UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART;
RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART:
September 3, 2015

CBCA 3491, 3636

A-SON'S CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

John G. Bravacos, Paoli, PA, counsel for Appellant.

Blythe I. Rodgers, Jonathan E. English, and Todd P. Maiberger, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **POLLACK**, and **LESTER**.

LESTER, Board Judge.

These consolidated appeals involve two separate contracts, with virtually identical terms, between appellant, A-Son's Construction, Inc. (Asons), and respondent, the Department of Housing and Urban Development (HUD). Through delivery orders under these contracts, Asons was to provide property management services for a continuously changing portfolio of HUD-owned real estate properties. Both Asons and HUD have filed motions for summary relief, each arguing that, under the proper interpretation of the terms of the two contracts, it should prevail in the parties' dispute over HUD's ability to prorate

monthly fee payments when HUD did not require services for a particular property for a full calendar month. To resolve the dispute, we have to decide two related issues: (1) whether the term "monthly" in a portion of the contracts necessarily means a "calendar month" that commences on the first day of one of the twelve calendar months, and (2) whether HUD is otherwise entitled to prorate Asons' "monthly" fees under the terms of the contracts for less than a period of one month (or a period of twenty-eight to thirty-one days, depending on the month). For the reasons explained below, we grant a portion of each party's motion for summary relief on the second issue, but deny both parties' summary relief motions on the first issue.

Background

I. The Single-Family Mortgage Insurance Program

HUD, through one of its organizational units, the Federal Housing Administration (FHA), administers the single-family mortgage insurance program. *See* Appeal File, Exhibit 64 at R-001750.[1] It insures approved lenders against the risk of loss on mortgages obtained with FHA financing. *Id.* In the event of a default on an FHA-insured loan, the lender (1) acquires title to the property by foreclosure, a deed in lieu of foreclosure, or another acquisition method; (2) files a claim for insurance benefits; and (3) conveys the property to HUD. *Id.* HUD becomes the property owner through the foreclosures – creating what are termed HUD "Real Estate Owned" (REO) properties – and then offers the REO properties for sale to recover the loss on the foreclosure claim. Because of the large number of property acquisitions through the mortgage insurance program and through other programs, HUD has a need to manage and sell a sizable inventory of single-family REO homes in a manner that promotes home ownership and, at the same time, maximizes return to the FHA insurance fund. *Id.*

Since 1999, HUD has outsourced the disposition of its REO properties through competitively bid contracts to Marketing and Management (M&M) vendors. *See* Exhibit 64 at R-001750. As the second generation of these M&M contracts – known as the "M&M II" contracts – was due to expire in 2009, HUD prepared to compete the third generation of its REO marketing and management needs, a procurement to which both HUD and the appellant refer as "M&M III." Although the M&M II contracts had encompassed three different activities – property management, asset management, and mortgagee compliance services – under a single contract, *see* Exhibit 24 at R-000549 to -000550, HUD separated these three

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

functions in its M&M III contracts, awarding separate regional contracts for property management (or "Field Service Management" (FSM)), separate regional contracts for asset management, and a single nationwide contract for mortgagee compliance services.

II. The Terms Of Asons' FSM Contracts

The issues in these consolidated cases relate to the M&M III contracts concerning FSM services. On September 16, 2009, HUD issued solicitation no. R-OPC-23447, through which it expected to award approximately thirty-five separate Indefinite Quantity/Fixed Unit Rate contracts throughout the country for the property management services that it required. Exhibit 32 at R-000840. The solicitation described the property maintenance and preservation services that the contract awardees would have to provide as including "inspecting the property, securing the property, performing cosmetic enhancements/repairs, and providing on-going maintenance." *Id.* at R-000841 (§ B.1); *see id.* at R-000960 to -000983 (Performance Work Statement (PWS) requirements).

On June 1, 2010, HUD awarded numerous regional FSM services contracts to various vendors, two of which went to Asons: contract no. C-OPC-23653 for Geographic Region 1P (encompassing Michigan) and contract no. C-OPC-23682 for Geographic Region 3P (including states in the New England area). Exhibit 1 at R-000001, -000066; Exhibit 47 at R-001362, -001426. Both of the Indefinite Quantity/Fixed Unit Rate contracts were for a base period of one year, with four one-year options. Exhibit 1 at R-000021 (§ F.2); Exhibit 47 at R-001381 (same).

Under the terms of Asons' contracts, the number of REO properties that Asons would manage at any given time was not stagnant. Because of the nature of real estate foreclosures, properties would regularly come into HUD's possession at varying times, and disposition of those properties would occur at varying times as they were sold or transferred. Accordingly, Asons could be assigned a property to add to its management portfolio at any time during a calendar month, and that property could leave Asons' oversight portfolio at any time, depending on when HUD acquired and disposed of the property. The number of properties under Asons' property management responsibility would vary over the life of the contract, depending upon the number of REO properties that HUD was holding.

HUD would order supplies and services from Asons – that is, it would add a property to Asons' management responsibilities – "by issuance of delivery orders or task orders [against each of the Contract Line Item Numbers (CLINs) in the contract] by the individuals or activities designated in the Schedule," and delivery and task orders could be issued at any time from "date of award through 12 months" (the conclusion of the one-year contract period). Exhibit 1 at R-000021 (Contract § F.3(a)/FAR 52-216.8(a), Ordering (Oct 1995));

see Exhibit 47 at R-001381 (same). From a logistical standpoint, Asons was to receive notice of assignments or orders through a web-based Internet portal, P260, "or as directed by the GTR [Government Technical Representative]." *Id.* at R-001408 (§ I.3(a), Ordering Process). All delivery/task orders would be "subject to the terms and conditions of this contract." *Id.* at R-001381 (§ F.3(b)/FAR 52-216.8(b)); *see id.* at R-001408 (§ I.3(b), Ordering Process: "[a]ll assignments/orders are subject to the terms and conditions of this contract"). As the contracts indicated, "[d]elivery or performance [would] be made *only* as authorized by orders issued in accordance with the Ordering clause." Exhibit 1 at R-000048 (§ I.4/FAR 52.216-22, Indefinite Quantities (Oct 1995)) (emphasis added); *see* Exhibit 47 at R-001408 (same).

Asons was to receive specific fees for each REO property that it was assigned to manage during the time period that HUD held that property. The contracts provided that HUD would pay Asons "as full compensation for all work required, performed and accepted under this contract . . . the fixed-unit-rate for the applicable CLINs and applicable periods" identified in section B of the contracts. Exhibit 1 at R-000023 (§ G.2); Exhibit 47 at R-001383 (same). The contractor was to submit "monthly invoices for payment of fixed-price services," Exhibit 1 at R-000024 & Exhibit 47 at R-001384 (§ G.4, Invoicing Procedures), billing for the fee as follows:

> **Fixed-Unit Rate Services** – The following types of items, if applicable, may be included on a single invoice:
>
> 1. PROPERTY MANAGEMENT FEE – a fixed fee per property for all requirements as stated in Section B.4, "PRICING STRUCTURE".
>
> 2. VACANT LOT MANAGEMENT FEE – a fixed fee per property for all requirements as stated in Section B.4, "PRICING STRUCTURE".
>
> 3. CUSTODIAL FEE – a fixed fee per property for all requirements as stated in B.4, "PRICING STRUCTURE". The Contractor shall invoice monthly beginning with the month the property is assigned.

Exhibit 1 at R-000025; Exhibit 47 at R-001385.

In turn, section B.4 of the contract, titled "Revised Pricing Structure," listed, in a basic chart form, the specific categories of property management services that HUD would require and the applicable fee for each service, assigning each category a different CLIN and identifying (1) the estimated quantity of services under each CLIN, (2) the estimated units of each service that the agency would order, and (3) the total price for each unit. *See* Exhibit

1 at R-000007; Exhibit 47 at R-001367. The chart in section B.4 set forth this information for the "Base Year Period," as well as for each of the four one-year option periods. Exhibit 1 at R-000007 to -000014; Exhibit 47 at R-001367 to -001374.

Five of the CLINs in section B.4 – CLINs 0001, 0002, 0003, 0004, and 0008 – covered pre-conveyance and initial inspections for each property that the contractor was required to manage.[2] *See* Exhibit 1 at R-000007; Exhibit 47 at R-001367. Through these "initial services," the contractor had to "complete a comprehensive (thorough and complete) property inspection" for each property, "to include conveyance condition items, initial inspection items, systems check, Lead Based Paint (LBP) considerations and any other items HUD requires." Exhibit 47 at R-001503. Pursuant to section B.4, HUD would order these initial services only one time for each assigned property. *See, e.g.*, *id.* at R-001367.

After the contractor completed these initial services for any given assigned property, the property would move to CLINs 0005, 0006, or 0007 – the CLINs associated with continuing property management and maintenance:

- CLIN 0005 provided the contractor with a "fee" to cover continuing property management services for "HUD-owned vacant" properties acquired by HUD by reason of payment of an insurance claim or another acquisition method. Exhibit 47 at R-001367, -001485; *see* Exhibit 1 at R-000125. Under CLIN 0005, the contractor had to "maintain properties in a manner that is clean, safe, sanitary and secure," including keeping properties in "ready to show condition," routinely inspecting the properties and taking all actions necessary to ensure that they were free from safety and health hazards and debris, and fixing broken windows, broken doors, and leaks. Exhibit 47 at R-001505, -001506; *see id.* at R-001493 (PWS § C-5) ("maintain all properties in a manner that results in properties that are clean, safe and sanitary and perserves property value"). "At a minimum," Asons had to "inspect the property once every two weeks and report data on FSM Property Inspection Form (Attachment 8)." *Id.* at R-001505.

[2] Another CLIN, CLIN 0006, includes "initial services" (including "inspection") associated specifically with custodial services. Exhibit 47 at R-001367. Because that CLIN also includes on-going management services after the initial services are complete, and because the language contained in CLIN 0006 affects the interpretation of the two on-going management services CLINs at issue in these appeals, we will discuss CLIN 0006 in conjunction with the other on-going management services CLINs.

- CLIN 0006 covered on-going project management "for custodial properties." Exhibit 47 at R-001367. Custodial properties were "vacant properties" that were "secured by a secretary-held mortgage" and over which, by virtue of its security interest, HUD had "certain rights and responsibilities." *Id.* at R-001512 (PWS § C-5.2.10).

- CLIN 0007 applied to the continuing property management and maintenance for "vacant lots," providing the contractor with an "on-going [property management] fee" for those services. Exhibit 47 at R-001367. The PWS indicated that "[v]acant lots [were] to be maintained at all times in a manner that result[s] in properties that are clean, safe and sanitary," without further explanation. *Id.* at R-001513 (PWS § C-5.2.12).

Unlike the initial services CLINs, CLINs 0005, 0006, and 0007 each indicated that the on-going property management/maintenance services would, or at least could, continue over extended periods of time. Nonetheless, each of the three on-going property management services CLINs used slightly different wording to indicate the "Estimated Unit" that HUD would order under each CLIN – "[m]onthly" (for CLIN 0005), "[m]onthly when a property is assigned until it is removed or converts to HUD vacant" (for CLIN 0006), and "[m]onthly until sold" (for CLIN 0007), as follows:

CONTRACT LINE ITEMS (CLINS)	**SUPPLIES OR SERVICES**	**QUANTITY**	**ESTIMATED UNIT**	**TOTAL UNIT PRICE**

* * *

CLIN 0005: ON-GOING PROPERTY MANAGEMENT (PM) FEE, HUD-OWNED VACANT				
0005	HUD-Owned Vacant	10332	Monthly	$455.00
CLIN 0006: INSPECTION, INITIAL SERVICES, ON-GOING PM FOR CUSTODIAL PROPERTIES				
0006	Custodial Properties	158	Monthly when a property is assigned until it is removed or converts to HUD vacant	$250.00

CLIN 0007: ON-GOING PM FEE, VACANT LOT				
0007	Vacant Lot	53	Monthly until sold	$170.00

Exhibit 1 at R-000007.

When the contract was originally executed, it contained a clause (in section B.5) dealing with payment to the contractor at contract expiration. Exhibit 1 at R-000015; Exhibit 47 at R-001375. The clause provided that, if unlisted or unsold properties remained assigned to the contractor when the contract (as opposed to a particular delivery order) expired, the contractor would receive only a "portion of the fixed unit price due for the property." Exhibit 1 at R-000015; Exhibit 47 at R-001375. Asons' contracts were modified on February 7, 2011, to replace the clause at section B.5 with a new version that, among other things, eliminated that sentence. Exhibit 64 at R-001657.

III. The Contract That HUD Originally Intended To Write

The record in these cases makes clear that the CLIN 0005 language in the solicitation – and in Asons' contracts – differs somewhat from what its drafters had originally planned.

As background, HUD had a payment system in place for its second generation of M&M contracts (the M&M II contracts), which preceded the contracts at issue here. Under the M&M II contracts, HUD would pay the contractor a "fixed fee" for property management or vacant lot management services for each "HUD-owned property" or HUD-owned vacant lot that HUD assigned to the contractor's management portfolio. Exhibit 24 at R-000540. "Though submitting as a single fixed fee, the Contractor [would] be paid in four equal monthly installments" for each property, and "[t]he Contractor [had to] invoice one fourth of the Property Management fee [or Vacant Lot Management fee] each month for four months beginning with the month the property [was] assigned." *Id.* Payment of the full fixed fee was not dependent on the length of time that the property remained in the contractor's inventory. If the property remained in the contractor's inventory for only two months, the contractor would still receive the full single fixed fee that would have been paid over the four-month period, although payment of the fee would be accelerated upon the early disposition of the property: "If the property closes or is reconveyed to a Mortgagee before the four installments are paid, the remaining Property [or Vacant Lot] Management fee shall be invoiced in the month the property reconciles or is reconveyed." *Id.* Conversely, if the property remained in the contractor's inventory for more than four months, the M&M II contract did not provide for any additional fee payment to the contractor – beyond the four

equal monthly payments for which the contract provided – for services relating to that property. *See id.*

There was a different provision for payment of custodial property management services under the M&M II contracts, which applied to properties that HUD did not own. Exhibit 24 at R-000541-42; *see id.* at R-000553 ("Custodial property – a borrower owned property that serves as security for a secretary-held mortgage . . . which HUD, through the Contractor, has taken possession of following default and vacancy or abandonment."). The M&M II contracts provided that "[t]he Contractor shall be paid a fixed monthly fee per property for those property management requirements described in Section C - 5.3.12 relating to custodial properties managed but not owned by HUD." *Id.* at R-000541. That fee was to be "invoiced monthly beginning with the month" of property assignment, as follows:

> The fee will be invoiced monthly beginning with the month the property is assigned to the Contractor. In the month following the month a property converts from custodial to HUD-owned, the Contractor will no longer receive the Custodial Fee but will be entitled to begin invoicing the Property Management Fee or Vacant Lot Management Fee.

Id. at R-000542-43; *see id.* at R-000641 (Clause G.4: "The Contractor shall invoice [its custodial fee] monthly beginning with the month the property is assigned.").[3]

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[3] In its motion for summary relief, Asons asserts that, when developing its offer, it assumed that HUD would pay the M&M III property management and vacant lot management services fees under CLINs 0005 and 0007 in the same manner that HUD had previously paid the M&M II custodial property services fee. There is nothing in the record, other than counsel's assertion, to support this statement. In fact, the only record evidence conflicts with that statement. Specifically, on June 24, 2010, just after award of the M&M III contracts, a representative of Asons sent an e-mail message to Craig H. Karnes at HUD, incorrectly representing that, although the final M&M III solicitation had stated that property management and vacant lot management fees were "to be invoiced 'one fourth of the management fee each month for four months,'" the conformed contract did not contain that provision, making it seem that monthly invoicing was desired. Exhibit 49 at R-001531. (In reality, the final M&M III solicitation never included any reference to a four-month divided fee payment for property management and vacant lot management services.) Given the timing of this statement, we can identify no basis for Asons' representations in its motion that it somehow prepared its offer believing that the property management and vacant lot management services fees would be paid in the same manner as the monthly M&M II custodial property services fee. "In countering a motion for summary [relief], more is

For the M&M II contracts, HUD used a system called the Single Family Acquired Asset Management System (SAMS) to assist in calculating and paying amounts due its contractors. Exhibit 46 at R-001360; *see* 71 Fed. Reg. 35,443, 35,443-44 (June 20, 2006) (discussing SAMS). SAMS did not permit HUD to prorate service fees for property management and other services. Exhibit 34 at R-001088; Exhibit 46 at R-001360. HUD would pay the entirety of the established monthly fee for any property management, vacant lot, or custodial services on a particular property during a given month, even if the property was assigned or removed from the contractor's portfolio in the middle of a month. Exhibit 34 at R-001088. That is, if a property was assigned to a contractor for property management services on March 25, the contractor would include the first of its four equal fee payment requests in its March invoice, without regard to the date within March that the property was assigned to it.

For the M&M III contracts, HUD planned to replace SAMS with P260, an Internet-based system developed by a third-party contractor, Yardi Systems, Inc. (Yardi), which would serve as the primary system of record for all M&M III REO case management transactions. Unlike SAMS, the P260 system could be programmed to prorate the monthly fee. Exhibit 34 at R-001088; Exhibit 46 at R-001360. That is, assuming a property management assignment that began March 25 and ended April 2, the P260 system could prorate the monthly fees for March and April so that the contractor only received payment for seven days of work in March and two days in April.

Because the P260 system was capable of proration, HUD, when it was originally drafting the solicitation for what would become the M&M III property management services contracts, developed language for CLIN 0005 that differed from the language that was eventually used. Initially, the HUD drafters provided HUD's Office of the Chief Procurement Officer (OCPO) with a draft of the program management services CLINs expressly stating that CLINs 0005 and 0007 would be prorated, with the contractor compensated only for the specific number of days that an assigned property was in that contractor's inventory:

> **FSM CLINS – FEE STRUCTURE**
>
> Field Service Managers . . . will be paid on a per property firm fixed fee basis plus reimbursement for actual cost incurred, or time and materials, as

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required than mere assertions of counsel." *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (quoting *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984)).

appropriate. The fixed fee includes one-time and recurring monthly payments. Clins 1 through 4 and Clin 8 are paid one-time and will be paid only after work has been completed. **Clins 5 and 7, Property Management fee are paid monthly. However, the first and last month fees are prorated based on the number of days the property was in inventory during the first and last month**.

Clin Line Items	Frequency of Payment	Base Year	Option 1	Option 2	Option 3	Option 4
		*	*	*		
CLIN 5: On-going Property Manage-ment (PM) Fee, HUD-owned, vacant	**Monthly when a property is assigned until it is sold**					
CLIN 6: Inspection, Initial Services, on-going PM for Custodial Properties	Monthly when a property is assigned until it is removed or converts to HUD vacant					
CLIN 7: On-going PM Fee, Vacant Lot	**Monthly until sold**					

Exhibit 28 at R-000815 (emphasis added); *see id.* at R-000814 (indicating submission of language to OCPO). Language from the proposed fee structure – identifying payments under CLIN 0005 as "[m]onthly when a property is assigned until it is sold" and under CLIN 0007 as "[m]onthly until sold" – was then included in the Yardi-developed functional requirements documents for the P260 system until at least June 2, 2011. *See* Exhibit 29 at R-000821; Exhibit 30 at R-000827; Exhibit 67 at R-001806.

Based upon this language, Yardi then developed a written description of the P260 design inputs, which it submitted to HUD on September 1, 2009. Yardi stated there that, for

both CLINs 0005 and 0007, "payment [would be] prorated based on the number of days the FSM was assigned to the property in the prior month and the number of days the property was in fee status" of either "HV (HUD Vacant)" or "VL (Vacant Lot)." Exhibit 31 at R-000830 to -000832; *see id.* at R-000832 ("If a property is assigned to an FSM during the post month and is sold within the post month, fees are calculated for days between assigned date and sold date.").

When the FSM solicitation was issued on September 16, 2009, the "Estimated Unit" language for CLIN 0007 was the same as in the OCPO draft: "[m]onthly until sold." Exhibit 32 at R-000843. However, for reasons not clear from the record, the language from the original OCPO draft for CLIN 0005 was changed. Instead of saying "[m]onthly when a property is assigned until it is sold," the solicitation identified the fee for CLIN 0005 as "[m]onthly," without further elaboration. *See* Exhibit 32 at R-000842. On October 7, 2009, a HUD employee sent an internal HUD e-mail message to several other HUD employees, including Craig H. Karnes, the Director of the M&M Acquisition Center, Office of the Chief Procurement Officer, in which the HUD employee stated that, although the P260 system (unlike SAMS) could prorate monthly fees, the FSM solicitation "has no proration language and the CLIN's just say 'monthly fee' plus we have multiple types of monthly [fees]." Exhibit 34 at R-001088. In response to the employee's question as to whether the FSM solicitation language would permit proration, Mr. Karnes indicated that whether prorating was permissible "depends on how the line item was specified in the solicitation/contract." *Id.* He stated that, if the existing language for CLIN 0005 did not permit prorating, HUD most likely would not be able to prorate unless it amended the solicitation before receipt of final proposals:

> If not, barring an amendment, the contractor would most likely be entitled to the full fee for the service. The good news is that there is still time to amend the contract unilaterally at this point, if we would like to change the desired approach.

Id. Another HUD employee (the Director of the REO Division, Denver Homeownership Center) then responded that, "[s]ince we are amending this section of the solicitation anyway, I think we need to include this." *Id.* Nevertheless, although the solicitation was subsequently reissued, with numerous amendments, Exhibit 41 at R-001110, HUD did not modify the relevant portion of section B.4. *Id.* at R-001185. Instead, when it reissued the amended solicitation on November 5, 2009, it left the "Estimated Unit" for CLIN 0005 as "Monthly." *Id.*

Subsequently, after a Yardi representative asked HUD for more information about the fee calculations, Exhibit 82 at R-002001, a HUD employee opined that she did not "think

[the solicitation] states anything about prorations." Exhibit 82 at R-002000. Another HUD employee then indicated that the proration language was originally in the CLIN descriptions, that the proration language did not make it into the solicitation, and that it was the contracting officer's responsibility to add it to the solicitation:

> The proration language was actually in the CLINS descriptions – this would be into Section B of the contract, it would not be in the PWS. The [contracting officer] who is awarding has to make sure this language gets into section B. It should have been in the CLIIN [sic] section of the solicitation.

Id.

> The solicitation was never amended to add any new language about proration.

IV. Contractor Complaints in Response to HUD's Prorating of the "Monthly" Fee

When HUD awarded the two M&M III contracts to Asons, it also awarded similar property management contracts to ten other contractors. Within a few months after these contract awards, four of the eleven awardee contractors (including Asons) began complaining about the proration of their monthly fees, arguing that the contracts as written did not allow HUD to prorate the monthly fees under CLINs 0005, 0006, or 0007 "based on transition date or assignment date." Exhibit 52 at R-001541; *see, e.g.*, Exhibit 54 at R-001543; Exhibit 56 at R-001554; Appellant's Response Brief, Exhibit D. On October 1, 2010, one HUD employee initially responded to one contractor's inquiry by stating that she "did not see or [was not] aware of any pro-rated information," Exhibit 52 at R-001540, while other contractors, near the same time, were told that they should prorate their fees based upon the date of the property's assignment into their inventory and the date of transition out of it. *See, e.g.*, Appellant's Response Brief, Exhibit D. Although another HUD employee, in response to Mr. Karnes' request, *see* Exhibit 52 at R-001539, reported on October 6, 2010, that he could not "find the prorated description" for CLIN 0005 in the solicitation, Exhibit 55 at R-001551, Mr. Karnes determined, after reviewing the contract language, that proration from date of assignment to date of transition was permissible:

> Neither Section 8 of the Contract, nor the [Performance Work Statement], comes out and says how the CLIN should be billed. I see nothing to indicate that the contractor should have expected full payment based on month of assignment though.

Exhibit 57 at R-001555. HUD directed its M&M III contractors in November and December 2010 to prorate fees to "days/months in inventory" for CLIN 0005. Exhibit 60 at R-001570;

Exhibit 62 at R-001641. HUD thereafter continued to require proration of the CLIN 0005, 0006, and 0007 monthly fees.

V. HUD's Exercise of Options

HUD has exercised three options under Asons' contracts, each one adding a year of property management services (including the follow-on CLINs to CLINs 0005 and 0007), through May 31, 2014. Exhibit 69 at R-001817 to -001820 (adding CLINs 0014 and 0016, the follow-on CLINs to CLINs 0005 and 0007); Exhibit 10 at R-000357 to -000361 (adding CLINs 0023 and 0025); Exhibit 14 at R-000371 to -000380 (adding CLINs 0032 and 0034).

VI. Asons' Claim Submission

On November 28, 2012, Asons submitted a claim (dated November 27, 2012) to the contracting officer under contract nos. 23653 and 23682, seeking payment of $1,937,403.71 and $712,041.84 under each contract, respectively, to cover "the difference between the partial monthly payment made by HUD and the unit price for each CLIN identified in the Contract." Exhibit 16 at R-000438 to -000440. Asons asserted that the contract provisions "require the fixed-unit-rate of the CLINs applied to the Estimated Unit and do not permit the partial or pro-rata payment that the P260 system has enforced." *Id.* at R-000439. The claim was certified, in accordance with the requirements of the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b) (2012), by Milan Thompson, Asons' Chief Executive Officer (CEO). *Id.* at R-000442.

In that November 28, 2012 claim, Asons represented that it had submitted a similar certified claim "[n]early two years ago," a copy of which it was attaching, to which "[t]here has been no response." Exhibit 16 at R-000438. The attached letter, which was undated, was addressed to Sharon Washington, "as Contracting Officer" for HUD, and, in it, Asons complained that the P260 system had changed Asons' invoices for payment under "CLIN numbers 0002, 0004, 0005, and 0008." *Id.* at R-000435. Asons sought $336,336.72 for the inappropriate payment of "a pro rata share of a CLIN item billing," which it alleged was inconsistent with the language of the contract. *Id.* Like the November 28, 2012, claim, this undated letter is signed and certified by Asons' CEO, Mr. Thompson. *Id.* at R-000436. Although the letter is undated, the appeal file contains an e-mail message from Mr. Thompson to Ms. Washington, dated December 8, 2010, in which Mr. Thompson stated as follows: "Please find attached an invoicing dispute with our recently awarded HUD Contracts. A certified letter will also be sent." Exhibit 17 at R-000457. Unfortunately, the copy of the December 8, 2010, e-mail message in the record is not accompanied by any attachment, and HUD has informed us that it has not determined what, if any, document was attached. In addition, Asons has included with its motion for summary relief a copy of an

internal HUD e-mail message dated December 9, 2010, with the subject "Dispute / Claim - C-OPC-23653," through which one HUD contracting office employee forwarded to another an attached "letter from A-Son's Construction disputing the change of invoices and amounts in P260," but without the attachment. In response to an inquiry from the Board, HUD has conceded that the undated certified claim was the attachment to the December 9, 2010, e-mail chain.

On December 20, 2012, Asons received an e-mail message from the HUD contracting office asking that Asons resubmit its November 27, 2012, claim as two separate claims, one addressing contract no. 23653 and one addressing contract no. 23682. *See* Exhibit 16 at R-0000429. In response, on December 22, 2012, Asons submitted two separate claims. Exhibit 17 at R-000455 to -000456. The first claim, certified by Asons' CEO, Mr. Thompson, solely addressed contract no. 23653 and sought $1,937,403.71, an amount that Asons asserted was the "difference between the invoice amount submitted by [Asons] and the amount the P260 system accepted and presented to HUD for payment" for CLINs 0005 and 0007. Exhibit 72 at R-001884, -001905. The second claim, certified by Asons' corporate counsel, solely addressed contract no. 23682 and sought payment of $712,041.84. *See* Exhibit 20 at R-000475, -000496.

On May 17, 2013, the contracting officer issued a decision (dated May 14, 2013) denying Asons' claim under contract no. 23682. Exhibit 15 at R-000413; Exhibit 21 at R-000497 to -000498. On August 12, 2013, Asons filed an appeal with the Board of the contracting officer's decision, which the Board docketed as CBCA 3491.

In the decision on the contract no. 23682 claim, the contracting officer did not address the contract no. 23653 claim. By letter dated July 31, 2013, counsel for Asons wrote the contracting officer, reminding her that the claim remained outstanding. On December 13, 2013, having received no response, Asons appealed the contracting officer's "deemed denial" of the claim under contract no. 23653. The Board docketed that appeal as CBCA 3636 and, at the parties' request, consolidated the cases.

Following consolidation, the parties engaged in discovery, exchanging written discovery requests and taking several depositions. After the discovery period concluded, both parties filed motions for summary relief, asking the Board to adopt their respective interpretations of CLINs 0005 and 0007.

Discussion

Asons' Jurisdictional Issue: Which Certified Claim Controls?

Asons has raised a question about which of its various claims provides the jurisdictional basis for these consolidated appeals. Subject matter jurisdiction is a threshold matter involving a tribunal's "power to hear a case." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)). Typically, when a question about subject matter jurisdiction arises, it requires the Board to determine whether the contractor submitted a valid CDA claim, given that "[s]ubmission of a valid CDA claim is a jurisdictional prerequisite to appeal to the Board." *H.L. Smith, Inc. v. Dalton*, 49 F.3d 1563, 1564 (Fed. Cir. 1995). Here, however, there is no question, and HUD does not dispute, that the Board has jurisdiction to entertain these appeals. The issue here is which of the smorgasbord of claims that Asons submitted is the one (or the ones) upon which the Board's jurisdiction rests. This issue is important to Asons because interest starts to accrue on a CDA claim from the date that a valid claim was received by a contracting officer. *See* 41 U.S.C. § 7109(a).

We have three different sets of claims from which to choose, all of which Asons alleges to have submitted to the contracting officer. First, Asons asserts that, on December 8 or 9, 2010, it submitted a single claim under both contract nos. 23653 and 23687 seeking to recover amounts that HUD had improperly withheld by prorating payments under CLINs 0005 and 0007, but HUD never acted on this claim.[4] Second, Asons asserts that, because HUD never responded to the December 2010 claim, it submitted on November 28, 2012, another claim under both contract nos. 23653 and 23687 covering CLINs 0005 and 0007. Third, at the contracting officer's request, Asons resubmitted its November 2012 claim as two separate claims – one covering contract no. 23653 and one covering contract no. 23682 – on December 22, 2012.

There are three basic requirements for a valid CDA monetary claim: "(1) the contractor must submit the demand in writing to the contracting officer, (2) the contractor must submit the demand as a matter of right, and (3) the demand must include a sum certain." *H.L. Smith*, 49 F.3d at 1565. "The CDA also requires that a claim indicate to the contracting

[4] While Asons identifies December 9, 2010, as the date that it submitted its claim to the contracting officer, referencing an internal HUD e-mail message between HUD employees on that date forwarding a letter from Asons, another e-mail message in the record from Asons to Sharon Washington, "as Contracting Officer," with an unidentified attachment, is dated December 8, 2010. Exhibit 17 at R-000457.

officer that the contractor is requesting a final decision," although this request need not be explicit. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). The CDA "prescribes no particular format" for a valid claim, but "the contractor's claim must be presented in sufficient detail to notify the contracting officer of the basis and amount of the claim as well as the basic factual allegations upon which the claim is premised." *Automated Power Systems, Inc.*, DOT BCA 2925, et al., 98-1 BCA ¶ 29,568, at 146,575. In addition, a monetary demand in excess of $100,000 "is not a claim under the [CDA] until certified." 48 CFR 52.233-1(c) (2014).

We start with Asons' earliest alleged claim, which, although undated, Asons states it sent to the contracting officer in December 2010. On its face, it satisfies all of the required elements for a valid claim: it is in writing, identifies Asons' complaint about prorated payments, seeks payment of a sum certain, implicitly requests a final decision, and is certified by Asons' CEO. Further, the record includes an e-mail message dated December 8, 2010, from Asons to the contracting officer at HUD, *see* Exhibit 17 at R-000457, as well as another e-mail message dated December 9, 2010, between two HUD employees which indicates that it is attaching a letter from Asons complaining about the P260 payment system. Both e-mail messages reference an attachment, but HUD filed an appeal file that did not include a copy of any such attachment. Nevertheless, HUD subsequently conceded that the undated certified claim was attached to the December 9, 2010, e-mail message, and, even though the agency has indicated that it does not know "what, if anything, was actually attached to" the December 8, 2010, e-mail message, Respondent's Response to Order of December 2, 2014, at 1-2, it seems more likely than not that the undated certified claim was also attached to the December 8, 2010, e-mail message.

Nevertheless, the claim submitted on December 8, 2010, only encompasses Asons' CLIN 0005 claim, not its CLIN 0007 claim. In the December 2010 claim, Asons complained that the P260 system had prorated Asons' invoices for payment under "CLIN numbers 0002, 0004, 0005, and 0008." Exhibit 16 at R-000435. The claim does not mention CLIN 0007. For the Board to exercise jurisdiction over an appeal relating to CLIN 0007, Asons must first have presented a valid claim seeking relief under CLIN 0007, containing "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *M. Maropakis Carpentry*, 609 F.3d at 1327 (quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1997)). Although "a contractor may increase the amount of its [submitted] claim and present evidence in support of an increase," it "may not raise any new claims which were not presented to the contracting officer." *EHR Doctors, Inc. v. Social Security Administration*, CBCA 3522, 14-1 BCA ¶ 35,630, at 174,492 (quoting *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808). "When a new claim is asserted that is not directly addressed in the appellant's original claim submission,

the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought." *Id.*

Here, although the allegations about prorating payments are similar for CLINs 0005 and 0007, the contracting officer would have to review different payment files to determine payment amounts for CLIN 0005 and for CLIN 0007, indicating that the claim for CLIN 0005 is separate and distinct from the claim for CLIN 0007. *See EHR Doctors*, 14-1 BCA at 174,492 (finding that new claim was not based on same operative facts as original claim where contracting officer would have to review different sets of documentation to evaluate each claim). Further, as will be discussed below, different portions of section B.4 cover payments under CLIN 0005 than those that are applicable to CLIN 0007, and the section uses different language to define the "Estimated Unit" associated with each CLIN, such that a different analysis is necessary to resolve CLIN 0005 and CLIN 0007 issues. In such circumstances, CLIN 0007 cannot be said to fall within the December 2010 claim. Accordingly, because the December 2010 claim does not address or apply to CLIN 0007, it does not provide the Board with a jurisdictional basis to consider Asons' CLIN 0007 allegations. It only covers Asons' allegations in these appeals relating to CLIN 0005 proration.

Although the December 2010 claim did not cover CLIN 0007, Asons submitted three more claim letters to the contracting officer – one on November 28, 2012, and two on December 22, 2012 – all of which expressly seek relief for underpayments under CLIN 0007. HUD does not dispute that the two December 2012 claim submissions are valid, but those claims were submitted only because a HUD employee was dissatisfied with Asons' November 28, 2012, submission. In its November 28, 2012, claim, Asons had sought relief under both contract no. 23653 and contract no. 23687, combining its monetary requests under both contracts into a single claim. HUD asked Asons to break it into two separate claims and to resubmit. To the extent that the contracting officer believed that combining equitable adjustment requests under two separate contracts into a single certified claim did not comport with the CDA, that belief lacked any foundation, at least in the circumstances here. As the Armed Services Board of Contract Appeals (ASBCA) explained in *Harbert International, Inc.*, ASBCA 44873, 97-1 BCA ¶ 28,719 (1996), nothing in the CDA precludes a contractor from combining monetary requests involving multiple contracts into a single CDA claim, at least if the contracts and/or claims are "sufficiently related." *Id.* at 143,360. The ASBCA recognized that Board decisions "involving a single contractor claim submitted under multiple contracts are hardly 'rare.'" *Id.* at 143,358. Without definitively deciding whether the CDA precludes putting wholly *unrelated* contracts or monetary requests into a single monetary claim, the ASBCA stated that it would evaluate "the justiciability under the CDA of a 'claim' relating to more than one contract . . . on a case-by-case basis, with the main

considerations being the relationship between the contracts to each other and the relationship between each contract and the claim." *Id.* at 143,360.

Here, as in *Harbert International*, we need not decide whether a single CDA claim can encompass *unrelated* contracts because Asons' two contracts are sufficiently related to justify use of a single claim covering both contracts. The terms of the two contracts are virtually identical, the alleged improper government action and the monetary requests at issue are based upon the same legal and factual theories, and the facts at issue involve the same witnesses and actors. Accordingly, the November 28, 2012, claim submission was valid, and the contracting officer has provided no justifiable basis upon which to have asked Asons to resubmit it as two separate claims.

In summary, Asons submitted certified claims relating to both CLIN 0005 and CLIN 0007. To the extent that Asons succeeds in these appeals, interest for any recovery under CLIN 0005 runs from December 8, 2010, the date upon which the HUD contracting officer received Asons' certified claim relating to CLIN 0005, while interest on any award under CLIN 0007 runs from November 28, 2012.

The Merits: Interpreting the Word "Monthly" In These Contracts

I. The Standard for Summary Relief

The parties have both filed motions seeking summary relief, each of them asserting that its interpretation of the language in CLINs 0005 and 0007 entitles it to judgment. "Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts." *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,891. "When both parties move for summary relief, each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration." *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955, at 167,991.[5]

[5] In *First Preston Management, Inc. v. Department of Housing & Urban Development*, CBCA 3563, 14-1 BCA ¶ 35,643, a case that has since been amicably resolved and dismissed, the Board denied cross-motions for summary relief involving contract interpretation issues under another HUD M&M III contract that are similar to the issues here, finding that the position of each party was not supported by the existing record at the pre-discovery summary relief stage. *Id.* at 174,538. The record in these cases, following discovery, is more thoroughly developed than the *First Preston* record.

The party moving for summary relief bears the burden of establishing the absence of any genuine issue of material fact associated with its request. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Nevertheless, "the party opposing summary [relief] must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). It must set forth specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"Contract interpretation is a question of law generally amenable" to summary relief. *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002). That being said, "the question of interpretation of language, the conduct, and the intent of the parties, *i.e.*, the question of what is the meaning that should be given by a court or board to the words of a contract, may sometimes involve questions of material fact and not present a pure question of law." *DJM/Reza, A Joint Venture*, VABCA 6917, et al., 05-1 BCA ¶ 32,943, at 163,208. "To the extent that the contract terms are ambiguous, requiring weighing of external evidence," summary relief is inappropriate, but only if the external evidence is sufficient to create a genuine issue of disputed material fact. *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988). Unless the "underlying probative evidence," considered in its entirety, creates a "genuine evidentiary conflict" as to the proper interpretation of an ambiguous provision, "there is no genuine underlying issue of material fact" precluding summary relief. *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1579-80 (Fed. Cir. 1989). A "mere dispute over the meaning of a term does not itself create an issue of fact." *Id.* at 1579.

II. HUD's Arguments that Asons Released or Waived its Prorated Payment Claims

A. The Effect of HUD's Failure to Allege Release in its Answer

HUD argues that the Board need not reach the contract interpretation issues here because Asons executed bilateral contract modifications during the course of contract performance expressly releasing HUD from liability. In support of this argument, HUD cites release language contained in four bilateral modifications under contract no. 23653 (Exhibit 69 at R-001818; Exhibit 75 at R-001968; Exhibit 77 at R-001975; Exhibit 84 at R-002007) and one bilateral modification under contract no. 23682 (Exhibit 11 at R-000364), each of which reads as follows:

> Pursuant to the terms of this contract and in consideration of the changes specified above, the Government of the United States, its officers, agents, and

> employees are hereby fully and finally released and discharged from all liabilities, demands, obligations, requests for equitable adjustment, and claims, whether legal, equitable, contractual, or administrative in nature, which the contractor . . . has or may have, now or in the future, arising under or relating to this modification of the contract . . . .

HUD asserts that the "language and coverage of the release is quite broad," affecting "the prices and payment of the CLINs at issue." Respondent's Motion for Summary Relief at 39. Because Asons did not "except the instant claim" from this release "when it knew of the issue underlying the dispute," *id.*, Asons should, HUD argues, be precluded from pursuing its claims.

Asons first responds that the doctrine of release is an affirmative defense and that, because HUD failed to raise the affirmative defense in its answer to Asons' complaint, the defense is waived. CBCA Rule 6(c), like Federal Rules of Civil Procedure 8(b) and 12(b), provides that, in its answer to an appellant's complaint, the respondent must set forth not only its defenses to the appellant's claims, but also "any affirmative defenses it chooses to assert." 48 CFR 6101.6(c). The purpose of putting the affirmative defenses in the answer "is to give the opposing party notice of the affirmative defense and a chance to respond." *Ultra-Precision Manufacturing, Ltd. v. Ford Motor Co.*, 411 F.3d 1369, 1376 (Fed. Cir. 2005) (quoting *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997)); *see Eagle Contracting, Inc.*, AGBCA 88-225-1, 92-3 BCA ¶ 25,018, at 124,702 (describing purpose of affirmative defense pleading requirement). Failure to plead an affirmative defense in a timely manner can result in the defense's waiver. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789; *see* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004) (citing cases). Release is an affirmative defense that the Government must plead in its answer. *Kolin Construction, Tourism, Industry & Trading Co.*, ASBCA 56941, et al., 11-1 BCA ¶ 34,670, at 170,798; *see* Fed. R. Civ. P. 8(c)(1) (identifying release as an affirmative defense).

Nonetheless, even though the Government acts "at its own peril" in failing to plead its affirmative defenses in its answer, "tribunals generally are liberal . . . in allowing the late assertion of [affirmative] defenses, absent prejudice to the opposing party." *Ball, Ball & Brosamer, Inc.*, IBCA 2841, 97-1 BCA ¶ 28,897, at 144,084; *see First Annapolis Bancorp, Inc. v. United States*, 75 Fed. Cl. 280, 288 (2007) ("An affirmative defense may be waived if not pled as prescribed, but the waiver is not effective absent unfair surprise or prejudice."). We have the authority under CBCA Rule 6(e) to permit amendments to pleadings "on conditions fair to both parties." While we encourage timely pleading of affirmative defenses, we, like other tribunals, will not typically reject an affirmative defense raised for the first

time in a motion for summary relief, absent articulable prejudice to the opposing party, particularly where the motion, as here, is filed well before any trial or hearing has been scheduled. *See, e.g.*, *Ultra-Precision*, 411 F.3d at 1376 (affirming trial court's consideration of affirmative defense first raised in second set of summary judgment motions); *National Gypsum Co.*, ASBCA 53259, et al., 03-1 BCA ¶ 32,054, at 158,454-55 (2002) (affirmative defense considered although first raised in brief); *Holland v. United States*, 74 Fed. Cl. 225, 256 (2006) (same), *rev'd on other grounds*, 621 F.3d 1366 (Fed. Cir. 2010). Here, Asons has had a full opportunity to respond to HUD's release argument and, importantly, has not alleged any prejudice from the late disclosure of this defense. Therefore, we consider the defense.

B. Whether Asons Released its Prorated Payments Claims

Addressing the merits of HUD's release argument, Asons asserts that HUD is overreaching by taking a limited release and attempting to convert it into a general release. "A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another." *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010). "Because a release is contractual in nature, it is interpreted in the same manner as any other contract term or provision." *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009); *see Restatement (Second) of Contracts* § 284 cmt. c (1981) ("The rules of interpretation that apply to contracts generally apply also to writings that purport to be releases."). Accordingly, like any other contract, "[i]f the provisions of a release are 'clear and unambiguous, they must be given their plain and ordinary meaning.'" *Optex Systems, Inc.*, ASBCA 58220, 14-1 BCA ¶ 35,801, at 175,097 (quoting *Bell BCI*, 570 F.3d at 1341). The "burden of proving the validity and applicability of release" is on the party seeking to enforce it – here, the Government. *Shell Oil Co. v. United States*, 751 F.3d 1282, 1297 (Fed. Cir. 2014) (quoting *A.R.S. Inc. v. United States*, 157 Ct. Cl. 71, 76 (1962)).

HUD's release argument fails for two reasons:

First, as with any contract interpretation issue, we look to the plain language of the release. *LAI Services, Inc. v. Gates*, 573 F.3d 1306, 1314 (Fed. Cir. 2009). On its face, that language does not purport to release all contractor claims under the contract, instead releasing only those claims "arising under or relating to *this modification* of the contract." Exhibit 11 at R-000364 (emphasis added). Although the modifications changed the unit prices under the "Total Unit Price" column for various CLINs in section B.4, they did not change or affect the "Estimated Unit" of any CLIN in that section. It is under the "Estimated Unit" column that the terms whose meaning is in dispute – "monthly" and "monthly until sold" – reside. Nothing in the plain language of the modifications indicates that a price

change under the "Total Unit Price" column somehow modified the definition of "monthly" in the separate "Estimated Unit" column.

Second, all of the modifications at issue were forward-looking, rather than backward-looking, providing price changes for not-yet-performed option periods. As an example, modification no. M0006 to one of the contracts had an effective date of October 1, 2011, and revised the contract unit prices for Option Period 1 starting October 1, 2011, and running through February 29, 2012. Exhibit 69 at R-001817 to -001818. Because each release only applied to claims arising from or relating to "this modification to the contract," it could not apply retroactively to release claims that had accrued in prior periods – not a single one of the cited modifications dealt with or affected prior year prices or payments. To the extent that HUD is arguing that the releases applied to potential claims that would arise during future performance, "[s]uch a promise is not a release" because "[a] promise to discharge in the future an existing duty merely creates a new duty that can itself be discharged by the parties." *Restatement (Second) of Contracts* § 284 cmt. a (1981). In essence, HUD is really arguing that, through the forward-looking modifications, the parties agreed to change the contract terms so that the word "monthly" was redefined to allow prorating. Nothing in the plain language of the modifications supports that position, and HUD has neither alleged nor presented evidence that the parties even discussed that concept in negotiating the modifications. The releases simply do not apply to the contract interpretation issue in dispute here.

C. Whether Asons Alternatively Waived Its Prorated Payment Claims

Alternatively, HUD argues that Asons waived its prorated payment claims because, in the payment invoices that it submitted through the P260 system, it sought payment of prorated amounts when properties were not in its portfolio for a full month.[6] It is true that, if a contractor performs a contract without protesting or objecting to the Government's erroneous interpretation of contract requirements, it may be barred from later recovering for alleged changes or extra work. *See, e.g.*, *E. Walters & Co. v. United States*, 576 F.2d 362, 367-68 (Ct. Cl. 1978); *Ling-Temco-Vought, Inc. v. United States*, 475 F.2d 630, 636-39 (Ct. Cl. 1973); *Acme Process Equipment Co. v. United States*, 347 F.2d 509, 515-18 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966). By failing to give timely notice of its objections, a contractor precludes the Government from reevaluating and correcting its

[6] Waiver constitutes an affirmative defense that respondent must plead in its answer. CBCA Rule 6(c); Fed. R. Civ. P. 8(c)(1). Although HUD did not plead waiver in its answer, we consider its waiver argument for the same reasons that we have considered its release argument.

erroneous interpretation before the contractor incurs damages. *Ling-Temco-Vought*, 475 F.2d at 638-39; *Northern Helex Co. v. United States*, 455 F.2d 546, 551 (Ct. Cl. 1972).

Here, however, Asons has repeatedly objected to HUD's payment proration position since early in contract performance (as have several other contractors with virtually identical contracts). *See, e.g.*, Exhibit 17 at R-000457; Exhibit 54 at R-001543, -001545, -001550, -001556; Exhibit 62 at R-001641; Appellant's Response Brief, Exhibit D. Although Asons may have submitted invoices through the P260 system in accordance with HUD's instructions to prorate, HUD cannot pretend that it did not simultaneously know of Asons' objections. When the agency is on notice of the contractor's objection, the agency has no basis for asserting a waiver simply because the contractor simultaneously performed in accordance with the Government's instructions. *Northern Helex*, 455 F.2d at 551; *Kiewit-Turner, A Joint Venture v. Department of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,177 (2014). HUD's selective focus only on the P260 invoice submissions – without any reference to preexisting and outstanding objections to prorating – is misguided. Asons has not waived its payment proration claims.

III. Interpretation of Asons' Contracts

A. The Basic Contract Interpretation Rules

The dispute in these consolidated cases focuses on the meaning of the word "monthly" in section B.4, as applied to CLINs 0005 and 0007. That dispute is best divided into two subparts: (1) whether the word "monthly," as used in section B.4, necessarily means "calendar month" (running from the first day of the calendar month to the last day of that month); and (2) whether section B.4 precludes HUD from prorating "monthly" fees if HUD has only ordered property management services for a portion of a month. Asons and HUD have offered differing interpretations of the word "monthly" in the context of the contract as a whole.

"In resolving disputes involving contract interpretation, we begin by examining the plain language of the contract." *LAI Services*, 573 F.3d at 1314 (quoting *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004)); *see McHugh v. DLT Solutions, Inc.*, 618 F.3d 1375, 1380 (Fed. Cir. 2010) ("Contract interpretation begins with the plain language of the written agreement."). In one sense, the interpretation issue here is "more subtle" than many presented to the Board "because the outcome is heavily dependent on the meaning ascribed to one word, not a group of words such as a clause, sentence, or paragraph, and therefore, it illustrates both the beauty and difficulties of English." *MPE Business Forms, Inc.*, GPO BCA 10-95, 1996 WL 812877 (Aug. 16, 1996), *rev'd and remanded on other grounds*, 44 Fed. Cl. 421 (1999). Nevertheless, we do not interpret the word in dispute

in isolation, but, to decipher its meaning, must consider its use in the context of the contract as a whole, *B.D. Click Co. v. United States*, 614 F.2d 748, 753 (Ct. Cl. 1980), "construed to effectuate its spirit and purpose giving reasonable meaning to all parts of the contract." *Hercules Inc. v. United States*, 292 F.3d 1378, 1381 (Fed. Cir. 2002). "If the plain language of the contract is unambiguous on its face, the inquiry ends, and the contract's plain language controls." *ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151 (citing *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369, 1373 (Fed. Cir. 2002)). If, however, the contractual language is susceptible to more than one reasonable interpretation, it is ambiguous. *Id.*; *see E.L. Hamm & Associates v. England*, 379 F.3d 1334, 1341 (Fed. Cir. 2004) ("ambiguity exists when a contract is susceptible to more than one reasonable interpretation"). If a contract provision appears ambiguous on its face, extrinsic evidence may assist in discerning the parties' intent and may show that language appearing on its face to be ambiguous is not because, for example, the parties shared a mutual understanding as to its meaning. *See Metropolitan Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006).

If resort to extrinsic evidence does not resolve an ambiguity, "the next question is whether that ambiguity is patent." *E.L. Hamm*, 379 F.3d at 1342. Generally, "[w]hen a dispute arises as to the interpretation of a contract and the contractor's interpretation of the contract is reasonable, we apply the rule of *contra proferentem*, which requires that ambiguous or unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document." *Turner Construction Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004). However, if "the ambiguity or lack of clarity was sufficiently apparent" on the face of the solicitation before the contract was awarded, the contractor was required "to inquire as to that provision before entering into the contract," and it is barred from later pressing its own interpretation if it failed to do so. *Id.* "More subtle ambiguities," however, "are deemed latent, and the general rule that such language is interpreted in favor of the nondrafting party will apply." *ACM Construction*, 14-1 BCA at 174,151.

B. HUD's Partial Performance Argument

HUD argues that Asons' interpretation of the contract conflicts with Federal Acquisition Regulation (FAR) clause 52.232-1, Payments (Apr 1984), 48 CFR 52.232-1 (2010), a clause included in Asons' contracts. HUD asserts that "the clause requires that partial deliveries invoiced by the contractor and accepted by the Government receive corresponding partial payment unless specifically prohibited by the contract." Respondent's Motion for Summary Relief at 9. HUD contends that, if Asons provided management services for a particular property for less than a full month, Asons provided only a "partial

delivery" – "service for less than a month's work" – and is entitled under the Payments clause to recover only a prorated amount for that month's work.

It is true that, pursuant to the "Payments" clause at FAR 52.232-1, an agency will make a reduced payment to the contractor for "*partial deliveries* accepted by the Government if . . . [t]he Contractor requests it and the amount due on the deliveries is at least $1,000 or 50 percent of the total contract price." 48 CFR 52.232-1 (emphasis added); *see* 48 CFR 32.102(d) ("[i]n accordance with 5 CFR 1315.4(k), agencies must pay for *partial delivery* of supplies or *partial performance* of services unless specifically prohibited by the contract" (emphasis added)). Yet, HUD's position that Asons was providing "partial delivery" and "partial performance" under these contracts is unfounded. FAR 32.102 makes clear that "partial performance" refers to performance "of [the] contract" or, as here, of the individual delivery/task orders that HUD placed. *See* 48 CFR 32.102(a). The word "partial" means "[n]ot complete; of, relating to, or involving only a part rather than the whole." *Black's Law Dictionary* 1293 (10th ed. 2014). "Performance" refers to "[t]he successful completion of a contractual duty." *Id.* at 1319. "Part" or partial "performance," then, means "[t]he accomplishment of some but not all of one's contractual obligations." *Id.* Accordingly, the terms "partial delivery" and "partial performance" identified in FAR 32.102 and 52.232-1 refer to the contractor's failure to perform some portion of the work that the agency assigned and ordered.

HUD does not allege that Asons failed to perform any of the property management services that HUD ordered. It does not allege that Asons only performed "part" of what HUD asked it to do. It instead argues that there was "partial performance" because HUD did not always ask Asons to provide services for the entirety of a month – that is, that HUD itself restricted the length of services requested. This argument is misguided. The completeness of Asons' performance depends on Asons' actions in providing the services that HUD actually ordered, not upon the limited duration of what HUD ordered. If Asons fully performed every delivery/task order that HUD assigned to it, it fully performed its obligations and is entitled to payment for full delivery and full performance. There is no basis for HUD to reduce Asons' fee payments based upon Asons' alleged "partial performance" of, or Asons' partial failure to perform, its obligations.

C. HUD's Trade Usage Argument

HUD asserts that industry trade usage requires us to interpret CLINs 0005 and 0007 as contemplating prorated fee payments because "industry trade practice is not to pay the relevant property maintenance services on a retainer basis or for time a property is not in contractor inventory, but to pay only as reimbursement for services actually rendered or to pay a specified fixed price for a specific task." Respondent's Motion at 22. HUD refers to

property management services contracting documents from Fannie Mae and Freddie Mac as evidence of the existence of such an "industry trade practice."

Interpretation of a contract "may properly include consideration of an accepted industry or trade practice." *Roxco, Ltd.*, ENG BCA 6435, 00-1 BCA ¶ 30,687, at 151,583 (1999). However, such trade usage or custom must "show that *language* which appears on its face to be perfectly clear and unambiguous has, in fact, a meaning different from its ordinary meaning." *Gholson, Byars & Holmes Construction Co. v. United States*, 351 F.2d 987, 999 (Ct. Cl. 1965) (emphasis added). That is, such evidence must show "a competing interpretation of *words*" contained in the Government's contract and not just "the fact that things are not customarily done in the manner called for by the contract." *Western States Construction Co. v. United States*, 26 Cl. Ct. 818, 824 (1992) (emphasis added); *see Jowett, Inc. v. United States*, 234 F.3d 1365, 1369 (Fed. Cir. 2000) (party must show a "term in the contract that has an accepted industry meaning different from its ordinary meaning").

On its face, HUD's argument fails. HUD has not argued that the *words* in Asons' contracts have a particularized meaning in the industry. Instead, HUD's allegations of an "industry trade practice" are based upon Fannie Mae and Freddie Mac contracts that, through their express language, clearly require those organizations to pay up to a specific fixed price for specific tasks, such as $60 for changing knob locks, $100 for cutting grass of less than 10,000 feet, or $100 for repairing a garage door. *See* Exhibit 71 at R-001864 to -001882; Exhibit 86 at R-002014 to -002019. The Fannie Mae and Freddie Mac contracts do not define payments as "monthly." They are instead written to provide reimbursement for specific expenses incurred, item by item. HUD's contract was written very differently: HUD reimbursed contractors through a "monthly" fee, without regard to the specific work that the contractor had to perform or specific expenses incurred on the property in a given month. HUD cites nothing from the industry showing an interpretation of the word "monthly" as meaning "proratable." Because HUD has focused solely on a generalized industry concept, without arguing (much less presenting evidence) that the word "monthly" has a specific meaning in the industry, HUD's trade practice argument is meritless.

D. Whether "Monthly" Must Start on the First Day of a Calendar Month

1. Ambiguity in the Start Date of Monthly Fee Payments

Having dealt with the parties' arguments about partial performance and trade usage, we are left simply to determine whether the plain language of the contracts permits HUD to make "monthly" payments under CLINs 0005 and 0007 of less than a full calendar month. To resolve this issue, we must answer two questions: first, whether the "month" under the M&M III contracts starts on the date of property assignment or, instead, at the top of

whatever calendar month in which a property is assigned; and, second, whether, once the "month" begins, HUD can pay less than a full month's fee if it removes a property from the contractor's inventory portfolio mid-month.

The first interpretation issue involves whether the word "monthly," as used in these contracts, necessarily means one of the twelve calendar months, starting on the first day of that calendar month. Asons assumes that it does. Accordingly, Asons believes that, if HUD added a property to Asons' property management services portfolio on April 30, it was entitled to be paid a full monthly property management fee for the period from April 1 through April 30, even though it only provided property management services for a single day in April.

The contract itself does not define the word "monthly." As a result, we turn to dictionary definitions to assist in extrapolating the word's "ordinary and commonly accepted meaning." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965); *see CBS Corp. v. Eaton Corp.*, No. 07-Civ.-11344, 2009 WL 4756436, at *4 (S.D.N.Y. Dec. 7, 2009) ("A sound method for determining the plain meaning of words is to look at their dictionary definitions." (citation omitted)). In doing so, however, we must always be cautious to consider the context in which the word at issue is used in the contract: "[a]lthough as any large dictionary shows, single words do have meanings and often a great many meanings, it is impossible to determine which one of those meanings the parties intended unless each word is considered in its context." 5 Margaret M. Kniffen, *Corbin on Contracts* § 24.21, at 210 (rev. ed. 1998).

Dictionary definitions of the word "month" typically include one of the twelve "calendar months" as one available definition – for example, according to *Black's Law Dictionary*, a "month" can be "[o]ne of the twelve periods of time in which the calendar is divided." *Black's Law Dictionary* 1161 (10th ed. 2014). Nevertheless, dictionaries also define a "month" as "[a]ny time period approximating 30 days <due one month from today>." *Id.*; *see Webster's New Twentieth Century Dictionary Unabridged* 1166 (2d ed. 1975) (defining "month" as including "the time from any day of one month to the corresponding day of the next," as well as "a period of four weeks or 30 days"); *Random House Dictionary of the English Language* 928 (unabridged ed. 1969) ("the time from any day of one calendar month to the corresponding day of the next," as well as "a period of four weeks or 30 days"); 2 *Bouvier's Law Dictionary* 2244 (3d rev. 1914) ("month" is "[a] space of time variously computed, as the term is applied to astronomical, civil or solar, or lunar months").

Further, in defining the corresponding word "monthly," the dictionaries provide nothing to indicate that "monthly" necessarily denotes a calendar month or always starts on

the first day of the calendar month. *See Webster's New Twentieth Century Dictionary Unabridged* 1166 ("continuing or lasting for a month" or "done, happening, appearing, payable, etc. once a month or every month; as, a *monthly* magazine"); *Random House Dictionary of the English Language* 928 ("pertaining to a month, or to each month"). Practical experience establishes that "monthly" does not necessarily equate with a calendar month: monthly credit card billing cycles do not always run from the first of a calendar month to the end, but can begin at any point in a calendar month and run until a corresponding day in the following calendar month.

Particularly because there are multiple dictionary definitions of the words "month" and "monthly," we have to evaluate the context in which the word "monthly" is used in Asons' contracts. At least one contract clause favors HUD's position that "monthly" does not have to start on the first day of a "calendar month." Section G.2, titled "Payment Schedule and Invoice Submission (Fixed-Price) (Feb 2006)," indicates that HUD will pay Asons for "work . . . performed," as follows:

> The Government shall pay the Contractor as full compensation for all *work required, performed and accepted* under this contract, inclusive of all costs and expenses, the fixed-unit-rate for the applicable CLINs and applicable periods, as stated in Part I, Section B of this contract.

Exhibit 1 at R-000023 (HUDAR 2452.232-70) (emphasis added); *see* Exhibit 47 at R-001383 (same). Although Asons believes that it is entitled to be paid a full thirty-day fee for the calendar month of April if HUD adds a property to Asons' property management services portfolio on April 30, Asons would only have provided services, or "work," for one day under that scenario. Asons' position conflicts with the concept that Asons will be paid for "work . . . performed." Construing the contract "to effectuate its spirit and purpose," as we must, *Hercules*, 292 F.3d at 1381, it is logical that HUD would want, and expect, to pay only for "work . . . performed," not to provide payments for services neither ordered nor received.[7]

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[7] As HUD also explains, interpreting the word "monthly" in CLINs 0005 and 0007 as meaning "calendar month," with a mandatory first-of-the-calendar-month start date, creates the possibility that Asons would be paid both a monthly fee under CLIN 0005 and a one-time fee under an "initial services" CLIN for the same property in a single month. As previously explained, when Asons is originally assigned a property, it performs pre-conveyance and/or initial services for that property under CLIN 0001, 0002, 0003, 0004, or 0008. When initial services are complete, the property may then receive property management services under CLIN 0005 or 0007. If a property is assigned for initial services under CLIN 0004 on April 1, but moves from the initial services CLIN to CLIN 0005 on

See Coastal Dry Dock & Repair Corp., ASBCA 31894, 87-1 BCA ¶ 19,618, at 99,236 ("One aid to interpretation . . . is that we should give meaning to the contract provision which is in furtherance of the principal apparent purpose of the contract.").

Conversely, however, interpreting the term "monthly" in CLINs 0005 and 0007 as something *other* than starting on the first day of a calendar month would seemingly render other contract language unnecessary and redundant, in conflict with general contract interpretation principles. "An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *see Restatement (Second) of Contracts* § 203(a) (1981) (contract interpretation should not leave a part of contract "of no effect"). In the contracts at issue here, the "Estimated Unit" for another of the CLINs – CLIN 0006 – is defined as "[m]onthly when a property is assigned until it is removed or converts to HUD vacant." Exhibit 1 at R-000007. This language seems to indicate that the monthly period starts when the property is assigned – that is, the fee for CLIN 0006 assignments does not start to run retroactively from the top of a calendar month, but starts to run instead from the date that the property is added to the contractor's portfolio. If the word "monthly," as used in CLIN 0005 and 0007, does not mean a "calendar month," there is no purpose in adding language to CLIN 0006 to indicate that "monthly" in that CLIN does not start at the top of the "calendar month." Accordingly, defining the word "monthly" in CLINs 0005 and 0007 as a roughly thirty-day period starting from the date that a property is assigned would render the extra language in CLIN 0006 redundant, in violation of standard contract interpretation principles.

To determine if a contract is ambiguous, a tribunal "need not determine which" of the parties' interpretations "is the more likely interpretation," but "need merely decide whether [each] . . . is sufficiently reasonable to render the clause ambiguous." *Mellon Bank, N.A. v. United Bank Corp. of New York*, 31 F.3d 113, 115 (2d Cir. 1994) (quoting *Wards Co. v. Stamford Ridgeway Associaties*, 761 F.2d 117, 121 (2d Cir. 1985)). Here, there are contract provisions that support, and detract, from each party's interpretation. Regardless of whether we find the word "monthly" to refer to a calendar month or, instead, to mean a roughly thirty-day period, there will be some conflict with some part of the contract. In these

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April 30, Asons would, under its interpretation of the contracts, receive a full fee payment under CLIN 0004 for the initial services provided from April 1 to 29 for the property, plus a full monthly April fee payment under CLIN 0005 for the same property. An interpretation that provides for such double payments would not effectuate the "spirit and purpose," *Hercules*, 292 F.3d at 1381, of the contracts.

circumstances, the meaning of the word "monthly" in these contracts is ambiguous – at least with regard to whether it means a calendar month beginning on the first day of the month.

2. Using Extrinsic Evidence to Resolve the Ambiguity

Typically, when faced with a contract provision that is ambiguous on its face, we may turn to extrinsic evidence to assist in discerning the parties' intent and to determine whether there is truly an ambiguity. *Metropolitan Area Transit*, 463 F.3d at 1260. Although competing extrinsic evidence can create a genuine issue of material fact that precludes a tribunal's ability to grant summary relief, *see Beta Systems*, 838 F.2d at 1183, a disputed fact is "material" only if it "might affect the outcome of the suit under the governing law," and a dispute is genuine only "if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party" based upon it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Here, much of the extrinsic evidence that the parties have submitted is not relevant, under proper contract interpretation rules, to a determination of whether the word "monthly" in CLINs 0005 and 0007 begins on the date of a property's assignment into Asons' portfolio or, instead, begins at the top of whatever calendar month in which the property is assigned. Both parties have attached to their summary relief pleadings voluminous pages of deposition testimony indicating what particular individuals subjectively, and *currently*, believe the contract language to mean – beliefs that the parties did not share with one another prior to contract award. Unexpressed subjective intent "plays no role in interpreting a contract," even if the contract is ambiguous. *Western States*, 26 Cl. Ct. at 826 (citing *ITT Arctic Services, Inc. v. United States*, 524 F.2d 680, 684 (Ct. Cl. 1975)); *see Dana Corp. v. United States*, 470 F.2d 1032, 1041 (Ct. Cl. 1972) ("subjective intent is not important and the [contract language] must be viewed from an objective standpoint"). Accordingly, the deposition testimony is generally irrelevant to the resolution of this dispute, and it cannot create a genuine issue of material fact.

Nevertheless, there is evidence in the existing record suggesting that some individuals within HUD, both before contract award and early during the contract performance period, interpreted the language that actually made it into the contract as providing for a "monthly" fee payment that, regardless of the date within the calendar month that the property was assigned, would retroactively start from the top of that calendar month. Interpreting the existing record evidence most favorably to Asons, Asons has a plausible argument that, after HUD employees discovered that HUD had issued a solicitation using *different* language from that which they had originally drafted, several of them indicated that, if HUD did not amend the solicitation and change the language, offerors would believe that, for any property assigned, payments would not be prorated: that is, offerors would believe that payments

would be calculated from the top of the calendar month in which the property was assigned (rather than running from the date on which the property was assigned). *See, e.g.*, Exhibit 34 at R-001088; Exhibit 41 at R-001110; Exhibit 82 at R-002000 to -002001. "Generally, evidence of contemporaneous beliefs about the contract is particularly probative of the meaning of a contract." *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1332 (Fed. Cir. 2015); *see Brooklyn Life Insurance Co. of New York v. Dutcher*, 95 U.S. 269, 273 (1877) ("The practical interpretation of an agreement by a party to it is always a consideration of great weight."); *Max Drill, Inc. v. United States*, 427 F.2d 1233, 1240 (Ct. Cl. 1970) (en banc) (per curiam) ("[t]he interpretation of a contract by the parties to it before the contract becomes the subject of controversy is deemed by the courts to be of great, if not controlling weight"). "[I]n an executory contract, . . . where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the [tribunal] as the true one." *City of Chicago v. Sheldon*, 76 U.S. (9 Wall.) 50, 54 (1869). Further, "[t]he closer in time to contract formation, and the more distant the prospect of litigation, the more reliable the parties' practical interpretation should be." *Dalles Irrigation District v. United States*, 82 Fed. Cl. 346, 356 (2008). Even though there is no allegation in the record that any of these HUD employees communicated their concerns about the language to Asons, HUD employees' pre-award interpretation of the contract as precluding proration is strong extrinsic evidence in resolving the facial ambiguity of the meaning of "monthly" in the M&M III contracts.

At the same time, there is evidence detracting from Asons' position. First, it is unclear from the existing record whether the individuals questioning whether the solicitation language permitted "prorating" were referring only to whether payment for a period of less than approximately thirty days was permitted or, rather, whether they were also referring to the start date for the first "monthly" payment, and the resolution of those issues among those HUD employees is less than clear on the existing record. Second, the record contains no information regarding the circumstances under which these HUD employees were rendering their interpretations – that is, nothing in the record tells us whether, in making these statements, they were interpreting the actual language used in the solicitation or instead were merely reacting to the absence of the language that they had suggested. Third, assuming that the HUD employees were referring to the start date for monthly payments, the record does not establish that the *contracting officer* shared the belief that those HUD employees appear to have had, and, even though the HUD employees' beliefs might support the reasonableness of Asons' interpretation, interpretations by unauthorized individuals do not bind the Government, making them less than conclusive. *See Enrico Roman, Inc. v. United States*, 2 Cl. Ct. 104, 108 (1983) ("Statements of an unauthorized Government employee have never provided the required imprimatur desired by plaintiff. At the very most, the statements of an unauthorized Government employee can only lend insight to the reasonable interpretation

of a contract."). Fourth, HUD has presented evidence that, when viewed most favorably to HUD, indicates that Asons did not hold the interpretation of the term "monthly" it now espouses when it was entering into the M&M III contracts and instead based its offer on a faulty assumption that property and vacant lot management services were paid with a single fee of four equal payments – evidence that, if true, would defeat Asons' argument that the parties mutually interpreted the actual contract provisions in the same manner prior to contract award. Exhibit 49 at R-001531. Fifth, and importantly, interpreting a contract in a manner that effectuates its purpose is an important element of contract interpretation, *Hercules*, 292 F.3d at 1381, and any argument that the start date for payment precedes the actual assignment of the property for management services appears to conflict with the stated purpose of the payment provisions of the contract, which indicated that the contractor would be paid for "work required, performed, and accepted." Exhibit 1 at R-000023; Exhibit 47 at R-001383.

As previously discussed, "[f]or purposes of deciding motions for summary relief, we must take all reasonable inferences in favor of the non-moving party." *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 14-1 BCA ¶ 35,687, at 174,683 (citing *Mingus Constructors*, 812 F.2d at 1390). Accordingly, in reviewing Asons' summary relief motion, we must make all reasonable inferences from the factual record in the Government's favor, and, in reviewing the Government's motion, we must reallocate those inferences in Asons' favor. "Any doubt on whether summary relief is appropriate is to be resolved against the moving party." *SBBI, Inc. v. International Boundary & Water Commission*, CBCA 3213, 14-1 BCA ¶ 35,582, at 174,362. Further, "[a]t this stage, the Board may not make determinations about the credibility of potential witnesses or the weight of the evidence." *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, et al., 14-1 BCA ¶ 35,805, at 175,114.

Because there is extrinsic evidence supporting each side's interpretation of the intended start date for "monthly" payments, and because of the conflict in that extrinsic evidence, we do not believe it appropriate in response to summary relief motions to decide whether the facial ambiguity can be resolved. If, following a hearing or a submission of this issue on the written record pursuant to Board Rule 19, we cannot resolve the ambiguity as to when the "monthly" fee payment begins based upon the extrinsic evidence, we will then have to determine whether that unresolvable ambiguity is sufficiently "patent" – that is, whether it is so "obvious, gross, glaring, . . . that plaintiff contractor had a duty to inquire about it at the start," *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009) (quoting *H & M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974)), which the contractor did not do – to avoid charging the Government, under the doctrine of *contra proferentem*, with responsibility for the ambiguity. *See HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004) ("Where an ambiguity is not sufficiently glaring to trigger the

patent ambiguity exception, it is deemed latent and the general rule of *contra proferentem* applies."). If we do not find the ambiguity patent, we will then resolve HUD's argument that Asons did not rely on its current interpretation when bidding, which, HUD argues, would preclude application of the *contra proferentem* doctrine here. Before we reach those issues, however, we must determine whether the extrinsic evidence that the parties have presented, and may present in a future hearing or Rule 19 record submission, is sufficient to resolve the ambiguity. *Gardiner, Kamya & Associates v. Jackson*, 467 F.3d 1348, 1354 (Fed. Cir. 2006). Applying the standards that we must to motions for summary relief, we deny both parties' requests for summary relief on whether "monthly" payments must begin at the top of the calendar month, rather than on the date of a property's assignment, and preserve this issue for further proceedings.[8]

E. Whether HUD Can Reduce Monthly Fee Payments To Less Than Thirty Days

1. Prorating Under CLIN 0005

Regardless of when the "monthly" fee period begins, there is a question as to whether, once the "monthly" period starts, HUD is obligated under the contracts to pay the full monthly fee – that is, a fee covering a full "month" of approximately thirty days – if a property leaves Asons' portfolio before that "monthly" period has ended.

It is clear from the dictionary definitions discussed above that the word "monthly" in CLIN 0005's "Estimated Unit" refers to a period of approximately thirty days. But nothing

[8] Asons has argued that the ASBCA's recent decision in *Amaratek*, ASBCA 59149, et al., 15-1 BCA ¶ 35,808 (2014), is relevant to this issue because, in *Amaratek*, the ASBCA considered the word "month" to begin on the first day and end on the last day of the calendar month. The *Amaratek* decision is inapposite here for three reasons. First, the decision was issued under ASBCA Rule 12.2 as having "no value as precedent," and, even if it had value as precedent, it would not be not binding on the CBCA. Second, the parties do not appear to have disputed in *Amaratek* that the reference to "month" in the contract there was a calendar month beginning on the first of each month, instead focusing only on whether the agency had to pay during a stop-work period; here, the meaning of the word "monthly" in Asons' contracts is a central focus of the parties' dispute. Third, the context of the contract language in *Amaratek* is different from that here, and contract interpretation is wholly dependent on the language and context used in an individual contract, read as an "organic whole." *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997). As discussed above, the word "monthly" can mean different things in different contexts. Accordingly, *Amaratek* is not helpful here.

in the CLIN 0005 language indicates that the period of approximately thirty days, or at least payment for it, can be cut off early or prorated for *less* than thirty days. That is made clear when we look at the "Estimated Unit" language for CLIN 0006, which defines the unit as "[m]onthly when a property is assigned *until it is removed or converts to HUD vacant*." Exhibit 1 at R-000007 (emphasis added). That language in CLIN 0006 connotes that the fee payment will cease, or be prorated, upon the date that the property is removed from the CLIN 0006 portfolio. HUD is arguing that CLIN 0005 should be interpreted to have the same effect as CLIN 0006. In fact, it affirmatively asserts that "there is no logical reason as to why CLINs 0005, 0006, and 0007 would be paid differently from one another." Respondent's Response Brief at 4. Yet, CLINs 0005, 0006, and 0007 all use different language in defining their "Estimated Units." If we interpreted CLIN 0005 in the same manner as CLIN 0006, the "until it is removed or converts to HUD vacant" language in CLIN 0006 would be superfluous. As previously discussed, interpretations that render portions of a contract superfluous are disfavored. *NVT Technologies*, 370 F.3d at 1159.

In addition, it is very clear that HUD was well aware of the type of language necessary to permit proration to a period of less than one full month. In addition to the CLIN 0006 language, HUD originally included in these contracts a clause that expressly addressed prorated payments at the contract's expiration. In the original version of section B.5, the contractor expressly "accept[ed] the risk that, upon expiration of the contract, including any options to extend that are exercised, properties assigned to it may remain unlisted or unsold" and that, "[i]n such case, in accordance with the fixed unit price nature of this contract, the Contractor shall only receive the portion of the fixed unit price due for the property as reflected in [section B.4]." Exhibit 1 at R-000015; Exhibit 47 at R-001375. Although HUD later amended section B.5 to eliminate this language, it is clear that HUD understood what was necessary to prorate. In addition, as with CLIN 0006, if HUD could prorate CLIN 0005 monthly payments without including the type of language originally set forth in section B.5, it would render that portion of the original section B.5 superfluous, in violation of contract interpretation principles. The fact that HUD included language expressly providing for prorating to a period of less than one full month in the contracts for some payments, but did not include it for CLIN 0005, supports an interpretation that the "monthly" payment under CLIN 0005 should not be reduced to a less-than-one-full-month period.

In effect, HUD asks us to interpret the word "monthly" to mean "daily." That is, HUD believes that it should pay Asons on a daily basis for each day that a CLIN 0005 property is in Asons' portfolio. It wants to limit its payments in any given month to those days within the month that Asons actively held that property as part of its services portfolio. Had HUD used the word "daily" in CLIN 0005, its intent would have been clear: if a property was assigned to Asons on March 15 and removed three days later, HUD would pay for four days of services. But the contract does not say "daily," and we have not identified

any basis upon which to contort the "monthly" fee language of CLIN 0005 into something that really provides for a daily fee.

HUD asserts that section G.2, which provides payment for "work . . . performed," sets forth the type of language necessary to permit prorating and to change the meaning of the word "monthly" to "daily." Yet, section G.2 provides that the payment for "work . . . performed" is defined "as stated in Part I, Section B of this contract." Exhibit 47 at R-001383. Section B.4, which is contained within "Part I, Section B," defines the property management fee period for CLIN 0005 as "monthly." Again, we cannot identify any logical way to define "monthly" as "daily" or "a thirty-or-so-day period, minus those days for which work was not ordered." The contracts simply do not say that.

HUD also references language in section G.2 providing that contractors will be paid "the fixed-unit-rate for the applicable CLINs" and argues that, by using the word "rate," the clause makes clear that HUD can simply pay a portion of the monthly property management services fee – that the monthly fee is really a monthly "rate" that can be prorated instead of a firm monthly fee. Again, there is no reasonable way to interpret the word "monthly" as something less than a full month simply because the contracts say that Asons will be paid the "fixed-unit-rate." Section G.2 qualifies the term "fixed-unit-rate" by indicating that it is "as stated in Part I, Section B of this contract." Section B defines the CLIN 0005 unit as "monthly" and identifies an associated unit price – it does not provide for discounts or percentage reductions in "monthly" fees. It seems clear that the use of the word "rate" in "fixed-unit-rate," in the context in which it is used in these contracts, means the "amount paid or charged for a good or service." *Black's Law Dictionary* 1452 (10th ed. 2014). Unless we can identify two reasonable competing interpretations of CLIN 0005's meaning, there is no basis for finding an ambiguity. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993) ("A contract is ambiguous if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language."). Any attempt to force HUD's proposed interpretation into the language of sections B.4 and G.2 creates not a reasonable possible interpretation of the contract language, but a confusing morass of words and phrases that results in no logical meaning at all. HUD's unreasonable interpretation cannot create an ambiguity.

HUD further asserts that, in the Questions and Answers (Q&As) that were made part of the solicitation for these contracts, HUD made a statement suggesting that monthly fees would be prorated to less than a full month. That Q&A reads as follows:

> B.5: At the end of the contract will the Vendor be paid for FSM services rendered on unlisted and/or unsold properties?

> Response: The FSM vendor will receive their monthly property management or vacant lot fee during the period of time the property remains in their inventory. The FSM vendor will be reimbursed for all allowable pass through expenses.

Exhibit 41 at R-001159. As made clear in the question itself, this Q&A relates to "the end of the contract." *Id.* There is a specific provision in the contract, section B.5, titled "Payment At Contract Expiration," which deals with how properties unsold at the end of the contract will be handled. *See* Exhibit 64 at R-001657. The on-going CLIN 0005 "monthly" property management services fee is not covered by section B.5, but by section B.4. Section B.4 says nothing about prorating monthly fees to a period of less than a full month, and HUD's attempt to apply a Q&A relating to section B.5 to redefine the meaning of the word "monthly" in the unrelated section B.4 is unfounded. Even if the Q&A expressly applied to section B.4, the language is simply too vague to put Asons on notice that, by saying "monthly," HUD meant "monthly but subject to proration to something less than a full month."

HUD also maintains that Asons cannot rely upon its interpretation of CLIN 0005 as not permitting prorating because Asons did not hold that understanding when it executed its contracts. Respondent's Motion for Summary Relief at 32-33. As support, it cites to an e-mail message from Asons, sent soon after contract award, in which Asons expresses confusion over why a provision that was contained in an early version of the solicitation – one that (like the predecessor M&M II contracts) provided for payment of a single management fee over the course of four months – was not in its awarded contracts, apparently not realizing that the four-month fee provision was deleted from the solicitation by amendment during the procurement process. *See* Exhibit 49 at R-001531. It is true that, "where a contractor seeks recovery based on his interpretation of an ambiguous contract, he must show that he relied on this interpretation in submitting his bid." *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990) (quoting *Lear Siegler Management Services Corp. v. United States*, 867 F.2d 600, 603 (Fed. Cir. 1989)). "This rule is aimed at preventing contractors from recovering additional compensation under a contract based on a mere afterthought, i.e., based on an interpretation of the contract not contemplated by the contractor at the bidding stage." *Fry Communications, Inc. v. United States*, 22 Cl. Ct. 497, 510 (1991). A contractor cannot "contend that it relied on any interpretation of [the] specification" at the bidding stage "when it had no knowledge of its existence." *Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1185 (Ct. Cl. 1973). The rule only applies, though, if the contract term is ambiguous. *Meredith Construction Co.*, ASBCA 41736, 93-2 BCA ¶ 25,864, at 128,685; *Roberts Construction Co.*, ASBCA 32171, 86-2 BCA ¶ 18,981, at 95,859. Here, although we have not yet decided when the one-month period for calculating monthly payment begins, we have found that, once the "month" begins, the

contract's plain language does not permit CLIN 0005 prorating to a period less than a full one-month period and that HUD's interpretation to the contrary is not reasonable. Accordingly, because there is no ambiguity, the rule requiring reliance when bidding has no application.[9]

HUD finally asserts that, if we do not find the right to make prorated fee payments obvious from the contracts' terms, we could imply that term into the contracts to fill a gap or an omission. In support, HUD cites to *Restatement (Second) of Contracts* § 204 (1981), which states that, "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Id.* Here, though, there is no omission. There is no gap. HUD, whether intentionally or not, issued a solicitation that provided for payment of monthly fees under CLIN 0005 and did not provide for fee proration, and it awarded Asons contracts containing that provision. That is not a gap or omission, but is the requirement to which HUD agreed. We have no basis for changing those agreements after-the-fact by adding terms to redefine the parties' bargain.

The real problem here is that HUD did not create the contract that it originally intended. HUD's original drafts of the solicitation provided that the CLIN 0005 "Estimated Unit" would be precisely the same as that for CLIN 0006: "Monthly when a property is assigned until it is removed or converts to HUD vacant." Yet, for reasons unclear from the record, the CLIN 0005 language was somehow changed during the procurement process to read "monthly," without the qualifying language, even while the CLIN 0006 went out as originally drafted. The record makes clear that numerous HUD employees, upon discovering the change in the CLIN 0005 solicitation language, recognized that the solicitation needed

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[9] HUD's argument about Asons' reliance is odd since it does not appear that HUD can show its *own* reliance during the procurement process on *its* current interpretation. HUD employees' belief during the procurement process that CLIN 0005 prorating was permissible was clearly based on language that was not ultimately included in the contracts. To the extent that the record contains any evidence about HUD's understanding at the time of bidding as to whether the contracts, *as they are written*, permitted proration, it shows that at least some HUD employees believed that they did not. There is no reason that the same reliance rule that HUD seeks to impose on the contractor should not apply equally to HUD. *See Fry Communications*, 22 Cl. Ct. at 510 (purpose of reliance requirement is to prevent party from imposing extra financial obligations on other as "mere afterthought" when, after contract award, it discovers means of interpretation that would provide the party extra money). Nevertheless, because we find that CLIN 0005 is unambiguous with regard to prorated fee payments, we need not resolve this issue.

to be changed before award to permit CLIN 0005 prorating. But no change in language was ever made. There is no basis for placing the burden upon the contractor to compensate for HUD's actions, even if those actions were a mistake. All of the communications in the record about the change in the CLIN 0005 solicitation language and the possible effect of the change are internal to HUD. There is no evidence that anyone ever shared with offerors before the contracts were awarded that different CLIN 0005 language was intended or that HUD expected to prorate CLIN 0005, such that Asons could have had no notice of HUD's unstated intent. Asons is bound only by the language in the contracts that it actually executed, *see Enterprise Information Services, Inc. v. Department of Homeland Security*, CBCA 4671, 15-1 BCA ¶ 36,010, at 175,886-87 (language, even if originally in solicitation, that was not incorporated into contract cannot change parties' obligations under the contract language actually written), and the actual contract language here does not permit CLIN 0005 fee proration to a period of less than a full month.[10]

2. Prorating Under CLIN 0007

We reach a different result with regard to CLIN 0007. Unlike CLIN 0005, the "Estimated Unit" for CLIN 0007 is "[m]onthly until sold." Exhibit 1 at R-000007. That is the language HUD originally intended to use for CLIN 0007. Under rules of contract interpretation, the addition of the "until sold" language to the word "monthly" has to have some purpose and meaning. *See NVT Technologies*, 370 F.3d at 1159. Because the word "monthly" in CLIN 0005 does not permit proration to something less than a full period of approximately thirty days, the addition of "until sold" in CLIN 0007 could have no other purpose but to *permit* HUD to stop payment of the monthly fee when the CLIN 0007 property is sold, even if it is sold mid-month. Accordingly, we find that CLIN 0007 permits proration.

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[10] HUD asserts that, at a minimum, the contract must be patently ambiguous as to prorating because "several different individuals had spotted a potential omission in the contract language as to whether property management fees were to be prorated." Respondent's Motion for Summary Relief at 38 n.21. The "individuals" to whom HUD refers are all HUD employees, who knew what the original intended language for CLIN 0005 was and then noticed that the actual solicitation contained different language. In the circumstances here, it would be wholly unfair to impose upon Asons the same level of knowledge, and obligation to identify an ambiguity, as HUD employees who were personally involved in the agency's internal development and implementation of the solicitation. HUD has identified no reason why Asons, prior to contract award, should have recognized that HUD had meant to include different language in the solicitation than it did.

Decision

For the reasons discussed above, the Board cannot decide the question of when a "month," for purposes of establishing when fee payments commence, starts under either CLIN 0005 or CLIN 0007. Given the competing evidence that the parties have submitted, the Board cannot property resolve that issue on a motion for summary relief. It will have to be resolved through further proceedings.

Nevertheless, we can, and do, grant summary relief on the issue of when the "month" ends under both CLINs 0005 and 0007, ruling in Asons' favor on CLIN 0005 and HUD's favor on CLIN 0007. While we do not decide here when payment under CLIN 0005 commences, regardless of when the "month" commences as to that CLIN, payment will run from that date to the day before the corresponding date in the next month – that is, if the "month" begins on January 1, payment for property management services will run through January 31, even if HUD cancels services for the property on January 15; if the "month" begins on January 10, payment will run through February 9, even if the property leaves inventory on February 3. As to CLIN 0007, HUD is entitled to prorate payment for the final month to reflect the number of days in inventory, so that, if the "month" starts on January 1 but leaves inventory on January 15, HUD will pay only for that fifteen-day period. Accordingly, CLIN 0005 will be paid in full monthly increments (of twenty-eight to thirty-one days, depending upon the month), but CLIN 0007 need not be paid in a full increment for the last month that a property is in inventory.

Accordingly, we **DENY** both parties' motions for summary relief as to the question of when the "monthly" fee payment under the contract begins. Nevertheless, we reject HUD's release, waiver, partial performance, and trade usage arguments.

We **GRANT IN PART** each party's motion for summary relief with regard to whether, once payment of the monthly fee for a particular property under CLIN 0005 or 0007 commences, the fee payment can be prorated to a period of less than a full month. We grant Asons' summary relief motion as to CLIN 0005, holding that HUD is *not* entitled to prorate the CLIN 0005 monthly fee to something less than one full month. We grant HUD's summary relief motion as to CLIN 0007, holding that HUD is entitled to prorate the last CLIN 0007 fee payment for vacant lot property management services for an assigned vacant lot to the date that the lot under that CLIN is sold.

Any interest on any judgment entered in Asons' favor under the CLIN 0005 claim will run from December 8, 2010, and any interest on the CLIN 0007 claim will run from November 28, 2012.

The Board will schedule further proceedings in these consolidated cases by separate order.

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HAROLD D. LESTER, JR.
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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HOWARD A. POLLACK
Board Judge