UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTED, RESPONDENT'S CROSS-MOTION DENIED:
April 9, 2020

CBCA 6188, 6312

CROWLEY LOGISTICS, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

James Y. Boland of Venable LLP, Tysons Corner, VA; and Dismas N. Locaria and Christopher G. Griesedieck of Venable LLP, Washington, DC, counsel for Appellant.

Matthew G. Lane and Samantha Ahrendt, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **BEARDSLEY**, and **LESTER**.

LESTER, Board Judge.

In September 2017, when Hurricanes Maria and Irma tore through Puerto Rico and the United States Virgin Islands (USVI), the Federal Emergency Management Agency (FEMA), as required by its mission statement, quickly had to respond to the disasters to reduce loss of life and property and to protect institutions of the United States. Unfortunately, when those hurricanes hit, FEMA did not have in place any contracts that

would allow it to ship equipment, goods, or other materials from the continental United States (CONUS) to either Puerto Rico or the USVI to assist in its disaster-relief efforts. The closest prepositioned contract that it had in place was limited to shipments from Puerto Rico to the USVI. That indefinite delivery/indefinite quantity (IDIQ) contract was held by Crowley Logistics, Inc. (Crowley), and had a price ceiling of only $4 million.

With no time to run a competition for CONUS-to-Puerto Rico and CONUS-to-USVI shipping contracts, FEMA hurriedly expanded Crowley's IDIQ contract on a sole-source basis to add 101 Contract Line Item Numbers (CLINs) that would allow for the immediate shipment of necessary disaster-relief materials to Puerto Rico and the USVI on barges that Crowley would obtain for temporary use. That modification also increased the price ceiling of Crowley's contract by $96 million—from $4 million to $100 million. As a result of the breadth of the disasters, FEMA quickly ran through the cost ceiling and more, but authorized contracting officials within FEMA continually instructed Crowley to keep performing.

In the rush to modify Crowley's IDIQ contract to get the services that FEMA desperately needed, a FEMA contracting officer who had a warrant of contracting authority limited to contract actions of $25 million or less executed the modification that expanded the scope of the contract by $96 million. Later, after several months of performance, FEMA notified Crowley that there was a problem with the contract modification and that FEMA needed supporting data to justify the costs that Crowley had been incurring. Eventually, authorized FEMA officials ratified what they said had been an unauthorized contract commitment, using the express ratification procedures of Federal Acquisition Regulation (FAR) 1.602-3 (48 CFR 1.602-3 (2017)), but, when doing so, effectively changed the pricing terms in the written contract modification for eleven of the CLINs, reducing what FEMA was willing to pay for barge shipment and stevedoring services under those CLINs.

Before the Board, Crowley complains that FEMA has improperly sought, unilaterally and after the fact, to rewrite the pricing provisions of the contract modification. On summary judgment, and supported by an extensive set of joint stipulations of undisputed material facts, it asks that we find the modification to be fully authorized and effective and that we order FEMA to calculate what Crowley is owed by reference to the contract's written pricing terms. Although we agree with FEMA that the contracting officer who executed the contract modification did not hold a written warrant that would have allowed her to execute the modification at issue, it is clear and indisputable that other contracting officers who held unlimited warrants of contracting authority not only knew what was happening—if not at the moment of the modification's execution, very soon thereafter—but were also intimately involved in ensuring that Crowley continued performing for months after realizing the modification signatory error. During that time, those authorized individuals never told Crowley that there was a contract modification formation problem.

In the circumstances here, and based upon the stipulated undisputed facts, we find that, to the extent that the original verbal directions to the contracting officer who executed the modification were insufficient to "authorize" the modification on its date of execution, other FEMA officials with unlimited contracting warrants implicitly ratified that modification through their conduct, long before FEMA engaged in an "express" ratification action that purported to modify the agreement that FEMA had already made. The contract modification is enforceable as written. FEMA must honor the payment terms that it implicitly ratified and cannot, after the fact, unilaterally revise those terms. For the reasons discussed below, Crowley's motion for partial summary judgment is granted, and FEMA's motion for summary judgment is denied.

Statement of Undisputed Facts

The following statement of facts is taken from the extensive joint stipulation of undisputed material facts that the parties filed with the Board, except where otherwise noted:

The Contract as Originally Awarded

On August 30, 2016, FEMA, through one of its contracting officers, Alfredia Allen, awarded Crowley contract no. HSFE70-16-D-0204 (the contract or contract-0204), an IDIQ contract with a $4 million ceiling. Under the contract, Crowley was to assist FEMA in responding to disasters by providing shipping containers and intermodal transportation services for the shipment of Initial Response Resources (IRRs) from Puerto Rico to various locations in the USVI. Joint Stipulation of Facts (JSF) ¶¶ 1, 4; Appeal File, Exhibit 1 at 55.[1] IRRs include life-sustaining and other commodities, such as water, meals, cots, tarps, plastic sheeting, blankets, infant and toddler kits, and fuel, that are needed to lessen damage before, or to alleviate damage and suffering immediately after, a disaster. JSF ¶ 5. The contract had an initial one-year contract period and four one-year option periods.

As originally written, contract-0204 contained eighteen CLINs for ocean transportation and related services, such as "Surface line haul services of containerized IRR commodities from original to port of embarkation," "Container handling equipment (CHE) services at the original location and port of embarkation," "Expedite loaded containers, via ocean vessel [from Puerto Rico] to assigned ports in the USVI," "Retrograde fully loaded containerized IRR commodities to origin loading facility," and "Fuel cost." Exhibit 2 at 3-5. This set of CLINs repeated for each option year, and each CLIN had a fixed price per unit.

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

When services were needed, the Government was to issue a written task order under which Crowley was to perform. Exhibit 2 at 26; JSF ¶ 4. The contract provided that, in the event of any conflict between a task order and the contract, "this contract shall control." Exhibit 2 at 26. It further provided that Crowley would be obligated to "honor any order exceeding the maximum order limitations" unless Crowley notified the ordering office within thirty days after the order's issuance of its intent not to ship the item or items. *Id.* at 27.

Crowley's contract was FEMA's only prepositioned or advance contract to support intra-island logistics in Puerto Rico and the USVI in the event of a disaster. JSF ¶ 10. As originally written, the contract did not contemplate transportation of IRR or other supplies from CONUS to either Puerto Rico or the USVI. *Id.* ¶ 4.

Levels of Contracting Authority Within FEMA

In August 2017, FEMA's Office of the Chief Procurement Officer (OCPO) was headed by Chief Procurement Officer, Bobby J. McCane. JSF ¶ 11. Within OCPO's Acquisition Operations Division (AOD), there were two Deputy Directors, each of whom headed one of AOD's two "sides": Darrien Demps was the Deputy Director for Disaster Operations within AOD, which the parties refer to as the "disaster side," and Lester Ingol was the Deputy Director for Preparedness and Internal Operations within AOD, the "non-disaster side." JSF ¶ 12. Because the position of AOD Director was vacant in the fall of 2017, both Mr. Demps and Mr. Ingol reported directly to Mr. McCane's deputy. *Id.*

Ms. Allen, the contracting officer who executed contract-0204, worked in the Incident Support Section (ISS) on the disaster side of AOD. JSF ¶ 13. Her Section Chief was Carolyn Ward. Ms. Ward's immediate supervisor was ISS Branch Chief Sam K. Ansani. Mr. Ansani reported directly to Mr. Demps. *Id.*

In the fall of 2017, Ms. Ward, Mr. Ansani, Mr. Demps, Mr. Ingol, and Mr. McCane all had unlimited contracting officer warrants. JSF ¶ 14; Exhibit 81. Ms. Allen's contracting officer warrant authority was limited to $25 million. JSF ¶ 15; Exhibit 13 at 3. Ms. Allen's immediate supervisors were aware at that time of the limit on Ms. Allen's contracting authority. *See* JSF ¶ 16.

The 2017 Hurricanes

During a one-month period beginning August 25, 2017, three separate hurricanes caused widespread damage to and/or destruction of critical infrastructure and property that required immediate action by FEMA: Hurricane Harvey hit Texas on August 25, Hurricane Irma hit the USVI on September 6, and Hurricane Maria hit Puerto Rico (as well as the

USVI) on September 20, 2017. Between August 25 and September 20, 2017, the President issued eleven emergency and disaster declarations, including DR-4335 (Irma, the USVI), DR-4339 (Maria, Puerto Rico), and DR- 4340 (Maria, the USVI). JSF ¶ 19. The three hurricanes, coming so close in time to one another and across such a wide geographic area, presented significant operational challenges for FEMA's response and recovery effort. *Id.* ¶ 20.

At the time, FEMA did not have in place any contracts that would allow FEMA to transport materials directly from CONUS to either Puerto Rico or the USVI. The only contract that it had in place was Crowley's, which was, according to its terms, limited to the transport of IRRs between Puerto Rico and the USVI. JSF ¶ 4.

Initial Contracting Actions in Response to Irma and Maria

On August 31, 2017, before Hurricane Irma had made landfall, FEMA's Logistics Management Directorate (LMD) requested that Ms. Allen use Crowley's contract to preposition an IRR package to the USVI, to be shipped from Puerto Rico, based upon Irma's projected storm path. JSF ¶ 22. The next day, Ms. Allen issued a Notice to Proceed (NTP) authorizing Crowley "to activate support operations to preposition FEMA Containers from the FEMA Distribution Center in Puerto Rico to the US Virgin Islands" in accordance with the terms of Crowley's contract, with a period of performance from September 1 to 15, 2017, not to exceed $46,000. Exhibit 16 at 1; *see* JSF ¶ 23. Crowley proceeded with performance. JSF ¶ 25. The actual task order for the work was not issued until September 30, 2017, executed by Ms. Allen. Exhibit 7.

After Irma hit the USVI on September 6, 2017, FEMA's Emergency Support Function (ESF) partner agencies began approaching LMD and Crowley for support in moving commodities from CONUS to the USVI, including a one-time shipment of General Services Administration (GSA) vehicles from New Jersey. JSF ¶¶ 26, 27. None of the ESFs had a support plan or prepositioned contract in place for transportation services from CONUS to a location outside the continental United States (OCONUS). *Id.* ¶ 26. As a result of the urgent and compelling nature of the need, and the lack of an existing contract for such shipments, Ms. Allen sought permission from AOD's disaster-side section, Mr. Demps, to issue an NTP to Crowley for CONUS-to-USVI shipments, supported by funding document WN00697Y2017T, with an "[e]stimated cost" of $8 million. *Id.* ¶ 28; Exhibit 54 at 2. By email dated September 6, 2017, Mr. Demps told Ms. Allen to issue a verbal order to Crowley, using the existing contract, "to transload palletized cargo into containers, load containers onto vessels and deliver containerized commodities [from CONUS] to affected areas in Puerto Rico and the [USVI]," but to "submit the completed files for review within 3 days." Exhibit 54 at 1-2; *see* JSF ¶ 29.

Later on September 6, 2017, Ms. Allen sent an email to Crowley (on which Ms. Ward was copied), indicating that "[t]his NTP authorizes Crowley Logistics to provide port operation services in support of Hurricane Irma" in an amount not to exceed $8 million, with an "effective period" from September 6, 2017, to February 2, 2018. Exhibit 16 at 3; *see* JSF ¶ 30. She indicated that a task order would be issued within three days, Exhibit 16 at 3, although the record does not appear to indicate whether it was ever issued. Crowley immediately proceeded with performance under the NTP. JSF ¶ 31. Further, on September 15, 2017, Ms. Alfredia confirmed by email that FEMA was expanding the task order to add inland transportation within St. Thomas, as directed by FEMA representatives. Exhibit 16 at 18.

Hurricane Maria's devastation of Puerto Rico on or around September 20, 2017, generated an urgent need for FEMA to provide a full suite of transportation and logistical services to the disaster area, including transportation of a significant quantity of supplies from CONUS to OCONUS. JSF ¶ 32. The increased contracting demands from Hurricanes Harvey, Irma, and Maria were severely taxing FEMA's acquisition process and contracting personnel, including contracting officers, within the OCPO. Appellant's Statement of Additional Facts (SAF) ¶ 8; Respondent's Statement of Genuine Issues (SGI) ¶ 8. Ms. Allen was working approximately forty to sixty hours over and above her usual work week to ensure that support made it to affected areas as quickly as possible, Mr. Ansani was working fifteen to sixteen hour days, and the entire OCPO team was working very long hours. SAF ¶ 9; SGI ¶ 9. Ms. Allen has testified that the mindset at the time, given the overwhelming demands on the contracting office, was "just get it done, get it done, get it done." Appellant's Summary Judgment Reply Brief Exhibit E at 2.

As part of that effort, Ms. Allen continued to issue NTPs and sign contract modifications to Crowley's contract to have Crowley proceed with the provision of services in September and October 2017. JSF ¶ 33. By the end of September 2017, Crowley was providing all-inclusive transportation and shipping services between CONUS, Puerto Rico, and the USVI ports of operation to support FEMA's response and recovery operations in the USVI and Puerto Rico. *Id.* ¶ 34. As early as September 2017, Ms. Ward, Mr. Ansani, Mr. Ingol, and Mr. Demps were aware that Crowley was providing transportation services from CONUS to OCONUS. *Id.* ¶ 35.

Modification P00004

In or around mid- to late September 2017, Ms. Allen determined that the scope of Crowley's contract, as it was then being used, had exceeded the purpose and intent of the initial award to a point where the contract should be re-competed, and she began developing a proposed sole source contract award to Crowley: contract no. HSFE70-17-C-0200

(contract-0200). JSF ¶ 36. She made several attempts to update a draft Justification and Approval (J&A) document for contract-0200 and to establish a realistic contract ceiling for approval, and, in her draft packet for the proposed contract, she recommended a new ceiling of $250 million due to the expanded volume of services required following Hurricane Maria. *Id.* ¶ 37. Mr. Ansani, the ISS Branch Chief, recommended that Ms. Allen reduce the proposed contract-0200 ceiling to $100 million. *Id.* ¶ 39. A week later, having received no feedback or approval for the J&A, Ms. Allen "requested permission to incorporate a scope change into [Crowley's original contract, contract 0204]. *Id.* ¶ 40. At that time, Mr. Ingol, the Deputy Director for the non-disaster side of AOD, was serving as the acting Deputy Director for Disaster Operations in the absence of its actual Deputy, Mr. Demps. Declaration of Lester Ingol ¶ 10 (Exhibit 3 to Respondent's Summary Judgment Motion). Deputy Director Ingol authorized the requested change in scope. JSF ¶ 40; *see* Exhibit 13 at 3.

On October 24, 2017, Ms. Allen issued modification P00004 to contract-0204, which purported to do the following:

> 1. To expand the scope of the contract to include a full suite of transportation and logistics services, including air transport, leasing of ocean shipping containers, providing intermodal transportation services of containerized commodities, cross-dock services, ocean transportation, Container Handling Equipment (CHE) at ports of embarkation and debarkation, surface line haul services, and drayage. These services are required to support FEMA response and recovery efforts for DR-4339 (Puerto Rico) and DR-4340 (USVI).
>
> 2. Increase the contract ceiling from $4,000,000 to $100,000,000.
>
> 3. Add Contract Line Item Numbers (CLINs) 1023 to 1132.
>
> 4. To incorporate supplemental scope requirements.
>
> 5. [T]o incorporate FAR Clause[] 52.232-18, Availability of Funds.

Exhibit 8 at 1-2. The modification, in addition to expanding the contract's scope to provide for transport services between CONUS, Puerto Rico, and the USVI, also extended the contract performance period through February 5, 2018. JSF ¶¶ 41, 42. Relevant for purposes of these consolidated appeals, the following were included in the added CLINs:

> CLINs 1072 through 1076, which identified a specific fixed firm unit price for "Ocean Transportation Dedicated Barge First Voyage" of the "Atlantic

> Trader/McAllister (154 FEU container minimum)" (CLIN 1072), "Baltimore/Allie B (242 FEU container minimum)" (CLIN 1073), "Charleston/Sisters (158 FEU container minimum)" (CLIN 1074), "Chesapeake Trader/Kristen McAllister (224 FEU container minimum)" (CLIN 1075), and "Elizabeth/Ivory Coast (315 FEU container minimum)" (CLIN 1076). *See* Exhibit 8 at 11-12.
>
> CLINs 1077 through 1083, which identified a specific fixed firm "per container" unit price for "Dedicated Barge Stevedoring" involving "USLoad/Download" (CLIN 1077), "Puerto Rico Load/Download (CLIN 1078), "USVI Load/Download" (CLIN 1079), "Per Gang Hour" (CLIN 1080), "Double Time" (CLIN 1081), "Triple Time" (CLIN 1082), and "Extra Labor" (CLIN 1083). *See* Exhibit 8 at 12-13.

Before the modification was issued, Ms. Allen and Crowley had discussed both the structure and the pricing of the new CLINs, including that the pricing for the dedicated barge services would use a per container rate. JSF ¶ 43.

Ms. Allen signed modification P00004 upon behalf of FEMA, *id.* ¶ 41, even though her warrant of contracting authority was limited to $25 million. Nevertheless, Ms. Allen copied Mr. Ingol on her email to Crowley transmitting the executed copy of modification P00004. Respondent Answer ¶ 41; Complaint Exhibit 15 at 399. Crowley also copied Mr. Ingol on an email the following day in which Crowley provided cost information for the preparation of a task order using CLINs added through modification P00004. Exhibit 17 at 65. In its briefing, FEMA acknowledges that Deputy Director Ingol, while standing in for Deputy Director Demps, authorized Ms. Allen to increase the contract ceiling from $4 million to $100 million, but asserts that Mr. Ingol did not know that additional CLINs were included in modification P00004 and thought that Ms. Allen, if she lacked sufficient contracting authority to execute the modification, would work with a contracting officer who had that authority. Respondent's Summary Judgment Motion at 10 & n.8. FEMA asserts that no evidence suggests that Mr. Ingol ever opened Ms. Allen's email or the pdf attachment containing modification P00004. *Id.* at 22.

On or about October 27, 2017, after modification P00004 had already been executed, Ms. Allen submitted to Ms. Ward for review the proposed J&A reflecting what Ms. Allen intended as a ceiling increase to contract-0204, although, according to FEMA, Ms. Ward may have thought that it was to support funding for a not-yet-awarded contract-0200. JSF ¶ 44; Exhibit 13 at 3. At about the same time, the United States Army Corps of Engineers (USACE) approached FEMA for help in moving power restoration equipment to Puerto Rico, and Ms. Allen authorized Crowley to do that urgent work. On November 7, 2017, Ms.

Ward instructed Ms. Allen to reduce the ceiling listed in the J&A to $61.5 million so that it could quickly be approved "in-house," meaning within FEMA and without the need for additional Department of Homeland Security (DHS) approvals. *Id.* ¶ 45. The next day, Ms. Allen informed Crowley that the contract-0204 ceiling would have to be reduced to $61.5 million, but Crowley responded that it was already near $61.5 million in costs incurred. *Id.* ¶¶ 46, 47. Ms. Allen immediately issued a verbal stop work order "because [she] didn't want the contractor to incur additional costs and exceed the ceiling." *Id.* ¶ 48. She also notified Ms. Ward of Crowley's burn rate—the rate at which costs were accruing—with Crowley having already expended $47.9 million and forecasting an additional $31.3 million in costs by November 17, 2017. Exhibit 13 at 3. Ms. Ward provided that information to Mr. Demps, who had returned to the office. JSF ¶ 49.

Because of FEMA's urgent need for services, Mr. Demps instructed Ms. Allen on November 9, 2017, to direct Crowley immediately to resume operations. JSF ¶ 50. In a separate email that same day to OCPO's Ombudsman, Mr. Demps stated that "[w]e need to communicate to Crowley to continue operations, we can't have operations cease." *Id.* ¶ 50 (quoting Exhibit 61 at 1490). Ms. Allen emailed Crowley, copying Mr. Demps and the OCPO Ombudsman, stating that "Crowley is authorized to resume transportation logistics operations in support of DR-4339 (Puerto Rico) under [contract-0204] effective immediately. The contract ceiling remains at $100 million." *Id.* ¶ 51 (quoting Exhibit 62 at 1499).

Contracting Authority Questions and Responses

FEMA contends that it was not until November 9, 2017, that Ms. Ward became aware that Ms. Allen was taking actions above and beyond her warrant of contracting authority. FEMA contends that Mr. Demps did not become aware of that fact until November 15, 2017. The record contains no evidence that, upon learning that Ms. Allen allegedly was acting beyond her warrant of contracting authority, either Ms. Ward or Mr. Demps directed that Crowley stop work or that anyone issue a stop work order to Crowley. Nor is there any evidence in the record that anyone told Crowley at that time that there was a problem in the execution of modification P00004.

By (at the latest) November 28, 2017, Mr. McCane became aware of Crowley's burn rate when Mr. Demps informed Mr. McCane that the "Crowley IDIQ with a $4M ceiling is expected to grow to $160M." JSF ¶ 52. On December 8, 2017, Mr. McCane, Mr. Ingol, and OCPO's Ombudsman received a copy of Crowley's weekly expenditures. *Id.* ¶ 53.

On December 19, 2017, Ms. Allen informed Crowley that her J&A for an increase to the $100 million contract ceiling was "being reviewed for approvals and signatures" and that, once approved, a bilateral contract modification would be prepared. JSF ¶ 55; Exhibit 20

at 11. In emails on January 10 and 17, 2018, Crowley requested confirmation from Ms. Allen that it would have written authorization to continue to operate beyond contract-0204's $100 million ceiling, indicating that its costs appeared already to have exceeded that ceiling and projecting another $15 million in costs within the following few weeks. JSF ¶ 56; Exhibit 20 at 10. By email dated January 18, 2018, Ms. Allen responded that "[t]his is to inform you that FEMA intends to extend the current task order to reflect a new period of performance date of April 18, 2018." JSF ¶ 57; Exhibit 20 at 18.

At about the same time, Mr. McCane directed Mr. Demps to suspend Ms. Allen's warrant of contracting authority. JSF ¶ 54. Mr. Demps did so on January 25, 2018. *Id.* The record does not indicate that Crowley was informed of the suspension.

On February 1, 2018, Crowley received for its signature a bilateral modification to contract-0204 that would extend performance to April 18, 2018, but did not increase the $100 million ceiling. Exhibit 21 at 1. Although Crowley signed the modification, it asked Ms. Allen about the ceiling increase. JSF ¶ 58. Ms. Allen responded to Crowley's email, stating that the J&A to increase the ceiling had been submitted to the OCPO and that she hoped everything would be approved within the next few days. Exhibit 21 at 3. Nevertheless, on February 6, 2018, Crowley was informed that Ms. Ward was replacing Ms. Allen as the contracting officer, that Crowley should "stop work" based upon a lack of approved funding, and that Crowley should provide details of all invoices to date, pending invoices, and projections through April 18, 2018. *Id.* at 7, 9. Crowley provided responsive information later that day, and, on February 7, 2018, Ms. Ward asked for "full cost proposals and any documentation that will confirm that [Crowley's] price is fair and reasonable" in relation to the CLIN pricing of contract-0204. *Id.* at 8; *see* JSF ¶ 59. She also asked for any documentation showing that Crowley was authorized to exceed the contract-0204 ceiling. Exhibit 21 at 15.

After providing Ms. Ward information responsive to her request, Crowley contacted Mr. Ansani on February 8, 2018, to discuss contract-0204. In an email communication memorializing the conversation, Crowley recognized that Mr. Ansani was waiting for Crowley's cost proposal to finalize a fair and reasonable price for the latest task order and that, once received, he intended to issue a new task order to confirm continuing contract performance. Exhibit 21 at 20. In addition, though, Crowley indicated that, "[p]er our discussion of Crowley's continuing contract performance, please provide concurrence and approval for Crowley to continue to operate under [contract-0204]." *Id.* Mr. Ansani, in a responsive email, stated, "You have my concurrence relative to the email below." *Id.*; JSF ¶ 60.

On February 22, 2018, in response to an inquiry from Crowley about what it viewed as ambiguities in direction during meetings with Ms. Ward and her team, Mr. Ansani provided the following statement to Crowley:

> Yes, please continue performance but not to exceed the $210M agreed upon funding. As of today barring any unforeseen circumstances, we are on track for the February 28 award date. Please accommodate any reasonable request from [Ms. Ward] to make sure we meet our target date. If you have any questions, please circle back with me.

Exhibit 21 at 37.

On February 28, 2018, Ms. Ward sent Crowley another email, with a copy to Mr. Ansani, indicating that performance had to end on March 7, 2018, with a total ceiling of $129 million:

> Just wanted to restate what was previous[ly] discussed. The period of performance will end on 07 March for a total $129M. If you do any work that exceed[s] this value you will be doing this at your own risk. It is an unauthorized commitment.

Exhibit 21 at 80; *see* JSF ¶ 61.

By email on March 7, 2018, Crowley asked Mr. Demps, with a copy to Mr. Ansani, to address Ms. Ward's "stop work" order, which would preclude any further work under contract-0204 beyond that day, and to tell Crowley whether it should continue working:

> An immediate work stoppage would be very disruptive to the ongoing recovery efforts on the Island. In order to avoid that we request that you or someone with the appropriate authority provide us with written authorization to continue work under the previously agreed upon pricing, terms and conditions.

Exhibit 24 at 1; *see* JSF ¶ 62. Less than forty minutes later, Mr. Ansani responded as follows: "We are working on a resolution as discussed with Mr. Demps, please continue performance as directed." Exhibit 24 at 1; *see* JSF ¶ 63. Crowley continued to perform.

Contract Payments and Express Ratification

When issuing modification P00004 back in October 2017, increasing the contract-0204 ceiling to $100 million and expanding the scope of work under the contract,

Ms. Allen asked Crowley to invoice FEMA in increments of no more than $25 million so that she could issue task orders, for payment purposes, that were within her contracting warrant authority. JSF ¶ 64.

In accordance with that request, Crowley submitted an "invoice summary" on October 25, 2017, of the first $25 million in costs that it had incurred or would incur for the expanded scope of work under contract-0204, and, on October 30, 2017, Ms. Allen issued a task order in that amount. JSF ¶¶ 65, 66. Crowley submitted its invoice for that task order of just below $25 million on November 1, 2017, which FEMA subsequently paid. JSF ¶¶ 67, 69. On November 8, 2017, Crowley submitted another "invoice summary" of just below $25 million, which resulted in another task order issued December 6, 2017, JSF ¶¶ 68, 70, followed by Crowley's invoice and FEMA's payment. JSF ¶¶ 71, 72.

In March 2018, two months after FEMA had suspended Ms. Allen's contracting authority, FEMA began gathering facts and documents to begin a ratification process under FAR 1.602-3 to pay Crowley for services that it had performed in response to Hurricanes Irma and Maria and for which it had subsequently invoiced FEMA. JSF ¶ 74. FEMA's OCPO assigned Mr. Demps to serve as the contracting officer for purposes of ratification and requested the assistance of a DHS price analyst to review the CLIN prices included in modification P00004. *Id.* ¶ 75. On April 6, 2018, based upon Mr. Demps' recommendation and following discussions between FEMA and Crowley, OCBO's Chief Procurement Officer, Mr. McCane, ratified and approved payment of $113,912,322.65 covering charges that FEMA found fair and reasonable, as contemplated by Federal Acquisition Regulation (FAR) 1.602-3(c)(4) (48 CFR 1.602-3(c)(4) (2017)). JSF ¶ 78; Exhibit 13. On October 10, 2018, after further discussions between FEMA and Crowley, Mr. McCane ratified and approved an additional payment of just over $40 million. JSF ¶ 81; Exhibit 23.

FEMA continues to question the fairness and reasonableness of the pricing in CLINs 1072 through 1083. JSF ¶ 82. FEMA's ratification payments include an amount that FEMA believes contains a fair and reasonable payment for CLINs 1072 through 1083, but in a lesser amount than that for which Crowley invoiced.

Procedural History Before the Board

On April 27, 2018, after Mr. McCane initially ratified in writing and approved payment of some of Crowley's requested costs, Crowley submitted a certified claim to Ms. Ward, as the responsible FEMA contracting officer, seeking payment of an additional $60,391,770.74, inclusive of interest and penalties under the Prompt Payment Act (PPA), 31 U.S.C. § 3903 (2012), but exclusive of interest under the Contract Disputes Act (CDA), 41

U.S.C. §§ 7101-7109. Crowley appealed the contracting officer's "deemed denial" of that claim to the Board on June 27, 2018, which the Board docketed as CBCA 6188.

On June 28, 2018, Crowley submitted a new invoice for additional incurred costs to FEMA in the amount of $17,682,180.46, which, viewing the invoice as in dispute, it converted into a certified claim on July 13, 2018. Although FEMA approved payment of some claimed costs in its express ratification action on October 10, 2018, it did not approve all of the claimed costs or issue a decision on the claim. On November 20, 2018, Crowley appealed the "deemed denial" of its second claim, which the Board docketed as CBCA 6312. The Board then consolidated CBCA 6188 and 6312.

After several months of discovery during which the parties took several fact witness depositions, the parties jointly requested that the Board suspend remaining discovery, at least temporarily, and establish a briefing schedule for partial summary judgment motions on several threshold legal issues. The Board granted the parties' joint request, and the parties subsequently submitted eighty-four paragraphs of stipulated undisputed material facts. Based largely upon those stipulated facts, Crowley sought partial summary judgment on its right to enforce the terms of modification P00004, as written, arguing (1) that Ms. Allen was authorized to issue the modification and (2) that, even if she was not, other authorized contracting officers within FEMA implicitly or institutionally ratified it. FEMA filed its own motion for summary judgment, arguing (1) that modification P00004 is unenforceable because its signatory, Ms. Allen, lacked contracting authority to execute it and (2) that FEMA's decision expressly to ratify its obligation to pay Crowley a fair and reasonable amount for the work that Crowley performed bars an implicit or institutional ratification argument. Following full briefing, the Board conducted oral argument on the parties' motions.

Discussion

I. Standard for Summary Judgment

"Summary judgment is only appropriate where there is no genuine issue of material fact." *Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 19-1 BCA ¶ 37,383, at 181,734. Nevertheless, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "It is not the judge's function 'to weigh the evidence and determine the truth of the matter,'" *id.* (quoting *Anderson*, 477 U.S. at 249), and "[a]ll justifiable inferences and presumptions are to be resolved in favor of the nonmoving party." *Id.* The extensive joint stipulations of facts that the parties worked together to prepare are very helpful to the resolution of these motions.

II. Whether Modification P00004, When Executed, Was Authorized

A. Contracting Authority

In *Federal Crop Insurance Co. v. Merrill*, 332 U.S. 380 (1947), the Supreme Court established that the Government is bound by the actions of a government employee only to the extent that the employee in question had "actual authority" to bind the Government in contract:

> The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. *Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power*. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.
>
> . . . .
>
> The oft-quoted observation . . . that "*Men must turn square corners when they deal with the Government*," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

Id. at 384-85 (emphasis added; citations omitted).

Although a government employee acting with "actual authority" can bind the Government in contract, the concept of "apparent authority," which is generally sufficient to bind a private litigant in contract, cannot be applied against the Government:

> It is a well recognized principle of procurement law that the contracting officer, as agent of the executive department, has only that authority actually conferred upon him by statute or regulation. *If, by ignoring statutory and regulatory requirements, he exceeds his actual authority, the Government is not estopped to deny the limitations on his authority, even though the private contractor may have [relied] on the contracting officer's apparent authority to his detriment, for the contractor is charged with notice of all statutory and regulatory limitations*.

CACI, Inc. v. Stone, 990 F.2d 1233, 1236 (Fed. Cir. 1993) (emphasis added) (quoting *Prestex, Inc. v. United States*, 320 F.2d 367, 371 (Ct. Cl. 1963)); *see Federal Crop Insurance*, 332 U.S. at 384; *Jascourt v. United States*, 207 Ct. Cl. 955, 956 (1975). "Apparent authority differs from express [actual] authority because it does not result from the principal's actual grant of authority," but instead results when the principal seems to acquiesce in an agent's performance of a function, purportedly upon behalf of the principal, without taking affirmative action to stop it. *Strann v. United States*, 2 Cl. Ct. 782, 789 (1983).

Before a government employee can be found to have express "actual authority" to bind the Government in contract, he or she must have been delegated specific authority either by Congress or through agency rule-making. *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). Specifically, "[a] government employee possesses express [actual] authority to bind the government only when the Constitution, a statute, or a regulation grants it in unambiguous terms. *Howard v. United States*, 31 Fed. Cl. 297, 312 (1994). Authority cannot be "inferred" from the *absence* of an express limitation on authority, but instead must be explicitly delegated. *El Centro*, 922 F.2d at 820.

In general, "[a]uthority and responsibility to contract for authorized supplies and services are vested in [each] agency head." Federal Acquisition Regulation (FAR) 1.601 (48 CFR 1.601 (2017)). Each agency head has delegated that authority to the heads of each contracting activity within that agency, who, in turn, have delegated their authority to specific contracting officers, each of whom is appointed through an individual "Certificate of Appointment," Standard Form (SF) 1402. FAR 1.601, 1.603-3. Each "Certificate of Appointment," or contracting officer's "warrant" of authority, specifies the scope of that contracting officer's actual authority to contract upon behalf of the Government:

> Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. *Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority.* Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

FAR 1.602-1 (emphasis added).

Ultimately, it is the contractor's burden to show that the government employee upon whose statements or actions it relied had actual authority to bind the Government to the

contract at issue. *EWG Associates, Inc. v. United States*, 231 Ct. Cl. 1028, 1029 (1982); *Llamera v. United States*, 15 Cl. Ct. 593, 597 (1988).

B. Ms. Allen's Written Warrant Authority

Neither party disputes that Ms. Allen's "Certificate of Appointment" was limited to contract awards of $25 million or less. FEMA contends that, because modification P00004 purported to increase the contract-0204 ceiling by $96 million, the entire modification (including both its new cost ceiling and its 101 newly added CLINs) is unauthorized and, when it was executed, unenforceable. Crowley disagrees, arguing that modification P00004 did not obligate FEMA to order any services or to spend any money, making it essentially a non-monetary modification. By signing modification P00004, Crowley argues, Ms. Allen was simply creating a contract vehicle through which other contracting officers with less limited authority could order services from Crowley by issuing task orders. Oral Argument Transcript at 33. It is the task orders issued under the IDIQ contract, Crowley asserts, that obligate funding, making the level of Ms. Allen's written contracting authority irrelevant to the enforceability of the modification. Further, even if the increased dollar ceiling in modification P00004 was beyond Ms. Allen's written authority, Crowley argues, there should be no question that Ms. Allen was authorized to add CLINs to contract-0204 because each CLIN, considered individually, was far below $25 million.

We cannot agree with Crowley's attempt to divide the contract modification into separate pieces for purposes of evaluating the contracting officer's authority. We recognize, as Crowley argues, that an IDIQ contract like contract-0204 only requires the Government to purchase "a stated minimum quantity of supplies or services"—under contract-0204, that minimum was $5000, an amount that FEMA met in 2016—and that, once fulfilled, the Government has no further legal obligation to purchase anything more. *Travel Centre v. Barram*, 236 F.3d 1316, 1319 (Fed. Cir. 2001). Nevertheless, the issue here is whether a contracting officer can enter into a contract, or modification, with a ceiling that, if all potential purchases were made, exceeds that contracting officer's warrant. In this case, the determination of whether a FEMA contracting officer's written warrant authorizes a particular contract action is guided by DHS Acquisition Workforce Policy Number 064-04-011 (revision 00), titled "Contracting Officer Warrant Program" (May 24, 2012), which applies to FEMA. That policy considers "the total potential contract ceiling" as the dollar value of an initial contract award or a subsequent contract modification:

> Warrant Authority Levels: The warrant authority levels specified in Attach 2, Tables 1-1 and 1-2 are based on the dollar value of the individual transaction (e.g., contract, modification, task/delivery order, and supplemental agreement). For example:

1. *Initial Contract Award*: If the basis of award involves evaluating options and/or award terms, *the dollar value of the individual transaction must include* the base period and all option periods, the award terms, and *the total potential contract ceiling to determine the warrant level required for award*.

2. *Modifications and Supplemental Agreements*: During contract administration, if an action includes both additions and deductions, *the aggregate, absolute value of the changes determines the warrant level required* (e.g., the value of an action that adds $35,000 of work and deducts $80,000 is $115,000).

Respondent's Summary Judgment Motion Exhibit 5 § V.F. The agency's written policy requires us to look at the potential dollar value of the overall modification, not the amount of specific funding that modification P00004 actually, at the time that it was executed, obligated FEMA to pay Crowley. Crowley's argument to the contrary would eviscerate the limits that FEMA intended to place on Ms. Allen's written contracting warrant.

Similarly, we must reject Crowley's argument that, even if Ms. Allen lacked written contracting authority to increase the contract-0204 ceiling to $100 million, she could still add 101 new CLINs to the contract. The totality of those new CLINs far exceeded the $25 million limit on her written contracting authority. If she lacked authority to issue the modification, the entire modification fails, and we cannot rewrite it to salvage portions of it while striking other portions. *See Comspace Corp.*, DOT BCA 3095, 98-2 BCA ¶ 30,037, at 148,637-68 (finding that contracting officer whose warrant was insufficient to allow for contract price increase lacked authority to modify the contract's delivery terms). The type of contract reformation in favor of which Crowley is essentially arguing, through which we would strike the ceiling increase but enforce the new CLINs, is beyond our authority. *See Defense Systems Co.*, ASBCA 50918, 01-1 BCA ¶ 31,152, at 153,880 (2000) ("Reformation is not intended to be a vehicle by which a court injects itself into the contracting process to create the contract it determines is best for the situation.").

C. Authority from Mr. Ingol

Although Ms. Allen lacked authority through her "Certificate of Appointment" to issue modification P00004, she believed that she had obtained a verbal direction from Deputy Director Ingol, who has a warrant with unlimited contracting authority, to issue that modification. Crowley believes that Mr. Ingol's direction to change the scope of contract-0204, coupled with the fact that Mr. Allen copied him on the email transmitting the modification to Crowley, provides actual authority for the modification. FEMA concedes

in its briefing that Mr. Ingol, while standing in for Deputy Director Demps, authorized Ms. Allen to increase the contract ceiling from $4 million to $100 million. Respondent's Summary Judgment Motion at 10. Supported by a declaration from Mr. Ingol, though, FEMA asserts that Mr. Ingol did not know that additional CLINs were included in modification P00004 and that Mr. Ingol assumed that Ms. Allen, if she lacked sufficient contracting authority to execute the modification, would work with a contracting officer who had that authority. Respondent's Summary Judgment Motion at 10 & n.8.

We understand that, when the discussions that led to modification P00004 were occurring, Mr. Ingol may have had less familiarity with the specifics of the disaster-side office than Mr. Demps would have had if he had been available. Given the crisis situation that was emerging within AOD, however, and the fact that AOD had absolutely no contract vehicles that would have allowed it to ship anything from CONUS to either Puerto Rico or the USVI, it is difficult to understand how, in authorizing a scope change to contract-0204, an expansion of the contract's scope to include CONUS-to-OCONUS transport would not have been known to be necessary. Nevertheless, we are currently considering cross-motions for summary judgment, and we can grant summary judgment only "where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation)." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,175. In arguing that Mr. Ingol did not authorize modification P00004, FEMA has submitted a declaration in which Mr. Ingol explains that he was only agreeing to a ceiling increase for contract-0204 that would be approved, if necessary, by another contracting officer. Ms. Allen's testimony reveals a very different understanding of her conversations with Mr. Ingol, which resulted in her addition of CLINs to contract-0204 to allow Crowley to provide CONUS-to-OCONUS transport. We cannot resolve that factual dispute on summary judgment.

Crowley also argues that, despite that factual dispute, there is no question that, when Ms. Allen issued modification P00004, she provided a copy of it to Mr. Ingol and that Mr. Ingol, at the very least, should have been aware of how Ms. Allen had acted on his verbal order, of the contents of the modification, and of the fact that Ms. Allen, rather than a contracting officer without an unlimited authority warrant, had signed it.[2] Mr. Ingol's failure to take any action in response rejecting the modification should, Crowley asserts, show his implicit authorization of the modification.

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[2] FEMA responds by asserting that no evidence suggests that Mr. Ingol ever opened Ms. Allen's email or the pdf attachment containing modification P00004. *Id.* at 22.

The Court of Appeals for the Federal Circuit has recognized that, given the number of people that the Federal Government employs, "federal expenditures would be wholly uncontrollable if Government employees could, of their own volition, enter into contracts obligating the United States." *City of El Centro*, 922 F.2d at 820. Nevertheless, we recognize that emergency circumstances requiring that immediate "action . . . be taken by government agents to protect life and property" possibly can excuse some of the formalities normally associated with documenting the contract formation process, *id.* at 821; *see Cyrus Contracting, Inc.*, IBCA 3232, et al., 98-2 BCA ¶ 29,755, at 147,468 ("Emergency circumstances can alter normal contracting authority procedures when contract work done is in good faith . . . ."), and that constructive, rather than actual, knowledge of the authorized contracting officer can possibly be sufficient to find an action authorized. *Cyrus Contracting*, 98-2 BCA at 147,467-68.

Although the parties have provided extensive stipulations that might provide a basis for deciding this authority issue here, some of the unusual circumstances at issue make us wary of deciding this authority issue on summary judgment. Further, our resolution below of Crowley's ratification argument renders a decision on this issue unnecessary. Accordingly, we decline to decide on summary judgment whether Mr. Ingol's conduct and constructive knowledge at the time that modification P00004 was executed were sufficient to provide authorization.[3]

III. Whether FEMA Ratified Modification P00004

A. The Law of Ratification

There is no question that Crowley is entitled to payment for the work that it performed under the guise of the expanded scope of contract-0204. Even if FEMA had not told us that it has recently made an express ratification of its obligation to pay for that work, "[w]here a benefit has been conferred by the contractor on the government in the form of goods or services, which it accepted, a contractor may recover at least on a *quantum valebant* or *quantum meruit* basis for the value of the conforming goods or services received by the government prior to the rescission of the contract for invalidity." *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986). FEMA received tens of millions of dollars in services from Crowley that helped FEMA with its mission during a crisis period. In such

[3] FEMA also argues that the absence of a documented written price reasonableness analysis, as required by FAR 15.403-3(c), in and of itself bars the enforceability of modification P00004. Based upon our resolution below of Crowley's ratification argument, we need not address this issue.

circumstances, "it is only fair and just that the Government pay for goods delivered or services rendered and accepted under it." *Id.* (quoting *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963)); *see Alisa Corp.*, AGBCA 84-193-1, 94-2 BCA ¶ 26,952, at 134,217-19 (considering *quantum valebant* award under contract found to be illegal).

Crowley does not have to seek relief under the *Amdahl* line of cases because FEMA, using the procedures set forth in FAR 1.602-3, has expressly ratified its commitment to pay Crowley for the Puerto Rico and USVI work, albeit under a different payment scheme than that set forth in modification P00004. Under that FAR provision, an authorized official may expressly ratify, or approve, a previous "unauthorized commitment," which is defined as "an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government." FAR 1.602-3(a). For a ratification under FAR 1.602-3, the deciding official must find, among other things, that "[t]he resulting contract would otherwise have been proper if made by an appropriate contracting officer" and must "determine[] the price to be fair and reasonable." FAR 1.602-3(c). FEMA made those determinations, except that FEMA elected to modify the unauthorized agreement, abolish the pricing terms for CLINs 1072 through 1083, and pay only what it found "fair and reasonable" for those CLINs. Rather than affirming the contract modification as written, FEMA effectively has approved a *quantum valebant* award for Crowley, based upon its view of what is fair and reasonable.

The monetary part of the parties' present dispute centers on whether Crowley can enforce the pricing terms of CLINs 1072 through 1083 as written in modification P00004 or whether, instead, it must produce additional supporting cost documentation to establish that FEMA's view of what is "fair and reasonable" is too low. Crowley believes that, because various contracting officers with unlimited warrants implicitly ratified Ms. Allen's modification, all of the modification's terms are fully enforceable, entitling Crowley to payment for CLINs 1072 through 1083 under the pricing structure in the written modification. Alternatively, Crowley argues that FEMA institutionally ratified the contract, as written.

"Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized," and "unauthorized contracts become binding," as written, "if they are ratified." *Parking Co. of America*, GSBCA 7654, 87-2 BCA ¶ 19,823, at 100,296; *see Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) ("Ratification is 'the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.'" (quoting *Restatement (Second) of Agency* § 82 (1958)). There is no one specific test that applies to every situation to determine whether ratification has occurred, *Americom Government Services, Inc. v. General Services Administration*,

CBCA 2294, 16-1 BCA ¶ 36,320, at 177,079, but ratification ultimately must "be based on a demonstrated acceptance of the contract." *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998).

There are two recognized means of implicitly ratifying an unauthorized agreement: (1) implicit ratification at the individual level and (2) implicit ratification at the institutional level. *Villars v. United States*, 126 Fed. Cl. 626, 633 (2016).

Individual ratification involves approval of a previously unauthorized contract action by one or more individuals who possess actual authority to contract. *Villars*, 126 Fed. Cl. at 633. "[S]uch ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken." *Harbert/Lummus Agrifuels*, 142 F.3d at 1433 (quoting *United States v. Beebe*, 180 U.S. 343, 354 (1901)). "If there be want of [full knowledge], though such want arises from the neglect of the principal, no ratification can be based on any act of his." *Id.* (quoting *Beebe*, 180 U.S. at 354). Yet, the "full knowledge" necessary to support ratification may be constructive rather than actual. *Reliable Disposal Co.*, ASBCA 40100, 91-2 BCA ¶ 23,895, at 119,717; *see Harbert/Lummus Agrifuels*, 142 F.3d at 1433-34 (a contracting officer's silence cannot constitute ratification "[i]n the absence of either actual or constructive knowledge of the unilateral contract"); *Americom Government Services*, 16-1 BCA at 177,079 (constructive knowledge is sufficient to find ratification). "Constructive notice can be established where an official knew or should have known of a matter but allowed it to continue." *Americom Government Services*, 16-1 BCA at 177,079; *see Real Estate Technical Advisors, Inc.*, ASBCA 53427, et al., 03-1 BCA ¶ 32,074, at 158,508 (2002) ("Constructive knowledge can be found where it is fair to impute the subordinate's knowledge to the superior."). While "[s]ilence in and of itself" by those individuals who are alleged to have ratified an agreement "is not sufficient to establish a demonstrated acceptance of the contract," *Harbert/Lummus Agrifuels*, 142 F.3d at 1433, "a ratifying official's constructive notice coupled with silence could amount to acquiescence or adoption of an unauthorized act," particularly if accompanied by "the Government's tacit acceptance of benefits." *Healthcare Practice Enhancement Network, Inc.*, VABCA 5864, 01-1 BCA ¶ 31,383, at 154,985; *see IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 375 (2d Cir. 1994) ("Ratification also may be found to exist by implication from a principal's failure to dissent within a reasonable time after learning what had been done."); *Guardian Safety & Supply LLC*, ASBCA 61932, 19-1 BCA ¶ 37,333, at 181,563 ("If the ratifying official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act, ratification will be found."); *Restatement (Second) of Agency* § 94 cmt. a ("Silence under such circumstances that, according to the ordinary experience and habits of men, one would naturally be expected to speak if he did not consent, is evidence from which assent can be inferred.").

Institutional ratification "is a distinct alternative remedy and creates a separate but limited avenue for recovery in the absence of contractual ratification." *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 14-1 BCA ¶ 35,687, at 174,682; *see Janowsky v. United States*, 133 F.3d 888, 891-92 (Fed. Cir. 1998) (discussing institutional ratification). In limited and exceptional instances, the Government may be bound to pay for otherwise unauthorized contract work, even if official or officials carrying out the ratification do not themselves have express contracting authority, after the Government received and retained benefits from the unauthorized contract. *Americom*, 14-1 BCA at 174,682. The ratifying official or officials must have knowledge of the work being paid for and must, because of position or status, be among those who make ratification reasonable. *Id.*

B. The Intersection of Express and Implied Ratification

FEMA's main position in opposition to implicit ratification is that, once FEMA made an express ratification in this matter, implicit ratification became barred as a matter of law. As discussed above, in April and October 2018, FEMA expressly ratified the work that Crowley performed under, although not the pricing set forth in, modification P00004. FEMA asserts that this case appears to be one of first impression because "[w]hat occurs when the government conducts an express ratification and a contractor then seeks to recover additional amounts under a theory of implicit ratification has never been addressed" before any tribunal. Respondent's Motion for Summary Judgment at 19. It asserts that the question before the Board is "whether implicit ratification applies when an express ratification of the exact same work in question has already been conducted." Respondent's Reply at 5.

FEMA's argument appears to be one tied to timing. Although the actions by FEMA's contracting office superiors that could be considered to constitute a ratification of modification P00004 all occurred between October 2017 and February 2018—dates that precede FEMA's express ratifications—FEMA asserts that "implicit ratification is a judicial remedy" that tribunals created in order to pay contractors when there is no other viable remedy and that, "[a]s such, [it] does not exist in any instance until a Court or Board determines it exists." Respondent's Reply at 11, 15. According to FEMA, FEMA's express ratification of the work (but not the prices) under modification P00004 pre-dates any implicit ratification that the Board might impose now and bars the Board from finding implicit ratification.

We reject FEMA's argument. It is not the Board that implicitly ratifies a contract. Implicit ratification is a fact-based action that occurs when those with the authority to ratify gain actual or constructive knowledge of an unauthorized contract commitment and then affirmatively act, or fail to act, in a manner that implicitly adopts or approves that

commitment. *Villars*, 126 Fed. Cl. at 633; *Parking Co. of America*, 87-2 BCA at 100,296-97; *see HNV Central River Front Corp. v. United States*, 32 Fed. Cl. 547, 550 (1995) ("Ratification occurs when the principal, upon learning of an unauthorized act of its agent, acquiesces in, or affirms that act through his conduct."). Perhaps an agency will later refuse to recognize the *effect* of the ratification or even that a ratification *occurred*, requiring the Board or another tribunal to resolve a dispute about ratification between the parties, but that does not mean that the Board itself is ratifying the unauthorized commitment, effective on the date of the tribunal's judgment. The effectiveness of the ratification is dependent upon the actions of the authorized individuals, and the ratification occurs when those officers act in a way that effectively ratifies the previously unauthorized commitment.

Here, Crowley is arguing that FEMA's authorized contracting officers implicitly ratified modification P00004 as early as October or November 2017, well before FEMA's express ratification. If FEMA implicitly ratified modification P00004 through the actions of its authorized contracting officers at that time, FEMA has no right later to use the express ratification provision in FAR 1.602-3 to attempt somehow to eradicate the prior implicit ratification.[4]

C. Implicit Individual Ratification of Modification P00004

Having disposed of FEMA's timing argument, it is not difficult for us to find that authorized officials, through individual ratification, implicitly ratified modification P00004. In fact, FEMA appears to concede this result, at least in part, in its summary judgment

[4] In its briefing, FEMA also mentions, but then appears to disclaim reliance upon, an argument that the express ratification procedures in FAR 1.602-3 displace and preclude any form of implicit ratification. To the extent that it has raised such an argument, we reject it. In the past, the Federal Circuit, in directing a lower tribunal to consider institutional ratification on remand, did not indicate that the implicit ratification doctrine was displaced by the FAR's express ratification procedures. *Janowsky*, 133 F.2d at 891-93; *see Silverman v. United States*, 679 F.2d 865, 870-71 (Ct. Cl. 1982) (finding the Government bound by implicit ratification without considering a predecessor express ratification regulation, when the agency accepted benefits flowing from a promise made by an official without contracting authority). Further, we see nothing in FAR 1.602-3 that makes express ratification the exclusive available method of ratification and bars any form of implicit ratification. *See* FAR 1.602-3(b) (indicating that agencies "should," rather than must, use its ratification process); *see also Digicon Corp. v. United States*, 56 Fed. Cl. 425, 426 (2003) (rejecting FAR 1.602-3 exclusivity argument); *Parking Co. of America*, 87-2 BCA at 100,297-98 (rejecting same argument relating to predecessor regulation).

briefing: "FEMA agrees that the facts exist to find that the performance of services was implicitly ratified if the Board determines that implicit ratification is applicable in this situation," although it claims that FEMA only ratified "the performance of the work," not "the particular CLIN prices" written into the modification. Respondent's Motion for Summary Judgment at 18 & n.11.

Here, FEMA has stipulated that, no later than mid-November 2017, both Ms. Ward, Ms. Allen's direct supervisor, and Mr. Demps, knew that modification P00004 was executed by a contracting officer without a sufficient contracting warrant. Despite that knowledge, they did not take any immediate action to notify Crowley that there was a problem with the contract or its terms. Oral Argument Transcript at 50-51. To the contrary, at about the time that he learned of the lack of authority, Mr. Demps told Ms. Allen and others to tell Crowley to continue to perform, as its services were essential and could not cease. For the next three months, any time that an effort was made to stop services from Crowley, that effort was overruled by either Mr. Demps or Mr. Demps's subordinate, Mr. Ansani, both of whom had unlimited warrants of contracting authority. It was not until February 2018 that Crowley was ever informed of a problem with its contract. Prior to that time, in FEMA's mind, "the issue was just this was mission critical work," and "[s]topping the work would have caused massive issues" relating to Puerto Rico's and the USVI's recovery. Oral Argument Transcript at 51. By insisting for months that Crowley continue work that could have no contractual basis other than modification P00004, without providing Crowley any notice of any defects in the validity of its contract, FEMA, through a combination of the consistent actions and silence of Ms. Ward, Mr. Demps, and Mr. Ansani, ratified the modification.

FEMA argues that, although it can and should be bound to pay for Crowley's work, it should not be bound to the price structure in modification P00004 because those who implicitly ratified it did not know what the pricing structure was. To the extent that Ms. Ward, Mr. Demps, or Mr. Ansani did not know precisely what modification P00004 defined as the payment terms for CLINs 1072 through 1083, that cannot preclude ratification of the agreement, in total, in the circumstances here. Mr. Ingol, while acting in Mr. Demps' position while he had to be out of the office, received a copy of the executed modification, which he presumably should have forwarded to Mr. Demps upon his return. The modification was also in the contract file. To the extent that Mr. Demps, beginning in mid-November 2017, and Mr. Ansani, at a later date, insisted on continued performance by Crowley without looking at those pricing terms, that was their choice. They clearly had the ability to obtain the modification, and, in the circumstances here, they are charged with constructive notice of its terms. What they could not do was insist that Crowley continue performing for several months (and to resume performing after Ms. Allen had issued a stop work order based upon a direction from Ms. Ward) without telling Crowley at the earliest

opportunity about the authority issue and then raise the issue for the first time three months later after Crowley had performed a high volume of emergency services.

At oral argument, FEMA suggested that constructive notice would be inappropriate here because, "given the situation here, there was no time for people to go digging for things not put on their plate. There was enough on their plates to deal with." Oral Argument Transcript at 49. We are not discounting the difficult circumstances in which FEMA's contracting officers found themselves in trying to address the damage that these hurricanes caused and do not suggest that FEMA's employees intentionally avoided obtaining "notice" of the modification's pricing terms. Nothing in the record indicates that anyone involved in the contracting effort to address these disasters was acting in anything but good faith. Nevertheless, after discovering the mistake in modification P00004's execution, FEMA failed to tell Crowley about it while actively insisting upon continued performance. In such circumstances, FEMA cannot disclaim that it is bound by the modification.

FEMA also argues that, when a contract action is implicitly ratified, the appropriate monetary result is a *quantum valebant* or *quantum meruit* award, something that FEMA believes it has already provided Crowley through its express ratification process. If there had been no ratification of an unauthorized commitment through which the agency had received substantial benefit, the *Amdahl* line of cases, which we previously discussed, might be invoked to provide the type of remedy that FEMA proposes. The remedy following ratification is different, at least as it applies to individual ratification.[5] Because authorized individuals within FEMA impliedly ratified modification P00004, Crowley is now entitled to "the same rights to compensation, reimbursement, and indemnity as [it] would have had, if this act had been previously authorized." *Leviten v. Bickley, Mandeville & Wimple, Inc.,* 35 F.2d 825, 827 (2d Cir. 1929); *see Lewis v. Forest Pharmaceuticals, Inc.*, 217 F. Supp. 2d 638, 660 (D. Md. 2002) ("A ratified act has the same effect as if it had been authorized *ab initio*; ratification confers retroactive authority on the agent-employee."); *Restatement (Second) of Agency* § 100 cmt. a ("The affirmance of the act of an unauthorized person by the purported principal, all conditions requisite for ratification being fulfilled, normally has the same effect as if such person had been originally authorized."). "[U]nauthorized contracts become binding," as written, through ratification. *Parking Co. of America*, 87-2 BCA at 100,296.

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[5] Having found individual ratification in the circumstances here, we need not further discuss Crowley's institutional ratification argument or address the appropriate monetary remedy for an agreement that has been institutionally ratified.

Having been ratified, the modification is enforceable according to its terms. Accordingly, FEMA had no right, months later, to use the FAR 1.602-3 express ratification provision to change the pricing terms of that modification. Crowley is entitled to payment under CLINs 1072 through 1083 according to the payment mechanism set forth in those CLINs.

Decision

For the foregoing reasons, Crowley's motion for partial summary judgment is **GRANTED**. FEMA's motion for summary judgment is **DENIED**. The Board will schedule further proceedings in these consolidated appeals by separate order.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Erica J. Beardsley
ERICA J. BEARDSLEY
Board Judge