UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED IN PART FOR LACK OF JURISDICTION;
DENIED IN PART:
December 8, 2017

CBCA 5116

VSE CORPORATION,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

David I. Bledsoe and Jason P. Matechak, Alexandria, VA, counsel for Appellant.

Hilary L. Martinson and J. Todd Casey, Office of Chief Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **ZISCHKAU**, and **LESTER**.

LESTER, Board Judge.

Appellant, VSE Corporation (VSE), has challenged a contracting officer's decision denying its request for an equitable adjustment to cover costs of extended storage of fireworks under a contract with respondent, the Department of Justice (DOJ) (acting through the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)). Initially, VSE argued that ATF constructively changed its contract by requiring the extended storage, with damages running from the date that VSE started performance under its contract. In

response, ATF filed a motion requesting summary relief in its favor on VSE's claim. VSE then filed an amended complaint adding two new counts – a breach of the duty of good faith and fair dealing claim and a superior knowledge withholding claim – and a new commercial impracticability legal theory to its constructive change count, after which the parties filed supplemental briefs. For the reasons set forth below, we dismiss VSE's appeal in part for lack of jurisdiction and otherwise grant summary relief to ATF.

Statement of Uncontested Facts

I. VSE's Original Contract

In 2006, the Department of the Treasury (Treasury) awarded contract TOS-06-052 (Treasury contract) to VSE, through which VSE was to provide nationwide services involving the transportation, storage, management, and disposition of seized or forfeited property for several federal agencies, including ATF. Respondent's Statement of Uncontested Facts (RSUF) ¶ 2. In the course of criminal investigations, ATF sometimes seizes property for forfeiture and evidentiary purposes, property that must be stored at least until ATF obtains authorization through legal proceedings to dispose of it. Appeal File, Exhibit 1 at 154-55.[1] Under the contract, storage services were paid on a cost-reimbursement basis, with costs calculated each month based upon the "per pound" weight of seized property stored.

In July 2007, VSE took possession of what was known as the "Covington seizure," which was being stored in bunkers at a facility owned by Heritage Disposal & Storage, L.L.C. (Heritage) in Alda, Nebraska. RSUF ¶¶ 3-4. The Covington seizure included more than 800,000 pounds of 1.3G and 1.4G fireworks[2] that were seized in what became part of a criminal action in the United States District Court for the Eastern District of Kentucky, docket number 08-CR-00056, against Sam Droganes, the original owner of the fireworks. *Id.* ¶ 3. Heritage initially charged VSE $0.10 per pound per month for storage of the Covington seizure, costs that VSE billed through to the Government under its cost-reimbursement contract.

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

[2] 1.3G explosives, formerly known as Class B special fireworks, are display fireworks that are designed to produce visible or audible effects for entertainment purposes by combustion, deflagration, or detonation, while 1.4G explosives, formerly known as Class C common fireworks, are consumer fireworks (such as firecrackers) intended for use by the general public. *See* http://www.americanpyro.com/glossary-of-pyrotechnic-terms.

Although Mr. Droganes was in the business of selling 1.4G fireworks, he had no license to sell 1.3G fireworks. Early testing showed that at least some fireworks that were identified as 1.4G fireworks were, in fact, 1.3G fireworks. On July 10, 2008, Mr. Droganes was indicted in the district court for the Eastern District of Kentucky for engaging in the business of importing, manufacturing, transporting, and distributing explosive material without an ATF license. The indictment contained a count seeking forfeiture of various fireworks.

On October 7, 2008, Mr. Droganes filed a motion for return of the legal 1.4G fireworks that ATF had seized. By order dated February 19, 2009, the district court directed ATF to "[p]rovide Mr. Droganes with a time table for the return of the legal 1.4G fireworks," but gave the United States until March 11, 2009, to complete its testing and segregation of the 1.3G and 1.4G fireworks. The court stated that, "although the segregation and/or testing of the 1.4G and 1.3G seized fireworks has taken an inordinately long time, because there are allegations of mislabeling of 1.4G fireworks, the United States is entitled to retain all fireworks labeled as 1.4G until such time as required to complete its testing." Nevertheless, it further stated that, "given the length of time which has elapsed since the July, 2007 seizure, the time deadlines for completion of segregation and testing must be strictly adhered to" and, "[o]nce the testing and/or segregation is complete, all fireworks determined to be 1.4G shall be returned to Defendant forthwith."

On March 11, 2009, an Assistant United States Attorney (AUSA) informed Mr. Droganes' counsel by letter that, apparently because of water damage and other degradation issues, the Covington seizure had become unfit to transport in interstate commerce, but that "ATF has agreed to compensate your client for the wholesale price of those items which should have been returned." The parties then made efforts to establish a proper value, but were ultimately unable to agree.

In May 2009, ATF asked VSE, for safety reasons, to "[r]e-palletize" the Covington fireworks being stored at Heritage. Exhibit 24 at 748. That reconfiguration required more storage space to be used, and Heritage, although it had a purchase order/subcontract in place with VSE, increased its storage billing rate from $0.10 per pound to $0.195 per pound. Applying that increased rate, Heritage began billing VSE approximately $170,000 each month for storage of the Covington seizure.

On July 31, 2009, Mr. Droganes pled guilty to one of the counts in a superseding indictment and, as part of his plea, agreed to forfeit the seized 1.3G fireworks, although the parties disagreed about how to classify some of Mr. Droganes' fireworks. Meanwhile, the Covington seizure remained in storage at Heritage's facility, subject to monthly payments from VSE to Heritage and from ATF to VSE.

II. The Solicitation for a Successor Contract

On December 20, 2009, ATF, now acting through DOJ, issued solicitation DJA-09-S-000067 (amended March 12, 2010), seeking proposals for a new nationwide contract for the transportation, storage, management, and disposition of certain types of property that ATF and another agency, the Food and Drug Administration (FDA) within the Department of Health and Human Services, might seize in the course of criminal investigations. RSUF ¶ 1; Exhibit 1 at 155. Like the Treasury contract, the solicitation indicated that the property to be stored would include alcohol, ammunition, explosives, tobacco products, and firearms. Exhibit 1 at 154. It further indicated that the awardee would "need to furnish secured storage facilities with adequate pallet/rack space capable of meeting the storage volumes listed in [the Statement of Work]." *Id.* at 155. The resulting contract would include a transition/phase-in period of up to 180 days, a base period of one year, and nine one-year option periods. *Id.* at 133-49.

ATF provided historical workload data as part of the solicitation, estimating that, typically, approximately ninety percent of seized property was ultimately destroyed and ten percent of such property (usually alcohol, tobacco, or fireworks) was sold, although a minimal amount of property would normally be returned to the original owner, retained by the agency, or transferred to another agency or charitable organization. Exhibit 1 at 155, 240. ATF represented in the solicitation that, "[o]n average, disposition is expected to occur within one year of seizure." *Id.* at 240. It then identified the general locations at which seized inventory was currently being stored under the predecessor contract, including the Heritage location in Alda, Nebraska, and the number and size of the containers, trailers, or pallets at each location. *Id.* at 241.

The solicitation provided that, "[i]f a substantial change from the estimated workload occurs, the Contract may be modified to reflect the change or changes." Exhibit 1 at 155. Nevertheless, the solicitation indicated that ATF retained the discretion to elect "to manage and dispose of some seized property in selected locations through mechanisms other than this Contract" and that "the Government makes no warranties, either expressed or implied, as to the future accuracy of historical workload." *Id.*

Several questions submitted during the solicitation process asked about expectations regarding the length of time between seizure and disposition. One offeror indicated that "[t]he quantities for estimated number of seizures per year and estimated on-hand seizures in the Workload Summary seems [sic] to indicate that seizures could be stored for multiple years while the Dispositions chart states that disposition is expected to occur within one year of seizure" and sought clarification of "the average length of time from seizure to disposition." Exhibit 1 at 55. Another indicated that "[t]he RFP states that 'On average,

disposition is expected to occur within one year of seizure,' but the Workload Summary table shows On-Hand Seizures to be far greater than the number of seizures that take place in a year," and asked whether the amount of seized goods in storage was expected to grow each year "due to the fact that a percent of seizures each year are not disposed of within a year." *Id.* at 75. In both instances, ATF responded that "[h]istoric workloads and statistics are not necessarily indicative of future plans or future occurrences," although "[i]t is the goal of the organization that future disposals will take place in a timely manner." *Id.* at 55, 75.

The solicitation indicated that the "transition/phase-in" period would "necessitat[e] an overlap of time when both contractors, the incumbent and successor, will be in force." Exhibit 1 at 167. The offeror was required, as part of its proposal, to present a "transition/phase-in plan" that, among other things, would show how the new contract awardee would assume responsibility for storage of existing property inventories; obtain all required leases, licenses, permits, and clearances necessary to perform; and "[t]ransition work from the incumbent contractor to ensure continuity of services." *Id.* It also had to provide a transition/phase-in schedule providing for the receipt and transfer of existing inventories of seized and forfeited property from the incumbent contractor to the new awardee. *Id.* at 169-70. That transfer of existing inventories included a requirement that, unless the new awardee intended to "re-contract" with the storage facilities being used by the incumbent, the successor contractor would need to "implement a plan of action to accomplish the transfer of the seized and forfeited property to its own Government-approved storage facilities." *Id.* at 171 ("These transfers would occur if the successor Contractor is not able or is unwilling to re-contract with the storage facilities currently used by the incumbent Contractor.").

The solicitation contained a provision describing how the new contractor could attempt to obtain a transfer of existing leases with the storage facility owners currently housing seized property, but it expressly disclaimed any responsibility for the owners' willingness to offer acceptable lease terms to the new contractor:

> If the successor Contractor desires to lease facilities leased by the incumbent Contractor, the [contracting officer (CO)] will, upon request, furnish the Contractor with a letter announcing the transition in order to contract with the landlords of these facilities. . . . *[T]he CO makes no representations as to whether the landlords will continue the same arrangements with the successor Contractor for the balance of the lease or subcontractor term*.

Exhibit 1 at 171 (§ C.1.10.7) (emphasis added). Similarly, the ATF-drafted "Transfer of Seized and Forfeited Property" clause expressly warned offerors that the existing landlords

holding leases for seized property storage space were under no obligation to continue such leases:

> Note: The Offeror (Contractor) is free to negotiate with the incumbent's existing subcontracted storage facilities should they desire to propose these facilities or vendors as subcontracts and thus reduce the need for local-to-local and specialty-to-specialty storage site transfers if awarded the Contract. However, the existing local and specialty storage facility vendors are under no obligation to do so.

Id. (§ C.1.10.8).

Once the transition/phase-in period of the contract ended and moved into the base period, the contractor would be expected to begin its physical custody and storage obligations. Contract Line Item Number (CLIN) 0006 identified the contractor's responsibilities for storage of hazardous items, indicating that the hazardous items covered by CLIN 0006 included "explosives and fireworks" that would need to be stored in bunkers:

Contract Line Item Number	**Task Description**	**Unit of Measure**	**Cost**	**Notes**
		* * *		
CLIN 0006	**Storage – Hazardous Items** Unload from in-coming delivery truck, inventory, secure, store, manipulate, load on out-going delivery truck, and release for disposition. Includes disposition methods other than destruction and sale.	Per square foot per month		Includes storage facility (bunker) and warehouseman costs. Hazardous items include explosives and fireworks.

Exhibit 1 at 131. The solicitation elsewhere identified the degree of care that hazardous items would require:

> The Contractor shall properly store hazardous items. When property is received that is identified by state or Federal regulation as hazardous, the Contractor shall store this material in accordance with Federal, state and local laws, codes, ordinances, and regulations that apply to environmental quality standards in each community where seized property is maintained or destroyed. . . .
>
> The Contractor shall utilize a storage location that is approved for storage of HAZMAT, and shall not store materials with dissimilar properties in the same area.

Id. at 234.

The solicitation also contained CLIN 0010 for "Other Direct Costs," which were "TBD [To Be Determined] by the Government Upon Award." Exhibit 1 at 132. It indicated that "[o]ther direct costs to be reimbursed by the Government include conference fees, travel costs, and per diem expenses associated with ATF-requested special meetings, conferences, briefings, and events related to this Contract." *Id.* at 126.

A clause titled "Disposition of Seized and Forfeited Property" provided that "[t]he seizing agencies maintain authority over all seized and forfeited property transferred to the Contractor" and that "[s]eized and forfeited property shall be maintained by the Contractor until its disposition." Exhibit 1 at 235 (§ 4.5). The solicitation also provided that "[t]he Contractor shall not move any property outside its storage facility without prior written approval of the [contracting officer's technical representative (COTR)]" and that "[a]ny movement of property between storage facilities shall" meet the safety standards set forth in the contract. *Id.* at 182 (§ C.4.4.8). It further stated that "[t]he Contractor shall dispose of seized and forfeited property in accordance with the disposition order signed by the COTR" and that "[d]isposition of seized and forfeited property may be made by: destruction; recycling; remittance; retention by seizing agency for official use; transfer to another Federal, state, or local agency or charitable organization; or sale." *Id.* at 235 (§ 4.5). It provided that, "[u]pon receipt of the disposition order, the Contractor shall execute the disposition using the method identified on the order." *Id.*

Section B of the solicitation indicated that ATF "expects to procure work under this Contract through Firm Fixed Price and Fixed Rate Contract Line items." Exhibit 1 at 126 (§ B.1.2). For the transition/phase-in costs in CLIN 0001, the offeror was to propose a

single fixed price for "all costs related to transition/phase-in, including relocation of seized and forfeited property from existing warehouses to Contractor facilities." *Id.* at 130. The solicitation then broke the pricing for different kinds of anticipated storage into four different CLINs: Storage – Non-Specialty Items (CLIN 0004), Storage – Climate Controlled Items (CLIN 0005), Storage – Hazardous Items (CLIN 0006), and Storage of Items in Administrative Custody (CLIN 0007). *Id.* at 131-49.

The pricing structure of each of these CLINs differed from the Treasury contract. While storage costs under the Treasury contract were calculated "per pound" of seized material each month, the new contract anticipated payment "per square foot [of storage space] each month." *Id.* at 131; *see* RSUF ¶ 24; Exhibit 7 at 526.

III. VSE's Proposal for the Successor Contract

VSE submitted its proposal in response to the solicitation on March 25, 2010. RSUF ¶ 26. Regarding the storage of hazardous items, VSE stated in its proposal that "[t]he VSE team's network of storage facilities provide safe and secure storage of explosives," with "many years experience storing explosives in secure bunker facilities," and identified a photo of the Heritage facility in Alda, Nebraska, as an example of its network. RUSF ¶ 29; Exhibit 3 at 331. It asserted that "[w]e have a complete understanding of the Statement of Work . . . and are positioned to satisfy those requirements at prices that are fair and reasonable." Exhibit 4 at 402; RSUF ¶ 37.

For the storage of hazardous waste, which was listed in the solicitation under CLIN 0006, VSE proposed a base year price of $1.95 per square foot, with incremental increases in each of the option years. RSUF ¶ 31; Exhibit 3 at 372-91. VSE has represented that it calculated this figure by converting a $0.10 per pound figure into a size estimate for the Covington seizure, which equated to approximately $1.77 per square foot (to which VSE would apply markups for general and administrative expenses). Exhibit 7 at 526.

While proposing a hazardous waste storage price of $1.95 per square foot under CLIN 0006, VSE had been paying Heritage substantially more than that amount for storage of the Covington seizure under the predecessor Treasury contract. Specifically, although VSE was already paying Heritage approximately $170,000 per month (roughly equivalent to a charge of $0.195 per pound), ATF would only pay about $72,500 to VSE each month for the Covington seizure storage under VSE's proposed CLIN 0006 price (roughly equivalent to a charge of $0.10 per pound). Exhibits 7 at 526, 20 at 725.

Further, when it submitted its proposal, VSE had been unable to negotiate a subcontract with Heritage. Despite having been unable to reach a subcontract agreement

with Heritage, VSE did not indicate any desire in its proposal to transfer the current inventory of seized property to any other facilities or to charge the Government for any transfer costs. For CLIN 0001, which covered transition/phase-in costs ("including relocation of seized and forfeited property from existing warehouses to Contractor facilities"), VSE proposed a price of $0.00. Exhibit 3 at 371.

IV. Continuing Storage of the Covington Seizure

During the solicitation process for the successor contract, VSE continued to store the Covington seizure at the Heritage facility under its Treasury contract, apparently continuing to bill Treasury at a rate of $0.10 per pound for storage even though Heritage, despite the fact that it had a subcontract with VSE, had started charging VSE $0.195 per pound.

The *Droganes* criminal prosecution also continued, but ATF did not return the legal 1.4G fireworks to Mr. Droganes following the district court's February 9, 2009, order or provide any compensation to Mr. Droganes for those fireworks (as the AUSA had indicated ATF would). On July 8, 2010, Mr. Droganes filed a motion with the district court seeking sanctions against the Government based upon ATF's failure timely to return his legal 1.4G fireworks.

V. The Successor Contract Award

On September 24, 2010, ATF, through DOJ, awarded its successor indefinite delivery/indefinite quantity (IDIQ) contract, contract DJA-10-D-000015 (ATF contract), to VSE. Complaint ¶ 10; RSUF ¶ 36; Exhibit 4 at 455. The contract provided for a base period of twelve months and nine one-year option periods, with no transition/phase-in period (based upon VSE's representation in its proposal that no transition activities were necessary). Exhibit 4 at 463. In accordance with Federal Acquisition Regulation (FAR) 16.504 (48 CFR 16.504 (2010)), the solicitation provided a minimum purchase guarantee by the Government for the base year (and, if exercised, for option years) of $1 million per year, with a contract ceiling of $80 million. *Id.* at 464; RSUF ¶ 37. It expressly stated that VSE's proposal of March 25, 2010, was incorporated into and made a part of the contract. Exhibit 4 at 464; RSUF ¶ 36.

After the new contract was awarded, VSE continued to store the Covington seizure at Heritage's facility. Complaint ¶ 10. ATF paid VSE for that storage under CLIN 0006 at the contractually-established rate of $1.95 per square foot. *Id.* ¶ 11.

VI. VSE's Complaints About Contract Costs

Almost immediately upon contract award, VSE complained that the amounts that it was being paid under CLIN 0006 were insufficient to cover its Covington seizure storage costs. At a technical meeting on October 5, 2010, VSE advised ATF that its monthly storage charges from Heritage exceeded its CLIN 0006 pricing and that its excess costs would continue to increase the longer that the Covington seizure was held. Motion for Summary Relief (MSR), Exhibit 2. VSE requested expedited disposition instructions to alleviate its mounting costs. The stated "action" from that meeting was that VSE would work with ATF and look for alternate storage locations in case the disposal instructions were not going to be timely. *Id.*

By February 16, 2011, ATF was informed that VSE had been unable to negotiate subcontract terms with Heritage because Heritage would not negotiate on pricing, meaning that VSE had no subcontract with Heritage. MSR, Exhibit 3. VSE informed ATF that it was paying Heritage for storage, but not at the prices that Heritage was demanding. *Id.* In response to concerns that Heritage was going to declare bankruptcy or might not protect the items in its possession, Heritage represented to ATF that it would "work in good faith, remain operational and open and providing the necessary security to government property as required while we continue to negotiate a final agreement" with VSE. Exhibit 5 at 523. Nevertheless, ATF asked VSE about the possibility of moving the Covington seizure to another facility, and VSE indicated that it would take approximately ninety days to prepare for a move, although both parties understood that special permits from the Department of Transportation (DOT) allowing for the transport of such hazardous materials would be necessary and that ATF likely would have to process a waiver request to DOT. MSR, Exhibit 3. In response to VSE's inquiry about the status of disposition for the Covington seizure, ATF stated that the issue was with the district court. *Id.*

VSE's excess unreimbursed costs continued to mount. In an attachment to its complaint, VSE has represented that, for storage during the month of October 2010, VSE paid Heritage a total of $176,553.96, but was reimbursed, in accordance with the terms of the ATF contract, only $72,540, a difference of over $100,000. *See* Complaint, Attachment D. It further alleged that, by January 2011, Heritage's monthly charge, for various reasons, had decreased to $95,580, but VSE was able to bill ATF only $70,200. *See id.* Although, in a February 2011 submission to ATF, VSE identified some slightly different dollar figures for January 2011, *see* MSR, Exhibit 5, the record is clear that, no matter what the exact numbers are, VSE was recovering far less from ATF than it was being charged by Heritage.

By late February and March 2011, VSE was recommending to ATF that the Covington seizure be moved from Heritage to another location, High Desert Pyro in Utah,

but at ATF's expense. Exhibits 7 at 525-28, 8 at 532-36, 26 at 752. ATF represents that it ultimately declined to authorize reimbursement of transport costs because, in the COTR's opinion, ATF had not caused the Heritage cost issue, MSR, Exhibit 4, but VSE questions whether that was the true reason. In any event, VSE never requested a transfer of the Covington seizure away from Heritage that did not involve ATF's payment of transport costs.

At the same time, VSE was hoping for a disposition order for the fireworks from the *Droganes* district court. The record reflects that ATF made various representations about the status of the district court action: (1) at a March 18, 2011, meeting, an ATF representative stated "that now ATF expects a decision from the court in the near future," Exhibit 27; (2) at a May 27, 2011, meeting, ATF indicated that it expected "[a] dispo[sition] possibly to be issued for destruction in August [2011]," Exhibit 29; (3) at a July 14, 2011, meeting, ATF indicated that "the expected destruction" was "now anticipated to be in September [2011]," Exhibit 31; and (4) at an August 30, 2011, meeting, "[i]t was agreed that in anticipation of the destruction disposition order . . . VSE procurement would" obtain quotes for on-site fireworks destruction. Exhibit 32.

VII. Bad Faith Findings in the *Droganes* Criminal Proceeding

After Mr. Droganes filed his motion for sanctions against the Government on July 8, 2010, DOJ filed its own motion, on January 14, 2011, seeking permission to destroy the legal 1.4G fireworks because they had deteriorated to such a degree that they could not be returned to Mr. Droganes.

On May 18, 2012, a United States magistrate judge issued a report and recommendation, approving a list of fireworks that should be forfeited as 1.3G fireworks, but also finding bad faith by the Government in responding to the court's orders. The magistrate judge stated that, "[w]hile the evidence and record do not demonstrate that the Government acted with intentional disobedience or bad faith in seizing the consumer fireworks, the Government's conduct in failing to provide a *complete* list of the 1.4G fireworks by the deadline ordered by the District Judge . . . and in failing to return [Mr. Droganes'] lawful items as ordered by the District Judge does constitute bad faith." *United States v. Droganes*, No. 08-51, 2012 WL 3610219, at *11 (E.D. Ky. May 18, 2012). The magistrate judge also disagreed with DOJ that the 1.4G fireworks had deteriorated to such a point that they should not be returned to Mr. Droganes, recommended that the district court order return of the 1.4G fireworks, and recommended the imposition of sanctions against the United States. *Id.* at *15.

Both parties objected to the magistrate judge's recommendations, although DOJ withdrew its request for permission to destroy the 1.4G fireworks and agreed to return them to Mr. Droganes. By decision dated August 21, 2012, the district court judge approved the magistrate judge's recommendation regarding which fireworks constituted 1.3G fireworks subject to forfeiture, but found that sovereign immunity barred the imposition of sanctions against the United States in the circumstances there. *United States v. Droganes*, 893 F. Supp. 2d 855, 865-85 (E.D. Ky. 2012), *aff'd*, 728 F.3d 580 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2287 (2014). Nevertheless, the district court judge found that "the Magistrate judge appropriately concluded the government engaged in bad-faith conduct that," but for sovereign immunity, "would justify sanctions." *Id.* at 885. The court based its bad faith finding upon (1) the Government's failure fully to comply with court orders to complete fireworks testing by specific deadlines and to provide Mr. Droganes a time table for the return of legal 1.4G fireworks and (2) its repeated misstatements about "the condition of fireworks in its refusal to return what were later found to be legal, undamaged fireworks." *Id.* at 885-86.[3] Although VSE cites to the *Droganes* court's bad faith findings in its pleadings, it has not placed any evidence from the *Droganes* litigation in the record of this appeal or attempted to establish the Government's bad faith in that litigation outside the context of its citation to the court decisions.

The district court issued a separate order on August 21, 2012, directing ATF to return any fireworks designated as 1.4G to Mr. Droganes within thirty days. RSUF ¶ 46. On September 28, 2012, ATF issued a task order to VSE for $250,000 directing the return of 272,832 pounds of 1.4G fireworks to Mr. Droganes. RSUF ¶ 47; Exhibit 13 at 576-88. Those fireworks – approximately one-third of the Covington seizure being stored at Heritage – were returned to Mr. Droganes in September 2012. RSUF ¶ 47.

On September 11, 2012, the district court issued a preliminary order and judgment of forfeiture in *Droganes*, ordering that the 1.3G fireworks be condemned and forfeited to the United States pursuant to 18 U.S.C. § 844(c)(1). Mr. Droganes appealed the district court's preliminary judgment of forfeiture to the Court of Appeals for the Sixth Circuit, but requests to stay the preliminary judgment were denied. On May 28, 2013, over Mr. Droganes' objection, the district court issued a final decree and order of forfeiture of the 1.3G fireworks and allowed ATF to dispose of them in accordance with law. *See* MSR,

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[3] On appeal, the Court of Appeals for the Sixth Circuit affirmed the district court's decision, but, like the district court, was "disturbed" by the "seemingly interminable delays in testing the seized fireworks" and "the government's doublespeak regarding the condition of the consumer fireworks and its ability to return them to Droganes." *United States v. Droganes*, 728 F.3d 580, 590 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2287 (2014).

Exhibit 7. VSE represents that the forfeiture order became final and non-appealable on December 17, 2013.

VIII. Continuing Covington Seizure Storage

During the proceedings in the *Droganes* action, ATF continued to ask about the contracting situation between VSE and Heritage, Exhibits 31, 34, and eventually issued a cure notice to VSE, dated July 31, 2012, asking VSE to address several issues that concerned ATF, including the fact that "VSE has yet to establish a firm contract with Heritage Disposal and Storage LLC since the award of the contract between ATF and VSE" almost two years earlier. Exhibit 10 at 560; *see* RSUF ¶ 44. ATF asked VSE, within ten days, to provide "[a] plan of action explaining how the above issue[] will be corrected." Exhibit 10 at 560. VSE responded to that issue by letter dated August 9, 2012, indicating that ATF's "concern is valid," but disagreeing "that it is considered a deficiency under FAR 52.249-8, Default (Fixed Price Services)" because "[t]he seized property located at Heritage Disposal and Services LLC is stored in accordance with the requirements of the contract" and "VSE invoices within the current terms of the contract." Exhibit 11 at 563. VSE concluded with a request for "some meaningful dialogue . . . to seek a global solution to the Heritage issue." *Id.*; *see* RSUF ¶ 45. No such solution was reached, and those portions of the Covington seizure that were not returned to Mr. Droganes in September 2012 remained stored in Heritage's facility, even though VSE had no storage contract with Heritage.

Once the disposition order became final and non-appealable in December 2013, ATF informed VSE that it was considering transporting the remaining Covington seizure to a government facility in California for use in fireworks detonation and destruction testing. Exhibit 36, 38. The record indicates that VSE proposed that Heritage perform the destruction, pursuant to a settlement agreement that VSE had reached with Heritage through which, were Heritage to obtain the destruction work, VSE's past-due storage costs would be waived. Exhibit 38; Exhibit 49 at 839. ATF considered Heritage's proposal, but ultimately objected to the rotary kiln thermal method of destruction that Heritage planned, as well as the costs that Heritage would charge ATF for destructive testing. Exhibit 39; Exhibit 49 at 851. ATF eventually arranged for transport of the Covington seizure, at its own expense, to the government facility in California for destructive testing, and the last fireworks were removed from Heritage's facility in August 2015. Because Heritage did not receive the destruction work, VSE's settlement agreement with Heritage had no effect on VSE's storage costs.

IX. VSE's Monetary Claims

A. The First Certified Request

On March 17, 2015, VSE submitted a request for equitable adjustment (REA) to ATF for $2,357,032 in storage costs, certified as a claim in accordance with FAR 33.207. Exhibit 18 at 648-89. In its REA, VSE requested that ATF classify the Covington seizure storage costs as "Other Direct Costs" in CLIN 0010, rather than as hazardous item storage costs under CLIN 0006, so that VSE could recover its actual payments to Heritage without regard to the CLIN 0006 pricing scheme. *Id.* at 648. It asserted that Heritage was charging it what amounted to "a rate of $12.19 per square foot" for the Covington seizure storage, where VSE's contract only permitted it to recover $1.95 per square foot under CLIN 0006. *Id.* at 649. It asserted that "[u]sing the square foot methodology for this highly specialized seizure does not support the requirements needed to safeguard and mitigate the dangers associated with the magnitude and volatility of the stored fireworks." *Id.* at 649-50. It claimed that it had anticipated prior to contract award that "the storage costs would be covered" under CLIN 0010 and not under CLIN 0006. *Id.* at 650.

On May 13, 2015, the ATF contracting officer issued a decision denying VSE's March 17, 2015, REA, although without the language notifying VSE of its appeal rights as required by 41 U.S.C. § 7103(e) and FAR 33.211(a)(4)(v). Exhibit 19 at 690-91.

B. The Second Certified Request

On or about August 10, 2015, VSE submitted another REA to the ATF contracting officer, this time seeking a contract price adjustment of $6,235,707.53 (plus applicable burdens and interest), certified as a claim in accordance with FAR 33.207. Exhibit 20 at 692-736. Of that amount, VSE asserted that $1,712,164.40 was money that VSE had already paid to Heritage for services performed between October 2010 and July 2015 for which VSE had not been compensated and that the additional $4,523,542.93 was for money that Heritage claimed was still owed to it. In this REA, VSE asserted that it was "entitled to this price adjustment due to constructive changes that occurred during its storage of the Covington seizure under the Contract." *Id.* at 692. It alleged that "ATF constructively changed the Contract by requiring VSE to store the Covington seizure – an unusually large and volatile collection of fireworks – for far longer than the duration contemplated in the Contract." *Id.* at 694. It asserted that it "did not factor into its price proposal the unforeseen possibility that the Covington seizure would need to be safeguarded" for a period of eight years (inclusive of the storage time under its prior Treasury contract). *Id.* It claimed that "VSE should not unfairly bear the cost burden of ATF's unilateral decision to store the fireworks at the Heritage facility for such a long period of time." *Id.* at 696.

By decision dated September 19, 2015, the ATF contracting officer denied VSE's second claim, but, again, did not include any language regarding VSE's appeal rights in his decision. Exhibit 22 at 741-42.

X. Heritage's Lawsuit Against VSE

On or about February 27, 2015, Heritage filed suit against VSE in the United States District Court for the District of Nebraska, a suit that was subsequently transferred to the United States District Court for the Eastern District of Virginia. RSUF ¶ 50; *see Heritage Disposal & Storage, L.L.C. v. VSE Corp.*, No. 15-CV-00076, 2015 WL 5821764 (D. Neb. Oct. 5, 2015) (transferring Heritage's suit to the Virginia district court). In its complaint, Heritage sought $4,523,542.93, plus interest and costs, for VSE's failure fully to pay Heritage for its storage services beginning in December 2010 (approximately two months after the ATF contract was awarded). RSUF ¶ 50; Amended Complaint ¶ 35. Heritage alleged causes of action against VSE for breach of contract, quantum meruit, and unjust enrichment, all arising out of the services that Heritage provided to store the Covington seizure.

On January 24, 2017, the district court issued a decision affirming a jury verdict in Heritage's favor, but reducing the jury-awarded damages to $3,496,086.29. *See Heritage Disposal & Storage, L.L.C. v. VSE Corp.*, No. 15-CV-1484, 2017 WL 361547 (E.D. Va. Jan. 24, 2017). In its decision, the district court, as part of its review of the jury's verdict, made numerous findings about VSE's storage of the Covington seizure with Heritage, including the following:

> 12. Heritage initially billed for its storage service pursuant to a purchase order that had been issued to it and which expired on September 30, 2010 (the "Purchase Order").
>
> 13. On May 9, 2009, . . . Heritage increased its storage billing rate under the Purchase Order from $0.10 per pound to $0.195 per pound in light of the additional space allocated to the fireworks [resulting from a re-palleting of the fireworks because of safety concerns]. Based on that increased rate, Heritage billed VSE $170,000 per month for storage.
>
> 14. The Treasury Contract and Heritage's Purchase Order both expired on September 30, 2010. On September 24, 2010, ATF awarded VSE a replacement prime contract for the period beginning October 1, 2010, which also covered the storage and manipulation of the Covington Seizure (the "ATF Contract"). The ATF Contract, however, did not

authorize payment for storage on a cost-plus basis, as the Treasury Contract, but rather provided for payment at specified rates for various categories of items stored; and ATF took the position that the Covington Seizure fell within a category whose storage rate was substantially below Heritage's storage fees under the expired Treasury Contract and Purchase Order.

15. The ATF Contract was negotiated and issued without Heritage's involvement, knowledge, or consent as to its rate structure.

. . . .

17. VSE and Heritage were never able to agree to a new subcontract with respect to the ATF Contract after the expiration of the Treasury Contract and the Purchase Order. In that regard, VSE refused to continue the storage payments to Heritage at the same level as under the Treasury Contract; and Heritage did not agree to accept as full payment the amount that VSE was paying on a monthly basis. As a result, there was a dispute between the parties concerning the amount that Heritage should be paid for storage for the period beginning October 1, 2010 through August 2015, when all of the Covington Seizure had been transferred out of Heritage's facilities.

18. Notwithstanding their dispute over the price of storage, Heritage initially continued to invoice VSE as it did under the Purchase Order. In that regard, it initially billed VSE $170,000 per month, calculated at the rate of $0.195 per pound, for the months of October-December 2010. VSE paid Heritage's October and November 2010 invoices, but then, beginning for the period December 1, 2010, paid $92,394 per month.

19. After VSE refused to continue paying $170,000, Heritage changed its billing rate from a per pound rate of $0.195 per pound to a square foot storage rate of $12.19; and beginning in February 2011, for the monthly period ending January 31, 2011, Heritage billed $206,000 per month for storage services based on its square foot storage rate of $12.19, rather than $170,000 per month at the rate of $0.195 per pound. It also billed that per square foot charge retroactively to the period beginning October 1, 2010. As a result, for the period beginning October 1, 2010, and continuing through September 2012,

> when a volume of fireworks was transferred out of Heritage's storage facilities, Heritage billed $206,000 per month; and VSE paid $92,394 per month (except for November and December 2010, for which it paid $170,000 per month).
>
> . . . .
>
> 21. Following the September 2012 transfer of fireworks, for the period beginning October 1, 2012, Heritage billed $125,069 per month (rather than $206,000), calculated based on $12.19 per square foot of space allocated to the fireworks remaining in storage. VSE paid $60,534 per month through August 2013, and then $57,348 per month through February 2015.
>
> . . . .
>
> 24. The rate charged by the only other vendor VSE could identify that was capable of storing the Covington Seizure in accordance with the requirements set forth in ATF Contract charged a rate of over $24 per square foot, a rate nearly 100% higher than the $12.19 per square foot rate billed to VSE by Heritage.
>
> 25. VSE did not object to Heritage's monthly bills except on the grounds that under the ATF contract, VSE could not recover the full amount of what Heritage had been charging because it had negotiated (without Heritage's involvement or agreement) a price for storage that did not cover what Heritage had been billing, and VSE had been paying, for over 3 years.
>
> . . . .
>
> 36. No later than the end of 2010, VSE was on reasonable notice that the parties had not reached an agreement concerning price and that Heritage expected to be paid an amount greater than what VSE was paying; and with that knowledge, VSE continued to request and accept Heritage's storage services despite the lack of agreement as to price.

Exhibit 49 at 835-42 (*Heritage Disposal*, 2017 WL 361547, at *2-*4). The court also found that "[t]here were . . . limited alternatives to Heritage's facility, and those that were available charged rates substantially higher than Heritage's." *Id.* at 862; *see id.* at 835 ("VSE was able

to locate only one other suitable facility for the storage of the Covington Seizure, whose storage fees were nearly twice those of Heritage."). The court entered judgment in Heritage's favor in the amount of $3,496,086.29.

On February 10, 2017, to avoid potential appeal issues and to create finality, VSE entered into a settlement of all claims with Heritage in the amount of $3,287,500 (a slight reduction in the district court judgment), waiving its appeal rights. Joint Status Report ¶ 7 (Feb. 27, 2017); Exhibit 50 at 866-68. Heritage subsequently notified the district court that the court's judgment had been satisfied. Exhibit 51. The parties did not request, as part of their settlement, vacatur of the district court's decision. *See* Exhibit 50.

XI. VSE's Appeal to the Board

On December 17, 2015, VSE filed with the Board its notice of appeal of the contracting officer's September 19, 2015, decision, asserting as the basis of its appeal that "ATF constructively changed the contract by requiring VSE to store the Covington seizure . . . for far longer than the duration contemplated by the contract," a "protracted storage duration" that "qualitatively changed the work to be performed" and that "entitles VSE to its requested price adjustment." Attached to the appeal notice was a copy of the contracting officer's decision of September 19, 2015. The notice of appeal neither mentioned nor attached the contracting officer's decision of May 13, 2015, on VSE's earlier REA.

On March 14, 2016, after VSE filed its complaint in accordance with Board Rule 6(b), 48 CFR 6101.6(b) (2015), ATF filed a motion for summary relief in lieu of an answer, arguing that VSE could not establish that ATF constructively changed the contract. After the parties fully briefed that motion, the parties on June 23, 2016, jointly filed a motion to suspend proceedings in this appeal in light of a voluntary disclosure that VSE had made to Treasury and DOJ involving the possibility that Heritage had overstated the weight of the Covington seizure in calculating storage costs under the Treasury contract, which the parties believed might have resulted in overbillings to the Government and might implicate issues in this appeal. The Board granted the parties' request and suspended its consideration of ATF's motion for summary relief.

Subsequently, after reporting that the district court in *Heritage* rejected VSE's proffer that Heritage was engaged in a fraudulent billing scheme and that VSE had reached a settlement with Heritage, the parties on February 27, 2017, sought to lift the suspension of proceedings and to provide VSE with an opportunity to amend its pleadings to reflect recent events. VSE filed an amended complaint on April 26, 2017, updating its prior allegations, adding two new counts to its complaint (seeking an equitable adjustment based upon a breach of the implied duty of good faith and fair dealing theory and a superior knowledge

withholding theory), and supplementing its previous constructive change count to add a commercial impracticability argument. The parties completed supplemental briefing on May 26, 2017, and the Board heard oral argument on the motion on October 19, 2017.

Discussion

I. Standard of Review

"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," and "[t]he moving party bears the burden of demonstrating the absence of genuine issues of material fact." *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256, at 169,264 (quoting *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,168). "A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing." *Id.* Although all reasonable inferences must be drawn in the non-moving party's favor, the non-movant, to defeat a summary relief motion, "'must show an evidentiary conflict on the record'" and "set forth specific facts showing there is a genuine issue for trial." *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089, at 176,205 (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). The non-movant cannot defeat a request for summary relief by merely reciting factual disagreements and allegations that find no support in the evidentiary record.

II. The Scope of VSE's Claim Before the Board

VSE argues repeatedly that it did not anticipate that it would have to store the Covington seizure for eight years. The first three years of that eight-year period involve the time that VSE was storing the seizure under the terms of its *prior* contract, which was with Treasury. VSE's successor contract, which covered the last five years of the Covington seizure, was awarded by DOJ. VSE submitted the certified claim that underlies this appeal, dated August 10, 2015, to the DOJ contracting officer, not Treasury.

To the extent that VSE is arguing that there was some type of breach under its Treasury contract and that it is entitled to damages for all or part of the first three years of the Covington seizure storage, we lack jurisdiction to entertain that claim. Before we could review damages arising under the Treasury contract, VSE would have to submit a claim for monetary relief under the Treasury contract to the Treasury contracting officer. *See Sharp Electronics Corp. v. McHugh*, 707 F.3d 1367, 1370-71 (Fed. Cir. 2013) (claim must be

submitted to a contracting officer at the agency with responsibility for the contract). Without a claim submission to Treasury, we lack jurisdiction to consider any complaint about damages arising from the three years of Covington seizure storage under the Treasury contract. *See id.* at 1370-71, 1375.

III. Collateral Estoppel Implications of the District Court Decisions

A. Collateral Estoppel Against VSE

Under the doctrine of collateral estoppel, "issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in a subsequent suit involving the parties to the prior litigation." *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 1569 (Fed. Cir. 1983). The rationale underlying this rule "is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided over again." *Id.* Accordingly, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Restatement (Second) of Judgments* § 27 (1982).

During the pendency of this appeal, the district court issued a monetary judgment against VSE in *Heritage*, which affected the amount of money that VSE is claiming here. In rendering that judgment, the district court, following a jury trial, made extensive factual findings that are directly relevant to the issues in this appeal. ATF, however, was not a party to the *Heritage* litigation. To bind VSE to the district court's findings in *Heritage*, we would have to apply the doctrine of nonmutual collateral estoppel, which "refers to use of collateral estoppel by a nonparty to a previous action to preclude a party to that action from relitigating a previously determined issue in a subsequent lawsuit against the nonparty." *State of Idaho Potato Commission v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 713 n.3 (9th Cir. 2005). "'Defensive' use of nonmutual collateral estoppel involves a defendant attempting to preclude a plaintiff from relitigating an issue that the plaintiff previously litigated unsuccessfully against a different party." *Id.*

Although the collateral estoppel doctrine was at one time limited to situations in which *both* parties (or those in privity with them) had mutually participated in both the prior and the current litigation, the Supreme Court has expanded the doctrine to permit the use of nonmutual defensive collateral estoppel against a private party in appropriate instances. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Accordingly, as one of our predecessor boards recognized, "only the party against whom collateral estoppel is asserted need be bound by the previous judgment" so long as the party being estopped was afforded a full and fair opportunity to litigate in the first action.

John H. Hampshire, Inc., GSBCA 4860, 81-1 BCA ¶ 14,914, at 73,769. "Permitting litigants to assert collateral estoppel in a defensive pose promotes efficiency by discouraging speculative lawsuits and conserving the resources of defendants." *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 574 (1st Cir. 2003); *see Standefer v. United States*, 447 U.S. 10, 24 (1980) ("no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and there is no sound reason for burdening the courts with repetitive litigation"); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-33 (1979) (permitting both offensive and defensive use of collateral estoppel, even though there was no mutuality of parties in the prior action). "[I]f the party against whom preclusion is sought did in fact litigate an issue of ultimate fact and suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact." *Restatement (Second) of Judgments* § 27 cmt. c.

"[N]onmutual issue preclusion is not available as a matter of right." *Rodriguez-Garcia v. Miranda-Marin*, 610 F.3d 756, 772 (1st Cir. 2010) (quoting 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4465, at 728 (2d ed. 2002)). A tribunal may refuse to apply it if, for example, its application would badly distort matters that must otherwise still be decided or would not result in efficiency gains; if the stakes in the first action were insufficient to have provided the party an incentive to litigate vigorously; or if the later action was not foreseeable at the time of the first. *Id.*; 18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *supra*, § 4465.1, at 747. "The burden of avoiding preclusion, though, is placed on the party who asserts lack of a full and fair opportunity to litigate in the first action." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *supra*, § 4465, at 734-35; *see Carter-Wallace, Inc. v. United States*, 496 F.2d 535, 539 (Ct. Cl. 1974) (burden is on party being estopped). Here, the issues that VSE litigated in *Heritage*, both factually and legally, are directly related to its claim in this appeal, and they were vigorously litigated there in an effort by VSE to reduce its storage cost damages. In fact, this appeal was stayed for over eight months to allow for resolution of the *Heritage* case, based upon the parties' representations that the case was relevant to the issues in this appeal. Plainly, the possibility that the *Heritage* court would issue findings directly relevant to this litigation was foreseeable. In such circumstances, we see no reason not to apply collateral estoppel against VSE to the extent that findings and issues actually decided in *Heritage* were fully and fairly litigated there.

We recognize that, after the *Heritage* district court issued its final judgment but before appeal, Heritage and VSE settled their dispute, with both parties waiving their appeal rights. Yet, the parties did not ask the district court to vacate the *Heritage* judgment or findings. Because the district court's decision was not vacated, collateral estoppel principles still may be applied to it, despite the parties' post-judgment settlement. *See, e.g., United*

States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950) (vacatur is necessary "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" through application of preclusion doctrine); *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1473 (Fed. Cir. 1989) ("to be assured that the judgment here would have no collateral estoppel effect, [plaintiff] would have had to have the [district] court vacate its order, which he failed to do").

In its briefing, ATF has not expressly used the words "collateral estoppel" in opposing VSE's claim. In fact, ATF could not have raised that defense when it originally filed its summary relief motion because there were not yet any district court findings in *Heritage*: the court had not yet issued its decision. Nevertheless, in its supplemental brief, filed after VSE amended its complaint in response to the *Heritage* decision, ATF repeatedly references the district court's findings in support of its summary relief request. By relying upon the findings to support summary relief in its favor, it seems clear that ATF is asking us to apply the collateral estoppel doctrine to the new legal theories, even if it does not use those express words. In any event, we have the discretion to raise collateral estoppel sua sponte where a prior adjudication has been brought to the tribunal's attention and the tie between the findings previously made and the new allegations being raised is clear. *See, e.g., Caldera v. Northrop Worldwide Aircraft Services, Inc.*, 192 F.3d 962, 970 (Fed. Cir. 1999) (recognizing that courts have allowed collateral estoppel to be raised sua sponte); *Studio Art Theatre of Evansville, Inc. v. City of Evansville*, 76 F.3d 128, 130 (7th Cir. 1996) (district court could raise issue of collateral estoppel sua sponte because the benefits of precluding relitigation of issues run not only to litigants, but also to the judicial system); *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993) (same); *Liles v. United States*, 219 Ct. Cl. 619, 620 (1979) ("The facts in the instant case require us, sua sponte, to raise the principle of collateral estoppel."). It is appropriate to do so here.

There are four prerequisites to the application of collateral estoppel: "(1) the issues to be concluded are identical to those involved in the prior action; (2) in that action the issues were raised and 'actually litigated'; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded . . . was fully represented in the prior action," with a full and fair opportunity to litigate the issues to be precluded. *Mother's Restaurant*, 723 F.2d at 1569 & n.4. With regard to the requirement "that a finding be 'necessary' to a judgment," that "does not mean that the finding must be so crucial that, without it, the judgment could not stand." *Id.* at 1571. It means only that, if a finding was "incidental or collateral" to "a nonessential issue," it will not necessarily be barred from reconsideration in later litigation. *Id.* Such incidental findings "have the characteristics of dicta." *Restatement (Second) of Judgments* § 27 cmt. h.

The district court's findings that we have cited above meet the four prerequisites for applying issue preclusion and are directly relevant to VSE's current appeal. In particular, although VSE alleges here that ATF never provided necessary consent to allow VSE to move the Covington seizure from Heritage's facility to another site, the district court found that there was no other less costly site to which VSE could have moved it. For reasons that we will address below, that finding directly affects VSE's constructive change argument. VSE had a strong incentive to litigate vigorously against Heritage's lawsuit and a full and fair opportunity to do so. We find that VSE is collaterally estopped from contesting the district court's findings that we have cited above.

B. Collateral Estoppel Against ATF

1. The *Heritage* Litigation

VSE has referenced some of the district court's findings in *Heritage* as evidence that should negatively affect ATF, but ATF is not bound by the *Heritage* findings. Litigants who never appeared in a prior action "may not be collaterally estopped without litigating the issue." *Blonder-Tongue Laboratories*, 402 U.S. at 329. Such litigants "have never had a chance to present their evidence and arguments on the claim," and "[d]ue process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.*; *see Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995) (no collateral estoppel against entity not a party to prior case); *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1569 (Fed. Cir. 1993) ("factual findings . . . cannot be used as a collateral estoppel against defendants who were not parties to that case").

2. The *Droganes* Litigation

VSE has asserted that the district court's bad faith finding against ATF in the *Droganes* criminal action establishes ATF's bad faith here. The bad faith finding in *Droganes* related to ATF's bad faith towards Mr. Droganes and the court itself, rather than towards VSE. To the extent that such a finding has any relevance to VSE's contractual rights, VSE cannot rely upon it to support its bad faith argument.

When a party is seeking to apply collateral estoppel against the United States, both the Government and the private party seeking to bar relitigation have to have been parties to the *same* prior action. That is, "[c]ollateral estoppel will apply against the government only if mutuality of parties exists." *American Federation of Government Employees, Council 214, AFL-CIO v. Federal Labor Relations Authority*, 835 F.2d 1458, 1462 (D.C. Cir. 1987); *see United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("nonmutual offensive collateral estoppel is not to be extended to the United States"). VSE was not a party to the

Droganes criminal action. Accordingly, VSE cannot apply collateral estoppel principles against ATF to support its bad faith argument.

In fact, VSE cannot even rely upon the *Droganes* findings as *evidence* in opposing ATF's summary relief motion. Although a judicial admission by a party in a prior suit may be admissible as a piece of evidence in a later-filed suit, *Shell Oil Co. v. United States*, 130 Fed. Cl. 8, 76 (2017), judicial factual findings, unless they provide a basis for applying collateral estoppel principles or are not subject to reasonable dispute within the parameters of Federal Rule of Evidence 201, constitute hearsay that is not admissible at trial. *See, e.g.*, *United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994); *Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993); *Taylor v. Washington Metropolitan Area Transit Authority*, 922 F. Supp. 665, 675 (D.D.C. 1996); Fed. R. Evid. 201(b). As a result, they are not admissible in connection with a summary relief motion. *Jones*, 29 F.3d at 1554; *In re Acceptance Insurance Cos., Securities Litigation*, 352 F. Supp. 2d 940, 950 (D. Neb. 2004). To the extent that VSE wants to establish ATF's bad faith in connection with the Government's conduct under VSE's contract, it must present evidence in support of its position.

IV. VSE's Constructive Change Theory

A. The Constructive Change Doctrine

The original basis of VSE's appeal was that ATF constructively changed its contract by requiring prolonged storage of the Covington seizure. Complaint ¶¶ 17, 33. In its initial response to ATF's motion for summary relief, VSE argued that "ATF constructively changed the Contract by requiring VSE to store the Covington Fireworks with Heritage for eight years," a "prolonged duration . . . far in excess of the storage period contemplated in the Contract and anticipated by ATF and VSE at the time the Contract was awarded." Appellant's Response at 3. It alleged that "VSE did not and could not factor into its price proposal the unforeseen and unforeseeable possibility that the Covington Fireworks would need to be safeguarded for such a long time." *Id.*

"The government constructively changes a contract to which it is a party when 'a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.'" *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017) (quoting *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). "A constructive change entails two base components, the change component and the order or fault component." *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678, *appeal dismissed*, 36 F.3d 1111 (Fed. Cir. 1994). Accordingly, "[t]o demonstrate that the government has constructively changed the terms of a contract, 'a plaintiff must show (1) that it performed

work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government.'" *Agility Public Warehousing*, 852 F.3d at 1385 (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)); *see Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,004 (discussing requirements for constructive change claims). Unless the Government "effect[s] an alteration in the work to be performed," "the doctrine of constructive change cannot be invoked against the Government." *Bell/Heery*, 739 F.3d at 1335.

In evaluating the change component, we must first determine what the contract actually required and then determine whether the work actually performed was "in addition to or different from that required." *Miller Elevator*, 30 Fed. Cl. at 678. To determine what the contract required, we look to the plain language of the contract itself, interpreted in accordance with widely accepted contract interpretation principles. *Parkview Engraving LLC v. Department of Veterans Affairs*, CBCA 1564, 10-1 BCA ¶ 34,372, at 169,729. If the Government was merely exercising its "right to insist on performance in strict compliance with the contract specifications," as properly interpreted, there is no "change" upon which to build a constructive change claim. *NavCom Defense Electronics, Inc. v. England*, 53 F. App'x 897, 900 (Fed. Cir. 2002). "Contract interpretation is a legal question that is often resolved by summary disposition." *CFP FBI-Knoxville, LLC v. General Services Administration*, CBCA 5210, 17-1 BCA ¶ 36,648, at 178,474.

B. The Contract's Storage Requirement

We have struggled to identify the "change" that VSE alleges occurred in light of the ATF contract language. The contract says that, under CLIN 0006, VSE would be paid a fixed amount of $1.95 "[p]er square foot per month" to secure, store, and manipulate hazardous items. Exhibit 1 at 131. VSE does not dispute that it was paid that amount for the Covington seizure.[4] Further, CLIN 0006 expressly indicates that it covers "storage facility (bunker) and warehouseman costs" and that the hazardous items covered by CLIN 0006 "include explosives and fireworks." *Id.* The Covington seizure storage utilized bunkers and warehousemen. On its face, the CLIN 0006 monthly fee payments satisfied ATF's contractual obligations for monthly storage under the contract.

VSE argues that it did not anticipate that it would have to store the Covington seizure for eight years, which includes the three years that the seizure was being stored under the

[4] VSE asserts that there is a dispute about how ATF should have measured square footage – that is, whether measurement is from exterior-end-to-exterior-end or interior-end-to-interior-end. We will discuss that issue later in this decision.

terms of VSE's *prior* contract with Treasury. During the three years of Covington seizure storage under that predecessor Treasury contract, Heritage increased the amount it was charging VSE to $0.195 per pound, but VSE submitted a proposal for the successor ATF/DOJ contract with a CLIN 0006 price of $0.10 per pound, an amount *less than* what Heritage was *already* charging VSE. At the same time, VSE failed to execute a subcontract with Heritage, meaning that VSE had no way to control what Heritage would charge in the future. When Heritage later increased its charges to VSE, VSE had no legal right to a lower charge. Further, although VSE was entitled under the solicitation to propose transition/phase-in costs (for inclusion in the successor contract price) that would have allowed VSE to transfer the Covington fireworks from Heritage's facility to a lower-cost facility, VSE proposed no such costs. VSE cannot blame ATF for its own decision to bid a CLIN 0006 amount below its anticipated costs.

VSE asserts that there is a factual dispute between the parties over "when the parties expected a disposition order [from the district court] for the Covington Fireworks (and the corresponding termination of their storage at Heritage)," which, it asserts, precludes summary relief. Appellant's Response at 6; *see id.* at 8 ("the issue of when ATF and VSE anticipated disposition of the Covington Fireworks is in dispute"). Yet, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. VSE's expectations about how long the Covington seizure might remain in storage are relevant only if its contract tied VSE's storage obligations to the length of the district court action. If ATF was entitled to continue to store seized property under VSE's contract (with payment of the monthly contractual charge) even after a district court had authorized disposal, which it was, any factual dispute about VSE's district court action expectations is irrelevant to ATF's summary relief motion.[5]

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[5] Citing to CLINs 0010 and 0011 in the successor contract, which might be viewed as providing for cost reimbursement (like the travel and administrative costs in CLIN 0010 that are "TBD"), VSE argues that whether its contract as a whole is a firm-fixed-price contract is a "material fact in dispute" that precludes summary relief. Appellant's Sur-Reply at 5-7. The only relevant issue, though, is whether CLIN 0006 is a firm-fixed-price CLIN, and there is no dispute that it is. Further, absent ambiguous contract language, matters of contract interpretation raise questions of law that do not depend upon the parties' subjective beliefs. *CH2M Hill Hanford Group, Inc. v. Department of Energy*, CBCA 1187, 08-2 BCA ¶ 34,002, at 168,152. VSE has not raised a factual dispute that precludes summary relief.

VSE next asserts that, although the *Droganes* district court issued a disposition order in 2013, ATF did not actually dispose of the Covington fireworks and empty Heritage's facility until August 2015. It argues that, at the very least, ATF was required to remove the Covington seizure promptly after the 2013 disposition order and that its failure to do so should create a right to complete cost reimbursement for any post-2013 storage costs. ATF asserts that the delay between December 2013 and August 2015 involved negotiating a possible destruction contract with Heritage, but we need not resolve the reasons for the time gap. VSE's contract is simply for storage, paid at a monthly rate. As VSE acknowledged during oral argument, the contract itself contains no language specifically tying the end of storage to disposition orders issued by courts. Transcript at 102 (The Board: "[I]s there a term in the contract that precludes ATF from just leaving [the fireworks] for that extra two years?" Counsel for VSE: "There is not."). The contract speaks of disposition orders not from a court, but *from the COTR*. Exhibit 1 at 235. We cannot add limitations to ATF's storage rights that are not identified in the contract language.

C. The Lack Of Contractual Time Limits

To support its argument that it reasonably believed that there would be a time limit for storage of the Covington seizure, VSE points to ATF's statement in the solicitation that, "[o]n average, disposition is expected to occur within one year of seizure." Exhibit 1 at 240. VSE argues that, based upon this language, it expected the Covington seizure to be gone within a year after contract award. *See* Transcript at 103. That language does not create a right to monetary relief here, for the following reasons:

First, ATF did not assert or guarantee that *every* disposition of property would occur within one year from the date of seizure. Instead, the solicitation identified only an expected average. VSE has neither asserted nor presented any evidence to indicate that ATF's statement, conditioned by the language "[o]n average," is actually incorrect. The Covington seizure is the only one that VSE has identified as taking an extended period of time. VSE represented at oral argument that, when bidding, its experience under the predecessor Treasury contract had showed that, except for the Covington seizure, explosives storage lasted anywhere from one month to twenty-four months, with an average of thirteen months. Transcript at 59, 111. VSE has not alleged how what it refers to as the "aberrational" Covington seizure actually impacted the "average" storage time under the successor DOJ contract or what that average, combining storage for all seizures under the DOJ contract together, was. The fact that storage of the Covington seizure lasted far longer than a year does not necessarily render ATF's estimate about averages in general wrong. Certainly, VSE has placed no evidence in the record indicating that the stated average, when all seizures are combined, was incorrect. And nothing in the contract indicates that, in defining

the average, there could not be some outliers that would require a significantly longer storage period than other seizures.

Second, even if VSE were arguing that ATF's estimate was wrong, it would not provide a basis for an actionable claim. Although a contractor might recover damages under a negligent estimate theory by showing "that the government's estimates [of the amount of work to be performed] were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made,'" *Agility Defense & Government Services, Inc. v. United States*, 847 F.3d 1345, 1350 (Fed. Cir. 2017) (quoting *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992)), that theory typically applies to estimates under requirements contracts. Such contracts "call[] for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart, Inc.*, 967 F.2d at 581. When an agency contemplates a requirements contract, the FAR requires the solicitation "to provide offerors with a realistic estimate of workload," and the contractor may be entitled to an equitable adjustment if it is damaged by the solicitation's failure to do so. *Agility Defense*, 847 F.3d at 1350; *see* 48 CFR 16.503(a)(1) (in requirements contract, "the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract").

The contract at issue here is an IDIQ contract, not a requirements contract. Under an IDIQ contract, the Government can select what and how much work to provide the contractor, and the contractor is not guaranteed any work in excess of the guaranteed minimum identified in the contract (up to an identified maximum quantity). *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). Although at least one tribunal has found that a negligent estimate in an IDIQ contract might create a basis for monetary recovery in certain limited instances, *see Ravens Group v. United States*, 112 Fed. Cl. 39, 50-53 (2013),[6] an IDIQ contractor generally "cannot expect the kind of accuracy in estimation that it can in a requirements or fixed price contract." *Dot Systems, Inc. v. United States*, 231 Ct. Cl. 765, 769 (1982). As long as the Government satisfies its minimum quantity purchase obligation and does not exceed the maximum quantity, it has satisfied its contractual obligations, and any alleged negligence in estimating becomes generally irrelevant to the parties' rights. *Travel Centre*, 236 F.3d at 1319-20; *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,378. Although VSE is complaining here about the *length* of individual seizure storage

[6] It does not appear that the Government in *Ravens Group* argued that its quantity obligations under an IDIQ contract were limited to the minimum and maximum quantity figures contained in the contract.

rather than the *quantity* of separate seizures, VSE has not indicated how, had it not underpriced CLIN 0006, any error in ATF's estimated average length for storage of a seizure would have negatively impacted its costs, given that, under the contract, VSE was entitled to and was paid a fixed-price "per square foot" amount for every month of CLIN 0006 storage.

D. ATF's Alleged Refusal To Permit Transfer

Assuming that the contract does not impose a time limit for storage of a particular seizure, VSE argues that ATF constructively changed the contract by precluding it from "mov[ing] the Covington Fireworks from Heritage to another storage facility without ATF's approval and cooperation – which ATF refused to give," meaning that "VSE had no choice but to continue to use Heritage for the work and to pay Heritage far more than what was anticipated at the time of the Contract award." Appellant's Response at 3. Although a government direction that bars the contractor from exercising performance options available to it under the terms of its contract could create a constructive change, *DOT Systems, Inc.*, DOT CAB 1208, 82-2 BCA ¶ 15,817, at 78,383, VSE's argument fails here for the following reasons:

First, although VSE complains about the consent requirement, the contract clause requiring ATF consent for any transport of seized property was there when the contract was awarded, and VSE submitted its proposal with full knowledge of the consent requirement. Such a requirement may impose upon ATF an obligation to act upon requests to transport seized property in accordance with its duty of good faith and fair dealing, *see Barseback Kraft AB v. United States*, 36 Fed. Cl. 691, 705 (1996) (party vested with discretion under the contract must exercise that discretion reasonably and without improper motive), but it does not shift to ATF all extra costs that VSE may incur as a result of its own failure to enter into a binding subcontract with the storage facility in which it elected to leave seized goods. VSE had the opportunity to include in its proposal for the successor contract the costs of transferring the Covington seizure to another facility. VSE elected not to do so, even though it knew that it was already paying Heritage *more* than what it was bidding for CLIN 0006 under the successor contract and that it had not been able to negotiate a subcontract with fixed storage and handling prices with Heritage.[7]

[7] VSE notes that, eventually, ATF agreed to transport of the Covington seizure at ATF's cost to a government facility in California, where destruction of the fireworks occurred. Although VSE complains that ATF should have agreed to pay for transport earlier than it did, the contract has separate provisions for storage under CLIN 0006 and disposition of fireworks by destruction (inclusive of transport to the destruction site) under CLIN 0008.

Second, VSE asserts that ATF "refused to give" consent for a transfer from the Heritage facility, but the record shows that the only time that VSE ever asked for such consent was with the caveat that ATF pay for the transfer. Yet, the contract required *the contractor* to pay for such transport. The only way that ATF would be responsible for such costs would have been if VSE had included transport costs in its CLIN 0001 transition/phase-in proposal, which it did not. We review an agency's response to a request for contractually-required consent to transfer for reasonableness. *American Ordnance LLC*, ASBCA 54718, 10-1 BCA ¶ 34,386, at 169,791. ATF's failure to consent to a transfer that would have imposed extra-contractual costs upon ATF is "within the bounds of 'reasonableness' as used in the context of reviewing discretionary action taken by a government official." *England v. Systems Management American Corp.*, 38 F. App'x 567, 572 (Fed. Cir. 2002). VSE cannot complain that ATF declined to agree to pay extra-contractual costs.

Third, to the extent that VSE is suggesting that it may have sought consent without including a cost-shifting request, the only record evidence in support is a declaration from VSE's program manager, who avers that, "[t]o [her] knowledge, ATF never approved VSE's requests to relocate the Covington Fireworks to another storage vendor." Declaration of Diana T. Walsh (Apr. 7, 2016) ¶ 7. There is no detail about the alleged relocation requests in the declaration, and no other evidence in the record supports any allegation that VSE made requests to transfer the Covington seizure without a condition that ATF pay for it. "It is well settled that 'a conclusory statement on the ultimate issue,'" even if presented in an affidavit or declaration, "'does not create a *genuine* issue of fact.'" *Applied Cos. v. United States*, 144 F.3d 1470, 1475 (Fed. Cir. 1998) (quoting *Imperial Tobacco Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir.1990)).

Fourth, the district court in *Heritage*, whose factual findings are binding on VSE through collateral estoppel, found that VSE was able to find only one other facility in the United States willing and able to take the Covington seizure and that the facility was charging almost twice as much as Heritage. As a result, even had ATF improperly denied consent to transfer, VSE would not have been prejudiced by that denial because it could not realistically have moved the Covington seizure from Heritage to a lower-priced facility. "Evidence of some damage resulting from the [alleged] change or other claim event is

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Exhibit 1 at 232-33. When it came time to dispose of the fireworks through destruction, ATF attempted to negotiate a method of and price for destruction with Heritage, but ATF and Heritage could not reach agreement. ATF ultimately paid a different contractor to transport the fireworks to the destruction site. The language of VSE's contract does not permit VSE to complain that ATF did not elect transport earlier than it did.

necessary to establish entitlement." *Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 648, 07-2 BCA ¶ 33,706, at 166,892. The appellant "must show that but for the breach [or constructive change], the damages alleged would not have been suffered." *San Carlos Irrigation & Drainage District v. United States*, 111 F.3d 1557, 1563 (Fed. Cir. 1997). The *Heritage* court's factual findings establish that VSE cannot prove damage as a result of the consent requirement, meaning that any withholding of consent, if it occurred, did not prejudice VSE.

E. Whether ATF Misled VSE

VSE's program manager avers in her declaration that both ATF and VSE expected the Covington fireworks to be destroyed soon after the September 24, 2010, successor contract was awarded and that "VSE relied on ATF's representations that the Covington Fireworks would be destroyed – or disposed of by other means – shortly after award of the Contract." Walsh Declaration ¶ 6. Because ATF misled VSE into believing during contract performance that the Covington seizure would soon and quickly be destroyed, VSE argues, the misrepresentation caused VSE to keep the Covington seizure with Heritage for what it believed would be a short time (to avoid incurring expensive transport costs that would exceed the costs of short-term continued storage at Heritage), which ultimately resulted in massive cost overruns because of the extended storage period.

We recognize that government efforts to mislead a contractor through subterfuges and evasions can breach the Government's contractual obligation to act in good faith. *Malone v. United States*, 849 F.2d 1441, 1445-46 (Fed. Cir. 1988). Here, though, the record is clear that, contrary to the declarant's conclusory statement, ATF made no false promises about the district court action. In its statement of genuine issues, all of the "promises" that VSE says ATF made about the "imminent disposition" of the fireworks through the *Droganes* district court action are merely predictions of the speed at which the district court might act, not promises of a specific date or deadline by which the Covington seizure would definitely be moved. In any event, the district court's findings make clear that, even if ATF had made a promise about a definite destruction deadline and/or affirmatively misled VSE about how long the Covington seizure would remain, VSE would not have been prejudiced by that promise because there was no other location to which VSE could have moved the seizure at a lesser monthly cost.

F. VSE's Other Constructive Change Arguments

VSE complains that "ATF pays VSE the same flat monthly rate under CLIN 0006" for all hazardous item storage throughout the country (beyond just the Covington seizure), "regardless of the size, volatility, or complexity of the hazardous items to be stored, or the

duration of that storage," Complaint ¶ 12, which VSE contends should affect the manner in which its contract is interpreted. Yet, VSE was, or should have been, well aware of that when it submitted its offer for the ATF contract. To the extent that VSE was concerned about the ATF contract's pricing mechanisms or thought that they were unfair, the time for it to have complained was before it entered into the contract. *See Beacon Construction Co. of Massachusetts v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) (contractor must complain or protest prior to contract award about any problems with proposed contract terms of which it is actually aware). It is too late to rewrite the contract terms after award.

VSE asserts that there is another CLIN, which is titled "Other Direct Costs," that is a better fit for its Covington seizure storage costs than CLIN 0006 and that it should be allowed to recover its extra costs under that CLIN. It is unclear whether we possess jurisdiction to entertain this argument, which VSE presented in its first certified REA, dated March 17, 2015. VSE did not identify or attach that REA or the contracting officer's decision responding to it to its notice of appeal. Assuming that the argument is encompassed within the second certified REA that is on appeal, we would have to reject it. CLIN 0006 covers the costs to secure, store, and manipulate hazardous items, and it expressly indicates that those hazardous items "include explosives and fireworks" and that the covered costs include "storage facility (bunker) and warehouseman costs." *Id.* Although CLIN 0010, the "Other Direct Costs" CLIN, provides for an amount to be determined by the Government upon award, which VSE believes can provide for full cost-reimbursement for its Heritage storage costs, the contract explains that "Other Direct Costs" relate to "conference fees, travel costs, and per diem expenses associated with ATF-requested special meetings, conferences, briefings, and events related to this Contract." Exhibit 1 at 126. We cannot interpret the contract as permitting VSE to extract the costs of hazardous item storage out of CLIN 0006 and move them to a CLIN that was intended to cover administrative and travel costs.

It is clear that the real reason for VSE's cost overruns was the absence of a subcontract with Heritage, which left VSE subject to Heritage's whims regarding future pricing. Further, inexplicably, VSE elected to bid CLIN 0006 for the successor ATF contract at a price far below what it was already paying Heritage under its predecessor contract. Having entered into a fixed-price CLIN that it underbid, VSE cannot viably complain that ATF actually used the services for which it had contracted. It was not ATF's contractual obligation to expend additional monies of its own to save VSE from a bad bargain that VSE had created for itself.

We grant ATF's motion for summary relief on VSE's constructive change claim.

V. VSE's Newly Raised Legal Theories

A. VSE's Superior Knowledge Theory

In its amended complaint, filed April 26, 2017, VSE added a count to its original complaint alleging a breach by ATF of its duty to disclose superior knowledge to VSE prior to contract award. VSE asserts that, when ATF issued an amended solicitation on March 10, 2010, ATF knew (a) that it was already in contempt of the 2008 *Droganes* court order requiring it to inventory and return the Covington fireworks and (b) that it had no intention of complying with the order. VSE alleges that it "undertook to perform the Contract without vital knowledge of the ATF's unwillingness to comply with the *Droganes* Court's orders, which greatly affected the costs to VSE of performance and the duration of performance." Amended Complaint ¶ 51.

"Although a contractor, when proceeding before this Board, may increase the amount of [a] claim" previously submitted to the contracting officer, "it 'may not raise any *new* claims not [previously] presented and certified to the contracting officer.'" *Crane & Co.*, 16-1 BCA at 178,003 (quoting *Santa Fe Engineers, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987)). "In determining whether a contractor's attempt to alter the legal theories underlying its claim constitutes a 'new' claim, tribunals 'look at whether the new issue is based on the same set of operative facts' as the claim submitted to the contracting officer." *Id.* (quoting *Foley Co. v. United States*, 26 Cl. Ct. 936, 940 (1992), *aff'd*, 11 F.3d 1032 (Fed. Cir. 1993)). "Operative facts are the essential facts that give rise to a cause of action," *id.* (quoting *Kiewit Construction Co. v. United States*, 56 Fed. Cl. 414, 420 (2003)), and "[a] claim is new when it 'present[s] a materially different factual or legal theory' of relief." *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369 (Fed. Cir. 2017) (quoting *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000, 1006 (Fed. Cir. 2015)).

We determine whether newly asserted legal theories involve the "same set of operative facts" as those set forth in the underlying claim by reference to whether the elements necessary to establish those new theories are essentially the same or interrelated with those associated with the original claim. *Crane & Co.*, 16-1 BCA at 178,004-05. This standard "does not require [rigid] adherence to the exact language or structure of the original administrative [Contract Disputes Act (CDA)] claim." *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003). "[M]erely adding factual details or legal argumentation does not create a different claim, but presenting a materially different factual or legal theory (e.g., breach of contract for not constructing a building on time versus breach of contract for constructing with the wrong materials) does create a different claim." *K-Con Building Systems*, 778 F.3d at 1006.

In the claim underlying this appeal, dated August 10, 2015, VSE detailed the reasons that, because ATF had required VSE to store the Covington seizure for far longer than contemplated by the contract, ATF was responsible for a constructive change. VSE alleged that "[n]either ATF, VSE, nor Heritage anticipated that the Covington seizure would need to be stored for seven years" and that VSE did not factor that lengthy storage requirement into its price proposal. As previously discussed, to establish a constructive change, a contractor must show that, during contract performance, the contracting officer ordered some service not required by the contract and, through government fault, somehow altered or expanded the contractor's contractual performance obligations. *Embassy Moving & Storage Co. v. United States*, 424 F.2d 602, 607 (Ct. Cl. 1970); *Crane & Co.*, 16-1 BCA at 178,004. A superior knowledge claim, on the other hand, focuses in large part upon the Government's knowledge of vital information *prior to* contract award and its failure to share it with an unknowing contractor. *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,687. Nothing in the claim that VSE submitted on August 10, 2015, addresses an illicit intent by ATF pre-dating the award of the ATF contract at issue here to withhold information from VSE. Further, nothing in the claim letter provides the contracting officer with notice that such pre-award intentions and knowledge are a part of and relevant to VSE's constructive change claim, meaning that the contracting officer would have been unaware that he needed to decide them. *See Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987) (claim must provide contracting officer with "adequate notice of the basis and amount of the claim"). In such circumstances, VSE's August 2015 claim cannot be said to encompass the operative facts underlying VSE's newly asserted superior knowledge theory.

The defect in VSE's attempt to allege a superior knowledge theory before the Board is very similar to the situation that the Court of Appeals for the Federal Circuit recently considered in *Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361 (Fed. Cir. 2017). There, the contractor alleged facts in its original claim supporting legal theories of mutual mistake and frustration of purpose, asserting that the parties mutually failed to envision when they entered their lease contract that a dam would draw a lake's water level down to the extremely low level that it did for an extended period of time and had only anticipated a short-term draw down. In proceedings before the Armed Services Board of Contract Appeals that formed the basis of the appeal to the Federal Circuit, though, the contractor added a reformation claim, asserting that, prior to contract execution, the agency had misrepresented the condition of the dam by failing to disclose the dam's deteriorated state. The Federal Circuit held that the contractor's original factual allegation – that the agency held a "supposed *mistaken belief*" about the dam's condition – did "not suggest, and [is] in fact logically inconsistent with, the very different notion that the [agency] *knowingly misrepresented* the state of the dam." *Id.* at 1370; *see K-Con Building Systems*, 778 F.3d at

1006 (a claim for "breach of contract for not constructing a building on time" is different from a claim of "breach of contract for constructing with the wrong materials").

"Jurisdiction [to entertain a contract appeal under the CDA] requires both that a claim meeting certain requirements have been submitted to the relevant contracting officer and that the contracting officer have issued a final decision" – either in writing or by "deemed denial" – "on that claim." *K-Con Building Systems*, 778 F.3d at 1005. VSE has not presented a claim to the contracting officer based upon operative facts supporting its superior knowledge theory. Accordingly, we must dismiss VSE's superior knowledge theory for lack of jurisdiction.

B. VSE's Implied Duty of Good Faith Theory

In its amended complaint, VSE also added a count alleging a breach by ATF of the covenant of good faith and fair dealing, asserting that "ATF breached that covenant by its unreasonable delay in inspecting and destroying the [Covington] Fireworks, in violation of the *Droganes* Court's order and in bad faith, while VSE was monthly losing money on the storage of the Fireworks." Amended Complaint ¶ 46.

To the extent that VSE is alleging bad faith by ATF, it did not mention bad faith in its claim to the contracting officer. To establish bad faith by the Government, "a contractor must establish, by clear and convincing evidence, that a government official acted with 'some specific intent to injure the [contractor].'" *CAE USA, Inc. v. Department of Homeland Security*, CBCA 4776, 16-1 BCA ¶ 36,377, at 177,349 (quoting *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002)). VSE does not allege or discuss in its claim any intent by ATF to harm VSE or a need for the contracting officer to evaluate whether anyone within ATF acted with an intent to harm VSE. Accordingly, we lack jurisdiction to entertain a bad faith claim here.

Even if we were to consider the bad faith argument, it would have to fail. The only "bad faith" that VSE alleges is the bad faith that the district court found in *Droganes*: that ATF took too long to respond to and fully comply with court orders and that ATF was not completely forthright about whether the legal 1.4G fireworks in the Covington seizure had deteriorated to the point that they could not be returned to Mr. Droganes. VSE has not placed any evidence of that bad faith in the record of this appeal, but instead relies solely on citations to the magistrate's and district court judge's decisions in *Droganes*. As previously discussed, because VSE was not a party to the *Droganes* action, VSE cannot bind ATF, as an agency of the United States, to the district court's findings through collateral estoppel and cannot even submit the findings as evidence in opposition to ATF's summary relief motion. *See Jones*, 29 F.3d at 1554; *American Federation of Government Employees*, 835 F.2d at

1462. Further, the bad faith that the district court found ran either to the district court or to Mr. Droganes, rather than VSE. The mere fact that ATF may have acted in bad faith towards Mr. Droganes does not entitle VSE to a presumption that ATF was also intentionally seeking to harm VSE. *See Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976) (bad faith requires "evidence of some specific intent to injure the plaintiff"); *Librach v. United States*, 147 Ct. Cl. 605, 614 (1959) (no evidence that transactions were "actuated by animus towards the plaintiffs"). The record here is devoid of any evidence that ATF was acting with an intent to harm VSE. Absent some showing of evidentiary support from VSE in support of such an allegation, summary relief in ATF's favor would be warranted if we possessed jurisdiction over the bad faith issue. *See Mingus Constructors*, 812 F.2d at 1390-91 (conclusory statements that evidence exists are insufficient to defeat summary relief); *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed. Cir. 1984) (argument and assertions of counsel, without evidence, do not create genuine issue of material fact).

Nevertheless, a claim that the Government breached the implied duty of good faith and fair dealing does not require an affirmative showing of bad faith. *Sigma Services, Inc. v. Department of Housing & Urban Development*, CBCA 2704, 12-2 BCA ¶ 35,173, at 172,591. The implied duty of good faith and fair dealing "requires a party to refrain from interfering with another party's performance or from acting to destroy another party's reasonable expectations regarding the fruits of the contract." *CAE USA, Inc.*, 16-1 BCA at 177,347 (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1334-35 (Fed. Cir. 2014)). "'[P]arties can show a breach of the implied duty of good faith and fair dealing by proving lack of diligence, negligence, or a failure to cooperate,' meaning that '[e]vidence of government intent to harm the contractor is not ordinarily required.'" *Id.* (quoting *TigerSwan, Inc. v. United States*, 110 Fed. Cl. 336, 345-46 (2013)).

On a jurisdictional level, VSE's newly added implied duty theory fares better than VSE's superior knowledge and bad faith theories. Although VSE's certified claim does not mention a lack of good faith, VSE alleged in its claim that it was losing money every month that it had to continue to store fireworks with Heritage and that ATF had directed VSE to keep the fireworks at Heritage's site despite that fact. That is enough for us to find that ATF was, or should have been, on notice of this argument when it received VSE's claim.

On the merits, though, VSE's good faith and fair dealing argument cannot survive ATF's motion for summary relief. "[T]he good faith and fair dealing duty 'is not limitless'" and "does not entitle contractors to extra-contractual benefits, or require the Government to take extra-contractual steps," as a courtesy to the contractor. *CAE USA, Inc.*, 16-1 BCA at 177,350 (quoting *West Run Student Housing Associates, LLC v. Huntington National Bank*, 712 F.3d 165, 170 (3d Cir. 2013)); *see Precision Pine & Timber, Inc. v. United States*, 596

F.3d 817, 831 (Fed. Cir. 2010) ("The implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions."). It "does not obligate the Government to assist a contractor" outside the requirements of its contract "by taking positive actions" that the contract does not require. *Excel Services, Inc.*, ASBCA 30565, 85-3 BCA ¶ 18,369, at 92,159. "If the Government is not *contractually* obligated to do certain things, it is not financially liable – under a breach of contract theory – for failing to do them." *CAE USA, Inc.*, 16-1 BCA at 177,350.

Here, VSE is complaining that, beginning on the very first day of performance under the successor contract, it incurred extra costs for which ATF is responsible. VSE had been storing the Covington seizure under its Treasury contract for almost three years before it submitted a proposal for the successor contract, yet it offered a fixed-price-per-square-foot for CLIN 0006 on the successor contract that was far below what it was already paying Heritage for such storage. At the same time, VSE failed to enter into a subcontract with Heritage, even though it proposed to leave the Covington seizure in Heritage's facility, exposing itself to Heritage's unilateral price increases. When ATF accepted VSE's proposal, it created a contract allowing ATF to order storage of hazardous products pursuant to CLIN 0006 at a fixed price of $1.95 per square foot for each month that storage was necessary. VSE has identified no theory of recovery that would require ATF, despite that contract right, to pay more. VSE cannot intentionally underprice its contract at amounts far below its actual costs and then immediately blame the Government for its losses. ATF did not cause VSE to lose money on CLIN 0006. VSE, by failing to propose a price that would cover its costs and by failing to negotiate a subcontract with Heritage before proposing that price, caused its own damage.

C. VSE's Commercial Impracticability Theory

VSE also added a commercial impracticability theory to its April 2015 amended complaint. It asserts, as part of its constructive change count, that "ATF's unreasonable and bad faith delay in performing its obligations, in violation of the [*Droganes*] court's order, rendered the performance of the Contract by VSE commercially impracticable, constituting a constructive change to the Contract." Amended Complaint ¶ 42.

Commercial impracticability claims fall into two categories: (1) "existing" impracticability, "which is based on facts in existence at the time the contract was made," and (2) "supervening" impracticability, "where impracticability results from events occurring after contract formation." John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 289 (5th ed. 2016); *see Restatement (Second) of Contracts* §§ 261, 266 (1981) (comparing existing and supervening impracticability

doctrines). Because VSE's argument is based upon the latter, we limit our discussion to the legal requirements applicable to supervening impracticability.

"[W]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996) (quoting *Restatement (Second) of Contracts* § 261); *see International Business Aircraft, Inc.*, ASBCA 30904, 88-1 BCA ¶ 20,419, at 103,281 (1987) ("where contract performance becomes impossible without the fault or negligence of the contractor, the failure to perform is excusable"). "A contract is commercially impracticable when performance would cause 'extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.'" *Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (quoting *Restatement (Second) of Contracts* § 261 cmt. d). Although sometimes "treated as a type of constructive change to the contract," *id.*, the theory differs from a traditional constructive change theory because it is "not premised on government breach or government fault." John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *supra*, at 289. "Instead, the contractor is relieved from its agreement to perform because performance is found to be greatly different from what was expected." *Id.* It is entitled to compensation under a constructive change theory if the Government either has assumed the risk of the supervening impracticability or has ordered the contractor to continue performing after learning of the excusable supervening impracticability. *Al Khudhairy Group*, ASBCA 56131, et al., 10-2 BCA ¶ 34,530, at 170,293-94.

A contractor must establish four factors to recover monetary relief on a commercial impracticability claim:

> To avail itself of this defense, [a contractor] must show that (1) a supervening event made performance impracticable; (2) the non-occurrence of the event was a basic assumption upon which the contract was based; (3) the occurrence of the event was not [the contractor's] fault; and (4) [the contractor] did not assume the risk of the occurrence of the supervening event.

Hearthstone, Inc. v. Department of Agriculture, CBCA 3725, 15-1 BCA ¶ 35,895, at 175,479 (citing *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294 (Fed. Cir. 2002)).

VSE's commercial impracticability argument is based not upon an allegation of an *independent* supervening event that caused its costs to increase, but upon alleged conduct *by ATF* that breached or changed its contract. That is not the type of "supervening event"

that the commercial impracticability doctrine was intended to cover. "Events that come within the [supervening impracticability theory] are generally due either to 'acts of God' or to acts of third parties." *Restatement (Second) of Contracts* § 261 cmt. d. "If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter," for which breach damages or an equitable adjustment are available. *Id.* As we have previously found, VSE cannot establish a constructive change, or breach, to the terms of its contract. Because its claim is based solely upon ATF's alleged actions in breach, it has failed to state a viable commercial impracticability claim.

Even if VSE properly alleged a viable supervening commercial impracticability, VSE's claim would still fail under the third and fourth prongs of the test for recovery. The wide disparity between what VSE charged ATF under CLIN 0006 and what VSE had to pay Heritage for CLIN 0006 storage was the result of (1) VSE's failure to negotiate a subcontract with Heritage, which allowed Heritage to charge VSE whatever it wanted, and (2) VSE's decision to propose a CLIN 0006 price far below what it was already paying Heritage at the time it submitted its proposal. Plainly, the fault for VSE's losses on CLIN 0006 storage each month falls upon VSE. In addition, by agreeing to a fixed-price "per square foot" amount under CLIN 0006, VSE assumed the risk of any cost increases for the services that it had agreed to provide. *See Safety Training Systems, Inc.*, ASBCA 57095, et al., 14-1 BCA ¶ 35,509, at 174,052 ("a fixed-price contract assigns any increase in costs to the contractor, thereby insulating the government from price fluctuations"). VSE's commercial impracticability claim is denied.

D. Method of Measuring Square Footage

In its response to ATF's motion for summary relief, VSE asserted that summary relief could not be granted because "VSE has disputed with ATF the proper method to measure square footage and bill for the storage of the Covington Fireworks," indicating that "VSE believed that square footage should be based on the outside dimension of the bunkers" while "ATF believed that [it] should be based on the inside dimension of the bunkers." Appellant's Response at 10. That factual disagreement, it asserts, precludes summary relief here.

There is nothing in VSE's claim that purports to identify a dispute about the manner in which square footage is measured under the contract. The sole issue there is whether the extensive length of the Covington seizure storage was contemplated by the parties and whether VSE is entitled to compensation for that alleged constructive change. We lack jurisdiction to entertain the square footage measurement dispute as part of this appeal. *See Crane & Co.*, 16-1 BCA at 178,003-04.

Decision

For the foregoing reasons, VSE's requests for damages under superior knowledge and bad faith theories, as well as its alleged dispute regarding the manner in which square footage was calculated, are **DISMISSED FOR LACK OF JURISDICTION**. VSE's requests for damages under constructive change and breach of implied duty of good faith and fair dealing theories are **DENIED**.

HAROLD D. LESTER, JR.
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge