ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Fluor Federal Solutions, LLC	)	ASBCA No. 62344
	)	
Under Contract No. N69450-12-D-7852	)	

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OPINION BY ADMINISTRATIVE JUDGE WITWER

In January 2019, we found appellant, Fluor Federal Solutions, Inc., entitled to an equitable adjustment following the invalid exercise of an award option year by respondent, the Department of the Navy. *Fluor Fed. Sols., LLC*, ASBCA No. 61353, 19-1 BCA ¶ 37,237. Familiarity with our prior decision is presumed. Because the parties have not been able to settle upon quantum, we address that now.

Fluor contends that it is entitled to $12,784,549, plus interest under the Contract Disputes Act (CDA), 41 U.S.C. § 7109. The Navy counters that Fluor is entitled to $6,740,769, plus CDA interest. The difference in the parties' respective amounts involves three issues: (1) whether Fluor is entitled to $481,862 in incurred costs questioned by the Navy; (2) whether the 16 percent rate of profit proposed by Fluor is reasonable; and (3) whether the award to Fluor should be offset by $114,378 for what the Navy calls "Costs to Recoup." Regarding these three issues, we conclude that Fluor has established, by a preponderance of the evidence, that it is entitled to the costs questioned by the Navy. We further conclude that a profit rate of 16 percent is not reasonable based upon the record in this appeal. Instead, we apply a rate of nine percent. Finally, we conclude that the offset proposed by the Navy is unsubstantiated and we do not reduce Fluor's award by that amount. In light of these conclusions, we sustain the appeal, in part, and make an award to Fluor in the amount of $9,633,889.53, plus interest in accordance with the CDA.

FINDINGS OF FACT

I. The Contract and the Entitlement Decision (ASBCA No. 61353)

1. In December 2011, the Naval Facilities Command (NAVFAC) Southeast awarded Fluor Contract No. N69450-12-D-7582 to provide regional base operations support at four Naval installations in the Jacksonville, Florida area, including two of the largest Naval installations in the United States (R4, tab 17 at GPV 12449; tab 18.126.1 at GOV19499).[1] *Fluor Fed. Sols., LLC*, 19-1 BCA ¶ 37,237 at 181,247. The parties refer to the contract as the RBOS I contract.

2. The RBOS I contract contemplated a period of performance of a base year, four option years, and three award option years. *Fluor Fed. Sols., LLC*, 19-1 BCA ¶ 37,237 at 181,247. Performance of the contract began in July 2012. *Id.* at 181,249. The fourth and final option year ran from July 2016 through June 2017. *Id*. The Navy did not exercise award option years 1 or 2 and deleted them from the contract. *Id*.

3. In April 2017, as the contract came to a close, the Navy unilaterally modified the award option plan to give itself the ability to exercise award option year 3. *Id.* Fluor objected to the modification, arguing that such action was not permitted under the contract. *Id.* Notwithstanding its objection, Fluor stated that it was willing to negotiate a bilateral agreement for continued performance. *Id.* Alternatively, Fluor stated that, if the Navy refused to negotiate a bilateral agreement, Fluor would file a claim for its allowable costs, plus profit, for the continued performance. *Id.*

4. On June 28, 2017, mere days prior to the expiration of the final option year, the Navy issued a unilateral modification exercising award option year 3 with a period of performance from July 2017 through June 2018. *Id.* at 181,250. The Navy subsequently extended Fluor's performance an additional six months through December 2018.

5. Fluor objected to the Navy's exercise of the award option year. *Id.* at 181,249-50. On July 25, 2017, Fluor submitted a certified claim for the work anticipated to be performed under the modification. *Id.* at 181,250. (*See also* R4, tab 47.6 at GOV26023-32) The claim included an estimate of the costs to be incurred, plus profit. *Fluor Fed. Sols., LLC*, 19-1 BCA ¶ 37,237 at 181,250. The Navy did not issue a final decision.

[1] The four installations covered by the ROBS I contract were: Naval Air Station Jacksonville, Naval Station Mayport, the Bureau of Medicine and Surgery, and Blount Island Command Jacksonville (R4, tab 17 at GOV12449).

6. Fluor appealed the deemed denial of its claim to the Board, which was docketed as ASBCA No. 61353. In January 2019, the Board granted summary judgment in Fluor's favor, holding that the Navy had no authority to unilaterally change the award option plan, and that the Navy's purported exercise of the award option year was unenforceable. *Id.* at 181,253. We remanded the appeal to the parties to determine quantum.

II. The Quantum Appeal (ASBCA No. 62344)

7. In January 2020, Fluor informed the Board that the parties were unable to successfully negotiate quantum. As a result, we docketed this appeal. The Board subsequently issued an Order of Proof of Costs, which directed Fluor to furnish a complete and detailed statement of claimed costs and the Navy to furnish a response. With respect to the Navy's response, our Order provided that "[t]he lack of response to any cost item or component thereof claimed by appellant shall be deemed an admission" (Bd. order dtd. Feb. 12, 2020, at 2).

8. In February 2020, Fluor submitted its statement of costs, which included claimed quantum for the invalid option year at issue here, as well as the six-month extension of Fluor's services (app. supp. R4, tabs 501-02). Because the six-month extension was not considered by the Board in the underlying entitlement decision, we concluded that it was outside the scope of this appeal (Bd. order dtd. Sept. 28, 2020; tr. 1/7).[2] We do not further address the six-month extension in our decision here.

9. Prior to submitting its response to Fluor's statement of costs, the Navy requested an audit from the Defense Contract Audit Agency (DCAA). Around this same time, the parties also engaged in a brief period of discovery. During discovery, Fluor furnished an expert report prepared by The Kenrich Group LLC (Kenrich) (app. supp. R4, tabs 529-32).[3] The Navy did not submit an expert report.

10. In August 2020, a few days prior to close of discovery, DCAA issued its report, in which it questioned less than one percent of Fluor's claimed incurred costs (R4, tab 50 at 13; tr. 3/74). More precisely, it questioned $481,862 in incurred costs based on its conclusion that Fluor did not provide sufficient documentation to permit

[2] Fluor's claim for costs associated with the six-month extension of services was the subject of our decision in *Fluor Federal Solutions, Inc.*, ASBCA No. 62343, 23-1 BCA ¶ 38,302, in which we granted summary judgment in Fluor's favor. An appeal involving the quantum associated with the six-month extension is separately pending before the Board as ASBCA No. 62343-QUAN.

[3] Fluor represents that Kenrich has been acquired by HKA Global, Inc. (HKA) (app. br. at 8 n.5). For consistency sake, we continue to refer to the firm as Kenrich.

DCAA to verify whether the costs were allowable, allocable, and reasonable (tr. 3/74, 80).

11. After the close of discovery, Fluor submitted an amended statement of costs (app. supp. R4, tabs 535-36), and the Navy submitted its response (R4, tab 64). Fluor's claim (and statements of costs) included quantum for both contract line item numbers (CLINs) that were part of the invalid option year: the firm-fixed price CLIN 11 and the indefinite-delivery, indefinite-quantity (IDIQ) CLIN 12. During the pendency of this appeal, however, the parties resolved their dispute involving CLIN 12 (joint stipulation dtd. Dec. 10, 2020; app. br. at 1 n.1). Accordingly, only CLIN 11, the firm-fixed price CLIN, is before us in this appeal (app. br. at 1; tr. 1/7). We deem Fluor's claim for damages associated with CLIN 12 to be withdrawn.

12. With respect to CLIN 11, the Board conducted a three-day hearing virtually on October 28-29 and December 11, 2020. During the hearing, Fluor presented testimony from three fact witness and expert testimony from Greg S. Bingham, who, at the time, was a Partner and the Co-Lead of Kenrich's Government Contracts Group.[4] The Board accepted Mr. Bingham as an expert in federal cost and pricing, as well as claims quantification (tr. 2/19). The Navy presented testimony from two fact witnesses.

III. Fluor's Quantum Calculation

13. Fluor retained Kenrich to calculate the quantum for its claim (app. br. at 8; app. supp. R4, tab 532 at 3). Kenrich calculated the quantum, including profit, based on data from Fluor's accounting system, discussions with Fluor personnel, and a review of relevant documents, regulations, and industry guidance (app. supp. R4, tab 532 at 3, 14, 18; tab 531; tr. 1/29, 45, 52, 54, 56, 57, 60, 68-74; 2/35).

14. Fluor provided ample evidence establishing the reliability and adequacy of its accounting system for determining incurred costs and payments for its contracts and other final costs objectives, including CLIN 11 (*see* app. br. at 11-13; app. supp. R4, tabs 511, 521, 524; 528, 532 at 9-13; tr. 1/30-62, 124-26; 2/24-34, 101-02, 188-89). Fluor holds contracts subject to full Cost Accounting Standards (CAS) coverage and its accounting and other subsidiary systems from which the claim amounts were extracted are subject to regular audits by the Defense Contract Management Agency (DCMA) and DCAA (tr. 1/32-34, 190).[5] The Navy does not dispute this evidence

[4] Mr. Bingham is currently a partner and co-leader of HKA's Government Contracting practice (app. br. at 8 n.5).

[5] Fluor's accounting system was approved by DCMA in November 2017 (R4, tab 521 at KEN141; tr. 1/32, 2/28-29) and DCAA issued approved provisional billing indirect rates for Fluor for the years relevant to CLIN 11 (tr. 1/33-34, 2/30;

(gov't resp. to app. statement of fact (ASOF) ¶¶ 25-29). (*See also* tr. 3/36-38 (DCAA auditor describing steps taken to establish the reliability of data provided by Fluor)).

15. With respect to the CLIN 11, Kenrich calculated that Fluor is entitled to $12,784,549, plus interest (app. supp. R4, tab 538; tr. 2/34-35, 105). This amount is based on a 16 percent profit rate and reflects the difference between Fluor's claimed incurred costs, plus profit, and the total amount of Navy payments for CLIN 11, which were $[redacted] (app. supp. R4, tab 538 at 3; tr. 2/35-38).[6]

16. Fluor's claimed quantum is summarized in the following table:

FLUOR'S QUANTUM CALCULATION FOR CLIN 11		
Quantum Element	**Explanation of Computation**	**Amount**
1. Direct Labor	Computed by identifying the actual Fluor direct labor costs.	$[redacted]
2. Materials, Equipment, Subcontracts, and Other Direct Costs	Computed by identifying the actual materials, equipment, subcontracts, and other direct costs.	$[redacted]
3. Indirect Costs	Computed by identifying the actual costs for fringe benefits, overhead, and general & administrative costs.	$[redacted]
Total Claimed Incurred Costs	**Sum of elements 1 through 3.**	$[redacted]
4. Profit	Computed by multiplying Fluor's total claimed costs (quantum elements 1 through 3) by a 16 percent profit factor.	$[redacted]
Subtotal	**Sum of elements 1 through 4.**	$[redacted]
Total Government Payments	Computed by identifying the total payments made by the Navy.	$[redacted]
Claim Amount	**Computed by subtracting the government payments from the subtotal.**	**$12,784,549**

(App. br. at 10-11; app. supp. R4, tabs 538, 539; tr. 1/68-75, 2/34-40)

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app. supp. R4, tabs 508-510, 532). Moreover, in DCAA's most recent audit of Fluor's indirect costs and indirect rates for 2017, issued in 2019, DCAA took no exception to Fluor's proposed costs (ex. A-10; app. supp. R4, tab 532 at 12; tr. 1/33-34, 2/31-33).

[6] Citations to pages in tab 538 of appellant's Rule 4 supplement are to the pdf pages.

17. To determine Fluor's total claimed incurred costs (*i.e.*, $[redacted]), Kenrich used a "top-down" method (app. supp. R4, tab 532 at 17). Kenrich started with the total incurred direct and indirect costs for CLIN 11 recorded in Fluor's accounting software, Deltek Costpoint (Costpoint) (app. supp. R4, tabs 532 at 17; 539 at 3; 511). Then, Kenrich removed certain direct costs that Fluor did not claim, such as costs that Fluor classifies as unallowable and unbillable in accordance with its accounting policies and procedures and Part 31 of the Federal Acquisition Regulation (FAR) (app. supp. R4, tabs 532 at 17-20; 539 at 3; 511 at KEN124; 524; tr. 1/56-60, 100-01, 3/40-41). Next, Kenrich removed an estimated amount for indirect costs associated with the unclaimed direct costs (app. supp. R4, tabs 532 at 17-20; 539 at 3; *see also* tr. 2/103-04). Finally, Kenrich subtracted the unclaimed costs from the total incurred costs to determine the total claimed costs (app. supp. R4, tab 532 at 19; tr. 2/104), which it determined to be $[redacted] (app. supp. R4, tabs 538, 539; tr. 3/37). We find this to be a reasonable method to determine total claimed incurred costs.

18. Regarding total claimed incurred costs, the Navy does not rebut the reasonableness of Kenrich's approach or the overall sources of information relied upon by Kenrich (gov't resp. to ASOF ¶¶ 17-20). Instead, as discussed in more detail in the next section, the Navy challenges only the costs questioned by DCAA (gov't resp. to ASOF ¶¶ 20, 32, 37; R4, tab 64 at GOV28031). In other words, the Navy concedes that Fluor is entitled to 99 percent of its claimed incurred costs.

19. Regarding profit, Kenrich determined that a profit rate of 16 percent was reasonable (app. supp. R4, tab 532 at 21). Kenrich's opinion was based on its experience calculating and evaluating profit rates, its review of industry data, and its application of the weighted guidelines method described in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) 215.404-71 (*id.* at 20-30). Applying this rate to the total claimed costs, Kenrich calculated a profit of $[redacted] (app. supp. R4, tab 538 at 3; tr. 2/38, 104). The Navy does not dispute that Fluor is entitled to reasonable profit but argues that a 16 percent rate of profit is unreasonable and would result in a windfall for Fluor (gov't br. at 5, 12).

20. The final two major elements of Fluor's quantum—total government payments and CDA interest—are not in dispute. The parties agree that the government has made prior payments in the amount of $[redacted] (app. br. at 11; GPFOF ¶ 15; tr. 2/28). The parties further agree that Fluor is entitled to interest calculated from the date of its claim until payment (app. br. at 10-11; gov't resp. to ASOF ¶ 23).

IV. Areas of Dispute

21. As noted in the opening paragraphs of this decision, the Navy contends that Fluor is entitled to $6,740,769, plus interest (gov't br. at 1). To arrive at this

amount, the Navy adopts the same methodology as Fluor to determine quantum. Specifically, the Navy agrees that Fluor is entitled to its incurred costs, plus reasonable profit, less prior payments by the Navy (gov't br. at 1; gov't statement of fact (GSOF) ¶ 15). There are three areas of dispute, however, that result in the lower quantum proposed by the Navy. First, the Navy questions $481,862 of Fluor's total claimed incurred costs for CLIN 11. Second, the Navy argues that a 16 percent profit rate is not reasonable and counters that a four percent profit rate should be applied. Finally, the Navy asserts that Fluor's claim should be offset by $114,378 for what the Navy calls "Costs to Recoup." We address these areas of dispute in turn below.

A. Questioned Costs

22. In its report, DCAA questioned $481,862 of Fluor's incurred costs for CLIN 11 (R4, tab 50 at 13; tr. 3/38-39).[7] The Navy challenges only these costs, which are set forth in the following table:

Categories of Costs Questioned by the Navy	Amount Questioned
Direct Costs:	
Retention and Performance Bonuses	$[redacted]
Arbitration Award and Legal Settlement	$[redacted]
Attorneys' Fees	$166,812
Corporate Reachback Services	$[redacted]
Directly Associated Indirect Costs	$[redacted]
TOTAL	**$481,862**

(R4, tab 50 at 14, 22, 25-26; GSOF ¶¶ 3-7)[8]

[7] DCAA took no exception to Fluor's claimed material and subcontractor costs (R4, tab 50 at 17, 20-21). It also took no exception to Fluor's indirect cost calculation (*id.* at 25-26).

[8] Initially, the Navy also disputed Fluor's entitlement to $126,506 in "trailing costs," and instructed DCAA not to audit these costs (R4, tab 64, at 4 n.1; tab 50 at 3, 5; gov't pre-hearing br. at 2; app. br. at 2 n.3, 15-16). During the hearing, however, the Navy represented that it no longer contested Fluor's entitlement to these costs (tr. 3/77; *see also* gov't br. at 1 n.1; gov't resp. to ASOF ¶ 39; GSOF ¶ 15). Thus, we do not consider these costs to be disputed.

Retention and Performance Bonuses

23. Fluor's quantum includes $[redacted] for retention and performance bonuses paid to 10 employees (app. br. at 16; R4, tab 50 at 14, 16; tab 60, "Bonus Review").[9] The Navy questions $[redacted] of this amount (gov't br. at 12-13; R4, tab 50 at 14, 16). More specifically, the Navy questions $[redacted] (out of a total $[redacted]) in retention and performance bonuses paid to Fluor's Project Manager and $[redacted] (out of a total $[redacted]) in retention and performance bonuses paid to Fluor's Health, Safety, and Environment (HSE) Representative at Naval Station Mayport (gov't br. at 12-13; R4, tab 60, "PSSC" and "Bonus Review"). The Navy contends the amounts are unreasonable (gov't br. at 12-13).

24. As one might expect, Fluor uses retention bonuses as a tool to retain employees on a project and in their current role for a specified period (tr. 1/157). Fluor provides performance bonuses to employees to recognize them for completed work (tr. 1/160). With respect to the bonuses at issue here, Fluor paid the bonuses pursuant to negotiated agreements with the employees and in accordance with Fluor's established policies (tr. 1/157-68, 3/81-82; R4, tabs 60.3; 60.6; 60.7; 60.13; 50 at 16; 60, "PSSC").

25. To determine the appropriate value of a bonus for a particular employee, Fluor considers several factors. Fluor considers the amount the employee would accept to remain on the project (tr. 1/157; R4, tab 50 at 16), as well as the value Fluor believes the employee would provide to the project (tr. 1/157).[10] Bonus amounts also vary depending on the employee's specific role, responsibility, and level of seniority on the contract (R4, tab 60, "Bonus Review;" tr. 1/154-155). Fluor also considers whether the amount is consistent with bonuses paid to other employees within Fluor's organization with similar levels of seniority and technical expertise (tr. 1/159-61, 163-64, 167-68).

26. The record reflects that Fluor adhered to this methodology in awarding the bonuses paid here. Employees who received bonuses under CLIN 11 had different roles, responsibilities, and levels of seniority and salary on the contract (R4, tab 60, "Bonus Review;" tr. 1/154-155), and the amount paid to each employee varied accordingly (R4, tab 60 "Bonus Review"). Fluor's Project Manager received the largest retention and performance bonuses (*id.*). He was also the most senior of the

[9] Tab 60 is a Microsoft excel spreadsheet provided in native format. It does not contain page numbers. We cite the title of the relevant spreadsheet tab, as needed.

[10] The DCAA auditor, who testified on behalf of the Navy, agreed such factors are appropriate to consider in determining the value of a retention or other bonus (tr. 3/86).

employees receiving bonuses (tr. 1/155). As Project Manager, he led the entire project, had oversight over the contract at all locations, supervised Fluor's direct employees and subcontractors, and was responsible for profit and loss (tr. 1/154, 156; R4, tab 60.1). Fluor viewed the Project Manager as a "proven asset," someone who had performed well on a similar Navy base operations support contract and whose technical knowledge and experience was "critical" to Fluor's successful performance of the RBOS I contract (tr. 1/157).

27. As noted above, the other bonuses questioned by the Navy were paid to Fluor's HSE Representative at Naval Station Mayport (tr. 1/161). This employee served as the "key" safety representative at Mayport and played an integral part in Fluor's successful performance of the contract (tr. 1/163). As such, Fluor wanted to ensure that it retained the employee's services and critical knowledge of the HSE industry to support the contract (*id*).

28. Other individuals who received bonuses during the invalid option year included estimators, planners, office managers, and the Project Manager's deputies (R4, tab 60, "Bonus Review;" tr. 1/154-55), *i.e.*, "lower-level" employees who were less senior to the Project Manager (tr. 1/155). The bonuses paid to these individuals were less than those paid to the Project Manager and, with two exceptions, less than those paid to the HSE Representative (R4, tab 60, "Bonus Review").[11] The record shows, therefore, that the amounts paid to different employees were based, in part, on the employee's role, responsibility, and level of seniority on the contract—factors we consider to be reasonable.

29. Further, the bonus amounts paid to employees under CLIN 11 were consistent with bonuses paid to other employees within Fluor's organization with similar levels of seniority and technical expertise (tr. 1/159-61, 163-64, 167-68). Additionally, with respect to the Project Manager, in particular, the bonuses he received during the invalid option year were consistent with prior bonuses he received (R4, tab 60.13 at 3).

30. Also relevant to the reasonableness of the claimed bonus costs is the unrebutted testimony of Gregory Ahlstrom, Fluor's Business Manager, who testified that employee attrition was of significant concern to Fluor during the performance of CLIN 11 (tr. 1/95; *see* gov't resp. to ASOF ¶ 11)[12] In this respect, Mr. Ahlstrom

[11] On their face, the two exceptions appear consistent with Fluor's approach to determining the appropriate value of bonuses.

[12] Although the Navy "disputes" this evidence, it fails to point to any evidence to support its challenge (gov't resp. to ASOF ¶ 11). Thus, we find that it has failed to adequately rebut Fluor's statement of fact. On that note, our review of the Navy's responses to Fluor's statements of fact shows that out of the 123

explained that, when the Navy exercised the invalid option year, Fluor anticipated that the option year would be the final performance period on the contract (*id.*)—the logical inference being that employees (including the Project Manager) might leave Fluor's employment prematurely to secure follow-on employment. Mr. Ahlstrom also testified that Fluor believed the Navy was actively recruiting Fluor employees to go work for the Navy during Fluor's performance of CLIN 11 (*id.*).

31. In its report, DCAA questioned $[redacted] of the claimed bonus costs for the Project Manager and the HSE Representative on the basis that it could not determine whether the amounts were reasonable (R4, tab 50 at 14, 16; tr. 3/42-50). In challenging the reasonableness of the bonus amounts, DCAA used a multi-step methodology to arrive at a "reasonableness threshold" that it applied to reduce the bonus costs claimed for these two employees (R4, tab 60, "PSSC"; tr. 3/42-47). We do not address DCAA's methodology in any great detail because the Navy, in its post-hearing brief, does not advance the objections made by DCAA to these costs or argue in support of DCAA's methodology for reducing the bonus amounts (gov't br. at 12-13).[13] Rather, the Navy

statements of fact proposed by Fluor, the Navy responded with a citation to the record in only five instances (gov't resp. to ASOF ¶¶ 34-36, 53, and 62). To be clear, the majority of the time, the Navy did not dispute the statement (*see e.g.*, *id.* ¶ 1), or challenged only the relevance (not the accuracy) of the factual assertion (*see e.g., id.* ¶ 10). That said, when the Navy did dispute the accuracy of an assertion, it failed in all but five instances to provide any factual support (*see e.g.. id.* ¶ 57). The Board bases its findings on the factual record. Unsupported allegations in post-hearing briefs do not constitute evidence. For this reason, consistent with the Board's longstanding evidentiary requirements, the Board's Post-Hearing Briefing Order in this appeal directed the parties to provide a citation to the record to support all factual assertions (Order dtd. Dec. 15, 2020). The Navy, for the most part, failed to do so.

[13] Suffice it to say, however, there are several problems with DCAA's methodology. The applied methodology was not based on an industry standard or guidance, or an industry-accepted methodology for evaluating compensation (tr. 3/82-83). Instead, it was based on advice received from an unnamed DCAA "quality person" (tr. 3/83, 85), whose credentials were not disclosed in the DCAA audit report or otherwise by the Navy. Additionally, DCAA did not compare the bonus amounts paid to the total base salary for each employee or to the total compensation for each employee (tr. 3/83, 95-96). DCAA also did not evaluate the work each employee receiving a bonus performed on the contract, nor did DCAA consider the relative value of the employees to Fluor or the Navy (tr. 3/83-84, 95-96). Rather, DCAA assumed that the employees provided equal value (tr. 3/84). DCAA also did not compare the questioned bonus costs to market-survey information or other benchmarks (tr. 3/83).

pursues a different objection, namely that the bonus costs are unreasonable because Fluor did not contemporaneously prepare a written reasonableness analysis before incurring the costs.

Arbitration Award and Legal Settlement

32. Fluor's CLIN 11 quantum includes $[redacted] for costs incurred in connection with union grievance disputes with two former employees assigned exclusively to the RBOS I contract (app. br. at 21; R4, tab 50 at 14, 16-17, 24-25; tr. 1/169-77). The Navy questions the entire amount (gov't br. at 14-15).

33. Specifically, Fluor paid a $[redacted] arbitration award and a $[redacted] settlement in connection with the grievances (R4, tab 50 at 14, 16-17, 24-25; tab 51, "Legal Settlements Testing;" tab 60, "PSSC; tabs 52, 55, 60.14; tr. 1/169-77). Unrebutted testimony established that neither grievance alleged (nor were there any findings) that Fluor engaged in fraud or discriminated against the employees on the basis of race, color, religion, sex, sexual orientation, gender identify, or national origin (tr. 1/171-72, 176; *see* gov't resp. to ASOF ¶¶ 57-58).

34. Additionally, the parties do not dispute that Fluor terminated the employment of both employees before the start of the invalid option year (app. br. at 21-22; gov't br. at 14-15; tr. 1/185-86). The parties also do not dispute that the grievances were resolved during the invalid option year (*id.*). The arbitration award was issued on February 1, 2018 (R4, tab 52), and the settlement was executed on February 26, 2018 (R4, tab 53). Finally, there is no dispute that Fluor paid the arbitration award and settlement amount during the invalid option year (app. br. at 21-22; gov't br. at 14-15; *see also* R4, tab 51, "Legal Settlements Testing;" tab 60.14; ex. A-8, tab "2018," rows "136785" and "42334").[14] Consistent with its disclosed accounting practices and DCMA-approved accounting system, Fluor directly allocated the costs to CLIN 11 (tr. 1/100-01).

35. The Navy raises a single objection to these costs, arguing that Fluor "did not incur these costs during the Award Option period" because the employees "never worked during the Award Option period" (gov't br. at 15).

Attorneys' Fees

36. Fluor's CLIN 11 quantum includes $166,812 for attorneys' fees paid to two law firms, referred to hereinafter as "Firm A" and "Firm B" (app. br. at 24;

[14] Tab 51 and Fluor's hearing exhibit A-8 are both Microsoft excel spreadsheets produced in native format. Where relevant, we provide citations to the applicable tab and row.

ex. A-5; R4, tab 50 at 24). Firm A provided legal advice and other services to Fluor regarding labor relations with the union whose members performed services in support of CLIN 11 (ex. A-5; tr. 1/99, 177-78). Firm B provided legal advice and other services related to contract administration activities, such as assisting with Fluor's evaluation of and responses to Navy letters and the unilateral contract modifications executed by the Navy (ex. A-5; tr. 1/99). Although the invoices for the legal services are partially redacted (R4, tabs 56, 57, 57.1-57.26), unrebutted testimony established that the claimed costs do not include costs that could be considered unallowable, such as claim prosecution costs (tr. 1/99-100, 134-35, 145-46, 177-78; *see also* ex. A-5; tr. 2/93-94; gov't resp. to ASOF ¶¶ 65-67) Rather, the claimed costs for legal services are limited to costs associated with contract administration (tr. 1/100, 145-46, 177-78; gov't resp. to ASOF ¶¶ 65-67). Moreover, Fluor implemented sufficient internal controls to ensure that costs related to claim prosecution were excluded from Fluor's claim (tr. 1/99-100, 134-35, 145-46, 177-78; 3/139).

37. Although some of the services were provided before the invalid option year began (*see e.g.*, R4, tabs 57.13, 57.14; tr. 1/135-36), unrebutted testimony established that Fluor received the invoices in question during the invalid option year and, consistent with its disclosed accounting practices and DCMA-approved accounting system, Fluor directly allocated the costs to CLIN 11 (tr. 1/100-01, 1/146-47, 3/94-95; gov't resp. to ASOF ¶ 68). In this regard, Fluor's disclosed accounting practice was to record costs at the time the invoice was received, reviewed, and approved (tr. 1/146).

38. Fluor's expert, Mr. Bingham, testified that it is common for companies to incur legal fees of this nature and that such fees are allowable costs provided they comply with FAR 31.205-33 and 31.205-47 (tr. 2/94). Mr. Bingham also testified that it was typical to redact privileged information and that there were other means of verifying the costs, including the internal controls of the company (tr. 2/95, 186-88). Mr. Bingham stated that, in his opinion, it was appropriate to include the claimed costs in the CLIN 11 quantum (tr. 2/93-94). We find this testimony helpful.

39. The Navy questions the costs on two grounds (gov't br. at 13-14). First, the Navy contends that the costs were not incurred during the invalid option year. Second, the Navy contends that Fluor failed to provide sufficient documentation to permit an auditor to determine whether the costs are allowable, allocable, and reasonable.

Corporate Reachback Services

40. Fluor's CLIN 11 quantum includes $[redacted] in direct labor costs for what Fluor refers to as "corporate reachback" services, *i.e.*, services provided at the corporate level that were required for Fluor's performance of CLIN 11 (app. br. at 26;

tr. 1/104-07, 178-79, 193, 2/91, 3/68; ex. A-6). These services were provided by employees of Fluor Government Group (FGG), which is a group within a separate corporate entity, Fluor Federal Services, Inc. (tr. 1/104, 110-11, 193; R4, tab 50 at 22, 25; tabs 58.1, 58.7; exs. A-6, A-7).

41. FGG employees provided reachback support to Fluor in functional areas that Fluor does not generally maintain, such as information technology, security, and document retention (tr. 1/104-06, 110-11; R4, tabs 58.1, 58.7; exs. A-6, A-7). These employees also provided reachback support to supplement Fluor's resources in other functional areas, such as contracts, human resources, and finance (tr. 1/107, 110-11; R4, tabs 58.1, 58.7; exs. A-6, A-7). FFG employees supported Fluor's performance of CLIN 11 by providing services in the aforementioned functional areas during workload peaks or because work in the relevant functional area was not substantial enough to necessitate a full-time equivalent Fluor employee (tr. 1/107, 1/178-79).

42. Fluor Federal Services (the parent company) invoiced Fluor (appellant) for the corporate reachback services provided by the FGG employees, and the record includes proof of payment by Fluor (R4, tabs 50 at 25; 59-59.85; tr. 1/115-22). The invoices include information reflected in the employee timesheets, including the employee's name, functional area (*e.g.*, contracts, human resources, security), date of services, hours worked, relevant charge code (*i.e.*, network and network activity) (*see e.g.*, R4, tabs 59.2, 59.3; tr. 1/115-22).

43. We find that Fluor provided ample evidence to establish that the FGG employees performed work in direct support of CLIN 11, including unrebutted testimony and source documents describing the timekeeping policies of the Fluor Federal Services (the parent company) to ensure its employees' time was accurately recorded and reflected the work performed (app. br. at 26-29; tr. 1/104-22, 180-83, 193-207, 209-10; ex. A-9). The Navy does not dispute this evidence or rebut it (gov't resp. to ASOF ¶¶ 72-80).

44. Moreover, in 2017 and 2018, DCAA conducted a specialized incurred costs audit, known as a Mandatory Annual Audit Requirements (MARR) 6 Audit or "floor check," to evaluate Fluor Federal Services' (the parent company) internal controls regarding its timekeeping system (tr. 1/204-06). The purpose of a floor check, among other things, is to verify the existence of employees who charge to the contract, to confirm the allocability of the time charges on employee timesheets to cost objectives, and to evaluate the contractor's timekeeping internal control procedures (tr. 1/204-05, 2/92-93). As part of a floor check, DCAA reviews timesheets and work authorizations (tr. 1/205-06). As noted, DCAA conducted a floor check of Fluor Federal Services in 2017 and 2018 and did not identify internal control weaknesses or

question the allocability of the corporate reachback costs (tr. 1/206-07). The Navy does not dispute this evidence (gov't resp. to ASOF ¶ 76).

45. Finally, Mr. Bingham also credibly testified that he reviewed the corporate reachback costs and concluded that they were properly allocated to CLIN 11 and not duplicative of any indirect costs (tr. 3/98-100). He explained that such duplication is the type of systematic error that would be discovered in a DCAA floor check (*id.*), which, as we stated in the preceding paragraph, DCAA did not find. Mr. Bingham also explained that the relevant business segments are CAS covered and are required to disclose their accounting practices and undergo compliance audits (tr. 3/99-100). A "double-billing" or duplication of costs would be precluded by the accounting systems used and would be identified in an audit of an incurred cost submission (*id.*). Mr. Bingham testified that Fluor's incurred cost submission for the relevant period was approved (tr. 3/99). Although the Navy contends that we should afford no weight to Mr. Bingham's testimony because "he is not an auditor" (gov't resp. to ASOF ¶ 80), we disagree. Mr. Bingham is more than qualified to offer such opinions.

46. The Navy questions the corporate reachback costs on two grounds (gov't br. at 16-17). First, the Navy argues that there is a "heightened risk" that the corporate reachback costs may be duplicative of Fluor's indirect costs. Second, the Navy argues that Fluor provided insufficient documentation to show the contract derived a benefit from these costs.

Directly Associated Indirect Costs

47. Finally, Fluor's CLIN 11 quantum includes $[redacted] in claimed indirect costs (app. supp. R4, tab 538 at 3; R4, tab 50 at 13). The indirect costs were calculated by multiplying Fluor's direct costs by its DCMA-approved indirect rates (app. supp. R4, tab 538 at 5, app'x. B). The calculation was performed in Fluor's Costpoint accounting system (*id.*).

48. DCAA took no exception to the methodology used by Fluor to calculate the indirect costs included in Fluor's CLIN 11 quantum or the indirect rates used by Fluor in its calculation (R4, tab 50 at 26; tr. 2/75-76, 99; gov't resp. to ASOF ¶ 84).[15]

[15] The record suggests that DCAA adopted a different methodology than Fluor for calculating indirect costs that resulted in a slightly lower amount (gov't resp. to ASOF ¶ 84; ex. A-1; tr. 1/14-15, 2/75-76). Fluor contends that DCAA calculated an amount that was approximately $24,000 lower (ex. A-1; tr. 1/14-15, 2/75-76), and the Navy contends the amount was approximately $26,000 lower (gov't resp. to ASOF ¶ 84). In its post-hearing brief, the Navy does not contest the methodology used by Fluor and does not argue that Fluor's quantum

Rather, because DCAA questioned certain Fluor CLIN 11 direct costs, it questioned the "directly associated" indirect costs (R4, tab 50 at 26-27). For CLIN 11, DCAA questioned $[redacted] in directly associated indirect costs (*id.*). The Navy does not advance any further reason to question these costs (gov't resp. to ASOF ¶¶ 81-85).

B. Disputed Profit Rate

49. The next area of dispute concerns profit. Fluor contends that a 16 percent rate of profit is reasonable considering the nature of the work and the risks involved in performing CLIN 11 of the invalid option year. The Navy counters that a four percent rate is reasonable. Before discussing the parties' respective positions, we must address the weight we afford to the testimony of the two witnesses who testified regarding profit: (1) Mr. Bingham, Fluor's expert, and (2) Mr. Stevens, a Supervisory Contract Specialist for NAVFAC Southeast, who the Navy called as a fact witness.

50. We begin with Fluor's expert, Mr. Bingham. As noted above, the Board accepted Mr. Bingham as an expert in federal cost and pricing, as well as claims quantification (tr. 2/19). Mr. Bingham has extensive experience in developing and evaluating profit positions and negotiating profit on requests for equitable adjustments, change orders, claims, termination settlement proposals, and new contractor proposals (app. supp. R4, tabs 523 at 22; 530; tr. 2/13-15, 56; gov't resp. to ASOF ¶ 89). Indeed, Mr. Bingham has firsthand knowledge of the profit rate earned by contractors on the more than 1,000 contracts he has reviewed over the past 34 years (tr. 2/13-14; 3/101). Mr. Bingham also lectures and teaches courses on the development and evaluation of profit. He has previously offered testimony regarding profit, which has been found to be credible and sound. (App. supp. R4, tab 532 at 22-23; tr. 2/9, 13-16, 42-43, 56, 69; 3/101, 109) Although we downwardly adjust the profit rate proposed by Mr. Bingham, we generally find his testimony regarding profit to be credible, well-founded, and reliable.

51. For its part, the Navy offered no contrary expert testimony on the issue of profit. Instead, the Navy called Mr. Stevens as a fact witness to discuss the appropriate rate of profit to be assigned here. During the RBOS I contract, Mr. Stevens primarily provided reachback support, as needed, to the Administrative Contracting Officer (ACO) of the Jacksonville Public Works Department (tr. 2/207, 214, 277-78). He assumed the duties of the ACO for the Jacksonville Public Works Department in the final two months of the invalid option year, approximately May 2018 (tr. 2/215, 277-78). Despite his involvement with the RBOS I contract, it is undisputed that Mr. Stevens has no experience negotiating or evaluating profit (gov't resp. to ASOF ¶ 109-10). Our review of the record before us demonstrates that

should be reduced by this amount. Thus, we consider waived any argument by the Navy regarding this discrepancy.

Mr. Stevens has no experience evaluating profit under the specific circumstances presented here (tr. 2/272-73, 278-80). Mr. Stevens has never used the DFARS weighted guidelines to evaluate claimed profit (tr. 2/232-33, 279), and he did not perform a weighted guidelines analysis here to evaluate Fluor's claim (*id.*, 2/243; *see also* gov't resp. to ASOF ¶ 114). For these reasons, we afford little weight to Mr. Stevens's opinions regarding the appropriate rate of profit to apply for CLIN 11.

52. Having addressed the weight we afford to the testimony regarding profit, we next find it helpful to discuss the various profit rates previously established on the contract and their relevance to our analysis here.

Profit Rate in Fluor's Proposal (Three Percent)

53. At the time of award, the profit rate included in the contract for firm-fixed price work was three percent (tr. 1/76). This was based on the rate of profit proposed by Fluor in its proposal (tr. 1/76, 129). Fluor's decision to propose this rate was not based upon an analysis of the DFARS weighted guidelines (tr. 1/77-78). Rather, it was based upon several factors (tr. 1/76-77, 129). For instance, Fluor considered the financial benefit it wished to realize on the contract (*id.*). The most important factor influencing Fluor's judgment regarding profit, however, was the competitive procurement environment (*id.*). To obtain the award, Fluor had to ensure that the rate of profit it elected to include in its proposal would not result in a total proposed price that might render its proposal non-competitive (*id.*). In other words, like all contractors competing in a multi-offeror procurement, Fluor had to consider what "total proposed price would win the contract" (tr. 1/76; 2/171, 197; 3/101-02, 134). The Navy does not dispute this evidence (gov't resp. to ASOF ¶ 105).

54. It is clear from the record that Fluor's decision to include a three percent rate of profit in its proposal was influenced by the competitive procurement environment and did not reflect all the risks and other factors that might warrant a higher rate for performance of the RBOS I contract (tr. 1/76-79, 129; 2/171-72, 197). How much Fluor's decision was influenced is difficult to assess from the record before us. It is worth noting, however, that within the first year of contract performance, the parties negotiated a seven percent profit rate for firm-fixed price work on change orders (ex. A-3; tr. 1/78, 84, 130, 132-33). Hence, while a three percent rate of profit was "acceptable" to Fluor to obtain the award (tr. 1/129), the parties' course of dealings suggest that a seven percent rate of profit more accurately reflected their respective assessments of what was fair and reasonable for this contract.

55. Regarding the three percent profit rate included in Fluor's proposal, Mr. Bingham also credibly testified that the rate was of "little relevance" in determining the appropriate rate for the invalid option year (tr. 2/138; 3/101-02). He explained that, as a general matter, the rate included in the underlying contract at the

time of award is not particularly relevant in the context of an equitable adjustment because that rate is calculated at a different time and under different circumstances (tr. 2/138; 3/101-02, 134-35). Mr. Bingham further explained that, for this reason, contracting parties typically will not use the profit rate included in the underlying contract when negotiating modifications to the contract, particularly where the modification is not considered a small or minor modification in terms of work (tr. 2/139-40). Mr. Bingham's testimony in this regard is consistent with the parties' conduct during the RBOS I contract, *i.e.*, the parties negotiated a different profit rate for modifications. Mr. Bingham also stated that each equitable adjustment should be evaluated independently and that what is considered reasonable for an equitable adjustment may not be the same as the rate for the underlying contract (tr. 2/44). With respect to the three percent rate of profit included in the contract here, Mr. Bingham testified that a three percent rate could not be supported for the invalid option year using the DFARS weighted guidelines (tr. 2/70). For all the above reasons, we do not find the three percent profit rate included in the underlying contract to be a reasonable rate of profit for CLIN 11.

Profit Rate for Modifications (Seven Percent)

56. Turning to the seven percent profit rate adopted by the parties for firm-fixed price modifications, we find that the agreed-upon rate was the result of arms-length negotiations (exs. A-2, A-3; tr. 1/85-86). Initially, the Navy proposed a three percent rate (tr. 1/78). To arrive at this rate, the Navy used the weighted guidelines (tr. 1/79). In response, Fluor asserted that the Navy's weighted guidelines analysis was flawed and conducted its own weighted guidelines analysis (ex. A-2 at 2; tr. 1/79, 82). Fluor's analysis yielded a rate of ten percent, which Fluor argued was fair and reasonable (ex. A-2 at 2; tr. 1/83). After additional discussions and negotiations, the Navy and Fluor agreed that a seven percent rate of profit for all firm-fixed price modifications was a fair and reasonable rate (ex. A-3). We find the seven percent rate of profit negotiated and adopted by the parties to be a presumptively fair and reasonable rate of profit for CLIN 11.

57. Interestingly, despite advocating for a lower rate of profit in this appeal, the Navy agrees that the seven percent rate is presumptively reasonable for CLIN 11. When discussing the seven percent rate in its post-hearing brief, the Navy represented:

> A negotiated profit rate between the parties involved in this case for the very work that is at issue is probative, if not definitive proof, regarding the rate of profit that the parties thought was reasonable for a modification involving firm fixed-price work.

(Gov't resp. to ASOF ¶ 108) Moreover, Mr. Stevens also testified that he considered the seven percent rate within the "acceptable" range for CLIN 11 (tr. 2/271). He explained that the parties had been "operat[ing] under 7 percent for so long" and that "there's no reason for me to have disputed that [rate]" (tr. 2/270). In fact, the record suggests that he may have believed that the seven percent rate *did* apply to CLIN 11 (tr. 2/218).

58. In its post-hearing brief, Fluor relies entirely on the testimony of Mr. Bingham as a basis to reject the seven percent rate (ASOF ¶¶ 108-09). Mr. Bingham agreed the seven percent profit rate negotiated by the parties was another relevant "data point," but not one upon which he placed much weight (tr. 2/71, 175; 3/130). He discounted the rate because he believed it was negotiated for "administrative ease," *i.e.*, so that the parties did not have to negotiate the profit rate for each modification (tr. 2/72-73; 3/102). Undoubtedly, the parties negotiated the rate for administrative ease (*see* tr. 2/219 (Mr. Stevens agreeing that it was not typical to revisit profit)). However, we see no reason to conclude that either party would have agreed to a rate they found unfair and unreasonable simply for administrative ease. Moreover, such a conclusion contradicts the record, which shows that the parties considered the rate to be "fair and reasonable" (ex. A-3).

59. Mr. Bingham also discounted the profit rate negotiated by the parties because, in his experience, such agreements are typically restricted to small, not major, modifications (tr. 2/73, 3/102-03, 130). Fluor, however, does not point us to any evidence in the record showing that the parties intended to restrict the use of the seven perfect rate to small modifications or to otherwise limit the parties' agreement (*see* exs. A-2, A-3). Nor is there evidence demonstrating that the parties did so in practice. To the contrary, contemporaneous documentation implies that both Fluor and the Navy believed they were negotiating a rate for "all" firm-fixed price modifications (ex. A-3 (Contracting Officer stating that "[a]s agreed to by Fluor and the Government, 7% profit has been determined fair and reasonable and will be applied to *all* FFP modifications.") (emphasis added); (ex. A-2 (Fluor referring to its proposed rate as applying to "*all* FFP Modifications.") (emphasis added)). Even Mr. Bingham conceded during cross-examination that he was "speculating" when he stated that the parties would not agree to use the seven percent for major modifications (tr. 3/132).[16]

60. In sum, we find the seven percent rate of profit a useful starting benchmark for determining the appropriate rate of profit for CLIN 11. That said, we

[16] The record also shows that Mr. Bingham may have discounted the agreed-upon seven percent profit rate because he believed it was applicable to IDIQ work (*i.e.*, CLIN 12) (tr. 2/71, 130 (discussing ex. A-2)). The parties' correspondence, however, indicates that the seven percent rate applies to modifications involving firm-fixed price work (exs. A-2, A-3).

note that this rate was adopted very early in the contract (approximately one year after contract award and only four months after the start of performance) and we acknowledge that subsequent events could justify an adjustment of the rate. In this respect, we agree with Mr. Bingham that the seven percent rate must be evaluated in the context of the actual risks experienced under the contract (tr. 2/133; 3/131). Accordingly, the presumption that a seven percent rate of profit is fair and reasonable for CLIN 11 is rebuttable. The question is whether either party has presented compelling reason to alter the rate.

Navy's Arguments to Reduce Rate to Four Percent

61. Although Fluor bears the burden of proof, we nevertheless begin with the Navy's argument because the Navy's argument for a downward adjustment is comparatively less complicated, and we can address it fairly succinctly. As discussed above, the Navy represented that the seven percent rate of profit is "definitive proof" of what the parties believed is reasonable for the firm-fixed price work at issue here under CLIN 11. Despite this representation, the Navy also relies upon the lay opinion testimony of Mr. Stevens to argue that the rate should be reduced to four percent (gov't br. at 6-8; GSOF ¶¶ 8-13).[17] Specifically, the Navy relies upon Mr. Stevens's opinions regarding the profit analysis performed by Kenrich and an impromptu weighted guidelines analysis that Mr. Stevens performed for the first time during the hearing (*id.*). Mr. Stevens opined that, under the DFARS weighted guidelines, which considers several factors, he would assign a rate of three percent for the performance risk factor and a rate of one percent for the contract type risk factor, for a total rate of profit of four percent (tr. 2/251-52, 270-71).

62. For the reasons previously mentioned, we afford little weight to Mr. Steven's testimony on these topics because we find that the Navy failed to establish that he possesses the requisite experience to offer such opinions. The Navy concedes that Mr. Stevens "has no experience in negotiating or evaluating contractor profit in his government career" (gov't resp. to ASOF ¶ 109) and that he "has never negotiated profit with a contractor in relation to a claim" (*id.* at ¶ 110). The Navy further concedes that Mr. Stevens has never "prepared a weighted guidelines analysis . . . in relation to a claim" (*id.* at ¶ 114). Additionally, the Navy concedes that, with the exception of the impromptu analysis he provided during the hearing, Mr. Stevens did not conduct a DFARS weighted guidelines analysis of the profit claimed by Fluor in this appeal (*id.*). In short, at no point did the Navy lay the

[17] The Navy advocated for a three percent rate of profit in its pre-hearing brief and in its response to Fluor's statement of costs (gov't pre-hearing br. at 2; R4, tab 64 at GOV28032). In light of its new position set forth in the post-hearing brief, *i.e.*, that a four percent rate is appropriate (gov't br. at 1, 4-5), we conclude that the Navy has abandoned its argument for a three percent rate.

requisite foundation for Mr. Stevens to offer his lay opinions regarding the appropriate amount of profit to be assigned for CLIN 11.

63. Furthermore, the Navy failed to establish that Mr. Stevens possesses the requisite personal knowledge of the facts upon which he relied in conducting his impromptu DFARS weighted guidelines analysis (*see* GSOF ¶¶ 13-14). For instance, Mr. Stevens opined that the Board should apply a rate of three percent for the performance risk factor because he contends the scope of work did not change during Fluor's performance of the contract (GSOF ¶ 13 (citing tr. 2/251-52)). The record before us in this appeal, however, does not demonstrate that Mr. Stevens possesses the technical expertise to reach such a conclusion (tr. 2/286-95). On cross-examination, Mr. Stevens admitted that he was not involved in the day-to-day activities of contract administration, nor did he have an understanding of Fluor's day-to-day activities (tr. 2/286-88). He lacked the technical expertise in the services required of Fluor under the contract and did not have a competent understanding of the contract's technical requirements (tr. 2/286-95), at one point testifying:

> I don't know what it takes to meet those requirements. You're right. I'm not a technical person. We just rely on Fluor's expertise to meet the requirements and then pay for it.

(Tr. 2/287)

64. The Navy does not dispute this characterization of Mr. Stevens's trial testimony (gov't resp. to ASOF ¶ 116), but argues that Mr. Stevens relied on "subject matter experts, technical experts, and others during contract administration" (*id.* (citing tr. 2/303)). While the Navy is correct, *i.e.*, Mr. Stevens did testify that, as a contracting officer, he often relied on the technical expertise of others (tr. 2/303), unfortunately for the Navy, Mr. Stevens also testified that he did not consult any technical experts when reviewing Fluor's weighted guidelines analysis (tr. 2/303-04).

65. Even if we were to consider the analysis conducted by Mr. Stevens, we find his rationale for reducing the profit rate from seven to four percent to be illogical and unsupported. Where a change or modification requires the contractor to perform work that is more complex or involves a higher degree of risk than the original work under the contract, one would expect the rate of profit to be higher than the original contract. *See* FAR 15.404-4(d), PROFIT; DFARS 215.404-71-1, WEIGHTED GUIDELINES METHOD—GENERAL. Conversely, if the work being compensated through a change or modification is less demanding or involves a lesser degree of risk than the original contract work, one would expect the rate of profit to be equal to or lower than the original contract. Here, Mr. Stevens contends that the modification exercising the invalid option year did not alter the scope of work. Accordingly, in our

view, the Navy should have continued to apply the seven percent rate of profit applicable to contract modifications.

66. Mr. Stevens's decision to depart from the seven percent strikes us as arbitrary. In this regard, he testified as follows:

> Q: Do you think that 3 percent or 4 percent or 7 percent are acceptable profit rates?
>
> A: I would say 4 percent is more acceptable in this range, but if it went up to 7, you know, I've always believed that if Fluor never visited the profit at all, even if we changed this to a cost-type contract, which it is, which I believe it is, we would have never disputed 7 percent. Now that we're talking about, and bringing to light, that Fluor is asking for such a high percentage and it forces us to take a look at factors to see if that's true or not, it really gets us even below the 7. And now we're in the 4 percent range.

(Tr. 2/270-71) The above testimony does not evidence a reasoned and informed analysis of profit, but rather, an offhanded and arbitrary decision to reduce the agreed-upon rate.

67. In sum, we find that the Navy provides no support for a downward adjustment of the seven percent rate of profit negotiated by the parties for firm-fixed price modifications.

Fluor's Arguments to Increase the Rate to 16 Percent

68. For its part, Fluor argues that the complex nature of the work and the risk it incurred while performing the invalid option year support an upward adjustment to 16 percent. Fluor's position is based primarily on the opinion of its expert, Kenrich.

69. To arrive at the 16 percent rate of profit, Kenrich analyzed the nature of the work and the risks Fluor incurred performing CLIN 11. Kenrich also consulted industry guidance and sources to confirm that the rate was reasonable and customary. Finally, Kenrich performed a DFARS weighted guidelines analysis. (App. supp. R4, tab 532 at 20-30) In explaining how each of these "data points" (as Mr. Bingham called them) factored into the opinion, Mr. Bingham represented that Kenrich's initial assessment, based on the risk profile identified, was that profit should be in the "high teens," around 15 to 20 percent (tr. 2/61). After consulting industry sources and conducting a weighted guidelines analysis (app. supp. R4, tab 532 at 23-31; tr. 2/42-

43, 56-57, 70), Kenrich concluded that the rate should be reduced to the low end of that range, *i.e.*, 16 percent (tr. 2/61).

70. We find the three methods used by Kenrich, *i.e.*, (1) analyzing the complexity of the work and the risks incurred, (2) consulting industry guidance and sources, and (3) using the DFARS weighted guidelines, to be appropriate methods to determine fair and reasonable profit for an equitable adjustment. That said, based upon the facts in the record before us, we do not find that a profit rate of 16 percent is supported under these methods. We address below each method.

Method 1: Analysis of Risk

71. Mr. Bingham testified that the reasonableness of the claimed profit is based on the overarching principle that "a higher risk endeavor should be rewarded with a higher return, a higher profit rate" (tr. 2/42; *see also* app. supp. R4, tab 532 at 20-21). We generally agree and find that this conclusion is supported by regulatory guidance, *see* FAR 15.404-4(d), PROFIT; DFARS 215.404-71-1, WEIGHTED GUIDELINES METHOD—GENERAL, and by industry guidance from the Defense Business Board (tr. 2/57-58; app. supp. R4, tab 532 at 23). Thus, to arrive at an appropriate profit rate, Kenrich analyzed the complexity of the work and the risks assumed by Fluor in performing CLIN 11. Kenrich assessed the level of cost and performance risk to be "very high" based on the following five factors (tr. 2/46):

72. First, Kenrich correctly noted that the Navy consistently refused to acknowledge its payment obligations under the invalid option year, forcing Fluor to litigate to obtain full payment for its performance. Mr. Bingham opined that being forced into litigation results in a riskier contract endeavor. Not only must the contractor assume the expense of litigation, but litigation directs management's attention away from contract performance, which increases the risk associated with the contract. (App. supp. R4, tab 532 at 21; tr. 2/46, 51; 3/105) We agree that a contract endeavor in which one party must litigate in order to receive that to which it is entitled increases the risk of the endeavor.

73. Second, Kenrich opined that Fluor's performance of the invalid option year was rendered more difficult or riskier due to what Kenrich called the "extended payment cycle" (app. supp. R4, tab 532 at 21; tr. 2/46-47, 3/104-05). We understand the extended payment cycle to refer to instances of delayed payment by the Navy. Fluor alleges this delay took many forms and was caused by different events and circumstances. Most of the delay (although not all) is supported by the record. Our findings with respect to the delay are set forth in the following several paragraphs.

74. Because the Navy did not acknowledge its payment obligations, Fluor was forced to perform the invalid option year at a loss. In this respect, the prices included

by the Navy in CLIN 11 were not based upon Fluor's actual (or estimated) incurred costs, but upon contract prices, which were several years old and obviously outdated. Thus, during performance, Fluor was not fully and appropriately compensated for its performance. (Tr. 1/18, 91-92, 173-74; 2/46, 48, 50-51; app. supp. R4, tab 532 at 21-22; gov't resp. to ASOF ¶ 12) To date, Fluor has not been fully compensated for its costs of performing the invalid option year despite the fact the Navy does not contest 99 percent of the incurred claimed costs (tr. 1/66). Specifically, more than seven years after Fluor commenced performance of the invalid option year, the Navy still has not paid Fluor more that $[redacted] million in incurred costs that the Navy admits it owes Fluor (the difference between Fluor's incurred costs and payments made by the Navy for CLIN 11) (*see* tr. 3/143-44).

75. During the invalid option year, the Navy also repeatedly delayed paying undisputed invoices. Our review of the payment schedule reveals that the Navy paid only one of the invoices within 30 days of receipt (app. supp. R4, tab 528, invoice no. 23752; *see also* tr. 1/94-95).[18] The longest amount of delay is 113 days (app. supp. R4, tab 528, invoice no. 22520). On average, the Navy made payment approximately 78 days after receipt of an invoice (*id.*).[19]

76. Even once the Navy paid the invoices, it did not always pay the invoices in full. The record establishes that the Navy did not pay the first three invoices in full, resulting in a withholding of $114,378 (app. supp. R4, tab 528, Column F; tr. 1/64-65, 2/51-52). Fluor contends the withholdings were improper (app. br. at 60-61). The record is silent as to why the invoices were not paid in full and the sole Navy witness to address the issue, Mr. Stephens, stated on cross-examination that he did not know the basis for the Navy's withholding (tr. 2/297-99). We find there is insufficient evidence to conclude that the withholdings were justified. The withholdings further support Fluor's allegations of delayed payment.

77. Fluor also points out that the first payment made by the Navy for CLIN 11 work was not made until January 2018, approximately seven months into the period of performance. Although the record demonstrates that the Navy did, indeed, pay the first invoice seven months into performance (tr. 1/63-64; app. supp. R4, tab 528), the record also shows that Fluor submitted the invoice four months into performance (*id.*). Fluor fails to show that its delay in submitting the invoice was the Navy's fault.

[18] Tab 528 is a Microsoft excel spreadsheet provided in native format. To view information pertaining to CLIN 11 invoices, we filtered column A of the "JAX11-12" tab to reflect only CLIN 11 invoices (*see* tr. 1/60-61).

[19] In calculating the average, we relied upon the dates in column H ("Invoice Date") and column J ("Last Receipt Date") (app. supp. R4, tab 528). Witness testimony indicated that column H represents the date of invoice submission and column J represents that date of invoice payment (tr. 1/62, 64).

Witness testimony established only that the delay was due to some back-and-forth between the Navy and Fluor regarding the contents of a "workbook" that would ensure the correct submission of invoices (*see* tr. 1/63-64). Testimony did not establish that this back-and-forth, or the resulting delay, was the Navy's fault (*see* tr. 2/284-85).

78. Finally, Fluor also points out that the majority of invoices for CLIN 11 were paid after the conclusion of the period of performance (ASOF ¶ 15; tr. 1/66). Here, too, although the record supports this allegation (*i.e.*, 11 out of 16 invoices were paid after the conclusion of the period of performance), we do not find this fact to be particularly dispositive because the record also shows that the majority of invoices (*i.e.*, 9 out of 16 invoices) were submitted by Fluor after the period of period of performance (app. supp. R4, tab 528, Columns H and I). Hence, the Navy's payment of these invoices outside the conclusion of the period of performance does not strike us as noteworthy.

79. The Navy's responses to these allegations of delayed payment contradict the record and are misplaced. First, the Navy argues, without citation to the record, that "the Navy [] has only ever refused to pay Fluor for unperformed work" (gov't resp. to ASOF ¶ 121; *see also id.* ¶¶ 14, 15). This argument is belied by the evidence discussed above. Second, the Navy contends that "Fluor did not become entitled to receive all of its costs plus a reasonable profit until the Board ruled on entitlement in this case" (gov't resp. to ASOF ¶ 113). Not so. Fluor was entitled to receive its incurred costs, plus reasonable profit, from the moment the Navy exercised the invalid option year. It is the Navy's improper actions that triggered its obligation to compensate Fluor, not the Board's decision. Our decision simply recognized and documented the Navy's improper actions.

80. As explained above, Kenrich concluded that these instances of delayed payment increased the risk associated with Fluor's performance of CLIN 11. For example, the unrebutted testimony of Mr. Bingham established that the Navy's failure to pay invoices within 30 days created a "cash problem" for Fluor and prevented it from pursuing opportunities to invest in ways that would yield a return (tr. 2/50, 55, 197-98). Overall, we find record support for many of the alleged instances of delayed payment. We further find that a contractual endeavor in which the government does not adhere to its payment obligations is risker than an endeavor in which the government makes timely payment in-full.

81. The third risk factor identified by Kenrich relates to the Navy's issuance of negative performance evaluations (app. supp. R4, tab 532 at 22). During the first five years of the contract, the Navy issued multiple negative evaluations of Fluor's performance (tr. 1/93). Fluor contends that the evaluations were inaccurate (app. br. at 59; ASOF ¶ 10). Understandably, Fluor was concerned the Navy would continue to issue less than satisfactory performance evaluations during the invalid option year and

that any such negative evaluations would adversely impact Fluor's ability to obtain future contracts (tr. 1/93-94). The Navy does not rebut this evidence (gov't resp. to ASOF ¶ 10). Mr. Bingham testified that the assessment of negative performance evaluations is a "huge" risk for any government contractor because they can be relied upon by other government entities when determining whether to award the contractor future work (tr. 2/47). Although we agree that the issuance of negative performance evaluations could pose a risk, Fluor does not allege that the Navy issued negative evaluations during the invalid option period (ASOF ¶ 16; tr. 1/93-94, 2/300-01). Rather, the record shows that the Navy rated Fluor's performance of CLIN 11 as satisfactory in all evaluated areas (ex. A-12). Accordingly, Fluor raises a hypothetical risk that does not seem to have materialized. We do not find this factor provides a basis to upwardly adjust the profit rate.

82. The fourth risk factor identified by Kenrich relates to the scope of work (app. supp. R4, tab 532 at 22; tr. 2/47, 49). As reflected in Kenrich's report and Mr. Bingham's testimony, it was Kenrich's "understanding" or "belief" that the Navy's solicitation was inaccurate and that Fluor was required to perform significant extracontractual work during the RBOS I contract and the invalid option year (app. supp. R4, tab 532 at 21, 22, 27, 28; tr. 2/166; 3/108)). Here, we use the phrase "extracontractual work" to refer to the following three factual allegations relied upon by Kenrich in its report: (1) the Navy did not provide Fluor with a promised management database (called Maximo), necessary to perform the contract; (2) the contract inventories were incomplete and inaccurate; and (3) the Navy directed Fluor to perform work on assets not listed in the contract, to address undisclosed asset conditions, and perform other work that Fluor contends is inconsistent with the contract (app. supp. R4, tab 532 at 22).[20] Kenrich opines that, as a result of this extracontractual work, Fluor is entitled to a higher rate of profit (*id.*). As discussed later in our decision, these allegations of extracontractual work also factor into Kenrich's DFARS weighted guidelines analysis.

83. Kenrich's belief regarding the alleged extracontractual work was based primarily upon conversations with Fluor personnel and allegations raised by Fluor in its claims and pleadings (tr. 2/127-29, 149-51, 164-69; 3/108, 117-18; app. supp. R4, tab 532 at 22 (explaining that Kenrich's understanding regarding the scope of the contract was based upon allegations by Fluor)). More specifically, Kenrich's belief that the condition of the equipment was not what the solicitation represented was based solely on conversations with Fluor personnel (tr. 2/150). Indeed, we would not expect experts in the field of federal cost and pricing and claims quantification to be able to independently assess the condition of the equipment at issue here, such as

[20] Fluor submitted a separate claim regarding these allegations, which is the subject of pending litigation in ASBCA No. 61543.

HVAC units, generators, and high voltage electrical substations.[21] Similarly, Kenrich's belief that the number of assets Fluor was required to maintain exceeded that represented in the solicitation was based upon conversations with Fluor personnel, as well as a comparison of the inventories in the contract and the assets being serviced as reflected in Fluor's management database, Maximo (tr. 2/151). Mr. Bingham, however, did not personally perform the comparison and it is not clear who may have performed such a comparison (*id.*). Fluor does not rely upon any such comparison in their post-hearing brief and we have not located any comparison of assets in the record before us in this appeal. Finally, although there is some vague reference to Maximo in the record (tr. 2/149), there is no indication in the record that Kenrich independently analyzed whether Fluor performed extracontractual work stemming from the Navy's failure to provide Maximo data.

84. In sum, Kenrich's understanding or belief that the scope of work was more complex than Fluor originally anticipated and that Fluor was required to perform extracontractual work was based upon information provided to Kenrich by Fluor personnel. Kenrich did not investigate or analyze Fluor's allegations (and likely did not have the expertise to do so) in order to form its own conclusion on these matters.

85. Critically, in the record before us in this appeal, Fluor did not present sufficient evidence for us to validate the factual underpinnings of Kenrich's report. Although we note that these allegations of extracontractual work are the subject of a different claim pending before the Board in which the Board held a 28-day trial, and we certainly do not expect Fluor to put on the same degree of evidence here, *some* evidence to support the factual allegations relied upon by Kenrich is necessary. We have carefully reviewed the testimony of all three fact witnesses called by Fluor in this appeal, and we do not find evidence sufficient to support Fluor's burden of proof on this issue.

86. Mr. Bingham testified that, if the factual underpinnings of Kenrich's report are correct, a higher profit rate is justified (tr. 2/167). Logically, the converse is also true. If the factual underpinnings of Kenrich's report are incorrect (or unsupported), a higher profit rate is not justified. Fluor bears the burden of proof to demonstrate that the factual allegations relied upon by Kenrich in its assessment of profit are true. Fluor has not met its burden. Accordingly, we do not find, as a factual matter, that Fluor's performance of CLIN 11 was rendered more difficult or riskier as a result of extracontractual work imposed by the Navy.

[21] Mr. Bingham explained that he's "no plumber or electrician" (tr. 3/108). Thus, to arrive at his "understand[ing] that the work required of Fluor changed daily, if not hourly," he "interviewed lots of people" (*id.*).

87. The fifth, and final, factor relied upon by Kenrich relates to the overall complexity of the work. Kenrich opined that Fluor was entitled to a higher profit rate because Kenrich assessed the nature of the work required by CLIN 11 as highly complex (app. supp. R4, tab 532 at 21). Kenrich's assessment of high technical risk was based on the fact that Fluor was required to service thousands of assets spread across four Naval installations, including two of the largest Navy installations in the continental United States (app. supp. R4, tab 531 at 21-22; tr. 2/144-45; 3/104). In doing so, Fluor provided a wide variety of services, implicating numerous technical disciplines, requiring specialized training, licenses, and certifications (app. supp. R4, tab 532 at 21; tr. 2/143-47, 195; 3/104, 127-28, 129-30). Although Mr. Bingham agreed that the contract did not require Fluor to perform experimental or developmental work (tr. 2/142), he testified that the sheer size and scope of the contract rendered performance technical complex (tr. 2/144-47).

88. Kenrich's assessment is supported by the record (R4, tab 18.126.1 at GOV19497-15000; tr. 1/89-91, 133-34) and unrebutted by the Navy (*see e.g.*, gov't resp. to ASOF ¶¶ 8-9; tr. 2/202-03). Regarding the latter point, although the Navy contends that the services themselves should not be characterized as complex or complicated, the Navy does not present any facts to support this contention and, instead, relies entirely upon the argument of counsel (gov't resp. to ASOF ¶ 121; tr. 2/202-03). We do not afford the Navy's unsupported allegations any weight.

89. In any event, regardless of how the services themselves are characterized,[22] there is no evidence in the record to rebut Fluor's argument that the sheer size and scope of the contract rendered performance technically complex. To the contrary, the Navy appears to concur that the RBOS I contract was unique in terms of the size, scope, and importance (tr. 2/202-03). Based upon the unrebutted evidence in the record before us, we find that the RBOS I contract was technically complex—arguably more complex than other base operations support contracts. Despite this factual conclusion, it is not evident to us why this would merit an increase in the rate of profit from the agreed-upon seven percent. The technical complexity of the RBOS I contract was known at the time the parties reached their agreement.

90. In sum, we find support for some, but not all, of the risk factors relied upon by Kenrich in arriving at a 16 percent rate of profit. When taken together, we find that these factors increased the level of performance and cost risk that Fluor incurred in performing the invalid option year. As a result, we find the seven percent

[22] The services varied in terms of complexity, ranging from changing light bulbs to high voltage electrical repair (tr. 2/144-45; R4, tab 18.126.1 at GOV19497-99; ASOF ¶ 9; gov't resp. to ASOF ¶ 9).

profit rate agreed upon by the parties early in contract performance to be too low. The question remains, however, how much of an increase is reasonable?

91. Our charge is to fix profit in a manner that is equitable based on the circumstances presented in each appeal. It is hardly an exact science. Even when using a more structured approach, such as the DFARS weighted guidelines, there is a wide range of values that may be applied. There is no "right" profit rate for this or any other contract modification. Rather, the application of sound judgment and common sense is required to ensure that the selected rate falls within the range of what may be considered equitable under the circumstances. Here, in light of the risk factors that we find supported by the record, an increase from 7 percent to 16 percent—an increase of more than double—does not strike us as reasonable or equitable. Rather, we find that such an increase would result in a windfall for Fluor. Based on the circumstances in this appeal, we find that a two percent increase from 7 percent to 9 percent is fair and reasonable.

92. As noted, Kenrich used two additional methods to assess profit: industry sources and the DFARS weighted guidelines. We did not find either one particularly useful in determining the specific rate of profit to apply here. Nevertheless, we address them briefly.

Method 2: Industry Sources

93. The first industry source relied upon by Kenrich, a 2014 report by the Defense Business Board, discusses general principles to consider when determining profit (app. supp. R4, tab 532 at 23).[23] For instance, the report explains that "[w]hat is appropriate profit is different depending on the type of contract, the nature of work being performed, and the risk that industry assumes" (report at 33). Although we agree with this statement (and other overarching guidance in the report), it does little to assist us in assigning a specific rate here.

94. Likewise, the second source consulted by Kenrich, a 2016 survey of government contractors performed by Grant Thornton, is of limited probative value (app. supp. R4, tab 532 at 24 (citing R4, tab 87)). The Grant Thornton survey indicates that, in 2016, approximately 10 percent of government contractors reported earning profit rates between 11-15 percent and approximately five percent of government contractors reported earning rates above 15 percent (app. supp. R4, tab 532 at 24 (citing R4, tab 87 at 9); tr. 2/58). The survey, however, does not provide

[23] A copy of the report, entitled Innovation: Attracting and Retaining the Best of the Private Sector, is available at *https://dbb.defense.gov/Portals/35/Documents/Reports/2014/DBB-FY14-02-Innovation%20report%20(final).pdf* (hereinafter "report").

sufficient information for us to conclude that such rates are relevant to the appeal pending before us. For instance, as the Navy correctly points out (gov't br. at 11), the report does not identify the nature of the work being performed by those contractors earning profit in these ranges or the types of contracts under which they are performing. Thus, we do not know whether those earning profit rates above 15 percent perform work similar in scope to the work performed by Fluor. In point of fact, we are skeptical that base operations support contractors would earn rates of profit that would rank them in the top five percent of all government contractors.[24]

95. We also note that the Grant Thornton survey was conducted in 2016—the year before Fluor's performance of CLIN 11 and, notably, during a period in which profit rates surged (R4, tab 87 at 2 ("Another notable trend in 2016 was the surge in higher profit rates[.]")). Without further explanation from Fluor, it is not clear whether data from 2016 is relevant and how it compares to data from 2017 or 2018 (*i.e.*, the years of Fluor's performance of CLIN 11).[25] In sum, the industry sources relied upon by Kenrich bring us no closer to identifying a specific rate to apply here.

Method 3: DFARS Weighted Guidelines

96. Finally, we arrive at the analysis conducted by Kenrich using the weighted guidelines (*see* app. supp. R4, tab 532 at 25-30; tr. 2/42, 58-65, 70). The weighted guidelines approach used by Kenrich has been long recognized by the Board as an appropriate method to determine a reasonable rate of profit for an equitable adjustment. That said, their use in this context is not mandatory. Rather, the weighted guidelines are intended to be used pre-award as a tool for forecasting profit. Applying the guidelines to a retrospective determination of profit after all the work has been performed presents difficulties and can yield inequitable results. Indeed, as we explain in further detail below, one of the factors we must consider under a weighted guidelines analysis is the risk associated with the contract type. This factor focuses on the degree of cost risk the contractor will assume under varying contract types, *e.g.*, firm-fixed price or cost-reimbursement. Fluor contends that we should view the risk associated with CLIN 11 to be akin to a firm-fixed price contract. The Navy counters

[24] Notably absent is any evidence showing that base operations support contractors have ever received profit in the range proposed by Fluor. It would have been helpful had the parties submitted evidence regarding other base operations support contracts—information to which both parties surely had access. The record also does not contain any evidence regarding Fluor's company-wide average (*see* tr. 2/129).

[25] We do not suggest that Fluor cherrypicked survey data from a year in which profit rates surged. In fact, Mr. Bingham testified that survey data of this nature is "rare" (tr. 2/58). Thus, it is possible that this is the only available data. Fluor, however, did not satisfy its burden to establish the relevance of this data.

that we should view the risk associated with CLIN 11 to be akin to a cost-reimbursement contract. Neither position is entirely justifiable under the facts of this appeal, which leads us to conclude that the weighted guidelines are not particularly well-suited to determine profit in this instance. For the sake of completeness, however, we address Fluor's arguments under a weighted guidelines analysis.

97. The weighted guidelines, which are set forth in DFARS 215.404-71, provide that the profit objective is a function of three factors (performance risk, contract type risk, and facilities capital employed) and a "special" factor that considers the contractor's cost efficiency. DFARS 215.404.71-1(a). Values are assigned to each factor and, with the exception of the cost efficiency factor, each factor has a normal value and a designated range of values. DFARS 215.404-71-1(b). The normal value is representative of average conditions on the contract when compared to all goods and services acquired by the Department of Defense. *Id.* The designated ranges provide values based on "above normal" or "below normal" conditions. *Id.* To determine whether above normal or below normal conditions exist, the DFARS lists certain "indicators." *See e.g.*, DFARS 215.404-71-2(d)(2), (3).

98. The weighted guidelines analysis conducted by Kenrich, excerpted from its report, is set forth below:

DFARS Weighted Guidelines Analysis

Performance Risk Factors	Weight	Value	Profit	
Technical	40%	7.0%	2.80%	
Management/Cost Control	60%	7.0%	4.20%	
Composite Value	100%		7.00%	[A]
Contractor Risk Factors	**Value**			
Contract Type Risk	6.00%			[B]
Facilities Capital Employed	**Value**			
Equipment	0.21%			[C]
Cost Efficiency	**Value**			
Cost Management and Control	3.00%			[D]
Composite Profit Rate	**16.21%**			[E=∑A:D]

(App. supp. R4, tab 532 at 26; *see* tr. 2/60-65)

99. The first factor, performance risk, considers the contractor's degree of risk in fulfilling the contract requirements. DFARS 215.404-71-2(a). This factor consists

of two subfactors: technical and management/cost control. *Id.* The technical subfactor reflects the technical uncertainties of performance and the management/cost control subfactor reflects the degree of management effort necessary to ensure that the contract requirements are met and that costs are reduced and controlled. *Id.*

100. The Navy does not challenge the weights Kenrich assigned to the two subfactors and we find the assigned weights to be reasonable under the circumstances here, where the degree of management effort necessary to perform a base operations support contract of this scope and magnitude would appear to outweigh the technical uncertainties of performing repair and maintenance work (tr. 1/89-91, 133; 2/145-47).

101. Regarding the values for the subfactors, the normal value is five percent, and the range is three to seven percent. DFARS 215.404-71-2(c). Kenrich assigned the maximum value of seven percent for the technical subfactor based on its understanding or belief that Fluor was required by the Navy to perform extracontractual work (app. supp. R4, tab 532 at 22, 27; tr. 2/166, 180-81; 3/108). As we have concluded, there is no record support for this factual underpinning of Kenrich's report. Due to the lack of record support, and because we do not otherwise find evidence of the regulatory indicators that might justify above normal or below normal conditions, *see* DFARS 215.404-71-2(d)(2)-(3), we assign the normal value of five percent to the technical subfactor.

102. For the management/cost control subfactor, Kenrich also assigned the maximum value of seven percent based upon its assessment that a substantial degree of management effort was necessary to ensure that contract requirements were met and that costs were reduced and controlled (app. supp. R4, tab 532 at 27-28). *See* DFARS 215.404-71-2(a). Kenrich explains that the invalid option encompassed elements of work that the Navy considering mission critical, including assets that reduced or eliminated adverse environmental impacts and were essential to providing safe and efficient facilities to support the Navy's missions (app. supp. R4, tab 532 at 28). The record supports this conclusion (*see e.g.*, R4, tab 1.1 at GOV201 (describing wastewater services required under the contract)), and the Navy does not identify any facts to rebut this conclusion (gov't resp. to ASOF ¶ 100). Indeed, the Navy appears to concede the matter (tr. 2/202-03).

103. In evaluating this subfactor, we also find relevant Kenrich's assessment of the complexity of the work performed, which we described above in findings 87-89. Based upon the unrebutted evidence in the record before us, we find that the RBOS I contract was unique in its technical complexity. For these reasons, we determine that some regulatory indicators exist to justify above normal conditions. DFARS 215.404-71-2(e)(2)(i)(A)-(B). We do not find, however, that the record supports assignment of the maximum value. *See* DFARS 215.404-71-2(e)(2)(ii). For example, we do not find record support for the proposition that the effort "requires large scale integration of the

most complex nature." *Id.* Accordingly, we assign a value of six percent to this subfactor. After weighting the individual subfactors, the overall weighted value for the performance risk factor is 5.6 percent.

104. The second factor is the contract type risk factor. DFARS 215.404-71-3. Again, it is this factor that leads us to conclude that the weighted guidelines are not well-suited to determine profit in this appeal. This factor focuses on the degree of cost risk the contractor will assume under varying contract types. DFARS 215.404-71-3(a). Fluor contends that we should view the risk associated with CLIN 11 to be akin to a firm-fixed price contract. Under the guidelines, a firm-fixed price contract with no financing has a normal value of five percent and a range of four to six percent. DFARS 215.404-71-3(c). Kenrich assigned the maximum value based on Kenrich's determination that several of the indicators justifying above normal conditions were present (app. supp. R4, tab 532 at 28-29). *See* DFARS 215.404-71-3(d)(3).

105. Kenrich's primary basis to justify the maximum value is, once again, its understanding or belief, based on conversations with Fluor personnel, that the Navy's solicitation was defective and that, as a result, Fluor was required to perform extracontractual work (app. supp. R4, tab 532 at 28-29). For the previously discussed reasons, we afford no weight to Kenrich's assessment that a higher value is merited due to allegations of extracontractual work. Kenrich also opined that the maximum value was appropriate because the contract did not include price protections, such as an economic price adjustment clause. Although one of the regulatory indicators to justify above normal conditions is the lack of price protections in "long-term contracts" where "there is considerable economic uncertainty," we are not persuaded that this fact alone merits the maximum value.[26] Having reviewed the regulatory indicators for both above normal and below normal conditions, DFARS 215.404-71-3(d)(3)-(4), we find that there is insufficient evidence to justify a departure from the normal value. Accordingly, were we to view the risk associated with CLIN 11 to be akin to that of a firm-fixed price contract (as Fluor argues), the assigned value would be five percent for this factor.

106. The Navy, however, asserts that we should view the risk associated with CLIN 11 to be akin to a cost-reimbursement contract, which has a range of zero to two percent. DFARS 215.404-71-3(c). Although the Navy acknowledges that CLIN 11 was issued as a firm-fixed price CLIN, the Navy contends that the risk associated with Fluor's claim for incurred costs plus a reasonable profit is more akin to a cost-reimbursement contract (gov't br. at 5). The crux of the Navy's argument is that, where costs are known with some certainty at the time profit is applied, a lower rate should be assigned for the contract type risk factor. Relying upon the testimony of

[26] Additionally, Fluor did not introduce evidence to show that there was considerable economic uncertainty.

Mr. Stevens, the Navy argues that we should assign a value of one percent for this factor (*id*. at 7).

107. The parties' disagreement regarding the degree of risk associated with CLIN 11 highlights the difficulty applying guidelines that were intended for pre-award negotiations in the context of an equitable adjustment. On one hand, the risk associated with CLIN 11 is not akin to a fixed-price contract. At this point, all costs have been incurred and Fluor is demanding (and we are awarding) costs that would not have been contemplated when pricing the CLIN as a firm-fixed price contract. On the other hand, applying the values associated with a cost-reimbursement contract would yield an overall profit rate that offends our sense of equity. The resulting rate would fall below the agreed-upon seven percent and would not account for the fact that the Navy, at all times, treated CLIN 11 as a firm-fixed price contract and paid only about 87 cents on the dollar during contract performance. (*See* gov't resp. to ASOF ¶ 113 (admitting that the Navy did not pay Fluor its incurred costs during performance))

108. Although one way to resolve this factor might be to split the difference between the parties' numbers, we elect instead to depart from the weighted guidelines and apply our previously explained method of adjusting the agreed-upon seven percent to nine percent to account for the increased risk. In our view, a profit rate of nine percent fairly compensates Fluor for the additional risk it assumed performing CLIN 11. As detailed above, those risks include the Navy's refusal to acknowledge its payment obligations and its repeated instances of delayed payment. The Navy's actions forced Fluor to litigate to obtain that to which it was entitled and to perform CLIN 11 at a loss. When taken together, we find these factors increased the level of performance and cost risk that Fluor incurred performing CLIN 11, and a profit rate of nine percent fairly reflects that risk.

109. The third factor under the weighted guidelines is the facilities capital employed factor.[27] DFARS 215.404-71-4. This factor rewards the contractor's capital investment in facilities that benefit the Department of Defense and the contractor's commitment to improving productivity. DFARS 215.404-71-4(a). There are three assets that are considered: land, buildings, and equipment. DFARS 215.404-71-4(f). Kenrich did not view this factor as a very important part of the profit calculation because Fluor's investment in facilities, land, and equipment was not significant (tr. 2/64). Kenrich did not assign values for land or buildings because Fluor did not invest in either while performing the invalid option year (app. supp. R4, tab 532 at 29). With respect to equipment, Kenrich used the normal value (17.5 percent), DFARS 215.404-71-4(f), and applied it against the approximately $[redacted] Fluor incurred for

[27] Fluor's brief suggests that Fluor has eliminated this factor from its claimed profit (app. br. at 38 n.7). Nevertheless, out of an abundance of caution, we address it.

equipment costs in support of the invalid option year (app. supp. R4, tab 532 at 30). This resulted in a 0.21 percent additional claimed profit (*id.*).

110. The Navy objects to this value because it contends "Fluor provided no information about how it determined the amount of facilities capital employed" (gov't br. at 7; gov't resp. to ASOF ¶ 102). (*See* tr. 2/255-56 (Mr. Stevens explaining that he did not understand how the $[redacted] was derived)). We generally agree with the Navy. Both Kenrich's expert report and Fluor's post-hearing brief indicate that the $[redacted] figure represents the equipment costs Fluor incurred in support of all CLINs in the invalid option year, not just CLIN 11 (ASOF ¶ 102; app. supp. R4, tab 532 at 29-30). This is problematic because only CLIN 11 is before us in this appeal. Although we attempted to locate in the record the source documents indicating the equipment costs attributable to CLIN 11 alone, we were unable to do so and Fluor, in its post-hearing brief, provided no record citations to assist us in this respect. Because Fluor failed to meet its burden to demonstrate that the value for this factor was accurately calculated, we do not assign any value.

111. The final factor is the cost efficiency factor. DFARS 215.404-71-5. This factor, referred to as the "special" factor, provides an incentive for contractors to reduce costs. DFARS 215.404-71-5(a). There is no normal value for this factor because there is no requirement to include any value at all for this factor. *Id.* Rather, the regulation instructs that "[t]o the extent the contractor can demonstrate cost reduction efforts that benefit the pending contract, the contracting officer may increase the prenegotiation profit objective by an amount not to exceed 4 percent of total objective cost . . . to recognize these efforts." *Id.*

112. To determine if it is appropriate to include a value for this factor, the regulation provides that the contracting officer shall consider "criteria . . . to evaluate the benefit the contractor's cost reduction efforts will have on the pending contract." DFARS 215.404-1-71-5(b). The regulation lists several such criteria, including, but not limited to: (1) the contractor's participation in Single Process Initiative improvements; (2) actual cost reductions achieved on prior contracts; (3) the contractor's costs reduction initiatives (*e.g.*, competition advocacy programs, technical programs, obsolete parts control programs, spare parts pricing reform, value engineering, outsourcing of functions such as information technology); and (4) subcontractor cost reduction efforts. *See* DFARS 215.404-71-5(b)(1)-(8).

113. Kenrich assigned a value of three percent for this special factor "because Fluor was forced to undertake efforts beyond what was reasonable for a typical firm-fixed price contract to reduce its costs because of the aforementioned issues caused by the Navy and the insufficient Navy-established price" (app. supp. R4, tab 532 at 30; tr. 2/64-65). In other words, it seems Kenrich applied the special factor because the Navy allegedly forced Fluor to perform extracontractual work, which resulted in Fluor

performing at a loss (*id.*). There are two problems with this conclusion. First, as already discussed, Fluor has not met its burden of proof to demonstrate that the factual underpinnings of Kenrich's report are correct. Second, even assuming that there is evidence to support the existence of "the aforementioned issues caused by the Navy," Fluor does not point to any evidence in the record before us demonstrating what, if any, cost reduction efforts Fluor undertook to benefit the pending contract. In this regard, Fluor did not provide any evidence to support the existence of the criteria listed in DFARS 215.404-71-5(b)(1)-(8), or similar type criteria. We find that Fluor has not met its burden to justify an increase in profit for cost reduction efforts and we do not assign a value for this factor.

114. To summarize our findings with respect to the DFARS weighted guidelines, although we are able to assign values for some of the profit factors, we do not find the guidelines to be particularly helpful in this appeal. Instead, for the above reasons, we find that a nine percent profit rate is fair and reasonable, resulting in $[redacted] in profit (calculated by multiplying Fluor's claimed incurred costs by the profit factor).

C. Navy's Deduction of "Costs to Recoup"

115. The final area of dispute between the parties involves a deduction first proposed by the Navy in its response to Fluor's statement of costs. There, the Navy asserted that Fluor's claim should be offset by $114,378 for "Costs to Recoup" (R4, tab 64 at 4). The only explanation provided by the Navy is a one-sentence footnote that states: "These are monies withheld from Fluor due to its failure to perform specific tasks" (*id.*).

116. The nature of this proposed deduction is difficult to decipher. In the Navy's response to Fluor's statement of costs, the deduction is not included in the Navy's computation of "questioned" or "rejected" incurred costs (*id.* at 2, 4). Rather, "Costs to Recoup" is listed as a proposed deduction from the incurred costs and profit that the Navy has "accepted" (*id.* at 4). The nature of the deduction did not become clearer after the hearing. The Navy did not solicit any testimony on direct examination from its witnesses regarding the purported "Costs to Recoup." The sole Navy witness to address the deduction stated on cross-examination that he did not know the basis for the Navy's deduction (tr. 2/297-99).

117. In the Navy's post-hearing brief, the Navy did not offer any proposed findings of fact to explain or support the deduction (*see generally* gov't br. at 17; GSOF ¶¶ 1-15). The single reference to the deduction in the Navy's proposed findings of fact is in a table illustrating the Navy's calculation of the amount owed to Fluor (GSOF ¶ 15). The table shows "Costs to Recoup" as a proposed deduction from the incurred costs and profit that the Navy has "accepted" (*id.*).

118. Based upon the scant explanation provided by the Navy, we find that the Navy does not dispute that Fluor incurred these costs. In this respect, the Navy did not include these costs in its litany of questioned or rejected incurred costs. Thus, we do not view the Navy to be arguing that Fluor has failed to meet its burden to demonstrate that it incurred these costs. Beyond this finding, however, we are at loss to understand the nature of the deduction. Accordingly, the Navy's proposed deduction is wholly unsubstantiated.

DECISION

I. Standard of Review

Where a contractor continues performance of a contract at the direction of the government following the government's improper exercise of an option, the contractor is entitled to reimbursement of its costs and reasonable profit under a theory of constructive change. *Fluor Fed. Sols., Inc.*, ASBCA No. 62343, 23-1 BCA ¶ 38,302 at 185,957 n.5 (citing cases). As appellant, Fluor bears the burden of establishing its damages by a preponderance of the evidence. *BAE Sys. San Francisco Ship Repair*, ASBCA Nos. 58810, 59642, 16-1 BCA ¶ 36,404 at 177,506-07 (citing *Teledyne McCormick-Selph v. United States*, 558 F.2d 808, 810 (Ct. Cl. 1978)); *Arrow, Inc.*, ASBCA Nos. 41330, 41338, 94-1 BCA ¶ 26,353 at 131,072. A claimant, however, is not required to prove its damages with absolute certainty or mathematical exactitude. *BAE Sys.*, 16-1 BCA ¶ 36,404 at 177,503-04 (quoting *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). Rather, it is sufficient that the claimant provides "a reasonable basis for computation, even though the result is only approximate." *Id*.

Once appellant makes a *prima facie* showing of quantum recovery, the government must present evidence to contest the *prima facie* case. *Id.* at 177,507. "If the government fails to do so, the *prima facie* case stands uncontroverted and the contractor, with the burden of proof, will have established its case by a preponderance of the evidence." *Id*. (citing *Env'tl. Safety Consultants, Inc.*, ASBCA No. 53485, 05-1 BCA ¶ 32,903 at 163,019).

II. The Parties' Contentions

The parties have adopted the same methodology for calculating Fluor's recovery (app. br. at 2; gov't br. at 1, 4; tr. 1/13). Specifically, the parties agree that Fluor is entitled to its incurred costs, plus reasonable profit, less prior payments by the Navy. We agree that this is the appropriate way to calculate Fluor's recovery. *White Sands Constr., Inc.*, ASBCA Nos. 51875, 54029, 04-1 BCA ¶ 32,598 at 161,308 ("The ineffective attempt to exercise an option gives a contractor the right to recover the costs it incurred in performing that work plus a reasonable profit on those costs. . . .

The measure of recovery is the difference between the amount incurred plus profit and the amount received for the work.") (citing *Lockheed Martin Corp.*, ASBCA No. 45719, 02-1 BCA ¶ 31,025). Additionally, both parties agree that Fluor is entitled to interest from July 25, 2017 (the date of Fluor's claim) until payment (app. br. at 2; gov't resp. to ASOF ¶ 23). We agree. 41 U.S.C. § 7109(a)(1); FAR 33.208, INTEREST ON CLAIMS (MAY 2014). *See e.g.*, *Fidelity Constr. Co. v. United States*,700 F.2d 1379, 1383 (Fed. Cir. 1983).

Applying the above methodology, Fluor asserts that it is entitled to an award of $12,784,549 plus interest, reflecting a 16 percent profit rate (app. br. at 2, 59; app. reply at 8-9). The Navy contends that Fluor is entitled to recover no more than $6,740,769 plus interest, reflecting a four percent profit rate (gov't br. at. 5, 18). As we have explained, the dispute between the parties centers around three issues: (1) whether Fluor is entitled to $481,862 in costs questioned by the Navy; (2) whether the profit rate proposed by Fluor is reasonable; and (3) whether Fluor's award should be offset for what the Navy calls "Costs to Recoup." We conclude that Fluor is entitled to the questioned costs, that the rate proposed by Fluor is not reasonable, and that the award should not be offset by any amount other than the payments already made by the Navy.

III. Questioned Claimed Incurred Costs

Fluor asserts entitlement to $[redacted] in claimed incurred costs before payment. The Navy questions only $481,862 of this amount (gov't br. at 2; gov't resp. to ASOF ¶¶ 32, 37). As reflected in the table in our Findings of Fact, the costs questioned by the Navy consist of $[redacted] in retention and performance bonuses, $[redacted] in arbitration awards and settlements involving former Fluor employees, $166,812 in attorneys' fees associated with contract administration, $[redacted] in corporate reachback services, and $[redacted] in directly associated indirect costs (finding 22). Fluor is entitled to recover these costs.

A. Retention and Performance Bonuses

Fluor asserts that it is entitled to the $[redacted] questioned by the Navy for retention and performance bonuses paid to two of its employees (app. br. at 49). We conclude these costs are direct costs of CLIN 11 and are allowable under FAR 31.205-6(f), COMPENSATION FOR PERSONAL SERVICES.

Fluor sufficiently demonstrated that it paid the bonuses pursuant to agreements and established company policies (finding 24). Moreover, the costs are supported by source documents, including the bonus agreements and proof of payment, as well as unrebutted testimony (findings 24-30). The Navy does not contest that: (1) Fluor incurred the costs, (2) the costs are direct costs of CLIN 11, or (3) the costs are a type

ordinarily allowable under FAR 31.205-6(f) (gov't br. at 12-13; gov't resp. to ASOF ¶ 41). Instead, the Navy argues that the costs should be disallowed on the basis of reasonableness pursuant to FAR 31.201-3, DETERMINING REASONABLENESS (*id.*).

Cost reasonableness is a question of fact, *Kellogg, Brown & Root Services, Inc. v. United States*, 728 F.3d 1348, 1359 (Fed. Cir. 2013), upon which the contractor bears the burden of proof, *Kellogg, Brown & Root Services, Inc.*, ASBCA No. 58081, 17-1 BCA ¶ 36,595 at 178,240 (citing FAR 31.201-3(a)). FAR 31.201-3(a) provides that "[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." Among the factors to be considered in determining the reasonableness of a claimed costs are whether: "it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;" the cost comports with "[g]enerally accepted sound business practices [and] arm's-length bargaining;" and the cost reflects "[a]ny significant deviations from the contractor's established practices." FAR 31.201-3(b). In interpreting the standard, the Federal Circuit has held that the "standard for assessing reasonableness is flexible, allowing [the Board] to consider many fact-intensive and context-specific factors." *Kellogg, Brown & Root Services, Inc.*, 728 F.3d at 1359.

Here, we find that the costs associated with the bonuses to be reasonable. The record shows that Fluor's methodology for establishing bonus amounts included arms-length bargaining (finding 24). The record also reflects that the bonuses were consistent with bonus payments made to employees with similar levels of seniority and technical expertise, and, in the case of the Project Manager, with prior bonuses he received for his role on the contract (finding 29). Fluor also presented unrebutted testimony that, around the time the Navy exercised the invalid option year, Fluor had significant concerns regarding potential employee attrition (finding 30). As a result, Fluor took necessary measures to prevent the loss of key employees (findings 26-27, 30). Such measures included the payment of retention bonuses (*id.*). We find that Fluor has established a *prima facie* case that the bonus costs it incurred are reasonable.

The Navy, on the other hand, has failed to adequately contest or rebut the reasonableness of these costs. In its post-hearing brief, the Navy does not advance the objections made by DCAA to these costs or argue in support of DCAA's methodology for reducing the bonus amounts (gov't br. at 12-13). Nor is it required to. As one of the Navy's witnesses correctly noted, the Navy is not bound by DCAA's findings (tr. 2/268). Rather, the Navy, as respondent, can decide for itself which arguments to raise

in rebuttal. Where the Navy's views depart from those of DCAA, we see no reason to address DCAA's views.

The Navy challenges the reasonableness of the bonus costs on the basis that "Fluor was unable to provide any *contemporaneous* analyses, benchmarks, comparatives, memoranda, or other documents that explained how Fluor determined reasonableness" (*id*) (emphasis added). (*See also id.* at 13 (claiming that "Fluor provided no *contemporaneous* reasonable documentation for DCAA to review during the audit.") (emphasis added); *id.* (alleging that Ms. Cook "testified that she was unaware of any written documentation or emails *before* the employees signed the bonus agreements that supported any analysis of how the bonus amounts were reasonable") (emphasis added)).

The Navy does provide any legal support for its position that contemporaneous documentation of reasonableness is required. We do not read either FAR 31.201-3(a) or FAR 31.205-6(f)(1) as prescribing any specific form of proof or requiring that such proof be contemporaneous. *See Mission Support Alliance, LCC v. Dep't of Energy*, CBCA 6477, 22-1 BCA ¶ 38,181 at 185,433 (rejecting the argument that timecards were necessary to support the reasonableness of challenged labor costs under FAR 31.201-3(a), but insisting on "*something* to satisfy [appellant's] burden of proof"). Because Fluor has proved, by a preponderance of the evidence, that the bonus amounts were reasonable, we hold that it is entitled to the $[redacted] questioned by the Navy.

B. Arbitration Award and Legal Settlement

Fluor contends that it is entitled to $[redacted] questioned by the Navy for costs incurred in connection with resolving two union grievances. We conclude these costs are allowable under FAR 31.205-47, COSTS RELATED TO LEGAL AND OTHER PROCEEDINGS. *See URS Energy & Constr., Inc. v. Dep't of Energy*, CBCA No. 2260, 12-2 BCA ¶ 35,094 at 172,353 n. 4 (citing *Hirsch Tyler Co.*, ASBCA No. 20962, 76-2 BCA ¶ 12,075 at 57,985-86). Fluor established that neither grievance involved allegations that it engaged in fraud or discriminated against the employees (finding 33).[28] Fluor also established that the grievances were resolved during the

[28] Although we conclude that Fluor has met its burden of proof on this issue, the evidence is very thin. As far as we can discern, the record does not contain the arbitration award. (Neither party cited to the award documentation.) Further, although the record includes a copy of the settlement agreement, the agreement is so heavily redacted that the Board cannot independently determine the nature of the allegations raised in the grievance (R4, tab 53). That said, to support its claim, Fluor presented unrebutted testimony, which we find to be sufficient to establish its *prima facie* case. Moreover, we note that the Navy did not contest Fluor's assertion that the grievances did not allege fraud or discrimination

invalid option year and that Fluor paid the amounts during the invalid option year (finding 34). Moreover, Fluor demonstrated that, consistent with its disclosed accounting practices and DCMA-approved accounting system, the costs were directly allocated to CLIN 11 (*id.*).

For its part, the Navy does not dispute that the costs are of a type ordinarily allowable (gov't br. at 14-15). Nor does the Navy dispute that the costs are reasonable. Rather, the Navy questions whether the costs were incurred. Specifically, the Navy asserts that Fluor did not incur these costs during the invalid option year period because the employees did not work during the option period (*id.* at 15). Fluor counters that it incurred these costs "when the liabilities were established, *i.e.*, when the arbitrator issued the award . . . and when Fluor, [the former employee], and the union settled [the] grievance" (app. reply at 4) (emphasis omitted). Thus, Fluor argues that the costs were incurred during the invalid option year (*id.*).

It is well-established that a cost is "incurred" when the contractor has actually paid the cost or has a legal obligation to pay it. *Cellular Materials Int'l, Inc.*, ASBCA No. 61408, 22-1 BCA ¶ 38,022 at 184,646-47 (concluding that costs are not "incurred" until there is a duty to make payment); *Technocratica*, ASBCA No. 44134, 94-2 BCA ¶ 26,606 at 132,363 ("Insofar as pertinent here, the evidence must show that appellant incurred the cost, that is, it actually paid the expense or had the legal obligation to do so."); *Riverside Rsch. Inst.*, ASBCA No. 28132, 87-2 BCA ¶ 19,693 at 99,718 (defining incurred cost as "an amount paid out in the past or an obligation to be paid out in the future") (internal citations omitted), *rev'd on other grounds*, 860 F.2d 420 (Fed. Cir. 1988); *Opportunities Industrialization Cnts., Int'l, Inc.*, ASBCA No. 20604, 78-2 BCA ¶ 13,385 at 65,431 (holding that costs are not "incurred" where "there is no evidence of any legal obligation on appellant's part to pay them"); *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776, 801 (1999) ("A cost is 'incurred' when a person becomes legally bound to pay."), *aff'd* 249 F.3d 1337 (Fed. Cir. 2001); *Int'l Dev. Sols., LLC v. Dep't of State*, CBCA No. 6400, *et al.*, 22-1 BCA ¶ 38,081 at 184,932 ("To incur a cost 'means to suffer a liability or expense.'") (citing *SUFI Network Servs., Inc. v. United States*, 785 F.3d 585, 593 (Fed. Cir. 2015).

Here, Fluor's liability attached when the arbitration award was issued and the settlement agreement was executed—both of which occurred during the invalid option year (finding 34). *See McCulloch v. Sec'y of Health & Hum. Servs.*, 923 F.3d 998, 1002-03 (Fed. Cir. 2019) (holding that the future guardianship expenses that were not yet due were, nevertheless, incurred because liability had "attached" by virtue of the trial court's judgment), cited in *Cellular Materials Int'l, Inc.*, 22-1 BCA ¶ 38,022 at

(gov't resp. to ASOF ¶¶ 57, 58; gov't br. at 14-15). Nor did the Navy seek an order from the Board during discovery to compel Fluor to produce unredacted versions of the source documents.

184,647. In addition, the record shows that Fluor actually paid these expenses during the invalid option year (finding 34). Accordingly, Fluor has adequately demonstrated that it incurred the costs during the invalid option year.[29] The Navy, for its part, fails to provide a single legal citation for its position that the costs were not incurred.[30] We hold that Fluor is entitled to the $[redacted] in legal settlement costs questioned by the Navy.

C. Attorneys' Fees

Fluor's CLIN 11 quantum includes $166,812 for attorneys' fees paid to two law firms. The evidence establishes that the claimed costs for legal services are limited to costs associated with contract administration (finding 36). Accordingly, we conclude these costs are allowable under FAR 31.205-33, PROFESSIONAL AND CONSULTANT SERVICE COSTS, and that Fluor has made a *prima facie* showing of quantum recovery. Conversely, the Navy has failed to adequately rebut Fluor's showing. In its post-hearing brief, the Navy objects to these costs on two grounds (gov't br. at 13-14. First, the Navy alleges that Fluor did not incur the costs during the invalid option year. Second, the Navy alleges that Fluor's failure to provide unredacted versions of the invoices prevented the Navy from determining whether it should reimburse these costs.

Before discussing the merits of these two allegations, we must address the sufficiency (or rather the insufficiency) of the Navy's post-hearing briefing. The Navy's entire legal argument regarding these costs is a mere six sentences long and

[29] To be sure, if CLIN 11 did not exist, Fluor still would have incurred these costs and allocated them to the contract. In that scenario, Fluor would not have been paid directly for the costs since the RBOS I contract was a fixed-price contract. Due to the Navy's invalid exercise of the option, however, Fluor is entitled to be reimbursed for costs incurred on the contract during the invalidly exercised option year.

[30] The Navy's argument regarding these costs is cursory and confusing. For instance, it is possible that, contrary to the express language in its brief, the Navy means to argue that the costs were, in fact, incurred during the invalid option year but that the costs should be assigned to a different accounting period. If so, the Navy provides no legal support for this alternative position and does not address whether the decision to assign the costs to a prior period might result in CAS noncompliance. At bottom, "[i]t is not incumbent upon the Board to become a party's advocate, to make a case for it, or to divine how a particular authority may support the party's position." *Scot Cardillo d/b/a Eng'rs Tooling Support*, ASBCA No. 62051, 22-1 BCA ¶ 38,153 at 185,299 n.2 (quoting *Lebolo-Watts Constructors 01 LV, LLC*, ASBCA No. 59740 *et al.*, 21-2 BCA ¶ 37,789 at 183,426).

fails to contain any legal authority for the Navy's positions. Moreover, except for a chart listing invoices and accompanying "document dates," the Navy does not cite any evidence submitted by the parties in this appeal. Nor does the Navy cite to or rely upon either of the parties' statements of fact. We find the Navy's arguments to be cursory and unhelpful to the Board in resolving this matter. Indeed, beyond simply raising the two objections mentioned above, the Navy did nothing more to advance its position. Nevertheless, we address briefly the Navy's arguments regarding these costs.

Regarding the first allegation, the Navy argues that "[m]any of these costs were incurred months and even a year before the [start of the] period of performance" (*id.* at 13). For support, the Navy created a chart, listing tabs from the Rule 4 file that the Navy alleges contain an invoice with a "document date" predating the start of the invalid option year period of performance (*id.* at 14). The Navy, however, ignores entirely the evidence introduced by Fluor during the hearing, which we conclude is sufficient to demonstrate that the costs were incurred during the invalid option year (findings 37-38). Specifically, unrebutted testimony established that Fluor received the invoices in question during the invalid option year and, consistent with its disclosed accounting practices and DCMA-approved accounting system, Fluor directly allocated the costs to CLIN 11 (finding 37). The Navy does not convince us that we should question these costs on this basis.

Regarding the second allegation, the Navy argues that Fluor's claim should be denied because Fluor provided only "redacted legal invoices and generic representations written for the audit" (gov't br. at 13). The Navy does not identify the "generic representations" to which it refers. We assume it is referencing Fluor's written response to DCAA's requests for information during the audit (ex. A-4). Here, too, the Navy ignores entirely the evidence introduced by Fluor during the hearing, which we conclude provides sufficient support for the claimed costs (findings 36, 38). The Navy also complains that Fluor could have provided, under the terms of the Board's Protective Order, the confidential information redacted in the invoices (gov't br. at 13). To the extent such information was necessary for the Navy's rebuttal case, it should have sought an order from this Board compelling Fluor to produce such information. Having failed to do so, the Navy cannot now argue that Fluor's legal costs should be barred because Fluor did not produce the information sought by the Navy, choosing instead to rely upon testimony to establish its *prima facie* case.[31]

[31] As a point of clarification, Fluor claims that it did not redact any information on the basis of confidentiality, but rather on the basis of attorney-client privilege (app. reply at 5). Because the Navy did not seek an order compelling the production of unredacted versions of the invoices, we did not have occasion to consider whether unredacted versions could have been produced pursuant to our Protective Order. We take no position on these issues here.

We hold that Fluor is entitled to the $166,812 for attorneys' fees questioned by the Navy.

D. Corporate Reachback Services

Fluor's CLIN 11 quantum includes $[redacted] in direct labor costs for corporate reachback services that were required for Fluor's performance of CLIN 11. Based upon the evidence presented by Fluor (findings 40-45), we find that Fluor has made a *prima facie* showing of quantum recovery for these costs.

The Navy challenges these costs on two grounds—neither of which passes muster. First, the Navy claims there is "a heightened risk" that the costs are duplicative (gov't br. at 16). Specifically, the Navy claims that Fluor may be "simply charging corporate employee time to the Navy which should already have been captured in indirect general and administrative costs already claimed" (*id.*). Other than this generalized allegation, the Navy offers no evidence whatsoever in support of its claim.[32] We disregard the Navy's speculative claims, as mere allocations and statements are not proof. *Ocean Tech., Inc.*, ASBCA No. 21363, 78-1 BCA ¶ 13,204 at 64,586 (rejecting government's unsupported allegation that claimed costs may have been duplicative of costs recovered under a separate contract). Notably, in response to Fluor's assertions that it appropriately excluded these costs from its general and administrative cost pool and that the costs "are not duplicative of any indirect costs claimed" (ASOF ¶ 72; *see also* tr. 3/98-100; ex. A-6; app. reply br. at 6 (citing ASOF ¶¶ 72-77)),[33] the Navy represented that it "does not dispute this finding" (gov't resp. to ASOF ¶ 72). Thus, not only does the Navy fail to offer any factual support for its claims, it expressly agrees with the finding that the costs are not duplicative of any indirect costs claimed. In sum, the Navy claim does not persuade us to question these costs on this basis.

The second argument made by the Navy is that Fluor must provide not just timekeeping records showing that work was performed in support of the contract, but also demonstrate that each "worker provided *meaningful* work that benefited the Navy in Florida" (gov't br. at 16) (emphasis added). The Navy contends that "it is Fluor's responsibility to provide some kind of documentation that reasonably articulates what each corporate worker was *specifically doing* for the benefit of the Navy whenever

[32] Our review of the record, including the testimony of the DCAA auditor, did not reveal any evidence of duplicative billing. (*See* tr. 3/72-73 (describing a perceived risk of duplication but not finding any such duplication)).

[33] Fluor's evidence on this point included unrebutted testimony from Mr. Bingham stating that he found no evidence of inappropriate or duplicative costs in his review of Fluor's financial records, and that any such errors would have been discovered during DCAA's floor checks (tr. 2/91-93). We find this evidence to be persuasive.

time was charged" (*id.* at 17) (emphasis added). Although the Navy does not expressly state as much, we believe the Navy is objecting to the costs on the basis that they are not allocable to the contract. Once again, however, the Navy offers no legal authority for its contentions and we are unaware of any requirement to show a specific benefit to the government in order to establish allocability. Indeed, the governing law supports a contrary conclusion.

The test for allocability is well-established. *Bearingpoint, Inc.*, ASBCA Nos. 55354, 55555, 09-2 BCA ¶ 34,289 at 169,392. The Federal Circuit, in interpreting the term "benefit" in the FAR allocability provision (*i.e.*, FAR 31.201-4), has held that the cost need not "directly benefit the government's interests for the cost to be allocable." *Boeing N.Am., Inc. v. Roche*, 298 F.3d 1274, 1284 (Fed. Cir. 2022). Rather, allocability is "an accounting concept" that requires a "sufficient 'nexus' [] between the cost and a government contract." *Id.* at 1281, 1284 (citing *Lockheed Aircraft Corp. v. United States*, 375 F.2d 786, 794 (Ct. Cl. 1967)). Critically, in *Boeing*, the Federal Circuit rejected the very inquiry the Navy demands here, instructing that "[t]he requirement of a 'benefit' to a government contract is not designed to permit contracting officers, the Board, or this court to embark on an amorphous inquiry into whether a particular cost sufficiently 'benefits' the government so that the cost should be recoverable from the government." *Id.* We find that Fluor has met its burden to demonstrate a nexus between the corporate reachback services and the government work that it was contracted to do. Contrary to the Navy's arguments, there is no additional requirement for Fluor to furnish evidence that the work was "meaningful" or to articulate what each employee was specifically doing for the benefit of the Navy at the time the work was performed. We find that Fluor is entitled to recover $[redacted] in corporate reachback costs.

E. Directly Associated Indirect Costs

Finally, as explained in our Findings of Fact, DCAA questioned $[redacted] in indirect costs (finding 48). These indirect costs were "directly associated" with the CLIN 11 direct costs questioned by DCAA (*id.*). Because we hold that Fluor is entitled to recover the direct costs questioned by the Navy, it is also entitled to recover the directly associated indirect costs questioned by the Navy.

In sum, based upon the evidence presented, we conclude that Fluor has made a *prima facie* showing of quantum recovery regarding both its direct and indirect costs. The Navy, on the other hand, has failed to contest or rebut this showing. Accordingly, the *prima facie* case stands uncontroverted and Fluor, with the burden of proof, has established its case by a preponderance of the evidence. *BAE Sys.*, 16-1 BCA ¶ 36,404 at 177,507.

IV. Profit

The second major area of dispute involves profit. We find that Fluor has not met its burden to show that a 16 percent rate of profit is reasonable. Rather, as we explained in detail in our Findings of Fact, we conclude that Fluor is entitled to recover $[redacted] in profit, reflecting a nine percent rate of profit.

A. Standard of Review

It is well-established that an equitable adjustment includes a reasonable and customary allowance for profit. *United States v. Callahan Walker Const. Co.*, 317 U.S. 56, 61 (1942); *Hi-Shear Tech. Corp. v. United States*, 356 F.3d 1372, 1380 (Fed. Cir. 2004) (quoting *Rumsfeld v. Applied Cos.*, 325 F.3d 1328, 1341 (Fed. Cir. 2003)); *Mo. Dep't of Soc. Servs.*, ASBCA No. 61121, 19-1 BCA ¶ 37,240 at 181,279 (citing *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963)) (other citations omitted). Without the allowance for profit, the government receives something for nothing and the contractor is not made whole. *Mo. Dep't of Soc. Servs.*, 19-1 BCA ¶ 37,240 at 181,279 (citing *Aero Components Co.*, ASBCA No. 42620, 92-1 BCA ¶ 24,565 at 122,565).

The prescribed rate of profit should fairly reflect both the nature of the work and the risks involved. FAR 15.404-4, PROFIT (requiring contracting officers to consider, among other things, the complexity of the work and the risk involved when establishing profit or fee); *Norair Eng'g Corp.*, ASBCA No. 10856, 67-2 BCA ¶ 6,619 at 30,696-97; *Am. Pipe & Steel Corp.*, ASBCA No. 7899, 1964 BCA ¶ 4,058 at 19,904; *ACE Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 279 (2006), *aff'd*, 499 F.3d 1357 (Fed. Cir. 2007); Cibinic, Nagle, and Nash, *Administration of Government Contracts*, 5th Ed. 2016, at 664 (hereinafter "Cibinic, Nagle, and Nash"). Logically, where a contractor performs work that is more complex and involves a higher degree of risk, it should be rewarded with a higher rate of return. *Am. Pipe & Steel Corp.*, ASBCA No. 7899, 1964 BCA ¶ 4,058 at 19,904. In the same vein, where a change or modification requires the contractor to perform work that is more complex or involves a higher degree of risk than the original work under the contract, the contractor is entitled to a higher rate of profit than that included in the original contract price. *Id.* Conversely, if the work being compensated through a change or modification is less demanding or involves a lesser degree of risk than the original contract work, the awarded rate of profit should reflect that reduction. *Yates-Desbuild JV v. Dep't of State*, CBCA No. 3350 *et al.*, 17-1 BCA ¶ 36,870 at 179,712 (citing *Varo, Inc.*, ASBCA No. 15000, 72-2 BCA ¶ 9,717 at 45,360).

As reflected in this appeal, there are numerous methodologies for determining a reasonable rate of profit and the Board retains some, albeit not unfettered, discretion in deciding which method to apply. *White Buffalo Const., Inc. v. United States*,

546 F.App'x 952, 955 (Fed. Cir. 2013) (citing *Home Savs. Of Am. v. United States*, 399 F.3d 1341, 1347 (Fed. Cir. 2005)). The determination of reasonable profit is a factual issue. *Bethlehem Steel Corp. v. United States*, 511 F.2d 529, 533 (Ct. Cl. 1975); *see also Callahan Walker Constr. Co.*, 317 U.S. 56 at 61. We review *de novo* a contracting officer's determination of profit. *I. Alper Co. v. Gen. Servs. Admin.*, GSBCA No. 11335, 92-3 BCA ¶ 25,038 at 124,813 (citing *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)).

Our charge is to fix profit in a manner that is equitable based on the circumstances presented in each appeal. *See I. Alper Co.*, 92-3 BCA ¶ 25,038 at 124,811 (citing *Callahan Walker Constr. Co.*, 317 U.S. at 61). As we alluded to earlier in our opinion, this is not an exact science. Even when using structured schemes, such as the DFARS weighted guidelines, there is a range of acceptable values and rates from which to select. In short, "there is no right answer to the problem of determin[ing] [] an appropriate profit rate." *Id.* at 124,813 (cleaned up). Rather, "the establishment of an amount of profit is essentially a jury verdict, a subjective analysis of all of the facts and circumstances surrounding the event." *NVT Techns., Inc.*, EBCA No. C-0401372, 05-1 BCA ¶ 32,969 at 163,311 (citation omitted). In the end, the deciding authority must exercise sound judgment and common sense.

B. The Three Percent Profit Rate in Underlying Contract is Not Determinative

In our Findings of Fact, we found that a rate of three percent, *i.e.*, the rate included in Fluor's proposal and incorporated into the underlying contract, is not reasonable for CLIN 11. The profit margin used by a contractor in its bid or proposal can be a useful indicator of the rate of profit to be applied in an equitable adjustment. In some instances, we have found the rate proposed by a contractor in its bid or proposal to be reasonable and have applied that rate to changed work. *See e.g.*, *Mo. Dep't of Soc. Servs.*, ASBCA No. 61121, 19-1 BCA ¶ 37,240 at 181,279. In using this indicator, however, the Board is mindful that the profit margin included by a contractor in its offer is often influenced by the competitive environment and may not accurately reflect the nature of the work and risks involved. Indeed, a contractor, in its business judgment, may submit an offer that does not include profit, or may be below-cost, or may be an attempted "buy-in" to gain additional experience in the industry. *Chugach Logistics-Facility Serves. JV, LLC*, B-421351, 2023 CPD ¶ 80 (citing *All Phase Env'tl., Inc.*, B-292919.2 *et al.*, 2004 CPD ¶ 62 at 8).

Such business decisions at the time of award do not preclude the contractor from realizing reasonable and customary profit on an equitable adjustment. *See Keco Indus., Inc.*, ASBCA No. 15184, 72-2 BCA ¶ 9,576 at 44,733 (contractor who bid at no profit is still entitled to record a fair profit on additional work); *Grumman*

Aerospace Corp. ex rel. Rohr Corp., ASBCA No. 50090, 01-1 BCA ¶ 31,316 at 154,677 (contractor entitled to 15 percent profit even when in loss position because of other performance problems); *Stewart & Stevenson Servs., Inc.*, ASBCA No. 43631, 97-2 BCA ¶ 29,252 at 145,522-23 (contractor entitled to reasonable profit even where bid contract at a loss); *Tecom, Inc. v. United States*, 86 Fed. Cl. 437, 469 (2009) (finding that a subcontractor who bid one percent profit is entitled to a fair rate of profit for additional work). Granted, our decision here does not mean that a contractor is entitled, in all circumstances, to a rate of profit greater than that proposed in its offer—only that additional analysis is often required to assess whether the rate accurately reflects the complexity of the work and the risks incurred.

Here, the total price proposed by Fluor in its proposal (and, thus, the profit margin included) was influenced by competitive factors (findings 53-54). Moreover, for the reasons expressed in Fluor's expert's credible testimony, with which we agree, the three percent rate of profit would not be a reasonable rate of profit for CLIN 11 (finding 55). Under the facts of this appeal, we do not consider the three percent to be a reasonable rate of profit for CLIN 11.

C. The Seven Percent Profit Rate for Firm-Fixed Price Modifications Is Presumptively Reasonable

This brings us to the seven percent rate applied by the parties to firm-fixed price modifications during contract performance. For reasons stated in our Findings of Fact, we found the rate negotiated by the parties to be presumptively fair and reasonable—a useful starting point for assessing the appropriate rate of profit—for the modification purporting to exercise the invalid option year (findings 56-59). Our factual findings, in this regard, are consistent with prior findings of this Board and others. *See e.g.*, *Coastal Dry Dock & Repair Corp.*, ASBCA No. 36754, 91-1 BCA ¶ 23,324 at 117,003 (applying the rate used by the parties for change orders during contract performance to an equitable adjustment for added work); *Norair Eng'g Corp.*, 67-2 BCA ¶ 6,619 at 30,696 (finding that the parties' rate for change orders to be "pertinent," but not dispositive, evidence of the rate to be applied in an equitable adjustment); *Yates-Desbuild JV*, 17-1 BCA ¶ 36,870 at 179,712 (holding that "[i]f the contract neither establishes nor precludes a rate for profit, the parties' rate for change orders may be relevant, as contemporaneous conduct establishing a reasonable rate") (quoting Cibinic and Braude, "Cost Recovery & Major Pricing Elements," in *Construction Contracting* 685, 764 (1991)).

The presumption that the parties' agreed-upon rate for change orders is fair and reasonable is rebuttable. For the reasons stated in our Findings of Fact, we found that Fluor demonstrated compelling reason to increase the rate to nine percent and that the Navy failed to demonstrate compelling reason to decrease the rate to four percent (findings 61-113). We see no reason to restate our factual findings here. Instead, we

highlight a few key points that merit emphasis and address one legal question raised by the record.

D. Various Methods Are Appropriate for Determining Profit

Various methods or factors may be used to arrive at an equitable rate of profit for a price adjustment. Here, Fluor's expert used several methodologies to analyze profit (finding 70). On the whole, we found the methods used by Kenrich appropriate for determining a reasonable rate of profit. With respect to the first method, *i.e.*, analyzing the complexity of the work and the risks involved, we take no issue with the methodology itself and, in fact, find support for some of the risk factors considered by Kenrich—primarily those associated with the Navy's failure to acknowledge its payment obligations and to make timely payment in-full. In this regard, we conclude that both the seven percent rate agreed-upon by the parties during performance and the four percent proposed by the Navy fall short of the compensation for which Fluor is entitled for bearing the risk of financing those costs of the work for which it was not paid by the Navy (on the order of $[redacted] million) for more than seven years.

Our factual findings, in this regard, are consistent with prior findings of this Board and others. *See New York Shipbuilding Co.*, ASBCA No. 16164, 76-2 BCA ¶ 11,979 at 57,427 (holding that, where a contractor invests private capital in a contract, it must be compensated fairly through profit for the loss of opportunity to invest that money elsewhere and to earn a return on equity capital); *Ingalls Shipbuilding Div., Litton Sys., Inc.*, ASBCA No. 17717, 76-1 BCA ¶ 11,851 at 56,778 (holding that the "value of the use of money to make money" must be considered in pricing of contract changes); *Aerojet-General Corp.*, ASBCA No. 17171, 74-2 BCA ¶ 10,863 at 51,691-2 (finding that a higher rate of profit was justified due to the government's withholding of progress payments); *P.J. Dick Inc. v. Gen. Servs. Admin.*, GSBCA No. 11772, *et al.*, 94-3 BCA ¶ 27,266 at 135,862 (finding that a higher rate of profit was warranted because the government made performance of the contract more difficult by withholding progress payments and refusing to definitize contract modifications); *I. Alper Co.*, 92-4 BCA ¶ 25,038 at 124,810, 124,812 (finding that the government mitigated the contractor's cost risk by making bi-weekly progress payments in *lieu* of the normal monthly billing period as stipulated in the contract, thus reducing the amount of time and money the contractor had to pay out of its own pocket).

E. Fluor May Not Rely Upon Kenrich's Report To Demonstrate The Existence of Extracontractual Work

One glaring problem with Fluor's case as it pertains to the risk factors relied upon by Kenrich is the lack of proof to support Fluor's allegations of extracontractual work. This lack of evidentiary support also undercuts the weighted guidelines analysis

conducted by Kenrich. As we explained in our Findings of Fact, if Kenrich's "understanding" of the scope of work is incorrect, then a higher rate of profit cannot be justified based on this particular risk factor. We, thus, arrive at the legal question raised by the record. Although neither party expressly raised the argument, we must address whether Kenrich's expert report and/or Mr. Bingham's testimony can supply the necessary factual support. We conclude that they cannot.

Kenrich's opinions regarding the alleged extracontractual work were based upon conversations with Fluor personnel and information provided to Kenrich by Fluor personnel (finding 83)—evidence not introduced or admitted in this appeal. Kenrich did not conduct an independent analysis to verify the factual allegations (findings 83-84). Under Federal Rule of Evidence 703, the facts or data relied upon by an expert "need not be admissible for the opinion to be admitted" if experts in the field would reasonably rely on such data.[34] Fed. R. Evid. 703. The Federal Circuit recently reiterated, however, that "the underlying information must not be used for substantive purposes." *WiLAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1374 (Fed. Cir. 2021) (quoting Fed. R. Evid. 703 advisory committee's notices to the 2000 amendments). This is because Rule 703 "is not, itself, an exception to or exclusion from the hearsay rule or any other evidence rule that makes the underlying information in admissible." *Id.* (quoting 4 Weinstein's Fed. Evid. § 703.05).

The Federal Circuit further found in *WiLAN* that "[t]hese principles have been reaffirmed repeatedly." *Id.* (citing *see e.g.*, *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (holding that "a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony") (citation omitted); *Factory Mut. Ins. Co. v. Alon USA L.P.*, 705 F.3d 518, 524 (5th Cir. 2013) (concluding that Rule 703 "was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purpose to base his opinion") (citation omitted); *United States v. Mejia*, 545 F.3d 179, 197-98 (2d Cir. 2008) (holding that an expert may not simply repeat hearsay to the jury); 29 Charles Alan Wright, Arthur R. Miller & Victor J. Gold, *Federal Practice and Procedure* § 6274 (2d ed. 2020) (Rule 703 does not permit the admission of otherwise inadmissible evidence "on the pretense that it is the basis for expert opinion when, in fact, the expert adds nothing to the [inadmissible evidence] other than transmitting [it] to the jury.")).

[34] Although the Federal Rules of Evidence are not strictly binding upon the Board, we may use them as a guide. Board Rule 10(c); *Parson-UXB JV*, ASBCA No. 56481, 11-2 BCA ¶ 34,806 at 171,282. Here, because Fluor is using Rule 703 as the sole basis for our consideration of this evidence, we address it on those terms.

F. Evidence of Customary Profit Was Lacking

The second method employed by Kenrich to analyze profit was to consult industry guidance and surveys (finding 70). Industry surveys on profit margins can provide a useful and appropriate reference for determining customary profit margins. Here, however, for the reasons stated in our Findings of Fact, we conclude that the industry report and survey relied upon by Kenrich are of little probative value (findings 93-95).

Even evidence that falls short of an industry survey, such as data compiled by the parties regarding the rate of profit earned by other contractors performing similar work or data regarding the contractor's average historical profit margin on similar contracts, can be of great assistance to the Board. Here, neither party furnished any evidence of what might be considered customary profit for base operations support contracts (finding 94). On this point, although the Navy claims in its post-hearing hearing brief that "[a] 16% profit rate is more common in firm-fixed price, highly technical, research and development contracts, not a base operations and support contract" (gov't br. at 12), the Navy offers no evidentiary support. Unsupported allegations in post-hearing briefs do not constitute evidence. *Argo Tech., Inc.*, ASBCA No. 30522, 88-1 BCA ¶ 20,381 at 103,061. *See also Lockheed Martin Aeronautics Co.*, ASBCA No. 56547, 13 BCA ¶ 35,220 at 172,820 (The Board bases its decisions "on facts established by the record, not allegations that are unsupported by, misanalyse, and/or contradict, that record.").

G. The Use of the Weighted Guidelines

This brings us to the third method relied upon by Kenrich: the DFARS weighted guidelines. The weighted guidelines method is a technique used by contracting officers in the formation stage to establish the profit or fee portion of the government's prenegotiation objective. FAR 15.404-4(a). This structured approach, which is set forth in DFARS 215.404-71 *et seq.*, requires the contracting officer to assign values to various profit factors.

The weighted guidelines are intended to be used pre-award, as a "tool for forecasting" profit (tr. 2/182). FAR 15.404-4(a); *see Keco Indus., Inc.*, ASBCA No. 18730, 74-2 BCA ¶ 10,711 at 50,939. (*See also* tr. 2/59-60, 136, 177-78, 182, 232, 234-35; app. br. at 57-58; gov't br. at 8-9; GSOF ¶ 11) Thus, their use in this context is not mandatory. *See States Roofing Corp.*, ASBCA No. 54854, 08-2 BCA ¶ 33,912 at 167,809. Although the Board has often relied upon the weighted guidelines, when appropriate, to determine profit for equitable adjustments, *see e.g., Supreme Foodservice GMBH*, ASBCA No. 57884, 20-1 BCA ¶ 37,618 at 182,631, *aff'd on other grounds*, 54 F.4th 1362 (Fed. Cir. 2022), we remain conscious of the difficulties in applying the guidelines to a retrospective determination of profit after all

work has been performed. *Ingalls Shipbuilding Div., Litton Sys., Inc.*, 76-1 BCA ¶ 11,851 at 56,768 (citing *Bethlehem Steel Corp.*, 511 F.2d at 533)); *Keco Indus., Inc.*, 74-2 BCA ¶ 10,711 at 50,696-97. Moreover, we recognize that, even when using a structured approach, like the DFARS weighted guidelines, there are no objective standards the application of which would be little more than a mathematical exercise. *See I. Alper Co.*, 92-3 BCA ¶ 25,038 at 124,812. Rather, the "[a]pplication of judgement and flexibility is required of the deciding authority." *Id.* (citing *Carvel Walker*, EBCA No. 3744, 78-1 BCA ¶ 13,005).

Our factual findings with respect to the weighted guidelines analysis proffered by Fluor are lengthy and we do not repeat them here. In short, under the weighted guidelines, to adopt Fluor's position would result in a windfall to Fluor and to adopt the Navy's position would result in windfall to the Navy. Accordingly, we conclude that an overall profit rate of nine percent is fair and reasonable based upon the record before us in this appeal. As further support for this rate, we note that, historically, a profit rate of 10 percent has been treated as more or less standard. *Yates-Desbuild JV*, 17-1 BCA ¶ 36,870 at 179,712 (citations omitted); *Metric Const. Co. v. United States*, 81 Fed. Cl. 804, 831 (2008) (citing *ACE Constructors, Inc. v. United States*, 70 Fed. Cl. 253, 279 (2006), *aff'd*, 499 F.3d 1357 (Fed. Cir. 2007)); *Walber Const. Co.*, HUDBCA No. 79-385-C17 *et al.*, 81-1 BCA ¶ 14,953 at 74,014); *Carvel Walker*, EBCA No. 3744, 78-1 BCA ¶ 13,005 at 63,422; Cibinic, Nagle, and Nash at 664 (citing cases). We view this as further evidence of reasonableness, although not dispositive proof. *Norair Eng'g Corp.*, 67-2 BCA ¶ 6,619 at 30,696-98.

V. The Navy Proposed Deduction for "Costs to Recoup" is Wholly Unsubstantiated.

The final point of contention between the parties involves $114,538 that the Navy argues should be deducted from Fluor's award for purported "Costs to Recoup" (gov't br. at 17). As we have explained, it is difficult to decipher what the deduction represents. It is wholly unsubstantiated (findings 115-118). The argument section of the Navy's post-hearing brief devotes a mere five sentences to this matter, and counsel's assertions are devoid of any citation to the record or applicable law (gov't br. at 17). In fact, other than listing the deduction as a line item in a table summarizing the Navy's calculations, the Navy offers no proposed finding of fact that mentions, let alone supports, the deduction (*id.*).

Fluor argues that, in addition to being unsubstantiated, the Navy's proposed deduction represents a separate and distinct government claim, for which the Navy bears the burden of proof and the obligation to comply with the jurisdictional prerequisites of the CDA (app. reply at 7). Although we suspect Fluor may be correct, the Navy's arguments and factual support are so lacking that we are unable to ascertain

whether the deduction represents a government claim. We decline to offset Fluor's award by $114,528.

CONCLUSION

We conclude that Fluor is entitled to $[redacted] in incurred claimed costs. This amount includes the $481,862 in costs questioned by the Navy and the $114,538 deduction proposed by the Navy. Further, Fluor is entitled to $[redacted] in profit, reflecting a nine percent rate of profit. Thus, Fluor is entitled to a total award of $9,633,889.53, with CDA interest from July 25, 2017, until the date of payment.

Dated: July 2, 2024

ELIZABETH WITWER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

J. REID PROUTY
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. 62344, Appeal of Fluor Federal Solutions, LLC, rendered in conformance with the Board's Charter.

Dated: July 9, 2024

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