ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
DTH Corporation	)	ASBCA No. 62967
	)	
Under Contract No. FA4830-14-D-0006	)	

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OPINION BY ADMINISTRATIVE JUDGE WOODROW
PURSUANT TO BOARD RULE 11

This appeal addresses a dispute between DTH Corporation (DTH) and the Air Force regarding a contract to construct a helicopter storage area at Moody Air Force Base. DTH submitted a claim for additional compensation related to various alleged changes and delays totaling over $2.7 million. The parties have agreed to waive a hearing and have the appeal decided on the written record pursuant to Board Rule 11.

Board Rule 11 allows the parties to waive a hearing and instead have the Board issue a decision based on the record. (Board Rule 11(a)). "Unlike a motion for summary judgment, which must be adjudicated on the basis of a set of undisputed facts, pursuant to Board Rule 11, the Board 'may make findings of fact on disputed facts." *U.S. Coating Specialties & Supplies, LLC*, ASBCA No. 58245, 20-1 BCA ¶ 37,702 at 183,031 (citation omitted). As the proponent of the claim, DTH bears the burden of proving liability and damages in this appeal. *Stobil Enter.*, ASBCA Nos. 61688, 61689, 19-1 BCA ¶ 37,400 at 181,809 (citing *Wilner v. United States*, 24 F.3d 1397, 1401-02 (Fed. Cir. 1994)).

The Board grants DTH $70,778.14 for an 89-day delay attributable to the Air Force, but denies all other claimed damages. DTH's claims regarding wetland

permitting and the boardwalk are barred by accord and satisfaction due to a signed contract modification. Further, DTH assumed the risk of increased costs for porous asphalt as the design-build contractor. We also conclude that the government did not direct or ratify a constructive change regarding topsoil processing. Finally, we deny the claims for indirect costs, profit, and claim preparation costs based upon our findings on the other claim elements.

We address each of DTH's claim items in turn.

FINDINGS OF FACT

I. The Contract

1. On July 8, 2014, the Air Force awarded DTH Multiple Award Construction Contract (MACC) No. FA4830-14-D-0006. This indefinite delivery, indefinite quantity (IDIQ) contract covered work at Moody Air Force Base, Grand Bay Range, and Grassy Pond, GA, and Avon Park, FL (R4, tab 1 at 1-4).

2. On September 22, 2016, the Air Force issued Delivery Order No. 2003 under the MACC to DTH for $6,586,540 (R4, tab 5). This firm fixed-price contract encompassed five projects to support a future HH-60 (Blackhawk) helicopter hangar at Moody Air Force Base (R4, tab 5 at 1, 15). The design-build contract required DTH to design and construct an access bridge and road, parking, utility corridor, stormwater management, and electric corridor (R4, tab 5 at 2-8). The contract stipulated a 90-day design and 360-day construction period (R4, tab 5 at 10).

3. The contract's scope of work (SOW) designated the projects as "Design-Build" and stated that the government-provided data and information "is as current as of the solicitation date." The SOW placed the burden on the contractor to conduct its own investigation, stating that the:

> Contractor shall perform actual field surveys, environmental studies and engineering, hydraulic engineering, geotechnical investigation, and utility verification prior to design, and mitigation at its own expense and familiarization with the area.

The SOW stated that the contractor must perform its own design:

> The objective of this project is to have the Contractor perform the actual design and construction based on data obtained from his investigation and verification under the stipulations of this bidding package. The Contractor

> shall coordinate with Government on the four-bay hangar for interfacing and any mandates.

The SOW further stated:

> [the] tentative scope of work for each sub-project is illustrated in each individual plans attached in this package. They are prepared only to obtain uniform bidding from potential bidders and will need to be modified during the Contractor's design process.

Finally, the contract cautioned:

> the scopes of works are depicted under each sub-project to express the Government's intent. Rules and regulations along with materials may be modified after actual field work is completed.

(R4, tab 5 at 15)

4. Under the SOW, project 1 required DTH to construct a new 3250 linear-foot paved road with drainage directed to a preexisting detention pond and a 180-foot concrete bridge over Beatty Creek (R4, tab 5 at 16-17).

5. Project 2 required DTH to construct three parking lots (west, north, and east) for private vehicles featuring flexible pavement, curb-and-gutter systems, and catch basins for surface drainage piped to a designated detention basin. The project also included designing and constructing LED lighting compliant with relevant standards (R4, tab 5 at 17-18).

6. Project 3 required DTH to construct a utility corridor east of the realigned Coney Road, housing underground conduits for natural gas, communication, electrical power, water, and sewer lines (R4, tab 5 at 19).

7. The SOW for project 4, the stormwater management project, stated that the bioretention pond should be approximately 1.5 acres in size and should detain pollutants in surface runoff received from the roadway and parking lots before discharging water to Beatty Creek (R4, tab 5 at 20). The SOW also stated that wetland mitigation would be required (*id.*). Preliminary concept drawings indicated the use of non-porous "Super Pave" asphalt (R4, tab 5 at 22-23, 27). Project 5 required DTH to repair the existing electrical corridor in accordance with the attached drawings (R4, tab 5 at 7-8, 15). Project 5 is not relevant to this dispute.

II. DTH's Performance and Modifications to the Contract

8. The Air Force issued the notice to proceed for the design phase on October 21, 2016.

9. On October 26, 2016, DTH submitted a request for information regarding the original design for a paved jogging trail through the wetlands areas. According to DTH, the paved jogging trail would impact the upstream wetlands and incur wetland mitigation fees to be paid with the project. DTH recommended elevating the jogging trail throughout the wetlands and stated that the probable effect would be to decrease cost. (R4, tabs 19 at 286, 28 at 6).

10. On November 10, 2016, Joseph Vaughn, the contracting officer's representative (COR), approved DTH's recommendation to elevate the jogging trail (R4, tab 19 at 286). He also eventually approved DTH's purchase of materials for the walk bridge and handrails (R4, tab 19 at 289).

11. The Air Force issued the initial notice to proceed for construction on August 3, 2017 (R4, tab 19 at 4).

12. On May 30, 2018, DTH emailed the government a revised construction schedule (R4, tab 11 at 1). The schedule reflected "all of the historical issues that caused excessive delays, and our expected Project Completion Date" (*id.*). DTH then requested a "Contract Modification, with Contract Extension of Duration, to match this" (*id*).

13. DTH attached a letter dated May 30, 2018, to the email (R4, tab 11 at 2). In the letter, DTH requested a contract extension due to delays encountered while obtaining the necessary wetland credits to begin work on the project (*id.* at 4). DTH's letter explained, "Due to the extensive delays caused when attempting to negotiate Environmental Land Credits, and Payment of In-Lieu Fees, then getting Approval by USACE for all the Changes, plus negotiations over the above Engineering Changes, our official Construction Schedule became much delayed" (*id*). DTH specifically requested that the USAF-Moody Contracting Office "grant us a Contract Modification for these Technical Changes and grant us a Contract Extension through 1 July 2019 for the Official Schedule, end-to-end" (*id.*).

14. On June 7, 2018, the parties signed bilateral Modification No. P0003 (R4, tab 12 at 1). The stated purpose of the modification was "to extend the Period of

Performance and to add and delete work for no additional cost" (*id*.). Modification No. P00003 included the following release language:

> In consideration of the modification agreed to herein as complete equitable adjustments for the agreed upon changes, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributed to such facts or circumstances giving rise to these changes.

(*Id.*)

15. DTH did not inform the government that the boardwalk and ADA ramps would increase the contract cost until after the modification was signed and the claim was submitted (R4, tab 19 at 346).

16. On July 7, 2018, the Air Force issued a second and final notice to proceed for construction (R4, tab 21 at 1).

17. The parties signed bilateral letter Modification No. P0005 on October 31, 2019. (R4, tab 16 at 2). The modification expressly states in paragraph 3 that:

> The contractor has agreed to give the Government consideration for the 90 days extension by solving the electrical duct bank issue. *This issue was previously agreed to be solved by both parties by cutting work from the west parking lot to pay for the additional work of the duct bank. DTH has agreed that by giving them a 90 day extension on the completion of work, as well as a final CPARS report reflecting performance improvements from the last interim CPARS, the contractor will complete the west parking lot as it was awarded initially and take the 90 day extension at no additional cost.* The new contract completion date is changed from 31 October 2019 to 31 January 2020.[1]

(Emphasis added).

[1] CPARs refers to the Contractor Performance Assessment Reporting System.

The modification further states that the parties' signatures "constitute a Mutual Agreement between both Parties (FAR 43.103(a)) to the consideration mentioned above in paragraph 3." It includes the following release language:

> [T]he Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributed to such facts or circumstances giving rise to these changes.

(R4, tab 16 at 1)

18. In connection with its work in the wetlands area, DTH excavated muck from various areas. Rather than haul away and dispose of this material, DTH processed it with machines that could transform the muck into high-grade topsoil (R4, tab 19 at 9). DTH documented its soil processing and hauling activities in its daily reports to the Air Force, indicating Air Force personnel knew about these operations (R4, tab 19 at 278, 280).

19. A soil processing machine, readily observable, was present at the construction site. The government granted access to Moody Air Force Base for the soil screening equipment and the subcontractors tasked with screening and hauling soil to Mt. Moody (R4, tab 23).

20. DTH submitted payment records to the Air Force, showing payments made to subcontractors for operating the soil screening machine, as support for its claim (R4, tab 19 at 346; app. br. at 54).

21. In her final decision, the CO stated that no government official ever saw the topsoil processing machine and that there was no record of the placement of excess soil until DTH submitted its claim. The CO further stated that the Air Force never approved the screening and hauling of 6,145 cubic yards of topsoil to Mt. Moody. (R4, tab 21 at 1, 3-4). In her deposition, she expressly denies having knowledge of the soil processing and placement at Mt. Moody (app. supp. R4, tab 31 at 61).

22. In total, there were six completed modifications for the contract:

> a. P00001, dated April 25, 2017. This unilateral modification fixed a contract writing system error and did not change the period of performance or cost of the contract (R4, tab 7).
> b. P00002, dated June 22, 2017. This no-cost bilateral modification extended the period of performance by 191

days due to permitting delays and redesigning of the retention ponds (R4, tab 8).
c. P00003, dated June 7, 2018. This bilateral modification extended the period of performance and added and deleted electrical work for no additional cost (R4, tab 12 at 1).
d. P00004, dated January 17, 2019. This no-cost bilateral modification extended the period of performance by 76 days to October 31, 2019 due to severe weather in October and December 2018 and January 2019 (R4, tab 14).
e. P00005, dated October 31, 2019. This no-cost bilateral modification extended the period of performance 90 days to January 31, 2020, to resolve an electrical duct bank issue that the contractor offered to solve in consideration for the additional time. This modification was originally done via letter due to an error with the Air Force's contract writing system. (R4, tab 16).
f. P00006, dated January 10, 2020. This no-cost bilateral modification extended the period of performance 31 days to March 2, 2020, due to weather (R4, tab 17).

23. DTH first submitted documentation of its expenditures on the boardwalk and ADA ramps with its claim (R4, tab 19 at 345-46).

24. DTH substantially completed the project on November 24, 2020 (R4, tab 21 at 2).

III. DTH's Certified Claim

25. On January 6, 2021, DTH submitted a certified claim in the amount of $2,776,486.42. DTH included eight specific items in its claim, labeled Claim Items A through H. (R4, tab 19)

26. Claim Item A is for $372,978.38 in unabsorbed home office overhead costs due to a 469-day delay in obtaining a wetland permit. DTH asserts that this delay was caused by the government, specifically the United States Army Corps of Engineers (USACE), and calculated the cost using the *Eichleay* formula. DTH argues that it was forced to remain on standby from the permit submission on March 31, 2017, until receiving the Notice to Proceed on July 7, 2018, despite permit approval on April 10, 2018. (R4, tab 19 at 6) DTH's claims unabsorbed overhead at the rate of $795.26 per day (R4, tab 19 at 96).

27. Claim Item B is for $201,174 in costs associated with elevating the Coney Street roadway to accommodate an underground electrical duct bank that was buried

at a shallower depth than expected (R4, tab 19 at 6-8). The government acknowledged that the underground duct bank was a differing site condition and the parties executed a letter Modification No. P00005 to extend the period of performance (R4, tab 16 at 1). However, DTH claims that the Air Force failed to fulfill the terms of the letter agreement (R4, tab 19 at 6-8).

28. In Claim Item C, DTH asserted that it incurred significant expenses transforming excavated swamp muck into valuable topsoil. The company sought $181,277.50 in compensation for processing and transporting this soil, arguing that the government's benefit from the improved material constitutes a constructive change. (R4, tab 19 at 9-10).

29. In Claim Item D, DTH requested $262,040 to build and design an elevated boardwalk and access ramps across a wetland area. The original bid drawings called for a paved running trail, but DTH determined this would negatively impact the wetlands, cause permit delays, and increase mitigation costs. (R4, tab 28 at 6, 23; tab 19 at 10-11, 286). Consequently, DTH and the government agreed to elevate the trail to minimize environmental impact (R4, tab 12). DTH argues that replacing the paved running trail with an elevated boardwalk saved the government both time and money, because it obviated the need to buy additional wetlands credits and avoided any delays associated with further modifying the wetlands permits (app. br. at 79). DTH's claim stated that it did not volunteer to perform the work and should be compensated for its costs and "[i]t would be unjust enrichment" (R4, tab 19 at 11).

30. Claim Item E claimed $521,059 in costs associated with installing porous asphalt in the East parking lot instead of non-porous "Super Pave" asphalt called for in the original drawings. DTH claims that it did not volunteer to perform this work (R4, tab 19 at 11-12). The porous asphalt was necessary to satisfy stormwater runoff requirements applicable to federal projects as set forth in section 438 of the Energy Independence and Security Act (EISA) (R4, tab 19 at 11-12; tab 21 at 2, 4).

31. Claim Item F is for indirect costs associated with all of the previous claim elements (R4, tab 19 at 12-13). The claimed indirect costs include a fringe rate of 15.5% and a combined overhead (OH) and general and administrative (G&A) rate of 31.1%. DTH used a blended rate for its OH and G&A costs. The base for the blended rate is the Direct Labor plus applicable Fringes plus all other Direct Costs. OH & G&A Cost pools included all other indirect costs that are not direct or Fringe. (R4, tabs 19 at 12-13, 21 at 2)

32. Claim Item G is for reasonable profit in the amount of $[redacted], or [redacted]% for each of the proceeding claim elements (R4, tab 19 at 13).

33. Claim H is for the amount of $10,784 for direct costs for its preparation of what it calls the settlement offer. This includes $6,100 for attorney fees, $2,500 for accountant fees, and $2,184 for transcription service fees. (R4, tabs 19 at 14; 21 at 2).

34. On April 6, 2021, the contracting officer (CO), Allison Lewis, issued a final decision denying the claim in its entirety (R4, tab 21).

35. On June 28, 2021, DTH filed an appeal of the COFD with the Board.

DECISION

I. Claim Item A – Wetland Permit Delay

DTH seeks $372,978.38 for 469 days of unabsorbed home office overhead, calculated using the *Eichleay* formula, alleging a government-caused delay while awaiting a wetland permit. DTH claims that it was forced to remain on standby for the entire period of time that it took for USACE to issue the wetland permit. Unabsorbed home office overhead costs, such as administrative expenses and salaries, are indirect costs allocated across all of the contractor's projects. *See Williams Constr., Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001). Government-caused delays can lead to these costs exceeding the amount initially allocated, making them "unabsorbed." *WECC, Inc.*, ASBCA No. 60949, 21-1 BCA ¶ 37,948 at 184,308. Recovery may involve fixed percentages or, in specific cases, the *Eichleay* formula. *M.E.S., Inc. v. McHugh*, 502 F. App'x 934, 938 (Fed. Cir. 2013); *Matcon Diamond, Inc.*, ASBCA No. 59637, 20-1 BCA ¶37,532 at 182,261.[2]

DTH divides its delay claim of $372,978.38 into two phases. The initial delay of 245 days, from August 3, 2017 to April 10, 2018, stemmed from inaccurate drawings and specifications provided by the government (app. br. at 12). The second phase of 89 days, spanning April 10, 2018, to July 7, 2018, covers the delay between the permit's approval and the Air Force issuing a notice to proceed. DTH argues this delay was unreasonable and directly impacted its ability to work, causing unabsorbed overhead costs (app. br. at 12).

Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2,688. *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1379 n.4 (Fed. Cir. 1998), provides the formula. In simple terms, the formula multiples the allocable daily contract overhead rate by the number of days of delay.

A. Phase I Delay – 245 Days

DTH argues that Phase I of the wetland permit delay, spanning from August 2017 to April 2018, was directly caused by the government's provision of inaccurate and outdated drawings and specifications. These inaccuracies, which included an undersized bioretention pond and incorrect specifications for the parking lot, jogging trail, and paving, necessitated costly redesigns and led to extensive back-and-forth communication with permitting authorities. DTH emphasizes that it reasonably relied on the government's flawed information and asserts it should not be held responsible for the resulting delays. (App. br. at 12-28).

The Air Force responds that DTH's delay claim is barred by accord and satisfaction and by the release language set forth in bilateral Modification No. P00003. The Air Force points out that DTH specifically requested this extension due to delays in obtaining the wetland permit, acknowledging the delays' impact (finding 13). Modification No. P00003, executed by both parties, extended the project timeframe and adjusted work at no additional cost to address these delays (finding 14). The Air Force emphasizes that this modification included a release of liability clause, absolving the government from any responsibility related to the permit delays (gov. br. at 5-7).

The government's brief does not draw a distinction between the defenses of accord and satisfaction and the release of claims (gov't br. at 5, 8, 17). See *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010) (discussing distinction). A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another. *Id*. By contrast, an accord and satisfaction discharges a claim when an alternative performance is accepted as full satisfaction. *WECC, Inc.*, ASBCA No. 60949, 21-1 BCA ¶ 37,948 at 184,306 (citing *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010)). Proving it requires demonstrating (1) proper subject matter, (2) competent parties, (3) mutual agreement, and (4) consideration. *Meridian Eng. Co. v. United States*, 885 F.3d 1351, 1363-64 (Fed. Cir. 2018) (quoting *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965)); *Bell BCI Co.*, 570 F.3d 1337, 1341 (Fed. Cir. 2009). Crucially, the contract modification must address the same subject matter as the disputed claim. *WECC, Inc.*, 21-1 BCA ¶ 37,948 at 184,307. As the Federal Circuit notes in *Holland*, "although release and accord and satisfaction are distinct defenses, an agreement may constitute both a release and an accord and satisfaction, either of which may bar future claims." *Holland*, 621 F.3d at 1377.

Modification No. P00003 states that "[t]he purpose of this modification is to extend the Period of Performance and to add and delete work for no additional cost" (finding 14; R4, tab 12 at 1). The summary of changes extends the period of performance for each of the Contract Line Items (CLINs) by roughly one year, from

September 21, 2018, until August 15, 2019 (R4, tab 12 at 2-5). The modification also contains a statement of objective setting forth specific changes to the communication and electrical work, including adding work and deleting other work from the SOW (R4, tab 12 at 5-6).

The release language in Modification No. P00003 states:

> In consideration of the modification agreed to herein as complete equitable adjustments for the agreed upon changes, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributed to such facts or circumstances giving rise to these changes.

(Finding 14).

Because a release is contractual in nature, it is interpreted in the same manner as any other contract term or provision. *See Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002) (citations omitted). The first step, therefore, requires an examination of the language used by the parties. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009); *Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000).

The release language in Modification No. P00003 is ambiguous in its scope, particularly with reference to the specific "facts or circumstances giving rise to these changes." When read in conjunction with the text of the modification, which does not mention the reasons for extending the period of performance, there is ambiguity regarding whether the modification was intended to address the "facts and circumstances" of the permit delay. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004)) (holding that the Board must consider the document as a whole and interpret it so as to harmonize and give reasonable meaning to all of its parts); *see also Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) (A contract is ambiguous if it is reasonably susceptible to more than one interpretation).

Given this ambiguity, we must refer to extrinsic evidence to ascertain whether the agreement set forth in the bilateral modification constituted and accord and satisfaction of the parties' dispute regarding the responsibility for the permit delay. *See Korte-Fusco JV*, 15-1 BCA ¶ 36,158, ASBCA No. 59767 at 176,455 (relying on extrinsic evidence when contract modification's meaning could not be determined from its text).

We have examined the contemporaneous record to ascertain the "facts and circumstances giving rise" to the modification. The record establishes that both parties agreed that the wetland permit delays were the "facts or circumstances giving rise to these changes." DTH's May 30, 2018, letter and email expressly requested an extension of the construction schedule due to delays encountered while obtaining the necessary wetland credits and approval of the wetlands permit (findings 12 - 13). The letter and email left little doubt that the purpose of the contract extension was due to the wetland permit delays. DTH acknowledged the purpose in testimony, stating that its request for an extension was due to wetland permit delays (R4, tab 28 at 16-18).

Similarly, the government documented its intent in the Memorandum for the Record that the modification aimed to compensate DTH for the delays with a no-cost time extension (R4, tab 22 at 1). The modification itself states that "[t]he purpose of this modification is to extend the Period of Performance and to add and delete work for no additional cost" (finding 14; R4, tab 12 at 1). These elements establish a clear link between the modification, the delays, and the intent of both parties to resolve the issue with a no-cost time extension, and all support an accord and satisfaction.

DTH counters that the modification was solely intended to exercise Option Year 2 for the period of performance from July 8, 2016 through July 7, 2017, and update wage determinations and to add and delete electrical work (app. br. at 14). DTH is mistaken, however, because the changes involving the option year and wage determinations were accomplished as part of Modification No. P00002, not No P00003 (R4, tab 3 at 1).[3]

DTH next points out that the SF-50 document itself for Modification No. P00003 does not mention the wetland permit delays (app. reply br. at 9-10). DTH clarifies that its offer of a $0 adder in its May 30, 2018, letter pertained only to additional costs for electrical and communications work, not to costs associated with the wetland permit delays (app. br. at 13). According to DTH, the plain language of the modification is unambiguous and the Board should not consider extrinsic evidence to interpret its meaning (app. reply br. at 10-11).

We agree that the $0 dollar "adder" referenced in the May 30, 2018 letter refers to communication and electrical lines, not the delay associated with wetland permitting (app. br. at 14). However, we find the record supports the mutual intention to agree to a no-cost time extension to compensate DTH for the permitting delays. The

[3] Exhibit 5 to DTH's deposition of the contracting officer is a modification labeled No. P00003 and dated July 7, 2016. This document pre-dates the award of the contract and appears to be a modification of the underlying multiple award construction contract, not Delivery Order 2003 that is the subject of this appeal. (App. supp. R4, tab 32 at 4071; ex. 5)

contemporaneous correspondence between the parties demonstrates that they principally were interested in an extension of the performance period to account for the wetland permitting delays. DTH fails to demonstrate otherwise. Accordingly, DTH's claim for 218 days of delay is barred by accord and satisfaction.

B. Phase II Delays – 89 Days

DTH argues that Phase II of the delay, from April 10, 2018 to July 7, 2018, stemmed directly from the Air Force's unreasonable delay in issuing a Notice to Proceed (NTP) for construction, even though the wetland permit was approved on April 10th. DTH emphasizes that both parties acknowledged work could not commence without this NTP, leaving DTH in limbo and unable to progress the project or reassign personnel. The three-month delay impacted the project timeline and caused unnecessary expenses for DTH. (App. br. at 28-31)

The government's response brief and the contracting officer's final decision failed to address the 3-month Phase II delay between the issuance of the wetland permit and the notice to proceed. Instead, the government relies on its accord and satisfaction argument, contending that DTH waived its right to claim damages for all wetland permit delays by signing Modification No. P00003 (gov't br. at 5-8). The government's argument, however, fails to establish how its delay in issuing the notice to proceed was part of the "facts or circumstances giving rise to these changes" described in Modification No. P00003. The government offers no explanation whatsoever to support the 3-month delay, nor does it argue how the modification's subject matter pertains to the causes of the post-permit delay. In addition, the government does not attempt to challenge the quantum of DTH's claim and offers no response to DTH's request for *Eichleay* damages for this period.

Therefore, we conclude that the government is responsible for the 89-day period of delay from April 10, 2018, until July 7, 2018, and is responsible for unabsorbed overhead at the rate of $795.26 per day for a total amount of $70,778.14 (R4, tab 19 at 96).

II. Claim Item B – Elevate Roadway & Coney Street Extension

The second claim item is for $201,174 in costs associated with elevating the Coney Street roadway to accommodate an underground duct bank that was buried at a shallower depth than expected. A duct bank is a protective concrete conduit system that carries electrical and communication cables underground.

The CO admits that the inconsistently buried underground duct bank and the buried manhole were differing site conditions (R4, tab 21 at 3). The government also

acknowledges that the parties agreed to bilateral Modification No. P0005 to address the differing site conditions (*id.*).

Letter Modification No. P0005, dated October 31, 2019, and signed by both parties, expressly states in paragraph 3 that:

> The contractor has agreed to give the Government consideration for the 90 days extension by solving the electrical duct bank issue. *This issue was previously agreed to be solved by both parties by cutting work from the west parking lot to pay for the additional work of the duct bank. DTH has agreed that by giving them a 90 day extension on the completion of work, as well as a final CPARS report reflecting performance improvements from the last interim CPARS, the contractor will complete the west parking lot as it was awarded initially and take the 90 day extension at no additional cost.* The new contract completion date is changed from 31 October 2019 to 31 January 2020.

(Finding 16).

The bilateral modification further states that the parties' signatures "constitute a Mutual Agreement between both Parties (FAR 43.103(a)) to the consideration mentioned above in paragraph 3" (finding 16). The modification includes the following release language:

> The Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributed to such facts or circumstances giving rise to these changes.

(*Id.*)

Thus, the agreement between the parties was to discharge DTH's claim for the costs associated with addressing the differing site condition of the buried electrical duct bank in exchange for (1) eliminating the west parking lot from the statement of work, (2) a 90-day extension of the performance period, and (3) a final CPAR reflecting performance improvements.

DTH does not dispute that the CO granted a 90-day extension of the performance period and deleted the west parking lot from the scope of work (app. br. at 46). However, DTH contends that the Air Force did not fully perform because it

did not issue a final CPAR reflecting performance improvements. According to DTH, the modified CPAR was material and important to DTH (app. br. at 42, 47). DTH contends that the government breached its agreement and that DTH is entitled to the full cost of elevating the roadway to address the inconsistent depth of the duct bank. (*Id*.)

The government argues that DTH's claim is barred by accord and satisfaction, stating that the sole consideration was a time extension and that DTH released all monetary claims (gov. br. at 8-10). The government admits that it did not issue a final CPAR indicating performance improvements, but contends that DTH's performance did not improve and that it must be truthful on the CPAR (gov. br. at 10; app. supp. R4, tab 31 at 56). The modification states that the government would issue "a final CPARS report reflecting performance improvements from the last interim CPARS" (finding 17). The government interprets this to mean that it would do so *only if* DTH's performance improved on the project (gov't br. at 9).

The Board possesses jurisdiction to determine whether the government acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation. *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1316 (Fed. Cir. 2011). However, in order to state a claim, the contractor must identify the errors in the evaluation. For example, if the contractor has been faulted in the CPAR for delay, the contractor "need[s] to allege facts indicating that all of the substantial delays were excusable," otherwise its complaint must be dismissed. *Id.* at 1316-17. DTH has not met this standard.

DTH does not directly challenge the validity of the final CPAR rating itself. DTH has not identified the specific improvements that it contends the final CPAR should have identified. DTH has not presented any evidence demonstrating that the final performance rating was inaccurate, unfair, or unjustified. In his deposition, Mr. Shaun Howard, DTH's President and Chief Executive Officer, stated that the government's rating was "very subjective." When pressed, he could not state specifically how the report was deficient (R4, tab 28 at 11-12). Moreover, DTH does not dispute the CO's factual assertion that DTH's performance failed to improve from the last interim performance report (app. br. at 38-47).

DTH contends that the government breached the agreement by not delivering what it contends was an agreed-upon improved CPAR rating. (App. br. at 18; app. reply br. at 19) DTH argues the CPAR improvement was part of the consideration for performing the extra work and that the government's failure to deliver undermines the agreement. According to DTH, the government's position – that the CPARs report was contingent upon DTH's future performance improvement – undermines its accord and satisfaction argument because it shows that there was no meeting of minds regarding what was exchanged. (App. br. at 18; app. reply br. at 19)

The problem with this argument is that DTH had not completed the work when the parties executed Modification No. P00005, which means that its performance record was still being compiled. DTH had an opportunity to improve its performance and, if it had done so, the government was obligated to reflect those improvements in the final CPAR. On the other hand, if DTH did not improve its performance, we do not read Modification No. P00005 as requiring the CO to fabricate improvements by DTH.

According to FAR 42.1503, past performance evaluations must be based on objective facts supported by performance data and must accurately depict the contractor's performance (48 C.F.R. § 42.1503(b)(1)). Therefore, any agreement to provide a predetermined positive CPARS rating would violate these requirements for objectivity and accuracy. *See, e.g.*, *St. Michael's Inc.*, ASBCA No. 62226 *et al.*, 25-1 BCA ¶ 38,757 at 188,390-392 ("CPARS evaluations 'should' be based upon 'objective data (or subjective observations) . . . CPARS ratings are the contracting agency's *opinion* of several aspects of the contractor's performance, based upon events that occurred during performance."); *Crowley Gov't Servs., Inc.*, ASBCA No. 63531, 23-1 BCA ¶ 38,371 at 186,363 (CPARS ratings shall be fair, accurate, and consistent with FAR 42.15.). Given this constraint, we interpret the language of Modification No P00005 – which states that the CO would issue "a final CPARS report reflecting performance improvements from the last interim CPARS" – to mean that the CO would do so only if the objective data supported such a report.

Because DTH has failed to meet its burden of demonstrating how the government breached its agreement to issue a final CPAR reflecting performance improvements from the last interim CPAR, we conclude that DTH's claim is barred by accord and satisfaction because the government upheld its end of the bargain outlined in Modification No. P00005. The agreement stipulated that DTH would release all monetary claims related to the differing site conditions in exchange for specific actions by the government. By eliminating the west parking lot from the scope of work and granting a 90-day extension to the performance period, the government fulfilled its obligations under the modification. Therefore, the release language, exchanging the claim for the government's actions, remains effective.

III. Claim Item C – Screen and Haul Away Topsoil

DTH asserts that it incurred significant expenses transforming excavated swamp muck into valuable topsoil. It seeks $181,277.50 in compensation for processing and transporting this soil, arguing that the government's benefit from the improved material constitutes a constructive change (app. br. at 49). However, the contract did not include this work, and the FAR mandates that "only contracting officers acting within the scope of their authority are empowered to execute modifications on behalf of the Government." 48 C.F.R. § 43.102(a); *Winter Cath-*

dr/Balti Joint Venture, 497 F.3d 1339, 1344 (Fed. Cir. 2007). Both parties agree the CO did not contemporaneously approve this change (gov't br. at 11; app. br. at 49-50; app. reply br. at 24). Therefore, to be compensated, DTH must prove a government official with implied or apparent authority directed the soil processing and transport.

To prove a constructive change, a contractor must demonstrate four elements: (1) government-compelled work outside the contract scope; (2) the directing official had authority to unilaterally alter contract duties; (3) the official expanded performance requirements; and (4) the added work was directed, not volunteered. *CBRE Heery, Inc.*, ASBCA No. 62420, 21-1 BCA ¶ 37,927 at 184,197; *Alfair Dev. Co.*, ASBCA Nos. 53119, 53120, 05-2 BCA ¶ 32,990, at 163,515.

Authority to bind the government is generally implied when such authority is considered to be an integral part of the duties assigned to the person who created the obligation. *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (quotation omitted); *N. Am. Landscaping, Constr. and Dredge, Co.,* ASBCA No. 60235 *et al.*, 18-1 BCA ¶ 37,116 at 180,655 (holding that project engineer and project manager had implied actual authority to direct contractor's work).

In her final decision, the CO stated that no government official ever saw the topsoil processing machine and that there was no record of the placement of excess soil until DTH submitted its claim. The CO further stated that the Air Force never approved the screening and hauling of 6,145 cubic yards of topsoil to Mt. Moody. (Finding 21). In its brief, the government argues that DTH has failed to provide any record evidence of any government official directing, instructing, or providing approval for DTH to haul topsoil to Mt. Moody. The government further argues that Mr. Claude Anthony Payton was not the contracting officer for the project and did not possess the authority to bind the government regarding any changes to the scope of the contract. Because DTH admits that the alleged processing and transport of topsoil was "outside the scope of the contract," only the contracting officer could approve such a change to the contract pursuant to FAR 1.602. (Gov't br. at 11).

To support its implied authority argument, DTH maintains that Mr. Payton, the Chief of Design and Construction, and Mr. Vaughn, the COR, acted with actual or implied authority when monitoring and guiding DTH throughout the performance of the approved changes. DTH relies upon the transcript of a conference call between DTH and Joseph Vaughn, the COR, and Mr. Payton, the senior project manager, to prove that the government directed DTH to screen and transport the soil (R4, tab 19 at 10, 267).

The teleconference transcript demonstrates that Mr. Vaughn had recommended to DTH that it haul any excess screened dirt to Mt. Moody and that Mr. Payton had acquiesced in the recommendation. However, there is no indication that either

Mr. Payton or Mr. Vaughn understood that the government would pay extra for the work or that they had specifically directed DTH to process the soil in the first place. (*Id.* at 267). Although DTH states in its claim that it did not volunteer to perform this work, the record falls short of establishing that anyone in the government specifically directed DTH to process and transport the soil.

In the alternative, DTH argues that the CO ratified the government's instructions through acquiescence (app. br. at 99). According to DTH, the CO acknowledged in her deposition that she relied upon her technical people (app. reply. br. at 25; app. supp. R4, tab 31 at 92). This acquiescence, DTH claims, constitutes ratification (app. br. at 95-100).

Unlike implied authority, which focuses on an individual's implied authority to direct a future change, ratification focuses on "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) (quoting Restatement (Second) of Agency § 82 (1958)). Ratification occurs where the individual affirming the action "(1) possesses the actual authority to contract; (2) fully knew the material facts surrounding the unauthorized action of his or her subordinate; and (3) knowingly confirmed, adopted, or acquiesced to the unauthorized action of the subordinate." *Villars v. United States*, 126 Fed. Cl. 626, 633 (2016); *see also Winter*, 497 F.3d at 1347. Whether a contractual change has been ratified involves questions of fact that the Board must decide. *See MTD Transcribing Serv.*, 01-1 BCA ¶ 31, 304, ASBCA No. 53104 at 154,540-541 (analyzing factual record to determine that agency had not ratified a transaction).

The Air Force was undeniably aware of the soil processing and hauling activities. This is evident from the daily reports, which explicitly mention soil processing and hauling, confirming that Air Force personnel were aware of these operations (finding 18). Furthermore, the presence of the soil processing machine at the construction site was impossible to miss, making it obvious to anyone observing the project. This awareness is further substantiated by the government's decision to grant access to Moody Air Force Base for both the soil screening equipment and the subcontractors responsible for screening and transporting the soil to Mt. Moody (finding 19). Finally, DTH, after paying its subcontractors for operating the soil screening machine, shared the payment records with the Air Force as supporting documentation for its claim (R4, tab 19 at 346; app. br. at 54).

However, demonstrating that Mr. Payton and Mr. Vaughn knew that soil was being processed and placed on Mt. Moody is not sufficient to prove that they affirmatively directed DTH to enlarge the scope of the contract to do so.

In its reply brief, DTH contends that the CO knew, or should have known, that DTH was processing and transporting the soil to Mt. Moody. DTH relies on the CO's testimony that she met weekly with the COR and Mr. Payton to discuss the contract's progress (app. supp. R4, tab 33 at 96-97). According to DTH, this is enough to support the CO's authorization of a constructive change or, alternatively, her ratification of the COR's direction to place the soil on Mt. Moody (app. reply br. at 24-25). We disagree. Merely demonstrating that the CO *may* have known that DTH was processing the topsoil is insufficient to prove that the CO ratified the extra work. Indeed, "ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority." *Winter*, 497 F.3d at 1347. Appellant has not cited evidence in the record that the CO had specific knowledge of the topsoil work at the time; in fact, she expressly denies having such knowledge in her testimony and the contracting officer's final decision (finding 21).

We conclude that DTH fails to meet the burden of proof necessary to establish either implied authority or ratification.

IV. Claim Item D – Nature Bridge Boardwalk and ADA Ramps

DTH is requesting $262,040 to build and design an elevated boardwalk and ADA ramps across a wetland area. The original bid drawings called for a paved running trail, but DTH determined this would negatively impact the wetlands, cause permit delays, and increase mitigation costs. Consequently, DTH and the government agreed to elevate the trail to minimize environmental impact (findings 9, 10).

DTH argues that replacing the paved running trail with an elevated boardwalk saved the government both time and money because it obviated the need to buy additional wetlands credits and avoided any delays associated with further modifying the wetlands permits (app. br. at 79). According to DTH, the CO's decision to deny the claim should be overturned because the CO failed to consider the cost savings to the government associated with the design change. DTH further argues that the Air Force violated its duty of good faith and fair dealing when threatening to terminate the contract for default. (*Id*.)

The government contends that DTH's claim is barred by accord and satisfaction. DTH chose to elevate the trail, including the bridge, as a design solution to prevent project delays and additional wetland mitigation costs. (Gov't br. at 18-19). DTH sought this change in their May 30, 2018, modification request, making it their responsibility. (Findings 12-13; gov't br. at 17; R4, tab 11 at 2-3) Modification No P00003, signed by both parties, incorporated this change and explicitly stated it was a "no additional cost" modification (finding 14). The modification language included a release of liability for the government regarding the agreed-upon changes, including the boardwalk (*id.*). Further, the government contends that DTH never

informed the government that the boardwalk would increase the contract cost until after the modification was signed and the claim was submitted (gov't br. at 20). Finally, under FAR 16.202-1, DTH bears the risk for cost overruns on a firm-fixed-price contract, barring unusual circumstances. Therefore, the boardwalk cost is DTH's responsibility, and the claim is barred by accord and satisfaction due to the signed modification that encompassed the boardwalk as a no-cost change.

The record supports the government's position. Joseph Vaughn, the COR, agreed with DTH's recommendation to elevate the nature trail and did so with the understanding that it would probably decrease the project cost (finding 10). Mr. Vaughn's supervisor, Mr. Payton, the Chief of Design and Construction, testified that DTH recommended elevating the nature trail and that the government did not affirmatively request DTH to elevate the nature trail.

> The government did not request that. The government requested a jogging trail. The jogging trail went along the edge of the wetlands. In order for the contractor not to pay wetland credits, they elevated that portion of the jogging trail to be out of the wetlands. Their solution to save money and wetland credits, but it cost them the price to elevate that jogging trail in that area. But the government did not request that.

(App. supp. R4, tab 33 at 48-49)

He further stated that he understood that elevating the jogging trail would not cost the government additional money.

> There was nothing to lead me to believe that it would cost more money. [DTH] got a saving by not buying wetland credits, so I assumed the saving for not buying wetland credits equated to what [DTH] put into [the] boardwalk.

(App. br. at 75; app. supp. R4, tab 33 at 106).

We conclude that DTH's claim for the boardwalk is invalid due to accord and satisfaction and because it falls under the contractor's risk in a firm-fixed-price contract. DTH, not the government, proposed the boardwalk, suggesting it as a "technical change" in their May 30, 2018, letter to avoid further delays and wetland mitigation costs (finding 13). The government agreed to the change. Modification No. P00003, signed by both parties, incorporated this change and explicitly stated it was a "no-cost modification." (Finding 14). The modification language included a

release of liability for the government regarding the agreed-upon changes, including the boardwalk (*id.*).

Moreover, DTH never informed the government that the boardwalk would increase the contract cost until after the modification was signed and the claim was submitted (finding 15). Finally, under FAR 16.202-1, DTH bears the risk for cost overruns on a firm-fixed-price contract, barring unusual circumstances. *Parsons Gov't Servs., Inc.*, ASBCA No. 61630, 20-1 BCA ¶ 37,655 at 182,815 (contractor assumes the risk of unforeseen expenses under firm-fixed price contract); *ITT Fed. Servs. Corp. v. Widnall*, 132 F.3d 1448, 1451 (Fed. Cir. 1997) (in a firm fixed-price contract situation, the contractor "assumes maximum risk and full responsibility for all such costs that may be incurred").

Therefore, we conclude that DTH is responsible for the boardwalk's cost, and the claim is barred by accord and satisfaction due to the signed modification that encompassed the boardwalk as a no-cost change.

V. Claim Item E – Asphalt East Parking Lot

DTH claims $521,059 in costs associated with installing porous asphalt in the East parking lot. According to DTH, the porous asphalt was necessary to satisfy stormwater runoff requirements applicable to federal projects as set forth in section 438 of the Energy Independence and Security Act (EISA) (finding 30). The original drawings for the East parking lot called for installing non-porous asphalt, a much cheaper alternative (finding 7).

The government contends that DTH's claim for additional compensation due to the use of porous asphalt is invalid because DTH was contractually obligated to comply with environmental regulations and bear the associated costs, which they implicitly acknowledged by choosing the more expensive solution (gov't br. at 21-23).

EISA Section 438 mandates that federal agencies must manage stormwater runoff from any new development or redevelopment projects on their property to "maintain or restore, to the maximum extent technically feasible, the predevelopment hydrology" of the site, essentially aiming to limit the increase in stormwater runoff compared to the site's original condition. 42 U.S.C. § 17094. In order for the government to maintain or restore predevelopment hydrology, the East parking lot had to be changed from Superpave Asphalt to OGFC "Porous" Asphalt (R4, tab 21 at 2, 4). DTH maintains that it did not volunteer to perform the work and that it is entitled to the additional costs associated with installing the porous asphalt (app. br. at 2, 80).

Despite their differing interpretations of responsibility for the cost increase, the government and DTH agree on certain key points. Both parties acknowledge that the

final design incorporated porous asphalt instead of the originally specified Super Pave asphalt for the East Parking Lot. Both the government and DTH agree that meeting EISA requirements was mandatory for the project. Moreover, both sides concur that using porous asphalt, while necessary for EISA compliance, was a more expensive option compared to the initial Super Pave specification. Finally, both parties seem to agree that DTH had a certain degree of flexibility in designing the project to meet the contract requirements, including environmental regulations.

The core disagreement lies in who bears the financial responsibility for the increased cost associated with the change in asphalt. DTH contends the government's initial specification, coupled with the expectation of design changes, constitutes a bait-and-switch, shifting the cost burden unfairly (app. br. at 90). Conversely, the government maintains that DTH, as the design-build contractor, assumed the risk of cost implications related to their chosen design solution (gov't br. at 23).

Because this was a design-build contract, DTH was responsible for the overall design and choice of materials for the parking lot (finding 2). Consistent with this responsibility, the statement of work made clear that DTH was responsible for performing its own design:

> *The objective of this project is to have the Contractor perform the actual design* and construction based on data obtained from his investigation and verification under the stipulations of this bidding package.

The statement of work also included the following statement:

> The tentative scope of work for each sub-project is illustrated in each individual plans attached in this package. *They are prepared only to obtain uniform bidding from potential bidders and will need to be modified during the Contractor's design process*.

(Finding 3 (emphasis added)).

Although it is true that the government approved DTH's design, that is not the same as mandating that DTH adopt a certain design or use certain materials. Indeed, the parties agree that the contract gave DTH flexibility to design the project in a manner that complied with EISA stormwater requirements (app. br. at 85). Moreover, by approving DTH's design, the government did not implicitly agree to pay more than the firm fixed-price for the work. The fact that the preliminary design in the solicitation included non-porous asphalt did not mean that the contractor was required to use that type of asphalt, or that the government warranted that it could be used

(finding 7), a fact that DTH acknowledges when it admits that the preliminary design would be subject to change (app. br. at 87). Construed as a whole, the contract sets forth a performance objective rather than a design specification.

Because this was a design-build contract, the contractor could alter the preliminary design and choose materials if the final design satisfied the environmental permitting requirements. The contractor bears the design risk of complying with the specification requirements in a firm fixed-price, design-build contract. *John C. Grimberg Co.*, ASBCA No. 58791 *et al.*, 18-1 BCA ¶ 37,191 at 181,052, *rev'd on other grounds*, *United States Army Corps. of Eng'rs v. United States*, 817 Fed. Appx. 960, 963 (Fed. Cir. 2020). This is true even if the government's preliminary design anticipated the use of cheaper materials. Therefore, we conclude that DTH is not entitled to recover for the claimed costs associated with installing non-porous asphalt.

VI. Claims Items F, G, and H – Indirect Costs, Profit, and Cost of Preparation

C. Claim Item F – Indirect Costs

For Claim Item F, DTH claims indirect costs associated with all the previous claim elements (finding 31). DTH contends that all of its indirect costs should be accounted for as direct costs, because they were incurred solely for the benefit of this contract and that there were no other contracts or business activities to which the costs were allocable (app. br. at 100; R4, tab 19 at 13).

The government does not challenge DTH's rates or its conclusion that its indirect costs are recoverable as direct costs allocable to this contract. Therefore, we conclude that DTH is entitled to recover its claimed indirect costs associated with the 89 days of delay attributable to the government. Because these costs are already accounted for in DTH's Eichleay calculations, we do not discuss them separately here (R4, tab 19 at 96). Moreover, because we deny the remaining claim elements, we do not need to address entitlement to these costs for those elements.

D. Claim Item G – Reasonable Profit

With respect to Claim Item G, DTH claims reasonable profit in the amount of $[redacted], or [redacted] percent, for each of the proceeding claim elements. DTH calculated the profit rate by using the rate from its proposal for Delivery Order No. 2003 as the fair and reasonable profit it expected to earn from the performance of work of this type, complexity, and risk level (finding 32).

Our ruling denying the individual claim elements renders it unnecessary to address DTH's claim of profit.

E. Claim Item H – Cost to Prepare the Settlement Offer

For Claim Item H, DTH claims the amount of $10,784 for direct costs for its preparation of what it calls the settlement offer. This includes $6,100 for attorney fees, $2,500 for accountant fees, and $2,184 for transcription service fees (finding 33).

It is well-settled that costs incurred for the litigation of a certified claim against the government are not recoverable. These types of expenses are unallowable under FAR 31.205-47. *See DODS, Inc.*, ASBCA No. 59510, 15-1 BCA ¶ 35,918 at 175,582 (appellant not entitled to expenses for litigating appeal); *AEI Pac., Inc.*, ASBCA No. 53806, 08-1 BCA ¶ 33,792 at 167,284 (costs for professional and consultant services unallowable if incurred for the prosecution of the claim).

DTH cannot avoid this limitation by characterizing its January 6, 2021, claim as a "settlement offer" (app. br. at 101). The subject line of the January 6, 2021, submission is "CLAIM - CONTRACT No. FA4830-14-D-0006, Delivery Order No. 2003." DTH expressly states that it "is submitting a written demand as a legal right, for the payment of damages in the sum certain amount of S2,776,486.42," and further expressly seeks a CO's final decision (R4, tab 19 at 1). Finally, DTH itself refers to the January 6, 2021, submission as a "certified claim to the CO" (app. br. at 4).

We reject DTH's claim for $10,784 in direct costs related to its "settlement offer" because the January 6, 2021, submission is clearly a certified claim, as evidenced by its language (*e.g.*, "claim," "written demand"). Costs for litigating certified claims against the government are unallowable and unrecoverable per established precedent and FAR 31.205-47.

VII. Claim Item I – Breach of the Implied Duty of Good Faith and Fair Dealing

DTH claims that the Air Force breached the implied breach of the duty of good faith and fair dealing by refusing to compensate DTH for its contractual changes and by refusing to modify its CPARS rating (app. br. at 11).

The implied duty of good faith and fair dealing requires parties to a contract to cooperate with each other's performance and refrain from obstructing it. *LaBatte v. United States*, 899 F.3d 1373, 1379 (Fed. Cir. 2018). This duty, rooted in the contract's terms, prevents actions that undermine the other party's reasonable expectations or the benefits they should receive. *Metcalf Const. Co.*, 742 F.3d 984, 991 (Fed. Cir. 2014). The duty is "keyed to the obligations and opportunities established in the contract." *Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014). However, it does not create new obligations or contradict

the contract's explicit provisions. *Precision Pine & Timber, Inc., v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010).

DTH's accusations of bad faith merely rehash its substantive arguments for claim compensation (app. reply br. at 44-45). For instance, DTH's assertion that the Air Force acted in bad faith by refusing compensation for porous asphalt simply repeats its argument for why that compensation is warranted (app. reply br. at 38-39). DTH does point to the Air Force's alleged failure to issue a favorable CPARS rating, pursuant to the agreement set forth in Modification No. P0005, as a violation of the duty of good faith (app. reply br. at 23). As we previously discussed, the CO is bound by regulation to provide a truthful and objective performance rating and cannot agree to do otherwise. We cannot conclude that the CO breached the implied duty of good faith and fair dealing by giving an objective and truthful rating (app. supp. R4, tab 31 at 56). *See Trident Engineering & Procurement, P.C.*, ASBCA Nos. 60541, 62144, 23-1 BCA ¶38,351 at 186,245-46 (holding that government did not breach duty of good faith and fair dealing when facts support negative poor performance rating).

Other than reiterating its previous arguments, DTH has presented no convincing evidence that the Air Force treated DTH arbitrarily or unreasonably during the performance of the contract. *King Aerospace, Inc.*, ASBCA No. 57057, 16-1 BCA ¶ 36,451 at 177,652-653 ("[A] contractor alleging a breach of the implied duty must demonstrate that the government acted arbitrarily or unreasonably.").

VIII. Waiver and Acquiescence

DTH contends that the government has waived the contract schedule and acquiesced to DTH's actual performance schedule (app. br. at 94). This contention, however, is not tied to any specific monetary claim. Because we already have addressed DTH's delay claims in connection with the wetland permitting, we need not separately address DTH's waiver argument.

IX. Ratification

DTH claims that the government ratified DTH's performance by allowing the contracting officer's technical representatives, Mr. Payton and Mr. Vaughn, to approve DTH's actions and to instruct DTH to complete certain tasks (app. br. at 95). We previously addressed this argument in connection with DTH's topsoil claim and do not address it here again.

CONCLUSION

For the foregoing reasons, we **sustain** DTH's appeal in the amount of **$70,778.14, plus interest under 41 U.S.C. § 7109 from January 6, 2021,** for 89 days of delay in connection with the Air Force's failure to timely issue a notice to proceed following the issuance of the wetlands permit. We **deny** the remainder.

Dated: June 9, 2025

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

MICHAEL N. O'CONNELL
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. 62967, Appeal of DTH Corporation, rendered in conformance with the Board's Charter.

Dated:

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