ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
BNN Logistics	)	ASBCA Nos. 61841, 61862, 61905
	)	62241,62355, 62356
	)	62357, 62651
	)	
Under Contract No. W91B4N-11-D-7005	)	

APPEARANCES FOR THE APPELLANT:

Michael D. Maloney, Esq.
Williams Mullen PC
Tysons Corner, VA

Todd W. Miller, Esq.
Miller & Miller
Denver, CO

Enayat Qasimi, Esq.
Whiteford, Taylor & Preston L.L.P.
Washington, DC

APPEARANCES FOR THE GOVERNMENT:

Scott N. Flesch, Esq.
Army Chief Trial Attorney
Zachary F. Jacobson, Esq.
MAJ Aaron McCartney, JA
MAJ James A. Wallace, JA
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE OSTERHOUT ON GOVERNMENT'S MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT AND APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Army files three motions for full and partial summary judgment against BNN Logistics (BNN or appellant), arguing that the six-year statute of limitations bars at least parts of BNN's claims in four appeals related to a National Afghan Trucking contract. BNN files its own cross-motion for summary judgment in one appeal, alleging that an audit report from the Army establishes a breach of contract.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The Bagram Regional Contracting Center (Army or the government) awarded Contract No. W91B4N-11-D-7005 (National Afghan Trucking Contract, or NAT) to BNN, among several other contractors, on August 15, 2011 (R4, tab 5 at 2-4, tab 284). This was an Indefinite Delivery/Indefinite Quantity Multiple Award Task Order contract for trucking services in Afghanistan with an estimated value of AFN 20,771,689,159 (R4, tab 5 at 1). The contract divided the cargo into three suites: Suite I for fuel, Suite II for dry cargo, and Suite III for heavy cargo (R4, tab 4 at 2, 24). Under the first suite, the contract allowed the contractor to observe fuel uploading onto the trucks (R4, tab 4 at 10). The government would periodically conduct a Performance Requirement Summary (PRS), part of which involved application of the Quality Assurance Surveillance Plan (QASP). The QASP set forth performance standards and allowed for deductions on invoices for failure to meet given metrics. (*See* R4, tab 4 at 2-3, 18-19).

2. Another part of the PRS was the Order of Merit List (OML) that the government calculated weekly to rank the NAT contractors and assign upcoming missions accordingly. This was to "ensur[e] all awardees in the applicable suite [we]re provided 'fair opportunity' to be considered for each shipment under the" task orders. (R4, tab 5 at 53) The contract established the evaluation criteria, and included ranking the contractors by performance and price. The Army would then notify each contractor of its score and rank each week, and assign a corresponding percentage of the total missions for the coming week (R4, tab 5 at 53-60, tab 480 at 7).

3. When the contract began, if the Army found more than 5% of fuel was missing from a contractor's fuel delivery once it arrived at its destination, the Army would consider the mission failed and not pay the contractor for the mission (R4, tab 1 at 9-10, tab 4 at 10). Further, the government would require the contractor to reimburse it for the missing fuel at a pre-established rate (R4, tab 4 at 10, tab 382 at 1, 4).

4. After BNN submitted its invoices, the government returned them with deductions it had applied based on its performance, and appellant then submitted these invoices for payment (R4, tab 5 at 5).

5. The government applied several deductions to BNN's first invoices both under the QASP and for alleged pilfering of fuel (*see*, R4, tabs 8, 11, 17). However, the Army was delayed in returning these initial invoices due to both the fuel deductions discussed above and BNN's submission of documents the Army believed to be fraudulent (*see*, *e.g.*, R4, tabs 310, 328). On March 12, 2012, for example, the Army returned BNN's first fuel invoice which covered September 15 – November 15, 2011 (R4, tab 304; tab 362 at 1). On March 24, 2012, BNN sent an email to the Army, acknowledging

receipt of "the final fuel invoice for the 16-30 November 2011 period" (R4, tab 314 at 1). Deductions on these invoices were large, and BNN owed the Army enough money on its first invoice, that the debt was applied against other suites' invoices in installments for several months into the future (R4, tab 8, tab 11 cells J21-26, tab 302, tab 311 at 1, tab 327, tab 468).

6. While the Rule 4 file contains several invoices for Suite I (*see,* R4, tabs 8, 11, 17, 36), most of the invoices do not specifically state what day BNN submitted them to the government, nor when the government returned them to appellant with the deductions applied, nor which of these versions the provided documents are. The Rule 4 file demonstrates that the Army had paid 11 invoices, numbered AAA0002-0010, as of March 17, 2012, which means appellant had received the invoices back and submitted them for payment. While these invoices used a different number system than that used in the Rule 4 file, it appears at least some of these may have been for dry and heavy cargo (app. supp. R4, tab 4 cells Y69-88; tr. 12-13; R4, tab 319 at 1, 3 (identifying 0006 and 0007 as duplicates of 0009 and 0010 for "December 2011 invoice")). The following chart identifies when the record demonstrated that BNN received invoices by suite.[1]

Invoices	Fuel	Demurrage	Dry	Heavy Cargo
Sept-Nov 15, 2011	March 12, 2012 (R4, tab 304, 362 at 1)			
Later Nov 2011	March 24, 2012 (R4, tab 314)			
Dec 2011	March-April, 2012 (R4, tab 412 at 2)		March 20, 2012 (R4, tab 313)	March 20, 2012 (R4, tab 313)
Jan 2012	March-April, 2012 (R4, tab 412 at 2)		October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Feb 2012	March-April, 2012 (R4, tab 412 at 2)		October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Mar 2012	March-April, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)
Apr 2012	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	May 18, 2012 (R4, tab 431 at 2)	May 18, 2012 (R4, tab 431 at 2)

[1] This chart does not include all of the invoices in the subject appeals. The chart primarily focuses on the invoices impacted by the motions.

May 2012	October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	January 26, 2013 (R4, tab 456; R4, tab 456b)	January 26, 2013 (R4, tab 456; R4, tab 456b)
Jun 2012	August 6, 2012 (R4, tab 360); October 31, 2012 (tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	January 26, 2013 (R4, tab 456; R4, tab 456c)	August 30, 2012 (R4, tab 363 at 3)
Jul 2012	August 30, 2012 (R4, tab 364 at 2); October 31, 2012 (R4, tab 412 at 2)	October 31, 2012 (R4, tab 412 at 2)	August 30, 2012 (R4, tab 363 at 5)	August 30, 2012 (R4, tab 363 at 3)
Aug 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	October 31, 2012 (R4, tab 412 at 2)	December 17, 2012 (R4, tab 419)	December 17, 2012 (R4, tab 419)
Sept 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	October 31, 2012 (R4, tab 412 at 2)	December 17, 2012 (R4, tab 419)	December 17, 2012 (R4, tab 419)
Oct 2012	January 31, 2013 (R4, tab 469 at 3); February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	December 12, 2012 (R4, tab 543)	December 12, 2012 (R4, tab 543)
Nov 2012	February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	January 1, 2013 (R4, tab 543)	January 1, 2013 (R4, tab 543)
Dec 2012	February 1, 2013 (R4, tab 543i)	January 31, 2013 (R4, tab 469 at 3)	January 31, 2013 (R4, tab 469 at 3)	January 31, 2013 (R4, tab 469 at 3)
Jan 2013			March 9, 2013 (R4, tab 543)	March 9, 2013 (R4, tab 543)
Feb 2013			March 27, 2013 (R4, tab 543)	March 27, 2013 (R4, tab 543)
Mar 2013			September 8, 2013 (R4, tab 543)	September 8, 2013 (R4, tab 543)

7. In a dispute of its OML ranking in fuel for the week of July 16-22, 2012, BNN's documentation included the ranking of the next lowest contractor, ANL (R4, tab 355 at 18). However, this was uncommon, and all other OML disputes only contained data for BNN (*see*, *e.g.*, R4, tab 350 at 4-10; tab 355 at 4-17, tab 399 at 3-10).

8. An internal BNN email from October 31, 2012, stated BNN received all of its completed invoices covering its work through March 2012 back from the

government "only at the end of March and April 2012" (R4, tab 412 at 2). The email also discussed deductions taken in fuel invoices through July 2012 and demurrage from March 2012 through September 2012 (R4, tab 412 at 2).

9. On January 31, 2013, the Army sent an email to BNN discussing its outstanding fuel debt. In this email, the Army discussed "a positive amount for fuel for the months of June, July, August, September 2012 and demurrage for June, July, August, September, October, and November 2012." The email also informed BNN of the amount of its fuel invoice "for October 2012, demurrage for December 2012 and positive amount for dry and heavy [cargo] for December 2012." (R4, tab 469 at 3)

10. On February 13, 2013, the Army completed an audit report of the NAT contract, concerning among other things the application of the OML performance metrics using "the information from the initial 6 months of the contract" (R4, tab 480 at 1, 5). This report noted "process weaknesses" in several areas (R4, tab 480 at 2). It also found in the "command's application of the OML closure rate element in Suite I-Bulk Fuel . . . command appropriately applied the contract criteria to assess contractor performance. However, we found significant discrepancies between the data used and the source documents." (R4, tab 480 at 9) Elsewhere, the report stated

> "The OML process wasn't effectively implemented because the criteria to measure contract performance was difficult to follow and command personnel didn't receive specific training . . . . Because the process wasn't fully understood during the contract implementation, rating methodology procedures were developed inconsistent with contractual requirements. Consequently, the OML application produced inconsistent or inaccurate results for contractor performance evaluations and rankings. In some instances, command made unauthorized deviations from the contract criteria and potentially violated the fair opportunity for consideration requirements."

(R4, tab 480 at 21) The report did not explicitly or implicitly single out any individual contractor. It noted it was limited in its review, but concluded "[c]ommand personnel should reassess the OML closure rate element data for bulk fuel and determine the potential cause of the data discrepancies and the validity of the data." (R4, tab 480 at 10)

11. BNN notified the government in an email sent on February 24, 2013, that its "[d]rivers [we]re not allowed to watch the upload process at Camp Phoenix." In another email sent on March 4, 2013, BNN reported to the Army "a fuel truck at Camp Phoenix was loaded with less than [the amount] annotated on [the] mission sheet. We

have sent a manager to this location and they too were not allowed to watch the upload." (R4, tab 499 at 1-2)

12. In an email dated September 8, 2013, BNN submitted a spreadsheet to the government indicating it had received the November and December fuel invoices no later than February 1, 2013 (R4, tabs 543, 543i).

13. BNN submitted a certified claim for $416,491.83 on April 17, 2018, for deductions taken through the QASP from November 2011 through January 2013 under the Fuel Suite (R4, tab 141 at 1, 3, 9-10). Appellant appealed the deemed denial of this claim on October 16, 2018, and the Board docketed this as ASBCA No. 61841. The contracting office subsequently issued a final decision (COFD) denying this claim in part on November 28, 2018 (R4, tab 153). Appellant appealed this COFD on December 7, 2018, which the Board docketed as ASBCA No. 61905.

14. BNN submitted another certified claim for $15,441,941.94 on May 7, 2019, alleging it did not receive the proper allocation of missions under the OML process (R4, tab 166). BNN stated it received the "Full Mission Data" from which the Army calculated the OML on September 19, 2017, leading it to believe it should have received an additional 4,170 missions (R4, tab 166 at 3; app. supp. R4, tabs 2-3). BNN claimed it was under-allocated missions for various weeks, and not given all the missions it was allocated in each week. It noted the number of missions it should have received in a given week was unknowable from the OML, since the Army expressed BNN's allocation as a percentage of total missions for all NAT contractors for the week, a number BNN did not have access to. (R4, tab 166 at 7, 9) The Army issued a COFD denying this claim on August 8, 2019 (R4, tab 167). Appellant appealed this COFD to the Board on October 30, 2019, which the Board docketed as ASBCA No. 62241.

15. BNN submitted a third certified claim on March 27, 2020, concerning "all improperly imposed financial penalties [for fuel pilferage] and unpaid demurrage, which amounts to $2,988,718.86" (R4, tab 264 at 19). This claim included an exhibit detailing improper payments and deductions on invoices spanning September 2011 to January 2013 (R4, tab 264a). BNN appealed the deemed denial of this claim on August 24, 2020, and the Board docketed this appeal as ASBCA No. 62651.

DECISION

Legal Framework

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors*, *Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of demonstrating both elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby*, *Inc.*, 477 U.S. 242, 248 (1986). Accordingly, even if there is a genuine dispute, the disputed fact is only material if it might make a difference in the result of a case. *Id.* at 248-49. When considering motions for summary judgment, the evidence produced by "the non-moving party is to be believed, and all justifiable inferences are drawn in [its] favor." *Europe Asia Constr. Logistic*, ASBCA No. 61553, 19-1 BCA ¶ 37,267 at 181,351 (citing *American Boys Constr. Co.*, ASBCA No. 61163, 18-1 BCA ¶ 36,949 at 180,051). In deciding a motion for summary judgment, the Board does not resolve factual disputes, but ascertains whether material disputes of fact are present. *Macro-Z Tech.*, ASBCA No. 56711, 12-1 BCA ¶ 35,000 at 172,004 (citing *Anderson*, 477 U.S. at 248).

The parties both cite *Elec. Boat Corp. v. Sec'y of the Navy*, 958 F.3d 1372 (Fed. Cir. 2020) as a good authority on the accrual of a claim (ASBCA No. 61841 gov't mot. at 5; 61841 app. opp'n at 9). [2] Indeed, this case discusses the current legal framework which shall control for all four motions. Claim accrual occurs as of

> "the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known." . . . Although "monetary damages need not have been incurred," "[f]or liability to be fixed, some injury must have occurred."

[2] To avoid confusion, we cite to the filings of the different motions and appeals with the primary ASBCA No., the filing being cited and the pinpoint, if used. For example, when citing to the first page of the government's motion for ASBCA Nos. 61841 and 61905, we will use the citation "ASBCA No. 61841 (61841) gov't mot. at 1." When referencing the government's motion concerning ASBCA No. 62651, we will use the citation "ASBCA No. 62651 (62651) gov't mot." Similarly, when referencing the government's motion concerning ASBCA No. 62241, we will use the citation "ASBCA No. 62241 (62241) gov't mot." We will similarly cite appellant's cross-motion and complaints, as well as both parties' responses and replies.

Elec. Boat Corp., 958 F.3d at 1375-76 (quoting 48 CFR § 33.201). A claim must be submitted within six years of the accrual of the claim. 41 U.S.C. § 7103(a)(4)(A). Although Electric Boat argued in that case that it had not suffered an injury for purposes of claim accrual until its actual compensation was affected, the Federal Circuit rejected that rationale. "Electric Boat was not required to incur actual costs . . . before filing a claim for equitable adjustment" but rather, once it had the right to request a cost adjustment, and was capable of knowing that its cost of performance would be affected. *Id.* at 1374, 1377. Similarly, we have held that "a cause of action for breach of contract accrues at the time of the breach." *Canvs Corp.*, ASBCA No. 57784, 18-1 BCA ¶ 37,156 at 180,890. "Damages need not have actually been calculated for a claim to accrue." *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018. The events fixing liability should have been known when they occurred unless they can be reasonably found to have been either concealed or "inherently unknowable" at that time. *Id.* at 173,017.

The Army's Arguments

In all three of its motions, the Army asserted the affirmative defense of the passage of the six-year statute of limitations for all or part of BNN's claims. We address each motion below.

For ASBCA Nos. 61841 and 61905, the Army asserted that BNN knew or should have known of several of its QASP deductions before April 17, 2012, six years before it filed its claim on April 17, 2018, because the deductions were included on the invoices the Army returned to it (61841 gov't mot. at 4-6). Thus, the Army sought summary judgment on "[t]he monthly invoices for the Contract up until the March 2012 invoice."[3] (61841 gov't mot. at 7). As support, it pointed to the requirement to submit invoices monthly (61841 gov't mot. at 2-3), the monthly invoices BNN submitted which are included in the Rule 4 file, and exhibits demonstrating an internal BNN discussion of various invoices through September 2012 (61841 gov't reply exs. G-1A, G-1B, G-2).

Similarly, in its motion for summary judgment in ASBCA No. 62651 regarding fuel pilferage deductions, the Army argued that BNN was aware of its concerns for its November 2011 through January 2013 invoices before March 27, 2014, six years prior to BNN filing its claim on March 27, 2020 (62651 gov't mot. at 5-7).

[3] This excludes the invoices for December 2011 and February 2012, which BNN does not include in its claim (61841 compl. ¶ 32). BNN also includes "Nov-11" in its complaint, though this appears to refer to the invoices covering September 15 – November 15, 2011, and November 16-30, 2011 (*id.* at ¶ 38).

Lastly, in ASBCA No. 62241, the government argued "the claim[s] arose when BNN received the OML Sheet from the Army each week memorializing the percentage of missions that BNN . . . would receive that week." (62241 gov't mot. at 7). Therefore, by May 7, 2013, six years before BNN filed its claim on May 7, 2019, "appellant should have known of any loss it would incur by not receiving the proper allocation of missions under the OML process" (62241 gov't mot. at 7). In its reply, the Army mentioned numerous disputes BNN raised about the OML process during the performance of the contract. According to the government, this indicates BNN knew there were issues with the OML, which is sufficient to put it on notice of the problems it now raises (62241 gov't reply at 10-17).

Appellant's Arguments

For ASBCA Nos. 61841 and 61905, BNN argued its "claims accrued when the Army paid the invoices that contained improper deductions. Until that time, BNN had suffered no injury" (61841 app. opp'n at 9). BNN also argued that the Army has not established when it issued the invoices to BNN. Appellant pointed to a chart displaying when the Army paid several invoices prior to the April 17, 2018, cutoff date, claiming none of them were the invoices in question. However, the invoices were identified in a different numbering system than the relevant invoices submitted to the Army. (*Id.* at 8) As stated above, however, we believe several were for the dry and heavy cargo suites (SOF ¶ 6).

For ASBCA No. 62651, BNN argued the Army had a right to impose proper fuel pilferage deductions, but the claim could not have accrued until BNN knew the deductions were improper (62651 app. opp'n at 1). According to BNN in a new argument in ASBCA No. 62651, it became aware of this impropriety when it received in another related litigation what it calls the "Doggett memo," though does not identify the specific date of receipt (*id.* at 5). This memo, issued by a COR on this contract, dated October 5, 2013, stated, "[i]n some instances, [fuel] download measurements may not be in full compliance with fuel regulations and policy, which degrades the Carrier's ability to properly invoice fuel missions" (62651 app. opp'n ex. A at 5). BNN thus argued that the Board should suspend the claim accrual until its undated receipt of this memo (62651 app. opp'n at 5-6). Finally, it requested further discovery in any event, but does not identify what it needs or how it would help its case (*id.* at 7-8).

For its OML claim, ASBCA No. 62241, BNN repeated its earlier arguments about claim accrual, namely that its claims accrued once it had "the evaluation[s] of NAT contractors underlying the OML sheet" and knew "the number of total missions assigned to all contractors that week" (62241 app. opp'n at 7). It pointed to the Army's audit report, providing snippets which focus on the Army's alleged

wrongdoing,[4] arguing its claim was inherently unknowable until it received this report and the Full Mission Data in 2017 (*id.* at 8-9). BNN also argued that it's unclear how "the mere receipt of an OML Sheet would put BNN on notice that the Army would not be allocating as much work in the *coming* week as it promised in the OML Sheet" (*id.*at 7) (emphasis in original).

Finally, BNN cross-moved for summary judgment, arguing "that the Army breached the OML provisions of the Contract, subject to whatever defenses to the breach the Army may subsequently be able to provide" (*id.* at 10). However, BNN failed to prove what it acknowledged is a required element of the breach theory (*see*, *e.g.*, 62241 app. cross-mot. reply at 7 ("BNN is seeking summary judgment only on the first three elements [of breach]")). BNN defended not proving the final element on policy grounds, saying it would potentially need to prove the same things twice, which would not be efficient (*id.* at 7 n.1). The Army stated in its opposition to the cross-motion that BNN did not satisfy all of the elements (62241 gov't opp'n at 23-24).

BNN also raised the theory of a breach of the duty of good faith and fair dealing in each of these appeals (61841 compl. at 13, 62651 compl. at 11, 62241 compl. at 7). The Army did not specifically refer to these theories or any facts unique to them in any of the motions, so it is unclear whether the motions apply to these theories as well. "A breach of an implied covenant of good faith and fair dealing does not require a violation of an express provision in the contract." *Cooper/Ports America*, *LLC*, ASBCA Nos. 61349, 61350, 19-1 BCA 37,285 at 181,405 (citing *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014). Proof of this theory requires a case-specific and fact-specific inquiry. *Boston Edison Co. v. United States*, 64 Fed. Cl. 167, 186 (2005) (citing *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997). Thus, we will not grant appellant's motion on these theories, because as BNN notes, it has had only limited discovery at this stage (62651 app. opp'n at 7-8), and a tribunal must be cautious when granting summary judgment if insufficient discovery has taken place. *Burnside-Ott Aviation Training Ctr.*, *Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993)

The Army's Motion for Partial Summary Judgment in ASBCA Nos. 61841 and 61905

Appellant stated in its complaint, "BNN seeks to recover for refunds of deductions taken improperly by the Agency from invoices under the Contract for services performed by BNN" (61841 compl. ¶ 1). BNN argued that the Army failed to follow the formula in the contract, applied deductions that were not applicable, and improperly manipulated data to increase deductions (*id*). The formula by which the Army was imposing the QASP deductions was available in the contract (SOF ¶ 1; *see*

[4] This version of the Audit Report removes all alleged wrongdoing by NAT contractors. The full report is available at R4, tab 480. *See* SOF 10.

also 61841 compl. ¶¶ 30-31 (referring to the formula in the contract)), and was dependent only on BNN's performance (SOF ¶ 1). BNN argued that the Army's improper institution of the deductions was the breach of contract. Thus, with BNN's access to the contract and its own performance data, it should have known what was and was not a proper deduction at the time the Army imposed one.

BNN's arguments that it only suffered an injury when it was paid misses the text of the FAR and the cases it cites, which specifically state that a monetary damage is not required, only an injury of some sort. 48 CFR § 33.201; *Elec. Boat Corp.*, 958 F.3d at 1376. In this case, BNN's injury is the Army's reduction of the portion of its invoices to which BNN was entitled. BNN's claim accrued when it received the invoices back from the Army instituting these deductions. Therefore, the six-year statute of limitations in 41 U.S.C. § 7103(a)(4)(A) bars BNN from seeking compensation from the Army for any deductions it was aware of prior to the filing of its claim on April 18, 2018. In this appeal, that is April 18, 2012 (SOF ¶ 13).

However, this only answers half the question. The government cites a single email in which BNN admits it received "all its fuel invoices for the month September 2[0]11-March 2012 only at the end of March and April 2012." This email's timeframe includes the cutoff date, and thus is of limited value in this appeal. The Army's arguments that invoices were to be submitted monthly is unconvincing, as that ignores what happened in reality. Upon review of the Rule 4 file, BNN had received the September-November 2011 invoice by March 17, 2012, and stated it had received the "final fuel invoice for the 16-30 November 2011 period" in a March 24, 2012 email. (SOF ¶ 5) However, the Rule 4 file and exhibits do not provide further clarity on when BNN received back the other two relevant invoices, those for January and March 2012.

Appellant's misplaced factual disputes and arguments concerning claim accrual at the time of payment are unconvincing, and it does not dispute that the deductions were known to BNN once it received the invoices from the Army. For these reasons, we grant, in part, the government's motion for partial summary judgment, as it applies to the invoices covering September 15, 2011, to November 30, 2011, and deny it, in part, as it concerns the January and March 2012 invoices.

The Army's Motion for Summary Judgment in ASBCA No. 62651

The Army's motion for summary judgment asserted the same statute of limitations argument for denial of BNN's claims for allegedly improper fuel invoice deductions and allegedly improper demurrage payments taken before March 27, 2014, six years before BNN filed its claim on March 27, 2020 (SOF ¶ 15). BNN's complaint included the assertion that "[t]he Army breached the [c]ontract, in part, by wrongfully imposing financial penalties on BNN because of the alleged pilferage of fuel" and that it "also seeks amounts owed by the Army for completed deliveries of fuel and for

demurrage payments on the Fuel Suite" (62651 compl. ¶ 1). This complaint and motion concerned invoices from September 2011 to January 2013 (SOF ¶ 15; 62651 gov't mot. at 7). It pointed to the Army's alleged failure to properly measure fuel during upload and download, a failure to investigate the responsible party for fuel pilferage, and imposition of deductions for missions "under the control of the Army" (62651 compl. ¶ 2). None of these allegations address why BNN would not know whether a fuel pilferage deduction was properly or improperly taken or demurrage was correctly or incorrectly calculated by the time the Army returned the invoices to BNN with those deductions.

The Army did not provide or direct the Board to any evidence indicating when it sent BNN the relevant invoices, so a review of the Rule 4 file is required to determine the applicable dates. BNN's October 31, 2012 email, which the government cited in the motion above, demonstrated that BNN had received its invoices, with deductions for pilferage, through July 2012. Further, it provided totals for demurrage from March to September 2012 (SOF ¶ 8). A January 31, 2013, email from the Army to BNN informed BNN of the net positive amount it is due to be paid from its October .2012 fuel invoice, and the demurrage, dry, and heavy cargo suites for December 2012. It also provided another total that included the November 2012 demurrage invoice amount, with sufficient specificity for BNN to understand whether it was receiving deductions it found improper on those invoices (SOF ¶ 9). BNN's September 8, 2013 email included its August to December 2012 fuel invoices, which BNN indicated it had received some months earlier (SOF ¶ 12). However, the record does not demonstrate clear evidence of when BNN received its fuel invoice for January 2013. Because we must draw all justifiable inferences in favor of appellant and the record before us does not demonstrate that BNN received this before this appeal's cutoff date of March 27, 2014, we must deny that portion of the government's motion.

Appellant raised tortured arguments, arguing that since it was not allowed to observe the uploading of fuel, it could not know whether the Army was performing it properly or not, and it needs more discovery to determine if the Army was aware of the impropriety of its actions and concealed them from BNN (62651 app. opp'n at 5-6). Even if this were relevant, BNN was aware of this issue prior to the cutoff date (SOF ¶ 11). Further, BNN argued that the contract allowed the imposition of deductions, but that its claim concerned whether the deductions were improper (ASBCA No. 62651 app. opp'n at 4). This is a distinction without a difference. BNN did not refute in any meaningful way that it had the best access to its employees' actions, and thus it should have had the best knowledge of whether or not its employees were pilfering fuel. If it believed the deductions were not proper, it could have raised a claim for the deductions upon receipt of the invoices. BNN did not explain how further discovery would help it escape this reality or locate another

material factual dispute, and so failed to persuasively argue for a successful resolution. *Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984). Therefore, we grant this motion, in part, as it relates to the fuel invoices from September 2011 to December 2012, and the demurrage invoices from March to December 2012. We deny the motion, in part, regarding the fuel and the demurrage invoices for January 2013, as well as any demurrage invoices before March 2012, for lack of information.

The Army's Motion for Partial Summary Judgment in ASBCA No. 62241

The Army's motion in ASBCA No. 62241, based on the Army's allegedly faulty calculation of the weekly OML score, sought to deny BNN's appeal as it pertained to BNN "receiving the proper allocation of missions under the OML process" before May 7, 2013, years before BNN's claim on May 7, 2019 (62241 gov't mot. at 7). After receiving the "Full Mission Data" on September 19, 2017, BNN stated it was able to recalculate the OML rankings and discover the discrepancy – allegedly a difference of 4,170 missions (SOF ¶14). Though the Army's motion does not appear to draw a very clear distinction (62241 gov't mot. at 7-8), BNN's claim asserted two bases for compensation: first, for the miscalculation of the OML resulting in faulty allocations for a given week; second, for the failure by the Army to actually assign the number of missions indicated on the weekly OML sheet over the course of the applicable week (*id.*; 62241 app. opp'n at 3).

BNN argued it could not have known about the Army's miscalculation of the OML until receiving the Full Mission Data in September 2017, and thus claim accrual did not happen until that point (62241 app. opp'n at 8). While BNN had access to the metrics in the contract, and its own performance data that it could use to verify the OML raw data, and was active in doing so (SOF ¶¶ 2, 15), it did not have access to the performance data of the other NAT contractors. This information factored into the weekly rank within each suite that all NAT companies would receive. (*See* 62241 app. opp'n ex. B). Importantly, NAT contractors were assigned a number of missions only as a percentage of total missions, a number BNN alleged it did not have access to until receiving the Full Mission Data (62241 app. opp'n at 7). The government referenced a long list of Rule 4 documents showing BNN disputing the OML sheets it received on numerous occasions (62241 gov't reply at 10, 13, 14,). The government also argued that BNN admitted in its filings that rankings were not done in the first eight weeks of the contract, putting BNN on notice that there were issues with the OML (*id.*at 13-16). However, this does not meaningfully rebut BNN's argument.

The Army's suggestion that failure to apply the OML rankings put BNN on notice for all future misapplications of the criteria is illogical. BNN disputed the calculation of its rank using the data it had available to it, but the record indicates BNN did not have access to information that would allow it to justify its rank among other

contractors' performance.[5] BNN also did not possess information to verify whether the percentage of total missions it was allegedly allocated was accurate, and did not receive a discrete number. For this reason and because we must draw all justifiable inferences in favor of appellant when deciding a motion for summary judgment, we cannot determine, based on the record currently before us, that BNN's claim accrued earlier than its receipt of the Full Mission Data, which was less than two years before the filing of its complaint. Thus, we must deny this motion.

BNN's Cross-Motion for Summary Judgment in ASBCA No. 62241

With its opposition, appellant filed a cross-motion for summary judgment, relying exclusively on the Army's audit report (SOF ¶ 10), arguing that the Army breached the OML and fair opportunity provisions of the contract through misapplication of the OML ranking system (62241 app. cross-mot. at 9-11). The parties disagreed about whether this report constituted inadmissible hearsay[6] (62241 gov't opp'n at 7, 17-18; 62241 app. cross-mot. reply at 8-9). However, this does not present a disputed issue of material fact, as the audit report does not conclusively establish a breach in this appeal. Even if it were taken as fact, the audit report does not detail an instance when BNN, or any contractor for that matter, was itself injured by the Army's actions, and only refers abstractly to general misapplication of the OML formulae instead of discrete instances. (SOF ¶ 10) BNN provided no answer to this shortcoming.

Beyond that, BNN repeatedly declined to prove one of the four elements of breach of contract (that it was damaged by the Army's actions), despite acknowledging that a showing of breach requires all four elements (62241 app. cross-mot. reply at 7 ("BNN is seeking summary judgment only on the first three elements")). The government highlighted this shortcoming (62241 gov't opp'n at 24-25). In response, BNN still failed to establish all four elements and only reasserted that proving this element would be a waste of its time and inconsistent with the Board's efforts to provide speedy dispute resolution (62241 app. cross-mot. reply at 7 n.1), apparently conflating proof that it was damaged at all and proving quantum. Thus, we deny this motion for failure to establish all four elements.

We have considered the parties' other arguments in these motions and found them unpersuasive.

---

[5] This is subject to one exception. BNN's dispute of its OML from July 16-22, 2012, does include the contractor at the next lowest rank. SOF ¶ 7. Why it should have this information is not addressed by either party, nor do they nor the record suggest this was the norm. Thus, we will not further analyze it.

[6] This is despite the government offering it as part of the Rule 4 file. *See* SOF ¶ 10.

CONCLUSION

For the reasons discussed above, we grant, in part, the Army's motion for partial summary judgment in ASBCA Nos. 61841 and 61905 as relates to the invoices covering September through November 2011, but deny it, in part, as to the January and March 2012 invoices. We grant the motion in ASBCA No. 62651, in part, as relates to the fuel invoices from September 2011 to December 2012, and the demurrage invoices from March to December 2012. However, we deny the motion, in part, regarding the fuel and the demurrage invoices for January 2013, as well as any demurrage invoices before March 2012. Finally, we deny both the Army's motion for partial summary judgment and BNN's cross-motion for summary judgment in ASBCA No. 62241.

Dated: August 5, 2021

HEIDI L. OSTERHOUT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61841, 61862, 61905, 62241, 62355, 62356, 62357, 62651, Appeals of BNN Logistics, rendered in conformance with the Board's Charter.

Dated: August 5, 2021

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