ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
CACI International Inc.	)	ASBCA No. 63663
	)	
Under Contract No. N00189-12-D-Z001	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON THE GOVERNMENT'S MOTION TO DISMISS AND
APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT[1]

In 2003 and 2004, CACI Premier Technology, Inc. (CACI PT), a subsidiary of appellant CACI International Inc. (CACI) performed interrogation services at Abu Ghraib prison pursuant to task orders issued by the Department of the Interior (DOI), in support of US military operations in Iraq. The scope of CACI PT's involvement in the abuse of prisoners at Abu Ghraib is the subject of legal action by the prisoners, in the United States Court system, pursuant to the Alien Tort Statute, and is not before us. Instead, this appeal pertains to CACI's inclusion of legal fees, incurred in defending against the Iraqi prisoner suits, in its incurred cost submissions for cost type contracts with the Department of Defense (DoD). The costs are not being charged directly to a government contract, but are instead included in the home office pool of overhead costs allocated to CACI's government and non-government work.

[1] This decision was originally issued on May 6, 2025, subject to a protective order. It is being reissued simultaneously with the Board's opinion on cross-motions for reconsideration. During a briefing on CACI's proposed redactions, the government requested correction of what it contended were "administrative errors." Some of the requested changes are incorporated in this reissuance.

In 2004, DOI terminated for convenience CACI PT's task orders, so that the work could be transitioned to DoD task orders. Also in 2004, the Iraqi detainees initiated the first of several related actions against CACI, alleging that they were subject to abuse and torture by CACI employees. In 2006, CACI PT filed an appeal before the Civilian Board of Contract Appeals (CBCA), seeking compensation for work performed pursuant to the DOI task orders. In 2007, the parties entered into a settlement agreement resolving the CBCA appeal. In 2008, Iraqi prisoners filed suit in *Al Shimari, et al. v. CACI Premier Tech., Inc.*, E.D. Va. No. 1:08-cv-0827 (Aug. 8, 2008). The legal expenses at issue in this appeal were incurred in defending against the *Al Shimari* litigation.

At the time of the settlement agreement in 2007, CACI had not incurred legal fees in defending against the *Al Shimari* suit; however, CACI had incurred legal expenses related to other Iraqi prisoner litigation. CACI included Iraqi prisoner litigation expenses in its incurred cost submissions in 2007 and 2008, without objection from the Defense Contract Audit Agency (DCAA) or the Defense Contract Management Agency (DCMA). Eventually, in May 2023, the DCMA contracting officer issued a final decision disallowing CACI's inclusion of Iraqi prisoner litigation costs in CACI's incurred cost submissions for fiscal years 2013 through 2017.

Pending before the Board are two motions. The government has filed a motion to dismiss Count II of CACI's complaint, seeking a determination that CACI's *Al Shimari* litigation costs are unallowable, because the costs were released in the 2007 settlement agreement of the CBCA action between CACI and DOI. CACI cross-moves for summary judgment that the 2007 settlement agreement did not release CACI's right to include the costs in its overhead rate; that the legal fees are allowable and, to the extent not resolved above, that the government's claim is barred by the statute of limitations. CACI separately seeks summary judgment that it should not be assessed a penalty for including excess executive compensation costs in its FY 2017 submission. We deny the government's motion to dismiss and grant CACI's motion for summary judgment in part. Specifically, we grant CACI's motion that the 2007 settlement agreement did not release its *Al Shimari* litigation costs, but deny the motion with regard to allowability of the legal fees; the statute of limitations; and the penalties on excess executive compensation costs.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

The facts material to the pending dispositive motions are not generally in dispute. However, the factual background, especially as pertains to CACI's actions at Abu Gharib, is the subject of extensive disputes. These background facts are not material to our decision, and we reference the parties' contentions solely to provide context to our decision.

A. CACI PT Performs Work at Abu Ghraib Pursuant to Task Orders Issued by DOI

CACI Premier Technology, Inc. performed interrogation services at Abu Ghraib prison in support of U.S. military operations in Iraq between 2003 and 2004. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 521-22 (4th Cir. 2014). The corporate structure of the CACI entities is not entirely clear in the record. CACI describes CACI PT as a wholly owned subsidiary of CACI, INC. – FEDERAL and affiliate of CACI (Appellant's Statement of Undisputed Material Facts (ASUMF) ¶ 13); however the *Al Shimari* decision states that CACI PT is a wholly-owned subsidiary of CACI International, Inc. 758 F.3d at 521.

CACI PT provided interrogation services under Task Order Nos. 35 and 71 issued and administered by the Department of the Interior under General Services Administration (GSA) Blanket Purchase Agreement (BPA) No. NBC00H01A0005 (R4, tab 11 at G-320). As discussed in more detail below, in February 2004 military authorities received evidence of abuse of detainees at Abu Ghraib by U.S. soldiers and others, prompting a number of investigations. In 2004,[2] DOI terminated Task Order Nos. 35 and 71 for convenience so that the task orders could be replaced by DoD contract vehicles pursuant to which CACI would continue to perform. The task orders were not terminated for default, and DOI did not assert that CACI PT breached the task orders (R4, tabs 1 at G-1, 11 at G-322).[3]

On December 21, 2006, CACI PT filed a notice of appeal at the Civilian Board of Contract Appeals seeking $268,480.64 plus interest for work performed under BPA No. NBC00H01A0005, including work performed under Task Order Nos. 35 and 71 (amend. compl. ¶ 35). *CACI Premier Tech., Inc. v. Dep't of the Interior*, CBCA No. 546 (Mar. 7, 2007). On February 12, 2007, CACI Premier Technology, Inc. entered into a settlement agreement with DOI (2007 settlement agreement) resolving claims arising out of the two task orders and other orders issued and subsequently terminated by DOI under BPA No. NBC00H01A0005 (R4, tab 1 at G-1-2).

The scope of the release contained in the 2007 Settlement Agreement is central to resolving many of the issues in the pending motions. The settlement agreement provides that it is between "CACI Premier Technology, Inc. (CACI) and the United States Department of the Interior (DOI)" (R4, tab 1 at G-1). The release paragraph states:

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[2] The date of the termination for convenience does not appear to be in the record.

[3] The government numbered its pages in its Rule 4 submission with leading zeros, which we omit here.

> DOI's payment of the Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders, including those in CBCA No. 546, including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders.

(*Id.*)

B. Abu Ghraib Prisoner Litigation

In February 2004, military authorities received evidence of abuse of detainees at Abu Ghraib by U.S. soldiers and others, prompting a number of investigations. A report by Major General George R. Fay found that CACI employees had "responsibility or complicity" in the abuses at Abu Ghraib. A report by Major General Antonio Taguba found that CACI employees were directly and indirectly responsible for abuse. *Al Shimari v. CACI Premier Tech., Inc.*, 324 F. Supp. 3d 668, 674 (E.D. Va. 2018). Beginning in 2004, CACI cooperated with the government in responding to multiple investigations, audits, and inquiries (R4, tab 20 at GSR4-469). CACI's role in the prisoner abuse scandal is not material to resolution of the pending dispositive motions. CACI has proposed multiple findings of fact regarding CACI PT's lack of culpability. As CACI notes, CACI and CACI PT were not charged with any crimes, and were not debarred from public contracting (ASUMF ¶¶ 22, 23).

Following disclosure of the abuse, plaintiffs alleging that they were subject to abuse filed the following civil actions against CACI PT and other defendants, with each action asserting claims under the Alien Tort Statute, 28 U.S.C. § 1350. CACI identified the following cases, in addition to the *Al Shimari* litigation cited above, as involving Iraqi prisoner litigation; *Saleh, et al. v. Titan Corp., et al.*, No. 1:05-cv-1165 (D.D.C.); *Ibrahim, et al. v. Titan Corp., et al.*, No. 1:04-cv-01248 (D.D.C); and *Abbass, et al. v. L-3 Services, Inc., et al.*, No. 1:09-cv-00229 (D.D.C.) (ASUMF ¶ 18). The litigation costs for the three appeals identified above are not at issue here.

The litigation expenses at issue in this appeal stem from *Al Shimari, et al. v. CACI Premier Tech., Inc.*, No. 1:08-cv-00827 (E.D. Va.) (filed June 30, 2008). As part of the *Al Shimari* litigation, CACI PT asserted a third-party complaint against the United States, on legal theories including indemnification, contribution, breach of contract and exoneration for acts that may have been directed or authorized by the government *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 941-42 (E.D. Va. 2019). The district court granted the government's motion to dismiss CACI PT's third party complaint, holding that CACI released any potential claims in the

2007 settlement with DOI. *Id.* at 972-74. The district court stated that CACI PT "had been on clear notice for several years that it was exposed to lawsuits directed at its conduct at Abu Ghraib when it entered into the settlement agreement in 2007." *Id.* at 973. The district court also noted that litigation that was similar to the *Al Shimari* litigation had been initiated against CACI and its subsidiaries in 2004. *Id.* The district court concluded that CACI PT "should have, and could have," reserved its equitable claim against the government when entering into the 2007 Settlement Agreement. *Id.* On November 12, 2024, a jury awarded plaintiffs $42 million in this case (dkt. 57). The award is not yet final and on January 10, 2025 CACI appealed the district court judgment to the United States Court of Appeals for the 4th Circuit (dkt. 61).

C. CACI's Claimed Overhead Costs

i. CACI's Incurred Cost Submissions and Tolling Agreements

CACI is claiming its *Al Shimari* litigation expenses as indirect costs pursuant to a representative contract that includes the allowable cost and payment clause, Federal Acquisition Regulations (FAR) 52.216-7 (R4, tab 2 at G-70). The allowability of litigation expenses is governed by three FAR provisions. FAR 31.204, Application of principles and procedures, provides general guidance that:

> (d) Section 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items. . . .

FAR 31.204(d). FAR 31.205-33, Professional and consultant service costs, provides in relevant part:

> (b) Costs of professional and consultant services are allowable subject to this paragraph . . . when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government . . . .

FAR 31.205-33(b).

FAR 31.205-47, Costs related to legal and other proceedings, provides in relevant part:

> (b) Costs incurred in connection with any proceeding brought by: a Federal, State, local, or foreign government

for a violation of, or failure to comply with, law or regulation by the contractor or subcontractor (including its agents or employees) (41 U.S.C. 4310 and 10 U.S.C. 3750); a contractor or subcontractor employee submitting a whistleblower complaint of reprisal in accordance with 41 U.S.C. 4712 or 10 U.S.C. 4701; or a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730, are unallowable if the result is-

(1) In a criminal proceeding, a conviction;

(2) In a civil or administrative proceeding, either a finding of contractor or subcontractor liability where the proceeding involves an allegation of fraud or similar misconduct; or imposition of a monetary penalty, or an order issued by the agency head to the contractor or subcontractor to take corrective action under 41 U.S.C. 4712 or 10 U.S.C. 4701, where the proceeding does not involve an allegation of fraud or similar misconduct;

(3) A final decision by an appropriate official of an executive agency to-

(i) Debar or suspend the contractor or subcontractor;

(ii) Rescind or void a contract; or

(iii) Terminate a contract for default by reason of a violation or failure to comply with a law or regulation.

***

(5) Not covered by paragraphs (b)(1) through (4) of this subsection, but where the underlying alleged contractor misconduct was the same as that which led to a different proceeding whose costs are unallowable by reason of paragraphs (b)(1) through (4) of this subsection.

***

(d) To the extent that they are not otherwise unallowable, costs incurred in connection with any proceeding under paragraph (b) of this subsection commenced by a State,

> local, or foreign government may be allowable when the contracting officer (or other official specified in agency procedures) determines, that the costs were incurred either:
>
> (1) As a direct result of a specific term or condition of a Federal contract or subcontract; or
> (2) As a result of compliance with specific written direction of the cognizant contracting officer.
>
> ***
>
> (f) Costs not covered elsewhere in this subsection are unallowable if incurred in connection with the following:
>
> (1) Defense against Federal Government claims or appeals or the prosecution of claims or appeals against the Federal Government (see 2.101).
>
> ***
>
> (4) Defense of suits brought by employees or ex-employees of the contractor or subcontractor under section 2 of the Major Fraud Act of 1988 where the contractor or subcontractor was found liable or settled.

FAR 31.205-47. The FAR section also addresses legal costs for matters totally unrelated to this appeal, such as mergers and acquisitions, patent infringement, bid protests, representation of individuals (such as directors) not legally required, and lawsuits between contractors or subcontractors relating to joint ventures. *Id.*

CACI transmitted its Incurred Cost Submissions for FY 2013 to FY 2017 to the government on the following dates: FY 2013 – January 10, 2014; FY 2014 – February 6, 2015; FY 2015 – December 31, 2015; FY 2016 – February 28, 2017; and, FY 2017 – March 30, 2018. CACI provided the government with revised submissions on the following dates: FY 2013 – October 10, 2016;[4] FY 2014 – December 13, 2016; FY 2015 – February 17, 2017; FY 2016 – N/A; and, FY 2017 – June 8, 2018. (Declaration of Angel L. Beltran II dated February 15, 2024 (Beltran Decl.) ¶¶ 11-17; CACI ASUMF ¶¶ 5-6).

[4] CACI ASUMF ¶ 6 states that the FY 2013 filing was resubmitted on October 31, 2016, rather than October 10 as stated in Mr. Beltran's declaration.

Mr. Angel L. Beltran's declaration asserts that the "Iraq Legal Costs," which include the *Al Shimari* litigation costs, were "included . . . in [CACI's] Incurred Cost Submissions" in the relevant years (Beltran Decl. ¶¶ 6-7). Mr. Beltran's declaration does not explain *how* the Iraq legal costs were included in the incurred cost submissions, that is, whether the costs were separately identified, or if the costs were included in a single number representing all legal costs. Mr. Beltran's declaration does not cite to CACI's incurred cost submissions (other than noting the dates that they were submitted) and the incurred cost submissions are not included in the Rule 4 file.

The government's Corporate Administrative Contracting Officer, Ms. Kimberly Davis, states in a declaration that CACI did not separate the *Al Shimari* costs from other legal fees, and the Defense Contract Audit Agency (DCAA) auditor was unable to break-out the *Al Shimari* costs without reviewing legal invoices (Declaration of Ms. Kimberly D. Davis, dated August 29, 2024 (Davis Decl.) ¶¶ 6, 8). Ms. Davis contends that she was unaware of the *Al Shimari* legal costs until July 12, 2022, when CACI provided a three line spreadsheet with the *Al Shimari* costs for FYs 2013-2017 (Davis decl. ¶ 11 (citing R4, tab 8 at G-209, G-213)).

CACI and DCMA executed a tolling agreement for incurred cost submissions effective July 13, 2022 (Davis decl. at ex. 2). CACI and DCMA executed extensions of the tolling agreement, effective December 7, 2022, January 25, 2023, February 23, 2023, and March 27, 2023 (ASUMF ¶ 8). The tolling agreement initially excluded the period from July 13, 2022 and December 31, 2022 "when determining whether the Government's claim is time-barred by the CDA statute of limitations . . .," and ultimately extended this period through April 28, 2023 (ASUMF ¶ 9; Davis decl. ex. 2 at 2).

ii. CACI's Iraqi Prisoner Litigation Costs Prior to FY2013

CACI included the legal costs incurred in defending against the Iraqi prisoner tort suits in its incurred cost submissions for FYs 2006 and 2007. On March 16, 2009, the Defense Contract Audit Agency (DCAA) released an audit report on CACI's "[Cost Accounting Standards (CAS)] 403 Noncompliance Related to Iraq Legal Defense Costs" (R4, tab 21). DCAA audited CACI's FY 2006 incurred cost submission and found that CACI "incorrectly claimed $4.09 million of legal costs related to lawsuits resulting from the performance of Iraq contracts as CACI Home Office residual costs when they should have been treated as CACI Premier Technology costs" (*id.* at GSR4-477). DCAA also noted that the legal costs should have been allocated to the DOI interrogation contract but, "[s]ince the contract in question has been closed through a settlement agreement, we recommend the costs to be directly allocated to the [Premier Technology Group (PTG)] G&A pool and allocated across PTG contracting efforts accordingly" (*id.* at GSR4-479). DCAA's

audit report was limited to the CAS noncompliance and explicitly did "not address the allowability of costs under FAR 31-205" (*id*. at GSR4-481).

CACI responded to the DCAA audit report in a letter dated May 18, 2009 (R4, tab 22). In addition to stating its reasons for disagreeing with DCAA's finding of a CAS 403 noncompliance, CACI noted: "[i]t appears to us . . . that the DCAA also believes the costs in question are unallowable . . . . We will address the allowability aspect of the DCAA's finding if and when the DCAA formally and explicitly makes it" (*id*. at GSR4-495).

On December 14, 2010, DCMA Corporate Administrative Contracting Officer (CACO) R. Bryan Whitfield issued a final determination of CAS 403 noncompliance to CACI (R4, tab 25 at GSR4-513). Mr. Whitfield determined that CACI International was "non-compliant with CAS 403 from July 1, 2004, through the present because it allocated certain legal costs to its home office residual expense pool rather than allocating those costs to its CACI Premier Technology Group (CACI PTG) segment in accordance with CAS 403" (*id*.). After explaining the basis for his CAS noncompliance determination, Mr. Whitfield noted "[t]his final determination of noncompliance applies only to the allocability, not to the allowability of these costs. No determination of allowability has been made at this time" (*id*. at GSR4-517).

CACI appealed Mr. Whitfield's CAS noncompliance determination to the Board where it was docketed as ASBCA No. 57559 (R4, tabs 27, 30). On September 4, 2012, DCMA and CACI executed a settlement agreement to resolve the CAS 403 noncompliance appeal (R4, tab 33). The 2012 settlement agreement permits CACI to continue allocating its Iraqi legal costs as residual home office costs, but permits DCMA to recover any material cost impacts for cost allocations after FY 2012, that are later determined to CAS non-compliant (*id*. at GSR4-560). The 2012 settlement agreement expressly "does not address or determine the reasonableness or allowability of CACI's Iraq legal costs" (*id*. at GSR4-561).

On September 12, 2013, DCAA released an audit report on CACI's incurred costs for FY 2008 (R4, tab 34). Among the findings, DCAA "questioned a total of $1,715,136 of claimed Iraqi legal costs based on FAR 31.201-2(a)(4), 'Determining Allowability,' FAR 31.201-3, 'Determining Reasonableness'" (*id*. at GSR4-620). DCAA concluded that "it is not allowable or reasonable for the government to pay for the contractor's legal defense costs as a result of improper conduct of its employees" (*id*.). In April and May 2014, Mr. Whitfield issued contracting officer's final decisions establishing final indirect cost rates and demanding repayment of disallowed costs claimed by CACI in FYs 2006 and 2007. The final decisions maintained that the claimed legal costs relating to CACI personnel in Iraq were unreasonable. (Gov't mot. exs. C, D; Amend. Compl. ¶ 41) CACO Whitfield also noted "that the acts alleged in these cases were not part of the contracts' terms" (gov't mot. ex. C at G-335-36; ex. D

at G-340). The final decisions do not reference the 2007 Settlement Agreement (gov't mot. exs. C, D).

On June 25, 2014, CACI appealed the final decisions issued in April and May 2014 to the ASBCA (am. compl. ¶ 42). On March 30, 2015, CACI and CACO Whitfield executed a settlement agreement resolving their disputes over indirect costs including legal fees and other issues in CACI's incurred cost submissions for FYs 2006 and 2007 (*id.* ¶ 43; R4, tab 8 at G-214-19). The 2015 settlement agreement is expressly limited to FYs 2006 and 2007 (R4, tab 8 at G-214-19). In five different paragraphs, it states, "nothing herein shall be deemed a waiver by either party of any rights or claims that may arise in connection with performance under these contracts that occurs in FY 2008 or later" (*id.* at G-215-18). The 2015 settlement agreement does not reference the 2007 Settlement Agreement (*id*. at G-214-29).

The DCAA audit reports for FYs 2009-2010 questioned the allowability of CACI's legal costs under FAR 31.205-33 and FAR 31.205-47 relating to professional services and legal proceedings without referencing the 2007 settlement agreement or Iraq legal costs specifically (R4, tab 14 at 41–42). The DCAA audit reports for FYs 2011-2012 did not question the allowability of legal costs or reference the 2007 settlement agreement (R4, tab 15 at 16–18).

iii. CACI's *Al Shimari* Legal Costs FY2013-FY2017

The disallowed legal costs at issue in this appeal were incurred in civil proceedings before the U.S. District Court for the Eastern District of Virginia, *Al Shimari, et al. v. CACI Premier Tech., Inc.*, No. 1:08-cv-00827 (R4, tabs 11 at G-320–22, 12 at 2-20). That action is currently on appeal to the United States Court of Appeals for the 4th Circuit. The DCAA audit reports for FYs 2013-2017 did not address legal costs and, thus, did not question the allowability of legal costs (R4, tabs 3 at G-76–79, 4 at G-105–07, 6 at G155-57).

On May 3, 2023, the CACO assigned to CACI issued a Final Decision and Demand for Payment of Debt, which: unilaterally established final indirect cost rates for contractor fiscal years 2013 through 2017; assessed penalties for compensation costs contained in CACI's indirect cost rate submissions for FYs 2014 and 2017; and demanded payment of $5,318,530 and $3,333,939 respectively for what the contracting officer characterized as overpaid indirect costs and penalties (R4, tab 11 at G-318–19, G-326). The contracting officer concluded that CACI released "any claim" to be reimbursed for the *Al Shimari* legal costs because the costs were covered by the 2007 settlement agreement (*id.* at G-320). In the final decision, the contracting officer conceded that the legal costs were indirect costs, but concluded that the *Al Shimari* legal costs were covered by the 2007 settlement agreement because they arose out of and were related to Task Order 35 and 71 issued under Blanket Purchase

Agreement No. NBC00H01A0005, which involved interrogation services at Abu Ghraib prison in Iraq (*id.* at G-319–20).

In the alternative, the contracting officer claimed the *Al Shimari* legal costs were unallowable pursuant to FAR 52.216-7 and FAR 31.204(d) because they were "similar" to costs disallowed under FAR 31.205-47 (*id.* at G-320). The contracting officer additionally confirmed that "FAR 31.205-47 does not specifically address the cost of defending lawsuits brought by private parties for illegal conduct" (*id.* at G-320). Quoting proceedings covered by FAR 31.205-47, the contracting officer concluded that pursuant to FAR 31.204(d) the *Al Shimari* legal costs were "similar" to proceedings "brought by: a Federal, State, local, or foreign government for a violation of, or a failure to comply with, law or regulation[s] by the contractor" or brought by "a third party in the name of the United States under the False Claims Act, 31 U.S.C. 3730" (*id.* at G-321).

The contracting officer concluded that the *Al Shimari* proceedings "could result in a finding of liability for illegal conduct and could result in a decision by the [g]overnment to debar or suspend CACI" (*id.* at G-322). The contracting officer additionally wrote that the *Al Shimari* proceedings "could have resulted in a decision to terminate CACI's interrogation contracts for default by reason of a violation or failure to comply with a law or regulation, had they not already been terminated" (*id.* at G-322).

Separately, the contracting officer concluded that, pursuant to FAR 31.205-47(g), CACI was required to segregate the *Al Shimari* legal costs and not bill them to the government while the proceedings are pending (*id.*).

D. CACI's Compensation Costs In Excess of FAR Limits

FAR 31.205-6(p), "Limitation on allowability of compensation," makes senior executive compensation above certain limits an unallowable cost. The applicable compensation limit is complex because it depends on the year the contract was issued. In addition, the limits are set on a calendar year basis, while CACI uses a July 1 fiscal year (R4, tab 3 at G-112-13). Thus, CACI's costs incurred during a given fiscal year must be allocated to calendar years to determine the allowable amounts. Because of "the potential for undue complexity and related costs to implement multiple rates to accommodate these revisions" the Director, Defense Pricing, Acquisition, Technology, and Logistics issued a Compensation Cap Memorandum on October 24, 2014 (gov't resp., ex. A at 1). The Compensation Cap Memorandum authorized the use of a single blended cap "as a practical and cost efficient solution to implement" the cap requirements (*id.*). DCMA issued guidance on implementing the Compensation Cap Memorandum (gov't resp., ex. B) requiring contractors to propose a cap in each incurred cost submission using an agreed-upon process and requiring DCAA to audit

the proposed cap to "ensure[ ] only the allowable compensation is billed each fiscal year based on the different authorized caps" (*id.* at 2; gov't resp., ex. A at 2).

CACI and the government entered into an advance agreement regarding the use of a blended compensation cap on May 31, 2018 (R4, tab 6 at G-173-77). The advance agreement stated that the parties would "discharge their respective responsibilities to develop transitional compensation caps" for CACI by using an agreed-upon formula for calculating blended caps based on weighted averages with a "basis for the weighting" determined by allocations of costs incurred in the time period covered by each submission (*id.* at G-173). The advance agreement recognized that it would be "impractical" to identify unallowable costs for each employee "on the basis of their actual labor accounting" and noted instead that unallowable compensation costs would be recorded in a separate indirect cost pool for the purpose of determining final indirect rates (*id.* at G-173–74). The advance agreement states that:

> Contractor agrees to include a detailed schedule in the forward pricing rate submission demonstrating the blended rates calculated using the method described above does not result in pricing total compensation to the Government in excess of that allowed by the terms of anticipated contracts. Contractor understands and acknowledges that a corresponding adjustment to proposed rates to remove unallowable excess compensation costs above the compensation limits will be made once the DCAA audit is complete.

(*Id.* at G-175)

CACI included a blended compensation cap in its FY 2017 incurred cost submission, dated July 31, 2018 (*id.* at G-154, G-162–63, G-166). After submitting its FY 2017 incurred cost submission, CACI realized that it had erroneously omitted certain executive compensation bonus costs in its calculation (*id.* at G-166). CACI notified the government of its error on December 10, 2018, and submitted revised calculations on December 31, 2018 (*id.*). DCAA audited the cap that CACI included in its FY 2017 Submission and confirmed that CACI used a calculation that the parties had agreed to in the advance agreement (*id.* at G-163). CACI's explanation for the excess costs was included in DCAA's audit report for the FY 2017 Submission:

> Inclusion of the bonuses in the compensation analysis resulted in an understated self-disallowance when compared to the FY 2017 blended FAR compensation cap. CACI voluntarily disclosed this error to DCAA and

> DCMA on December 10, 2018 and stated we would submit a revised FY 2017 [submission] to correct the error.
>
> We concur that the amounts questioned by DCAA match our self-disclosure and the subsequent adjustments made to our FY 2017 [submission] resubmission on December 31, 2018. However, we do not agree that a penalty should be assessed on these questioned costs, as they were self-disclosed by CACI and not identified by DCAA during the course of their audit.

(*Id.* at G-166) Based on a prior finding that CACI had failed to include excess compensation costs in its FY 2014 Submission, DCAA concluded that CACI should be assessed a penalty because, according to DCAA, CACI demonstrated that it was "prone to mistakes when calculating the voluntary deletions above the cap ceilings" (*id.* at G-164). DCAA reached its conclusion with respect to the FY 2014 costs after CACI had submitted its FY 2017 submission (R4, tabs 4 at G-102, 6 at G-154).

The FAR provides that the government can assess penalties against contractors that submit unallowable costs. Specifically, FAR 52.242-3, Penalties for Unallowable Costs, provides in relevant part:

> (b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 3748 or 41 U.S.C. chapter 43, as applicable, which is implemented in Section 42.709 of the Federal Acquisition Regulation (FAR).
>
> . . .
>
> (d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to–
>
> (1) The amount of the disallowed cost allocated to this contract; plus
>
> (2) Simple interest, to be computed-

> (i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and
>
> (ii) Using the applicable rate effective for each six-month interval prescribed by the Secretary of the Treasury pursuant to Pub.L.92-41 (85 Stat.97).
>
> . . .
>
> (g) Pursuant to the criteria in FAR 42.709-6, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

FAR 52.242-3. The criteria for waiving penalties are located at FAR 42.709-6, Waiver of the penalty. The provision states that the contracting officer "shall" waive the penalties on expressly unallowable costs when:

> (a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);
>
> (b) The amount of the unallowable costs under the proposal which are subject to the penalty is $10,000 or less (*i.e.*, if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709-1(b) is $10,000 or less); or
>
> (c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that-
>
> (1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (*e.g.*, the types of controls required for satisfactory participation in the Department of Defense sponsored self governance programs, specific accounting controls over indirect costs, compliance tests which

> demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and
>
> (2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; *i.e.*, their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

FAR 42.709-6.

The contracting officer determined that CACI's FY 2017 Submission included $4,326,318 in excess costs above the cap that CACI and DCAA identified and assessed a penalty of $2,812,539 under FAR 52.242-3 with an additional $438,636 in interest because the contracting officer determined that these excess costs were expressly unallowable (R4, tab 11 at G-323, G-326-27). The final decision further considered whether the penalties were subject to waiver, writing:

> While CACI concurred with the disallowed costs, it does not agree that penalties should be assessed on these costs. CACI argues that penalties should not apply because CACI self-disclosed the errors in the CFY 2017 Proposal. Self-disclosure, however, is not a basis for waiving penalties under FAR 42.709-6 (Waiver of the Penalty). CACI did not withdraw either its CFY2014 or CFY2017 Proposals prior to commencement of the audit. Additionally, the unallowable costs subject to penalty exceeds $10,000 in amount. *See* FAR 42.709-6(a) and (b). After considering CACI's position and the information it provided, I have determined that the requirements of FAR 42.709-6 are not met to support waiver of the penalty. Therefore, I am assessing total penalties under FAR 42.709-2(a)(1) in the amount of $3,333,939.

(*Id.* at G-327)

E. Non-Flexibly Priced Contracts

All demands for payment, penalties, and interest in the final decision, except for fringe benefit costs, are incorrect because they calculate government indirect cost participation using firm-fixed price contracts that are not subject to adjustment through the final indirect cost process (Amend. Compl. ¶¶ 2, 46, 60, 62; 2nd Amend. Answer ¶¶ 2, 46, 60, 62). Notwithstanding CACI's other claims, the demands for payment in

the final decision are overstated. The parties agree that the correct amounts are: FY 2013, $536,955; FY 2014, $644,171 (overpayment), $56,000 (penalty and interest); FY 2015, $197,080; FY 2016, $49,549; FY 2017, $2,490,282 (overpayment), $2,492,385 (penalty and interest); for a total of $6,466,422 (amend. compl. ¶ 73; 2nd amend. answer ¶ 73; gov't resp. at 24, (¶ 88), app. reply at 24 n.12).

DECISION

A. Standard of Review

We will grant summary judgment only if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that may affect the outcome of the decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Once the moving party has met its burden of establishing the absence of disputed material facts, then the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984). The fact that both CACI and the government have filed dispositive motions does not require us to grant summary judgment for one side or the other, both motions can be denied in the event that there are material factual disputes regarding each motion. *See, e.g., Mingus*, 812 F.2d at 1391.

B. The 2007 Settlement Agreement Does Not Barr CACI's Claimed Costs

CACI seeks entry of summary judgment in its favor that the 2007 settlement agreement did not waive its claim for reimbursement of *Al Shimari* legal costs. The government moves for an order dismissing Count II of CACI's complaint for failure to state a claim because CACI's request for reimbursement of *Al Shimari* legal costs is precluded by the 2007 settlement agreement.

As an initial matter, we address the different remedies sought by CACI and the government (summary judgment vs. dismissal). While the Board may consider facts beyond the pleadings to decide a jurisdictional issue in a motion to dismiss, our review of a motion to dismiss for failure to state a claim is limited to the pleadings (*see L-3 Commc'ns Integrated Sys., L.P.*, ASBCA Nos. 60713, 60716, 17-1 BCA ¶ 36,865 at 179,625). The government's motion to dismiss cites to multiple documents for non-jurisdictional facts. Accordingly, we treat the government's motion to dismiss as a motion for summary judgment. *Dick Pacific/GHEMM, JV*, ASBCA No. 55829, 08-2 BCA ¶ 33,973 at 167,941. In instances where we treat a motion to dismiss as a motion

for summary judgment, the non-moving party is entitled to an opportunity to controvert the factual allegations. *See, e.g. Id.* at 167,941-42. However, here, CACI's statement of facts in its motion for partial summary judgment already addresses the issues raised by the government. Furthermore, because we deny the government's motion to dismiss, inviting CACI to respond would just result in wasted effort.

Having determined that the Board is reviewing cross-motions for summary judgment regarding the 2007 settlement agreement, we turn to the language of the settlement agreement. The interpretation of a settlement agreement is a question of law. *See, e.g., JAAAT Tech. Serv., LLC*, ASBCA No. 61792 et al., 21-1 BCA ¶ 37,878 at 183,965. The relevant paragraph of the settlement agreement provides:

> DOI's payment of the Settlement Amount shall constitute full and final payment, settlement, and accord and satisfaction of all claims and disputes by DOI and CACI arising out of or related to the terminated Task Orders, including those in CBCA No. 546, including but not limited to all claims for interest, general administrative costs, direct and indirect costs of all kinds whatsoever relating to the terminated Task Orders.

(R4, tab 1 at G-1) The government contends that the settlement agreement releases all claims related to the task orders, including the *Al Shimari* legal costs that CACI included in its indirect cost proposals (gov't mot. at 10-21). The government additionally contends that *Al Shimari* legal costs should be barred by issue preclusion based upon the holding of the District Court for the Eastern District of Virginia, that CACI's third-party plaintiff claims against the government were released by the 2007 settlement agreement (gov't mot. at 21-24). Conversely, CACI contends that the settlement agreement is limited to claims between the signatories, CACI PT and DOI, and is not binding upon CACI or DCMA. CACI additionally alleges that the language of the 2007 settlement agreement does not release future claims, and that the government's actions between 2007 and 2023 demonstrate that the government did not interpret the settlement agreement as precluding CACI from including litigation costs in its overhead rates. (App. mot. at 12-17)

We start with CACI's argument that the settlement agreement is limited to CACI PT and DOI. We find that there is a material factual dispute regarding CACI's corporate structure, such that we cannot determine whether CACI PT and CACI are different parties for the purpose of this CACI's motion. However, that is of no import, because we conclude that the settlement agreement with the Department of the Interior is not binding on the Defense Contract Management Agency. CACI cites to the Federal Circuit's holding in *Holland v. United States*, 621 F.3d 1366 (Fed. Cir. 2010)

for the proposition that where "an individual agency – and not the United States – enters into a settlement agreement whose terms apply to the agency and not to the United States generally, the agreement does not release all potential claims against the United States" (app. mot. at 12). We do not read the decision in *Holland* as making that point directly, but it is implied by the court's analysis.

In *Holland* the plaintiff sought breach of contract damages stemming from a government-assisted acquisition of failing thrifts. The background facts and regulatory scheme are too complex to address in this opinion, but in short, the plaintiff, actually the executor for the estate of the true party in interest, entered into a financial assistance agreement with the Federal Savings and Loan Insurance Corporation (FSLIC) in exchange for taking over the liabilities of failing depository institutions. *Holland,* 621 F.3d at 1370. The assistance agreement was approved by the Federal Home Loan Bank Board (FHLBB) in an action that the court found to be beyond a simple regulatory approval, such that the FHLBB was a co-obligor with FSLIC in the transaction. *Id.* at 1375.

Congress subsequently enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) to prevent the collapse of the thrift savings industry. *Id.* at 1372. FIRREA abolished the FSLIC and created a new resolution fund under the Federal Deposit Insurance Corporation (FDIC) and replaced the FHLBB with the Office of Thrift Supervision (OTS). *Id.* The plaintiff subsequently entered into a settlement agreement with the FDIC but sought to bring a breach of contract claim against the government based upon the contractual obligations of the OTS, as successor to the FHLBB, independent of its settlement with the FDIC as successor to FSLIC. *Id.* at 1374. The court held that the settlement between Holland and the FDIC was an accord and satisfaction with regard to the OTS, because FSLIC and the FHLBB were co-obligators arising from the assistance agreement, and because the release of one co-obligator acted as release of co-obligators under the controlling Illinois law. *Id.* at 1377-81. If a settlement agreement with one government agency were binding on all government agencies, the court would not have needed to resort to Illinois law to decide the appeal.

Even without the *Holland* decision, the plain language of the settlement provides that it is a "settlement, and accord and satisfaction of all claims and disputes by DOI and CACI" (R4, tab 1 at G-1). A settlement agreement is a contract and a contract normally binds only the parties to the agreement. The government contends that *Holland* actually stands for the opposite position, that a settlement with one government agency is binding on other government agencies (gov't resp. at 26-27). Ignoring the Federal Circuit's reliance upon Illinois law, and the fact that the FHLBB was determined to be a co-obligator in the agreement, the government contends that the court's focus was on the released claims rather than the signatories, and that the opinion stands for the proposition that a general release of claims on a government

contract releases all claims against the government (gov't resp. at 27). The government cites to *Dairyland Power Coop. v. United States*, 27 Fed. Cl. 805, 811 (1993), *aff'd* 16 F.3d 1197 (Fed. Cir. 1994), for the proposition that a release on a government contract releases all claims against the government (gov't resp. at 27-28). However, the government provides no explanation of how the *Dairyland Power* case demonstrates that point.

In *Dairyland Power* a utility executed a release on a contract modification with the Atomic Energy Commission. The Court of Federal Claims found that the release barred *Dairyland Power*'s action against the government acting through the Department of Energy. *Dairyland Power*, 27 Fed. Cl. at 811-12. We take judicial notice of the fact that the Atomic Energy Commission's responsibilities were eventually transferred to the Department of Energy. *Id.* at 806 n.1. Thus, *Dairyland Power* provides no support for the proposition that a settlement with one agency binds the entire government.

The government has not argued that it was a third-party beneficiary of the settlement agreement. However, even if we were to consider such an argument *sua sponte*, it would not change the outcome. For the Department of Defense to be able to enforce the settlement agreement as a third-party beneficiary it would be required to show that the settlement agreement was for its direct benefit. *Pac. Gas and Elec. Co. v. United States*, 838 F.3d 1341, 1361-62 (Fed. Cir. 2016). Here, the Department of Defense is not mentioned in the settlement agreement.[5] Thus, there is no support for a finding that DoD was a third-party beneficiary of the 2007 settlement agreement.

Our determination that a settlement agreement expressly settling claims for a single agency is not automatically binding upon another agency is consistent with the scope of representation for agency counsel before the CBCA. That board has held that an end user agency receiving a service through a contract with another agency is not a party to the contract. *LFH, LLC, Appellant v. Gen. Servs. Admin.*, CBCA Nos. 395, 455, 08-2 BCA ¶ 33,915 at 167,820, (citing *Heritage Reporting Corp. v. Gen. Servs. Admin.*, GSBCA 10396, 92-1 BCA ¶ 24,677 at 123,122). This is also consistent with multiple cases holding that an attorney employed by an agency other than the Department of Justice cannot represent another agency. *United States v. Am. Tel. & Tel. Co.*, 86 F.R.D. 603, 617 (D.D.C. 1980); *Gray v. Rhode Island Dep't of Children, Youth & Families*, 937 F. Supp. 153, 158-60 (D.R.I. 1996). Thus, because the government has not cited to any evidence that DoD authorized, or participated in the 2007 settlement agreement, we hold that the 2007 settlement agreement is not binding on DoD.

[5] The settlement agreement does require CACI to certify that it returned certain government-furnished equipment to the Army.

Having determined that DoD was not a party to the 2007 settlement agreement, and is not able to enforce the release issued to DOI, we need not reach CACI's arguments that the release is not binding on future costs, and CACI's arguments about the government's prior interpretation. We deny the government's motion to dismiss, being treated as a motion for summary judgment because the settlement agreement cannot be enforced by a non-party to the agreement.

The government additionally contends the Board should find that CACI cannot include its litigation costs in its overhead rate due to issue preclusion, premised upon a federal district court holding that CACI had released its costs (gov't mot. at 25-29). As explained above, the Eastern District of Virginia granted the government's motion to dismiss CACI PT's third party complaint, holding that CACI released any potential claims in the 2007 settlement agreement with DOI. *Al Shimari*, 368 F.Supp.3d at 972-74. The district court stated that CACI PT "had been on clear notice for several years that it was exposed to lawsuits directed at its conduct at Abu Ghraib when it entered into the settlement agreement in 2007." *Id.* at 973. The district court also noted that litigation that was similar to the *Al Shimari* litigation had been initiated against CACI PT in 2004. *Id.* The district court concluded that CACI PT "should have, and could have," reserved its indemnity claim against the government when entering into the 2007 Settlement Agreement. *Id.*

Issue preclusion is legal doctrine that prevents re-litigation of an issue that has already been decided. A claim is barred by issue preclusion when:

> the issue previously adjudicated is identical with that now presented, (ii) that issue was "actually litigated" in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action.

Thomas v. Gen. Servs. Admin., 794 F.2d 661, 664 (Fed. Cir. 1986); *see also Lessors of Abchakan Vill., Logar Province., Afghanistan*, ASBCA No. 61787, 22-1 BCA ¶ 38,234 at 185,673-74. However, the issue presented in *Al Shimari* is not the same as the issue to be resolved here. In *Al Shimari*, the court rejected CACI's third-party complaint against the United States asserting what CACI characterized as equitable legal theories of indemnification, exoneration, and contribution as well as the contractual remedy of breach of the duty of good faith and fair dealing, with regard to a tort claim stemming directly from the Department of Interior task orders. Thus, the district court litigation does not present the same issue as this appeal. *See, e.g., FTC v. Nat'l Urological Grp. Inc.*, 785 F.3d 477, 482 (11th Cir. 2015) (To establish that an issue is not identical to one resolved in previous litigation, a party "need only point to one material differentiating fact that would alter the legal inquiry," *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317 (11th Cir.2003)).

In addition, the district court was considering *direct* costs under the DOI task orders. In this appeal we are considering whether legal costs, admittedly stemming from the DOI task orders, can be included in CACI's *indirect* costs in its overhead rate to be applied to other contracts. The *allowability* of these costs is a separate question. Here, we only consider whether the 2007 settlement agreement prohibits CACI from including the costs in its overhead rate. We conclude that the 2007 settlement agreement does not prohibit CACI from including the costs in its overhead rates.

C. CACI Has Not Established That Its Litigation Costs Are Allowable

Having determined that CACI is not prohibited from including the *Al Shimari* litigation costs in its overhead rate due to the 2007 settlement agreement with DOI, we must wade into the minefield of allowability of litigation costs. CACI requests entry of summary judgment holding that its *Al Shimari* litigation costs are allowable (app. mot. at 17-23). The government contends that the costs are unallowable (gov't resp. at 35-39).

Legal expenses are addressed in the FAR in FAR 31.205-33, PROFESSIONAL AND CONSULTANT SERVICE COSTS, which provides: "(b) Costs of professional and consultant services are allowable subject to this paragraph . . . when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government . . . ." FAR 31.205-47 in turn lists specific legal expenses that are not allowable, such as defending litigation against the government. CACI contends that FAR 31.205-33 provides that legal expenses are allowable unless specifically identified as unallowable by 31.205-47, which is explicitly referenced in FAR 31.205-33(b) (app. br. at 17). The government concedes that the listed examples in FAR 31.205-47 do not address CACI's *Al Shimari* litigation expenses,[6] but contends, instead, that the *Al Shimari* expenses are similar or related to prohibited expenses and thus are unallowable pursuant to the general provision of FAR 31.204(d) (gov't resp. at 36).

The allowability of litigation expenses has been subject to conflicting interpretations. Some legal scholars have advocated for CACI's proposed

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[6] The government asserts that some of the litigation costs may have been incurred in bringing the third-party complaint against the United States, and that such costs would be unallowable (gov't resp. at 37-38, 38 n.7). CACI asserts that such costs were incurred after the fiscal years at issue in this appeal (app. reply at 19). CACI concedes that "costs incurred in prosecuting a claim against the Government are not allowable" (*id.*). Thus, to the extent there is an issue as to whether such costs were charged to CACI's indirect cost pool, the issue appears to be one of quantum and not entitlement.

interpretation – that any legal expenses not specifically excluded by FAR 31.205-47 are allowable, if otherwise reasonable and not prohibited by some other FAR restriction.[7] *See, e.g.* Karen L. Manos "Allowability of Legal Costs / Edition II" 16-13 Briefing Papers 1 at 16. However, our reviewing court has held that an argument that "the only professional service costs that are not allowable under FAR § 31.205-33 are those costs that are specifically disallowed under another FAR provision" is "fundamentally flawed." *Boeing N. Am., Inc. v. Roche*, 298 F.3d 1274, 1285 (Fed. Cir. 2002). Instead, the Federal Circuit held that allowability of legal costs is subject to what is now FAR 31.204(d)[8] providing that the "'[f]ailure to include any item of cost does not imply that it is either allowable or unallowable.' In such situations, FAR 31.204(c) instructs us: '*The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items*.'" *Boeing*, 298 F.3d at 1285 (emphasis in original) (quoting FAR 31.204(c) now codified at FAR 31.204(d)). Thus we must determine whether CACI's *Al Shimari* litigation costs are "similar or related" to other unallowable costs.

The contracting officer concluded in the final decision that the costs were similar to proceedings brought by a federal, state, local, or foreign government for the violation of a law or regulation by the contractor, or similar to a proceeding brought by a third-party in the name of the United States, like the False Claims Act (R4, tab 11 at G-321). CACI contends that the *Al Shimari* litigation costs are not "similar or related" to unallowable costs because the litigation involved a private tort action pursuant to the Alien Tort Statute, and is not similar to a suit by a government, or citizen suits representing a government interest (such as citizen suits pursuant to, for example, the Clean Water Act) (app. mot. at 17-23). The Alien Tort Statute, 28 U.S.C. § 1350 applies to "civil action[s] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

In *Sw. Marine, Inc. v. United States*, 535 F.3d 1012 (9th Cir. 2008), the court held that costs of defending against a citizen suit brought pursuant to the Clean Water Act were similar to costs disallowed by FAR 31.205-47 because the citizen suit provisions supplemented the remedies available to the government and because penalties would be payable to the government. *Id.* at 1017. In *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009) the court found that a violation of Title VII of the Civil Rights Act of 1964 would have constituted a breach of the government contract at issue, and that the FAR makes litigation costs associated with breaches of contract unallowable. *Id.* at 1043-45.

[7] For example, a contractor could not seek reimbursement of a legal bill including travel expenses for a domestic first-class plane ticket.

[8] The cited language was previously codified at FAR 31.204(c).

The government contends that a judgment against CACI in the *Al Shamiri* litigation could provide a basis for suspension and debarment proceedings against CACI[9] (gov't resp. at 35-36). As CACI points out, the task orders at issue were terminated for convenience over twenty years ago, and the government has never brought any disciplinary action against CACI (app. mot. at 20-21). Moreover, debarment is based upon a current contractor's responsibility to perform a contract. The government has issued hundreds of contracts to CACI over the past twenty years, always finding CACI to be a responsible bidder.

Although the *Al Shimari* litigation is being brought by private parties, it is alleging violation of international law.[10] We determine that this factual situation is similar to the categories of litigation cost disallowed in 31.205-47(b), such as actions being brought in a *qui tam* action where the government has not intervened. The fact that the Iraqi litigation is unlikely to lead to a suspension or debarment due to the passage of time does not mean that the costs are not similar or related to unallowable costs. As such, CACI is required to isolate the costs of the *Al Shimari* litigation. If the current judgment against CACI is overturned on appeal and CACI receives a final judgment without a monetary penalty, the costs will be allowable.

CACI attempts to distinguish *Boeing* by noting that the Federal Circuit determined that the costs at issue in that appeal, involving a shareholder derivative suit, were not "similar" to unallowable costs, and instead held that the costs were "related." According to CACI, because the alien tort claims are not "related" to litigation involving unallowable costs, the costs should not be determined to be unallowable. (App. mot. at 22-23) However, the Federal Circuit in *Boeing* also interpreted its prior holding in *Caldera v. Northrop Worldwide Aircraft Servs., Inc.*, 192 F.3d 962 (Fed. Cir. 1999).[11] "Properly understood, *Northrop* and FAR § 31.205-47 taken together establish a simple principle – that the costs of unsuccessfully defending a private suit charging contractor wrongdoing are not allowable if the 'similar' costs would be disallowed under the regulations". *Boeing,* 298 F.3d at 1286.

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[9] CACI contends that the government "raises additional arguments outside the scope of the COFD" and that the Board should not entertain such arguments (app. reply at 17, 23). The Board's review is *de novo* and parties may raise new arguments before the Board. Contract Disputes Act (CDA), 41 U.S.C. § 7104(b)(4); *Northrop Grumman Corp.*, ASBCA No. 62165, 21-1 BCA ¶ 37,922 at 184,170.

[10] CACI alleged in the *Al Shimari* litigation that its actions were directed by the government which could make the costs allowable pursuant to FAR 31.205-47(d).

[11] Legal commentors have characterized *Boeing* as rewriting the holding in *Northrop*. *See, e.g.,* Ms. Karen Manos, "Feature Comment: The Federal Circuit's Decision in Boeing North American: Better, But Still Wrong," 44 GC ¶ 203 (June 5, 2002).

Northrop involved legal defense costs in an action charging that Northrop wrongly terminated employees because they refused to participate in fraud against the United States. *Id.* The *Boeing* court characterized *Northrop* as holding that the questioned costs were similar to costs that were unallowable pursuant to "closely comparable categories" of costs that disallowed costs brought by state and local governments in suits alleging fraud or similar misconduct. *Id.* Here, the allegations against CACI involve violations of the law of nations or a treaty of the United States, rather than federal or state laws. We find that allegations of violation of the law of nations is "similar" to other disallowed costs for violation of law and render the costs unallowable if CACI is ultimately found liable.

Having determined, based upon the holding in *Boeing* and *Southwest Marine*, that that CACI's *Al Shimari* litigation costs are unallowable as costs similar to disallowed costs pursuant to FAR 31.204(d), we must address CACI's argument that those appellate court decisions are no longer good law (app. reply at 15-17). According to CACI, the Major Fraud Act of 1988 was the origin of FAR 31.205-47 and the act does not prohibit similar and related costs (app. mot. at 2). According to CACI, any gap-filling or interpretation by the FAR Council expanding the scope of the exceptions is the result of the appellate courts applying *Chevron* deference in interpreting the FAR (app. reply at 15-16).

The Federal Circuit considered deference to the FAR in *Brownlee v. DynCorp*, 349 F.3d 1343 (Fed. Cir. 2003). In *DynCorp*, the contractor was performing a cost type base support services contract. *Id.* at 1345. DynCorp incurred legal expenses in connection with a criminal investigation of allegations of fraudulent documentation of vehicle maintenance, misuse of government gasoline credit cards, and recording false data. The government did not prosecute DynCorp, but did prosecute one of DynCorp's employees, who pleaded guilty to a charge of unauthorized access to a government computer. *Id.* at 1346. Before the Board, the government argued that legal costs involving conviction of a contractor employee were unallowable. However, the Board held that regulation was inconsistent with the Major Fraud Act of 1988, which specified only that legal costs were unallowable where the contractor was found liable. *Id.*

In interpreting FAR 31.205-47(b), the court found that the statute, 10 U.S.C. § 2324(k)(2)(A),[12] was ambiguous, and relied upon *Chevron* deference (*Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) to determine that the implementing regulation, the FAR, was a permissible construction of the statute. *DynCorp*, 349 F.3d at 1354-55. The court noted that "'a very good indicator of delegation meriting *Chevron* treatment [is] express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or

[12] 10 U.S.C. § 2324(k)(2)(A) has been recodified at 10 U.S.C. § 3750(c)(1).

rulings for which deference is claimed.' [*United States v. Mead Corp.*, 533 U.S. 218, 229 (2001)] Not surprisingly, we have specifically held that the provisions of FAR are entitled to *Chevron* deference." *DynCorp*, 349 F.3d. at 1354. The court granted deference to the FAR council's interpretation of 10 U.S.C. § 2324 in extending the disallowance to instances where there was a criminal conviction of a contractor employee rather than the contractor itself. *Id.* at 1355.

The Supreme Court recently overturned *Chevron* deference in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). CACI contends that the Board must reinterpret the statute without granting *Chevron* deference to the FAR (app. reply at 17).[13] Even if we were to agree with CACI's interpretation of the impact of *Loper*, CACI's argument fails to consider the Board's obligation to apply Federal Circuit precedent. We are required to apply Federal Circuit precedent unless it has been expressly overturned by statute or the Supreme Court. *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005). Here, *Loper* expressly did *not* overturn the Federal Circuit's precedent interpreting the FAR. Instead the Court held:

> we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology.

Loper Bright, 603 U.S. at 412. Moreover, *Chevron* was concerned with regulations issued pursuant to the Administrative Procedures Act (APA) and the APA explicitly exempts rulemaking relating to public contracts. 5 U.S.C. § 553(a)(2). Instead, FAR rulemaking is implemented through 41 U.S.C. § 1707.

Moreover, we are not convinced that the Federal Circuit's holding in *Boeing* is not supported when viewed with the proper degree of deference. However, that is an argument to be considered by the Federal Circuit upon a more comprehensive briefing rather than an argument raised by CACI in its reply brief.

D. The Government's Claim is Not Barred by the Statute of Limitations

CACI asserts that it is entitled to summary judgment that the government's claim regarding legal costs for FYs 2013-2015 is barred by the statute of limitations because the costs were included in incurred cost proposals filed more than six years prior to the government's final decision (app. mot. at 27-28). The government contends that a statute of limitations dispute is not appropriate for summary judgment

[13] *See also* Nathaniel E. Castellano, "AFTER CHEVRON: How Might *Loper Bright* Impact Procurement Law?" 38 Nash & Cibinic Rep. NL ¶ 49 (August 2024).

because the record is not complete; that there is uncertainty regarding the start date of the tolling agreement between the parties; and because CACI has the burden of proof and did not establish in its motion that the *Al Shimari* costs were identified as such in CACI's incurred cost submissions (gov't resp. at 39-42).

Pursuant to FAR 33.201, a claim accrues "when all events, that fix the alleged liability of ... the contractor and permit assertion of the claim, were known or should have been known." For indirect costs on cost type contract, the statute of limitations generally begins to run upon submission of the incurred cost submission. The key to a fact-specific inquiry is whether the government had sufficient information to know of the claim. *Strategic Tech. Institute, Inc.*, ASBCA No. 61911, 22-1 BCA ¶ 38,027 at 184,680-81, *aff'd, Strategic Tech. Inst. v. Sec'y of Defense*, 91 F.4th 1140 (Fed. Cir. 2024). Claim accrual begins with the submission of sufficient information to the government, rather than allowing the government time to perform an audit or to appreciate the significance of the information it already has. *Id.*; *Doubleshot, Inc.*, ASBCA No. 61691, 20-1 BCA ¶ 37,677 at 182,905 (citing *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,018).

We first address the government's arguments that determination of a statute of limitations defense is a fact-intensive inquiry that is not appropriate for resolution on summary judgment, and that it is inappropriate here, where discovery is not complete, and that it needs discovery on the parties' tolling agreement (gov't resp. at 39-41). Obviously, if there is a material factual dispute, an issue cannot be resolved by summary judgment. However, the Board has resolved on summary judgment far more complex appeals than that at issue here. The government cites to the rule of civil procedure that prevents entry of summary judgment when facts are unavailable to the nonmovant (FED. R. CIV. P. 56(d)), but fails to comply with its requirements. As we have noted, it is not sufficient just to note that discovery is still ongoing. Rather the non-moving party "must explain specifically how additional discovery will allow the party to rebut the summary judgment motion." *Chugach Fed. Sols., Inc.*, ASBCA No. 61320, 19-1 BCA ¶ 37,314 at 181,496 (citing *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1179-80 (10th Cir. 2008); *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1363-64 (Fed. Cir. 2008)). The government simply argues that discovery "may show trickery or other misconduct by CACI that would warrant equitable tolling" (gov't resp. at 41). This is insufficient to prevent entry of summary judgment.

The government's remaining argument, that CACI has not established that the government knew that CACI was including *Al Shimari* costs in its incurred cost submission, provides a basis for denying CACI's motion. The statute of limitations is an affirmative defense, and the burden is on CACI to demonstrate that the government did not timely assert its claim. *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320-22 (Fed. Cir. 2014). Here, CACI relies upon the declaration of Mr. Beltran, CACI's director of government compliance. Mr. Beltran states that CACI

included its Iraqi legal costs in its incurred cost submissions (Beltran decl. ¶ 7). However, Mr. Beltran's declaration simply asserts that the "Iraq Legal Costs," which include the *Al Shimari* litigation costs, were "included . . . in [CACI's] Incurred Cost Submissions" in the relevant years (*id.*). Mr. Beltran's declaration does not explain *how* the Iraq legal costs were included in the incurred cost submissions, that is, whether the costs were separately identified, or if the costs were included in a single number representing all legal costs. Mr. Beltran's declaration does not cite to CACI's incurred cost submissions (other than noting the dates that they were submitted) and the incurred cost submissions are not included in the Rule 4 file. Thus, there is no information in the record as to whether supporting documentation, such as invoices, that could demonstrate the inclusion of Iraqi litigation costs, were provided in CACI's incurred cost submissions.

The government submitted the declaration of the Corporate Administrative Contracting Officer, Kimberly Davis, to controvert the declaration of Mr. Beltran. According to Ms. Davis, CACI did not separate the *Al Shimari* costs from other legal fees, and the Defense Contract Audit Agency (DCAA) auditor was unable to break-out the *Al Shimari* costs without reviewing legal invoices (Davis decl. ¶¶ 6, 8). The wording of the declaration is ambiguous as to whether DCAA did not have access to the invoices (because they were not included in the incurred cost submissions) or whether DCAA simply had not reviewed the invoices. Ms. Davis contends that she was unaware of the *Al Shimari* legal costs until July 12, 2022, when CACI provided a three line spreadsheet with the *Al Shimari* costs for FYs 2013-2017 (Davis decl. ¶ 11 (citing R4, tab 8 at G-209, G-213)). The burden of demonstrating that the government's claims are barred by the statute of limitation falls on CACI. We find that Ms. Davis' declaration, being proffered by the party opposing summary judgment, is sufficient to demonstrate the existence of a material factual dispute as to whether the government knew or should have known that CACI was claiming *Al Shimari* litigation costs on the date of CACI's incurred costs submissions. CACI's arguments in its reply brief basically allege that the government should have known that CACI was claiming *Al Shimari* litigation costs based upon prior cost submissions (app. reply at 20-21). However, suspicion that costs may be included is not the same as knowledge that the costs were included. The government could not establish by preponderate evidence that CACI had claimed unallowable costs based upon a suspicion.

E. The Government's Assessment of Penalties on CACI's Executive Compensation Costs

CACI additionally seeks summary judgment that the government improperly assessed penalties for excess executive compensation (app. mot. at 23-27). As explained in the facts, the allowable amount of executive compensation depends on the year that a contract was issued. In addition, CACI has a fiscal year that is different from the calendar year. Thus, CACI must calculate a blended rate to determine the

correct amount of allowable executive compensation. Compensation above the applicable limit is an unallowable cost.

On May 31, 2018, CACI and the government entered into an advance agreement authorizing the use of a blended rate (R4, tab 6 at G-173-77). Prior to entering into the advance agreement, the lower statutory rates applied to CACI (FAR 31.205-6(p)). CACI submitted its FY2017 incurred cost submission on July 31, 2018 (R4, tab 6 at G-154). CACI subsequently realized that it had improperly included unallowable costs because it had omitted some executive bonuses in the calculation of unallowable (above the blended rate) compensation costs. CACI provided a revised incurred cost submission on December 31, 2018 (R4, tab 6 at G-173-77). It is unclear from the record and the parties' briefing when CACI's blended rate was established. However, at the latest, it was established in the DCAA audit report of CACI's incurred cost submission dated March 28, 2019 (*id.* at G-163). That same audit report was the basis for the assessment of penalties at issue in this appeal.

CACI contends that it cannot be penalized for submitting expressly unallowable costs when the blended rate determining the allowable costs limit did not yet exist (app. mot. at 23-27). CACI cites our decision in *Ology Bioservices, Inc.*, ASBCA No. 62663, 21-1 BCA ¶ 37,867 at 183,878. *Ology* did not involve a blended rate, but rather the government's failure to issue the statutory cap for the fiscal year 2013 until March 2016, long after contractors were required to file their incurred cost submissions. *Id.* We held that it was unfair to assess a penalty against Ology when the government had not updated the statutory compensation cap amount as required by statute. *Id.* at 183,878-79.

Conversely, the government contends that, if CACI is correct that the blended rate had not yet been established, the lower statutory rate would control, and CACI would have claimed even more unallowable costs (gov't resp. at 43). The parties agree on the calculation of the blended rate, and amount of allowable costs. The dispute is limited to the assessment of penalties. Although not cited by the parties, we hold that the language of the advance agreement controls. The advance agreement required CACI to submit a "detailed schedule . . . demonstrating the blended rates calculated using the method described above does not result in pricing total compensation to the Government in excess of that allowed by the terms of anticipated contracts" (R4, tab 6 at G-175). Thus, the advance agreement placed the burden on CACI to submit a blended rate that did not include unallowable costs. This is a different factual pattern than in *Ology* where the government failed to publish the statutory allowable cost. Thus we reject CACI's argument that it should not be subject to penalty because there was no approved rate at the time it submitted its incurred cost submission. In fact, since the contractor submits the blended rate in its cost submission, there normally will not be an approved rate at the time a contractor files its incurred cost submission.

CACI next argues that it should be not subject to penalty because the contracting officer did not make a determination that CACI's excess executive compensation costs were expressly unallowable (app. mot. at 26). As noted above, the FAR provides three justifications for waiving penalties: the contractor withdrew the cost proposals before the DCAA audit began; the amount of unallowable costs was under $10,000; or the contractor demonstrates to the satisfaction of the contracting officer that its policies are sufficient to prevent inclusion of unallowable costs, and the unallowable costs were inadvertently included in the proposal. FAR 42.709-6. CACI does not allege, and no evidence in the record supports a finding, that CACI withdrew its incurred cost submission before the initiation of the audit.[14] In addition, the amount of unallowable costs far exceeds $10,000. Thus, we need only consider the third provision for waiving penalties.

CACI asserts that the contracting officer failed to make the determination required by the FAR that "a cost submitted by the Contractor in its proposal is expressly unallowable" because CACI itself first identified the unallowable costs (app. mot. at 26 (quoting FAR 52.242-3(d))). The contracting officer stated in the final decision that she had "determined that CACI included . . . expressly unallowable executive compensation costs" and that self-disclosure is "not a basis for waiving penalties under FAR 42.709-6 (Waiver of the Penalty)" (R4, tab 11 at G-326-27). Thus, we find that the contracting officer made the necessary determination. CACI's self-disclosure would have been sufficient to require waiving of the penalties if CACI had withdrawn the incurred cost proposal *before* DCAA began its audit. FAR 42.709-6(a).

CACI additionally asserts that the contracting officer failed to consider whether the penalty should be waived (app. mot. at 26-27). According to CACI, the contracting officer failed to acknowledge CACI's explanation and failed to consider whether the penalties should be waived (app. mot. at 26-27). CACI asserts, without citation to the record, that it "has sufficient policies, training, and internal controls and reviews to generally prevent these types of costs from being included" and that DCAA had previously reviewed CACI's compliance functions in its audits (app. mot. at 26). However, the final decision explicitly references CACI's argument that it should not be subject to penalty and determines that CACI had not met the requirements of the FAR for a waiver of penalty (R4, tab 11 at G-327). The DCAA audit report notes that CACI improperly submitted excess executive compensation costs in its 2014 incurred cost proposal,[15] and thus that CACI was "prone to mistakes" (R4, tab 6 at G-164). CACI asserts that the contracting officer "imposed a penalty without either claiming

[14] The record does not appear to identify the date the DCAA audit was initiated.
[15] CACI does not challenge the assessment of penalties in the FY 2014 incurred cost submission.

that the FY 2014 error showed that CACI was prone to mistakes or referencing CACI's voluntary identification of the FY 2017 error" and thus provides a basis for rejecting the penalties (app. reply at 24). However, the contracting officer did not cite to DCAA's finding that CACI was prone to mistakes as a basis for determining not to waive penalties (R4, tab 6 at G-164).

The parties do not discuss the standard of review to be applied by the Board to the contracting officer's determination that CACI had not established to the contracting officer's satisfaction that CACI had in place the necessary controls. Board precedent holds that, once the government establishes that unallowable costs were charged, the burden is on CACI to "prove that the CO's determination not to waive the penalty was an arbitrary and capricious abuse of discretion." *Raytheon Co.*, ASBCA No. 57743 *et al.*, 17-1 BCA ¶ 36,724 at 178,846 (citing *U.S. Fidelity & Guaranty Co. v. United States*, 676 F.2d 622, 628 (Ct. Cl. 1982), *aff'd, Raytheon Co. v. Sec'y of Defense*, 940 F.3d 1310 (Fed. Cir. 2019). We find that CACI has not cited sufficient evidence to establish that the contracting officer's determination was arbitrary, capricious or an abuse of discretion. As the government has not cross-moved, we do not enter summary judgment in its favor on the penalties.

As a final matter, the parties agree that the final decision improperly included non-flexibly priced contracts in its calculation of the unallowable costs and penalty amounts. The parties agree that the correct amounts are: FY 2013, $536,955; FY 2014, $644,171 (overpayment) $56,000 (penalty and interest); FY 2015, $197,080; FY 2016, $49,549; FY 2017, $2,490,282 (overpayment) $2,492,385 (penalty and interest); for a total of $6,466,422 (amend. compl. ¶ 73; gov't resp. at 24 (¶88), app. reply at 24 n.12).

CONCLUSION

For the reasons stated above, we deny the government's motion to dismiss, treated as a motion for summary judgment. We grant summary judgment in favor of CACI that its claimed Iraqi litigation costs are not barred by the 2007 settlement agreement between CACI PT and DOI, and that the final decision improperly included non-flexibly priced contracts in the calculation of unallowable costs and penalty amounts, but deny the remainder of CACI's motion for summary judgment.

Dated: May 6, 2025

DAVID D'ALESSANDRIS
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. 63663, Appeal of CACI International, Inc., rendered in conformance with the Board's Charter.

Dated: March 11, 2026

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