



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER
AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON JULY 24, 2023**

DISMISSED FOR FAILURE TO STATE A CLAIM: July 12, 2023

CBCA 7559

HPM CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

David S. Panzer and P. Tyson Marx of Ward & Berry, PLLC, Tysons, VA, counsel for Appellant.

Eunice Nkengasong, Andrew J. Unsicker, and Paul Davis, Office of the Chief Counsel, Department of Energy, Richland, WA, counsel for Respondent.

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

LESTER, Board Judge.

HPM Corporation (HPMC) has appealed a decision by a Department of Energy (DOE) contracting officer denying HPMC's nonmonetary claim. In that decision, the contracting officer rejected HPMC's interpretation of several contract clauses regarding DOE's audit rights and dispute negotiation obligations, as well as HPMC's contention that DOE had breached its obligation to negotiate disputes in good faith. DOE has filed a motion to dismiss HPMC's appeal for lack of jurisdiction and for failure to state a claim on which relief can be granted.

Because HPMC is continuing to perform its contract, and because the contract interpretation issues that it is pursuing could affect how it will approach its continuing contract obligations, we do not find the claim here to be the type of monetary-claim-dressed-as-a-nonmonetary-claim that the Court of Appeals for the Federal Circuit found in *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018), could be pursued only through a claim that included a request for payment of money in an amount stated in a sum certain. Although we therefore possess jurisdiction to entertain HPMC’s nonmonetary claim, we disagree with HPMC’s interpretation of the clauses in its contract. While those clauses obligate DOE and HPMC to negotiate disputes in good faith, neither party is required to acquiesce to the other party’s positions or to agree to engage in alternative dispute resolution (ADR). Further, the clauses do not contain the types of limitations on DOE’s audit and documentary support access rights that HPMC is attempting to impose. For these reasons, and as explained further below, we deny DOE’s motion to dismiss for lack of jurisdiction but grant DOE’s motion to dismiss HPMC’s appeal for failure to state a claim.

Statement of Facts

I. The Relevant Terms of HPMC’s Contract

A. The Basic Contract

On December 31, 2018, DOE awarded HPMC a contract to provide occupational medical services at the Hanford Site in Washington state. Complaint ¶ 3; *see* Appeal File, Exhibit 1.¹ Language in the contract identifies it as “a performance-based Contract that includes Firm-Fixed-Price (FFP) Contract Transition, FFP Occupational Medical Services, Cost Reimbursement (CR) Occupational Medical Support Services, and Indefinite Delivery/Indefinite Quantity (IDIQ) Contract Line Item Numbers (CLIN).” Exhibit 1 at 10.² The base period of this hybrid contract was to run for thirty-three months, and the contract contained two extension options: the first allowing DOE to extend the contract for two additional years, and the second allowing for a second two-year extension. *Id.* at 12-18.

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

² The Federal Acquisition Regulation (FAR) authorizes the type of hybrid contract at issue here—“[c]ontracts . . . may be of any type or combination of types that will promote the Government interest” unless otherwise barred by statute. 48 CFR 16.102(b) (2018) (FAR 16.102(b)); *see id.* 16.104(e) (titled “Combining contract types”).

B. The Contract's Audit and Document Inspection Clauses

The contract (at clause I.27) incorporates by reference the clause at Federal Acquisition Regulation (FAR) 52.215-2 (48 CFR 52.215-2 (2018)), "Audits and Records–Negotiation (Oct 2010)." Exhibit 1 at 185. That clause provides "the Contracting Officer, or an authorized representative of the Contracting Officer," in any cost-reimbursement, labor-hour, or time-and-materials contract with "the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract." FAR 52.215-2(b).

The contract (at clause I.36) also incorporates by reference FAR 52.216-7, "Allowable Cost and Payment (Jun 2013),"³ but with a limiting notation (added in bold lettering) that states as follows: "Applies to Cost-Reimbursement." Exhibit 1 at 185. Pursuant to the direction in the FAR, the clause at FAR 52.216-7 is included in a solicitation or contract "when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a commercial product or commercial service) is contemplated." FAR 16.307(a)(1). Paragraph (g) of that clause provides the Government with the following audit rights:

Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited.

Any payment may be —

- (1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or
- (2) Adjusted for prior overpayments or underpayments.

FAR 52.216-7(g).

In addition to those audit provisions, clause I.173 of HPMC's contract incorporates the language from section 970.5204-3 of the Department of Energy Acquisition Regulation (DEAR) (48 CFR 970.5204-3), titled "Access To and Ownership of Records (Oct 2014)." Exhibit 1 at 231-33. Paragraph (a) of that clause defines "Government-owned records" as "all records acquired or generated by the contractor in its performance of this contract,"

³ When HPMC's contract was awarded in December 2018, the June 2013 version of FAR 52.216-7 cited in HPMC's contract had been superceded by a new version promulgated in August 2018. The language of the June 2013 and August 2018 versions of FAR 52.216-7 are the same, however, rendering any error in including the superceded version of the clause in the contract irrelevant to the current dispute.

except “as provided in paragraph (b) of this clause.” *Id.* at 231. Paragraph (b) defines “[c]ontractor-owned records,” which “are considered the property of the contractor and are not within the scope of paragraph (a),” as including “[e]mployment-related records,” as well as “[c]onfidential contractor financial information, internal corporate governance records and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor’s corporate headquarters).” *Id.* at 231-32. Paragraph (d) of the clause requires the contractor to make all records, including contractor-owned records, available to DOE or its designees for inspection, copying, and audit, as follows:

Inspection, copying, and audit of records. All records acquired or generated by the Contractor under this contract in the possession of the Contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the Contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the Contracting Officer, the Contractor shall deliver such records to a location specified by the Contracting Officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

Id. at 232-33. Paragraph (e) provides that the “clause applies to all records created, received and maintained by the contractor without regard to the date or origination of such records including all records acquired from a predecessor contractor.” *Id.* at 233.

C. The Contract’s Dispute Negotiations Clause

The contract also contains a provision dealing with the use of alternative dispute resolution (ADR) to address contract disputes. Clause H.24 is a DOE-specific clause titled “DOE-H-2033 Alternative Dispute Resolution (Oct 2014),” which reads, in its entirety, as follows:

- (a) The DOE and the Contractor both recognize that methods for fair and efficient resolution of contractual issues in controversy by mutual agreement are essential to the successful and timely completion of contract requirements. Accordingly, DOE and the Contractor shall use their best efforts to informally resolve any contractual issue in controversy by mutual agreement. Issues of controversy may include a dispute, claim, question, or other disagreement. The parties agree to

negotiate with each other in good faith, recognizing their mutual interests, and attempt to reach a just and equitable solution satisfactory to both parties.

- (b) If a mutual agreement cannot be reached through negotiations within a reasonable period of time, the parties may use a process of alternate dispute resolution (ADR) in accordance with the clause at FAR 52.233-1 entitled, *Disputes*. The ADR process may involve mediation, facilitation, fact-finding, group conflict management, and conflict coaching by a neutral party. The neutral party may be an individual, a board comprised of independent experts, or a company with specific expertise in conflict resolution or expertise in the specific area of controversy. The neutral party will not render a binding decision, but will assist the parties in reaching a mutually satisfactory agreement. Any opinions of the neutral party shall not be admissible in evidence in any subsequent litigation proceedings.
- (c) Either party may request that the ADR process be used. The Contractor shall make a written request to the Contracting Officer, and the Contracting Officer shall make a written request to the appropriate official of the Contractor. A voluntary election by both parties is required to participate in the ADR process. The parties must agree on the procedures and terms of the process, and officials of both parties who have the authority to resolve the issue must participate in the agreed upon process.
- (d) ADR procedures may be used at any time that the Contracting Officer has the authority to resolve the issue in controversy. If a claim has been submitted by the Contractor, ADR procedures may be applied to all or a portion of the claim. If ADR procedures are used subsequent to issuance of a Contracting Officer's final decision under clause FAR 52.233-1 entitled, *Disputes*, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the Contracting Officer's final decision and does not constitute reconsideration of the final decision.
- (e) If the Contracting Officer rejects the Contractor's request for ADR proceedings, the Contracting Officer shall provide the Contractor with a written explanation of the specific reasons the ADR process is not appropriate for the resolution of the dispute. If the Contractor rejects

the Contracting Officer's request to use ADR procedures, the Contractor shall provide the Contracting Officer with the reasons for rejecting the request.

Exhibit 1 at 145-46.

II. The Fiscal Year 2019 Incurred-Cost Audit

In the second half of 2020, DOE designated the Defense Contract Audit Agency (DCAA) as DOE's auditor for purposes of performing an incurred-cost audit on the contract for fiscal year (FY) 2019. Complaint ¶ 7. On October 19, 2020, the DOE contracting officer emailed HPMC to complain that HPMC was not providing DOE with copies of the records that DCAA was requesting during the audit and directed HPMC to "provide DOE all records provided and to be provided to DCAA for HPMC's FY 2019 incurred cost audit." *Id.* ¶¶ 8, 11. HPMC alleges in its complaint that it "was concerned about releasing the disputed information to DOE because it contained HPMC's proprietary information and related to the FFP portion of the Contract." *Id.* ¶ 11. It responded to the contracting officer by objecting to the requested production, arguing that, because HPMC did not submit any cost or pricing data for the FFP portion of the hybrid contract, it should not need to provide proprietary information to DOE regarding fixed-price costs. *Id.* ¶ 12. HPMC marked all documents that it provided DCAA as "HPMC Proprietary for DCAA Eyes Only." *Id.* ¶ 14.

On November 2, 2020, DCAA informed HPMC that "these markings are improper and cannot preclude DCAA from meeting [its] responsibilities of providing information to the [DOE] Contracting Officers and other organizations with a need to know that information." Complaint, Exhibit 1 at 1. DCAA indicated that it would not honor the marking unless HPMC could justify why DCAA should refrain from providing access to DOE. *Id.* DCAA reported that, although it would "treat the documents as proprietary information" with accompanying safeguards, it would need to "provide them to other Government organizations," like DOE, that "have a need to know." *Id.* HPMC responded by stating its allegedly long-held understanding "that a competitively awarded contract excluded the buyer (DOE) access to the level of data being requested for audit and that an audit report would be presented to DOE for use in finalizing and negotiating annual indirect rates." Complaint ¶ 22. HPMC stated that it would not provide the requested information directly to DOE but would allow DCAA to send any documents to DOE that DOE had a "need to know." *Id.* ¶ 23. According to HPMC's complaint, HPMC is unaware of any actual transfer of FY 2019 audit documents from DCAA to DOE. *Id.* ¶ 25.

III. The Fiscal Year 2020 Incurred-Cost Audit

For the FY 2020 incurred-cost audit, DOE designated Cohn Reznick (CRZ) as its auditor. Complaint ¶ 26. On January 19, 2022, the DOE contracting officer, relying on the requirements of FAR 52.216-7 (clause I.36) and DEAR 970.5204-3 (clause I.173), directed HPMC to provide both CRZ and DOE with a final indirect-cost-rate proposal accompanied by “adequate supporting data” that included “any firm fixed price data needed to evaluate the indirect cost pool and base costs used to calculate indirect cost rates.” Exhibit 7; *see* Complaint ¶ 26. Counsel for HPMC responded on January 22, 2022, that the disputed information was proprietary and that DOE was not entitled to it. Complaint ¶ 28. He argued that clause I.173 was intended to provide DOE with access only to materials related to environmental, safety, and health work plans to protect against ionizing radiation and radioactive materials. *Id.* He indicated that HPMC would provide information necessary to the audit to CRZ but not to DOE. *Id.* ¶ 29.

On April 11, 2022, DOE and HPMC met to discuss a possible amicable resolution. Complaint ¶ 32. After the parties did not resolve the dispute at that meeting, HPMC, by letter dated April 18, 2022, formally requested that DOE engage in ADR pursuant to clause H.24 of the contract. *Id.* ¶ 34. DOE declined. *Id.* ¶ 37.

IV. HPMC’s Nonmonetary Claim

On June 8, 2022, HPMC submitted a nonmonetary claim, seeking, as a matter of right, a decision “with respect to HPMC’s request for DOE to participate in ADR concerning the scope of information required to support an indirect cost rate proposal under FFP portions of a contract.” Complaint ¶ 38. In its claim, HPMC asserted that “the Contracting Officer under the Contract improperly, and in violation of the Contract terms, refused to engage in good faith negotiations to resolve” the parties’ dispute. Exhibit 14 at 1. “The question here,” HPMC asserted, “is whether HPMC’s indirect cost rate proposal is adequate, not whether the Agency is empowered to request additional documentation.” *Id.* at 3. HPMC also argued that, even assuming that DOE needed additional data, the audit and records inspection clauses in the contract do not permit DOE to obtain direct access to documentation, and DOE should instead be limited to “the sharing of the [auditor’s] findings with the Agency and giv[e] HPMC the ability to address the findings, as has always been done in the past regardless of contract type.” *Id.*

By decision dated August 3, 2022, the DOE contracting officer rejected HPMC’s interpretations of the contract and HPMC’s position that DOE had not acted in good faith. Complaint ¶¶ 42, 44. The contracting officer found that, pursuant to the contract’s inspection and audit clauses, DOE is permitted access to what HPMC views as proprietary material

during an incurred-cost audit, even if some of the material relates to the FFP portion of the hybrid contract. *Id.*, Exhibit 3 at 2-3. The contracting officer then indicated that “DOE will proceed with the remedy to remove all unsupported costs associated with the FY 2020 indirect rates and FY 2022 provisional billing rates.” *Id.* at 3. The decision included a notice of HPMC’s appeal rights. *Id.*

V. HPMC’s Appeal to the Board

HPMC filed a notice of appeal with the Board on October 31, 2022. Subsequently, on December 1, 2022, it filed a two-count complaint. The first count sought an interpretation of clause H.24 of the contract that would require DOE to negotiate in good faith to resolve the parties’ disagreement about DOE’s access to audit documentation, and the second count sought an interpretation of the contract’s audit clauses that would limit DOE’s ability to access supporting documentation. On February 1, 2023, DOE filed a motion to dismiss for lack of jurisdiction and for failure to state a claim on which relief can be granted. A few minutes after filing its dispositive motion, DOE filed its answer to HPMC’s complaint.

HPMC responded to DOE’s motion on April 14, 2023. HPMC attached to its response an expert witness report from Jeffrey DuVal, who HPMC hired to present opinions on “industry experience regarding the requirements [for a contractor] to prepare and audit an [incurred-cost submission] with a particular focus on the requirements for [FFP] contracts.” Appellant’s Response Brief, Exhibit 3 at 3. In his report, Mr. DuVal opines, “based on [his] experience in the industry,” (1) on how incurred-cost submissions are typically audited (with definitive guidance for the conduct of such audits “found at FAR 52.216-7”); (2) that incurred-cost submissions are not required for fixed-price contracts; and (3) that, if a contractor has a “combination contract” involving both fixed-price CLINs and cost-reimbursement CLINs, any clauses in the contract providing for audits or inspection of documents should be interpreted as applying only to the cost-reimbursement CLINs in the contract. *Id.* at 6-7.

HPMC also attached to its response a letter that it sent to CRZ on April 14, 2023, in which it provided data for CRZ to use in its incurred-cost “audit as to the **cost-reimbursement** portion of the Contract.” Appellant’s Response Brief, Exhibit 1. Nevertheless, HPMC indicated that it was only providing “those materials required by FAR 52.215-2 and FAR 52.216-7.” HPMC asserted that costs “relating to the firm fixed price” portion of the contract “are not subject to audit” and that HPMC was not providing documentation regarding FFP costs.

Discussion

I. The Board's Authority to Review Nonmonetary Claims

“The Board’s jurisdiction to entertain contract disputes derives from” the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). *Duke University v. Department of Health & Human Services*, CBCA 5992, 18-1 BCA ¶ 37,023, at 180,289. If a contractor seeks money from the Government, “the contractor, as a prerequisite to review by the Board, must have submitted a written claim to the relevant agency’s contracting officer seeking payment, as a matter of right, of an amount to which it believes itself entitled, stated in a sum certain, and requesting a decision of the contracting officer.” *Id.* at 180,290. Yet, “[n]ot every CDA claim that the Board reviews has to be one involving the payment of money.” *Id.* The FAR defines a “claim” as including “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, . . . the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.” FAR 2.101. “The contractor need not submit a monetary claim to have its dispute over interpretation resolved, even if a decision may ultimately affect monetary amounts that the contractor may eventually receive.” *Duke University*, 18-1 BCA at 180,290 (citing *Medical Development International Ltd. v. Department of Justice*, DOT BCA 4547, 06-2 BCA ¶ 33,405, at 165,627-29).

That being said, “[w]hile contractors may in some circumstances properly seek only declaratory relief without stating a sum certain, they may not circumvent the general rule requiring a sum certain by reframing monetary claims as nonmonetary.” *Securiforce International*, 879 F.3d at 1360. The Federal Circuit has held that, “[i]f ‘the only significant consequence’ of the declaratory relief sought ‘would be that [the appellant] would obtain monetary damages from the federal government,’ the claim is in essence a monetary one.” *Id.* (quoting *Brazos Electric Power Cooperative, Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998)). Accordingly, if a claim is essentially monetary in nature, the Board lacks jurisdiction to consider it unless and until the contractor has submitted a money claim to the contracting officer seeking payment of an amount stated in a sum certain, followed by a contracting officer’s decision on that monetary claim. *See id.*

Even if the Board’s jurisdiction to entertain a nonmonetary claim is established, that does not mean that the Board is necessarily “required to issue a declaration of rights” simply because “a contractor raises a question of contract interpretation during the course of contract performance.” *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999). In responding to a contractor’s nonmonetary request for contract interpretation, the Board “is free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect

the parties' interests." *Id.* Another concern that may be considered is "the prospect of piecemeal litigation and premature involvement in contract administration." *Garrett v. General Electric Co.*, 987 F.2d 747, 751 (Fed. Cir. 1993). "The discretion to grant declaratory relief only in limited circumstances allows the court or board to restrict the occasions for intervention during contract performance to those involving a fundamental question of contract interpretation or a special need for early resolution of a legal issue." *Alliant Techsystems*, 178 F.3d at 1271.

II. The Impact of DOE's Answer on its Motion to Dismiss

HPMC argues that, because DOE filed an answer to HPMC's complaint within minutes after filing its motion to dismiss, the portion of the motion seeking dismissal for failure to state a claim is rendered moot. Appellant's Response Brief at 7 n.7.

The Board's Rules provide that, in considering motions to dismiss for failure to state a claim, "the Board looks to Rule 12(b)(6) of the Federal Rules of Civil Procedure [(FRCP)] for guidance." Board Rule 8(e) (48 CFR 6101.8(e) (2021)). Under FRCP 12(b), a motion to dismiss for failure to state a claim "must be made before" filing an answer to the complaint. "[S]hould the defendant file a [FRCP] 12(b) motion simultaneously with the answer, the [tribunal] will view the motion as having preceded the answer and thus as having been interposed in timely fashion." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1361, at 93 (3d ed. 2004) (citing cases). Although HPMC cites two United States district court decisions (*Dixon v. National Security of Alabama, Inc.*, No. 2:18-cv-13, 2018 WL 11488320 (M.D. Ala. Aug. 22, 2018), and *Thornton v. City of St. Petersburg, Florida*, No. 8:11-cv-2765, 2012 WL 2087434 (M.D. Fla. June 8, 2012)) in which the courts held that motions to dismiss for failure to state a claim become moot if a defendant voluntarily files an answer before the court decides the dispositive motion, that is a minority view, *see* 5C Charles Alan Wright & Arthur R. Miller, *supra*, § 1361, at 93, which the Board elects not to adopt.

Even if DOE's motion to dismiss could be viewed as untimely, tribunals have the discretion to accept an untimely motion, filed after the submission of an answer, "to promote judicial economy." *Moore v. Noggel*, No. 1:19-CV-3296, 2022 WL 205331, at *3 (N.D. Ga. Jan. 24, 2022) (quoting *Green v. Henry County Commission*, No. 1:19-cv-874, 2020 WL 974388, at *3 (M.D. Ala. Feb. 28, 2020)); *see GEM Engineering Co. v. Department of Commerce*, GSBICA 13566-COM, 97-1 BCA ¶ 28,637, at 142,980-81 (1996) (considering motion to dismiss for failure to state a claim filed after the agency had filed its answer). Given the Board's goal of promoting "the just, informal, expeditious, and inexpensive resolution of every case," Board Rule 1(c), we see no reason to require DOE to modify and

re-file its motion under a different rule and restart the briefing process. We will consider DOE's motion to dismiss, which was timely filed, on its merits.

“In general, a case can only be dismissed for failure to state a claim upon which relief may be granted when that conclusion can be reached by looking solely upon the pleadings.” *SRA International, Inc. v. Department of State*, CBCA 6563, 20-1 BCA ¶ 37,543 (quoting *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674). In defining what materials are a part of the “pleadings” for purposes of a motion to dismiss for failure to state a claim, we include materials that are attached to, incorporated by reference into, and/or integral to the complaint. *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 15-1 BCA ¶ 35,976, at 175,789. Further, because HPMC's claim, which HPMC attached to its notice of appeal in accordance with Board Rule 2(a), provides the jurisdictional basis for our review under the CDA, we can look to the allegations contained therein in considering the Government's dispositive motion. *John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304, at 185,971.

III. The Contract Clause Regarding Good Faith Negotiations and ADR

In the first count of its complaint, HPMC asks the Board to declare that clause H.24 of its contract requires DOE to negotiate the parties' dispute in good faith. DOE says, in challenging HPMC's argument, that HPMC is proposing that DOE must agree to participate in ADR if HPMC requests it. DOE, citing to the Board's decision in *Active Construction, Inc. v. Department of Transportation*, CBCA 6597, 22-1 BCA ¶ 38,051, asks us to dismiss this count for lack of jurisdiction, arguing that the Board lacks any authority to direct the Government to submit to ADR.

With regard to DOE's jurisdictional argument, the underlying basis for HPMC's ADR request differs from that in *Active Construction*. There, an appellant seeking monetary damages in a pending appeal asked the Board to exercise its inherent authority to compel the agency to mediate the parties' dispute to avoid the need for a merits hearing. We held that nothing in the CDA provides the Board with authority to compel a party in a case before us to engage in mediation. *Active Construction*, 22-1 BCA at 184,767. Here, though, HPMC is not asking us to exercise alleged inherent authority. Instead, HPMC is asking us to resolve what it contends is a dispute about the meaning of a provision in its contract that requires good faith negotiation and potentially ADR, resolution of which (HPMC alleges) could assist the parties as HPMC continues to perform its contract. That appears to be the kind of nonmonetary declaratory relief request over which the CDA provides us jurisdiction. *See, e.g., Alliant Techsystems*, 178 F.3d at 1270; *J&J Maintenance, Inc.*, ASBCA 63013, 23-1 BCA ¶ 38,353.

In considering DOE's motion to dismiss for failure to state a claim, however, it is difficult to understand what HPMC hoped to achieve through this particular declaratory relief request. As an initial matter, HPMC disclaims that it is contending that, to negotiate in good faith, DOE had to agree to HPMC's request for ADR, even if its claim and some of its briefing suggest otherwise. HPMC's concession is appropriate. Clause H.24 repeatedly says that the parties "may" agree to ADR but does not mandate it. In fact, the clause expressly provides that "[a] voluntary election by both parties is required to participate in the ADR process." Exhibit 1 at 145. HPMC would have no basis for seeking an interpretation of the ADR clause that would require DOE, in order to act in "good faith," to agree to mediate the parties' disputes.

Beyond that, we do not understand the basis of HPMC's complaint. Both HPMC and DOE agree that clause H.24 of the contract requires the parties to negotiate disputes in good faith. DOE has, in fact, negotiated with HPMC about whether and to what extent HPMC should be required to provide DOE with copies of documents that DOE's auditors request in support of incurred-cost audits. Although "[a]n obligation to negotiate 'in good faith' nixes trickery and certain forms of obduracy," *PSI Energy, Inc. v. Exxon Coal USA, Inc.*, 17 F.3d 969, 973 (7th Cir. 1994), HPMC has not alleged that DOE has engaged in any type of chicanery in negotiations. HPMC merely alleges that DOE does not agree with and has not capitulated to HPMC's position on DOE's audit rights. "[T]he duty to negotiate in good faith does not compel either party to consent to the other party's position." *In re Midway Airlines, Inc.*, 180 B.R. 851, 939 (N.D. Ill. 1995); see *PSI Energy*, 17 F.3d at 974 ("An obligation to bargain in good faith differs from an obligation to make concessions").

If HPMC is making any further allegations about a lack of good faith in negotiations, they are too general and vague to support an argument that DOE has somehow breached clause H.24. HPMC appears to want to pull the Board into the minutiae of contract administration and have the Board direct the positions that DOE must take in the negotiation process. That is not the purpose of the CDA's nonmonetary claim review process, which is directed to early resolution of distinct disputes involving contract interpretation. Under the authority discussed in *Alliant Techsystems*, 178 F.3d at 1271, we decline to provide further guidance about how to apply the "good faith" negotiations requirement in HPMC's contract.

IV. The Contract Clauses Regarding DOE's Audit Rights

A. Whether HPMC's Claim is Monetary in Nature

The second count of HPMC's complaint addresses the interpretation of contract clauses that grant DOE the right to audit and to inspect documents supporting HPMC's costs. It appears that HPMC is asking the Board to resolve two questions: (1) whether, under the

terms of HPMC's hybrid fixed-price/cost-reimbursement contract, DOE and its auditors are barred as part of any audit from seeking any information relating to the FFP portion of the contract; and (2) whether HPMC is entitled to preclude the DOE contracting officer from accessing audit cost support that HPMC provides to DOE's designated auditor.

DOE argues that we lack jurisdiction over these interpretation requests because, under *Securiforce International*, HPMC is required to present these issues as part of a money claim. HPMC has already decided not to provide DOE with documentation that, according to HPMC, is relevant only to the FFP portion of its contract, and DOE has announced that, as a result, it will reduce HPMC's allowable indirect cost markups and seek reimbursement of any such markups to the extent that they were previously paid. Once those deductions are effectuated, says DOE, HPMC will be in a position to submit a money claim.

The *Securiforce* rule applies “[i]f the ‘only significant consequence’ of [the contractor] prevailing on [its] claims is that [the contractor] would be entitled to recover money from the government.” *J&J Maintenance*, 23-1 BCA ¶ 38,353 (quoting *Securiforce International*, 879 F.3d at 1360). That does not mean, however, that “any claim that may lead to payment of additional compensation is monetary, and thus must state a sum certain.” *Id.* “[I]f a contractor does not want to perform work that the Government is demanding . . . , the contractor can seek review through a nonmonetary claim in which the contractor asks for a judgment finding that the Government’s contract interpretation is incorrect.” *Duke University*, 18-1 BCA at 180,290 (citing *Alliant Techsystems*, 178 F.3d at 1269-70). “That is, the contractor does not necessarily have to perform the work and then seek monetary relief.” *Id.*

HPMC is asking the Board to interpret its contract in a manner that would relieve HPMC from having to provide DOE with the audit support documents that DOE is demanding. Although HPMC presumably could continue to decline DOE's production demand (as it now seems to be doing), wait for DOE to effectuate the indirect cost reductions that DOE has indicated it intends to impose, and then submit a monetary claim to recover that money, HPMC is not obligated to wait until DOE takes such action in order to seek a decision interpreting its audit production obligations under the contract. *See Alliant Techsystems*, 178 F.3d at 1269-70. Resolution of that contract interpretation issue may assist HPMC in its continuing contract performance. Further, given that DOE has not yet applied the cost deductions that it has indicated it expects to undertake, HPMC has not yet suffered a monetary loss and therefore has no basis for submitting a monetary payment demand. Accordingly, the Board possesses jurisdiction to entertain HPMC's claim seeking interpretation of DOE's audit and document inspection rights under its contract.

B. DOE's Audit and Document Production Rights Under the Contract

HPMC's contract contains three separate clauses that provide DOE with audit and document access rights:

- (1) The "Audits and Records–Negotiation (Oct 2010)" clause at FAR 52.215-2(b), which provides "the Contracting Officer, or an authorized representative of the Contracting Officer," in any cost-reimbursement or time-and-materials contract, "the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract";
- (2) The "Allowable Cost and Payment (Jun 2013)" clause at FAR 52.216-7, which allows the contracting officer to "have the Contractor's invoices or vouchers and statements of cost audited" but in this contract is designated with the limiting language, "Applies to Cost-Reimbursement"; and
- (3) The "Access To and Ownership of Records (Oct 2014)" clause at DEAR 970.5204-3, which subjects "[a]ll records acquired or generated by the Contractor under this contract . . . to inspection, copying, and audit by the Government or its designees at all reasonable times."

With regard to HPMC's argument that these clauses only authorize DOE and its auditors to access information regarding the cost-reimbursement CLINs in its contract and that information associated with the FFP CLINs are completely off-limits, we disagree. HPMC's contract expressly identifies one of the FAR clauses identified above (FAR 52.216-7) as being tied to the cost-reimbursement portions of HPMC's contract, but the other FAR clause (FAR 52.215-2) provides generally for audits of "cost-reimbursement" contracts. Although HPMC asks that we decide whether FAR 52.215-2 applies only to the cost-reimbursement CLINs in its hybrid contract or to the contract as a whole, it is unnecessary to do so because, as far as we can tell, DOE's auditors have not requested documents that would fall outside the context of a normal incurred-cost audit. Contractors' incurred-cost submissions under cost-reimbursement contracts "are audited . . . to establish allowable direct costs and indirect cost rates for each fiscal year." Donald P. Arnava, James J. Gildea & Normal E. Duquette, "DCAA Audits," 94-09 Briefing Papers 1, 4 (Aug. 1994). DOE represents that "[a] well-known audit risk is misallocation and/or cost shifting between fixed price, cost reimbursable, and indirect work/costs" and that "HPMC has had a history of misallocating costs between FFP and [cost-reimbursement] portions of the Contract." Respondent's Reply Brief at 20. The audit in question is being undertaken to ensure that indirect costs being charged to the cost-reimbursement CLINs are appropriately allocated to

those CLINs and have not been, through some type of accounting mechanism, moved away from FFP CLINs. *See id.* (DOE’s auditors are attempting “a review of whether HPMC is complying with applicable legal and regulatory standards in accounting for its costs between the [cost-reimbursement] and FFP CLINs of the hybrid Contract.”).

The Board is in no position to impose some type of myopic limitation on the scope of documentation that auditors need to support an audit of the cost-reimbursement aspects of this contract or of HPMC’s indirect cost rates. “The allocation of indirect costs to particular contracts is often a complex process involving sophisticated cost accounting techniques.” *United States v. Newport News Shipbuilding & Dry Dock Co.*, 862 F.2d 464, 465 (4th Cir. 1988). Auditors “must exercise professional judgment in selecting which procedures and techniques are appropriate in the circumstances,” and “[t]he scope of work necessary is a matter of audit judgment considering the contract auditing and reporting standards in the context of a variety of factors which might be involved in a particular audit.” DCAA Contract Audit Manual 6-103.1(a) (Apr. 2023) (available at <https://www.dcaa.mil/Guidance/CAM-Contract-Audit-Manual/> (last visited July 11, 2023)). “The auditor’s primary objective is to examine the contractor’s cost representations, in whatever form they may be presented . . . and to express an opinion as to whether such incurred costs are reasonable, allowable, and applicable to the contract as determined under generally accepted accounting principles and cost accounting standards applicable in the circumstances. *Id.* 6-102.1. HPMC has identified no basis upon which we would step into the shoes of the auditors and micromanage what documents they may, or may not, need to support their review or bar them from accessing certain categories of documents.

Even if the clauses at FAR 52.215-2 and 52.216-7 did not provide a basis for DOE’s access to any documents tied to FFP CLINs, the third clause identified above (DEAR 970.5204-3) does. That clause does not contain any language that could be viewed as limiting its application to the cost-reimbursement aspects of HPMC’s contract. HPMC argues that the clause is “a measure to govern contractor records due to the nature of the hazardous materials handled at many DOE facilities and the need for DOE to be able to access contractor medical records and track the ‘long term effects of exposure,’ not as a measure for conducting [incurred-cost submission] audits.” Appellant’s Response Brief at 11 (quoting 79 Fed. Reg. 56279 (Sept. 19, 2014)). Yet, the audit and document access language in the clause is quite broad. Further, contrary to HPMC’s representations, the clause was originally promulgated “to explain the circumstances under which contractor ownership of certain records may be appropriate” while ensuring that “the Government’s rights to inspect, copy, and audit these records are not limited,” so that DOE could still “carry out its legal responsibilities . . . in overseeing its contractors, including [but not limited to] compliance with [DOE’s] health and safety and reporting requirements, and to protect the public

interest.” 62 Fed. Reg. 34842, 34858, 34862 (June 27, 1997); *see* 48 CFR 970.0407-1-2. Nothing in the clause identifies the “medical records” limitation that HPMC seeks to impose.

The Court of Claims made clear more than forty years ago that a contractor cannot complain during contract performance about the Government’s reliance upon audit access rights, including the right to access what the contractor views as proprietary information, created by contract clauses to which the contractor, prior to award, did not object:

Plaintiff’s complaint that disclosure of its proprietary information will be made to the contracting officer is a statement of no more than what plaintiff has agreed to in the contract. The audit clause gives audit and inspection rights to “[t]he Contracting Officer or his representatives.” If plaintiff desires to keep the contracting officer in the dark as to the identifies of its suppliers [or about other information in its accounting files], . . . it should not have contracted with the Government on a cost-reimbursement basis necessitating audit of plaintiff’s . . . costs.

SCM Corp. v. United States, 645 F.2d 893, 902 (Ct. Cl. 1981). If the contractor wanted “to limit the audit process in the manner it now seeks, it should have done so when it entered into the contract and given the Government the opportunity to decide whether or not it wished to (or even may) enter into a cost-reimbursement contract on a restricted audit basis.” *Id.* “While [the contractor] has the right to insist on its restrictions on audit procedures for any future contracts, it has no right to impose them unilaterally and retroactively on an existing contract.” *Id.* at 903. Here, had HPMC wanted to create some kind of clear limitation on DOE’s audit rights or demarcation of what documents could be requested under this hybrid FFP/cost-reimbursement contract, it should have insisted on those limitations, written in clear language, *before* it executed the hybrid contract.

HPMC tells us that the documents which the auditors are seeking are far beyond what should be needed to evaluate HPMC’s costs. Certainly, the Government’s audit rights under these clauses are not limitless and do not provide a basis for wide-ranging document requests for corporate records unrelated to the verification of actual costs. *See, e.g., United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162, 166-67 (4th Cir. 1988). But the contractor does not get to stop an audit simply because it thinks that what it has produced is good enough. Here, HPMC tells us that DOE’s auditors have requested records relating to “the labor costs of HPMC employees and contractors working on the FFP portion of the Contract” and HPMC’s “bank statements and confidential contractor financial information.” Appellant’s Response Brief at 11. Yet, in the decision on appeal, the contracting officer indicates that the documents which HPMC is shielding relate to “costs associated with the FY 2020 indirect rates and FY 2022 provisional billing rates.” Exhibit 10. On the record

before us, we have no way to identify whether those documents are needed for the audit that DOE is undertaking, and the purpose of granting us jurisdiction under the CDA to entertain nonmonetary claims was not to allow us to micromanage the specifics of an audit like the one at issue here. Under the authority discussed in *Alliant Techsystems*, 178 F.3d at 1271, we decline to provide the type of review that HPMC is requesting.

HPMC also complains that, if it produces documents to the auditors, it should not have to show DOE's contracting officer any of its proprietary information and should be able to bar the auditors from sharing that information. It suspects that DOE is intending to use HPMC's confidential cost information to assist in a new, follow-on contract solicitation for the same FFP services that HPMC is now providing. Appellant's Response Brief at 4. That argument mirrors the plaintiff's argument in *SCM Corp.*, where the plaintiff said "that it is entitled to take measures which will prevent the abuse of audit rights whereby the auditor or contracting officer discloses proprietary and confidential information obtained in the course of the audit to other contracting officers and other government departments." *SCM Corp.*, 645 F.2d at 903. The current version of the DCAA Contract Audit Manual contains a provision similar to one in effect when *SCM* was decided, which now reads, "Government interests can best be served by maximum cooperation and exchange of useful information between audit and procurement personnel." DCAA Contract Audit Manual 1-403.1(c). "Whether or not the exchange of such information is or would be an abuse of the audit clause depends upon whether or not it is permitted by the contract." *SCM Corp.*, 645 F.2d at 904. Here, as in *SCM*, the audit clauses permit the exchanges.⁴ HPMC's concerns about possible

⁴ HPMC notes that the audit clauses require it to produce audit documentation to "the Contracting Officer, *or* an authorized representative of the Contracting Officer," FAR 52.215-2(b) (emphasis added), or to "the Government *or* its designees," DEAR 970.5204-3(d) (emphasis added). The contracting officer designated DCAA and then CRZ as DOE's auditors, and DCAA and CRZ have received or will receive HPMC's audit documentation. HPMC argues that, because the audit clauses create an "either/or" situation, and because the contracting officer elected to have the auditors see that documentation, the contracting officer has waived his right to see the audit documentation himself. Yet, an audit report is simply "advisory in nature and subject to the discretionary authority of the Contracting Officer to accept or reject in whole or in part." *Systems Associates, Inc.*, DOT CAB 72-40, 74-1 BCA ¶ 10,403, at 49,138 (1973). Ultimately, the contracting officer decides whether to accept or reject the contractor's cost submissions. HPMC's position that the ultimate deciding official—the contracting officer—is barred from seeing the materials that support his designee's audit findings would preclude the contracting officer from making rational decisions about whether to accept and adopt those findings and is unsupported by precedent. The designation of DCAA and CRZ as DOE's auditors did not include a

inappropriate use of its proprietary information by the contracting officer are wholly speculative, and, “[i]f there were an actual misuse of plaintiff’s proprietary data obtained for limited purposes pursuant to a government contract, it would appear that a claim for a constructive change or a suit for breach of contract would lie.” *Id.* at 905 n.9. Had HPMC wanted to preclude the contracting officer from accessing its confidential financial data, it should have negotiated such a limitation before executing this contract. *Id.* at 902.

HPMC has requested that we not grant DOE’s motion to dismiss before reviewing the report of its expert witness, which HPMC contends shows how audits ought to be performed and what information should be necessary to support an audit. As previously discussed, we resolve motions for failure to state a claim upon which relief may be granted by looking solely at the pleadings and documents integral to the pleadings. *SRA International*, 20-1 BCA at 182,313. “[O]ther outside materials,” like HPMC’s expert witness report, “are not permissible.” *Id.* Even if we considered the report, however, it would not change the result. In his report, HPMC’s expert, Mr. DuVal, asserts his belief that, when FAR 52.216-7 is contained in a hybrid contract, the contractor should not have to submit detailed information about the FFP portion of its contract during an incurred-cost submission audit. The proper interpretation of a contract, however, is a question of law for which expert opinions are not necessary. *See Marx & Co. v. Diners’ Club, Inc.*, 550 F.2d 505, 510 (2d Cir. 1977) (“[E]xpert testimony on law is excluded because the tribunal does not need the witness’ judgment.” (internal quotation marks and citation omitted)). Accordingly, Mr. DuVal’s legal opinion is not relevant to this matter.

Decision

For the foregoing reasons, DOE’s motion to dismiss for lack of jurisdiction is denied. DOE’s motion to dismiss for failure to state a claim is granted. The appeal is **DISMISSED FOR FAILURE TO STATE A CLAIM**.

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

delegation of the contracting officer’s ultimate authority to decide whether to accept HPMC’s cost submissions.

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge