UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: October 28, 2011

CBCA 1012, 2570

MERLIN INTERNATIONAL, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

David C. Aisenberg of Looney, Cohen, Reagan & Aisenberg, LLP, Boston, MA, counsel for Appellant.

Kris M. Gawin and Megan E. Gemunder, Office of the General Counsel, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **GOODMAN**, and **SHERIDAN**.

HYATT, Board Judge.

These appeals are of a contracting officer's decision denying the claim of appellant, Merlin International, Inc. (Merlin), for breach damages under a delivery order awarded to it by respondent, the United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS). The order, for a base year with four option years, was for the acquisition of unlimited perpetual use licenses to be used in conjunction with a software package marketed by Siebel Systems that USCIS intended to use to track immigration throughout the United States. Merlin seeks breach damages based

on DHS's decision that it would not renew the delivery order for the first option period of the contract on the ground that there was no "bona fide need for the System or functionally similar products or services." For the reasons stated, we deny the appeal.

Findings of Fact[1]

Background and Chronology of the Acquisition

USCIS came into existence on March 1, 2003, following the enactment of the Homeland Security Act of 2002, which transferred the functions of the Immigration and Naturalization Service (INS) from the Department of Justice to the newly formed DHS. USCIS is responsible for the administration of immigration benefits and services, including the following: immigrant visa petitions, naturalization petitions, asylum and refugee applications, granting lawful permanent resident status and U.S. citizenship, making adjudicative decisions performed at service centers, and managing all other immigration benefit functions. Appeal File, Exhibit 51.

In 2002, INS initiated a ten-year modernization plan to improve and upgrade the agency's information technology (IT) systems. Immigration records had been maintained by approximately sixty aging databases, referred to as the legacy systems. USCIS continued INS's assessment of these existing systems in an effort to identify a workable, modern IT environment. It determined that the legacy environment was "costly, inefficient, and nearly obsolete." The existing IT environment, which consisted of a non-standard, outdated infrastructure supporting the legacy systems' minimally integrated applications, was batch processing oriented, and made limited use of web-based tools and applicant self services. Some programs still relied on handling significant volumes of paper, and current systems did not support improved business processes. USCIS lacked data integration/data management capability across the enterprise. Appeal File, Exhibits 7, 51 at 131-32.

After conducting a market study, USCIS narrowed its focus to a product developed by Siebel Systems, Inc. The Siebel product provided a mature customer data integration

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[1] The citations to the record include the appeal file exhibits submitted by the parties. The Government submitted two volumes of consecutively numbered exhibits. Although the second volume, containing exhibits 51through 83, is denoted a supplemental appeal file, for clarity all citations herein to the Government's appeal file exhibits are treated as part of a single Rule 4(a) appeal file. The appellant's Rule 4(d) exhibits are referred to as supplemental appeal file exhibits.

package.[2] Appeal File, Exhibit 6. An overall description of the Siebel product, its capabilities, and features is provided in its literature:

> Siebel Universal Customer Master (UCM) is Oracle's[3] lead Customer Data Integration (CDI) solution. Siebel UCM leverages the unrivaled domain expertise of the Siebel platform to deliver a rich and complete CDI solution with many unique capabilities. Siebel UCM's comprehensive functionality enables an enterprise to manage customer data over the full customer lifecycle: capturing customer data, standardization and correction of names and addresses; identification and merging of duplicate records; enrichment of the customer profile; enforcement of compliance and risk policies; and the distribution of "single source of truth" best version customer profile to operational systems.

Among the most significant and relevant features offered by the Siebel UCM are the abilities to match, cleanse, correlate, and resolve inconsistencies in records. Appeal File, Exhibit 53.[4]

Merlin is a value-added reseller of IT products, including Siebel software, to the Federal Government. At the times relevant to this acquisition, it was a small, veteran-owned business with a General Services Administration (GSA) schedule contract that offered the Siebel UCM products in which USCIS was interested. Appeal File, Exhibit 3; Transcript at 99, 104.

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[2] The study defined customer data integration as the combination of technologies and processes required to maintain an accurate, timely, and complete view of the customer across multiple channels, business lines, and databases. Appeal File, Exhibit 6.

[3] On September 12, 2005, Oracle Corporation acquired Siebel Systems. Oracle continues to manufacture and distribute Siebel products and software applications, including the Siebel UCM, under the Siebel brand name.

[4] This description of the Siebel product is taken from the Siebel UCM Guide (Version 7.8), dated April 2006, which was the version available in the 2006-2007 time frame and is considered by the Government to be an authoritative source of the software's functionality. Hearing Exhibit 71 (Government's Expert Report); Transcript at 1173-74, 1480-83. Merlin's expert acknowledged that this version applied after April 2006. Transcript at 968-69. Earlier versions of the guide were less descriptive of the product's functionality. Hearing Exhibit 71. Under the contract, USCIS would be entitled to all upgrades and updates. Appeal File, Exhibit 7.

On July 20, 2004, USCIS entered into blanket purchase agreement HSSCHQ-04-A-00850 (BPA 850) with Merlin, under Merlin's GSA schedule contract GS-35F-0396K, to provide DHS with a contractual vehicle that would permit it to order all Siebel software and maintenance, including CDI software, from either of Merlin's or Siebel's GSA schedule contracts. Appeal File, Exhibit 5.

Also on July 20, 2004, USCIS issued delivery order HSSCHQ-04-F-00851 (delivery order 851) to Merlin under BPA 850. Appeal File, Exhibit 51. This order was issued concurrently with BPA 850, in the amount of $100,000, with a base performance period of July 20, 2004, through July 19, 2005, and four option years. Included in this order were forty million UCM software licenses. Appeal File, Exhibit 51.

In September 2005, the Director of the Program Management Office of the Office of USCIS's Chief Information Officer (CIO) sent a memorandum to the DHS contracting officer requesting that the contracting office proceed with the acquisition of unlimited UCM licenses from Siebel. The memorandum noted that purchases on a per record basis would not be cost effective since DHS had validated that USCIS would require an amount in excess of 500 million. Appeal File, Exhibit 15.

In November 2005, USCIS issued an acquisition plan supporting the purchase of a DHS-wide unlimited perpetual use site license for Siebel's UCM software. Appeal File, Exhibit 11. Citing the findings of its market study, the plan acknowledged that a BPA was already in place under which to order Siebel products and that an initial order for forty million licenses had already been placed. These licenses were being used to support two USCIS initiatives: one, a fraud tracking system, and the other, a project to achieve records digitization. According to the acquisition plan, between these two programs, all forty million licenses were already allocated. Appeal File, Exhibits 6, 11.

USCIS considered the advantages of a lease to purchase (LTOP) plan approach versus a direct purchase agreement. It determined the direct purchase would cost the agency an up-front payment of $15,100,000 versus the total LTOP cost of $17,364,825, which would be spread out in annual payments over a five-year period. After deriving the cost of the two approaches based on present value, the agency determined that the direct purchase would be slightly more expensive than the cost of an LTOP plan. The LTOP plan was thus deemed to be the less expensive alternative, with the added benefit of budget flexibility. The DHS Chief Financial Officer certified that funding would be available for the option years. Appeal File, Exhibit 11.

USCIS prepared a limited source justification for the purchase of unlimited licenses. This justification stated that:

> While other vendors provide similar software, only one, Siebel[,] can provide the CDI capability required by DHS. In addition, Siebel is currently being used in CIS for case management and other projects. A break or interruption in service could jeopardize these projects. DHS has adopted Siebel UCM software as a technical solution and it is noted in the DHS Technical Reference Model. Also, as part of its ongoing technology initiatives, DHS is pursuing a means of linking all of the DHS components through a common data bus. Standardization of software across the enterprise will facilitate the data consolidation process as well. Siebel is the only manufacturer of the Siebel UCM software.

Appeal File, Exhibit 12. USCIS decided that this purchase would also be effected through Merlin.

Merlin's GSA Schedule Contract Terms

With respect to leases of software under special item number (SIN) 132-3, Merlin's schedule contract, GS-35F-0783M,[5] provided:

> 2. **STATEMENT OF ORDERING ACTIVITY INTENT:**
>
> (a) The ordering activity and the Contractor understand that a delivery order issued pursuant to this SIN is a lease arrangement and contemplates the use of the product for the term of the lease specified in such delivery order (the "Lease Term"). In that regard, the ordering Activity, as lessee, understands that the lease provisions contained herein and the rate established for the delivery order are premised on the lease provisions contained herein and the rate established for the delivery order are premised on the ordering Activity's intent to fulfill that agreement, including acquiring products for the period of time specified in the order. Each lease hereunder shall be initiated by a delivery order which shall, either through a statement of work or other attachment, specify the product being leased and the required terms of the transaction.
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> (b) Each ordering activity placing a delivery order under the terms of this option intends to exercise each renewal option and to extend the lease until

[5] Merlin's schedule contract was effective for the period from September 13, 2002, through March 13, 2008. Appeal File, Exhibit 3.

> completion of the Lease Term so long as the need of the ordering activity for the product or functionally similar product continues to exist and funds are appropriated. Contractor may request information from the ordering activity concerning the essential use of the products.

Appeal File, Exhibit 3 at 11.

The USCIS Orders and Their Individual Terms and Conditions

BPA 850 and Delivery Order 851

Merlin's quotation for the terms of BPA 850 and delivery order 851were adopted by the Government. These terms included the following pertinent provisions:

> - The rights of the Government to terminate this Agreement under (a) and (b) above shall apply only to the entire Contract, including any renewals thereof, and not allow individual product terminations or partial terminations.
>
> - Termination Provisions: Merlin's Software Purchase Plan (SPP) allows termination for convenience (in accordance with FAR 52.212-4) and termination for unavailability of funds. Related to a termination for convenience, the SPP Agreement provides for a ceiling on the financial obligation of DHS equal to the present value of the remaining unpaid Payment Amounts due during the contract term (including all option periods), discounted at the term equivalent U.S. Treasury (H.15) T-bill rates (currently 3.30% for a four year term) as of the date of the Product/Service Order (PSO) less any SPP payment made to the date of such termination.
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> - Except as expressly provided otherwise in this agreement, (i) all remedies available to either party are cumulative and not exclusive; and (ii) termination of this agreement or any license shall not limit either party from pursuing other remedies available to it, including injunction relief. Upon termination, all amounts owed under this Agreement and all schedules shall immediately become due and payable.
>
> - The Government warrants that the use of the Software is essential to the Government's proper, efficient and economic operation for the full Contract term and any renewals entered into thereafter. The Government has provided required information relative to the essential use of the Software including, but not limited to, a description of the currently identified applications to be

> supported, planned life-cycle operations of the Software and OMB [Office of Management and Budget] budget requests for the Contract Term.
>
> - Should the Contract be terminated due to non-appropriation of funds, the convenience of the Government, or non-renewal, the Government agrees not to replace the software licensed under the Contract nor pursue outsource contracting with functionally similar software or services during the remaining Original Contract Term.

Appeal File, Exhibit 51 at 144, 168, 172.

The parties agreed to the following restriction with respect to the exercise of yearly options:

> The Government, by placing the . . . order, agrees to use its best efforts to obtain funds for each option period and to extend the lease until the completion of the full lease term, so long as the bona fide need of the Government for the system or functionally similar products or services continues to exist in each fiscal year.

Appeal File, Exhibit 51. These provisions were proposed by Merlin to address the concerns of Hitachi Capital America Corp. (Hitachi), Merlin's financing source, that the products were essential and would be in use for the full contract term and any renewals, thus creating reasonable assurance that the options would probably be exercised. Transcript at 55-56, 430.

The first order, delivery order 851, contained one contract line item to lease a suite of twenty-seven Siebel commercial-off-the-shelf (COTS) information technology products and support services from Merlin. Part of this suite was the UCM, with a quantity of forty million licenses. Appeal File, Exhibit 51; Transcript at 489.

According to the acting CIO, who spearheaded the agency's decision to purchase the Siebel UCM, the Government's primary intent in executing delivery order 851 was to develop and service a case management system for USCIS. Transcript at 728. The subsequent order for unlimited licenses was to accommodate the projected large scale growth in the system. *Id.* at 775.

On July 31, 2004, the contracting officer issued modification 0001 to delivery order 851, changing the period of performance to the period from July 20, 2004, through July 19, 2005, with four consecutive option years. Appeal File, Exhibit 51 at 158.

On December 3, 2004, the Government issued a stop work order for all work associated with BPA 850 and task order 851. The contracting officer advised Merlin that the Government wanted to restructure the BPA and task order. Appeal File, Exhibit 51 at 211.

Thereafter the Government and Merlin discussed making modifications to the terms of the BPA and delivery order 851. Transcript at 490-91, 799-800. The contracting officer explained that his objective was to ensure clarity with respect to the options and to ensure that the Government retained its unilateral right not to exercise an option if not supported by appropriations or a bona fide need. Transcript at 586-87.

On January 28, 2005, the contracting officer sent the following e-mail message to Merlin:

> DHS/CIS still anticipates a need for Siebel products but is not in a position from a technical or financial standpoint at this time to entertain requirements past this current fiscal year. DHS/CIS currently has aligned funding for Siebel products in the amount of $3 mission for fiscal year 2005. DHS/CIS is requesting Merlin identify the array of Siebel licenses and products that can be purchased this fiscal year with the $3M. With the licenses in place, CIS will have the ability to test those products and determine if the Siebel product will meet their current and future needs.

The e-mail message also requested a per record unit price for licenses based on a sliding scale for quantities and stated that DHS would like to see a ceiling or a cap on the number of records for which it was charged. Finally, the message stated that USCIS would like to "renegotiate the terms and conditions of the current BPA and structure the BPA with options," creating a vehicle against which the agency could "place orders for existing and future needs enterprise wide." Appeal File, Exhibit 51at 213.

By letter dated January 31, 2005, Merlin's president responded to the contracting officer's inquiry as follows:

> As we stated in our prior correspondence, Merlin and its assignee, Hitachi Capital America Corp., have already paid Siebel in full for all of the software described in the above referenced task order [delivery order 851] in reliance upon the software purchase plan terms in the order. All specific software was delivered by Siebel and accepted in full by the Government. Accordingly, the request outlined in your letter to modify the existing contract structure [is] unacceptable and rejected.

Appeal File, Exhibit 51 at 211.

After considering Merlin's response, and consulting with the program office and DHS's Office of General Counsel, the contracting officer responded to Merlin by letter dated February 4, 2005, expressing disappointment that it had not been possible to reach agreement on a restructuring of delivery order 851. The contracting officer added that DHS had determined that payment of $3,000,000 was the payment due for the base period of July 19, 2004, through July 20, 2005. The contracting officer advised that DHS still desired to modify the terms of the BPA by clarifying the nature of the options and outlining procedures relative to exercise of the options. Finally, the contracting officer rescinded the stop work order and confirmed that payment had been authorized and should be received within seven days. The contracting officer further stated, "We intend to issue a modification to the Government Order clarifying the nature of the options and outlining procedures relative to the exercise of the option." Appeal File, Exhibit 51 at 209.

The contracting officer explained in his testimony that, after consulting with DHS's Office of General Counsel and the requiring activity, he had concluded that the terms of delivery order 851 effectively precluded DHS from partially terminating the order. He was concerned that if the Government had terminated the order for convenience, it would still have been required to pay the full amount of the LTOP lease due to the order's termination schedules as set forth in the terms Merlin proposed and to which USCIS agreed. He determined that it would be in the Government's best interest to proceed with the order since there was a requirement for some of the products and services. Given that the order called for a suite of products, some of which the Government did require, and, in the agency's judgment, it could not partially terminate the order, DHS exercised its options for all four years under that order. Transcript at 488-89, 496.

On September 13, 2005, USCIS's Office of the CIO (OCIO) completed a "Person-Centric Software Solution Market Study." USCIS concluded that its goals would best be met by the implementation of a "person-centric" software data management tool, in which information across a wide variety of databases and files could be searched and assembled in a manner that would make information more useful in terms of both content and timeliness. The study identified and compared leading software providers of customer data integration software solutions. After evaluating three such suppliers, the study determined that the Siebel Systems UCM offered a mature product with proven technical advantages that translated into reduced program risk for development of a person-centric records system at a lower lifecycle cost. Appeal File, Exhibit 6.

The contracting officer initiated negotiations to modify BPA 850's general terms and conditions in order to address the agency's concerns about potential liability should it not

be in a position to exercise an option or need to achieve a partial termination of an order. DHS believed that under the terms of BPA 850, as written, it would have had to make payment in full even if it had terminated the order or not exercised an option. Transcript at 517-19.

Effective September 21, 2005, the parties entered into bilateral modification P0001 to BPA 850. This modification revised the statement of work and terms and conditions applicable to government orders issued under the BPA. The modified contractual terms were proposed by the Government. The negotiations preceding the modification were participated in by attorneys for Merlin, DHS, and Hitachi, which at that time was the financial institution used to finance software purchases by Merlin. Transcript at 854-56. Hitachi's attorney testified that the goal of the financing company was to minimize the risk that the Government would change its mind about completing the lease transaction and choose not to renew. The language proposed by DHS was similar to terms and conditions generally approved by financing institutions that purchase revenue streams associated with LTOP transactions. *Id.*

The following terms and conditions were included in the modification of BPA 850:

Section C.1.1 described the history and objectives of USCIS's business modernization program:

> The USCIS IT Transformation is a comprehensive program that will migrate USCIS to a modern world-class digital processing capability, enhance national security, improve customer service and responsiveness, better prevent future backlogs, and improve efficiency and effectiveness.
>
> DHS has validated that the current cumulative total of records across their legacy systems is estimated in excess of 500 million records. In order to support the growing needs of records, DHS [US]CIS will look to either purchase or lease a DHS-Wide unlimited perpetual use site license that will cover all existing records as well as future growth.

Appeal File, Exhibit 7 at 25.

Section H.10, which sets forth the terms and conditions applicable to lease to ownership plans, became applicable to all orders issued under the BPA after September 21, 2005, the date of the modification:

> These Lease to Ownership Plan Terms and Conditions, as provided by the Government (the "LTOP Terms") are made a part of this BPA and shall be incorporated in future Government Orders by reference. The Government Order and any renewal thereof refers to the ordering document between the Department of Homeland Security (the "Government") and Merlin Technical Solutions, Inc.[6] ("Contractor") for the acquisition of the System specified herein. The Government shall elect a Lease to Ownership Plan ("LTOP") with a period of performance, payment schedule, dollar amounts, system and lease term shall be specified per each individual Government Order.

Section H.10.3 provides in pertinent part:

> The Government warrants that the use of the System is essential to the Government's proper, efficient and economic operation for the anticipated lease term. Prior to acceptance of the Government Order, the Contractor will require written information from the Government to establish and document the essential use of the System. Such information would include, but is not limited to, a description of the use of the System, the essential Government activities provided by the System and planned life cycle for the System.

Section H.10.4 provides:

> The Government has contemplated this LTOP and understands that a Government Order issued hereunder is a lease arrangement and contemplates the use of the System for the base period and any option periods as set forth in each individual Government order. The parties agree that this LTOP does not require, and should not be interpreted as requiring, either party to take any action or perform any covenant under this LTOP that is contrary to the Anti-Deficiency Act or other federal law. Accordingly, the Government Order shall not be deemed to obligate succeeding fiscal years or otherwise commit the Government to continue performance beyond the current Government fiscal year.
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> Contractor shall provide the System to the Government pursuant to the terms of the Government Order. To carry out this LTOP, the Contractor will be supplying the system to the Government in anticipation of the Government leasing the System for the full Lease Term. The Government agrees that its

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[6] Merlin Technical Solutions, Inc. is now Merlin International, Inc.

> continued right to use the System is conditioned upon its compliance with the terms and conditions of the Government Order. The Government, as lessee, understands that the lease conditions contained herein and the rate established for the Government Order are premised on the Government's intent to fulfill the terms of the Government Order.
>
> Contractor agrees to accept Payment Amounts provided under this LTOP in order to obtain the bargained for purchase price (System Price) for the System delivered, as set forth in the Government Order, and confers on the Government the right to make lease payments for the items delivered pursuant to and in reliance on the terms of this LTOP, the essential use information provided by the Government, and terms contained herein.

Section H.10.5 provides in pertinent part:

> The Government, by placing the Government Order, intends to exercise each option and to renew the lease until completion of the Lease Term so long as the need of the Government for the System or functionally similar product or services continues to exist and funds are appropriated.

Section H.10.8 provides in pertinent part:

> The Government has the option to renew the Government Order for subsequent fiscal years beyond the initial fiscal year. Once an option is exercised, the Government Order will be renewed for the relevant option period. The Government, by placing the Government Order, agrees to use its best efforts to obtain funds for each option period, and to extend the lease until completion of the full Lease Term, so long as the bona fide needs of the Government for the System or functionally similar products or services continues to exist in each fiscal year. Because of this commitment, [the] Government is receiving favorable pricing which is not normally available.
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> The Government's Contracting Officer shall provide notice of its intent to exercise the option 30 days prior to the expiration of the option period outlined in each individual Government Order. If the Government elects to exercise an option, a modification to the Government Order will be issued.

> Notwithstanding the terms of Section H.6.0[7], the Government may elect not to exercise an option and not renew the lease at the end of the initial base period or any subsequent option period under this paragraph if it (a) no longer has a bona fide need for the System or functionally similar products; or (b) there is a continuing need but adequate funds have not been made available to the Government in an amount sufficient to make the Payment Amounts. If this occurs, the Government will promptly notify the Contractor, and the Government Order will not be renewed and will terminate at the end of the last fiscal year for which funds were appropriated.

Section H.10.10 sets forth the terms applicable to a termination of the lease in relevant part:

> Government orders may not be terminated except by the Government's contracting officer responsible for the Government Order pursuant to FAR 52.212-4 . . . . The Government reasonably believes that the bona fide need will exist for the base period and each option period and corresponding funds in an amount sufficient to make all payments for the Lease Term will be available to the Government. Therefore it is unlikely that leases entered into under this LTOP will terminate prior to the full Lease Term.
>
> If a Government Order expires or terminates prior to the expiration of the Lease Term set forth in the Government Order for any reason, the Government agrees not to replace the system leased under the Government Order with functionally similar equipment and/or software for a period of one (1) year after such expiration or termination. Upon such expiration or termination, the Government's rights to the System are extinguished and the Government agrees to return the System to the Contractor in accordance with H.10.13.

Appeal File, Exhibit 7.

The modification of BPA 850 also stated that:

> The GSA terms and conditions included in this BPA, or incorporated by reference, apply to all purchases made pursuant to it. In the event of an

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[7] Section H.6.0 sets forth the text of Federal Acquisition Regulation [FAR] clause 52.217-9 (Option to Extend the Tem of the Contract (Mar. 1989)).

> inconsistency between this BPA and the contractor's GSA Schedule(s), the provision of the GSA Schedule shall take precedence.

Appeal File, Exhibit 7.

Award of Order for Unlimited Licenses

On September 12, 2005, Merlin and Hitachi held a telephone conference call with the Acting USCIS CIO, who confirmed that USCIS had spent some eighteen months doing market research on vendors and technical solutions available to facilitate the combining of information from the numerous legacy systems used by the agency, each of which maintained limited information and could not interact with other systems or each other. She said that USCIS selected the Siebel system because it puts all data about a single person on one record, which would enhance the agency's ability to identify individuals who may present security concerns and which would lead to improved service in terms of issuing green cards and processing citizenship applications. When asked about the chance that the software would no longer be needed during the lease term, the Acting CIO replied that, based on these studies, she believed the system needs would only grow. Supplemental Appeal File, Exhibit 60.

On December 30, 2005, DHS entered into delivery order number HSHQDC-06-J-34 (delivery order 34) with Merlin. The order was issued under the modified BPA 850. It provided for an LTOP arrangement, with the base period to run from December 31, 2005, through December 2006, and to continue for four option years. For the base year, the lease payment was $3 million. The first option year provided for a payment of $4,500,000; the remaining three option years provided for payments of $3,288,375 each. Appeal File, Exhibit 2.

A notice of assignment to Hitachi Capital America Corporation of the proceeds due Merlin under delivery order 34 was hand delivered to the contracting officer on December 30, 2005, along with an instrument of assignment executed by Merlin. Appeal File, Exhibits 27-29. Thereafter, Hitachi resold the proceeds to Citizens Leasing Corporation doing business as Citizens Asset Finance (Citizens), but did not file another notice of assignment. Merlin had no involvement in the resale of the proceeds by Hitachi to Citizens. Transcript at 90.

The contract between Hitachi and Citizens contained language obligating Hitachi to pursue, on Citizens's demand, a claim for damages under the Contract Disputes Act should the contract, and its expected income stream, expire prematurely. Supplemental Appeal File, Exhibit 61.

Before agreeing to purchase the proceeds from Hitachi, Citizens undertook to assess the risk inherent in the transaction. It reviewed the due diligence material available, including a USCIS "Solution Justification," which it provided to outside counsel for an opinion. In addressing potential risks, Citizens's outside counsel noted that, among other things, Congressional approval of information technology modernization efforts did not reflect "a particularly strong statutory-regulatory mandate for the Customer Data Integration Solution." It was also noted that organizational instability at DHS could affect USCIS or result in funding being redirected. Supplemental Appeal File, Exhibit 62.4.[8]

Between September 2005 and May 2006, USCIS conducted a "Data Integration Proof of Concept." A proof of concept represents a limited and incomplete implementation of an information technology or business process to evaluate its feasibility and to verify that the technology or process is of value. Respondent's Hearing Exhibit 71 at 8; Supplemental Appeal File, Exhibit 68; Transcript at 740-41. The proof of concept was intended to test the Siebel UCM's ability to accomplish data integration among the legacy systems. The most notable functions to be tested by the proof of concept were: matching, cleansing,

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[8] This letter was submitted to the Board in Merlin's Rule 4(d) submission, in Exhibit 62, Tab 4, which consisted of twelve pages. It was included in documents provided by Citizens to Merlin for purposes of preparing the supplemental appeal file. When counsel for Merlin realized that this letter, and a subsequent update, written by outside counsel for Citizens, had been included, he moved to compel their return as documents covered by the attorney-client privilege that had been inadvertently included in Merlin's Rule 4(d) submission. Respondent objected, noting among other things that the letter sought advice about business matters, and that if any privilege had attached, it had been waived. The presiding judge denied the motion, concluding that even if the privilege were applicable, appellant had not met the standards applicable to Federal Rule of Evidence 502 (addressing inadvertent disclosure of privilege documents). To the extent that appellant has asked us to reconsider that ruling on grounds that the document is not relevant, we decline to do so.

correlation, and resolution of inconsistencies in records.[9] The proof of concept was not completed at the time the order was awarded in December 2005.

Of the numerous existing legacy systems, the core system in the integration process is known as the Computer Linked Alien Information Management System 3 Local Area Network, or CLAIMS 3 LAN. The CLAIMS 3 LAN system manages intake of petitions and applications across USCIS and operates as a hub, providing the business processes associated with the large number of subsidiary systems that contribute to the adjudication or approval of benefits. The immigrant information maintained in CLAIMS 3 LAN is critical to every other business process represented in the legacy systems and thus was the focal point for the integration effort. In particular, the CIO testified that the "ability to integrate CLAIMS 3 LAN is a fundamental requirement for any data integration effort, and the information contained in CLAIMS 3 LAN is an absolute requirement for any customer master record that would be enterprise-wide in nature." Transcript at 1144-48; Hearing Exhibit 71.

The proof of concept tested the Siebel system with five legacy systems, but did not include CLAIMS 3 LAN. The contractor who spearheaded the proof of concept effort explained that the intent was to demonstrate that the legacy systems would feed data to the UCM and the UCM would perform its various functions. The proof of concept exercise started with CLAIMS 3 LAN, but it was quickly determined that the application was too brittle to use for this purpose. Instead the contractor developed an abstract of that database which was referred to as CLAIMS 3 LAN Repository. The proof of concept ultimately did show that the Siebel software could read input from the limited number of systems that were tested. It did not demonstrate a two-way integration function, however. Transcript at 1160-61.

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[9] The Siebel UCM system supports eleven functions. In particular, it supports unified customer data across multiple databases and functionally disparate systems to generate a single, trusted, authoritative source of customer data across the enterprise. It also provides a rules-based means to automate the quality of the master data by comparing data to its source and age to determine whether to maintain or update it. Its cross-referencing function allows identification of customer data in external systems to be saved in the UCM. The Siebel system also creates a best version record based on the current best state of customer data stored in the UCM. The source data history table maintains a record of data transactions between the UCM and registered external systems. The UCM supports data cleansing and data matching using third-party software. Hearing Exhibit 71.

Not all potential technical impediments to implementation of the Siebel UCM were addressed during the proof of concept process, Transcript at 737, 1143-44, which was not intended to resolve all potential problems. Transcript at 1463. The Acting CIO and the contractor both agreed that some technical issues would have to be resolved down the road. The Acting CIO was satisfied that the proof of concept showed that USCIS's data integration goals would work, but would present some technical challenges. Transcript at 740-41.

The Acting CIO testified that at the time the unlimited licenses were ordered, USCIS was anticipating growth of three new requirements that were being developed. The first was the Guest Worker Program, under which non-citizens would enter the country and work for a period of time. The second requirement was the Real ID Act of 2005, which created a requirement for tracking immigrants through state drivers licenses, and the third requirement was for digitization of paper immigrant records to make the records more accessible. Transcript at 749. These requirements were "primary drivers" underlying the decision to acquire unlimited Siebel UCM licenses. Transcript at 774.[10]

The Acting CIO testified that she understood the term "bona fide need" to mean there is a solid requirement that must be satisfied. During her tenure as Acting CIO, she regarded the Siebel software as fulfilling a bona fide need of USCIS. Transcript at 771.

In April 2006, just prior to completion of the proof of concept, the Acting CIO left USCIS. Transcript at 717. In May 2006, a permanent CIO was appointed to replace the Acting CIO. Respondent's Hearing Exhibits 71, 84; Transcript at 1138.

The new USCIS CIO undertook to familiarize himself with the status of existing USCIS legacy systems and the requirements for IT modernization and development within the organization. An outside audit of the CLAIMS 3 LAN systems currently in place

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[10] These anticipated legislative initiatives did not materialize as envisioned. Hearing Exhibit 71.

showed them to be extremely antiquated and incompatible with the Siebel UCM.[11] Transcript at 1148-49.

In conjunction with his review of the UCM purchase, the CIO analyzed the results of the proof of concept exercise. The CIO testified that USCIS had intended to implement a service-oriented architecture characterized by the ability of multiple entities or systems within the architecture to exchange messages with each other. This type of system is normally implemented using an enterprise service bus. For USCIS, the service bus was provided by TIBCO Software Inc. TIBCO allowed the various databases and systems to communicate and exchange messages. The Siebel UCM is designed to be connected to an enterprise service bus, which facilitates the exchange of messages with other entities on the bus concerning customer data information, ultimately achieving the integration of that information. The messages that can be exchanged in this environment are grounded in a language known as XML (extensible markup language), which is proprietary to Siebel. XML messages operate on a two-way basis to provide integration services and to develop an overall profile of a customer, or immigrant, by creating a universal master record for that person. The proof of concept demonstrated the ability to aggregate, but not to integrate, information about a customer. In essence the communication ran only one way. This was

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[11] The CIO explained that one of the most significant obstacles in working with the old legacy systems, particularly CLAIMS 3 LAN, was that they were extremely antiquated -- "not just old, not just antiquated, not just obsolete." He elaborated that:

> Siebel UCM is designed to interoperate with systems that . . . have contemporary obsolescence, that . . . are obsolete in the modern sense. That even though they are obsolete and outdated, . . . the technology is not so old and unworkable that it can't work with UCM.
>
> A file structure based system on a main frame that is not a relational database, such as CLAIMS 3 mainstream main frame, or CIS -- those present technical obstacles. They are not unworkable technical obstacles. They can be overcome. However, as you go further and further back in time, upon which the technology base of a system is, you reach a point where the system becomes so old and antiquated that [it] is unable to be effectively interfaced by UCM without an extraordinary amount of very expensive technological duct tape. That the technological duct tape could be applied is realistic, but the quantity is so extreme and costs so much that it is impractical and unreasonable.

Transcript at 1169.

largely due to the antiquity of CLAIMS 3 LAN, which effectively hampered this important legacy system from participating in the overall architecture. Transcript at 1157-62.

On November 10, 2006, the new CIO sent a memorandum to the contracting officer on the subject of the upcoming option exercise for delivery order 34. He advised that he had "reevaluated the Transformation Program and how the Siebel unlimited Universal Custom Master (UCM) licenses fit into it" and had taken "into consideration the capability of the base product with 40,000,000 UCM licenses." He reached the conclusion that "USCIS has no bona fide need for the unlimited UCM licenses." He went on to state that "I am notifying you that USCIS does not intend to provide funds for DHS to exercise option one for the unlimited UCM licenses available on the DHS-wide contract." Appeal File, Exhibit 32.

This communication generated exchanges within DHS concerning whether a "bona fide need" for the software existed. On January 30, 2007, the USCIS CIO sent a memorandum to the DHS CIO detailing his concerns about continuing to pay for unlimited licenses of the Siebel UCM software. He stated that his conclusion was predicated on a careful analysis of the supporting documentation generated for the acquisition: (1) the acquisition plan; (2) the limited source justification; and (3) the sole source justification. Based on his review, the CIO concluded as follows:

> 1. I believe that a *reasonable understanding and interpretation of the challenges confronting USCIS*, and the assumptions made, reasonably justified a bona fide need for an expansion of the base 40 million licensing to an unlimited licensing for this product at the time the order was requested by my predecessor.
>
> 2. I believe that as the understanding of USCIS' needs evolved, some base assumptions made at the time of order have been found to be no longer valid.
>
> 3. I believe that with several base assumptions proving not to be valid, as well as the subsequent change in strategy by the USCIS Transformation Program Office, such factors fundamentally change the context upon which the acquisition plan, limited source justification, and sole source justification are based.
>
> 4. I believe the USCIS Transformation Program Officer's change in strategy is based on this better understanding of need and as such a bona fide need for this license expansion modification no longer exists.

Appeal File, Exhibit 39.

Elaborating on his explanation, the CIO observed that the acquisition plan confused the terms "CRM [Customer Relationship Management] tool" and "CRM data management tool." In his view, the terms reflected two distinct needs. The base need for a CRM tool had been satisfied with the base contract quantity of 40 million licenses under delivery order 851. The need for a "CRM data management tool" reflected the assumption that a need existed to obtain a technology vehicle to enable the search for "person-centric" information across a wide variety of databases and files using one query term and assembly of that information into one record that makes the data more useful to the end user. The CIO explained that this assumption was invalid because it was based on the belief that a wide variety of usable data bases existed and that the diversity of data contained in these databases is desirable. After reviewing the procurement, he determined that the variety of databases in existence at USCIS were "fundamentally unusable in a modernization effort because of their obsolescence and irresolvable security deficiencies."[12] This assessment was concurred in by both DHS and non-DHS oversight organizations. Appeal File, Exhibit 39.

This evolving understanding of the deficiencies in existing data systems caused the new CIO to modify his organization's approach, to focus on accelerated retirement, abandonment, and replacement of the large number of legacy systems, rather than on the synchronization of information in obsolete systems. Appeal File, Exhibit 39. Before following through with the decision to decline to exercise the option, however, all CIOs at DHS were queried as to whether any other office had a bona fide need for the product. None of the other program offices identified a need for the Siebel UCM product. The contracting officer further confirmed that there was no need for the UCM within all of DHS before proceeding with the decision to decline the option renewal. Transcript at 675, 1230.

The CIO also testified that the unlimited licenses purchased in the base year had not been used and further affirmed that, to the best of his knowledge, USCIS had not made any significant use of the 40 million licenses under delivery order 851. That order was fully executed as to the option years because the language of the original order provided no option to terminate in part and USCIS was in fact using some of the products acquired under that order for purposes unrelated to customer data integration.

By letter dated November 30, 2006, the contracting officer, pursuant to the terms of delivery order 34 and modification P001 to BPA 850, formally notified Merlin that DHS did not intend to renew delivery order 34 for 2007, 2008, or subsequent periods. The stated reason was that the Government no longer had a bona fide need for the system or for functionally similar products or services. Supplemental Appeal File, Exhibit 64.

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[12] Many of the systems in use by USCIS dated back to the mid-1980s and early 1990s. Hearing Exhibit 71.

Merlin's general counsel responded, in a letter dated December 19, 2006, proposing an alternative payment plan for the products purchased in delivery order 34. In a letter dated December 26, 2006, the contracting officer acknowledged Merlin's offer and advised that the Government's position that it had no bona fide need for the products remained unchanged. Following additional exchanges with Merlin, on January 31, 2007, the contracting officer reaffirmed this position. Appeal File, Exhibits 66, 69-70.

Finally, after conducting several in-person meetings with Merlin and Siebel specialists, the contracting officer followed up with a letter to Merlin dated April 20, 2007:

> As a result of our meeting on February 27, 2007, a follow up meeting was held with [various individuals representing DHS, Siebel, and Oracle]. [The Siebel/Oracle representative] described Oracle and Siebel functionality and presented an alternative strategy. Notwithstanding [these] options, the government's position remains unchanged. As stated in our letters dated November 30, 2006, December 26, 2006, and January 31, 2007, the government no longer has a bona fide need for the System or functionally similar products or services.

Appeal File, Exhibit 42.

On July 27, 2007, Merlin's vice president and chief operating officer formally filed a claim under the Contract Disputes Act (CDA), asserting that the failure to exercise the option for option year one was a breach of contract and claiming entitlement to the amount of $14,364,835 plus interest. On October 10, 2007, the DHS contracting officer denied the claim. Appeal File, Exhibits 1, 49.[13]

The Government proffered two experts at the hearing -- the new CIO, who was qualified to testify as an in the fields of large scale system integration and organizational transformation, and a contractor who had worked with both the acting CIO and the new CIO. The contractor was qualified to testify as an expert in the field of customer data integration and in the USCIS legacy systems. The CIO explained that USCIS did not, in his view, have a bona fide need for the Siebel UCM or functionally similar software during fiscal year 2007. He determined this based on two premises:

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[13] In the letter denying the claim, the contracting officer pointed out that the certification affixed to the claim referred to a contractor other than Merlin. On October 24, 2007, Merlin resubmitted the claim with a corrected certification. Supplemental Appeal File, Exhibit 67.

1. Because of the technical obstacles to implementing UCM on [USCIS's] legacy systems (particularly the seven CLAIMS 3 LAN systems) USCIS was not technologically positioned to effectively use a CDI tool to the extent where an excess of 40,000,000 customer records [licenses] would be used/accessed by UCM in the next year. Since it could not be effectively used, no bona fide need existed for Siebel UCM; and

2. USCIS was not positioned to effectively use <u>any</u> CDI tool for the next year (in 2007) so that use of any product with similar functionality would not be required.[14]

Hearing Exhibit 71. In essence, in the view of the CIO, these premises required a shift in strategy from refurbishing the existing legacy systems to replacing them. Based on his assessment, in 2007, USCIS had no practical way to make use of the material functionality of the Siebel UCM or any other similar CDI tool offered by another vendor. Hearing Exhibit 71.[15]

<u>"Substitute" Software Applications</u>

Merlin's expert, who was proffered as an expert in systems integration, agreed that in 2007 USCIS did not develop a master record for each customer and did not implement any system that could have achieved a "person-centric" solution, or develop a single system containing a trusted, authoritative record for each immigrant. Transcript at 989-93, 1014. Merlin's expert testified, however, to his opinion that DHS worked around the Siebel UCM system to achieve functions similar to those offered by the Siebel UCM. Specifically, he identified certain software applications, such as Person-Centric Query Service (PCQS), Secure Information Management Service (SIMS), Electronic Data Management Systems (EDMS), Central Indexing System (CIS), and CIS Consolidated Operational Repository (CISCOR). In his view, these applications achieved a degree of functional similarity, although not functional equivalence. Hearing Exhibit 69 (Merlin's Expert Report); Transcript at 932-48.

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[14] The contractor who worked on the TIBCO enterprise bus also explained that the eleven functions of the Siebel software are inherent in the software and it is not possible to acquire these discrete functions on a piece-by-piece basis. Transcript 1431-32, 1439-40.

[15] The Government's expert report was authored jointly by the CIO and by the contractor who maintained the TIBCO enterprise bus under the Acting CIO, participated in the proof of concept, and now performs other IT work as a contractor for USCIS.

The USCIS CIO testified that as he understood the term, there were no products that were "functionally similar" to the Siebel UCM that could have met the Government's needs in fiscal year 2007.[16] He stated that the problems inherent in integrating CLAIMS 3 LAN into the Siebel UCM would be common to any customer data integration tool. Replacement was simply not possible because the underlying problem with the extremely antiquated legacy systems was not mitigated by a modern customer data integration software tool. There was no functionally similar software that would work any better. Transcript at 1170-71.

The CIO also testified that the individual applications Merlin contends are substitutes for the UCM cannot effectively integrate data, which is the principal feature offered by the Siebel system. In the view of the CIO, functionally similar software would be a tool that provides the same material functions as the predominant material functions of the Siebel software. Transcript at 1172. The CIO addressed each application at the hearing.

PCQS is a query service which allows users to submit a single query (such as an immigrant's name) across six USCIS and Department of State systems and pull up all records concerning the named individual. This system does not merge or unify these records; it simply pulls them up, aggregates the record in temporary memory until returned to the requester, and then discards the data. Hearing Exhibit 71. One of the Government's experts was the designer of the PCQS system. He analogized this tool to a Google search, which retrieves the records containing the terms that are queried but does not evaluate or integrate the records. Transcript at 1486-88. As such, the Government's experts attested that PCQS did not duplicate the functionality of the Siebel UCM.

EDMS is a subcomponent of USCIS's Integrated Digitization Document Management Program, intended to allow USCIS to digitize its paper-based files. EDMS is simply a repository of digitized documents. In contrast to the Siebel UCM, it has no capability for data integration or data cleansing. Hearing Exhibit 71; Transcript at 1488-89.

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[16] The CIO testified that he understood the term "functionally similar software" to denote software whose features predominantly reflected the same material functions of the purchased software. It would not be enough to provide incidental, or only a few, features in common with the Siebel UCM. Transcript at 1171-72. In the relevant time period (2006 and 2007), there were approximately eight companies with products that competed with the Siebel UCM. These included Oracle (which eventually retired its own product to focus on Siebel), SAP, Dandrite International, VisionWare, SeeBeyond, DWL, Initiate Systems, and Siperian. Hearing Exhibit 71.

SIMS was a web-based information and case management service pilot intended to assist USCIS in end-to-end processing of adoption applications. It was developed using a completely different Siebel eBusiness application which does not perform the unique Siebel UCM functions described in Siebel's UCM guidebook. SIMS did not meet the requirements for management of the adoption applications and was decommissioned in 2009. Hearing Exhibit 71; Transcript at 1489-90.

The Second Appeal

On July 19, 2011, Merlin filed a second claim with the contracting officer, re-alleging the same operative facts and formally adding a notification of the sale of the proceeds by Hitachi to Citizens.[17] On September 16, 2011, the contracting officer responded with a letter stating that the issues raised in Merlin's correspondence had already been fully litigated and briefed at the Board. On September 23, 2011, Merlin filed a second appeal involving this claim. Following a conference with counsel for the parties confirming the contracting officer's statement, the new appeal, CBCA 2570, was consolidated with the existing appeal (CBCA 1012).

Discussion

Overview

In the process of modernizing its information technology systems, USCIS identified a need for a software tool that would integrate disparate repositories of records (both on paper and online), housed in some sixty legacy systems, into a single, searchable database. After conducting market research, USCIS, through its Acting CIO, decided that the Siebel UCM would best meet this goal. To this end, in July 2004, USCIS entered into a blanket purchase agreement (BPA 850) with Merlin, a reseller of the Siebel software that USCIS desired to purchase. USCIS issued an initial order (delivery order 851) against the BPA at that time, purchasing, under a lease to purchase (LTOP) plan, a suite of Siebel products

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[17] The filing of this second claim was prompted by a decision issued by the Court of Federal Claims, dismissing a contractor's claim for lack of jurisdiction based on the failure to notify the contracting officer in the claim letter that the future proceeds anticipated under the LTOP transaction had been assigned to a financing institution, and reassigned once more to another financing institution, without the contracting officer's knowledge. Since the contracting officer had no knowledge of either assignment, the court reasoned that the claim was defective and dismissed the matter for lack of jurisdiction so that the contracting officer could consider this information in ruling on the claim. *Northrop Grumman Computing Systems, Inc. v. United States*, No. 07-613C (Fed. Cl. June 23, 2011).

including 40,000,000 licenses. After DHS became concerned that the terms and conditions of the BPA might hinder its ability to partially terminate that order for convenience, it entered into negotiations with Merlin to revise the original terms and conditions of BPA 850. These mutually agreed to changes were set forth in modification P0001.

Subsequently, on December 30, 2005, USCIS issued delivery order 34, under the modified terms and conditions of BPA 850, for the purchase of a DHS-wide unlimited perpetual use license for the Siebel UCM software. This was deemed necessary to support existing records and all future growth. The purchase was similarly structured as an LTOP plan with a base year and four option years. The modified terms and conditions provided that the Government would use its best efforts to obtain funding and would extend the lease until completion so long as the bona fide need of the Government for the system or functionally similar products or services continued to exist in each fiscal year. In addition the terms stated that:

> The Government warrants that the use of the System is essential to the Government's proper, efficient and economic operation for the anticipated lease term. Prior to acceptance of the Government Order, the Contractor will require written information from the Government to establish and document the essential use of the System.

Merlin accepted the order, without obtaining written information from the Government on the essential use of the system, and paid Siebel in full for the order with financing obtained from Hitachi, which participated in the negotiation of the deal. Shortly after that, Hitachi resold the payment stream to Citizens.

A few months after delivery order 34 was issued, a new CIO replaced the Acting CIO and undertook a full review of the agency's existing IT systems and plans to modernize. When it came time to exercise the option for the first option year, the new CIO had developed the view that the rapidly escalating problems with the antiquated legacy systems necessitated an approach other than the acquisition of the Siebel UCM licenses, which he believed would be expensive and impracticable to implement. He advised the contracting officer that there was no longer a bona fide need for the unlimited Siebel licenses. The contracting officer then notified Merlin that USCIS would not exercise the option for the first option year. Merlin submitted a claim to the contracting officer, alleging the Government had breached the LTOP terms and conditions. Merlin asserted that the Government's liability for that breach is the amount of $14,364,825, the amount it would have received had all the options been exercised under the delivery order. The contracting officer denied the claim on the ground that no breach of the lease agreement had occurred.

Merlin contends that lease terms were breached by USCIS's refusal to exercise the first option year because the underlying facts supporting the original determination of bona fide need had not changed during the base year of the lease and the Government in fact used substantially similar products during the first option year period. In addition, Merlin asserts that the Government breached a warranty that it would need the Siebel UCM licenses for the full term of the lease.

USCIS argues that because Merlin and Hitachi failed to effect a proper assignment when Hitachi resold the proceeds to Citizens, the Board lacks jurisdiction over the claim.[18] In addition, it maintains that there was no breach of the LTOP terms and conditions.

Anti-Assignment Acts Issue

USCIS's argument focuses on the fact that while the transaction was originally financed by Hitachi, with the contracting officer's full knowledge and consent, Hitachi resold the income stream to Citizens. No formal paperwork was executed notifying DHS of this reassignment and seeking to substitute Citizens for Hitachi as the assignee of the claims. DHS urges that this "defect" precludes Merlin from pursuing the claim.

The Assignment of Contracts Act, 41 U.S.C. § 15 (2006) (recently modified and recodified at 41 U.S.C.A. § 6305 (West Supp. 2011)), and the Assignment of Claims Act, 31 U.S.C. § 3727, are frequently discussed in tandem (the Anti-Assignment Acts), since the two Acts generally share common concerns.[19] *See Fireman's Fund Insurance Co. v.*

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[18] USCIS moved for summary relief on this issue and the parties cross-moved for summary relief on the merits prior to the hearing. The Board's decision also resolves these motions, which were deferred because of disputed facts.

[19] The Assignment of Claims Act provides, in subsection (b), that "[a]n assignment [of any part of a claim against the United States Government or of an interest in the claim] may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." Subsection (c) makes subsection (b) inapplicable "to an assignment to a financing institution of money due or to become due under a contract" provided certain conditions are met. The Assignment of Contracts Act provides in subsection (a) that "[n]o contract . . . or any interest therein, shall be transferred by the party to whom such contract . . . is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned." Subsection (b) of that provision states that "[t]he provisions of subsection (a) . . . shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof . . . are assigned to a bank, trust company, or other financing institution, including any Federal lending agency."

England, 313 F.3d 1344, 1349 (Fed. Cir. 2002); *Tuftco Corp. v. United States*, 614 F.2d 740, 744 n.4 (Ct. Cl. 1980); *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256; *Great Lakes Dredge & Dock Co.*, ASBCA 53929, et al., 04-1 BCA ¶ 32,518, at 160,863. These Acts were intended to prevent fraud, particularly the buying up of claims against the Government; to protect the Government from having to deal with multiple persons or strangers to the contract; and to eliminate conflicting demands for payment and chances of multiple litigation and liability. *Great Lakes Dredge & Dock Co.*, and cases cited therein.

The circumstances raised by the Government do not divest the Board of jurisdiction. The failure to execute the proper paperwork to reflect a second assignment of the proceeds of the contract from one financing institution to another does not invalidate the claim. Merlin, which filed the appeal, is still a proper party to pursue the breach claims. *See Beaconwear Clothing Co. v. United States*, 355 F.2d 583, 591 (Ct. Cl. 1966); *Northrop Grumman Computing Systems, Inc. v. United States*, No. 07-613C, slip op. at 4-5 (Fed. Cl. June 23, 2011). There is no risk of multiple claims, since Citizens has no cause of action against the Government in its own right. If appellant prevails, the Government's liability runs to Hitachi, which is separately obligated to reimburse Citizens under its own agreement with that institution.

We note that the court in *Northrop Grumman*, while finding the contractor to be a proper party to pursue that litigation, dismissed the appeal for lack of jurisdiction because, while the proceeds had been resold to a financing institution, no assignment of claims had been filed with the contracting officer and the claim letter did not disclose the sale of the rights to the proceeds. The court was concerned that this information could have affected the contracting officer's decision and thus dismissed the case to permit the contracting officer to consider it. In the subject appeal, the contracting officer was well aware of the initial assignment of the proceeds to Hitachi, and the Government has not identified how disclosure of the second sale might have affected the contracting officer's decision.

Breach Claims

At the core of this dispute is whether, under the leasing terms and conditions agreed to by the parties, the Government breached its contractual commitment by failing to exercise the option for the first option year following completion of the base contract period. Merlin contends that the contract as modified curtailed the agency's discretion to discontinue the lease and that, in this case, the stated conditions for justifying non-exercise of the option were not met. Merlin also argues that the Government breached the lease by using

functionally similar software products during the year following the decision not to exercise the option. In addition, even if the Government is deemed to have acted within its prerogative to end the lease, Merlin asserts that it should still recover because DHS breached its warranty that the Siebel software was essential to its efficient operation and that the agency had and would continue to have a "bona fide need" for the Siebel licenses.

In general, the decision to renew under an LTOP plan is within the sole discretion of the leasing party unless there is language in the leasing provisions that limits or restricts the circumstances under which that party may unilaterally decline to exercise its option to renew. *Government Systems Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed. Cir. 1988); *Pacificorp Capital, Inc. v. United States*, 25 Cl. Ct. 707, 717 (1992), *aff'd,* 988 F.2d 130 (Fed. Cir. 1993) (table); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 44, et al., 08-2 BCA ¶ 33,685,at 167,584 and cases cited therein. It has also been recognized that an option may be restricted by agreed-upon contract provisions, such as the limitations contained in BPA 850, as modified, and delivery order 34. *See Northrop Grumman Computing Systems, Inc. v. United States*, 93 Fed. Cl. 144, 149 (2010); *Northrop Grumman Computing Systems, Inc. v. General Services Administration*, GSBCA 16367, 06-2 BCA ¶ 33,324, at 165,266.

This appeal requires us to decide whether the Government has breached the terms of the delivery order by failing to exercise the first, and subsequent, options. Contract interpretation begins with the plain language of the contract, which must be read in accordance with its express terms and plain meaning. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996); *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993); *TST Tallahassee, LLC v. Department of Veterans Affairs*, CBCA 1576, 11-1 BCA ¶ 34,672 at 170,806; *BGK Main Street Operating Associates v. General Services Administration*, GSBCA 16238, 04-2 BCA ¶ 32,658, at 161,654. The Board's task is to discern the intent of the parties at the time the contract was signed. *KDI Development, Inc. v. General Services Administration*, CBCA 2075, 11-1 BCA ¶ 34,744, at 171,043 (citing *Stockton East Water District v. United States*, 583 F.3d 1344, 1362 (Fed. Cir. 2009) ("Is our reading of the plain meaning of this provision consistent with the intent of the parties at the time the contracts were executed, since contract interpretation is fundamentally a question of the contracting parties' intent?"); *Cities of Burbank, Glendale and Pasadena v. Bodman*, 464 F.3d 1280, 1284 (Fed. Cir. 2006)).

In interpreting the language of a contract, reasonable meaning must be given all parts of the agreement so as not to render any portion meaningless, or to interpret any provision so as to create a conflict with other provisions of the contract. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir.1983). In other words, "an interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of [the

contract] useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978); *see also, e.g.*, *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Johnson Controls*, 713 F.2d at 1555; *Serco, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 1695, 11-1 BCA ¶ 34,662. Contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). The contract must be construed to effectuate its spirit and purpose, giving reasonable meaning to all of its parts. *Gould, Inc.*, 935 F.2d at 1274; *Electronic Data Systems, LLC v. General Services Administration*, CBCA 1552, 10-1 BCA ¶ 34,316, at 169,505 (2009).

Because this is an order placed under Merlin's GSA schedule contract, pertinent provisions of the schedule contract must be considered together with the terms of the modified BPA and delivery order 34. The Government argues that the order of precedence clause in the delivery order requires that in the event of an inconsistency the general provisions of the GSA schedule contract should prevail. Respondent further states that the schedule provision option clause clearly permits the non-exercise of an option. An examination of the provisions of delivery order 34 and the schedule contract, however, reveals that both provide that the agency intends to exercise each option, renewing the lease until completion of the lease term, so long as (1) the need of the Government for the system or functionally similar products or services continues to exist and (2) funds are appropriated. The modified BPA also states that "[t]he Government . . . understands that a Government Order issued [under this LTOP] is a lease arrangement and contemplates the use of the System for the base period and any option periods as set forth in each individual Government order."

Both the revised BPA terms and conditions and Merlin's GSA schedule contract define LTOPs as lease arrangements, recognize that prices are negotiated accordingly, and suggest that the ordering activity (agency) intends to extend the lease until completion of its term so long as the need of the ordering activity for the product or functionally similar product continues to exist and funds are appropriated. The GSA and DHS contracts also both contain provisions encouraging the contractor to request information from the ordering activity concerning the essential use of the products. We find no inconsistencies among the terms of these contractual instruments that would dictate that the GSA schedule terms should prevail or that support the Government's interpretation of those terms to override the language in the BPA and delivery order.

Appellant maintains that USCIS breached its obligations under the LTOP plan because the circumstances underlying the agency's original bona fide needs assessment did

not change, so as to justify declining to renew the lease in the first option year. Merlin argues that the bona fide need for the unlimited software licenses was established as of the time delivery order 34 was awarded. According to Merlin, nothing subsequently changed in terms of the agency's goals and mission that would support a determination that USCIS no longer had a bona fide need for the licenses.

Testimony adduced at the hearing from Merlin's general counsel and from Hitachi's outside counsel establishes that these parties understood the significance of the term "bona fide needs" to be consonant with the meaning of the term as used in appropriations law, which is where the term originated. In that context, the bona fide needs rule prohibits an agency from obligating an appropriation in advance of its needs. An appropriation available for a specific fiscal year can be obligated only for the bona fide needs of that year. 31 U.S.C. § 1502(a); *Lee v. United States*, 124 F.3d 1291, 1295 (Fed. Cir. 1997); *JJA Consultants v. Department of the Treasury*, CBCA 432, 07-2 BCA ¶ 33,632. It is solely the province of the agency to determine its bona fide needs each fiscal year. *See, e.g.*, *Capital Controls Co.*, B-173586 (Nov. 24, 1971). That determination will not be disturbed unless found to be arbitrary, capricious, or an abuse of discretion. The agency's judgment with respect to its technical needs in particular will not be overcome absent a showing that the determination is unreasonable. *See, e.g.*, *Ultra Electronics Ocean Systems, Inc.*, B-400219 (Sept. 8, 2008).

When fiscal-year, as opposed to multi-year, funds are obligated, the bona fide needs determination is one that is made each fiscal year. It was recognized by both the Government and Merlin that the main reason for renegotiating the terms of the original BPA was to eliminate the Termination clause with its schedule of costs payable if the contract should terminate. The alternate terms, proposed by the Government, did not contain a termination schedule of costs.

All parties to delivery order 34, and the financing institutions, were familiar with the term "bona fide needs" as it pertained to the Anti-Deficiency Act, and recognized that there are risks inherent in the use of LTOP arrangements. All parties presumably understood that funds would have to be obligated annually at the time the options were ripe for exercise and should have understood that the need for the technology would be subject to review. The newly-appointed CIO properly undertook such an analysis, in conjunction with his overarching role to examine and refine USCIS's IT modernization effort. The information he developed supports his determination that USCIS would not have a bona fide need for the Siebel licenses in the upcoming option year. This reflected his assessment of the continuing degradation and obsolescence of the legacy systems, and in particular CLAIMS 3 LAN, as a factor that caused the Siebel CDI tool and unlimited licenses to be unworkable in the existing USCIS IT environment. Although he conceded that a technical fix could probably be fashioned with "expensive technological duct tape," he did not regard this as

an economical or effective way to make use of this, or any other data integration tool. Nothing in the record demonstrates that his conclusions were arbitrary or capricious. The decision that there was no bona fide need to justify exercise of the option year for 2007 did not breach this term of the contract.

Functionally Similar Products

Merlin also argues that the agency's continuing bona fide need for unlimited licenses is proven because the Government used functionally similar software products, which its expert testified were capable of providing a variety of features of the Siebel UCM. In particular, Merlin's expert pointed to PCQS, EDMS, and SIMS as software products that provided USCIS with substantially similar functionality. As established in our findings of fact, these products do not perform the cleansing and matching of records in different systems, and do not integrate disparate data into one clean, authoritative record as does the Siebel product. USCIS did not improperly replace the Siebel UCM with these software applications, nor do these software applications demonstrate a continuing need for the Siebel licenses.

The Government's experts both provided credible, detailed explanations of the functionality of the software applications identified by appellant's expert. Although the UCM includes numerous features and ancillary tools, the predominant function of a CDI tool is to identify, cleanse, and interact with data on existing databases to produce a single, trusted source document. The Government's experts showed that the software applications identified by appellant's expert did not perform as a CDI or provide the capability to integrate data from the old systems to create a single, trusted source document -- the primary feature of the Siebel UCM. Thus, as a factual matter, USCIS did not use these or any other programs with functional similarity during the year following the decision not to exercise the first option year. This proviso cannot reasonably be construed to mean, as Merlin suggests, that the use of programs providing discrete functions that are inherent in an overall data integration tool should be deemed to breach the terms of the delivery order.[20]

Appellant's argument that USCIS continued use and manipulation of data housed in its legacy systems violates the requirement that the agency will not use functionally similar

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[20] Reviewing this contract clause as a whole, this proviso appears primarily to ensure that the Government not exercise an option only to turn around and purchase something similar that might provide it with a better deal. There is no evidence that this happened here.

technology is also unpersuasive. The Court of Appeals for the Federal Circuit has recently issued a decision addressing the interpretation of comparable contract language concerning the use of a similar or previously owned product to continue operations following non-exercise of an option under an LTOP arrangement. *See McHugh v. DLT Solutions, Inc.*, 618 F.3d 1375 (Fed. Cir. 2010). In that case, the Army had entered into an LTOP plan under which it agreed it would not replace the software it had leased with functionally similar equipment for at least one year after the termination of the contract. The Army terminated the contract for convenience and continued to use existing software to manage the relevant data. The Court held that the requirement to refrain from substituting functionally equivalent products or from replacing the contracted-for product referred to actions taken by the agency subsequent to the termination of the contract and did not prevent the agency from continuing to use products it owned prior to the contract award. For the reasons stated in *McHugh*, the continued use of the existing legacy systems by USCIS, even combined with the applications identified by Merlin's expert, did not constitute a use of functionally similar products.

Merlin's position that the continued exercise of the option years for the purchase of the software and the forty million Siebel UCM licenses under delivery order 851 was an acquisition of a functional substitute, and proved that the agency had a continuing bona fide need for the unlimited licenses under delivery order 34, also is untenable. As the CIO and contracting officer testified, these option years were exercised because of the differing conditions applicable to that order. The Government interpreted those terms and conditions to preclude a partial termination for convenience. The agency still had a use for some of the Siebel software acquired under that order. The CIO confirmed in his testimony that even if some limited use may have been made of some of the forty million licenses to digitize records, most licenses were, in fact, not used. The exercise of the options under this delivery order does not demonstrate a continuing need for the unlimited licenses acquired under delivery order 34, nor does it establish use of a functionally similar substitute within the meaning of the LTOP terms.

Warranty

According to Merlin, section H.10.3 of modification 001 to BPA 850 warranted that the use of the system acquired with delivery order 34 was essential to the Government's proper, efficient, and economic operation for the duration of the lease term. Merlin asserts that absent a change in the circumstances upon which this warranty rested, USCIS was obligated to exercise the option years of the contract. Merlin contends that the only changed circumstance was the appointment of a new CIO with a different vision for modernizing the USCIS IT environment.

USCIS responds that it did not breach any warranty and that, even if the language of section H.10.3 was intended to serve as an enforceable warranty, Merlin did not obtain the written confirmation that it was expressly required to secure. Merlin counters that the language in the contract was sufficient confirmation of the warranty and it did not need an additional written guarantee.

Merlin asserts that it relied on the Government's assurance that it had carefully assessed its future IT requirements and that a need for the licenses would exist for the entire term of the lease, and that the underlying legacy systems were in such condition that the Siebel UCM licenses were an appropriate case management tool to use with the legacy systems. It says that it was induced by these representations to enter into the contract at a more favorable price that it would otherwise have agreed to. According to Merlin, when DHS chose not to exercise the first option year because it could not make use of the licenses, it confirmed that the agency had misrepresented the Government's need for the licenses.

The Court of Appeals for the Federal Circuit has provided guidance on elements of proof for establishing the existence of a warranty:

> "[A] warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself." . . . Thus, to be successful [the contractor] must establish that the [Government] provided a warranty either explicitly or implicitly in its contract by showing that: "(1) the Government assured the plaintiff of the existence of a fact, (2) the Government intended that plaintiff be relieved of the duty to ascertain the existence of the fact for itself, and (3) the Government's assurance of that fact proved untrue."

Oman-Fischbach International (JV) v. Pirie, 276 F.3d 1380, 1383-84 (Fed. Cir. 2002) (quoting *Dale Construction Co. v. United States*, 168 Ct. Cl. 692, 699 (1964), and *Kolar, Inc. v. United States*, 650 F.2d 256, 258 (Ct. Cl. 1981)). To the extent a fact warranted by the Government proves untrue, the warranty serves to indemnify the contractor for any resultant loss. *Dale Construction*. Although an express warranty does not require formal words of creation, *Everett Plywood & Door Corp. v. United States*, 419 F.2d 425, 429 (Ct. Cl. 1969), an express warranty does not exist absent specific language in the contract at issue. *Walter Dawgie Ski Corp. v. United States*, 30 Fed. Cl. 115, 127 (1993) (citing *Ekco Products Co. v. United States*, 312 F.2d 768, 771 (Ct. Cl. 1963); *Burgwyn v. United States*, 34 Ct. Cl. 348, 360 (1899)).

An examination of the cases relied upon by Merlin for the proposition that the Government essentially warranted that its need for the UCM licenses would continue for the

projected lease term reveals that in general they did not involve the type of a statement or procurement before us in this case. For example, in *Oman-Fischbach*, the Court determined that the Government, by specifying a particular disposal site for use by the contractor, did not warrant that the site would be available using the most direct route, and was not liable for the increased costs of using a more circuitous route. In *Dale Construction*, the Government was deemed liable for incorrect representations on plans furnished to the contractor. In *Kolar*, the Court held that neither a description of practice bombs as "demilitarized," nor a statement that "cutting torches" could be used to remover surplus scrap materials, warranted that the practice bombs were safe for handling with cutting torches, particularly where other contract provisions warned of the hazardous nature of the materials purchased. *Everett Plywood*, in which a warranty was found to have been made, involved an unqualified representation that a certain quantity of board feet of timber would be available under a sale of timber by the Forest Service.

Merlin maintains that even without the letter of essential need, the contract language represents that the Siebel unlimited licenses were essential to the operation and as such constitutes a warranty because (1) the Government assured it of the existence of the "fact" that the software was integral to its modernization plan and would continue to be over the full term of the lease and (2) the Government intended that Merlin be relieved of its duty to inquire into the accuracy of that "fact."

We find the reasoning of the Court of Federal Claims in *Northrop Grumman Information Technology, Inc. v. United States*, 78 Fed. Cl. 45 (2007), *aff'd*, 535 F.3d 1339 (Fed. Cir. 2008), addressing the contractor's claim of warranty in similar circumstances to be persuasive. In that case, the contractor claimed that the Government had warranted that it had an essential use for and had tested and confirmed the viability of software acquired under an LTOP arrangement. The court determined that although a letter of essential use had been issued, it had not been incorporated into the contract and thus was not a warranty that the Government had breached.[21] The court also considered, in the alternative, whether, if the letter of essential use had been incorporated into the contract, it would have constituted a warranty such that the contractor could recover breach damages. The contract stated that if the bona fide needs of the Government for the software ceased to exist and such need was not fulfilled with a product performing functions similar to those which the leased product was intended to provide within twelve months after non-exercise of the option, the Government would be relieved from all obligations under the lease. The court considered whether the language in the letter together with this term of the contract would create an

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[21] This Federal Circuit affirmed the decision on this basis and did not address the alternative ruling, discussed above, since the failure to incorporate the letter of essential use by reference disposed of the claim.

enforceable warranty. The court concluded that the interpretation advanced by the contractor effectively negated the Government's fundamental right to extricate itself from a contract for a product it could not use.

The letter of essential use referred to in section H.10.3 was never requested by or provided to Merlin. Appellant discounts the importance of this fact, contending that the statements made in the contract and confirmed in conversations with the Acting CIO obviated a formal request for such a letter. The Government, in Merlin's view, effectively warranted that it had a long-term need for the software licenses. Merlin states that it would not have agreed to the favorable pricing terms offered to DHS in the absence of this representation.

The statement that the Government warrants that the use of the system is essential to the Government's proper, efficient, and economic operation for the anticipated lease term was juxtaposed with a requirement that the contractor ask for and receive a letter confirming that the acquisition of unlimited licenses was essential. The first statement must be viewed in combination with the following sentence stating that the contractor shall request written information from the Government to establish and document the essential use of the system. Indeed, if statements set forth in the modified BPA were intended to establish a warranty with respect to the essential use of the system, the requirement to formally request additional written information from the Government would also be superfluous. Such an interpretation would be contrary to well-accepted principles of contract interpretation.

Moreover, the language concerning the essential use of the system cannot be read in isolation from the language of the modified BPA as a whole and from government actions showing that USCIS intended to retain a degree of flexibility. The fact that the transaction is structured as a lease, rather than as a multi-year contract, also supports the intent to retain a measure of flexibility.

Merlin argues that the Government should have known that it would rely on this representation and that it had no way to ascertain for itself what the Government's needs actually were. From Merlin's perspective, USCIS effectively promised that its need for this product and unlimited licenses would continue for the full term of the lease. Although case law allows contractor recovery in situations where the contractor relied on mistaken factual information provided by the Government where it affected performance of the contract, these precedents are not applicable to the facts here. A representation about the Government's belief that it will continue to need to lease something cannot reasonably be construed as a guarantee that an option will be exercised.

In this case, the Government assured the contractor as to its expectation that the product it was purchasing would be needed for the full term of the lease; it did not warrant

that its need for the licenses would continue to exist for the full term of the lease, that personnel would not change, or that IT modernization strategies would not be reevaluated. This risk is inherent in annual year contracting, where a bona fide need must be deemed to exist at the time an option comes due and monies are obligated. Merlin, Hitachi, and Citizens understood that "bona fide need" is a term of art used in appropriations law. Under well-settled precedents, the continuation of its bona fide need for a product is not something the agency can guarantee as to option years under an LTOP. This was at best a statement of expectation, limited by the possibility that, among other things, changes in the agency's assessment of its needs, an annual process, might be modified for any variety of considerations. Statements that a particular product is essential to the Government's efficient operation are limited to the period for which the initial obligation is made.

Decision

For the reasons stated, we conclude that USCIS did not breach the terms of the order nor did it breach a warranty made to Merlin. The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

PATRICIA J. SHERIDAN
Board Judge