ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Pratt & Whitney, a division of Raytheon Technologies Company	)	ASBCA No. 59222
	)	
Under Contract No. N00019-10-C-0005	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS ON THE GOVERNMENT'S MOTION FOR PARTIAL RECONSIDERATION AND REOPENING OF RECORD FOR LIMITED HEARING ON FLEET INTRODUCTORY ASSISTANCE

Pending before the Board is the "Government's Motion for Partial Reconsideration and Reopening of Record for Limited Hearing on Fleet Introductory Assistance" filed by the Defense Contract Management Agency (DCMA or government). Appellant, Pratt & Whitney, a division of Raytheon Technologies Company (Pratt) opposes the motion. For the reasons stated below, we deny the government's motion.

An extensive factual background and procedural history of this appeal is contained in our November 23, 2021, decision, *Pratt & Whitney, a division of Raytheon Technologies Co.*, ASBCA No. 59222, 22-1 BCA ¶ 38,104, and will not be repeated here in detail. However, the following brief summary is provided to give context to the government's motion. Pratt produces jet engines for military and civilian jet airplanes. Pratt sources some of its parts from "collaborators" that participate in the engine program expenses and revenues based upon their "program share" which is based on an estimated cost of production for the part, referred to as the Manufacturing Target Cost (MTC). The sum of the MTCs for the parts provided by a collaborator, as a share of the list price of the engine, represents the Gross Revenue Share (GRS) for the collaborator.

However, unlike ordinary subcontractors, the "collaborators" participate in the costs of engine programs by paying an upfront fee to Pratt to finance the development of the engine and then are compensated for engine sales based upon their pre-determined share of the engine price. In addition, the list price of the engines typically is not the sales price actually received by Pratt, because of Fleet Introductory Assistance (FIA) discounts offered in the hope of future engine sales and future parts sales. In addition, the collaborators are responsible for a share of Pratt's administrative and management expenses, referred to as "drag." Thus, Pratt actually pays to the collaborators a Net Revenue Share (NRS) representing the GRS less FIA, drag, and other miscellaneous deductions. In some cases, Pratt paid GRS to the collaborators and then debited them for the deductions, while in other cases, Pratt reduced payment by the deductions.

The last thirty plus years of litigation[1] between Pratt and DCMA have concerned the proper valuation of the parts supplied by collaborators. These payments to collaborators are relevant because Pratt holds cost type contracts with government. The costs assigned to parts in the commercial engine programs affect the allocation of overhead costs between the government and Pratt's commercial clients, on Pratt's cost type contracts. Simply put, the higher the direct costs assigned to the collaborator parts, the lower the share of overhead costs that will be allocated to the government contracts. Conversely, the lower the direct cost of the collaborator parts, the lower the share of overhead costs that will be allocated to Pratt's commercial work, making Pratt's commercial engine sales more competitive or more profitable.

In 1992, a government contracting officer asserted that Pratt's accounting for collaborator parts, which at the time did not assign *any* cost to the parts, was non-compliant with the Cost Accounting Standards (CAS), dating back to 1984. The dispute came before the Board based on the government's deemed denial of Pratt's request for a final decision, and the Board sustained the appeal. *United Technologies*

[1] Judge Scott referred to these cases as "the *Jarndyce v. Jarndyce* of the cost accounting world." *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,051.

Corp., Pratt & Whitney, ASBCA Nos. 47416 *et al*., 01-2 BCA ¶ 31,592, *rev'd, Rumsfeld v. United Technologies Corp.,* 315 F.3d 1361 (Fed Cir. 2003). The Board's decision holding that revenue share payments were not payment for parts was overturned by the United States Court of Appeals for the Federal Circuit in *Rumsfeld v. United Technologies Corp.,* 315 F.3d 1361 (Fed Cir. 2003). The question before the Federal Circuit was whether Pratt was required to assign *any* cost to the collaborator parts. The *amount* of the cost to be assigned was not at issue in the appeal. The Federal Circuit held that Pratt was required to assign a cost based on the amount paid for the parts in the current period.

Following the *Rumsfeld* decision, Pratt accounted for collaborator parts based on the notional MTC cost, reduced by drag, rather than the actual amounts paid to the collaborator. A DCMA contracting officer initially accepted Pratt's treatment and entered into a written Accounting Practices Agreement with Pratt, permitting Pratt to value the collaborator parts using MTC. However, following an inspector general (IG) report critical of the agreement, a subsequent DCMA contracting officer found Pratt's accounting treatment to violate the CAS, leading to the present litigation. Before the Board, Pratt contended that MTC was the proper measure for the collaborator costs, while DCMA contended that GRS, without any deductions was the proper cost measure. In our opinion, we agreed with the government, that Pratt's use of MTC was contrary to the holding in *Rumsfeld*, but held that NRS, rather than GRS was the proper measure.

The government's 67-page motion for reconsideration asserts six errors in the Board's November 23, 2021, decision.[2] For the most part, the government's motion simply repeats arguments that the Board considered and rejected in its decision. We hold that the government has not established a basis for reconsideration of our decision and deny the motion for reconsideration and the motion to reopen the record.

DECISION

I. *Standard Of Review*

A motion for reconsideration is not the place to present arguments previously made and rejected. "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014) (quoting *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)). Moreover, "[m]otions for reconsideration do not afford litigants

[2] Judge Scott, the author of the Board's November 23, 2021, decision, retired shortly after it was issued, and has not participated in the review of this motion for reconsideration.

the opportunity to take a 'second bite at the apple' or to advance arguments that properly should have been presented in an earlier proceeding." *Dixon*, 741 F.3d at 1378; *see also Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384. On the other hand, if we have made mistakes in the findings of fact or conclusions of law, or by failing to consider an appropriate matter, reconsideration may be appropriate. *See Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911; *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708 at 161,816. The Board recently summarized the standard for reconsideration stating "[i]n short, if we have made a genuine oversight that affects the outcome of the appeal, we will remedy it." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,146 at 180,841. Here, as in *Relyant*, no such mistakes have been identified.

II. *The Government's Allegations of Error Regarding the Calculation of Revenue Share*

The bulk of the government's motion simply rehashes its argument that *Rumsfeld* requires the use of GRS rather than NRS.

A. The Government's GRS Arguments

The government asserts that:

> *Rumsfeld v. United Technologies Corp*., 315 F.3d 1361, 1371 (Fed. Cir.), *cert. denied*, 540 U.S., 1012 (2003) ("*Rumsfeld*") explicitly held that the sharing of gross revenues, i.e., "gross revenue share," constitutes the of cost [sic] collaborator parts under Cost Accounting Standard ("CAS") 418. The Board's Decision rejecting gross revenue share as the cost of the collaborator parts is directly contrary to Federal Circuit precedent on this issue.

(Gov't mot. at 1). We fully addressed the government's arguments in our November 23, 2021, decision and find that the government has not demonstrated error in our holding.

The government's motion alleges that the Federal Circuit held in *Rumsfeld* that GRS was the measure of collaborator part cost (gov't mot. at 5-9). Here the government misquotes the Federal Circuit's holding by inserting its preferred wording into the language of the opinion. The Federal Circuit held that "the revenue share payments comprise costs for those parts." *Rumsfeld*, 315 F.3d at 1377. The government asserts that the Federal Circuit held "[T]he revenue share payments [e.g., gross revenue share] comprise costs for [collaborator] parts." (gov't mot. at 3-4).

After Pratt challenged the government's alteration of the Federal Circuit's holding (app. opp'n at 5), the government doubled-down by insisting that "[t]he phrase, 'The Lord's Prayer,' does 'not exist' in Matthew or Luke—but that catechistic standard most assuredly 'exists' in those Gospels. So as in *Rumsfeld*" (gov't reply at 6). We recognize that *Rumsfeld* is binding precedent and accord the language of the decision its normal meaning rather than seeking to divine a meaning outside the four corners of its secular text. We considered the government's arguments, *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,078-79, 185,080-81, and rejected them, holding that "when the court in *Rumsfeld* held that revenue share payments were the cost of collaboration parts, it did not specify gross revenue share or net revenue share." *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,088.

The government additionally argues that our decision was inconsistent in holding that NRS was the proper measure of collaborator part cost, while properly recognizing that revenue share did not include payments for items other than parts (gov't mot. at 9-12). Once again, we considered the government's arguments, *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,078-79, 185,080-81, and determined that Pratt had not met its burden to establish that its payments to collaborators included compensation for items other than parts, *id.* at 185,075 (finding 187), 185,088, but that NRS, rather than GRS, represented Pratt's payments to collaborators for the parts. *Id.* at 185,055 (finding 56), 185,088. The government next alleges that our decision demonstrates that GRS is the cost of the parts under CAS 418 (gov't mot. at 12-15). We note that the government here argues that the correct measure is GRS net of FIA.[3] This is a new argument, and inconsistent with the government's position in its post-hearing briefing that the correct measure of the cost of collaborator parts was GRS with no deductions. The government asserts that the Board made a factual error in its decision by stating that Pratt does not report GRS in its financial accounts (gov't mot. at 15 n.6). However, what Pratt reports is GRS net of FIA (tr. 5/60, 116-20, 124-27). This argument then provides the premise for the government's next argument alleging error in our factual finding that Pratt paid NRS to the collaborators, and that we impermissibly accepted expert witness testimony regarding the CAS (gov't mot. at 15-24). We recognized that there was evidence in the record to support the government's contentions and cited to that evidence in our decision; however, our findings of fact are supported by the record. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,055 (finding 56), 185,068 (findings 129-31), 185,074-75 (findings 175, 179), 185,076 (finding 188). The fact that the government would weigh the evidence differently does not constitute a basis for reconsideration.

[3] In its reply brief the government asserts that its position remains that GRS should not be reduced by FIA (gov't reply at 8).

The government's argument that we should not consider the testimony by Pratt's expert witness, Ms. LeeVan was considered by the Board when Judge Scott denied the government's motion *in limine* (Bd. Order dtd. May 30, 2019), and again denied the government's renewed motion *in limine* (Bd. Order dtd. Jan. 28, 2020). We hereby reject this argument for the third time. We note that expert testimony is permissible for limited purposes in a Board appeal involving cost accounting issues. *Northrop Grumman Corp.*, ASBCA No. 61775, 20-1 BCA ¶ 37,712 at 183,060 ("Thus, when we interpret the CAS provisions at issue here, we do not take into account the experts' opinions of what they mean. That does not mean that the experts were unhelpful to our resolution of this appeal, for as described below, they can illuminate accounting concepts that aid us in avoiding interpretations that would be inconsistent or nonsensical."). The government also alleges that our opinion ignores Pratt's method of accounting for the collaborator payments in its financial reporting (gov't mot. at 24-26). However, our decision clearly reviewed Pratt's financial treatment of the collaborator parts. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,048 (finding 4), 185,054 (findings 45-48).

The government next places new emphasis on an argument raised in passing in its post-hearing briefing that the Board should interpret the Federal Circuit's holding in *Rumsfeld* based upon statements contained in the government's briefing in that appeal. In *Rumsfeld*, the Federal Circuit held that "Pratt purchased the parts from its foreign parts suppliers, and that the revenue share payments comprise costs for those parts." *Rumsfeld*, 315 F.3d at 1377. The government's motion is premised upon the argument that, when the Federal Circuit referred to "revenue share" it must have meant "gross revenue share" even though the specific question of how to calculate the revenue share was not at issue in the appeal. *See, Rumsfeld*, 315 F.3 at 1377 n.19 ("The question of the propriety of removing Drag from the indirect cost pool is also not before us on appeal . . . ."). The government cites extensively to the briefing before the Federal Circuit in *Rumsfield* in an attempt to demonstrate that what the Federal Circuit must have *really meant* when it referred to revenue share was GRS, and not NRS (gov't mot. at 26-32).

When the Federal Circuit held that Pratt must account for the cost collaborator parts, it used the term "revenue share payments." According to the government, by referring to the briefing by the parties "it is clear and undisputed that 'Revenue Share Payments' was simply a synonym of 'Gross Revenue Share'" (gov't mot. at 26). Thus, according to the government, we should *interpret* the court's holding in *Rumsfeld* not based on the *plain language* used by the Federal Circuit, but instead based on the *meaning of words as used by the government in its briefing.* The government contends it is clear that the government, the Board, and Pratt shared this interpretation (gov't mot. at 27-29); however, the Board's decision made a clear distinction between gross revenue share and net revenue share. *United Technologies. Corp.*, 01-2 BCA ¶ 31,592 at 156,111 ("The agreed-upon program expenses and Drag

are deducted from the gross revenue share and collaborators are paid net revenue shares."). Instead, the government relies upon the fact that the Board used "revenue share" to refer to GRS in summarizing the position of the government's expert witness (gov't mot. at 27-28 (quoting *United Technologies*, 01-2 BCA ¶ 31,592 at 156,122)). The government's evidence that Pratt shared its interpretation is similarly unavailing, with the government referencing Pratt's quotation of the Board's opinion (gov't mot. at 29) and briefing that references revenue share payments that Pratt contends actually refer to net revenue shares (gov't mot. at 29-30; app. opp'n at 9). The government goes so far as to accuse the Board of "redefin[ing]" the term revenue share in our decision (gov't mot. at 30). We decline the government's suggestion that we "interpret" the holding in *Rumsfeld* based upon the meaning assigned to terms in the government's own briefing before the Federal Circuit.

B. The Government's NRS Arguments

The government next asserts that:

> The Board committed manifest legal error by concluding, without explanation, that "net revenue share" or "net revenue share payments" is the "proper" cost of the collaboration parts. "Net revenue share" has no relationship to actual part cost under either the Federal Circuit's *Rumsfeld* or CAS 418. Moreover, the Decision misuses the word "payment" by conflating the net cash liquidation portion of the payment with the incurrence of that cost.

(Gov't mot. at 1-2). For the most part, this is just the flip-side of the coin from the government's argument that GRS is the proper measure of cost for collaborator parts (gov't mot. at 32-34). Our decision includes factual findings supporting our holding. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,054 (finding 44), 185,057 (findings 69-70), 185,059-60 (findings 85-86). The government also alleges that NRS is a payment method, and not an actual cost (gov't mot. at 34-38). Again, we addressed this issue in our decision. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,078.

Finally, the government asserts that our holding that NRS is the proper cost will result in more litigation (gov't mot. at 38-40). In our decision, we applied the requirements of the CAS to Pratt's business practices regarding collaborators. The fact that this application may, in the opinion of the government, result in further litigation is not relevant.

III. *The Government's Allegations of Error Regarding the Advance Agreement*

A. The APA Is Valid and Enforceable

The government alleges that:

> The Board plainly erred in ruling that the "Agreement between the United States Government and United Technologies Corporation, Pratt & Whitney Division Regarding Certain Collaboration Agreement Accounting Practices" (the "APA") is a "valid" agreement supported by consideration, despite finding that the APA violated the directly applicable regulation, FAR 31.109, governing advance agreements.

(Gov't mot. at 2). The government again raises arguments already addressed in the Board's decision. The government asserts that an agreement covering future costs can only be made pursuant to FAR 31.109 (gov't mot. at 41-44), that there was no consideration supporting in the APA (gov't mot. at 44-45), and that the contracting officer lacked the authority to violate the credits clause (gov't mot. at 45-47). The government's first argument, that an agreement regarding future costs can only be made through an advance agreement pursuant to FAR 31.109, was not presented in its post-hearing briefing, and was waived. To the extent it is properly before us, we do not find the argument persuasive. The government cites no authority for its conclusion that a properly formed agreement must comply with FAR 31.109 if it is to address future costs. Our opinion considered the government's argument, and we found that the APA did not comply with the provisions of FAR 31.109. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,083-84. However, while FAR 31.109 provides a method for the government and contractors to agree to the treatment of costs in future periods, it does not provide that it is the *exclusive* method of addressing future costs. In fact, FAR 31.109 expressly provides that "an advance agreement is not an absolute requirement" and the absence of an agreement will not affect the treatment of costs. FAR 31.109(a). As we held in our decision, we look to the substance of the agreement, and are not bound by labels applied by the parties. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,084 (quoting *Paradigm II, LLC, d/b/a JB Carpet & Upholstery Care*, ASBCA No. 55849, 09-1 BCA ¶ 34,070 at 168,464).

The government additionally alleges that, in its opinion, the APA agrees to a treatment that violates the FAR, and that this renders the advance agreement invalid (gov't mot. at 43 (quoting FAR 31.109(c) ("contracting officer[s are] not authorized… to agree to a treatment of costs inconsistent with [FAR Part 31]")). As an initial matter, we note that we found that the contracting officer possessed authority to enter

into the APA. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,066-67 (finding 121), 185,084. The government's new argument would make advance agreements illusory. Under the government's interpretation, it can enter into an advance agreement with a contractor regarding the treatment of a certain cost that is binding on future contracts. However, if the government later changes its mind and decides that the cost treatment that it agreed to is not correct, it can disclaim the agreement under the logic that the contracting officer's actions were *ultra vires* because the contracting officer did not have authority to enter into an agreement that violates the FAR.

The government repeats and expands its argument from its post-hearing brief (gov't br. at 124) that an advance agreement "cannot be enforced against procurement contracts in which it was not incorporated" (gov't mot. at 42 (quoting *Gen. Dynamics Corp., Elec. Boat Div.*, ASBCA No. 21737, 83-2 BCA ¶ 16,907); *see* gov't reply at 17-19). As noted above, we held that the APA was a valid agreement, but was not an "advance agreement" specifically entered pursuant to FAR 31.109. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,083-85. *General Dynamics* is not directly on point, since it interpreted an advance agreement issued pursuant to Armed Services Procurement Regulation (ASPR) 15.107, the predecessor to FAR 31.109. Moreover, *General Dynamics* involved an unusual factual background where Admiral Rickover threatened to terminate a large submarine contract with Electric Boat, and offer the contract to a competitor, unless the contractor immediately agreed to a large cost reduction. The parties almost immediately disagreed on the interpretation of the advance agreement. *Gen. Dynamics*, 83-2 BCA ¶ 16,907 at 84,120-21, 84,125-28, 84,136-38. Here, the parties entered into the APA and both parties treated it as binding, until after the IG investigation and the government's change of position.

The government repeats its argument that the APA was not supported by consideration. We previously considered the government's arguments and held that the APA was supported by mutual consideration, noting that the APA was supported by the general consideration of avoiding further litigation expenses. *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,084. The government contends that Pratt had a pre-existing duty to comply with *Rumsfeld* and thus there was no consideration (gov't mot. at 44-45); however, this ignores the fact that *Rumsfeld* explicitly left open on remand the drag issue. *Rumsfeld*, 315 F.3d at 1377 n.19. The government's repetition of its previous arguments does nothing to change our opinion.

The government also alleges that the APA violates the credits clause. Once again, this is a rehash of its previous arguments. In our decision, we noted that the government had the burden of establishing that it overpaid Pratt, *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,085 (citing *Alaska Aerospace Corp.,* ASBCA No. 59794, 16-1 BCA ¶ 36,498 at 177,843), and held that the government had not met that burden. We noted that there was "no firm consensus among government personnel as to whether FAR violations had occurred." *Id.* at 185,084. The government's motion

does not address this failing and simply rehashes its argument that the contracting officer was not legally permitted to agree to a FAR violation (gov't mot. at 45-47).

B. The Government's Drag Claim is Barred by Accord and Satisfaction

The government next asserts the following legal error regarding our holding that the government's drag claim was barred by accord and satisfaction:

> The Board committed reversible error in ruling that the Government's "Drag" claim is "barred" by the APA's recital of "accord and satisfaction," notwithstanding that the APA, on its face, was unlawful in purporting to permit Pratt to violate the Credits Clause, FAR 31.201-5, by not recording collaborator "Drag" payments as credits to its indirect expense pools.

and

> The Board applied an erroneous "burden" on the Government to prove that Drag indirect expense reimbursements were allocated to specific or particular indirect costs accounts in order to establish, as the record indisputably proves, that Pratt allocated to the Government indirect costs that Pratt recovered through collaborator Drag payments.

(Gov't mot. at 2). As noted above, in our decision we held that the government had not satisfied its burden of demonstrating that it overpaid Pratt. The government argues that all of its witnesses testified that Pratt violated the credits clause (gov't mot. at 60). However, that is not the same as establishing by a preponderance of the evidence that Pratt actually allocated drag reimbursements to government contracts. In our opinion, we specifically noted that the government's own witness testified that the government "did not test to see if Drag applied to any costs that had been allocated to government contracts and reimbursed by the government." *Pratt & Whitney*, 22-1 BCA ¶ 38,104 at 185,084.

The government also seeks once again to rely upon a document that is not part of the record in this appeal (gov't mot. at 62-63). The government contends that it discovered the document after the hearing and sought to admit the document during post-hearing briefing (gov't br. at 38 n.8). The Board denied the government's motion to supplement the Rule 4 file with the document (Bd. Order dtd. Oct. 29, 2019) and denied the Government's motion for reconsideration (Bd. Order dtd. Feb. 6, 2020).

We deny the government's request to add the document to the record of this appeal for a third time.

IV. *The Government Has Not Provided a Basis for Reopening The Record*

The government's last argument is that the Board should reopen the record and conduct an additional hearing based upon an alleged prejudicial error. According to Pratt:

> The Board subjected the Government to prejudicial error by permitting Pratt to present evidence that collaborator FIA expense is a legitimate reduction of a collaborator's revenue share notwithstanding Pratt's refusal to produce *any* Pratt FIA agreements to the Government. Moreover, the Board's reliance on Pratt's irrelevant draft "agreement" between parties other than Pratt as proof of FIA types, terms and conditions was incorrect. The Government respectfully requests the Board to re-open the record for the limited purpose of allowing the Government to obtain relevant documentation and deposition testimony from Pratt concerning FIA and conduct an additional hearing on that issue.

(Gov't mot. at 2). The government's argument is based on a document, ASR4, Tab 1183, that was admitted to the record over the government's objection. The government's discovery request for FIA agreements was a subject of the government's April 2019 motion to compel. The Board denied that request. (Bd. Order dtd. May 3, 2019). The government again raised its objection at the hearing (tr. 5/265-77) and requested that the document be stricken from the record in its post-hearing briefing (gov't br. at 41 n.9). For the *fourth time* we deny the government's request.

We cited the document in question exactly once in our decision, in paragraph 2 of the facts. That fact provides:

> 2. In the commercial market, Pratt sells an engine to an airframer (*e.g.*, Airbus or Boeing), which installs the engine on an aircraft. [redacted] [4] The airframer then sells the aircraft with Pratt's engine installed to the ultimate customer, typically an airline. Upon delivery of the aircraft to the airline, Pratt pays the airline a "Fleet Introductory

[4] The bracketed material has been redacted in the public version of our decision.

> Assistance" (FIA) concession, an amount aimed at incentivizing the airline to select Pratt's engine. (Tr. 5/108-10, 6/204) FIA can take many forms, including, *e.g.*, cash, [redacted] to airlines in the competitive market, to gain an advantage over Pratt's competitors-primarily General Electric and Rolls Royce (tr. 5/110, 230-31, 260-61, 6/204-05, 7/143, 152-55, 243; *see, e.g.*, app. supp. R4, tab 1183 at 144881 ¶ 3.1, which names FIA amounts and examples of FIA[4]).

Pratt & Whitney, 22-1 BCA ¶ 38,104 at 185,048. Finding of fact 2 is followed by a footnote which explains:

> The government objects to this document on the ground that it is based upon a joint venture, Pratt and Whitney and General Electric Engine Alliance, LLC, agreement with [redacted][5] (airline) and that appellant allegedly did not disclose any other FIA arrangements to it (*see* tr. 5/264, 269). We overrule the objection but cite the document for the limited purpose of its recitation of FIA examples.

Id. at 185,089 n.4. The government contends that was legal error for us to consider this document and of such a prejudicial nature that we must reopen the record to permit discovery of other FIA agreements and conduct an additional hearing on the matter. We disagree.

The document in question was cited simply for the fact that FIA can take a variety of forms. That finding was also supported by hearing testimony. *Id.* at 185,048 (citing tr. 5/230-31). The decision provides that the document is only cited for the "limited purpose of its recitation of FIA examples." *Id.* at 185,099. There is ample evidence in the record, ignoring ASR4 1183, to support our finding that "collaborator FIA expense is a legitimate reduction of a collaborator's revenue share" (gov't mot. at 2). Additionally, we deny the government's request to reopen the record.

[5] The bracketed material has been redacted in the public version of our decision.

CONCLUSION

For the reasons stated above, we deny the government's motion for partial reconsideration and motion to reopen the record.

Dated: August 29, 2022

DAVID D'ALESSANDRIS
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. 59222, Appeal of Pratt & Whitney, rendered in conformance with the Board's Charter.

Dated: August 30, 2022

for Jamnye D. Gates

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