UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: November 4, 2014

CBCA 3466

LYNCHVAL SYSTEMS WORLDWIDE, INC.,

Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Respondent.

Matthew R. Keller, Margaret M. Marks, and Kevin M. Carson of Odin, Feldman & Pittleman, P.C., Reston, VA, counsel for Appellant.

Kimberly A. Manganello, Mark L. Hansen, and Ryan P. Carpenter, Office of the General Counsel, Pension Benefit Guaranty Corporation, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **SULLIVAN**.

**SULLIVAN**, Board Judge.

This appeal arises from a contract between Lynchval Systems Worldwide, Inc. (Lynchval), the appellant, and the Pension Benefit Guarantee Corporation (PBGC), the respondent. Lynchval seeks to recover amounts it claims that it is owed but was not paid as the result of a modification to the contract, asserting that PBGC obtained the modification through economic duress. PBGC has filed a motion for summary relief, pursuant to Rule 8(g) of the Rules of the Civilian Board of Contract Appeals (48 CFR 6101.8(g) (2013)), arguing that Lynchval cannot establish the necessary elements of economic duress. Because there are material issues of disputed fact, the Board denies PBGC's motion.

## Background

### Contract Terms

The parties executed a labor hour contract that required Lynchval to provide personnel for actuarial services and computer support for a division of PBGC. Exhibit 2 at 28.[1] The contract was awarded on September 2, 2009, with the base year to be October 1, 2009 through September 31, 2010, and four option years. *Id*. at 21, 24-25. The contract ended on September 31, 2012, at the end of the second option year. *Id*. at 126.

Pursuant to the terms of the contract, Lynchval was to provide personnel in five labor categories at specific hourly rates. Exhibit 2 at 24; Complaint ¶ 9.[2] The contract described key personnel "as those personnel held responsible by the Contractor for making substantive, measurable contributions to the accomplishment of contracted work. They are those personnel essential to the ongoing conduct of the project and who will assure consistent control and direction." Exhibit 2 at 42 (Clause H.6 PBGC-37-001, Key Personnel (Jan. 2006)). One of the key personnel for the contract was the project manager. *Id*. The Board is not able to determine from the record whether the names of the individuals identified as key personnel initially were submitted with Lynchval's proposal. The contract also required that Lynchval give PBGC notice and the opportunity to approve the replacement of any key personnel:

> These key personnel shall NOT be reassigned or diverted without the written consent of the Contracting Officer. Prior to removing any of the individuals identified in the Contractor's proposal as key personnel, the Contractor shall provide 30 calendar days advance notice to the Contracting Officer and shall submit justification (including resumes for proposed substitutions) in sufficient detail to permit evaluation of the impact on the project.

*Id.*

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[1] All exhibits are found in the appeal file, unless otherwise noted.

[2] The contract was one of two labor hour contracts that Lynchval held with PBGC to supply actuarial services and computer support. The work on the contract at issue supported the Integrated Present Value of Future Benefits (IPVFB) system. The other contract was to support the PIMS program.

The contract incorporated by reference the contract terms and conditions for commercial items, 48 CFR 52.212-4, Contract Terms and Conditions–Commercial Items, Alternate I (2007) (FAR 52.212-4). Exhibit 2 at 47. This clause provided that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties." FAR 52.212-4(c).[3]

Events Leading to the Disputed Modification

The parties entered into the disputed modification following and as a result of the termination of the individual Lynchval originally employed as project manager for the PBGC contract. By email message dated November 26, 2010, Lynchval's project partner, who was Lynchval's representative for all contract related matters, notified several individuals at PBGC that the project manager and another gentleman had been terminated. Exhibit 5 at 134 ("[T]he management team made the difficult decision to re-align our resources which resulted in the eliminate [sic] two of our Lynchval team members, [project manager and other gentleman]."). The project partner also set forth a "proposed resource mix" for the contracts Lynchval had with PBGC. *Id*.

The parties do not dispute that Lynchval did not give PBGC thirty days notice or the opportunity to consent to the termination of the project manager, as required by clause H.6. Lynchval does dispute that notice was required because, Lynchval contends, PBGC suggested that Lynchval terminate the project manager. Appellant's Statement of Genuine Issues at 1. PBGC denies any involvement in Lynchval's decision to terminate the project manager. Answer ¶ 11; Respondent's Reply to Appellant's Opposition to Respondent's Motion for Summary Relief at 10-11.

After the termination of the project manager and the other gentleman, the parties engaged in extensive communications by email regarding the terms of a transition plan to address the replacement of these personnel and the additional cost that would be incurred as the new individuals learned the PBGC systems they would be supporting. These communications began on December 10, 2010, when a program official at PBGC advised

[3] The contract does not appear to contain a disputes clause, although FAR 12.302(b) provides that FAR 52.212-4 may not be tailored to remove the Disputes clause. The Board reads into the contract the standard Disputes clause found at FAR 52.233-1. *Rockies Express Pipeline LLC v. Salazar*, 730 F.3d 1330, 1338 (Fed. Cir. 2013) (citing *G. L. Christian & Associates v. United States*, 312 F.2d 418, 426-27 (Ct. Cl. 1963)) ("if the parties to a government contract neglect to include a clause in the contract *that is otherwise required by regulation* . . . , courts will read the clause into the contract as a matter of law.").

the Lynchval project partner by email that PBGC had decided to "proceed with the staff changes as you submitted in your email of November 26." Exhibit 13 at 152. The program official further advised that "[w]hile we remain committed to ensuring the success of this contract for all parties involved, we are also concerned about the direct impact of this staffing change on these contracts." *Id*. The program official then asked Lynchval's project partner how Lynchval proposed to address the financial effect of the staffing changes.

> [W]e would like to know what sort of financial concessions you propose as a result of these changes. Specifically, these changes significantly impact the PBGC's costs as we transition to the new team with significantly less experience to support these contracts. As such, the labor hour costs of the learning curve for the new staff are significant.

*Id*.

According to PBGC's proposed findings, Lynchval submitted a proposal in response to this request on January 18, 2011.[4] Respondent's Statement of Uncontested Facts, ¶ 14.[5] Lynchval agrees that it offered a three-percent discount in response to PBGC's request for a discount. Appellant's Statement of Genuine Issues, ¶ 14 at 1. According to Lynchval's chief financial officer (CFO), Lynchval offered this discount "as an accommodation to keep good relations with PBGC." Declaration of Lynchval Chief Financial Officer (July 11, 2014) ¶ 4.

Following PBGC's review of the proposal, on January 24, 2010, the contracting officer replied to Lynchval's project partner with questions, including one concerning the proposed discount:

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[4] It appears that Lynchval's January 18, 2011, proposal may have been provided in response to a meeting between the parties held on January 5, 2011. *See* Exhibit 22 at 181. Neither party has offered findings or provided an explanation as to what transpired at that meeting.

[5] As support for this proposed finding, PBGC cites to a page from the appeal file. Exhibit 25 at 188. However, this page contains only an email message from Lynchval's project partner which purports to be forwarding "Lynchval's proposal as discussed on January 5, 2011." The Board is unable to locate in the appeal file or Lynchval's submissions any document that appears to be Lynchval's actual initial proposal. However, as noted above, Lynchval does not dispute that it submitted a proposal on January 18, 2011, or that it offered a three-percent discount. Appellant's Statement of Genuine Issues ¶ 14, at 1. Lynchval does dispute PBGC's characterization of this offer as a "concession." *Id*.

> The proposed discount of 3% is too low. The intent of the discount was to be an incentive for accelerating the learning curve thus reducing the time PBGC was supported by a less than fully productive team. 3% doesn't do this. I believe a more realistic figure is 30%.

Exhibit 28 at 193.

On January 28, 2011, Lynchval's project partner requested another extension of the deadline to provide a proposal to PBGC. Exhibit 32 at 236. In this request, the project partner stated that the proposal would include a thirty-percent discount.

> I want to clearly state that we are incorporating into our plan a discounted rate of 30%, as we do agree with the assessment that all new personnel assigned to the IPVFB contract should be discounted during their transition period on the job. Our study of the overall requirements are indicating this will take approximately the first six months on the job, as new personnel must learn and fully assimilate the IPVFB processes during their first six months before they can become fully efficient on the contract.

*Id*. Lynchval disputes PBGC's contention that this communication represents Lynchval's acceptance of the thirty-percent discount. Appellant's Statement of Genuine Issues ¶ 15, at 2. As support, Lynchval cites the project partner's declaration in which she attests that she "reluctantly, involuntarily accepted [the contracting officer's] demand on behalf of the company." Declaration of Lynchval Project Partner (Dec. 8, 2013) ¶ 15. Lynchval also alleges that this agreement did not occur until March 8, 2011, as the project partner attests. Respondent's Statement of Genuine Issues ¶ 15, at 2; Project Partner Declaration ¶ 15.

By email message dated February 1, 2010, the project partner forwarded Lynchval's resource transition plan, dated February 1, 2010. Exhibit 39. In the cover letter to the contracting officer, the project partner described further the thirty-percent discount.

> We are incorporating into our plan a discount of 30% on our billing rates to any Lynchval staff learning the IPVFB work, taking into account the experience some of the staff already have working on the contract. This discount will apply from February 1, 2011 through August 31, 2011, recognizing that new and existing Lynchval personnel must familiarize themselves with PBGC processes in order to become efficient.

*Id*. at 284.

By email message dated February 15, 2011, the contracting officer forwarded to the project partner the "results of the technical evaluation" of Lynchval's February 1, 2011, proposal. Exhibit 48 at 337. In its review, PBGC identified the fact that the rates proposed in the February 1, 2011, plan were "not consistent with the cover letter" in which "Lynchval agrees that a 30% reduction rate is appropriate as the staff becomes familiar with the system and their responsibilities." *Id*. at 346. PBGC set forth a chart of rates to be applied during the transition. *Id*.

By email message dated March 1, 2011, Lynchval's project partner submitted a revised version of the resource transition plan. Exhibit 55. In the cover letter to this plan, the project partner again addressed the thirty-percent discount.

> We are incorporating into our plan a discount on our billing rates of 30% for Lynchval staff working on the IPVFB contract in the positions of Actuary, Senior Analyst, Actuarial Programmer and Associate Analyst learning the IPVFB system, recognizing that new and existing Lynchval personnel must familiarize themselves with PBGC processes in order to become efficient.
>
> We believe this plan will bring the Lynchval team up to peak performance and addresses ASD's concerns regarding the staffing of the IPVFB contract.

*Id*. at 387.

By email message dated March 4, 2011, the contracting officer provided to the project partner the "technical comments from the IPVFB program office" on the March 1, 2011, proposal. Regarding the thirty-percent discount, the contracting officer stated that "PBGC has been applying the 30% discount rates effective 2/1/2011. These rates will continue to apply whether PBGC approves this proposal or not. PBGC is expecting Lynchval to share the training cost of new staff members." Exhibit 62 at 436. Lynchval contends that this direction from PBGC regarding the thirty-percent discount to be applied ended the discussions about the discount and Lynchval believed that it had no choice but to accept the discount at this amount at this time. Appellant's Statement of Genuine Issues ¶ 22, at 3; Appellant's Opposition at 13-14.

By email message dated March 8, 2011, the project partner provided Lynchval's response to the technical comments. Exhibit 64. Regarding the comment about the thirty-percent discount, Lynchval stated:

Agreed.

February 1, 2011 Invoice Submittal

$84,402.83
- 21,237.47 (30%) [6]
$63,165.36

We will apply a credit of $21,237.47 to the March 2011 invoice.

*Id*. at 470. On April 6, 2011, the contracting officer notified the Lynchval project partner by email that the transition plan as amended by the March 8, 2011, email message was "reasonable." Exhibit 70 at 498.

The thirty-percent discount was applied for a period of six months. By email message dated August 5, 2011, the contracting officer notified Lynchval's vice president of operations that Lynchval "has met the criteria of performance in the transition plan. Therefore, the reduced rates set forth on page 10 of the proposal will cease to be in effect after August 31, 2011." Exhibit 80 at 566.

On September 4, 2011, the contracting officer issued modification 009. Exhibit 84. The purpose of the modification was to incorporate Lynchval's transition plan into the contract and revise section H.7 to add the position description for "project coordinator." The contracting officer entered the modification pursuant to the clause, Changes – Time and Materials or Labor-hours, FAR 52.243-3. *Id*. at 587.

With its appeal, Lynchval seeks to recover $187,460.71, which is said to be the difference in the amount that Lynchval could have invoiced at the non-discounted labor rates and the amounts that it did invoice between February 1 and August 31, 2011. Respondent's Statement of Uncontested Facts ¶ 28.

## Discussion

PBGC moves for summary relief on two grounds: 1) Lynchval has waived its claims of duress by not timely objecting to the amendment to the contract and 2) Lynchval cannot

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[6] $21,237.47 is actually 25.16% of $84,402.83. Thirty percent of $84,402.83 is $25,320.85.

make a showing of economic duress as a matter of law. In the course of briefing, the parties have filed two other motions to strike aspects of the pleadings and supporting materials. The Board addresses these motions first before turning to the motion for summary relief filed by PBGC.

I. Motion to Exclude the Declaration of the Chief Financial Officer

To support its opposition to PBGC's motion, Lynchval submitted the declaration of its CFO. PBGC moves to strike this declaration because Lynchval did not identify the CFO as a person with relevant knowledge in response to PBGC's interrogatories before discovery closed in the case. Respondent's Motion to Exclude CFO Declaration from the Record at 3. PBGC argues that Lynchval's failure to identify the CFO in response to interrogatories during the discovery period constitutes a violation of Board Rule 13(d), which requires parties before the Board to conduct discovery as permitted by orders issued by the Board. Because of this failure, PBGC asks the Board to strike the CFO's declaration pursuant to Federal Rule of Civil Procedure 37(c).

In response, Lynchval has filed excerpts of its supplemental response to PBGC's interrogatories, served on May 2, 2014, in which Lynchval identified the CFO as a person with relevant knowledge. Despite the CFO's position within the company and his knowledge regarding the matters in dispute, Lynchval only states that it identified the CFO in response to PBGC's interrogatories "as quickly as practicable" but does not explain why Lynchval could not or did not identify the CFO before the close of discovery. Appellant's Opposition to Respondent's Motion to Exclude CFO Declaration from the Record at 1, 3. Lynchval argues that its disclosure of the CFO as a knowledgeable individual was permitted by Board Rule 14(f), which requires parties before the Board to supplement discovery responses "as quickly as practicable" upon learning that previous responses are incomplete, incorrect, or inadequate.

PBGC's motion, invoking Federal Rule of Civil Procedure 37(a), rests upon the premise that Lynchval failed to disclose the CFO as a person with knowledge. But, in fact, Lynchval did disclose the CFO when it supplemented its interrogatories after the close of discovery. Therefore, the issue presented by PBGC's motion is whether the disclosure of the CFO is timely pursuant to the Board's rules requiring supplementation or whether there should be a sanction for the untimely disclosure.

Rule 14(f) provides that a party that has responded to written discovery, "upon becoming aware of deficiencies or inaccuracies in its original responses, . . . shall, as quickly as practicable, and as often as necessary, supplement its responses to the requesting party with correct and sufficient additional information." Rule 14(f). PBGC suggests in its

motion that this duty to supplement is curtailed by the discovery cut-off date ordered by the Board, pursuant to Rule 13(d), which provides that discovery may be had only as permitted by Board order:

> Conduct of discovery. Parties may engage in discovery only to the extent the Board enters an order which either incorporates an agreed plan and schedule acceptable to the Board or otherwise permits such discovery as the moving party can demonstrate is required for the expeditious, fair, and reasonable resolution of the case.

Rule 13(d).

The discovery scheduling order in this case only provided that discovery would conclude by December 31, 2013 (later enlarged to April 18, 2014). There is no suggestion in either the discovery scheduling order or Rule 13(d) that the deadline for discovery activities is the time limit on supplementation pursuant to Rule 14(f). Courts have construed the federal rule regarding supplementation, Federal Rule of Civil Procedure 26(e), to be a continuing obligation with regard to the disclosure of knowledgeable persons and relevant documents. Fed. R. Civ. P. 26(e) advisory committee's notes (1970 Amendment). Moreover, given the importance of ensuring that knowledgeable individuals are identified for opposing parties, it would be unwise to constrain or limit the obligation to supplement to the period allowed for discovery.

The Board denies PBGC's motion to exclude the CFO's declaration. Although Lynchval waited until after the close of discovery, it did supplement its interrogatory response to put PBGC on notice that the CFO was a person with knowledge before PBGC filed its motion for summary relief. Because the Board has considered the CFO's declaration in denying the motion for summary relief and Lynchval may ask the CFO to testify at further proceedings in this matter, the Board grants PBGC's alternative request to be allowed to depose the CFO.

## II. Motion to Strike Contested Facts from Brief

In addition to its opposition to the motion for summary relief, Lynchval filed a motion that it styled "motion to strike contested facts from brief." Lynchval cites to Board Rule 8(g)(3) as the authority for its motion, but that rule requires a non-moving party to prepare a statement of genuine issues in response to a statement of uncontested facts, which Lynchval has also submitted. With its motion, Lynchval seeks to strike from PBGC's brief facts that purportedly were not in PBGC's statement of uncontested facts. Although Lynchval provides what it terms as "examples" of facts recited in the brief, this motion

simply appears to be another version of Lynchval's opposition to PBGC's motion. The Board does not discern any real issue created by the purported additional facts that Lynchval has identified. Accordingly, the Board has considered the motion as part of Lynchval's argument, but denies the motion to strike as formulated.

## III. Motion for Summary Relief

### A. Standard of Review

Summary relief is appropriate where there is no genuine issue of material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. The moving party has the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Celotex Corp*., 477 U.S. at 324. Although the onus is on the moving party to persuade the tribunal that it is entitled to summary relief, the movant may obtain summary relief, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party's case. *Id*. at 325.

In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. All reasonable inferences and presumptions are resolved in favor of the non-moving party. *Id.* at 255. The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc*., 200 F.3d 795, 806 (Fed. Cir. 1999).

### B. Waiver

PBGC contends that Lynchval waived its right to challenge the contract modification based upon economic duress because Lynchval waited "a full two years after unambiguously accepting the 30 percent figure" to bring its claim. Respondent's Memorandum in Support of its Motion for Summary Relief at 4. PBGC bears the burden to prove its affirmative defense of waiver. *Westfed Holdings, Inc. v. United States*, 407 F.3d 1352, 1360 (Fed. Cir. 2005). "Waiver is 'an intentional relinquishment or abandonment of a known right or privilege.'" *General Dynamics C4 Systems, Inc*., ASBCA 54988, 09-2 BCA

¶ 34,150, at 168,818 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). However, an agreement obtained by duress is void and cannot constitute a knowing waiver of a right. *Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 652 (Ct. Cl. 1981); *Pearson Machine Controls, Inc.*, IBCA 1959, 85-3 BCA ¶ 18,275, at 91,731-32.

At this stage of the proceedings on a motion for summary relief, Lynchval's claim of economic duress necessarily defeats PBGC's assertion of a waiver.[7] If Lynchval did not voluntarily agree to the discount, it cannot be found to have waived its right to challenge that agreement on the basis of economic duress. The Board is unable to grant summary relief based upon waiver at this time because it does not have sufficient facts concerning the agreement between the parties and whether it was voluntary on Lynchval's part. *Pearson Machine Controls*. Without a knowing, voluntary agreement, the Board cannot find waiver.

C. Economic Duress

1. Elements Required To Prove Economic Duress

To establish that it agreed to the proposed modification of the labor rates for the six-month period only because of economic duress, Lynchval must establish three elements: (1) that it involuntarily accepted PBGC's terms regarding the discount, (2) that circumstances permitted no alternative, and (3) that such circumstances were the result of PBGC's coercive acts. *Rumsfeld v. Freedom NY, Inc*., 329 F.3d 1320, 1329 (Fed. Cir. 2003). To show coercive acts by PBGC, Lynchval must establish that PBGC's actions were (1) illegal, (2) a breach of an express provision of the contract without a good faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing. *Id*. at 1330 (citing *Systems Technology Associates,*

[7] PBGC did not assert waiver as an affirmative defense in its answer, although Board Rule 6(c) requires the respondent to affirmatively state any defenses in its answer to the complaint. The purpose of this rule is to put the other party on notice regarding a party's possible defenses. *Santiago v. United States*, 107 Fed. Cl. 154, 159 (2012) (citations omitted). Failure to comply with this rule is not an automatic bar to the presentation of the defense. Instead, the Board must inquire as to the possible prejudice to the opposing party, including opportunity to respond to the defense. *N&P Construction Co.*, VABCA 2578, et al., 92-1 BCA ¶ 24,447, at 121,980 (1991). If there is no prejudice to the other party, the Board may permit the presentation of the defense. *Cities Service Helex, Inc. v. United States*, 543 F.2d 1306, 1313 n.14 (Ct. Cl. 1976). Although Lynchval asserts that PBGC has waived the affirmative defense of waiver, it identifies no prejudice flowing from the assertion of the defense now.

*Inc. v. United States*, 699 F.2d 1383, 1387-88 (Fed. Cir. 1983); *David Nassif Associates v. United States*, 644 F.2d 4, 12 (Ct. Cl. 1981); *Johnson, Drake & Piper, Inc. v. United States*, 531 F.2d 1037, 1042-43 (Ct. Cl. 1976)). "'Economic duress may not be implied merely from the making of a hard bargain.'" *Johnson, Drake & Piper*, 531 F.2d at 1042 (quoting *Aircraft Associates & Manufacturing Co. v. United States*, 357 F.2d 373, 378 (Ct. Cl. 1966)). "In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. . . . The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities." *Fruhauf Southwest Garment Co. v. United States*, 111 F.Supp. 945, 951 (Ct. Cl. 1953).

To defeat a motion for summary relief, the appellant must demonstrate the existence of a factual dispute on one or more of the elements necessary to prove duress. *See Range Technology Corp*., ASBCA 51943, *et al.*, 04-1 BCA ¶ 32,456, at 160,548 (2003); *see also Dureiko v. United States*, 209 F.3d 1345, 1358 (Fed. Cir. 2000) (case properly dismissed when hurricane, rather than the Government, left contractor with no alternative than to accept Government's terms).

2. Disputes Over Material Facts Preclude Summary Relief

Lynchval agreed to provide actuarial support services to PBGC on a labor hour basis. Lynchval further agreed that certain individuals, including the project manager, would be key personnel responsible for the "ongoing conduct of the project" who would "ensure consistent control and direction." Exhibit 2 at 42. Lynchval terminated the project manager without notifying PBGC as required by clause H.6 of the contract and proposed to replace him with individuals who were not knowledgeable about the PBGC systems to be supported on the contract.

Rather than insist upon its rights to thirty days notice and the opportunity for advance written consent of proposed replacement of personnel, PBGC sought a reduction in the hourly rates for all the personnel on the contract to be applied as a discount on the billed invoices for a six-month period. This reduction in rates was a change to the contract and could only be obtained through written agreement of the parties. FAR 52.212-4(c) ("Changes in the terms and conditions of this contract may be made only by written agreement of the parties."). The parties' agreement took the form of a transition plan that was proposed by Lynchval, modified through negotiation between the parties, and ultimately approved by PBGC.

Lynchval challenges the modification of the contract that provided for this discount by arguing that it agreed to the modification as the result of economic duress. As evidence

of duress, Lynchval asserts that it would not have fired the project manager if not directed by PBGC to do so and that PBGC mandated the discount at thirty percent.

The Board has identified two material facts in dispute that preclude the Board from finding that there was mutual agreement and granting PBGC's motion for summary relief: 1) the reasons for the project manager's termination and PBGC's role, if any, in that termination; and 2) the context in which the contracting officer issued the March 4, 2011, email message and whether that message is to be construed as a directive or simply another communication in the parties' negotiations concerning how to address the costs of replacing key personnel on the contract.

The parties dispute whether PBGC had a role in the termination of the project manager, which was the precipitating event for the disputed modification. Lynchval asserts that PBGC suggested that Lynchval terminate the project manager and then "punished" Lynchval for the termination by seeking a discount for the new personnel. Appellant's Opposition at 17. As support for this allegation, the CFO declares that "the Company would never have terminated [the project manager] had the PBGC not request[ed] the company to do so." CFO Declaration ¶ 8. The CFO further declares,

> PBGC indicated that [the project manager] was unruly and out of control and it was our "HR" issue to resolve. After a number of attempts by our on site manager and President it was apparent that the only recourse was to terminate [the project manager]. Which we did after completion of a critical report for PBGC.

*Id*. Lynchval also relies upon two contractor performance assessment reports (CPARs) that describe performance problems on the contract at issue and the other contract held by Lynchval. Appellant's Opposition at 16-17 (citing Appellant's Supplemental Appeal File at 57 and 218).

In response, PBGC asserts that there is no evidence to support the claim that PBGC suggested or had any involvement in Lynchval's decision to terminate the project manager. PBGC does not address the CFO's statements in his declaration. With regard to the CPARs, PBGC asserts that the reference to management difficulties does not implicate the project manager. Instead, PBGC cites to the deposition testimony of the contracting officer's technical representative, who testified that it was her "best guess" that the reference to "key personnel" was a reference to Lynchval's project partner. Respondent's Reply at 10. With regard to the CPAR that did describe difficulties with the project manager's performance, PBGC explains that this comment is not relevant because it addresses performance on the other contract held by Lynchval. *Id*.

The dispute over what prompted the termination of the project manager is material because the project manager's termination led to PBGC's insistence that Lynchval provide a discount for the labor hours while the personnel replacing the project manager became familiar with the PBGC systems and programs that they would be supporting. Lynchval's termination of the project manager without following the requirements to give PBGC notice would be a breach of a contract obligation and the basis for expecting some kind of concession from Lynchval to permit continued performance of the contract. If PBGC had no role in the project manager's termination or had a valid basis for suggesting his termination, then PBGC had a proper basis to insist that Lynchval address the performance problems and the costs attendant to having new personnel on the program. If, however, PBGC directed that the project manager be terminated without a valid basis, it could be viewed as overreaching by PBGC to also insist upon a discount when new personnel had to be brought on board to provide the contract support. The Board is unable to determine which scenario applies because the parties dispute whether PBGC was even involved in the decision to terminate the project manager. This dispute cannot be resolved on a motion for summary relief; therefore, the Board will conduct further proceedings to understand what led to the project manager's termination and whether his termination led to the application of the discount.

Lynchval must also establish that its offer of the transition plan, including the thirty-percent discount, was involuntary and that it had no alternatives to offering a discount. As evidence of the involuntary nature of the plan and the discount, Lynchval cites the March 4, 2011, email message sent by the contracting officer in which the contracting officer states that the thirty-percent discount would be applied by PBGC regardless of whether PBGC approved the transition plan. Appellant's Opposition at 10 (citing Exhibit 62 at 436). Based upon this email message, Lynchval asserts that PBGC simply took the discount and Lynchval had no choice in the matter. Appellant's Opposition at 11. PBGC argues that the contracting officer's March 4, 2011, email message should be viewed in the context of the ongoing communications between the parties concerning the "finer points" of the transition plan and that the parties had already agreed that the discount would be thirty percent. Respondent's Reply at 8.

The dispute regarding PBGC's direction at this point in the negotiations is material because to make the change to the contract there had to be mutual, written agreement between the parties. FAR 52.212-4(c). If there was no agreement, PBGC's modification of the contract was without a legal basis. Despite the parties' focus upon the amount of the discount, the written agreement is the transition plan and, based upon a review of the exchange of email messages in the appeal file, the parties did not agree to that plan until April 6, 2011, when PBGC approved the final version of the plan submitted by Lynchval with modifications. Although there are numerous email messages from Lynchval's project

partner stating the intent to offer a thirty-percent discount, the March 4, email message on its face indicates that the thirty-percent discount would be applied regardless of whether PBGC approved the larger personnel transition plan. The Board likely will have to weigh the evidence to resolve this dispute, which it may not do to resolve a motion for summary relief. Because the parties dispute the role that the March 4, 2011, email message played in the negotiations leading to the approval of the transition plan, the Board must conduct additional proceedings to understand those negotiations.

In its briefing, Lynchval identified several other arguments regarding the parties' negotiations that it asserts support its claims of economic coercion. For example, Lynchval argues that the idea of a discount did not begin with Lynchval and that the contracting officer never provided the basis for the demand for a thirty-percent discount rather than a lesser amount. Appellant's Opposition at 9, 11-12. "Economic duress may not be implied merely from the making of a hard bargain." *Aircraft Associates*, 357 F.2d at 378 (citing *Fruhauf*). The Board finds that these arguments and others raised by Lynchval in response to PBGC's motion go to the nature of the bargaining between the parties and will not be sufficient to carry Lynchval's burden to establish that the modification resulted from economic coercion. The Board offers this guidance to allow the parties to focus on the issues in further proceedings before the Board.

## Decision

For the reasons stated, the Board **DENIES** PBGC's motion for summary relief and motion to strike the CFO's declaration. Under separate order, the Board will issue a schedule for further proceedings in this matter.

MARIAN E. SULLIVAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge