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 MOTION FOR SUMMARY JUDGMENT
REGARDING AFFIRMATIVE DEFENSE FOUR, ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT REGARDING AFFIRMATIVE DEFENSE FIVE,
AND ON APPELLANT'S MOTION TO STRIKE

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. The Air Force awarded Boeing five contracts between 1966 and 1973 relating to a missile program. Boeing, in turn, 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 for 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 that we decide in this decision, Boeing

seeks summary judgment regarding affirmative defense four of laches, and both parties have cross-moved for summary judgment regarding affirmative defense five, in which the government avers non-compliance with the notice provision of two of the contracts. Boeing has also moved to strike a supplemental expert report that the government submitted with its reply brief regarding affirmative defense five. We deny Boeing's motion as to affirmative defense four. We also deny both the government's motion regarding affirmative defense five and Boeing's cross-motion. We further deny Boeing's motion to strike the supplemental expert report.

STATMENT OF FACTS 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, Robert H. Charles, 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 (Joint Stipulations of Fact (stip.) ¶ 14). Mr. Charles' first sentence in his MOA is "I refer to the Air Staff Summary Sheet...and the attachments thereto" (stip. ¶ 15).

3. The indemnification clause that Mr. Charles authorized 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. Mr. Charles authorized the indemnification 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)

4. 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; 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 [sic] (Indemnification Clause Under ASPR 10-703," 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)

5. 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 [*see* statement 4].

....

(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)

6. 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). In particular, the Indemnification clause contained paragraph (f), which provided in part that:

> [Lockheed] shall (i) promptly notify [Boeing] 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 [Boeing], and (iii) immediately furnish to [Boeing] copies of all pertinent papers received by [Lockheed]. The Government or [Boeing], or

> both, may direct, participate in, and supervise the settlement or defense of any such claim or action....

(Stip. ¶ 33) The sole parties to the subcontract were Boeing and Lockheed (app. 2nd supp. R4, vol. 2, tab 2 at LPRO0840478). We find no provision in the subcontract purporting to give Lockheed privity with the government.

C. First Production Prime Contract and Subcontract

7. 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 (stip. ¶ 34). Mr. Racusin's first sentence in his MOA is "I refer to Aeronautical Systems Division/ASK letter dated June 17, 1970, which provides justification for this action" (stip. ¶ 35).

8. In his MOA, Mr. Racusin authorized inclusion of the clause INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP) and the definitions, for 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)

9. By date of 6 January 1971, the government awarded Boeing the first production prime contract (stip. ¶ 40). Contract No. F33657-70-C-0876 contained the definitions of "unusually hazardous risks" appearing in Mr. Racusin's MOA (*see* statements 6, 8), 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)

10. 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 [*see* statement 8]. 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....

(Stip. ¶ 40)

11. Significantly, paragraph (f) of the Indemnification clause in the first production prime contract also contained a notice provision. It provided:

> (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.

(Stip. ¶ 40)

12. 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) which required, in paragraph (a), that Boeing, at its 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" (Exhibits to Appellant's Motion for Summary Judgment (mot., ex.) 8A). Special Provision 26 in Section J of the contract specified the types and minimum amounts of insurance required as "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).

13. 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 Mr. Racusin's 1970 MOA (*see* statement 8) and the first production prime contract (app. 2nd supp. R4, vol. 4, tab 6 at LPRO0449792). The indemnification clause in the first production subcontract contained a notice provision in paragraph 6. It provided:

> [Lockheed] shall (i) promptly notify [Boeing] 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 [Boeing], and received by [Lockheed]. The Government or [Boeing], or both, may direct, participate in, and supervise the settlement or defense of any such claim or action....

(Stip. ¶ 45) The subcontract also included clause 6.60, INSURANCE, that required Lockheed to maintain insurance at least as specified in ASPR 10-501.1, 10-501.2, 10-501.3, and 10-501.4, which were incorporated by reference (app. 2nd supp. R4, vol. 4, tab 8 at LPRO0517189; mot., ex. 11A at LPRO0462884). The sole parties to the subcontract were Boeing and Lockheed (app. 2nd supp. R4, vol. 4, tab 5 at LPRO0517535). We find no provision in the subcontract purporting to give Lockheed privity of contract with the government.

D. Second Production Prime Contract and Subcontract

14. By date of 25 August 1971, Mr. Racusin executed an MOA approving inclusion of an indemnification clause in a contract to produce SRAM missiles (stip. ¶ 49). Mr. Racusin's first sentence in his MOA is "I refer to Aeronautical Systems Division [ ] letter dated 16 July 1971, which provides justification for this action" (stip. ¶ 50). Mr. Racusin also approved indemnification against the same "unusually hazardous risks" as those defined in the first production prime contract (*see* statement 8; app. 2nd supp. R4, vol. 5, tab 1 at 3).

15. 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 Mr. Racusin's 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), including the notice provision in paragraph (f) (*see* statement 11).

16. The second production prime contract also incorporated the clause ASPR 7-104.65 INSURANCE (1968 FEB) and cited 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).

17. 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 Mr. Racusin's MOA for the first production prime contract (*see* statement 8; app. 2nd supp. R4, vol. 5, tab 6 at

LPRO0500589-92). The indemnification clause in the subcontract contained paragraph 5.4.2.6, a notice provision that was identical to that in the first production subcontract (*see* statement 13). The subcontract also 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 further included clause 6.60, INSURANCE (*see* statement 13; app. 2nd supp. R4, vol. 5, tab 6 at LPRO0500621). The sole parties to the subcontract were Boeing and Lockheed (app. 2nd supp. R4, vol. 5, tab 6 at LPRO0500535). We find no provision in the subcontract purporting to give Lockheed privity of contract with the government.

18. In our decision regarding Boeing's motion for summary judgment on affirmative defenses six and seven, we concluded that the present record did not establish that Secretary of the Air Force Seamans had ratified Mr. Racusin's approval of the inclusion of the Indemnification clause in the second production prime contract, as required by Exec. Order No. 11610. *The Boeing Co.*, ASBCA No. 54853, 11-2 BCA ¶ 34,813 at 171,324.

E. Third Production Prime Contract and Subcontract

19. By date of 30 June 1972, Dr. John L. McLucas, 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. Dr. McLucas' first sentence in his MOA is "I refer to Aeronautical Systems Division (PP) letter dated 4 May 1972 as amended by ASD (PP) letter dated 21 June 1972, which provides justification for this action." (Stip. ¶ 62)

20. Dr. McLucas executed his MOA under the authority of Pub. Law No. 85-804 and Exec. Order No. 10789, as amended by Exec. Order No. 11610. He approved inclusion in the contract of 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 that Mr. Racusin had authorized for the first production prime contract (*see* statement 8). (App. 2nd supp. R4, vol. 6, tab 1)

21. 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 Dr. McLucas' 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" and the notice provision set out in the first and second production prime contracts (*see* statements 8-9, 14-15; app. 2nd supp. R4, vol. 6, tab 1 at 3, tab 2 at 135, 141-42). In its answer to Interrogatory No. 112(a) of appellant's first set of interrogatories, regarding implementation of Dr. McLucas' 30 June 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).

22. 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* statements 8, 11). The indemnification clause in the subcontract contained a notice provision in paragraph 5.2.4.6, a notice provision that was identical to that in the first production subcontract (*see* statement 13). 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* statement 17). The sole parties to the subcontract were Boeing and Lockheed (app. 2nd supp. R4, vol. 6, tab 10A at LPRO0505466). We find no provision in the subcontract purporting to give Lockheed privity of contract with the government.

F. Fourth Production Prime Contract and Subcontract

23. By date of 27 June 1973, Dr. McLucas executed an MOA approving inclusion of an indemnification clause in a contemplated fourth production prime contract (stip. ¶ 71). Dr. McLucas' first sentence in his MOA is "I refer to Aeronautical Systems Division (PP) letter dated March 30, 1973 which provides justification for this action" (stip. ¶ 72).

24. In his MOA, Dr. McLucas 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. 7, tab 2 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....

....

(f) The Contractor shall (i) promptly notify the Contracting Officer of any claim or action against, or of any loss by, the Contractor or any subcontractor which reasonably may be expected to involve indemnification under this clause, (ii) furnish evidence or proof of any claim, loss or damage covered by this clause 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, control or assist in

> 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.

(App. 2nd supp. R4, vol. 78, tab 9 at 1-3) With respect to insurance, the clause provided that the government's liability "shall not be increased" by a reduction in the contractor's coverage (stip. ¶ 73).

25. 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* statements 8, 14, 20).

26. 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).

27. In or about July 1973, Boeing awarded Lockheed a fourth production subcontract, No. R-829591-6556, 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* statements 8, 10). The indemnification clause in the subcontract contained a notice provision in paragraph 3.1.2.6, that was identical to that in the first production subcontract (*see* statement 13). 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; stip. ¶ 77). The sole parties to the subcontract were Boeing and Lockheed (*see* app. 2nd supp. R4, vol. 8, tab 3 at LPRO0064777). We find no provision in the subcontract purporting to give Lockheed privity of contract with the government.

G. The Record Relevant to Laches and Notice

28. Boeing ultimately procured approximately 1,500 propulsion systems from Lockheed, and the government procured approximately 1,500 SRAMs from Boeing. These totals appear to include the SRAMS called for by the second production prime and subcontracts. At least in part, Lockheed performed its subcontracts at its Redlands, California facility (RFA&R ¶¶ 96, 97), which had previously been occupied by an entity named Grand Central Rocket. 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).

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

30. Lockheed used trichloroethylene (TCE) in performing the development subcontract at the Redlands facility (RFA&R ¶ 106). Boeing alleges, and the government denies for lack of information, that Lockheed also used TCE 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).

31. The Redlands site contained a large trench, referred to as the burn pit. Lockheed submitted a report to the California Regional Water Quality Control Board (Water Board), noting that, during contract performance, as paraphrased by the Water Board, "[w]aste solvent [*i.e.*, TCE] was poured into a trough at the burn pit and then set afire, and waste propellant [*i.e.*, AP], which may have contained varying amounts of solvent, was placed into cardboard cartons which were also ignited at the burn pit" (R4, tab 32 at 4).

32. In 1980, the California Department of Health Services discovered TCE in twelve water supply wells that were in the Redlands, California area of the Bunker Hill Groundwater Basin (Basin) (R4, tab 32 at 1; compl. and answer ¶ 99). Further sampling revealed an underground plume of TCE, which was later estimated by the Water Board to cover an area of "about 14 square miles" (R4, tab 32 at 1). In the early 1980's, the Water Board initiated an investigation to determine possible sources of the TCE (*id.*).

33. It is undisputed that, in 1984, Lockheed learned that "the listing for [the] investigation and potential cleanup in the California State Superfund List [was] being considered to be 'Lockheed Propulsion Company...'" (stip. ¶ 89).

34. Norton Air Force Base (Norton) was adjacent to Redlands, California and groundwater beneath Norton is part of the Basin (app. 2nd supp. R4, vol. 31, tab 2 at LPRO03433393). In 1982, studies conducted as part of an Air Force program at Norton identified TCE beneath the base; this plume was separate from the Redlands plume (*id.* at LPRO03433393-96).

35. In September 1985, Lockheed submitted to the Water Board a report prepared by Lockheed's consultants that identified a local airport as the most likely source of TCE contamination. The Water Board staff advised Lockheed that "additional investigations regarding discharges from the former [Lockheed] facility was [sic] necessary." (R4, tab 32 at 3)

36. Lockheed agreed to perform additional investigation, submitted another report on 31 July 1986, and worked with Water Board staff, exchanging information into 1992 to ascertain the source and cause of contamination (*id.* at 3-5). At a meeting with Lockheed on 23 November 1992, "Board staff informed Lockheed that the former [Redlands] facility was determined to be the source of TCE found in the Basin." Lockheed and the Water Board staff conducted still further testing and reviews extending into 1993. (R4, tab 32 at 8)

37. On or about 15 September 1992, Lockheed's outside counsel met with Lockheed's insurance carriers. According to the notice sent to carriers, the meeting was to encompass "the sites which are the subject matter of Lockheed's environmental claims." The Redlands site was one of the sites included in those claims. Lockheed contemplated a presentation and demand for coverage regarding each site and requested each carrier to state its position regarding coverage within 60 days. (2nd supp. R4, vol. 7, tab 206 at 1-2)

38. On 6 May 1993, Lockheed met with staff of the Water Board regarding technical information that, in the opinion of the Water Board staff, reflected that the Redlands facility was the source of a TCE plume contaminating water in the Basin. According to the Water Board:

> Lockheed informed the Board staff that after a lengthy and detailed review of the technical information, it was Lockheed's position that there was not substantial evidence to indicate that Lockheed was the source of the TCE contamination in the Basin, and that Lockheed, therefore, was not in a position where they could justifiably utilize stockholders' funds in conducting any additional work. Board staff disagreed with Lockheed's technical evaluation and informed Lockheed that Board staff would begin preparing a cleanup and abatement order.

(R4, tab 32 at 8)

39. On 27 May 1993, Leslie Walpole Procter, an underwriter at Lloyd's, London, filed suit in *Procter v. Lockheed Corp. et al.*, No. 731752 (Cal. Super. Ct. 1995). Plaintiff sought a declaratory judgment regarding Lockheed's insurance coverage demands for the Redlands and other sites. (App. 2nd supp. R4, vol. 29, tab 11; stip. ¶ 97) Lockheed thereafter cross-claimed seeking, *inter alia*, a declaratory judgment that Procter and his other carriers were obligated to defend and/or indemnify Lockheed against demands by Federal and state environmental agencies regarding the Redlands and other former Lockheed sites (app. 2nd supp. R4, vol. 29, tab 18; stip. ¶ 98).

40. By Cleanup and Abatement Order No. 94-10 adopted on 28 January 1994, the Water Board recited that, "[b]ased on investigations conducted since the early 1980's, [the Water Board] has concluded that the former Lockheed...facility...is the source of the TCE in the Basin." The Water Board directed Lockheed to submit a work plan and take remedial action according to a specified schedule. (R4, tab 31 at 2, 120-21)

41. By Order No. 94-11 adopted on 28 January 1994, the Water Board surveyed the history of investigative efforts from 1980 to 1993 to determine the source of TCE contamination in the Redlands area of the Basin and concluded that "the former Lockheed...facility...is the source of the TCE in the Basin." By its order, the Water Board required Lockheed to submit a report, together with a work plan and time schedule, and to complete all field activities necessary to identify potential source areas of further TCE contamination of soil or groundwater at the Redlands facility. (App. 2nd supp. R4, vol. 30, tab 5 at LPRO0372099, -0372107)

42. By Cleanup and Abatement Order No. 94-37 adopted on 22 April 1994, the Water Board rescinded Cleanup and Abatement Order No. 94-10 (*see* statement 40) and ordered Lockheed to take a variety of remedial measures based upon the Water Board's finding that Lockheed "has caused or permitted...waste [in the form of TCE] to be discharged into the waters of the state and [has] created...a condition of pollution or nuisance" (app. 2nd supp. R4, vol. 30, tab 14 at LPRO0949559).

43. In September 1995, Lockheed filed suit in *Lockheed Martin Corp. v. Seven W Enterprises, Inc. et al.*, No. 95-6153 ER (RNBx) (C.D. Cal.), for the costs of response, as well as contribution and declaratory relief under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA) against subsequent occupants of the Redlands site. Thereafter, on 1 November 1996, the court dismissed this action with prejudice. (Stip. ¶¶ 110-11)

44. On 13 December 1996, plaintiffs filed their complaint in *Carrillo, et al. v. Lockheed Martin Corp., et al.*, No. SCV 34791 (Cal. Super. Ct., 1996), a purported class action seeking damages and injunctive relief against Lockheed, as well as previous and subsequent occupants of the Redlands site, for contamination by TCE and other toxic chemicals. In their complaint, plaintiffs alleged that Lockheed's and other defendants' "improper use and disposal of these toxic substances into the ground was...an ultrahazardous activity." (2nd supp. R4, vol. 9, tab 275A at LPRO0446819).

45. On 10 January 1997, the State of California filed a complaint in *State of California Department of Toxic Substances Control v. Lockheed Martin Corp., et al.*, No. 97-0198 (C.D. Cal.) (the state CERCLA action). The state sought damages and declaratory relief under CERCLA, for the present and future costs "of response, removal and remedial actions" incurred by the state at the Redlands site. (2nd supp. R4, vol. 9, tab 275I at LPRO0446985) By date of 23 October 1997, the court entered a consent

decree whereby Lockheed agreed, *inter alia*, to pay the state $900,000 for past costs incurred by the state at the Redlands site and to turn over documents and information regarding relevant activities at the site (2nd supp. R4, vol. 9, tab 284 at WQB005-0585-87).

46. On 25 February 1997, plaintiffs filed their complaint for damages in *Acklin, et al. v. Lockheed Martin Corp.*, *et al.*, No. SCV 36336 (Cal. Super. Ct.), generally alleging that they were residents in areas around the Redlands site who had been injured by exposure to the TCE plume, as well as other toxic substances, resulting from the activities of Lockheed and other occupants of the Redlands site (2nd supp. R4, vol. 9, tab 275D at LPRO0446894, -0446896-901, -0446917)

47. By certified letter both to Boeing's president and to its vice president and general counsel, dated 23 May 1997, outside counsel for Lockheed "request[ed] that Boeing indemnify it against certain claims and losses that Lockheed...has suffered and will continue to suffer in connection with its activities in support of" four of the SRAM contracts. The claims and losses that Lockheed's outside counsel cited were: (a) the *Carrillo* and *Acklin* actions (*see* statement 44, 46), as well as the state CERCLA action (*see* statement 45), all of which were then pending; (b) "[l]osses, damages, and expenses incurred by Lockheed...in connection with [Water Board] Order No. 94-11...[and] Cleanup and Abatement Order No. 94-37" (*see* statements 41, 42); and (c) "[t]he reasonable expenses of litigation and settlement incurred and to be incurred by Lockheed...in the above actions and proceedings." (2nd supp. R4, vol. 9, tab 275 at 1-2)

48. In 1997, methods became available for the first time to detect small quantities of AP in drinking water (stip. ¶ 118). On 28 May 1997, Lockheed learned that tests conducted by the California State Department of Health Services showed AP in the Redlands plume (stip. ¶ 119).

49. By e-mail dated 4 June 1997, an Air Force Lt. Colonel alerted multiple recipients in the Air Force and Defense Logistics Agency (DLA) to the discovery of the AP plume in and around Redlands, CA, and stated that "[t]he former Lockheed site is approximately 1.3 miles from the closest Redlands, CA water production wellfield." He also advised that Lockheed's associate general counsel for environmental matters had informed him that Lockheed "has evidence that several former government contracts performed at the [Redlands] site had Public Law 85-804 indemnification clauses." (App. 2nd supp. R4, vol. 35, tab 3 at 1)

50. In 1997, the DLA employed a system of "Bellringer" reports whereby field offices alerted headquarters to significant situations that could result in press interest, increases in the cost of contract performance or changes in contractor situations (mot., ex. 64 at 263-64, ex. 70 at 157-58). By a "BELLRINGER SITUATION REPORT" dated 12 June 1997, an Air Force commander notified the commander of the Defense Contract

Management Command and other officials of the discovery of AP at the Redlands site. He stated that "[t]his discovery is likely to significantly increase [Lockheed's] environmental tort litigation case load and their environmental cost claims against the government." He also opined that "[t]he government will have to deal with legal liability issues." (App. 2nd supp. R4, vol. 35, tab 38 at 2-3)

51. By Cleanup and Abatement Order No. 97-58 adopted on 18 July 1997, the Water Board stated that, "[b]ased on information available to the Board at the time Order 94-37 was adopted [*see* statement 42], [TCE] was the only contaminant discharged from the former...[Redlands] facility that was known to have significantly impacted groundwater." However, the Board noted, "[i]n late April 1997, [the California Department of Health Services] began sampling production wells located both within and outside the TCE plume to determine if perchlorate was present in the groundwater. Perchlorate was found in several production wells, including drinking water wells...." The Water Board concluded that Lockheed's waste disposal practices had "resulted in the discharge of solid rocket fuel to the ground in a manner which would have allowed ammonium perchlorate...to migrate to the groundwater." The Water Board ordered Lockheed to submit and implement a remedial action plan. (App. 2nd supp. R4, vol. 36, tab 19 at LPRO0372112-13)

52. Lockheed's outside counsel stated in his 29 March 2000 letter to an Air Force attorney (*see* statement 58) that, following the filing of the *Carrillo* action in 1996 (*see* statement 44), "more than seven hundred individuals" filed separate actions against Lockheed alleging similar causes of action allegedly arising from both the TCE and AP plumes near the Redlands site (app. 2nd supp. R4, vol. 41, tab 31 at 5).

53. After receipt of Lockheed's 23 May 1997 demand for indemnification from Boeing (*see* statement 47), a Boeing attorney caused a search for contract files to be made within Boeing and located "[l]ess than 20, more than five" boxes of material, consisting of portions of prime and subcontracts and correspondence, regarding the SRAM program. He also spoke to Boeing personnel who had worked on the program. (Respondent's Opposition to Appellant's 8 May 2009 Motion for Summary Judgment on Affirmative Defense No. 4 (Laches) (gov't opp'n to no. 4 mot.), ex. 9, Reardon tr. 17-19)

54. Following this search, Boeing responded to Lockheed's demand for indemnification. By letter to Lockheed's outside counsel, dated 26 January 1998, Boeing's house counsel stated that Boeing had been unable to locate the prime or subcontracts after a "diligent search" and that, without those documents, Boeing was unable to evaluate Lockheed's demand for indemnification. He asked Lockheed for additional documentation and stated: "Of course, Boeing intends to inform our government customer of this demand for indemnification." (App. 2nd supp. R4, vol. 9, tab 287)

55. Boeing did not thereafter inform the government of Lockheed's demand. Asked at his deposition why Boeing had not done so, the Boeing attorney stated:

> A First, I received a communication from [Lockheed's outside counsel] stating that Lockheed wished to make that communication. And second, didn't really know what we would communicate.
>
> Q What communication from [Lockheed's outside counsel] are you referring to?
>
> A I received a phone call from [Lockheed's outside counsel] saying, Lockheed would like to make notification to the Government.
>
> ....
>
> Q What is the time period for this phone call?
>
> A Days after this January 26th [1998] letter.
>
> Q And, what did he say?
>
> A That Lockheed would like to make notification to the Government.
>
> Q And, what was your response to that?
>
> A Fine.
>
> ....
>
> Q And, did you bring that -- did you later ask [Lockheed's outside counsel] why Lockheed had not notified the Government?
>
> A No
>
> Q Could you have notified the Government...[?]
>
> A Sure.
>
> Q And, why didn't you?

> A There was nothing to inform them about.
>
> Q What about the demand for indemnification?
>
> A It was -- that indemnification, the request, absent additional supporting data, would have been fruitless.

(Gov't opp'n to no. 4 mot., ex. 9, Reardon tr. 29-30)

56. We are unable to find from the present record regarding Boeing's actions that Lockheed's 23 May 1997 letter constituted Boeing's first notice of either the Water Board's orders or the environmental litigation against Lockheed regarding the Redlands site.

57. It is undisputed that, in 1998, apart from the *Procter* litigation (*see* statement 39), Lockheed filed a complaint in *Lockheed Martin Corp. v. Continental Insurance Co.*, No. BC 199546 (Cal. Super. Ct.) against certain of its insurance carriers and underwriters, alleging breach of the duty to defend against, *inter alia*, toxic tort claims regarding the Redlands and other sites (stip. ¶ 140; Exhibits to Appellant's Motion for Summary Judgment (app. mot. ex.), tab 79 at 1-2).

58. By letter to an Air Force attorney dated 29 March 2000 and captioned "Lockheed Martin Request for Indemnification," Lockheed's outside counsel transmitted a memorandum regarding TCE and AP pollution at the Redlands site. He asserted that "a number of the Company's prime and subcontracts contained government indemnification clauses" and that "it is in the mutual interest of the Air Force and Lockheed Martin to begin working together to fulfill the requirements of these clauses." (App. 2nd supp. R4, vol. 41, tab 31 at 1) The attached four-page memorandum was general in nature. It broadly outlined the background of the TCE and AP plumes, referred to Water Board orders Nos. 94-10 (*see* statement 40), 94-11 (*see* statement 41) and 97-58 (*see* statement 51), as well as to the *Carrillo* action (*see* statement 44) and the other toxic tort actions (*see* statement 52) (*id.* at R40000178-80). The memorandum contained no discussion regarding whether the cited claims exceeded the level of available insurance, or regarding the probability of recovery from other potentially responsible parties and insurance carriers. In his deposition, John Taffany, the Air Force witness designated under FED. R. CIV. P. 30(b)(6), testified that:

> Notice was given to the Air Force by virtue of this 29 March 2000 letter. It was not given to the contracting officer, but that was the first approach or the first time that the Air Force was made aware of this, of Lockheed's, essentially request for indemnification.

He further testified that the Air Force was also notified through what was characterized in the letter as the "recent telephone conversation" between Lockheed's outside counsel and an Air Force attorney. (Mot., ex. 69, Taffany tr. 301)

59. In his letter, Lockheed's counsel had requested the Air Force attorney to determine who would be responsible "for managing this matter" within the Air Force (app. 2nd supp. R4, vol. 41, tab 31 at 1). There had not been a contracting officer on the SRAM program in "[m]aybe 15 [or] 20 years" and the Air Force assigned one in 2000 (mot., ex. 45, Tippett tr. at 244-45).

60. The record reflects that, in the fall of 2001, Lockheed representatives met with Air Force representatives and sought recovery from the Air Force under CERCLA (Respondent's Opposition to Appellant's 8 May 2009 Motion for Summary Judgment on Affirmative Defense No. 4 (Laches) (gov't opp'n), vol. 2, ex. 10, ¶ 6).

61. The record contains evidence that multiple individuals involved in contract formation, and in subsequent events relating to this appeal, are deceased. These individuals include: (a) Mr. Charles, who signed the MOA for the Development prime contract (*see* statement 2), and who died on 25 October 2000 (4th supp. R4, tab 622); (b) Mr. Racusin, who approved inclusion of the Indemnification clause in the second production prime contract (statement 14), and who died on 12 April 1998 (4th supp. R4, tab 661); (c) Dr. McLucas, who as acting Secretary of the Air Force, authorized inclusion of the Indemnification clauses in the third and fourth production prime contracts (*see* statements 19, 23), and who died on 11 December 2002 (4th supp. R4, tab 650); (d) J.R. Currier, Boeing's Manager, Propulsion Subcontracts, SRAM Program, who was involved in inclusion of the Indemnification clause in at least the third production prime contract, and who died on 11 October 2000 (R4, tabs 15, 16; 4th supp. R4, tab 625 at 1); (e) Ernest F. Thorslund, who was Boeing's Senior Representative on its resident team at the Redlands site until April 1972, and who died on 13 March 1996 (4th supp. R4, tabs 491, 673); and (f) Blaine T. Larsen, who was the government's Corporate Administrative Contracting Officer from at least October 1974 through the phase-out of the Redlands site and thereafter, and who died on 26 May 1999 (4th supp. R4, tabs 509, 522-23, 647).

62. The record contains the testimony of Harvey Gordon, deputy for acquisition in the Office of the Secretary of the Air Force from June 1969 to January 1982. He served as Mr. Racusin's deputy, and he was deposed regarding events that transpired 34 to 37 years earlier. (Joint supp. R4, vol. 1, tab 1A, Gordon tr. 11, 13 16, 115) His recollection regarding particular documents at issue was diminished (*id*., tr. 14, 24, 68, 84-85, 101, 108-09, 112, 116).

63. The record reflects that, after 2001, the Air Force conducted an extensive effort to find relevant records at various Air Force facilities and National Archives locations in

Washington, DC, and throughout the country (gov't opp'n, vol. 2, ex. 10, ¶ 8). These efforts were "generally unfruitful" (*id.* ¶ 15). Significantly, while the Air Force was able to locate documents approving the use of indemnification clauses in the contracts, it was "unable to locate the critical staffing documents [such as the Air Staff Summary Sheets] that would have accompanied these approvals [*see* statements 2, 7, 14, 19, 23]...[and that] would have shed more light on what was intended and possibly covered by the [Pub. L. No.] 85-804 language" (*id.* ¶ 13). The record reflects that, in 2000, Boeing advised both the Air Force and Lockheed that Boeing had no contract documents and, in 2001, Boeing's corporate legal staff advised Air Force counsel that its records had been "destroyed...pursuant to [Boeing's] own internal corporate document retention procedures" (*id.* ¶ 12).

64. The record contains the deposition of a former Air Force records officer, who managed the Air Force records retention program from April 2002 to February 2008. She testified that the Air Force promulgated its own records disposition schedule, which in turn followed the government's general records schedule. On the basis of the Air Force records disposition schedule, she testified that the MOAs for the prime contracts would have been destroyed in the ordinary course of business six years and three months after final payment on each contract. This period would include the underlying staff summary sheets that are referenced in the MOAs (*see* statements 2, 7, 14, 19, 23). She testified that the Air Force would have compiled records evidencing the destruction of contract files, and those records in turn would have been maintained for six years from the date of destruction. Applying these rules to the fourth production prime contract, which was closed in 1975, she concluded that the contract files themselves should have been destroyed in 1981, and evidence of the destruction should have been destroyed in 1987. (Gov't opp'n, vol. 2, ex. 11, Hochgesang-Noffsinger tr. 18, 47, 54-56, 66, 95-96, 102, 123, 226, 243).

H. Claim

65. By date of 5 June 2001, Boeing and Lockheed entered into a claim sponsorship agreement, whereby Boeing authorized the submission of a claim to the government on behalf of Lockheed (R4, tab 40 at 1).

66. By date of 6 February 2004, Boeing submitted a claim "under its SRAM prime contracts," on behalf of Lockheed, to the contracting officer. In the claim, Boeing sought indemnification for the incurred and projected 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 claim was certified by both Boeing and Lockheed representatives. (R4, tab 42 at 4 n.1, 49)

67. The contracting officer denied the claim in August 2004 (R4, tab 41). The contracting officer addressed the merits of the claim in his decision, and further concluded that Lockheed "did not provide the prompt notice to the Air Force that the indemnification clause requires" (*id.* at 7). Following the denial of its claim, Boeing 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 result[ed] 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 affirmative defense four, the government alleged that Lockheed knew about "environmental issues" at its Redlands facility "as early as 1980," but did not inform the Air Force until 2000. (Answer at 33) In the fifth affirmative defense, the government generally alleged that Boeing failed to comply with the notice provisions in the Indemnification clauses in the first and second production prime contracts (*see* statements 11, 15; answer at 33). Boeing now moves for summary judgment on the fourth affirmative defense. The government moves for summary judgment on affirmative defense five, and Boeing opposes and cross-moves for summary judgment on that defense.

Our evaluation of the parties' 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. With respect to cross-motions, "[t]he fact that both parties have moved for summary judgment does not mean that [we] must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not appropriate if disputes remain as to material facts." *Mingus Constructors*, 812 F.2d at 1391. With cross-motions, such as those on affirmative defense five, the Board "must evaluate each party's motion on its own merits." *BMY, A Division of Harsco Corp.*, ASBCA No. 38172, 93-2 BCA ¶ 25,704 at 127,868.

B. Affirmative Defense Four

In its affirmative defense four, the government averred:

> 4. Laches: LMC knew about the environmental issues at Redlands as early as 1980, when the SARWQCB notified LMC of TCE contamination. Further, LMC was aware of pollution issues at Redlands that may have involved indemnification as of 1994, when the SARWQCB ordered LMC to begin TCE remediation. Potential AP contamination became apparent in 1997, along with toxic-tort lawsuits in state court stemming from alleged exposure to TCE and AP in the local drinking water. LMC unilaterally remediated TCE and AP and defended the state court litigation, by then known to trigger a potential indemnification request to the Air Force. LMC did not inform the Air Force of its ongoing pollution issues until 2000. Aver LMC's delinquent notice prejudiced the Air Force. On information and belief, relevant and critical documents and personnel that were likely available when the issues arose are no longer available.

(Answer at 33)

In its motion for summary judgment as to affirmative defense four, Boeing asserts that the facts alleged by the government in the affirmative defense do not establish laches.

Boeing argues that the government "has only alleged...that Appellant delayed telling the Air Force about the discovery of TCE contamination...the 1994 Water Board orders, the discovery of AP contamination, and the toxic tort lawsuits." (Appellant's Motion for Summary Judgment (no. 4 mot.) at 179) According to Boeing, the government has failed to allege when Boeing's claim for indemnification first accrued, "let alone that Appellant delayed in asserting that [Contract Disputes Act] claim, or that the delay was unreasonable and inexcusable" (*id.*). Boeing also contends that the government "is clearly wrong on the facts it alleges" (*id.* at 180).

In opposing Boeing's motion, the government argues that Boeing "offers no evidence to show that Appellant was diligent in pursuing its...indemnification claim" (gov't opp'n to no. 4 mot. at 1). The government tells us that the record establishes that "Appellant's 'decades of delay' have not only prejudiced [the government's] ability to defend itself...but have also put the Board in the untenable position of attempting to discern the truth...with very few contemporaneous documents and effectively no witnesses" (gov't opp'n to no. 4 mot. at 4).

Laches is an equitable doctrine that denies relief to "one who has unreasonably and inexcusably delayed in the assertion of a claim." *S.E.R., Jobs for Progress, Inc. v. United States*, 759 F.2d 1, 5 (Fed. Cir. 1985) (quoting *Brundage v. United States*, 504 F.2d 1382, 1384 (Ct. Cl. 1974)). While both the prime contracts and subcontracts (with the possible exception of the third production prime contract) contain prompt notice provisions regarding potentially indemnifiable events (*see* statements 5, 6, 11, 13, 15, 17, 21, 22, 24, 27), those clauses do not bar a laches defense. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1030 (Fed. Cir. 1992) (noting that "laches is routinely applied within the prescribed statute of limitations period for bringing the claim").

As the proponent of laches as an affirmative defense, the government bears the burden of proof. *See Advanced Cardiovascular Systems, Inc. v. SciMed Life Systems, Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993). In meeting that burden, "[t]he passage of time alone does not constitute laches." *Mediax Interactive Technologies, Inc.*, ASBCA No. 43961, 93-3 BCA ¶ 26,071 at 129,582. "To successfully invoke laches, a defendant must prove by a preponderance of the evidence (1) that the plaintiff delayed filing suit an unreasonable and inexcusable length of time after the plaintiff knew or reasonably should have known of its claim against the defendant; and (2) the delay resulted in material prejudice or injury to the defendant." *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995) (patent action); *Aukerman*, 960 F.2d at 1033; *S.E.R.*, 759 F.2d at 5.

Applying these principles to the record before us, we conclude that Boeing has not demonstrated the lack of triable issues regarding the elements of unreasonable, inexcusable delay and of prejudice. Hence, Boeing's motion must be denied. We reach this conclusion for four principal reasons.

First, we reject Boeing's technical argument that the government has failed to plead a proper laches defense. Under our Rule 6(b), the government's answer need only "set forth simple, concise and direct statements of the Government's defenses to each claim asserted by appellant, including any affirmative defenses available." "[T]he Board's rules, like the Federal Rules of Civil Procedure, only require notice pleading." *Unitech Services Group, Inc.*, ASBCA No. 56482, 10-1 BCA ¶ 34,362 at 169,695. Construing the pleading "so as to do justice," FED.R.CIV.P. 8(e), we conclude that it alleges the elements of delinquent notice and prejudice, and was sufficient to put Boeing on notice that the government was asserting laches as a bar, so that Boeing could proceed to conduct discovery regarding the affirmative defense.

Second, the record will not support summary judgment regarding the absence of unreasonable and inexcusable delay on Boeing's part in asserting its claim. While the parties dwell on Lockheed's asserted delay, we look first at Boeing, the claimant. With these five prime contracts, "Boeing is the only party with which the government is in privity," *Boeing*, 11-2 BCA at 171,327, not Lockheed (*see* statements 6, 13, 17, 22, 27). We have already held that we have jurisdiction over this appeal under the Contract Disputes Act (CDA), 41 U.S.C. § 7101 *et seq*. *The Boeing Co.*, ASBCA No. 54853, 06-1 BCA ¶ 33,270 at 164,888. It is familiar that "our jurisdiction [under the CDA] extends only to appeals by contractors," *CBI Services, Inc.*, ASBCA No. 34983, 88-1 BCA ¶ 20,430 at 103,337, inasmuch as they are in privity with the government. *See* 41 U.S.C. § 7101(7). "Subcontractors are generally not in privity of contract with the government." *Rahil Exports*, ASBCA No. 56832, 10-1 BCA ¶ 34,355 at 169,647, and generally cannot assert claims on their own behalf.

With respect to Boeing, its motion for summary judgment must be denied. Drawing justifiable factual inferences in favor of the government as the party against which the motion is directed, we conclude that Boeing has failed to establish that it did not "unreasonably and inexcusably delay[ ] in the assertion of [its] claim." *S.E.R.*, 759 F.2d at 5. The record contains uncontroverted evidence that Lockheed notified Boeing of "claims and losses that [it]...has suffered and will continue to suffer" on four of the contracts by letter dated 23 May 1997 (statement 47). Assuming *arguendo*, that this letter constituted Boeing's first notice of these claims and losses (*but see* statement 56), almost seven years elapsed before Boeing filed its claim by letter dated 6 February 2004 (statement 66). The record contains testimony from the Boeing counsel responsible for addressing Lockheed's notification letter that, despite written assurances in January 1998 "to inform our government customer" (statement 54), Boeing seemingly made a conscious decision *not* to alert the Air Force, and perforce to file a claim, because: (a) Lockheed's representative had advised that Lockheed "would like to make notification to the government"; and (b) in any event, it "would have been fruitless" for Boeing to do so absent more documentation (statement 55). The record also reflects that, in the interval between receipt of Lockheed's May 1997 notification and the submission of its claim, Boeing entered into a claim

sponsorship agreement with Lockheed in 2001 (statement 65). In addition, the present record does not address whether Boeing's knowledge predated Lockheed's notification. We are unable to find whether Boeing had any knowledge of either the Water Board orders (*see* statements 40-42, 51) or the litigation at issue regarding the Redlands site (*see* statements 39, 43-46) *before* Lockheed's 23 May 1997 letter (statement 47). Given the almost seven year delay that is established, however, summary judgment in favor of Boeing must be denied.

With respect to Lockheed's conduct, summary judgment must also be denied. Taking the unstated premise of the defense to be that Lockheed's "delinquent notice" as the government phrases it, caused Boeing to delay its claim, the record presents triable issues regarding whether the notice that Lockheed ultimately gave "unreasonably and inexcusably delayed" Boeing's claim. *See S.E.R.*, 759 F.2d at 5. It is familiar that "[i]ssues that require 'the determination of reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.'" *Matthews v. Ashland Chemical, Inc.*, 703 F.2d 921, 925-26 (5th Cir. 1983) (quoting *Gross v. Southern Railway Co.*, 414 F.2d 292, 296 (5th Cir. 1969)). We have previously denied summary judgment regarding reasonableness in the defense of laches, *e.g., Atlas Headwear, Inc.*, ASBCA No. 53968, 05-1 BCA ¶ 32,905 at 163,031-32 (reasonableness of five-year delay between final delivery and reconciliation of account).

Drawing justifiable factual inferences in favor of the government as the party against which the motion is directed, *Maropakis*, 609 F.3d at 1327, we conclude that the record presents triable issues regarding whether Lockheed reasonably should have alerted Boeing in 1984, when Lockheed learned that the Redlands site was under consideration for the state Superfund listing (*see* statement 33), or in September 1992, when environmental problems appear to have crystallized sufficiently for Lockheed's outside counsel to meet with its insurance carriers and demand coverage positions within sixty days (*see* statement 37). Similarly, there are triable issues regarding Lockheed's conduct in November 1992, when the Water Board staff informed Lockheed that the Redlands site was considered to be "the source of TCE found in the Basin" (*see* statement 36). In addition, we discern triable issues surrounding Lockheed's failure to notify Boeing in May 1993, when the Water Board staff stated that it would begin preparing a cleanup and abatement order (*see* statement 38), and in January 1994, with the issuance of Cleanup and Abatement Order No. 94-10 (*see* statement 40), as well as in April 1994, in the face of Cleanup and Abatement Order No. 94-37 (*see* statement 42).

Lockheed's litigation regarding the Redlands site likewise presents triable issues of unreasonable and inexcusable delay. Thus, there is a triable issue regarding whether Lockheed should have notified Boeing in May 1993 of the *Procter* litigation (*see* statement 39), given the relationship between the insurance requirements and the indemnification clauses in both the prime and subcontracts (*see* statements 12, 13, 17, 22, 24, 27).

Third, apart from delay, there are triable issues regarding the element of prejudice in the laches defense. The government's argument is couched in terms of defense prejudice, which "may arise by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts." *Auckerman*, 960 F.2d at 1030. The government principally points to evidence regarding individuals involved in contract formation who died before and after Lockheed notified the government in 2000 and Boeing filed the claim in 2004 (*see* statements 58, 66), as well as to documents that have been destroyed since contract performance (*see* statements 63-64).

Again drawing justifiable factual inferences in favor of the government as the party against which the motion is directed, *Maropakis*, 609 F.3d at 1327, we conclude that the government has raised triable issues regarding the unavailability of potential witnesses who were involved in contract formation. Viewing the record in the light most favorable to the government, it appears that these individuals could have been interviewed and their testimony preserved regarding the government's defense that pollution risks were not intended to be covered by the indemnification clauses. This is true of Mr. Charles, who died in 2000, and who approved inclusion of the Indemnification clause in the Development prime contract (*see* statement 61). It is also not unreasonable to infer, for purposes of this motion, that Mr. Charles could have shed light on the parties' intentions in including an Indemnification clause in the Development prime contract that apparently contained a narrower definition of "unusually hazardous risks" than the comparable clauses in the four later prime contracts (*compare* statement 4 *with* statements 8, 14, 20, 25). Similarly, the apparent delay in notification and claim may have denied the government the opportunity to interview and preserve the testimony of Mr. Racusin, who died in 1998, and who approved the Indemnification clauses in the first and second production prime contracts (statement 61), and of Dr. McLucas, who died in 2002, and who authorized the Indemnification clauses in the third and fourth production prime contracts (*id.*). Other potential witnesses whose testimony would appear material have died (*id*), and at least one deponent had an understandably diminished recollection regarding events decades earlier (statement 62).

Fourth, the present record will not support summary judgment for Boeing regarding the second production prime contract. Under Exec. Order No. 11610, 36 Fed. Reg. 13755 (July 24, 1971), the inclusion of the Indemnification clause in the second production prime contract could only be approved in advance "by an official at a level not below that of the Secretary of a military department." We have already concluded in our decision on Boeing's motion for summary judgment regarding the government's sixth affirmative defense that the present record fails to establish that Secretary Seamans ratified the Indemnification clause in this contract. *Boeing*, 11-2 BCA

¶ 34,813 at 171,325. The motion papers before us on this defense, based upon the same record, warrant the same conclusion.

C. Affirmative Defense Five

In its affirmative defense five, the government averred:

> 5. Failure to provide notice: Paragraph (f) of the ASPR 10-702 indemnification clause, contained in both the FY 1971 and 1972 prime production contracts, required Boeing to:
>
> > (i) promptly notify the Contracting Officer of any occurrence 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) to the extent required by Government, permit and authorize the Government to direct, participate in, or supervise the settlement or defense of any such claim or action.
>
> This failure to provide contractually-mandated notice, as set out in [affirmative defense] No. 4 above, has resulted in prejudice to the Government. Documents and witnesses that may have been available when the company first learned of the alleged groundwater contamination are no longer available.

(Answer at 33)

Two aspects of this affirmative defense stand out. The first is its limited scope. As pled, the affirmative defense is confined to the notice provisions in the Indemnification clauses in "the FY 1971[, or first,] and 1972[, or second,] prime production contracts." (*Id.*) By its terms, the defense does not apply to the development prime contract (*see* statements 4-5), or to the third or fourth production prime contracts (*see* statements 21, 24-26). While the defense as articulated in the government's motion papers may be read to apply to all five contracts at issue in this appeal, we treat the defense as asserted solely regarding the first and second production prime contracts, and not regarding the other three contracts.

The second aspect of this affirmative defense that stands out is the government's misquotation of the notice provision contained in the relevant Indemnification clause, which was ASPR 10-702(b)(2) INDEMNIFICATION UNDER PUBLIC LAW 85-804 (1968 SEP). Both the first and second production prime contracts contained this notice provision (statements 11, 15). The provision – paragraph (f) of the clause – imposed the following obligation upon Boeing:

> (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.

(statement 11) In these circumstances, we consider the motion and cross-motion in light of the notice provision set forth above and actually incorporated in the first and second production prime contracts, as distinguished from the notice provision set out in the government's answer. Both parties assert that the notice provision actually incorporated in these two contracts has not been construed in previous decisions. (Respondent's Motion for Summary Judgment Affirmative Defense No. 5 (Lack of Notice) (no. 5 mot.) at 94; Appellant's Opposition to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment on Affirmative Defense Five (app. opp'n to no. 5 mot.) at 103) As mentioned, the parties have cross-moved for summary judgment regarding this defense.

In its motion, the government first contends that Boeing did not promptly notify the contracting officer of various occurrences, actions or claims that "reasonably [could have been] expected to involve indemnification" (no. 5 mot. at 96). The government points to a "long litany" of events, from the potential 1984 state Superfund listing (*id.* at 98; *see* statement 33) to the toxic tort suits filed through 1998 (*see* statements 44-46, 52) that it says reasonably should have prompted Boeing to give notice under the Indemnification clause (no. 5 mot. at 96-102). The government's second point is that it has suffered defense prejudice, resulting chiefly from the deaths of potential witnesses and loss of documents (no. 5 mot. at 103-19). Finally, the government urges that the lack of prompt notification presents circumstances of such overwhelming prejudice as to require denial of Boeing's claim (no. 5 mot. at 119-22).

In its opposition and cross-motion, Boeing urges that the government's motion should be denied, and its cross-motion granted, because there is no triable issue regarding compliance with paragraph (f). Boeing first insists that the government "does not allege or establish if or when any of the 'events' it discusses in its motion were 'reasonably...expected' to involve" a claim under the Indemnification clause (opp'n to no. 5 mot. at 112). Boeing then contends that its cross-motion should be granted because the government's theory of the case is "demonstrably unreasonable and illogical" in that the Air Force timely received the required notice (*id.* at 114). That is, Boeing's position is that, while the 29 March 2000 letter from Lockheed's outside counsel to the previous Air Force counsel constituted the requisite notice (*see* statement 58), the government urges that Boeing failed to give notice for over fifteen years before the date of that notice. Thus, Boeing tells us that "the earliest Water Board TCE claim is 1994 [*see* statement 40], the earliest Water Board AP claim is 1997 [*see* statement 51], the earliest toxic tort TCE claim is 1996 [*see* statement 44], [and] the earliest toxic tort AP claim is 1997." (*Id.* at 115) Although paragraph (f) of the Indemnification clauses set forth no procedures or conditions for notice, Boeing argues that its obligation to provide notice to the government did not arise following an "occurrence" alone. Rather, that obligation arose only after the contractor had performed a "calculus." To round out the "calculus" after an "occurrence," Boeing tells us Lockheed must determine that it "has a reasonable expectation: (1) that it would receive each claim and (2) that each of these claims, independently, would meet the requirements for indemnification" (*id.*). Boeing insists that it is entitled to summary judgment because "there is no evidence" that the third party proceedings, comprising the Water Board orders and the toxic tort actions, "were reasonably expected to meet the requirements for indemnification prior to March 2000[,] when [the government] admits it did receive notice" (*id.* at 114, 116).

We conclude that the government's motion regarding affirmative defense five, and Boeing's cross-motion regarding the same defense, must both be denied with respect to the first and second production prime contracts. We reach this conclusion for three principal reasons.

First, while the motion papers present numerous legal and factual issues, we think that the nub of the matter is that the motions present issues of reasonableness that are inappropriate for summary disposition. By its terms, paragraph (f) imposes a notice obligation only for "occurrences, actions or claims" that "*reasonably* may be expected to involve indemnification" (emphasis added). The parties highlight the issue of reasonableness in their motion papers. Thus, the government tells us that "it is up to the Board to look at each of these events and determine whether each event 'reasonably' may have been expected by Lockheed 'to involve indemnification' under the SRAM contracts or subcontracts." (No. 5 mot. at 98) The government insists that there is no genuine issue of material fact that the facts recited in its motion "reasonably" should have been expected by Lockheed" to involve indemnification (*id.*). The government also asserts that it is clear that the 1994 Water Board orders (*see* statements 40-42) reasonably should have been

expected to involve indemnification (No. 5 mot. at 99-100). For its part, Boeing's position is that it could not reasonably have given notice before it did.

In deciding the motion regarding affirmative defense four above, we adverted to the principle that "[i]ssues that require 'the determination of the reasonableness of the acts and conduct of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment.'" *Matthews*, 703 F.2d at 925-26 (quoting *Gross,* 414 F.2d at 296). By its terms, the clause focuses on reasonableness. We also conclude regarding this defense that "further development of the record is warranted as we must examine the parties' conduct in light of the circumstances." *ASFA Construction Industry and Trade, Inc.*, ASBCA No. 57269, 11-2 BCA ¶ 34,791 at 171,250. There are also triable issues regarding the "calculus" that Lockheed purportedly performed concerning whether the claims exceeded available insurance, or regarding the probability of recovery from other potentially responsible parties and insurance carriers.

Second, the record presents genuine issues of material fact regarding prejudice, precluding summary judgment for either party. Boeing argues that, even if it gave dilatory notice, the government's motion must be denied, and Boeing's cross-motion granted, because the government suffered no prejudice. (Opp'n to mot. no. 5 at 137)

The triable issues regarding prejudice include: the nature of the knowledge of officials at Norton Air Force Base regarding the Redlands plume (*see* statement 34); the disposition of the 4 June 1997 email from an Air Force Lt. Colonel regarding AP in the Redlands plume (*see* statement 49); the consequences of the 12 June 1997 "Bellringer" report (*see* statement 50); and the extent of Air Force knowledge regarding the Water Board orders and toxic tort suits cited in Lockheed's 29 March 2000 request for indemnification (*see* statement 58).

Third, with respect to the second production prime contract, summary judgment for either party is unwarranted for the additional reason that there are triable issues regarding whether the Indemnification clause in the contract was properly authorized. *Boeing*, 11-2 BCA ¶ 34,813 at 171,324.

D. Motion to Strike

The government attached to its reply regarding affirmative defense five a supplemental expert rebuttal report of Thomas Cain, an engineer (Respondent's Reply to Appellant's 22 June 2009 Opposition and Respondent's Opposition to Appellant's 22 June 2009 Cross Motion for Summary Judgment on Affirmative Defense No. 5 (Failure to Provide Notice), ex. 15). The supplemental report appears to address TCE releases at the Redlands site during the respective periods in which it was occupied by Grand Central Rocket (*see* statement 28) and Lockheed. Boeing has moved to strike the report as both, untimely, because it was filed after the deadline for expert reports, and irrelevant to

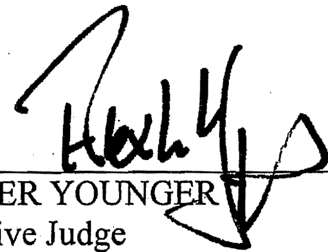
affirmative defense five. Boeing also contends that the report is without merit. (Appellant's Reply in Support of its Cross Motion for Summary Judgment on Affirmative Defense Five and Exhibits at 35-39)

We deny the motion to strike. We need not reach the issues raised by the motion at this time. It will be time enough to address the admissibility of the supplemental report when we reach the triable issues in this appeal.

CONCLUSION

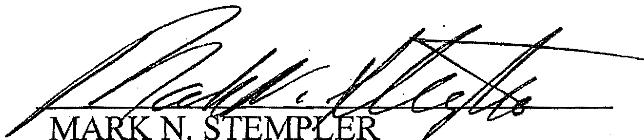
Boeing's motion for summary judgment as to affirmative defense four is denied. The government's motion for summary judgment as to affirmative defense five is denied, and Boeing's cross-motion for summary judgment as to affirmative defense five is denied. Boeing's motion to strike is denied.

Dated: 15 May 2012



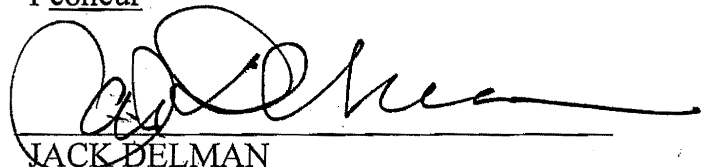
ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



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