ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Northrop Grumman Corporation	)	ASBCA No. 62165
	)	
Under Contract No. F33657-01-C-4600	)	

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OPINION BY ADMINISTRATIVE JUDGE STINSON ON APPELLANT'S PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION

Pending before the Board is a partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike, filed by appellant Northrop Grumman Corporation (NGC). Previously, NGC and respondent, the Defense Contract Management Agency (DCMA), filed cross-motions for partial summary judgment on a government claim regarding the disallowance of appellant's pension costs pursuant to Federal Acquisition Regulation (FAR) 31.201-6, Accounting for Unallowable Costs.[1] The government's cross-motion for partial summary judgment and opposition to appellant's partial motion for summary judgment includes the argument that NGC's pension costs are unallowable as unreasonable costs pursuant to FAR 31.201-3 (gov't cross-mot. at 7-8). According to appellant, the Board lacks jurisdiction to consider the government's reasonableness challenge based upon FAR 31.201-3, because that issue was not first addressed in a final decision and "has never been part of the cost disallowance at issue in this appeal" (app. mot. dis. at 1). NGC requests that the Board dismiss the government's FAR 31.201-3 reasonableness challenge for lack of jurisdiction and strike any reference to that argument from the government's briefing. In the alternative, NGC requests that the

[1] By Order dated February 11, 2021, the Board granted appellant's motion to stay proceedings on the parties' cross-motions for partial summary judgment, pending resolution of appellant's partial motion to dismiss.

Board strike the government's FAR 31.201-3 reasonableness challenge because of its alleged prejudicial effect on NGC in this litigation. (App. mot. dis. at 16) For the reasons stated below, we deny NGC's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. In Fiscal Year (FY) 2012, NGC performed flexibly-priced contracts which contained FAR 52.216-7, Allowable Cost and Payment (JSUMF ¶ 1).[2] NGC's Incurred Cost Submission (ICS) for FY 2012, dated June 27, 2013, included pension costs incurred pursuant to certain NGC nonqualified defined-benefit pension plans, which for government contract purposes, accounted for such costs on a pay-as-you-go basis (JSUMF ¶¶ 2-4, 7).

2. Certain pension plan participants who received pension benefits in FY 2012 earned compensation during their working years in excess of the limitation or cap set forth in FAR 31.205-6(p). NGC included as a compensation factor in its Retirement Benefit Formulas, amounts in excess of the applicable FAR 31.205-6(p) limitation in a given year, as part of participants' earned salary and bonus. (JSUMF ¶ 15)

3. On June 7, 2019, Elizabeth Imhoff, DCMA's corporate administrative contracting officer (CACO), issued a final decision disallowing certain of NGC's pension costs contained in its 2012 ICS (JSUMF ¶¶ 16-17; R4, tab 6).

4. The government's disallowance was based upon the premise that the pension costs were unallowable pursuant to FAR 31.201-6 as "directly associated costs" of unallowable compensation costs as specified in the limitation on allowability of compensation set forth in FAR 31.205-6(p). The final decision stated that some plan participants who received a benefit in FY 2012, earned compensation in excess of the applicable FAR 31.205-6(p) limitation during their working years that was not excluded

[2] "JSUMF" refers to the parties' October 9, 2020, Joint Stipulation of Undisputed Material Facts submitted in support of the parties' cross-motions for partial summary judgment; "app. mot." refers to appellant's November 6, 2020, motion for partial summary judgment; "gov't cross-mot." refers to the government's December 21, 2020, opposition to appellant's motion for partial summary judgment and cross-motion for partial summary judgment; "app. mot. dis." refers to appellant's January 19, 2021, partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike; "gov't resp." refers to the government's March 9, 2021, response to appellant's motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike; "app. reply" refers to appellant's March 16, 2021, reply brief; "gov't sur-reply" refers to the government's March 22, 2021, sur-reply; and "app. sur-sur-reply" refers to appellant's April 12, 2021, sur-sur-reply.

from the Retirement Benefit Formulas' compensation factor. Accordingly, the government determined that the portion of the benefit related to the compensation in excess of the limitation was an unallowable, directly-associated cost, pursuant to FAR 31.201-6. (JSUMF ¶ 18)

5. The final decision cited FAR 31.201-6, FAR 31.205-6(p) and FAR 52.216-7 as the basis for disallowing the pension costs (JSUMF ¶ 20). Although the final decision did not include a specific citation to the allowability provision found at FAR 31.201-2 (R4, tab 6), the parties stipulate that the CACO's allowability determination for the pension costs was made pursuant to FAR 31.201-2(a)(5), which provides that an allowable cost must not be subject to "[a]ny limitations set forth in this subpart" (JSUMF ¶ 20); 48 C.F.R. § 31.201–2(a)(5).

6. The final decision did not disallow pension costs pursuant to FAR 31.201-3, FAR 31.205-6(b), or FAR 31.205-6(j) (JSUMF ¶¶ 19, 21).

7. By email dated September 3, 2019, appellant filed its notice of appeal.

8. On November 6, 2020, appellant filed a motion for partial summary judgment on Counts I and II of its complaint (app. mot. at 1). Count I sought declaratory relief that appellant's pension costs are allowable pursuant to statute and FAR 31.205-6(p) (compl. Count I). Count II sought declaratory relief that appellant's pension costs are not directly associated costs subject to FAR 31.201-6 (compl. Count II). Appellant's motion does not address Count III of appellant's complaint, which alleges that the government's disallowance of pension costs is overstated. Count IV, alleging accord and satisfaction bars the government's disallowance of post-retirement benefits and environmental remediation costs, was dismissed by Order dated February 19, 2020.

9. On December 21, 2020, the government filed its opposition to appellant's motion for partial summary judgment, and cross-motion for partial summary judgment. The government argued that the methodology used by appellant to calculate its pension benefits, the "Retirement Benefit Formulas," resulted in unallowable costs because the calculation "includes the plan participant's actual compensation earned during relevant working years and does not exclude compensation that was in excess of the FAR 31.205-6(p) cap in effect at the time the plan participant earned the compensation" (gov't cross-mot. at 2). The government also argued that "[t]he challenged pension costs are unreasonable because the Retirement Benefit Formulas do not exclude compensation in excess of the FAR 31.205-6(p) cap applicable to the years in which the plan participant earned the compensation" (gov't cross-mot. at 7).

10. On January 19, 2021, appellant filed its partial motion to dismiss for lack of jurisdiction or, in the alternative, motion to strike, alleging that the Board lacked jurisdiction to consider the government's argument "that the pension costs in question

also are unallowable as 'unreasonable' costs under FAR § 31.201-3," and alleging that "[a] cost disallowance under FAR § 31.201-3 is materially different than one under FAR § 31.201-6(a)" (app. mot. dis. at 1). Appellant also filed a motion requesting a stay of proceedings pending resolution of its January 19, 2021, motion. By Order dated February 11, 2021, the Board stayed proceedings pending resolution of appellant's partial motion to dismiss.

DECISION

I. Burden of Proof

As proponent of the Board's jurisdiction, DCMA bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *The Boeing Co.*, ASBCA No. 58660, 15-1 BCA ¶ 35,828 at 179,190. Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09, our jurisdiction requires "both a valid claim and a contracting officer's final decision on that claim." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (citing *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996)).

II. The Government's Final Decision on its Unilateral Rate Determination is a Government Claim Which We Review *De Novo*

This appeal involves a unilateral rate determination, which is considered a government claim. *Parsons Gov't Servs., Inc.*, ASBCA No. 62113, 20-1 BCA ¶ 37,586 at 182,508 (citing FAR 52.216-7(d)(4) ("Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause")). The CDA provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). It is well established "that the linchpin for appealing claims under the Contract Disputes Act is the contracting officer's 'decision.'" *Paragon Energy Corp. v. United States*, 227 Ct. Cl. 176, 177, 645 F.2d 966, 967 (1981). This is true for all further proceedings on "a claim relating to a contract: either by a contractor against the Government or by the Government against a contractor." *Boeing Co.*, ASBCA No. 37579, 89-3 BCA ¶ 21,992 at 110,594; *Chandler Mfg. and Supply*, ASBCA Nos. 27030, 27031, 82–2 BCA ¶ 15,997 at 79,312 (linchpin for appealing CDA claim and for this Board's jurisdiction is contracting officer's decision, which "is equally applicable to claims the Government is pursuing against a contractor").

It likewise is well-established that our review of a contracting officer's final decision is *de novo* and either party may raise legal theories not previously raised with the contracting officer. 41 U.S.C. §7104(b)(4) (action brought before the Board proceeds *de novo*); *Supreme Foodservice GmbH*, ASBCA No. 57884 *et al.*, 20-1 BCA

¶ 37,618 at 182,635 ("we review COs' [contracting officers'] decisions *de novo* and the government is not compelled to limit its arguments to the CO's"); *Kellogg Brown & Root Servs., Inc*., ASBCA No. 58081, 17-1 BCA ¶ 36,595 at 178,240 (government "is not limited in defending its case to the logic asserted in the contracting officer's final decision" because "the Board considers the action *de novo*"); *Astronautics Corp. of America*, ASBCA No. 48190, 97-1 BCA ¶ 28,978 at 144,319 (in "*de novo* proceedings, either party may raise legal theories that were not raised previously").

III. Contentions of the Parties

The parties agree that the CACO's final decision contained no discussion of FAR 31.201-3, or the reasonableness of the pension costs in dispute (SOF ¶ 6). Rather, the final decision addressed whether the pension costs were unallowable pursuant to FAR 31.201-6 as "directly associated costs" of unallowable compensation costs, as defined in FAR 31.205-6(p) (SOF ¶¶ 4-5). It also is undisputed that the government first challenged the reasonableness of appellant's pension costs pursuant to FAR 31.201-2 and FAR 31.201-3 in its opposition and cross-motion for partial summary judgment (gov't cross-mot. at 7-8).

Appellant questions our jurisdiction to consider the government's reasonableness challenge because the CACO's final decision "does not include a government claim that the Pension Costs are unallowable under FAR § 31.201-3" and that "[t]he absence of this claim" deprives us of jurisdiction to address that issue in this appeal (app. mot. dis. at 4). Appellant states that, "for the first time in the government's cross-motion for partial summary judgment and opposition to Northrop Grumman's motion for summary judgment, DCMA trial counsel asserts that the Pension Costs are 'unreasonable' under FAR § 31.201-3 and unallowable, even if they are not unallowable under FAR § 31.201-6" (app. mot. dis. at 3 (citing gov't cross-mot. at 3, 7–12)). According to appellant, the Board "has no jurisdiction over DCMA trial counsel's FAR § 31.201-3 disallowance" (app. mot. dis. at 1). In the alternative, appellant requests that we exercise our "discretion and deny the government's attempt to add this disallowance now to this appeal" (*id*.).[3]

The government responds that its reasonableness challenge is based upon the same rationale and legal theory (gov't resp. 5-6, 9), and "there is a single Government claim because there is no material difference in the facts or the analysis required to

[3] NGC alleges that DCMA "trial counsel disallowed, for the first time in its response and cross-motion for summary judgment, the disputed pension cost under FAR § 31.201-3" (app. reply at 1). However, DCMA counsel did not "disallow" the disputed costs, rather, counsel for DCMA raised the issue as a legal challenge to appellant's claimed-entitlement to those costs (gov't cross-mot. at 7).

determine allowability under either FAR 31.201-2, -3 or FAR 31.201-6(a)" (gov't resp. at 3). The government also argues that the plain language of FAR 31.201-3 does not preclude the government raising a reasonableness challenge at this stage of the litigation because the FAR provision "does not specify when the Government must raise its reasonableness challenge (*i.e.*, prior to litigation), nor does it detail what is sufficient for the Government to bring such a challenge" (gov't resp. 11, 13). According to the government, "[a]t issue *is the same challenged costs; the same challenged methodology; and the same rationale* for disallowance whether per FAR 31.201-6(a) or FAR 31.201-2" and "disallowance of the challenged pension costs is directly related to the same unallowable, over-the-cap compensation included in the Retirement Benefit Formula – whether disallowed as an unreasonable cost or as unallowable directly associated costs" (gov't resp. at 3-4) (emphasis in original).

IV. We Have Jurisdiction to Consider the Government's Reasonableness Challenge

A. Standard for Determining What Constitutes a New Claim

Appellant argues that "if the remedies sought, the operative facts, or the legal grounds for the new basis are materially different from the claim set forth in the COFD [contracting officer's final decision], then the Board lacks jurisdiction over the new basis" (app. mot. dis. at 6). In support of its position, appellant cites the Court of Appeals for the Federal Circuit's decision in *K-Con Bldg. Sys., Inc. v. United States*, for the proposition that the Board lacks jurisdiction where "the government asserts a new basis for government recovery only after the filing of an appeal by a contractor when the new basis and the claim in the existing COFD 'either request different remedies (whether monetary or non-monetary) or assert grounds that are materially different from each other factually or legally'" (app. mot. dis. at 6) (quoting 778 F.3d 1000, 1005 (Fed. Cir. 2015), citing *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). [4]

[4] *K-Con* involved a contractor claim. The government notes that although appellant relies upon *K-Con* as support for its jurisdictional argument concerning the government claim here, NGC's motion also argues "that cases involving contractor claims are inapposite to determining the Board's jurisdiction over Government claims" (gov't sur-reply at 5 n.1 (citing app. mot. at 12-13 n.10)). In response, appellant states that the Board, in *AeroVironment, Inc.*, ASBCA Nos. 58598, 58599 16-1 BCA ¶ 36,337, "followed the reasoning in *K-Con* and found that it did not have jurisdiction to resolve the merits of a government cost disallowance claim" (app. sur-sur-reply at 2 n.2). Yet, in challenging the government's reliance upon *Sarro & Assocs. v. United States*, 152 Fed. Cl. 44 (2021), and *Cline Constr. Co.*, ASBCA No. 28600, 84-3 BCA ¶ 17,594, appellant once again argues these decisions "are inapposite to the Board's

On this issue, the Court in *K-Con* explained that "merely adding factual details or legal argumentation does not create a different claim, but presenting a materially different factual or legal theory (*e.g.*, breach of contract for not constructing a building on time versus breach of contract for constructing with the wrong materials) does create a different claim." *K-Con*, 778 F.3d at 1006, citing *Santa Fe, Eng'rs, Inc. v. United States*, 818 F.2d 856, 858-60 (Fed. Cir. 1987). The Court noted also, that it has "not treated the different-remedies component as imposing so rigid a standard as to preclude all litigation adjustments in amounts 'based upon matters developed in litigation.'" *K-Con*, 778 F.3d at 1006, quoting *Tecom, Inc. v. United States*, 732 F.2d 935, 937–38 (Fed. Cir. 1984).

In *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365-66 (Fed. Cir. 2003), the Federal Circuit treated two claims as the same for jurisdictional purposes, even though the contractor claim submitted to the contracting officer, and the claim raised in litigation, presented "slightly different legal theories." In *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369-70 (Fed. Cir. 2017) (citing *K-Con*), the Federal Circuit held that the Board lacked jurisdiction to consider a contractor claim for knowing misrepresentation by nondisclosure when the contractor had presented to the contracting officer a claim for reformation based on mutual mistake and frustration of purpose. The Court observed that "[m]aterially different claims 'will necessitate a focus on a different or unrelated set of operative facts.'" *Lee's Ford*, 865 F.3d at 1369, quoting *Placeway Constr. Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) (to determine whether an issue constitutes new or separate claim "the court must assess whether or not the claims are based on a common or related set of operative facts"); (*see Blanchard's Contracting*, *LLC*, ASBCA No. 62508, 21-1 BCA ¶ 37,807 at 183,599 (discussing Federal Circuit decisions examining what constitutes a new claim). More recently, in *Kiewit Infrastructure West Co. v. United States*, the Federal Circuit stated, albeit dicta, "[a]s we have previously made clear, two claims may be considered the 'same' for CDA jurisdictional purposes if 'they arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery.'" 972 F.3d 1322, 1328 (Fed. Cir. 2020), quoting *Scott Timber*, 333 F.3d at 1365.

The government's reasonableness challenge does not seek a different remedy, i.e., the government here demands return of the same alleged overpayments it made in NGC's interim billings due to inclusion of alleged unallowable pension costs in NGC's final indirect cost proposals for fiscal year FY 2012 (R4, tab 6). Accordingly, the issue presented in this appeal is whether the government's reasonableness challenge asserts

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jurisdiction in this appeal as each relates to contractor claims" (app. sur-sur-reply at 4 n.5).

"grounds that are materially different . . . factually or legally" than the claim already encompassed in the CACO's final decision. *K-Con*, 778 F.3d at 1005.[5]

B. The Government's Reasonableness Challenge does not Assert Grounds that are Materially Different Either Factually or Legally from the Claim Addressed in the CACO's Final Decision

Appellant argues that the government's reasonableness challenge presents an entirely new claim that the Board lacks jurisdiction to consider (app. mot. at 10). According to appellant, the legal standard regarding the government's allowability challenge is "whether the Pension Costs were 'generated solely as a result of incurring [compensation in excess of the compensation limitation established by FAR 31.205-6(p)], and would not have been incurred had the [compensation in excess of the compensation limitation established by FAR 31.205-6(p)] not been incurred'" (app. mot. dis. at 11 (citing FAR 31.201-6) (block statements in original)). Appellant suggests that the legal standard regarding the government's reasonableness challenge is "whether the Pension Costs 'nature and amount . . . exceed that which would be incurred by a prudent person in the conduct of competitive business'" (app. mot. dis. at 11 (citing FAR 31.201-3(a)). According to appellant, "[t]his determination 'depends upon a variety of considerations and circumstances . . . .'" (app. mot. dis. at 11 (citing FAR § 31.201-3(b)). Missing from appellant's recitation of its understanding of the applicable legal standard is the recognition that the government's reasonableness challenge also centers upon the government's contention that appellant's methodology improperly includes as a factor compensation in excess of the FAR 31.205-6(p) cap.

Both of the government's challenges to appellant's pension costs can be summarized as follows:

[5] Citing *NI Indus., Inc*., ASBCA No. 34943, 92-1 BCA ¶ 24,631, DCMA suggests that the Board should consider the gravamen of the government's claim, and the breadth of its legal theory, in deciding whether the reasonableness challenge constitutes a new claim (gov't resp. at 5-6, 9-10). Appellant challenges the efficacy of that decision as support for the government's position, noting that *NI Industries* predates the Federal Circuit's decision in *K-Con* (app. reply at 6). According to appellant, *K-Con* identified a different standard for deciding what constitutes a new claim. The government disagrees and challenges appellant's assertion that *K-Con* "undermines the applicability of the Board's decisions regarding jurisdiction prior to 2015" (gov't sur-reply at 5-6). Because we find that the government's reasonableness challenge is not materially different, factually or legally, from the claim addressed in the CACO's final decision, and thereby satisfies the standard set forth in *K-Con*, we need not wade through the legal quagmire proffered by the parties on this issue in their respective briefs.

- Inclusion of compensation in excess of the FAR 31.205-6(p) cap as a factor in appellant's methodology to determine pension costs rendered appellant's costs unallowable because it violated FAR 31.201-6(a) as a directly-associated cost.
- Inclusion of compensation in excess of the FAR 31.205-6(p) cap as a factor in appellant's methodology to determine pension costs rendered appellant's costs unreasonable because it violated FAR 31.201-3(b), specifically NGC's responsibilities to the Government and the public at large by including those costs as a factor.

Both challenges require the Board to determine whether it was improper for appellant to include compensation in excess of FAR 31.205-6(p) as a factor in appellant's methodology to determine pension costs, either because it violated FAR 31.201-6(a) as a directly-associated cost, or because it violated FAR 31.201-3(b) as contrary to NGC's responsibilities to the government and the public at large (by including as a factor compensation in excess of FAR 31.205-6(p)). The cost is unallowable if it violated FAR 31.201-6(a) as a directly associated cost or is unreasonable if it violated FAR 31.201-3(b) as contrary to NGC's responsibilities to the government and the public at large. Both determinations turn on the propriety of including compensation in excess of FAR 31.205-6(p) as a factor in appellant's pension costs methodology.

The reasonableness of appellant's costs is thus closely tied to the government's challenge based upon unallowability. The additional legal argument that the costs are unreasonable because they are contrary to NGC's responsibilities to the government and the public at large is not so materially different as to constitute a new claim. It is an additional legal argument as to why the specific methodology utilized by appellant allegedly was improper. In this regard, the government's FAR 31.201-3 reasonableness challenge and FAR 31.205-6(p) allowability challenge do not "assert grounds that are materially different," *K-Con,* 778 F.3d at 1005. Rather, they "arise from the same operative facts, claim essentially the same relief, and merely assert differing legal theories for that recovery." *Kiewit*, 972 F.3d at 1328, quoting *Scott Timber*, 333 F.3d at 1365.

Appellant admits that the parties' JSUMF already contains facts material to a FAR 31.201-3 cost disallowance (app. mot. dis. at 13). Appellant argues, however, that missing from the JSUMF is "the singular most material fact" regarding a FAR 31.201-3 cost disallowance, i.e., the "'initial review of the facts [that] results in a challenge of a specific cost by the contracting officer or the contracting officer's representative,' regarding the cost's reasonableness" (app. mot. dis. at 12-13). We discuss below in section IV. C., the import of an initial review of the facts and whether it represents an obstacle fatal to the government's position in the context of this appeal.

Appellant also suggests that the following facts are relevant to the issue of reasonableness, specifically, "(a) what are competitive market requirements regarding the amount of pension benefits; (b) why paying executives the pension benefits the market demands is consistent with the government's interests; and (c) the relevance of government cost allowability requirements to the amount of pension benefits that the commercial market demands" (app. mot. dis. at 13-14). These additional "facts" all bear on the appropriateness of appellant including in its Retirement Benefit Formulas compensation in excess of the FAR cap, an issue already placed squarely before the Board by virtue of the CACO's decision on allowability. Again, whether NGC has upheld its responsibility to the government and the public at large by claiming salary costs over the statutory limit does not assert grounds that are materially different from the government's unallowability challenge and, instead, asserts merely a differing legal theory.

C. The Contracting Officer's Initial Review of the Facts

To be allowable, a cost must (1) be reasonable, (2) be allocable, (3) comply with Cost Accounting Standards (CAS) or generally-accepted accounting principles and practices, (4) comply with contract terms, and (5) comply with any limitations set forth in FAR subpart 31.2. 48 C.F.R. § 31.201-2(a).[6] Pursuant to paragraph (a) of FAR 31.201-3, Determining reasonableness, "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." 48 C.F.R. § 31.201-3(a). There is no presumption of reasonableness "attached to the incurrence of costs by a contractor," and "[i]f an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." *Id.*

Appellant argues that because the CACO did not make an "initial review of the facts" regarding the *reasonableness* of appellant's costs, as reflected in the final decision, we lack jurisdiction to consider the government's reasonableness challenge now (app. mot. dis. at 13). On this issue, the government argues that "[t]he plain language of FAR 31.201-3 does not specify when the Government must raise its reasonableness challenge (*i.e.*, prior to litigation), nor does it detail what is sufficient for the Government to bring such a challenge; there must merely be a 'challenge of a specific cost'" (gov't resp. at 13). According to the government, the CACO and the

[6] As noted by the Federal Circuit, "allowable costs must conform to any of the specific limitations set forth in 48 C.F.R. §§ 31.201–205." *Information. Sys. & Networks Corp. v. United States*, 437 F.3d 1173, 1175 (Fed. Cir. 2006). "Many of these limitations are enumerated in 48 C.F.R. § 31.205 and include rules for determining the allowability of forty-seven different types of costs." *Id.*

Defense Contract Audit Agency (DCAA) "did challenge 'a specific cost' – both challenged the allowability of Northrop Grumman's pension costs that are directly associated with unallowable compensation" (*id*.). Although, after the government's initial review of the facts, the issue of whether pension costs were unreasonable was not specifically addressed by the CACO, the government is correct that the specific pension costs were challenged by the CACO (R4, tab 6 at G-000185).

We addressed the significance of government's "initial review of facts" and the subsequent determination regarding reasonableness of specific costs in *Parsons Evergreene, LLC*, ASBCA No. 58634, 18-1 BCA ¶ 37,137, aff'd in part, rev'd in part, remanded, *Parsons Evergreene, LLC v. Secretary of Air Force*, 968 F.3d 1359 (Fed. Cir. 2020). *Parsons* involved a contractor's claims for equitable adjustments to an indefinite-delivery, indefinite-quantity contract with the Department of the Air Force. Administrative Judge Clarke issued the opinion of the Board, with Administrative Judge Shackleford and Administrative Judge Prouty concurring in the result. Judge Clarke's opinion stated that FAR 31.201-3(a) "requires two actions by the government: (1) it must perform an 'initial review of the facts,' and (2) that review results in a 'challenge' to 'specific costs.'" Judge Clarke's opinion held that although an audit conducted by DCAA satisfied the requirement for an initial review of the facts, the government failed to satisfy FAR 31.201-3(a) because "[n]either DCAA nor the AF challenged the reasonableness of any 'specific costs' in the claims." *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,790.

In a separate opinion authored by Judge Shackleford concurring in the result, and joined in by Judge Prouty, the Board disagreed with Judge Clarke's reasoning, taking "great issue with that portion of the damages analysis" leading up to Judge Clarke's conclusion that appellant had "satisfied its burden to prove its claimed costs were reasonable when the government challenged all costs but failed to challenge the reasonableness of any specific cost in the claim, stating 'Such a blanket challenge to all costs is insufficient to satisfy FAR 31.201-3(a).'" *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,821 (A.J. Shackleford opinion concurring in result). Judge Shackleford stated that "[t]his finding has no place in our analysis of the damages, as the reasonableness of the amounts is appellant's burden to show, unaided by the government's failure to challenge the reasonableness of specific costs." *Id*. Judge Shackleford noted that "[o]nce a CO's final decision is appealed to this Board, the parties start with a clean slate and the contractor bears the burden of proving liability and damages *de novo*." *Id*., citing *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994).

On appeal, the government alleged "that the Board erroneously shifted the burden as to reasonableness to the government, when the burden should have been on Parsons to prove reasonableness." *Parsons Evergreene*, 968 F.3d at 1369-70. The Federal Circuit held that "Judge Clarke's analysis on this issue was expressly disclaimed by the other two panel judges in a concurring opinion," and that "Judge Shackleford's opinion, not

Judge Clarke's opinion, is the Board's controlling opinion on the reasonable-costs issue." *Parsons Evergreene*, 968 F.3d at 1370.

In this appeal, the CACO challenged the specific pension costs, in contrast to the government in *Parsons Evergreene*, which challenged all claimed incurred costs based upon a flawed technical analysis found wanting by the Board. In both appeals, however, the government did not specifically challenge the reasonableness of the costs until the claims were on appeal. *Parsons Evergreene*, 18-1 BCA ¶ 37,137 at 180,789-790 ("In its audit, DCAA did not challenge the reasonableness of any specific costs. DCAA generally questioned all costs based on the AF's flawed technical review basically finding no entitlement"). Pursuant to our decision in *Parsons Evergreene*, and the Federal Circuit's affirmance of Judge Shackleford's concurring opinion on the issue of reasonableness, we find that the government's failure here to expressly address the issue of reasonableness of the specific costs in its final decision is not a bar to our jurisdiction to consider that issue in this appeal.

Our decision in *BAE Sys. San Francisco Ship Repair*, ASBCA No. 58810, 14-1 BCA ¶ 35,667, likewise supports such a finding. In that appeal, the contracting officer issued a final decision challenging claimed costs, but did not assert reasonableness as a basis pursuant to FAR 31.201-3(a). The contractor argued that the contracting officer's "challenge of costs 'should precede an audit, so the auditor can help to resolve it'" and that once "DCAA has audited, including an evaluation of reasonableness, it is far too late for Government trial attorneys to spring a FAR § 31.201-3 challenge.'" *BAE*, 14-1 BCA ¶ 35,667 at 174,589. We rejected that argument, stating "[w]e do not interpret FAR 31.201-3 to require the [contracting officer] to challenge a contractor's claimed costs before initiating an audit." Noting that the contracting officer's decision "challenged all but $351,244.12 of BAE's $903,973.00 claim," we held that, based upon the contracting officer's challenge, "FAR 31.201-3 assigned to the contractor the burden of proof that the costs claimed are reasonable." *Id*., see also *SRI Int'l*, ASBCA No. 56353, 11-1 BCA ¶ 34,694 at 170,867 (Board considered issue of reasonableness after rejecting government challenge to allowability pursuant to FAR 31.205-20, even though DCAA chose "not to look into the reasonableness of clamed costs" in an incurred cost audit).

Appellant argues that the government's reasonableness challenge is a materially different claim because appellant would bear the burden of proving the reasonableness of its costs (app. mot. dis. at 11). The government responds that FAR 31.201-3 does not specify when the government must raise reasonableness or what specifically is required to raise such a challenge; there merely must be a "challenge of a specific cost by the contracting officer or the contracting officer's representative," which then places the burden of proof "on the contractor to establish that such cost is reasonable" because a cost cannot be allowable if it is not reasonable (gov't resp. at 13).

As we have found, the government's reasonableness challenge is not materially different from the claim discussed in the final decision. There is no presumption of reasonableness, and appellant has the burden of establishing the reasonableness of its costs. 48 C.F.R. § 31.201-3(a). The fact that appellant has the burden of proof - imposed upon it by the FAR - does not somehow cause the government's reasonableness challenge to be materially different from the claim addressed by the CACO.

D. Our Decision in *AeroVironment* is not Dispositive

Appellant argues that our decision in *AeroVironment* is dispositive on the issue of whether the government's reasonableness challenge is materially different from the government's unallowability determination upon which the final decision was based (app. mot. dis. at 6-9). In *AeroVironment*, after the conclusion of mediation, appellant filed a motion to dismiss as moot two pending appeals of government claims, one disallowing costs in excess of a FAR cap and the other assessing penalties. *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,176. In opposing dismissal, the government sought to amend its answers in both appeals to clarify the scope of the claims asserted in the final decisions. *Id*. Appellant challenged the government's motion to amend, arguing that we lacked jurisdiction to consider the proposed amendments because they constituted new claims beyond those asserted in the final decisions. *Id*. at 177,177. We agreed, and granted appellant's motion to dismiss the appeals as moot because the appeals either had been settled or paid in full. *Id.* at 177,181-82.

We also denied the government's motion to amend, finding that the proposed amendments concerned new government claims which sought to add different bases for challenging the allowability of the appellant's executive pay compensation. During mediation, the government trial attorney (GTA) had proposed "a different methodology that materially change[d] quantum, as well as the essential nature of the operative facts forming the factual predicate of the original claims." *Id*. at 177,180. We noted that "[t]he monetary relief sought by the GTA increases substantially that originally claimed, and greatly escalates the stakes involved in the litigation." We also noted that the proposed methodology was "based on a new method of determining the cap and is not a factor or element that is either subsumed within or inherent in the CO's decisions." *Id*. In determining that the proposed methodology represented a new claim, we found that "[a] simple arithmetic problem would be transformed by the proposed amendments into a full-scale controversy challenging the correctness of the parties' prior conduct and practice in computing the cap," and that "the amendment would convert material factual areas of agreement and methodology . . . into areas of disagreement." *Id*. at 177,179. That, of course, is not the situation presented in this appeal. Unlike *AeroVironment*, both "claims" here concern complementary challenges to the same methodology utilized by NGC to determine its pension costs. Both "claims" seek the same remedy – return of improperly-paid pension costs - presumably in the same amount.

In its responsive brief, the government summarized several factual distinctions between this appeal, and *AeroVironment*, stating that "the Government sought to amend its answer to the appellant's complaint to encompass a *different methodology* (proration) to determine *a different amount* of unallowable executive compensation (subject to further penalty) upon *a different rationale* (whether proration of the compensation cap is required between two calendar years for a contractor that reports on a fiscal year basis)" (gov't resp. at 14 (emphasis in original) (citing *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,175-76)).

In its reply brief, appellant suggests that the government's "attempt" to distinguish *AeroVironment* "misses the mark" (app. reply at 5). However, appellant offers no explanation or support for its assertion. Instead, appellant summarily declares that "[t]he Board's analysis in *AeroVironment* . . . is the precedent applicable to this appeal, and this precedent establishes that DCMA trial counsel's FAR § 31.201-3 disallowance is materially different from the disallowance under FAR § 31.201-6(a) and is a separate claim" (app. reply at 6). NGC's summary declaration is insufficient to refute the government's argument regarding the factual and legal distinctions between the two appeals. Given the disparate issues presented in both appeals, appellant's reliance upon *AeroVironment* simply does not tally in its favor.

Also of import to the Board in *AeroVironment*, was that the contracting officer "exercised her independent judgment and asserted the claims in a manner that was consistent with conclusions of the audit report," contrary to the methodology espoused by the GTA, which, if adopted, "effectively would reverse the CO's exercise of her judgment and independent discretion." *AeroVironment*, 16-1 BCA ¶ 36,337 at 177,181. We noted that both the contracting officer and the DCAA auditor "implicitly considered and rejected the interpretation now espoused by" the GTA, which we characterized as "a new and fundamentally different interpretation of the executive compensation limitations that underlay the CO [contracting officer] decisions and assessments." *Id.* at 177,179.

In contrast, the government's reasonableness challenge here in no way infringes upon the CACO's independent judgment or the exercise of her discretion. As discussed above, reasonableness is one of the factors determinative of allowability. According to the government, because the pension costs are allegedly derived from unallowable compensation pursuant to FAR 31.205-6(p), they are unreasonable (gov't cross-mot. at 7-8). The government's reasonableness challenge in no way conflicts with, or is at odds with, the CACO's final decision.

E. Our Decision in *DynCorp* has Application Here

The government relies upon our recent decision in *DynCorp Int'l LLC*, ASBCA No. 61950, 20-1 BCA ¶ 37,703, both in its opposition to appellant's motion for partial summary judgment and cross-motion for partial summary judgment (gov't cross-mot. at 9-10), and in its opposition to appellant's partial motion to dismiss (gov't resp. at 6-8). *DynCorp* concerned the disallowance of severance payments made to a contractor's former chief executive officer. The contracting officer's final decision disallowed those costs, finding that the severance pay was compensation subject to the ceilings set forth in FAR 31.205-6(p) and that the severance amounts paid in excess of the statutory compensation limits under FAR 31.205-6(p) are unallowable. In the alternative, the contracting officer found that the severance paid was unallowable as a directly-associated cost under FAR 31.201-6(d) to the extent that it would not have been incurred but for the underlying unallowable salary cost. *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040. Although DCAA's audit report stated that the costs were unreasonable, the final decision neither mentioned, nor was it based upon, the reasonableness or unreasonableness of those costs pursuant to FAR 31.201-3. The Board, in denying that portion of the appeal, however, based its decision upon a finding that the challenged severance payments were not reasonable. *DynCorp*, 20-1 BCA ¶ 37,703 at 183,042.

The government properly notes that the final decision in *DynCorp* "disallowed the costs as either compensation itself in excess of the FAR cap or, alternatively, as a directly associated cost of unallowable compensation; the final decision did not cite reasonableness as a basis for the disallowance" (gov't resp. at 8 (citing *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040)). As to the alternative argument regarding the directly-associated cost of unallowable compensation, the Board noted it "need not consider 'directly associated cost' because our decision is based on reasonableness." *DynCorp*, 20-1 BCA ¶ 37,703 at 183,044 n.4.

In its motion to dismiss, appellant argues that *Dyncorp* actually "supports the Board's lack of jurisdiction in this appeal over DCMA trial counsel's disallowance under FAR § 31.201-3" because "[i]n *DynCorp*, the Board found it significant that DCAA challenged the reasonableness of the severance costs in the audit report, such that the 'initial review of the facts' did result in 'a challenge of a specific cost by the contracting officer that shifts the burden of proof'" (app. mot. dis. at 13 n.12). However, appellant's motion to dismiss is based, not upon what DCAA may or may not have considered, as possibly reflected in its audit report, but upon what the CACO addressed in her final decision (app. mot. dis. at 4, 6, 9).[7] Indeed, appellant's motion is premised upon its argument that "[t]he Relevant COFD does not include a government claim that the Pension Costs are unallowable under FAR § 31.201-3" (app. mot. dis. at 4).

[7] Appellant states that neither DCAA nor the CACO "challenged cost reasonableness after the initial review of the facts" (app. mot. dis. at 13 n.12).

In *DynCorp*, the Board noted that DCAA found the pension costs at issue unreasonable. However, that does not equate to a finding that, had DCAA not made that determination in *DynCorp*, we would have lacked jurisdiction to consider the government's reasonableness challenge in that appeal. The CDA assigns to the contracting officer, not DCAA auditors, the authority to decide claims, as it is contracting officer's "prerogative to accept all or part of a contractor's claim or reject the claim entirely." *BAE*, 14-1 BCA ¶ 35,667 at 174,589.

Appellant does not argue that *DynCorp* was wrongly decided. As noted above, NGC took the position in its motion to dismiss that *DynCorp* supports its jurisdictional argument (app. mot. dis. at 13 n.12). In its reply brief, however, NGC argues that we should ignore the import of our decision in *DynCorp* because, according to appellant, "the Board assumed jurisdiction without discussion and, thus, DCMA cannot rely on the decision to support its jurisdictional argument" (app. reply at 5-6, citing *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("[Q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents")).[8] Appellant opines that "the *DynCorp* Board likely assumed jurisdiction because DCAA expressly challenged the reasonableness of the severance costs at issue in that appeal and then, in litigating the appeal, the contractor introduced the issue of DCAA's reasonableness assessment in its argument in support of judgment on the administrative record" (app. reply at 5-6).

We reject appellant's attempt to avoid the import of our precedent through mere conjecture as to its validity. Indeed, our decision did not "assume" jurisdiction. Rather, we found that "[w]e have jurisdiction pursuant to the Contract Disputes Act of 1978."

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[8] Appellant also cites an unpublished decision of the Court of Federal Claims, *PSEG Nuclear, LLC v. United States*, No. 01-551C, 2005 WL 6112637, at *7 (Fed. Cl. Apr. 22, 2005) (*see* app. sur-sur-reply at 4-5), for the proposition that "[w]hen a court . . . does not address the question of jurisdiction, the court's decision is not binding on the jurisdictional issue." Appellant's reliance upon this decision is questionable at best. In addition to the non-precedential status of *PSEG Nuclear* as an unpublished decision, *see Hanlon v. Sec'y of Health and Human Servs.*, 40 Fed. Cl. 625, 630 (1998), we note that published decisions of the Court of Federal Claims are likewise neither binding upon this tribunal, nor are they even binding in other matters pending before the Court of Federal Claims. *C.R. Pittman Constr. Co., Inc.*, ASBCA No. 57387 *et al.*, 15-1 BCA ¶ 35,881 at 175,427 n.6 (Court of Federal Claims decisions are not binding precedent for the ASBCA); *Zaccari v. United States*, 142 Fed. Cl. 456, 462 n.6 (2019) ("Decisions of the United States Court of Federal Claims do not bind the court in this matter but may provide persuasive authority").

Dyncorp, 20-1 BCA ¶ 37,703 at 183,037. Under the heading "Jurisdiction," we stated that the final decision "involves both entitlement to reductions in severance pay and calculation of the deductions," although appellant focused "on the right to a deduction, not the calculation of the deduction." *DynCorp*, 20-1 BCA ¶ 37,703 at 183,040. We denied appellant's appeal, "but only as to the government's right to deductions in severance pay, not the amounts of the deductions" because, although appellant raised "reasonable concerns in its claim over how the deductions were calculated by DCAA (and they appear to remain to be negotiated), that issue is not before us today." *Id*. This is not a situation where questions of jurisdiction "merely lurk in the record." The Board determined that it had jurisdiction to consider the appeal.

Moreover, additional Board precedent establishes our jurisdiction to consider the government's reasonableness challenge in line with our decision in *DynCorp*.[9] In *Kellogg Brown & Root Servs., Inc*., 17-1 BCA ¶ 36,595 at 178,240, we considered a contractor's claim on behalf of its subcontractors for additional costs. With regard to one subcontractor, BMS-CAT, the contracting officer's final decision found that the requested costs did not comply with contract, subcontract, and FAR provisions. At trial, and in post-trial briefing, the government "asserted that each of the costs also should be disallowed on the basis of reasonableness pursuant to FAR 31.201-3," noting that [t]his change in emphasis is significant because it shifts the burden of proof to" the contractor. *Id.*

We recognized that "[t]he government has the burden of proof in establishing that a cost is unallowable by operation of a specific contract provision or regulation," and the government "is not limited in defending its case to the logic asserted in the contracting officer's final decision" because "the Board considers the action de novo." *Id*. Concerning the government's cost-reasonableness challenge to the contractor's invoiced amounts, we stated that FAR 31.201-3(a) "explicitly provides that when a review of the facts 'results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable,'" and that "[t]he Federal Circuit has interpreted this provision as providing the 'reviewing officer or court considerable flexibility in assessing the reasonableness of costs.'" *Id*., citing *Kellogg, Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013).

In its reply brief, appellant suggests that because the government does not argue that the CACO's final decision relied upon "FAR § 31.201-3 as a basis to disallow the disputed pension costs" and "does not contend that the contracting officer issued a second COFD that disallows the disputed pension cost under FAR § 31.201-3," the government, "therefore, confirms that the Board lacks jurisdiction to reach the merits of

[9] Additional Board precedent establishing our jurisdiction here likewise is discussed in section IV. C. of this decision.

this new disallowance" (app. reply at 2). However, on appeal, we do not lack jurisdiction to consider a legal argument simply because the contracting officer did not address that argument in the final decision. As discussed above, our jurisdiction allows us to consider a new legal argument presented by a party if the argument is not materially different from the dispute presented in the contracting officer's final decision. We find that we have jurisdiction to consider the government's reasonableness challenge here because it is not materially different, either factually or legally, from the claim set forth in the CACO's final decision.

V. NGC has not Demonstrated Undue Delay or Undue Prejudice by Introduction of the Government's Reasonableness Challenge at this Stage of the Litigation

In the alternative, NGC requests that we strike the government's reasonableness challenge from its opposition and cross-motion for summary judgment because "[t]he government has not moved to amend its answer to assert this new disallowance, but instead asserted a new disallowance in its summary judgment briefing" (app. mot. dis. at 14). Board Rule 6(b) requires the government's answer to admit or deny the allegations of the complaint and "set forth simple, concise, and direct statements of the Government's defenses to each claim asserted by the appellant, including any affirmative defenses."[10] Appellant correctly notes that the government did not "assert this new disallowance," i.e., its reasonableness challenge, in its answer (app. mot. dis. at 14).

Appellant cites Board Rule 6(d) in support of its motion to strike (*id.*). Although Rule 6(d) provides that the Board "may order a party to make a more definite statement of the complaint or answer, or to reply to an answer" and "may permit either party to amend its pleading upon conditions fair to both parties," it likewise provides that "[w]hen issues within the proper scope of the appeal, but not raised by the pleadings, are tried . . . by permission of the Board, they shall be treated in all respects as if they had been raised therein," and that "motions to amend the pleadings to conform to the proof may be entered, but are not required."

Our Board Rules "do not specifically address motions to strike, and we are guided by the Federal Rules of Civil Procedure." *Fru-Con Const. Corp*., ASBCA Nos. 53544, 53794, 03-2 BCA ¶ 32,275 at 159,673, citing *Nero and Associates, Inc*., ASBCA No. 30369, 86-1 BCA ¶ 18,579. Pursuant to Fed. R. Civ. P. 12(f), a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or

[10] The government's reasonableness challenge is not properly categorized as an affirmative defense to the government's own claim. *Supreme Foodservice GmbH*, 20-1 BCA ¶ 37,618 at 182,627 ("an affirmative defense is just that, a defense, not an offensive weapon").

scandalous matter."[11] A tribunal "has considerable discretion in deciding such a motion," which generally is "disfavored, though, and have often been denied even when literally correct where there has been no showing of prejudicial harm to the moving party." *ASCT Grp., Inc*., ASBCA No. 61955, 20-1 BCA ¶ 37,540 at 182,289, citing *Godfredson v. JBC Legal Grp., P.C.*, 387 F. Supp. 2d 543, 547-48 (E.D.N.C. 2005).

Appellant argues that "[t]he Board may refuse to grant leave to amend a pleading if there exists undue delay, bad faith or dilatory actions, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice" (app. mot. dis. at 14-15 (citing *Pub. Warehousing Co., K.S.C.*, ASBCA No. 58088, 16-1 BCA ¶ 36,555 at 178,044) (leave to amend pleading should be freely given in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed")). Appellant raises two of these grounds, undue delay and undue prejudice, in support of its motion (app. mot. dis. at 15-16).

Our decision in *DynCorp*, upon which the government relies in support of its reasonableness challenge (gov't cross-mot. at 9), was issued on September 29, 2020, just ten days before the parties filed their Joint Stipulation of Undisputed Material Facts (JSUMF at 9). There is little room to argue undue delay in the government's first raising *DynCorp*, and its legal reasoning, in its December 21, 2020, opposition and cross-motion for partial summary judgment as it did, given that our decision in *DynCorp* was then recently-issued, and the government believed it to be precedent applicable to this appeal. *Advanced Eng'g & Planning Corp*., ASBCA Nos. 53366, 54044, 05-1 BCA ¶ 32,935 at 163,127 ("[W]e are bound by our precedent."); *PCA Health Plans of Tex., Inc.*, ASBCA No. 48711, 98-2 BCA ¶ 29,900 at 148,014 ("[A] decision by the Board is deemed binding precedent in another appeal unless the decision is reversed or otherwise modified by the Board's Senior Deciding Group or the court of appeals.")

Perhaps the government could have amended its answer at some point soon after issuance of our decision in *DynCorp* and addressed the issue pursuant to Rule 6(d) as a "direct statement" of the government's defense to an allegation asserted by the appellant in its complaint. Perhaps the government could have raised the issue during discussions when the parties were contemplating their respective cross-motions for summary judgment. Regardless of whether the government could have, or should have, raised the issue earlier, appellant has not demonstrated undue delay that would warrant striking the

[11] Although appellant does not cite Fed. R. Civ. P. 12(f) as support for its motion to strike, we note that appellant's motion would be considered timely pursuant to that rule, having been filed prior to "responding to the pleading," i.e., the government's December 21, 2020, response in opposition and cross-motion for partial summary judgment, which contains the allegations appellant requests be stricken.

government's reasonableness challenge. To the extent appellant's argument is directed at the presumption that the government should have sought leave to amend its answer (app. mot. dis. at 14), the details of the government's reasonableness challenge are now set forth in its opposition and cross-motion for partial summary judgment, and, accordingly, "the cat is out of the bag." Indeed, our rules require only notice pleading, "to put the opposing party on notice that a particular defense is asserted so that the opposing party may 'proceed to conduct discovery regarding the affirmative [or other] defense.'" *Niking Corp.*, ASBCA No. 60731, 17-1 BCA ¶ 36,639 at 178,450, quoting *The Boeing Co*., ASBCA No. 54853, 12-1 BCA ¶ 35,054 at 172,197-98.[12]

Appellant argues that the government's actions have resulted in "unfair surprise to Northrop Grumman" (app. reply at 7). However, appellant admits that, "[i]f the Board were to deny this motion [to dismiss], then Northrop Grumman will expend the effort to gather relevant material facts and brief the merits of the government's improper disallowance of the Pension Costs under FAR § 31.201-3" (app. mot. dis. at 4 n.5).[13] The current posture of this litigation provides NGC the opportunity to gather any relevant facts needed through discovery and to brief the issue on its merits. *ABB Enter. Software, Inc*., ASBCA No. 60314, 17-1 BCA ¶ 36,586 at 178,202 (amendment of answer allowed where no deadline set for close of discovery "and introduction of an affirmative defense at this stage will not hinder their ability to pursue further written discovery or subsequent depositions"). With regard to discovery, as noted in their September 28, 2020, Joint Motion to Amend Schedule, the parties "agreed to postpone discovery and file cross-motions for summary judgment on entitlement in this appeal." In addition, although the parties have filed initial cross-motions for partial summary judgment, additional briefing on those motions remains to be completed. Moreover, even after conclusion of cross-motions, there remains issues raised in Count III of appellant's complaint which the parties have yet to address (SOF ¶ 8).

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[12] Rule 6(d) also provides that "[i]f evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided however, that the objecting party may be granted an opportunity to meet such evidence."

[13] Appellant already has determined the issues it believes require additional research to respond to the government's reasonableness challenge, specifically, "(a) FAR § 31.201-3 case law; (b) FAR § 31.201-3 regulatory history, including the underlying policy of the language in FAR § 31.201-3 that DCMA trial counsel focuses on in the government cross-motion and opposition (i.e., 'considerations and circumstances, including . . . the contractor's responsibilities to the Government . . . and the public at large' (Gov't Mot. at 3) [gov't cross-mot.]); and (c) the difference between the purpose of FAR § 31.201-3 and other cost principles in FAR Subpart 31.2" (app. mot. dis. at 12).

Any alleged prejudice to appellant because the government first raised its reasonableness challenge during cross-motions for partial summary judgment is lessened also by the Board's February 11, 2021, Order, granting appellant's motion to stay proceedings on the parties' cross-motions for partial summary judgment pending a decision on appellant's partial motion to dismiss for lack of jurisdiction. The Board granted appellant's motion to stay on the grounds that resolving first the jurisdictional issue raised by appellant would promote the efficient administration of justice.[14] With the issuance of this decision, the parties now are able to decide whether discovery concerning the government's reasonableness challenge is necessary, and ultimately whether to continue with the cross-motions for partial summary judgment that currently are stayed.

VI. Additional Discovery

The government suggests that its reasonableness challenge to NGC's Retirement Benefit Formulas methodology can be decided on the current record, without utilizing the factors set forth in FAR 31.201-3(b) (gov't sur-reply at 3). This is because the government "does not challenge the reasonableness of the pension costs because of the amount of those costs. Rather, the Government contends the methodology Northrop Grumman used to calculate those costs was unreasonable." (Gov't resp. at 4) According to the government "[t]he Board need not consider additional facts based upon the Government's narrow reasonableness allegation that the Retirement Benefit Formula methodology itself is unreasonable[,] because of its direct relationship to, and resulting generation of, unallowable compensation" (gov't resp. at 6).

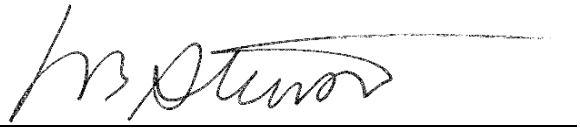
Appellant responds, stating, "the argument that one fact, under DCMA trial counsel's theory of the FAR § 31.201-3 disallowance, is the end-all-be-all of the reasonableness of the disputed pension cost conflicts directly with the plain language of FAR § 31.201-3," which, according to appellant, "requires the assessment of multiple factual 'considerations and circumstances' when determining cost reasonableness" (app. reply at 3). Whether the "one fact" identified by the government is sufficient to establish the propriety or impropriety of the government's disallowance (gov't sur-reply at 4) goes to the merits of the appeal. Prior to proceeding with additional briefing on the parties' partial motions for summary judgment, we believe it is appropriate to allow appellant the opportunity to determine what discovery, if any, is necessary on the issue of reasonableness, and what additional documents or evidence, if any, are necessary to supplement the Rule 4 file.

[14] At page 14 of its motion, appellant likewise cites Board Rule 7(a), which provides, in part, that "[t]he Board may entertain and rule upon motions and may defer ruling as appropriate. The Board will rule on motions so as to secure, to the fullest extent practicable, the informal, expeditious, and inexpensive resolution of appeals." Our decision here is in keeping with Rule 7(a).

CONCLUSION

We have jurisdiction to consider the government's reasonableness challenge to NGC's pension costs. We have carefully considered appellant's remaining arguments and are not persuaded by them. NGC's partial motion to dismiss or, in the alternative, motion to strike, is denied. The parties are ORDERED to confer and file a joint report with the Board within 45 days of receipt of this decision, setting forth the status of this appeal. The joint status report should include proposed deadlines for (1) any additional discovery, and (2) continued briefing of the parties' cross-motions for summary judgment, including any necessary supplemental briefing.

Dated: August 4, 2021



DAVID B. STINSON
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 No. 62165, Appeal of Northrop Grumman Corporation, rendered in conformance with the Board's Charter.

Dated: August 5, 2021

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