the Contractor. The Government may direct, participate in, and supervise the settlement or defense of any such claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required, in regard to such settlement or defense.

(g) The Contractor shall procure and maintain, to the extent available, such insurance against unusually hazardous risks as the Contracting Officer may from time to time require or approve. All such insurance shall be in such form, in the amounts, for the periods of time, at such rates, and with such insurers, as the Contracting Officer may from time to time require or approve. The obligations of the Government under this clause shall not apply to claims, loss or damage to the extent that insurance is available and is either required or approved pursuant to this paragraph. The Contractor shall be reimbursed the cost of any such insurance in excess of that maintained by the Contractor as of the date of this contract, to the extent the cost thereof is properly allocable to this contract and is not included in the contract price. (May 1964)

(Stip. ¶ 17) We find no requirement in the development prime contract that Boeing obtain pollution insurance generally, or groundwater contamination insurance specifically.

5. Effective 7 November 1966, Boeing awarded subcontract No. R-712876-9553 to Lockheed for the development and testing of the SRAM propulsion system (stip. ¶ 32; app. 2nd supp. R4, vol. 2, tab 1 at LPRO0840407). The development subcontract contained an Indemnification clause and Definitions for Indemnification regarding "unusually hazardous risks" similar to the development prime contract (stip. ¶ 33). We find no requirement in the development subcontract that Lockheed obtain pollution insurance generally, or groundwater contamination insurance specifically.

C. *First Production Prime Contract and Subcontract*

6. By date of 28 August 1970, Aaron Racusin, a deputy assistant secretary of the Air Force, executed an MOA approving inclusion of an indemnification clause in a contract to produce SRAM missiles. In his MOA, Mr. Racusin authorized inclusion of the clause INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) and the definitions, or purposes of the clause, of "unusually hazardous risks" to include those resulting from or in connection with:

> (i) the explosion, detonation, combustion or surface impact of a missile, simulated missile or component thereof utilizing the material delivered or services rendered under this contract;
>
> (ii) the use of materials containing radioactive, toxic, explosive or other hazardous properties of chemicals or energy sources.

The indemnification extended to such risks regardless of whether the hazard occurred before or after delivery or acceptance, or within or outside of the United States. (App. 2nd supp. R4, vol. 3, tab 2 at AFPROD50000024, -26)

7. By date of 6 January 1971, the government awarded Boeing the first production prime contract (stip. ¶ 40). Contract No. F33657-70-C-0876-PZ0003 contained the definitions of "unusually hazardous risks" appearing in Mr. Racusin's MOA (*see* finding 6), and further provided, with respect to an indemnification clause:

> (d) For purposes of the clause of this contract entitled "Indemnification Under Public Law 85-804", a claim, loss or damage shall be considered to have arisen out of the direct performance of this contract if the cause for such claim, loss or damage occurred during the period of performance of this contract, or as a result of the performance of this contract (1968 Sep).

(Stip. ¶ 40)

8. The first production prime contract incorporated by reference the clause ASPR 10-702(b)(2) INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) (stip. ¶ 40). In pertinent part, that clause provided:

(a) Pursuant to Public Law 85-804 (50 U.S.C. 1431) and Executive Order 10789, and notwithstanding any other provision of this contract, but subject to the following paragraphs of this clause, the Government shall hold harmless and indemnify the Contractor against --

(i) claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;
(ii) loss of or damage to property of the Contractor, and loss of use of such property but excluding loss of profit; and
(iii) loss of, damage to, or loss of use of property of the Government;

to the extent that such a claim, loss or damage (A) arises out of the direct performance of this contract, (B) is not compensated by insurance or otherwise, and (C) results from a risk defined in this contract to be unusually hazardous. Any such claim, loss, or damage within deductible amounts of Contractor's insurance shall not be covered under this clause.

....

(c) ...The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract, the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous....

....

(g) The Contractor shall procure and maintain, to the extent available, such insurance against unusually hazardous risks as the Contracting Officer may from time to time require or approve. All such insurance shall be in such form, in the

> amounts, for the periods of time, at such rates, and with such insurers, as the Contracting Officer may from time to time require or approve. The obligations of the Government under this clause shall not apply to claims, loss or damage to the extent that insurance is available and is either required or approved pursuant to this paragraph. The Contractor shall be reimbursed the cost of any such insurance in excess of that maintained by the Contractor as of the date of this contract, to the extent the cost thereof is properly allocable to this contract and is not included in the contract price. **(MAY 1964)**

(Stip. ¶ 40)

9. The first production prime contract incorporated by reference the clause ASPR 7-104.65 INSURANCE (1968 FEB) (app. 2nd supp. R4, vol. 3, tab 4 at LPRO0398072). That clause provided, in part:

> (a) The Contractor shall, at his own expense, procure and maintain during the entire performance period of this contract insurance of at least the kinds and minimum amounts set forth in the Schedule.
>
> (b) At all times during performance, the Contractor shall maintain with the Contracting Officer a current Certificate of Insurance showing at least the insurance required by the Schedule, and providing for thirty (30) days' written notice to the Contracting Officer by the insurance company prior to cancellation or material change in policy coverage.

(Exhibits to Appellant's Motion for Summary Judgment (mot., ex.) 8A) Special Provision 26 in Section J of the contract stated that, for purposes of the above clause, "the types of insurance and minimum amounts required are those set forth in ASPR 10-501.1, 10-501.2, 10-501.3 and 10-501.4" (app. 2nd supp. R4, vol. 3, tab 4 at LPRO0398060).

10. The 30 September 1970 versions of ASPR 10-501.1, 10-501.2, 10-501.3 and 10-501.4 required: workman's compensation and employers' liability insurance in the amount of $100,000; general liability insurance for bodily injury with minimum limits of $50,000 per person and $100,000 per accident; automobile liability insurance with minimum limits of $50,000 per person and $100,000 per accident for bodily injury and $5,000 per accident for property damage; and aircraft public and passenger liability insurance with minimum limits of $50,000 per person and $100,000 per accident for

bodily injury, other than passenger liability, $50,000 per accident for property damage, and $50,000 passenger liability bodily injury per passenger (app. 2nd supp. R4, vol. 78, tab 1 at 1). We find no requirement in this clause, or in any other provision of the first production prime contract, that Boeing obtain pollution insurance generally, or groundwater contamination insurance specifically.

11. Boeing awarded Lockheed the first production subcontract, No. R-785050-9556, for the SRAM propulsion system, in 1971 (app. 2nd supp. R4, vol. 4, tabs 5, 6). At paragraph 5.4, the subcontract contained an indemnification clause and definitions for indemnification substantially similar to those in the 1970 MOA (*see* finding 6) and the first production prime contract (app. 2nd supp. R4, vol. 4, tab 6 at LPRO0449792). The subcontract included clause 6.60, INSURANCE, that provided:

> 6.60.1 The Seller shall, at his own expense, procure and maintain during the entire performance period of this subcontract insurance of at least the kinds and minimum amounts set forth in ASPR 10-501.1, 10-501.2, 10-501.3, and 10-501.4 incorporated herein by reference.

(App. 2nd supp. R4, vol. 4, tab 8 at LPRO0517189; mot., ex. 11A at LPRO0462884) We find no requirement in this clause, or any other provision in the first production subcontract, that Lockheed obtain pollution insurance generally or groundwater contamination insurance specifically.

D. *Second Production Prime Contract and Subcontract*

12. On 14 November 1958, President Eisenhower issued Exec. Order No. 10789, authorizing the Department of Defense to enter into contracts "without regard to the provisions of law relating to the making...of contracts, whenever, in the judgment of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force...the national defense will be facilitated thereby." 23 Fed. Reg. 8897 (Nov. 14, 1958) (app. 2nd supp. R4, vol. 77, tab 2). Significantly, Exec. Order No. 10789 provided that the Secretaries of Defense, Army, Navy, and Air Force could exercise the authority themselves or delegate it to "other military or civilian officers or officials." The authority was limited to "amounts appropriated." (*Id.*) On 24 July 1971, however, President Nixon amended Exec. Order No. 10789 by, *inter alia*, providing that the limitation to amounts appropriated would not apply to indemnification clauses, and requiring that such indemnification provisions be approved "in advance by an official at a level not below that of the Secretary of a military department...." Exec. Order No. 11610, 36 Fed. Reg. 13755 (July 24, 1971) (app. 2nd supp. R4, vol. 78, tab 4).

13. In 1970 through 1972, Aaron Racusin served as Deputy Assistant Secretary (Procurement) of the Air Force. It is undisputed that he approved MOAs authorizing the inclusion of Pub. Law No. 85-804 indemnification clauses under proper delegations of authority. (App. 2nd supp. R4, vol. 21, tab 31 at 2, tab 35 at 1; *see also* finding 6)

14. From June 1969 to January 1982, Harvey J. Gordon served as a deputy for acquisition in the Office of the Secretary of the Air Force. In deposition testimony, he testified that, in or about August 1970, the Secretary of the Air Force had delegated authority to approve indemnification clauses to Deputy Assistant Secretary Racusin. Mr. Gordon reviewed requests for the inclusion of indemnification clauses in the contracts before the requests were reviewed and signed by Mr. Racusin. The information that Mr. Gordon received related to the contractor's insurance coverage, "the nature of the risk,...whether that risk could be otherwise insured or provided for...." (Mot., ex. 43, Gordon tr. 11, 14-15) With respect to an August 1971 MOA for indemnification against unusually hazardous risks in connection with the proposed second production prime contract, Mr. Gordon testified that he would probably have reviewed the package he received, reviewed the MOA, and referred it to Mr. Racusin for signature (*id.*).

15. By date of 25 August 1971, Mr. Racusin signed an MOA finding that indemnification of Boeing against "unusually hazardous risks" in the second production contract would facilitate the national defense. The MOA, executed under the authority of Pub. Law No. 85-804 and Exec. Order No. 10789, authorized the government to include in the contract the clause ASPR 10-702(b)(2) INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) and the attached definitions. (Stip. ¶ 51) The definitions in the attachment were essentially the same as the definitions in the attachment to the MOA for the first production prime contract (*see* finding 6). (App. 2nd supp. R4, vol. 5, tab 1 at 3; R4, tab 13 at 3).

16. At the time of his review of the 25 August 1971 MOA, and at the time that Mr. Racusin signed it, Mr. Gordon had not seen, and was not aware of, Exec. Order No. 11610. He and Mr. Racusin believed at the time that Mr. Racusin had the authority to approve the inclusion of indemnification clauses in contracts. (Mot., ex. 43, Gordon tr. 41-43, 65-67)

17. By date of 19 October 1971, the government awarded Boeing the second production prime contract, No. F33657-71-C-0918 (app. 2nd supp. R4, vol. 5, tab 2; RFA&R ¶ 45; stip. ¶ 54). As with the first production prime contract, and as stated in the 25 August 1971 MOA, the second production prime contract incorporated by reference the clause ASPR 10-702(b)(2), INDEMNIFICATION UNDER PUBLIC LAW 85-804

(1968 SEP). The contract also included the same definitions of "unusually hazardous risks" set out in the first production prime contract (stip. ¶ 54).

18. The second production prime contract also incorporated the clause ASPR 7-104.65 INSURANCE (1968 FEB) and referred to ASPR 10-501.1, 10-501.2, 10-501.3, and 10-501.4 for the types of insurance and minimum amounts required (app. 2nd supp. R4, vol. 5, tab 2 at R4S 00343, -00359). We find no requirement in this clause, or in any other provision in the second production prime contract, that Boeing obtain pollution insurance generally or groundwater contamination insurance specifically.

19. Boeing awarded Lockheed the second production subcontract, No. R-798900-9556, for the SRAM propulsion system in 1971 (app. 2nd supp. R4, vol. 5, tab 6). At paragraph 5.4, the subcontract contained an indemnification clause and definitions for indemnification substantially similar to those in the 1970 MOA (*see* finding 6; app. 2nd supp. R4, vol. 5, tab 6 at LPRO0500589-92). The subcontract included clause 5.4.2.7 requiring Lockheed to "procure and maintain, to the extent available, such insurance against unusually hazardous risks as [Boeing] may from time to time require or approve" (stip. ¶ 60). The subcontract also included clause 6.60, INSURANCE (*see* finding 11; app. 2nd supp. R4, vol. 5, tab 6 at LPRO0500621). We find no requirement in this clause, or any other provision in the subcontract, that Lockheed obtain pollution insurance generally or groundwater contamination insurance specifically.

20. By memorandum dated 19 January 1972, Mr. Racusin recommended to Secretary of the Air Force Seamans that he approve indemnification of Boeing for unusually hazardous risks under a separate contract for depot level component overhaul and repair of missiles. In the memorandum, Mr. Racusin cited Exec. Order No. 11610 and told the Secretary that "[t]he requested coverage has already been approved for the [first] production contract...under a delegation of authority then in existence and prior to the issuance of the new Executive Order." (Respondent's Second Rule 4 File Supplement, tab 365 at 1)

21. By date of 24 August 1972, Defense Procurement Circular (DPC) No. 103 set out the ASPR changes required by the July 1971 amendment of Exec. Order No. 10789 in Exec. Order No. 11610. DPC No. 103 provided that ASPR clause 10-702 had been rewritten to remove the appropriation ceiling, and that ASPR Section XVII Part 17-301 had been changed to indicate that indemnification authority could only be exercised by the Secretary of a military department. (App. 2nd supp. R4, vol. 78, tab 6 at 13-26)

22. By date of 25 September 1972, Mr. Gordon wrote a memorandum to Deputy Assistant Secretary Richard Keegan, Mr. Racusin's successor. In the memorandum, Mr. Gordon stated that Air Force counsel had determined on 15 December 1971 that

authority to approve indemnification was "no longer delegable as of July 22, 1971." However, in "the intervening period," Mr. Racusin had authorized indemnification terms for unusually hazardous risks four times – on the second production contract, on one contract with Fairchild Industries, Inc. (Fairchild) that is relevant here, and on two other contracts not relevant here. Mr. Gordon added that:

> In the strict legal sense, lacking the requisite authority, the aforementioned indemnification provisions are invalid unless subsequently ratified by the Secretary of the Air Force. In three (3) instances, this is not required in that the performance indemnified has been completed and there are no claims thereunder either pending or in process.

(App. 2nd supp. R4, vol. 21, tab 31 at AFPROD50000084) Mr. Gordon considered the second production prime contract one of the three latter instances in which performance had been completed, and in which there were no pending claims. As to the Fairchild indemnification provision where ratification was deemed necessary, Mr. Gordon recommended that an after-the-fact ratification, and settlement of a pending claim under that contract, be prepared for the Secretary. (*Id.* at AFPROD50000085; mot., ex. 43, Gordon tr. 66-67, 76-77)

23. Based upon Mr. Gordon's communication, Deputy Assistant Secretary Keegan sent a 13 October 1972 memorandum to Assistant Secretary of Defense Turner that set out the four contracts identified by Mr. Gordon and recommended ratification for only the indemnification clause in the Fairchild contract (app. 2nd supp. R4, vol. 21, tab 34). A similar memorandum for Secretary Seamans again noted that there were four Air Force contracts containing indemnification clauses that were invalid unless ratified by the Secretary. The second production prime contract was among the four. Ratification was recommended for the indemnification clause in one of the Fairchild contracts for settlement of a pending claim. A proposed MOA was provided for Secretary Seamans' signature. (App. 2nd supp. R4, vol. 21, tab 35) Thereafter, pursuant to his authority under Pub. Law No. 85-804 and Exec. Order No. 10789, as amended, to indemnify contractors against "unusually hazardous risks," Secretary Seamans signed a memorandum authorizing the indemnification, stating: "I herein ratify and approve for payment to the subject contractor the sum of $60,161.00, having determined such amount to be just and reasonable..." (mot., ex. 16).

24. In his deposition, Mr. Gordon testified that, when he prepared his 25 September 1972 memorandum, he had been told that the second production prime contract had been completed. He did not have personal knowledge of that and recognized, at the deposition, that he had incorrectly concluded that the second production contract had been completed.

He was not aware that his conclusion was incorrect in September 1972. (Mot., ex. 43, Gordon tr. 86-97)

25. It is undisputed that Boeing's performance under the second production prime contract extended into 1973 (stip. ¶ 57).

E. *Third Production Prime Contract and Subcontract*

26. By date of 30 June 1972, the acting Secretary of the Air Force signed an MOA finding that indemnification of Boeing against "unusually hazardous risks" in a third production prime contract would facilitate the national defense. The MOA, executed under the authority of Pub. Law No. 85-804 and Exec. Order No. 10789, as amended by Exec. Order No. 11610, authorized the government to include in the contract the clause ASPR 10-702(b)(2), INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) and the same definitions of "unusually hazardous risks" as those appearing in the first production prime contract (*see* findings 6, 7). (App. 2nd supp. R4, vol. 6, tab 1)

27. In or about July 1972, the government awarded Boeing the third production prime contract, No. F33657-73-C-0006 (stip. ¶ 64). It appears that, as with the first and second production prime contracts, and as authorized in the June 1972 MOA, the third production prime contract incorporated by reference the clause ASPR 10-702(b)(2) INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) and included the definitions of unusually hazardous risks set out in the second production prime contract (*see* finding 15; app. 2nd supp. R4, vol. 6, tab 2 at 135, 141-42). In its answer to interrogatory no. 112(a) of appellant's first set of interrogatories, regarding implementation of the 1972 MOA, the Air Force stated that "[t]he action taken by the Air Force to implement the MOA was the inclusion of the indemnification clause in the prime contract" (app. 2nd supp. R4, vol. 61, tab 7, ¶ 112). The contract documents in the present record are not sufficiently complete to permit a finding regarding any insurance requirements imposed upon Boeing under the contract as awarded.

28. Boeing thereafter awarded Lockheed the third production subcontract, No. R-816730-9556, for the SRAM propulsion system (app. 2nd supp. R4, vol. 6, tab 10A-B at LPRO0505466-467). At paragraph 5.4, the subcontract contained an indemnification clause and definitions for indemnification substantially similar to those in the first production prime contract (app. 2nd supp. R4, vol. 6, tab 9 at LPRO0084581-84; *see* findings 6, 7). As with the second production subcontract, the third production subcontract included clauses 5.4.2.7 and 6.60 regarding insurance (app. 2nd supp. R4, vol. 6, tab 8 at LPRO0487788, tab 9 at LPRO0084583; stip. ¶ 68; *see* findings 11, 19). We find no requirement in these clauses, or any other provision of the subcontract, that

Lockheed obtain pollution insurance generally or groundwater contamination insurance specifically.

F. *Fourth Production Prime Contract and Subcontract*

29. By date of 27 June 1973, the acting Secretary of the Air Force executed an MOA authorizing inclusion of an indemnification clause in a contemplated fourth production prime contract. In the MOA, he also authorized the contracting officer to approve Boeing's indemnification of subcontractors provided, *inter alia*, "that the subcontractor insurance coverage is [at] an appropriate level of financial protection." (App. supp. R4, vol. 2, tab 12 at R4S 00487) By date of 26 June 1973, the contracting officer awarded to Boeing, and the next day, the Air Force approved, the fourth production prime contract, No. F33657-73-C-0734 (stip. ¶ 73; app. supp. R4, vol. 7, tab 2 at BPRO0026736). In accordance with the 27 June 1973 MOA, the fourth production prime contract incorporated the clause ASPR 10-702(b)(1)(2) INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1972 AUG) (app. 2nd supp. R4, vol. 7, tab 2 at BPRO0026790). In pertinent part, that clause provided:

> (a) Pursuant to Public Law 85-804 (50 U.S.C. 1431 - 1435) and Executive Order 10789, as amended, and notwithstanding any other provision of this contract, but subject to the following paragraphs of this clause, the Government shall hold harmless and indemnify the Contractor against:
>
> (i) claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death, personal injury, or loss of, damage to, or loss of use of property;
> (ii) loss of or damage to property of the Contractor, and loss of use of such property but excluding loss of profit;
> and
> (iii) loss of, damage to, or loss of use of property of the Government but excluding loss of profit;
>
> to the extent that such a claim, loss or damage (A) arises out of or results from a risk defined in this contract to be unusually hazardous or nuclear in nature and (B) is not compensated by insurance or otherwise. Any such claim, loss

> or damage within deductible amounts of Contractor's insurance shall not be covered under this clause.
>
> ....
>
> (c) ...The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract....
>
> (d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract, the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous or nuclear in nature....

(App. 2nd supp. R4, vol. 78, tab 9) With respect to insurance, this clause provided that the government's liability "shall not be increased" by a reduction in the contractor's coverage (stip. ¶ 73).

30. The fourth production prime contract contained the same definitions of "unusually hazardous risks" as those appearing in the first, second and third production prime contracts (stip. ¶ 73; *see* findings 6, 17, 26).

31. The fourth production prime contract also incorporated the clause ASPR 7-104.65 INSURANCE (1968 FEB) and referred to ASPR 10-501.1, 10-501.2, 10-501.3, and 10-501.4 for the types of insurance and minimum amounts required (app. 2nd supp. R4, vol. 7, tab 2 at BPRO0026774, -26790). We find no requirement in this clause, or in any other provision in the fourth production contract, that Boeing obtain pollution insurance generally or groundwater contamination insurance specifically. The April 1973 ASPR 10-501.1 through 10-501.4 set out the same types and minimum amounts as the ASPR version applicable to the first production contract (app. 2nd supp. R4, vol. 78, tab 8; *see* finding 10).

32. In or about July 1973, Boeing awarded Lockheed a fourth production subcontract, No. R-829591, for the SRAM propulsion system under the fourth production prime contract (stip. ¶ 76; R4, tab 29 at 1). At clauses 3.1.1 and 3.1.2, the fourth production subcontract contained definitions for indemnification, and an indemnification clause, substantially similar to those in the first production prime contract (stip. ¶ 77; *see also* findings 6, 7). The fourth production subcontract contained clause 3.1.2.7, requiring Lockheed to "procure and maintain, to the extent available, such insurance against

unusually hazardous risks as [Boeing] may from time to time require or approve" (R4, tab 29 at 7). We find no requirement in this clause, or any other provision in the fourth production subcontract, that Lockheed obtain pollution insurance generally or groundwater contamination insurance specifically.

G. *Alleged Misrepresentation Regarding Insurance Coverage*

33. The parties have stipulated that "[a] pollution exclusion was first inserted into [Lockheed's insurance] policies starting in 1971" (stip. ¶ 134).

34. By letter to Lockheed dated 23 February 1973, Boeing, in inquiring whether Lockheed required an indemnification clause in the fourth production subcontract, stated that:

> It has now been determined that the following information is needed before indemnification will be approved.
>
> 1. Type of liability coverage and limits
>
> 2. Deductibles
>
> 3. Exclusions of an extrahazardous nature
>
> ....
>
> 6. Definition of specific risks to be covered

(R4, tab 24) Lockheed responded by letter to Boeing dated 9 March 1973. This date was after award of the third production prime contract and subcontract, and before award of the fourth production prime contract and subcontract. With respect to "[e]xclusions of an extra hazardous nature," Lockheed stated only that "[n]uclear energy hazards liability is excluded in both the comprehensive general liability policy and the aircraft products liability policy." (R4, tab 25 at 1)

35. In discovery, Boeing asked the government to identify the types and amounts of insurance required by each of the contracts. The government responded by referring appellant to "the respective contract clauses." (App. 2nd supp. R4, vol. 57, tab 1B vol. 61, tab 2, interrogatory and response ¶ 25.c.) Later, John Taffany, the Air Force Rule 30(b)(6) witness, testified at his deposition that the insurance provisions in Lockheed's subcontracts, including the indemnification clauses and clause 6.60.1 (*see, e.g.*, finding 11), "required [Lockheed] to maintain and obtain a certain level of insurance" (mot.,

ex. 69, Taffany tr. 15, 277-78, 862-63). We find no evidence in the present record that the government required either Boeing or Lockheed to go beyond the requirements in the insurance clauses, or ASPR, in obtaining coverage.

H. *Performance and Claims*

36. Boeing ultimately procured approximately 1,500 propulsion systems from Lockheed, and the government procured about 1,500 production SRAMs from Boeing. These totals appear to include the SRAMS called for by the second production prime and sub contracts. At least in part, Lockheed performed its subcontracts at its Redlands, California facility (RFA&R ¶¶ 96, 97). It is undisputed that, on 20 June 1975, Lockheed completed all SRAM rocket motor deliveries (stip. ¶ 80) and thereafter did not use the Redlands site (compl. and answer ¶ 98).

37. Under each of the SRAM subcontracts, Lockheed produced and used both rocket motor propellant and sustain igniter propellant, which were components of the SRAM propulsion system, at the Redlands facility. The rocket motor propellant and sustain igniter propellant contained ammonium perchlorate (AP). (Stip. ¶ 84) AP is a regulated explosive (RFA&R ¶ 144).

38. Lockheed used trichloroethylene (TCE) in performing the development subcontract at the Redlands facility (RFA&R ¶ 106). Appellant alleges, and the government denies for lack of information, that TCE was also used by Lockheed at the Redlands facility in performing the four production subcontracts (RFA&R ¶ 119). TCE is a material containing toxic and hazardous properties of chemicals (RFA&R ¶¶ 147-48).

39. In or about 1980, TCE was discovered in the groundwater in the Redlands, California area (compl. and answer ¶ 99). Later, AP was also found in Redlands area groundwater (compl. and answer ¶¶ 108-09). The California Regional Water Quality Board, Santa Ana Region (Water Board) issued cleanup orders to Lockheed (stip. ¶¶ 99, 120-21). Lockheed has also been named as a defendant in numerous toxic tort suits in state court based upon TCE and AP contamination (Appellant's Statement of Undisputed Material Facts, ¶¶ 142-56, 164).

40. By date of 6 February 2004, Boeing submitted a claim on behalf of Lockheed to the contracting officer. In the claim, Boeing sought indemnification on behalf of Lockheed, pursuant to the indemnification clauses of the SRAM contracts, for the costs Lockheed has incurred, and will incur, for environmental response and remediation activities in response to the TCE and AP contamination, as well as for the costs that Lockheed has incurred, and will incur, to defend against third party tort claims. The total

amount of the claim was estimated to be over $200 million. The claim was certified by both Boeing and Lockheed representatives. (R4, tab 42)

41. The contracting officer denied the claim on various grounds in August 2004 (R4, tab 41). Boeing thereafter filed this appeal on behalf of Lockheed.

DECISION

A. Introduction

In its five-count complaint, Boeing alleges that the government breached each of the five contracts. Thus, Boeing alleges in count I, with respect to the development contract, that its "claims, losses or damages resulted from an unusually hazardous risk" and that the government is "contractually liable to Boeing and/or [Lockheed] for the incurred and future costs for environmental response and remediation" (compl. ¶¶ 145-46). Boeing further alleges that the government's "refusal to honor its indemnification obligations to Boeing and/or [Lockheed] constitutes a breach of the [development] prime contract" (compl. ¶ 147). The allegations regarding the other prime contracts and subcontracts are virtually identical to those regarding the development prime contract and subcontract. Thus, in counts II, III, IV and V, Boeing alleges that it has and will be damaged as a result of "an unusually hazardous risk," that the government is "contractually liable" for those damages, and that the government's "refusal to honor its indemnification obligations to Boeing and/or [Lockheed] constitutes a breach" of the first, second, third and fourth production prime contracts, respectively (compl. ¶¶ 156-58, 167-69, 178-80, 189-91). In its prayer for relief, Boeing seeks two categories of damages for the alleged breaches: (a) actual and estimated response and remediation costs; and (b) incurred and future toxic tort litigation costs uncompensated by insurance (compl. at 72).

In its answer, the government interposed denials to Boeing's principal allegations, and alleged nine affirmative defenses. Two are relevant to this decision. In the sixth affirmative defense, the government alleged that, because of President Nixon's issuance of Exec. Order No. 11610 on 24 July 1971 (*see* finding 12) Deputy Assistant Secretary Racusin did not have authority to execute the 25 August 1971 MOA approving of the indemnification clauses in the second production prime contract (*see* findings 13-15). In the seventh affirmative defense, the government alleged that, if Lockheed understood the indemnification clause in the five contracts to cover groundwater contamination, it was required to acquire insurance to cover that risk. Boeing now moves for summary judgment on both affirmative defenses.

Our evaluation of Boeing's motions is guided by the familiar canon that summary judgment is properly granted only where there is no genuine issue of material fact and the

movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact-triable issues-are present." *Conner Bros. Construction Co.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784 at 162,143, *aff'd, Conner Bros. Construction Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008) *quoting John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. In evaluating a summary judgment motion, we draw justifiable factual inferences in favor of the party opposing the motion. *M. Maropakis Carpentry, Inc. v. United* States, 609 F.3d 1323, 1327 (Fed. Cir. 2010). However, once the movant meets its burden of showing the lack of any genuine issue of material fact, the non-moving party must set out specific facts showing the existence of a genuine issue of material fact; conclusory statements and bare assertions are insufficient. *Mingus Constructors*, 812 F.2d at 1390-91.

B. *Affirmative Defense Six*

In its sixth affirmative defense, the government averred:

> 6. Lack of authority and non-compliance with legal requirements: By virtue of a change to Executive Order 11610 [sic], dated 22 July 1971, the authority to enter into unlimited indemnification agreements covering unusually hazardous risks may not be delegated below the level of a Secretary of a military department. The 25 August 1971 MOA was signed by the Deputy Assistant Secretary (Procurement) rather than the Secretary. Aver the Deputy Assistant Secretary lacked authority to approve the indemnification clause for the second (FY 1972) production contract.

(Respondent's Answer at 33-34) (underlining in original)

The scope of this defense bears stressing. As pled, the defense is confined to the 25 August 1971 MOA (*see* finding 15), and the indemnification clause, in the second production prime contract (*see* finding 17). The validity of other provisions of that contract is unaffected by the defense. In addition, the government does not challenge the indemnification authorizations, or the indemnification clauses themselves, in either the development or the first production prime contract, respectively, both of which preceded Exec. Order No. 11610. Similarly, there is no challenge to the indemnification authorizations, or to the indemnification clauses themselves, in the third and fourth production prime contracts. (*See* findings 26, 27, 29, 30)

In its motion for summary judgment, Boeing concedes that the Secretary of the Air Force did not sign the 25 August 1971 MOA. Boeing's chief argument is ratification. Relying primarily upon *Reliable Disposal Co.*, ASBCA No. 40100, 91-2 BCA ¶ 23,895 and *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955), Boeing contends that the Secretary had actual or constructive knowledge that Deputy Assistant Secretary Racusin authorized indemnification clauses in the August 1971 MOA, and that the government ratified the authorization. (Mot. at 186-92)

For its part, the government confines its response to a single paragraph, with little elaboration. The operative contention is that "there is no evidence to support the view that the Secretary even knew there had ever been a Memorandum of Approval authorizing indemnification" for the second production prime contract. (Respondent's Opposition to Appellant's 8 May 2009 Motion for Summary Judgment (And Respondent's Cross Motion for Summary Judgment) on Counts I-V and Opposition to Appellant's Motion for Summary Judgment on Affirmative Defense No. 6 at 3)

We conclude that the present record fails to establish that the indemnification clause in the second production prime contract was ratified by Secretary Seamans, and that accordingly Boeing is not entitled to summary judgment on the sixth affirmative defense.

Harbert/Lummus Agrifuels Projects v. United States, 142 F.3d 1429 (Fed. Cir. 1998) affords guidance for the resolution of the issue. In *Harbert/Lummus*, the issue was whether the contracting officer had ratified an alleged oral contract to guarantee continued funding of an ethanol plant. The record reflected that the contracting officer was present at a meeting where another official, who had no authority to do so, made an oral undertaking to continue to guarantee funding, but the contracting officer himself had remained silent. In holding that the contracting officer did not ratify the official's oral undertaking, the court concluded that the evidence did not establish that the contracting officer had the requisite actual or constructive knowledge of the official's unauthorized act. The court relied upon the principle articulated in *United States v. Beebe*, 180 U.S. 343, 354 (1901) that:

> Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual. Knowledge is necessary in any event.... If there be want of it, though such want arises from the neglect of the principal, no ratification can be based on any act of his.

> Knowledge of the facts is the essential element of ratification, and must be shown or such facts proved that its existence is a necessary inference from them.

The court accordingly held that "[s]ilence in and of itself is not sufficient to establish a demonstrated acceptance of the contract" by the contracting officer, and rejected the position that his silence constituted assent to the oral undertaking. *Harbert/Lummus*, 142 F.3d at 1434; *accord Corners and Edges, Inc.*, ASBCA No. 55767, 09-1 BCA ¶ 34,019 at 168,294 (concluding there was no ratification absent evidence that contracting officer "demonstrably accepted" directives of project officer allegedly constituting changes to contract work). The court in *Harbert/Lummus* also concluded that the fact that the contractor "continued performing its construction activities would not have put the [contracting officer] on notice of the existence" of the unauthorized oral contract. *Harbert/Lummus*, 142 F.3d at 1433.

In light of *Harbert/Lummus*, we cannot grant summary judgment in favor of Boeing on the sixth affirmative defense. After President Nixon issued Exec. Order No. 11610 on 24 July 1971, only Secretary Seamans could authorize indemnification when the second production prime contract was awarded to Boeing on 19 October 1971. It is undisputed that Secretary Seamans did not authorize indemnification at the time of award, and the most that this record reveals of any later ratification by the Secretary of Mr. Racusin's act is silence (*see* finding 23). The present record contains no documentary evidence showing that he explicitly ratified Mr. Racusin's unauthorized act. The present record also contains no testimonial evidence showing the Secretary "demonstrated acceptance" of that act, as required by *Harbert/Lummus*.

Boeing nonetheless insists that Secretary Seamans "impliedly adopted [Mr. Racusin's] act by both his conduct and silence" (app. mot. at 186). Boeing urges that the "only reasonable inference" from the events surrounding Mr. Gordon's 25 September 1972 memorandum (*see* finding 22) is that "the Secretary [actually] knew that Mr. Racusin had authorized the inclusion of indemnification provisions in the [second production prime] contract after the issuance of [Exec. Order No.] 11610, and that that clause was in fact included" in the contract (mot. at 187-88). Alternatively, Boeing contends that the Secretary should have known that Mr. Racusin had signed the MOA because of the information gathered by his subordinates, and that their knowledge should be imputed to the Secretary (*id.* at 188-91).

Boeing's second point is that, when Mr. Racusin executed the relevant MOA, no regulations had been promulgated implementing Exec. Order No. 11610. Absent such regulations, Boeing asserts, "the existing regulations relating to [Exec. Order No.] 10789, which permitted Mr. Racusin to sign the 1971 MOA, remained in effect, and the 1971

MOA was properly authorized...under the ASPR in effect at the time the MOA was signed." (Mot. at 194 n.110)

We cannot accept Boeing's first argument, regarding the inferences to be drawn from the Secretary's "conduct and silence," as well as from the knowledge and actions of his subordinates. On summary judgment, we must draw all reasonable factual inferences in favor of the Air Force, as the nonmoving party. *M. Maropakis Carpentry*, 609 F.3d at 1327. The dispositive consideration is the provision in Exec. Order No. 11610 that indemnification authority could only be exercised "by an official at a level not below that of the Secretary of a military department" (*see* finding 12). Hence, our focus must be on the Secretary, and his "[s]ilence in and of itself is not sufficient to establish a demonstrated acceptance of the contract." *Harbert/Lummus*, 142 F.3d at 1434. Given Exec. Order No. 11610 and *Harbert/Lummus*, Boeing's arguments that the Secretary either knew, or should have known, that Mr. Racusin had authorized indemnification in the contract are not controlling. Moreover, the reasonable inference from the present record is that, given the erroneous information in Mr. Gordon's 25 September 1972 memorandum (*see* findings 22, 24), the Secretary lacked the "[k]nowledge of the facts [which] is the essential element of ratification." *Beebe*, 180 U.S. at 354.

We also cannot accept Boeing's second argument, regarding Mr. Racusin's authority to sign the 1971 MOA pursuant to the regulations promulgated under Exec. Order No. 10789. It is true that President Eisenhower provided in Exec. Order No. 10789 that the Secretary could delegate his authority to indemnify to any "other military or civilian officer[] or official[]" of the Air Force, 23 Fed. Reg. 8897 (Nov. 14, 1958), and that Mr. Racusin's authority to authorize indemnification, and to approve indemnification clauses in contracts, had derived from such a delegation. Nonetheless, President Nixon's issuance of Exec. Order No. 11610 necessarily vitiated that delegation and obviated any need for further regulations delegating authority because it expressly provided that the authority to indemnify could only be exercised "by an official at a level not below that of the Secretary of a military department." This preclusion of delegability regarding indemnification also distinguishes *Facchiano Constr. Co. v. Department of Labor*, 987 F.2d 206, 210 (3rd Cir.), *cert. denied*, 510 U.S. 822 (1993), upon which Boeing relies. By contrast to Exec. Order No. 11610, the executive order at issue there explicitly provided that "[e]xecutive departments and agencies shall issue regulations governing their implementation of this Order." *Facchiano Constr.*, 987 F.2d at 210 n.6.

We are not dissuaded from this conclusion by cases holding that institutional ratification may be inferred from acceptance of contract benefits. *E.g.*, *Janowsky v. United States*, 133 F.3d 888 (Fed. Cir. 1998); *Williams*, 127 F. Supp. at 623. In *Janowsky*, the court held that it was error to dismiss an implied-in fact contract claim without considering whether the agency "ratified the proposed contract...by receiving the

benefits from it." *Janowsky*, 133 F.3d at 892. In *Williams*, upon which Boeing relies (app. br. at 191), the court held that a contracting officer with constructive knowledge of an unauthorized act "did not repudiate the agreement." *Williams*, 127 F. Supp. at 623. We cannot regard these cases as dispositive here, however, inasmuch as the generalized concept of institutional ratification inferred from the overall circumstances cannot surmount the precise standard of approval "by an official at a level not below that of the Secretary of a military department" in Exec. Order No. 11610. The issue before us, moreover, is not the legality of the underlying contract, but solely the enforceability of the indemnification clause.

C. *Affirmative Defense Seven*

In affirmative defense seven, the government averred:

> 7. Failure to obtain required insurance: If [Lockheed] understood that the indemnification clause covered risks such as groundwater contamination, it was required to obtain insurance for that risk. On information and belief, the company failed to do so. This failure amounts to a misrepresentation to the Government that all necessary insurance had been obtained, and precludes recovery, at least to the extent that insurance would have covered the claimed expenses.

(Respondent's Answer at 34) (underlining in original)

Boeing's motion regarding this defense turns on the two propositions that: (a) Lockheed obtained the insurance that was required by the SRAM contracts; and (b) the government reviewed and approved Lockheed's coverage (mot. at 195-98). Boeing also urges that Lockheed understood that its insurance policies covered groundwater contamination, and that Lockheed pressed this position in litigation with its insurance carriers (mot. at 199-200).

In response, the government advances multiple contentions. Initially, the government argues that affirmative defense seven is an "alternate pleading" that should be addressed after we decide "Appellant's claim." (Respondent's Opposition to Appellant's 8 May 2009 Motion for Summary Judgment on Affirmative Defense No. 7 (Misrepresentation) (opp'n on defense 7 at 1-2)) Beyond this prematurity argument, the government points to Lockheed's 9 March 1973 letter to Boeing. In that letter, Lockheed represented to Boeing that the only exclusions in its insurance coverage of an extra hazardous nature related to "[n]uclear energy hazards liability." (Finding 34) Inasmuch

as Lockheed's policies also included pollution exclusions, and inasmuch as its claim is based on groundwater contamination, the government argues that Lockheed's 9 March 1973 letter to Boeing was a material misrepresentation. In addition, the government urges that it relied upon Lockheed's 9 March 1973 letter to Boeing, pointing to execution of the MOA for the fourth production contract (*see* finding 29). (Opp'n on defense 7 at 2-3, 19, 21, 26-31) Seemingly, the government argues that Lockheed's 9 March 1973 letter constituted fraud, entitling the government to have the ensuing contract declared void *ab initio*, or to other relief (opp'n on defense 7 at 27-28). The government also contends that it has been prejudiced in asserting affirmative defense seven because of appellant's "dilatory conduct," as set out in affirmative defenses four and five (opp'n on defense 7 at 33-35).

Boeing vigorously attacks the government's arguments. Boeing urges that the government raises an entirely new defense in its opposition, which it had not previously asserted. Boeing says that the first time the government articulated this new defense was at the deposition of John Taffany, the government's Rule 30(b)(6) witness, which the Board authorized after the date for the close of discovery (Appellant's Reply to Respondent's Opposition to Appellant's Motion for Summary Judgment on Affirmative Defense Seven (reply) at 8-10). With respect to the merits of the assertedly new defense, Boeing denies that Lockheed misrepresented its insurance coverage, and further denies that the government relied on the statement's in Lockheed's 9 March 1973 letter to Boeing (reply at 11-25).

We conclude that Boeing is entitled to summary judgment on affirmative defense seven, as pled in the answer. We reach this conclusion for two principal reasons.

First, we conclude that the affirmative defense pled in the answer differs from the defense articulated in the government's motion papers. The affirmative defense pled in the answer turns on the proposition that, in order to assert a claim based upon groundwater contamination, Lockheed "was required to obtain insurance for that risk," and its failure to obtain "necessary insurance" in itself "amount[ed] to a misrepresentation." (Respondent's Answer at 34)

By contrast, the defense that the government presses in the motion papers appears to assert a different type of misrepresentation. It appears to focus upon statements regarding insurance exclusions in Lockheed's 9 March 1973 letter. Inasmuch as the claimed misrepresentation in Lockheed's March 1973 letter to Boeing preceded the 26 June 1973 execution formation of the fourth production prime contract (*see* finding 29), it necessarily does not apply to the development contract or subcontract, or to the first, second, or third production prime contracts or subcontracts, which had already been executed before Lockheed sent the March 1973 letter (*see* findings 3, 5, 7, 17, 19, 27, 34).

Nonetheless, the defense now asserted by the government in its motion papers appears to be based upon different operative facts from those in the defense pled in the answer. Given this consideration, it would not be appropriate to rule now on the affirmative defense asserted in the motion papers without a fuller record. While discovery has closed, we will permit appellant to pursue limited discovery confined to the issues raised in the new affirmative defense if the government wishes to continue to press the defense. We note that the Board looks unfavorably at allegations of fraud that are based solely on unsupported generalized statements not the subject of an active investigation.

Second, considering the affirmative defense that was pled in the answer, we conclude that it warrants summary disposition. In so concluding, we reject the government's argument that the affirmative defense pled in the answer is an "alternate pleading" that must await a decision on appellant's claim. The government points to no reason for doing so, and we know of none. The government has not strongly argued in the motion papers for the defense as pled in the answer.

Nonetheless, independently evaluating the defense, we cannot accept its major premise. In discovery, the government pointed to "the respective contract clauses" as the touchstone of the types and amounts of insurance coverage required. Based on the record before us, and after examining those clauses, for purposes of the motion, we do not read the subcontracts to require insurance against pollution generally, or against groundwater contamination specifically. We have so found with respect to each of those instruments. Taking them individually, we have found no insurance requirement in the development subcontract (finding 5). The first production subcontract contained clause 6.60, Insurance, which required "the kinds and minimum amounts" of insurance set forth in ASPR 10-501.1, 10-501.2, 10-501.3 and 10-501.4 (finding 11). These ASPR provisions, in turn, incorporated requirements for multiple types of coverage – ranging from employer's liability to passenger liability – but not for pollution or groundwater contamination risks. Similarly, the second and third production subcontracts also contained clause 6.60 and the foregoing ASPR clauses (findings 19, 28). The fourth production subcontract is somewhat different. It lacked the specific insurance requirements found in the other production subcontracts, but it contained clause 3.1.2.7, which called for such insurance coverage as Boeing might "require or approve," but was silent regarding pollution or groundwater contamination insurance (finding 32). The parties have not pointed to anything in the present record reflecting that Boeing required or approved insurance against pollution or groundwater contamination risks.

While the government has structured the defense pled in the answer solely in terms of Lockheed's understanding and conduct, we nonetheless recognize that Boeing is the only party with which the government is in privity. We have accordingly found, for purposes of the motion, that four of the prime contracts imposed no requirement on

Boeing to obtain pollution insurance generally or groundwater contamination insurance specifically. The four prime contracts imposing no such requirement are the development prime contract, and the first, second and fourth production prime contracts (findings 4, 10, 18, 31).

With respect to the third production contract, the government has failed to point to any evidence in the present record that the contract imposed any insurance requirements (*see* finding 27). The government's failure to point to any such evidence in itself warrants summary disposition of affirmative defense seven regarding that contract.

Absent a regulatory or contractual requirement to carry pollution insurance generally, or groundwater contamination insurance specifically, affirmative defense seven cannot stand. On the record before us, we cannot conclude that the disputed coverage was required.

CONCLUSION

Appellant's motion for summary judgment as to affirmative defense six is denied. Appellant's motion for summary judgment as to affirmative defense seven is granted, except with respect to that affirmative defense as articulated in the government's motion papers.

Dated: 28 July 2011

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

JACK DELMAN
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54853, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated:

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