UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: December 8, 2017

CBCA 3350-R, 3672-R, 4658-R, 4659-R

YATES-DESBUILD JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Thomas Lynch of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

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

LESTER, Board Judge.

Appellant, Yates-Desbuild Joint Venture (YDJV), seeks reconsideration of our decision dated September 19, 2017. It raises a single issue: that the Board did not adequately address its "prior material breach" defense to the liquidated damages that respondent, the Department of State (DOS), assessed against it. YDJV asserts that, because DOS withheld pre-award superior knowledge about threats by the Government of India (GoI) to withhold construction permits for the Mumbai consulate project unless and until various international tax disputes were resolved, DOS is barred from collecting any liquidated damages from YDJV for delays to the project for which YDJV is admittedly responsible. We deny YDJV's motion.

Background

As discussed in our previous decision in these appeals, *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, DOS awarded YDJV a contract on September 27, 2005, for the construction of a nine-building consulate compound in Mumbai, India. Although the project was supposed to take twenty-eight months to complete, it ultimately took more than six years.

On April 23, 2013, YDJV filed the first of four notices of appeal with the Board. In three of those appeals (CBCA 3350, 4658, and 4659), YDJV sought compensation for project delays and increased costs for which YDJV blamed DOS. In the other notice of appeal (CBCA 3672), filed January 8, 2014, YDJV challenged the Government's assessment of more than $11 million in liquidated damages. In its ninety-page pre-hearing brief and during a three-and-a-half-week hearing, YDJV complained of DOS's failure to disclose information in its possession prior to contract award indicating that the GoI might withhold construction permits for the consulate project in Mumbai as leverage to obtain DOS's assistance in resolving outstanding unpaid tax disputes. In YDJV's telling, that failure constituted an improper withholding of superior knowledge that entitled YDVJ to damages and that, applying critical path method (CPM) analysis principles, entitled YDJV to 880 days of compensable delay and 266 days of non-compensable time extensions. Appellant's Pre-Hearing Brief at 1. YDJV acknowledged prior to the hearing, however, that DOS was entitled to 151 days of liquidated damages. *Id.*[1]

After the hearing, YDJV included in its 138-page post-hearing brief a new argument (although it devoted little more than one page to it), asserting that DOS's superior knowledge withholding constituted a prior material breach that barred DOS from recovering *any* liquidated damages for the almost four years of delay that occurred in the completion of the project. YDJV did not address that argument in its post-hearing reply brief.

The Board, in its decision dated September 19, 2017, found that, while DOS had failed in its obligation to disclose its superior knowledge to YDJV regarding the likelihood that the GoI might hold construction permits in abeyance to force resolution of outstanding tax disputes, the tax dispute/permit issue did not cause any delays on the project for almost two years after contract performance began in September 2005. By the time that the GoI began to slow or cease issuing permits in early September 2007 because of tax disputes, the

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[1] YDJV also argued in its pre-hearing brief that, had it known of the tax disputes between the United States and the GoI, it would not have bid the project. Appellant's Pre-Hearing Brief at 9. We rejected that argument in our prior decision.

project was already behind schedule by 342 days, and YDJV was solely responsible for 340 of those days (with the remaining two days being excusable for reasons not caused by DOS). Although we found that DOS was subsequently responsible for a total of 389 days of delay caused by permit and tax dispute issues from early September 2007 through mid-August 2009, YDJV was entitled to compensation for only forty of those days because YDJV was concurrently responsible for 349 days of its *own* delays, unrelated to the tax dispute/permit issue, during the same period. In the end, we found that YDJV was responsible for a total of 1135 of the 1299 total days of delay on this project, although DOS was responsible for concurrent delay for 391 of those delays, and that YDJV was entitled to only forty days of compensable delay for which DOS was wholly responsible.

As part of that decision, we rejected an argument that YDJV had raised – that, pursuant to a decision by the Court of Claims in *Atlantic Dredging Co. v. United States*, 53 Ct. Cl. 490 (1918), and a Supreme Court decision affirming it, *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920), YDJV was entitled to recover damages that would place it in the position that it would have occupied if it had never entered the contract in the first place. *Yates-Desbuild*, 17-1 BCA at 179,689-90. As part of that discussion, we also determined that DOS's superior knowledge withholding "affected only one aspect of the construction period and did not constitute a total breach" and that DOS could recover liquidated damages. *Id.* at 179,690. We found that, in the circumstances of this project, DOS was entitled to recover liquidated damages for 744 delay days (less forty days of compensable delay to which we found YDJV was entitled). *Id.* at 179,684-85, 179,707-08.

On October 19, 2017, YDJV timely filed a motion for reconsideration, consistent with Board Rule 26(c) (48 CFR 6101.26(c) (2016)), asking the Board for further clarification regarding its first material breach defense to DOS's liquidated damages claim and asserting that, subsequent to the completion of post-hearing briefing, there were two significant decisions regarding that issue of which it wanted the Board to be aware: the Court of Appeals for the Federal Circuit's decision in *Laguna Construction Co. v. United States*, 828 F.3d 1364 (Fed. Cir. 2016), and the decision of the Armed Services Board of Contract Appeals (ASBCA) in *Kellogg Brown & Root Services, Inc.*, ASBCA 56358, et al., 17-1 BCA ¶ 36,779. Based upon those two decisions, YJDV argued, it was appropriate for the Board to revisit YDJV's prior material breach defense.

Following YDJV's request for reconsideration and our review of the record relating to that issue, we asked YDJV to clarify when it first notified DOS of its prior material breach defense. YDJV responded that, because its prior material breach defense to DOS's liquidated damages claim is based upon the same set of operative facts as its affirmative superior knowledge claim, DOS should have recognized that it might raise the defense, even though YDJV never affirmatively "use[d] the terms 'prior material breach' as a defense to

DOS's ability to recover liquidated damages" prior to filing its post-hearing brief. Appellant's Response at 1.

Discussion

I. Standard of Review

"A motion for reconsideration must be based on the acquisition of newly discovered evidence or the showing of legal error." *Sims Paving Corp.*, DOT BCA 1822, 91-2 BCA ¶ 23,733, at 118,868. YDJV's claim of error is the Board's failure adequately to discuss the prior material breach defense in its prior decision. By allowing DOS to recover liquidated damages in our prior decision, it should be clear that we rejected YDJV's late-raised defense. Nevertheless, to ensure that the record in these appeals is clear, we address YDJV's reconsideration request below.

II. YDJV Waived Its Prior Material Breach Argument

"Post-trial briefs are not generally appropriate places to raise one's theory of the case." *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 219 n.14 (3d Cir. 1999).

Before it filed its post-hearing brief, the main focus of YDJV's appeals was DOS's failure to disclose prior to contract award information in its possession that the GoI had threatened to withhold construction permits for the consulate project in Mumbai as leverage to obtain DOS's assistance in resolving outstanding unpaid tax disputes. In YDJV's original telling, that failure constituted an improper withholding of superior knowledge that, applying critical path method (CPM) analysis principles, entitled YDJV to 880 days of compensable delay and 266 days of non-compensable time extensions and DOS to 151 days of liquidated damages. Appellant's Pre-Hearing Brief at 1. Although YDJV supplemented its superior knowledge withholding theory with several other legal and factual theories affecting DOS's entitlement to liquidated damages, it never mentioned prior to or during the hearing that it viewed the non-disclosure of information as a prior material breach barring DOS from *any* recovery of liquidated damages for the duration of the contract, even though it had ample opportunities during extensive pre-litigation discussions, discovery, pre-hearing exchanges and stipulations, and a ninety-page pre-hearing brief to do so.[2] When it finally raised the

[2] YDJV contends in a supplement to its motion for reconsideration that the parties tried the prior material breach defense at the hearing by implied consent. We find that contention unsupported by the record.

argument for the first time in its 138-page post-hearing brief, YDJV devoted little more than one page to it, and it did not address the issue in its post-hearing reply brief at all.

"In considering whether a new issue may be raised after the trial of a case, the major concern must be to avoid prejudice to the litigants." *Zwicker Knitting Mills v. United States*, No. 496-78, 1980 WL 4737, at *11 (Ct. Cl. Trial Div. Nov. 25, 1980). "[I]t would be grossly unfair to allow a plaintiff to go to the expense of trying a case only to be met by a new defense after trial." *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1161 (3d Cir. 1989); *see National Association of Life Underwriters, Inc. v. Commissioner of Internal Revenue*, 30 F.3d 1526, 1531 (D.C. Cir. 1994) ("it is reversible error for" a tribunal to consider arguments raised for the first time in a post-trial brief "where the opposing party is prejudiced"). "When one party utterly fails to raise a significant issue before the [hearing], the record developed with regard to that issue will usually be inadequate to support a substantive finding in its favor and, generally speaking, [the tribunal] should [not] consider such an issue." *Trident Seafoods, Inc. v. National Labor Relations Board*, 101 F.3d 111, 116 (D.C. Cir. 1996). As a result, issues raised for the first time after trial are routinely considered waived. *See, e.g.*, *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 935 (8th Cir. 1999); *Trident Seafoods*, 101 F.3d at 116; *Union Pacific Railroad Co. v. United States*, 524 F.2d 1343, 1365 (Ct. Cl. 1975); *Galesburg 67, LLC v. Northwest Television, Inc.*, No. 15-C-5650, 2017 WL 3608204, at *3 (N.D. Ill. Aug. 22, 2017); *Eagle Contracting, Inc.*, AGBCA 88-225-1, 92-3 BCA ¶ 25,018, at 124,702.

An issue raised for the first time after trial causes potential prejudice not only to the opposing party, but also to "the adjudicatory process" itself. *SUFI Network Services, Inc. v. United States*, 113 Fed. Cl. 140, 145 (2013) (quoting *Nager Electric Co. v. United States*, 396 F.2d 977, 982 (Ct. Cl. 1968)), *aff'd in part and vacated in part on other grounds*, 785 F.3d 585 (Fed. Cir. 2015). The Board was unaware during the hearing that YDJV was challenging DOS's right to assess *any* liquidated damages under this contract. YDJV in its pre-hearing brief indicated the opposite, expressly acknowledging that DOS was entitled to liquidated damages covering at least 151 days of delay. Further, in its motion for reconsideration, YDJV alleges that its prior material breach defense negates the necessity of the Board's "determination of the critical path, or analysis of potential concurrent delays to the critical path," Motion for Reconsideration at 9, which were a central focus of the three-and-a-half-week hearing and the Board's extensive September 19, 2017, decision. By having the Board sit through a hearing focused upon the parties' competing critical path analyses, without disclosing a defense that, by YDJV's telling, would have eliminated the necessity of much of that hearing, the appellant rendered inefficient the Board's use of its and the parties' time, and it precluded the Board from focusing during the hearing upon facts relating to the prior material breach defense and ensuring that they were sufficiently developed to allow for a fully informed decision.

The prejudice issue is particularly relevant in the situation here, given that, because of YDJV's failure timely to raise this defense to DOS's liquidated damages claim, DOS had no reason to question YDJV's witnesses or develop an evidentiary record as to (and the Board had no reason to focus upon) whether YDJV had waived the defense during contract performance. "A [prior] material breach does not automatically and *ipso facto* end a contract." *Cities Service Helex, Inc. v. United States*, 543 F.2d 1306, 1313 (Ct. Cl. 1976). Instead, it "gives the injured party the *right* to end the agreement," but allows it to "choose between canceling the contract and continuing it." *Id.* (emphasis added). "If [the party] elects . . . to continue the contract [after learning of the prior material breach], the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach." *Id.* Although there are at least four approaches for determining whether a party's election to continue performance waives its ability to excuse its remaining performance obligations and deficiencies, *see Precision Pine & Timber, Inc. v. United States*, 62 Fed. Cl. 635, 648-49 (2004) (discussing four approaches described by the Court of Claims in *Cities Service*), all of them require the non-breaching party to make an election (with, at a minimum, some type of explicit reservation of rights to the breaching party) upon learning of the prior material breach. *Id.* at 648-51.

YDJV asserts that there is no evidence in the record showing that YDJV learned of DOS's withholding of superior knowledge until after contract performance was complete (that is, although YDJV learned of the tax dispute's effect on permit issuance during contract performance, YDJV did not know until after contract completion that DOS was aware prior to contract award of threats by the GoI to withhold permits) and that it could not have waived DOS's prior material breach because it never made a knowing election to continue contract performance after learning the full extent of the breach. Yet, there was no reason for DOS to develop the record on this point during discovery or at the hearing. When evaluating a superior knowledge claim, we look at pre-award information: the Government's pre-award knowledge of significant information, the contractor's pre-award lack of knowledge, and the pre-award availability of that information from other sources. *Grumman Aerospace Corp. v. Wynne*, 497 F.3d 1350, 1357 (Fed. Cir. 2007). Unaware of that pre-award information, the contractor does not account for it in the contract price that it includes in its proposal, and it is entitled to an equitable adjustment (or damages) for any increased costs resulting from its lack of equal knowledge when preparing its proposal. To prove its increase in costs, it is not necessary for either the contractor or the Government to establish *when*, exactly, the contractor learned after award that the Government had withheld previously known information. The relevant inquiry is whether unanticipated costs were incurred that, had the Government shared before award what it knew, the contractor could have included in its proposal.

YDJV waived its prior material breach defense by not raising it before filing its post-hearing brief.

III. Even If Timely Raised, YDJV's Prior Material Defense Lacks Merit

Even if YDJV had timely raised its prior material breach defense to DOS's liquidated damages claim, we would reject it.

Under the doctrine of prior material breach, "when a party to a contract is sued for breach, it may defend on the ground that there existed a legal excuse for its nonperformance at the time of the alleged breach," *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1380 (Fed. Cir. 2004), and tribunals "will 'often . . . impose liability on the party that committed the first material breach.'" *Id.* (quoting E. Allen Farnsworth, *Farnsworth on Contracts* § 8.15, at 439 (1990)). The rule is "based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties . . . if there has already been an uncured material failure of performance by the other party." *Id.* at 1380-81 (quoting *Restatement (Second) of Contracts* § 237 cmt. b). At a certain point, a party's uncured material breach will discharge the other party's remaining duties to render performance. *Restatement (Second) of Contracts* § 242. This rule applies even if the defending party "was then ignorant of" that legal excuse when it committed its own breach. *College Point Boat Corp. v. United States*, 267 U.S. 12, 15 (1925).

Nevertheless, not every contract breach constitutes a prior material breach that discharges the other contracting party's remaining performance obligations or excuses its performance deficiencies. *See Dunkin' Donuts Inc. v. Gav-Stra Donuts, Inc.*, 139 F. Supp. 2d 147, 155 (D. Mass. 2001) ("Not all breaches of contract by one party will excuse performance by the other."). "Being guilty of a wrong does not make the breaching party an outlaw or deprive the breaching party of all rights, even the rights created by the contract that is broken." 13 Sarah Howard Jenkins, *Corbin on Contracts* § 68.2, at 158 (rev. ed. 2003). Some breaches only "give rise to a claim for damages for partial breach" rather than discharging the other party's performance obligations. *Restatement (Second) of Contracts* § 241 cmt. a. The standard of materiality necessary to fall within the prior material breach doctrine "is necessarily imprecise and flexible," giving tribunals latitude to evaluate the specific circumstances surrounding a particular breach in applying the prior material breach doctrine. *Id.*; *see* 13 Sarah Howard Jenkins, *supra*, § 68.2, at 158 ("The remedy varies with the circumstances of each case."). "Whether a breach is so substantial as to justify an injured party's regarding the whole transaction as at an end 'is a question of degree; and must be answered by weighing the consequences in the actual custom of men in the performance of contracts similar to the one that is involved in the specific case.'" *Milton Regional Sewer*

Authority v. Travelers Casualty & Surety Co. of America, No. 4:13-CV-2786, 2014 WL 5529169, at *6 (M.D. Pa. Nov. 3, 2014) (quoting *2401 Pennsylvania Corp. v. Federation of Jewish Agencies of Greater Philadelphia*, 466 A.2d 132, 139 (Pa. Super. Ct. 1983) (quoting 4 Arthur L. Corbin, *Corbin on Contracts* § 946 (1951))).

The *Restatement* identifies the following factors for tribunals to consider in evaluating whether a breach is sufficiently material to defer a party's performance obligations in response to a prior breach:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241. In addition, before finding that a party's performance obligations are completely *discharged* and its own performance deficiencies excused, two additional factors are to be considered along with those stated above: (1) "the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements," and (2) "the extent to which the agreement provides for performance without delay" in circumstances "indicat[ing] that performance or an offer to perform by [a specific] day is important." *Id.* § 242.

Applying these factors, the centerpiece of the tribunal's obligation in evaluating a prior material breach defense has to be to identify the scope and extent of the actual "ill effects" that the responding party suffered because of the other party's prior breach:

> Indeed, regarding a breach merely as a wrong without regard to the extent and quality of its ill effects does not discharge the other party. It is not the fact of breach that results in a discharge but rather when the ill "effects" of the breach are so material to the interests of the other party that a mere judicial remedy is insufficient to satisfy the requirements of justice as felt by the community. Only if the *effects* of the breach are material is the legal duty of the other party suspended or discharged.

13 Sarah Howard Jenkins, *supra*, § 68.2, at 158-59 (emphasis added); *see* 14 Richard A. Lord, *Williston on Contracts* § 43:6, at 627-28 (4th ed. 2013) ("It is ultimately a question of degree, which, it has been said, should be decided based on the inherent justice of the matter.").

Further, and importantly, the prior material breach doctrine defers or discharges a party's remaining performance obligations *only* to the extent that the prior material breach remains *uncured*. "Even if the failure is material, it may still be possible to cure it by subsequent performance without a material failure." *Restatement (Second) of Contracts* § 237 cmt. b; *see LNV Corp. v. Outsource Services Management, LLC*, 869 F.3d 662, 670 (8th Cir. 2017) (contract law "conditions future contract performance on there being no *uncured* prior material breach"); Amy B. Cohen, *Reviving Jacob and Youngs, Inc. v. Kent: Material Breach Doctrine Reconsidered*, 42 Vill. L. Rev. 65, 81 (1997) (if material failure "remains uncured for a period of time beyond that allowed by the intent of the contract," it permits non-breaching party to "withhold performance permanently"). "[A] party who has cured a material breach has still committed a breach, by his delay, for which he is liable in damages." *Restatement (Second) of Contracts* § 242 cmt. a. But the responding party, once the material breach is cured, can no longer excuse its own continuing performance breaches and deficiencies through reliance on that defense.

In this case, the harm to YDJV from DOS's non-disclosure was the knowing and likely *possibility* (based upon threats that the GoI had made) that, at some point during contract performance, the GoI would hold YDJV's construction permits in abeyance pending DOS's assistance in resolving various tax disputes. Although YDJV should have been told of the GoI's threats prior to contract award, whether the GoI would actually follow through on those threats or that YDJV would suffer any actual delay or damage from DOS's failure to disclose the possible GoI future action was not definite at the time of contract award. DOS expected diplomatic efforts to resolve the issue before it could have any impact upon the project. And, in fact, for a significant period of time after contract performance began, the GoI actually issued construction permits for the Mumbai complex, causing no harm or delay to YDJV. For the first two years of contract performance – from September 27, 2005, to the end of August 2007 – it was YDJV, not DOS, that was responsible for 340 days of

performance delays, delays that had no causal connection to tax disputes. It was not until September 2007 that the first tax-related delay (that one for a twenty-day period) occurred. If we look at the "ill effects" of DOS's superior knowledge withholding for the first two years of contract performance, those effects were minimal in the overall scheme of contract performance and certainly not "material" from a breach standpoint.

Beginning in 2008, the tax dispute started to have a much more significant impact upon the permit process, an impact that did not begin to wind down until June 23, 2009, when, at the direction of the Secretary of State, DOS issued a public notice formally exempting from local, state, and federal taxation any real property in the United States that a foreign government owned and was using to house staff of permanent missions to the United Nations. *See* 74 Fed. Reg. 31,788 (July 2, 2009). In our September 19, 2017, decision, we attributed a total of 389 days of delay to DOS (in what we defined there as periods 1, 2, and 3) for tax-related issues that caused permit delays. Nevertheless, only two buildings – the main compound access control building (MCAC) and, to a lesser extent, the warehouse – were significantly affected by that delay. For most of periods 2 and 3, while waiting for the MCAC permit (known as a further work commencement certificate (FWCC)) to be issued, YDJV had FWCCs for all of the other buildings in the Mumbai complex. Despite that fact, YDJV was wholly unable – for reasons not caused by the tax disputes or by DOS's failure to disclose pre-award superior knowledge (with the exception of some delay associated with warehouse construction) – to progress on the other buildings because of problems of its own or, more accurately, of its subcontractors' making. As we recognized in our September 19, 2017, decision, had there been no delays caused by the tax dispute issues, YDJV would still not have progressed on this project. In fact, we found that, for periods 2 and 3, 349 of the delay days for which DOS was responsible were concurrent with YDJV delay days (and that YDJV was responsible for an additional thirty-one days of non-concurrent delay). Again, looking at the totality of circumstances during periods 2 and 3, it is impossible to say that the "ill effects" resulting from DOS-responsible delays outweigh the ill effects caused by YDJV's own delays.

By July 20, 2009, the GoI had conducted a joint plinth inspection for the MCAC, and the FWCC for that building was issued on August 12, 2009. At that point in time, DOS had effectively cured the breach arising from its pre-award non-disclosure about possible permit problems. The extensive delays that occurred after that date were *not* the result of permit issuances and were not DOS's fault or responsibility. As described in our September 19, 2017, decision, they largely arose because of YDJV's own performance oversight problems and, to some extent, changes in the GoI's visa policy. YDJV cannot claim that DOS waived its ability to recover liquidated damages for YDJV-caused delays during periods after which DOS had already cured the tax disputes that had been interfering with the permit issuance process.

The situation here differs from that in cases like *Laguna Construction* and *Christopher Village, L.P. v. United States*, 360 F.3d 1319 (Fed. Cir. 2004), in which the Federal Circuit applied the prior material breach doctrine to breaches involving fraud by a contractor. Citing prior court precedent, the Federal Circuit in *Christopher Village* recognized that "any degree of fraud [under a government contract] is material as a matter of law" and that "efforts to defraud the government that are or may be successful are particularly culpable." *Christopher Village*, 360 F.3d at 1335-36. Further, such fraud is not curable for purposes of the prior material breach doctrine because, by its nature, it is "hurtful to the Government's procurement practices" and "undermines the security of the prime contractor's performance," justifying a public policy that requires the United States to be "able to 'rid itself' of contracts that are 'tainted' by fraud." *Laguna Construction*, 828 F.3d at 1371-72 (quoting *United States v. Acme Process Equipment Co.*, 385 U.S. 138, 143-46 (1966)); *see Long Island Savings Bank, FSB v. United States*, 503 F.3d 1234, 1251-52 (Fed. Cir. 2007) ("false certification constitutes an uncured material failure of performance that precludes the plaintiffs' claim for damages"); *J.E.T.S., Inc. v. United States*, 838 F.2d 1196, 1200-01 (Fed. Cir. 1988) (contractor's fraud in procuring contract excused the Government's alleged subsequent breach); *Dunkin' Donuts*, 139 F. Supp. 2d at 155 ("There was a frustration of purpose when a breach involving fundamental dishonesty by one party occurred, because no amount of payment for past thefts by [defendant] could ever restore the business trust and confidence which plaintiff wanted to have in its distributors." (quoting 6 Colin K. Kaufman, *Corbin on Contracts* § 1266, at 23 (Supp. 1997)). Although it is possible for the Government to *waive* fraud in certain circumstances through continued contract performance after full disclosure of the fraud, *see Long Island Savings Bank*, 503 F.3d at 1252, we are aware of no Federal Circuit decisions indicating that fraud as a material breach can be *cured*.

These appeals do not involve fraud. Here, the effect of DOS's pre-award non-disclosure was cured at, by the latest, mid-August 2009, when the tax disputes that were holding up permit issuances were wholly resolved. After that date, there were no further delays associated with permits resulting from tax disputes. YDJV cannot justify its performance failures after that cure by blaming DOS's pre-award withholding of information – that withholding simply had nothing to do with YDJV's performance failures. Even prior to the cure, YDJV's performance difficulties were largely of its own making. Although it blames DOS for the first material breach, it was YDJV who first delayed the project, creating 340 days of unexcused delay before the tie between permits and tax disputes had any "ill effects" on this project, and YDJV's delays continued for the next two years alongside and concurrently with delays for which DOS was responsible. In the circumstances here, it was not DOS's withholding of information that caused the first material performance failures on this project, and we see no reason to excuse YDJV's extensive performance failures during the entirety of this project – and to allow YDJV to recover affirmative monetary damages

after barring DOS from recovering any liquidated damages – simply because DOS's pre-award information withholding ultimately impacted the project schedule.[3]

Decision

For the foregoing reasons, YDJV's motion for reconsideration is **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge

[3] YDJV has asked that we apply *Kellogg Brown & Root Services, Inc.*, ASBCA 56358, 17-1 BCA ¶ 36,779, to find that the existence of the Changes clause in YDJV's contract did not limit its ability to mount a prior material breach argument and did not convert any material breaches into changes for which YDJV would be entitled to an equitable adjustment. It notes that the ASBCA in *Kellogg Brown* held that "the availability of a contract remedy does not mean the wronged party must avail themselves of that remedy in lieu of the affirmative defense of prior material breach." *Id.* at 179,249. We recognize that there is some case precedent contrary to YDJV's argument, *see Granite Computer Leasing Corp. v. Travelers Indemnity Co.*, 894 F.2d 547, 552-53 (2d Cir. 1990) (contract clause potentially converts what might otherwise be considered a material breach into a breach encompassed within the contract's remedy provisions); *DNC Parks & Resorts at Yosemite, Inc. v. United States*, 133 Fed. Cl. 314, 321-22 (2017) ("the parties are free to contract for, and are bound by, any legal terms included in a contract," and such terms can limit a party's remedy for prior material breach), but it is unnecessary for us to resolve that issue in light of our disposition of YJDV's motion for reconsideration.