UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 6650 DENIED: April 26, 2023

CBCA 6650, 7147

WILLIAMS BUILDING COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Kevin M. Cox of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **O'ROURKE**.

Opinion for the Board by Board Judge **LESTER**. Board Judge **VERGILIO** concurs.

LESTER, Board Judge.

When appellant, Williams Building Company, Inc. (WBC), filed the first of these two consolidated appeals (CBCA 6650), it was seeking an equitable adjustment to cover increased costs allegedly incurred under its fixed-price contract with the Department of State's Bureau of Overseas Building Operations (OBO) for building space renovation work in Wuhan, China. During the pendency of CBCA 6650, OBO terminated WBC's contract for convenience, and WBC filed a second appeal (CBCA 7147) encompassing its request for termination settlement expenses, which WBC represents incorporates and adds to the costs being sought in CBCA 6650.

OBO has filed a motion for summary judgment focused solely on the claim at issue in CBCA 6650, asserting that resolution of that appeal may assist in resolving disputes over costs that WBC is seeking through the termination settlement proposal (TSP) at issue in CBCA 7147. OBO argues that the claims in counts I and II of WBC's complaint are barred by past bilateral modifications and releases and that OBO is entitled to judgment on count III because there is no triable issue regarding WBC's inability to prove damage. Although WBC argues that OBO's motions are moot because they are superceded by its TSP, precedent from the Court of Appeals for the Federal Circuit tells us that, unless and until WBC waives any claim to interest under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), running from the date of its original claim submission, which WBC has not done, the claims in CBCA 6650, as well as OBO's motion for summary judgment, are not moot.

Reviewing OBO's motion on its merits, we grant summary judgment in OBO's favor on count I of WBC's complaint in CBCA 6650 because prior bilateral modifications and releases bar further recovery; we grant OBO's motion for summary judgment on count II based upon the same bilateral modifications and releases and, for the small portion of count II not covered by those modifications, based upon WBC's inability to prove damage; we grant OBO's motion for summary judgment on count III because WBC cannot prove damages; and we grant summary judgment in OBO's favor on WBC's request for payment of invoices from a scheduling subcontractor, Perry Associates, because it is barred by a prior settlement and release. Because we have resolved those claims in OBO's favor, there is no basis for WBC to claim that OBO's breaches required it to prepare a request for equitable adjustment (REA) or for WBC to recover its REA preparation costs. Further, there is no damages award against which to apply WBC's request for profit, general and administrative (G&A) overhead, and bond markups. Accordingly, we deny WBC's appeal in CBCA 6650. The parties may present arguments about the effect of this decision on WBC's claims in CBCA 7147 in future proceedings.

Background

These two appeals have had a somewhat torturous history. Before either appeal was ever filed, WBC submitted, withdrew, reconfigured, and resubmitted a series of REAs and claims that can be somewhat difficult to follow. In WBC's first-filed appeal, CBCA 6650, various motions have been filed seeking partial relief on one ground at one point and another ground at another point, sanctions on yet another ground at another point, and other varied requests for relief at other points. Complicating matters was WBC's failure for an extended period of time after it filed CBCA 6650 to identify how much money it was actually seeking and on what it was basing its monetary demands, coupled with earlier settlements of a portion of some cost claims through contract modifications with release language that the parties interpreted very differently. When, during the pendency of CBCA 6650, OBO

terminated WBC's contract for convenience, even more confusion resulted as WBC initially continued to seek recovery of costs that it estimated it would incur in the future if it were to perform the contract and to resist demands that it identify the specific dollar amounts that it would pursue in CBCA 6650. Eventually, WBC filed its second appeal, CBCA 7147, in which, as part of its claim for convenience termination settlement expenses, it has largely duplicated but significantly added to the costs that it seeks in CBCA 6650.

Because it may shed light on the reasons for our disposition of OBO's current motion for summary judgment, which seeks resolution only of the claims at issue in CBCA 6650, we below provide in some detail the background of the proceedings before the Board, the various REAs and claims that WBC submitted that have culminated in the claim now pending in CBCA 6650, and the various settlements into which the parties have entered.

The Contract

On June 15, 2016, WBC entered into a firm-fixed-price contract, no. SAQMMA-16-C-0015 (the contract), with OBO for a tenant retrofit of two floors in an office building in Wuhan, China, which was expected to serve as the United States Consulate. The contract anticipated completion by June 10, 2018. The contract contained various clauses from the Federal Acquisition Regulation (FAR), including FAR 52.243-4, "Changes (JUN 2007)" (48 CFR 52.243-4 (2016) (FAR 52.243-4)), and FAR 52.249-2, "Termination for Convenience of the Government (Fixed-Price) (APR 2012)," as well as the "Alternate I (SEP 1996)" version of subsection (g) of FAR 52.249-2.

Modifications P00007 and P00008 to the Contract

Various delays occurred before and during performance. WBC ultimately complained that the original "issued for construction" (IFC) documents that accompanied the solicitation and were incorporated into the contract were defective. OBO issued a new set of IFC documents on March 3, 2017, but there were objections to their incorporation into the contract. WBC provided OBO with a number of requests for information (RFIs) and submittals (relating both to the original IFC set and to the revised IFC) that WBC asserts OBO had difficulty answering, with delays in responses that allegedly impacted WBC's work.

On or about March 16, 2018, OBO and WBC executed a bilateral modification, P00007 (mod-07), the purpose of which was "to fund [a request for equitable adjustment (REA)] for mechanical, plumbing, electrical, architectural, technical security, security, fire protection/alarm (fire/life safety) and telecommunication changes." Appeal File, Exhibit 9

at 197.[1] Through mod-07, in exchange for the payment of $1.975 million, WBC agreed to the substitution of a new set of IFC documents for the ones originally issued with the contract, as follows:

> **RFP 002 — Issued for Construction Documents**
> Scope of Work: The issued for construction (IFC) documents issued with the contract are replaced with the IFC documents dated March 3, 2017.
> Amount: $1,975,000.00 (direct costs, overhead and profit only)
> VAT [Value-Added Tax]: VAT amount will be accounted for in a future mod.
> Time Extension: WBC will be submitting a request for equitable adjust[ment] for time extension and delay costs the amount of which will be negotiated in a future mod.

Id. at 203. As part of the modification, WBC agreed to release OBO from all liability under the contract for direct costs, overhead, and profit attributable to the facts and circumstances giving rise to the modification, while reserving its right to seek a time extension and extended overhead and/or delay costs, as follows:

> **Contractor Release**
> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $1,975,000.00 for changes described above, WBC hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the proposals for adjustment, except for a time extension and extended overhead costs attributable to any Government caused delays.

Id.

Subsequently, on or about June 15, 2018, the parties executed another bilateral modification, P00008 (mod-08), the purpose of which was to provide WBC with a 204-day time extension for achieving substantial completion using the revised IFC documents incorporated through mod-07, with an extended completion date of December 31, 2018, and added funding of $1,864,968 for a revised schedule that required WBC to implement double shifts and increase supervisory management staff to meet the new deadline. Exhibit 10 at 204, 210. In mod-08, WBC agreed to perform and to release OBO in the following manner:

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[1] All exhibits are contained in the appeal file, unless otherwise noted.

> **RFP 002 — Time Extension**
> Scope of Work: Due to all Government caused delays up through January 31, 2018, the contract completion date is extended from June 10, 2018 until December 31, 2018.
> Amount: $1,864,968.00
>
> **Contractor Release**
> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $1,864,968.00 for changes described above, [WBC] hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the proposals for adjustment.
>
> Furthermore, for REA for revised schedule that requires the implementation of double shifts and an increase in supervisory management staff [sic]. Extra work shifts and staffing results [in] increased costs associated with an agreed to 204-day time extension (to achieve substantial completion by 31 December 2018) in compensable costs as the delays are deemed to be Government caused. In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $1,864,968 for changes/revised schedule[,] contractor hereby releases the Government from any and all liability under this contract for further equitable adjustment attributable to such facts and circumstances giving rise to the proposals for adjust[ment] as of February 22, 2018.

Id. at 210.

WBC's Subsequent Monetary Claims

Beginning in late November 2018, WBC submitted what became a series of separate, but somewhat overlapping, additional requests for monies under the contract, two of which are relevant in these appeals.[2] WBC submitted proposed change order (PCO) 075 on

[2] In addition to the REAs and claims that we discuss here, WBC submitted several others, including a $1 million pass-through claim from a subcontractor that, according to OBO, lacked any cost support. WBC withdrew that particular claim several months later, following OBO's expressed inability to distinguish it from one of the claims in this appeal. Although these additional submissions added to the confusion about what costs WBC was seeking and created concerns at OBO about overlapping and duplicative cost requests, we need not identify all of them because they are not presently before the Board.

November 28, 2018, requesting an additional time extension for alleged Government-caused delays of 137 days (beyond the 204 days granted in mod-08) and an equitable adjustment of $1,353,683.35. Exhibit 140 at 22612. Asserting that "the Government is responsible for [a total of 446] days of excusable and compensable delays" on the contract, WBC stated that, "[t]hrough the issuance of Mod 008, the Government granted a [204] day excusable/compensable time extension, leaving [242] excusable/compensable days of delay remaining." *Id.* at 22613. WBC acknowledged that, through the requirement in mod-08 that WBC implement double shifts and increase supervisory staff, WBC had been able to mitigate that remaining 242-day compensable delay down to 137 days. *Id.* Nevertheless, it asserted that, "as a result of the continued issuance of numerous additional changes issued after the stated scope of Mod 008 of all Government caused delays up through January 31, 2018, and the Government's active interference with WBC's operations, WBC has been prevented from mitigating the remaining [137] days of excusable/compensable Government delays, which is the cause of this time extension request and request for reimbursement." *Id.*

Parallel with PCO 075 and its updates, WBC submitted a separate REA (the breach of contract REA) to OBO on November 29, 2018, alleging entitlement to monetary damages totaling $2,360,246, which WBC alleged resulted from OBO's breach of or cardinal change to the contract; OBO's interference with the performance of WBC's subcontractor, Huashi No. 6 Construction Co. Ltd. (Huashi); and the unreasonable amount of time that OBO took to respond to WBC's RFIs. In the REA, WBC described its cardinal change theory as follows:

> OBO has breached the Contract by the issuance of a defective set of plans and specifications, resulting in the issuance of more than seventy[-two] (72) proposed change orders ("PCOs") by WBC, and the subsequent issuance of thirteen (13) formal Contract Modifications worth $8,196,470.30 or approximately fifty-six percent (56%) of the Contract value. The scope and magnitude of these changes has resulted in a scope of work that is far different than that which the parties bargained for when the Contract was awarded and, therefore, a cardinal change to the Contract.

Exhibit 36 at 368; *see id.* at 393. In support, WBC looked back to pre-award activities, describing how two amendments to the original solicitation, dated April 15 and 23, 2015, made nearly seventy-five changes to the original IFC set before the contract was awarded. *Id.* at 368. WBC then described how OBO "continued to make significant changes to its design" after award of the contract, which, according to WBC, showed that "the initial design was defective and [that] the Project was being re-designed on the fly." *Id.* at 370. WBC cited to changes that were covered by (and compensated through) prior contract modifications, including mod-07 and mod-08, plus six additional alleged changes—customs delay, manager interference, smoke exhaust fans, wood door design, ceiling height conflict,

and work suspension—that allegedly occurred between July 19 and October 17, 2018 (after mod-08 was executed). *Id.* at 370-74. WBC alleged that "[t]he most significant change made by OBO to the Contract design was" the change that "eventually led to the issuance of Modification P00007," executed March 16, 2018, which incorporated "eighty-four (84) pages of changes which impacted multiple trades, procurements, submittals, and construction work" and "was essentially a re-design of the Project after WBC had bid on, and been awarded, the contract." *Id.* at 377-78. WBC alleged that "[t]he changes introduced by OBO" through mod-07 "were a complete re-design of . . . all of the major components of the Project" and "modified the Project so drastically from what was intended, that it is no longer the same work that WBC bargained for when it bid on the Contract." As a result, WBC alleged, "[t]hese changes, in addition to the others listed above, represent a cardinal change to the Contract, and breach, for which WBC should be compensated." *Id.* at 381.[3]

Subsequently, on January 9, 2019, WBC submitted a revised, updated version of PCO 075 to OBO, increasing the number of days of delay for which it believed OBO to be responsible to 206 (up from 137 days in the November 28, 2018, version of PCO 075) and the monetary portion of its request for an equitable adjustment to $1,959,993.68 (up from $1,353,683). Exhibit 141.

WBC then, on February 8, 2019, "converted" the breach of contract REA, but not PCO 075, into a "certified claim" under the CDA. *See* Exhibit 47 at 534.

Subsequently, on March 6, 2019, WBC submitted what it called an "updated" version of the February 8, 2019, breach claim that added PCO 075 into the breach of contract claim, increased its claimed costs to $8,314,503, and increased the number of delay days being sought. Exhibit 47 at 534, 538. Two months later, on May 6, 2019, WBC formally withdrew its certified claim, Exhibit 61 at 860, and on May 9, 2019, it submitted two separate certified claims to OBO:

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[3] As for WBC's allegations that OBO delayed in responding to RFIs and submittals, WBC identified seven "notices of delay" that it sent the OBO contracting officer between July 12, 2017, and July 25, 2018, complaining about such delays. Exhibit 36 at 382-86. As for WBC's complaints about OBO's oversight of WBC's subcontractor, Huashi, WBC alleged that OBO had interfered with WBC's relationship with Huashi from August through at least November 2018, that OBO's interference led to labor unrest within Huashi's workers and the unjustified and improper exclusion of WBC employees from the project, and that WBC was forced to hire new subcontractors to complete the work after terminating Huashi. *Id.* at 386-87. WBC sought an equitable adjustment for its increased costs.

(1) Through the first claim, WBC sought a 341-day time extension (to add to the 204-day extension previously granted through mod-08) and time-related cost adjustments of $3,203,679.28. *See* Exhibit 62 at 862. With the extension, the deadline for substantial completion would move to November 29, 2019. *Id.* WBC acknowledged that mod-08 "included all Government caused delays up through January 31, 2018," but alleged that OBO's "continued issuance of numerous additional changes" after January 31, 2018, and "the Government's active interference with WBC's operations" prevented WBC from mitigating delays that, according to WBC, mod-08 had generated. *Id.* at 863. The monetary request in this claim was calculated by applying a daily rate of $6179.35 for WBC and $3200 for a subcontractor, plus markups for escalation, overhead, and bonding. *Id.* at 864.

(2) The second claim was described as a "resubmission to update costs for the cardinal change/breach of contract claim only" and sought payment of $5,493,264. Exhibit 63 at 1091, 1095. In this claim, WBC discussed what it alleged were defective designs in the original IFC documents; two constructive changes that had been resolved through bilateral modifications P00014 and P00015 (mod-14 and mod-15); OBO's alleged interference with the performance of WBC's subcontractor, Huashi; and OBO's general lack of reasonableness in administering WBC's contract. *Id.* at 1092-94. It claimed that these activities breached OBO's obligation not to hinder the other party's performance and to "do whatever is necessary to enable the contractor to perform." *Id.* at 1094. Accompanying the claim were documents from 2017 in which WBC complained about the original IFC documents; documents from late 2018 and early 2019 regarding Huashi's performance; and a list of what appears to be all costs incurred on the project from February 2016 (a date preceding contract award) through April 2019. The claim provided little if any breakdown of what costs were included in the $5,493,264 figure that WBC had calculated as its damages. *See id.* at 1095.

The Contracting Officer's Consolidated Decision on the May 9, 2019, Claims

On August 13, 2019, the OBO contracting officer issued a single, consolidated decision denying both of the May 9, 2019, claims. Exhibit 66. As for the cardinal change claim, the contracting officer stated that it was barred by prior bilateral modifications and releases. As for OBO's alleged delays in responding to RFIs and submittals, the contracting officer stated that the first six "notice[s] of delay" referenced in WBC's November 29, 2018, REA involved alleged delays that pre-dated the mod-07 and mod-08 releases and were therefore barred, and he indicated that he could find no damage associated with the last "notice of delay." As for WBC's claim about Huashi interference, the contracting officer represented that OBO had acted in good faith and was not responsible for Huashi's omissions and errors. He also addressed WBC's separate, time-related "delay impact" claim, finding that WBC had failed to show entitlement.

Settlement of the May 9, 2019, Claim Involving PCO 075 in Modification P00020

Subsequently, effective September 28, 2019, the parties settled WBC's "delay impact" claim for time delays (PCO 075), as well as a separate claim for customs storage fees, in bilateral modification P00020 (mod-20), with OBO agreeing to pay just under $5 million and to extend the contract's substantial completion deadline to February 29, 2020:

> This [request for contract action (RFCA)] is for time delays experienced on the project related to design changes and a project shutdown caused by security concerns when the general contractor changed their major local subcontractor. The contractor has three open certified legal claims related to customs storage fees, time delays, and cardinal changes to the contract. This RFCA represents a partial settlement of the first two of these claims. Time delays compensated by this RFCA are related to the following changes during construction. (This RFCA addresses PCO 067 Storage costs related to customs warehousing of critical materials – $185,663.90. PCO 075 Additional Time related Costs – $4,578,004.66. [Total: $4,763,668.56]. Bond Cost for the preceding of $235,657.17 to cover contract extension to new end date of 29 February 2020. [Grand total: $4,999,325.73].

Exhibit 22 at 312-13. Mod-20 also contained the following release:

> **PCO 075 – Time Extension**
> Scope of Work: Period of performance is extended from January 1, 2019 up through February 29, 2020. 358 days are compensable, 67 days non-compensable. (425 days total).
> Amount: $4,813,661.83 — ($4,578,004.66 extended contractor costs + $235,657.17 bond costs) (No VAT)
> Time Extension: None
>
> **Contractor's Release**
> In consideration of the modification agreed to herein as a complete equitable adjustment in the amount of $4,999,325.73, WBC hereby releases the Government from any and all liability for further requests for equitable adjustments, claims or demands attributable to the facts or circumstances set forth in WBC's above-referenced PCOs.

Id. at 315. The parties did not resolve, and expressly left open for further negotiation, WBC's cardinal change claim. *Id.* at 313.

WBC's First Appeal (CBCA 6650)

On November 8, 2019, WBC filed with the Board an appeal of "the portion of the Contracting Officer's Final Decision dated August 13, 2019, . . . denying its claim, as amended, for breach of contract/cardinal change/defective specifications/breach of implied duty of good faith and fair dealing." The Board docketed that appeal as CBCA 6650. WBC indicated in its notice of appeal that "[t]his appeal does not include the items negotiated and settled between the parties in Bilateral Modification No. P00020 in the amount of $4,999,325.73 (PCOs 067 and 075), which are specifically excepted out of this appeal," but WBC neither included any kind of breakdown of the costs that were being claimed as part of CBCA 6650 nor identified the total amount that it was seeking. When WBC filed its complaint on December 26, 2019, the complaint alleged and discussed delays to the project that caused WBC to incur damages but again did not identify the monetary amount that WBC was seeking in the appeal.

Before filing an answer to the complaint, OBO filed a motion requesting a more definite statement, asserting that, since a large portion of the damages addressed in the contracting officer's decision had been settled, OBO was "entitled to an unambiguous statement of [WBC's] sought-after damages" so that OBO could understand what remained in dispute and could properly frame an answer to WBC's complaint. On February 8, 2020, WBC filed a response to OBO's motion in which it declined to define what damages it was seeking in CBCA 6650 because, as it stated, "while Appellant provided a sum certain in its Claim regarding b[r]each damages, this Project in Wuhan, China is ongoing (although presently subject to [a] stop work order due to coronavirus concerns) and the final damage figure will not be known until completion."

Termination of WBC's Contract for Convenience

On February 28, 2020, because of concerns about COVID-19, OBO terminated WBC's contract for convenience.

Additional Proceedings in CBCA 6650

By order dated March 2, 2020, the Board granted OBO's motion for a more definite statement, directing WBC to identify the total dollar amount that it believed it was entitled to recover in CBCA 6650, consistent with the "amount in controversy" disclosure requirement of Board Rule 6(a) (48 CFR 6101.6(a) (2020)). On March 13, 2020, in response to that order, WBC represented that, following the settlement of its time-related cost claim and OBO's termination for convenience of its contract, it was now seeking $5,309,623.24 through its appeal in CBCA 6650, a reduction of $184,640.76 from its original claimed

amount of $5,493,264 reflecting the removal of some consultant and bonding fees. WBC did not otherwise describe how its figure was calculated.

OBO expressed confusion over what costs were a part of WBC's calculation. At approximately the same time, WBC requested that the Board stay CBCA 6650, potentially for a year or more, to provide WBC with time to submit a convenience TSP and to negotiate that TSP with OBO. The Board denied the stay request and, by order dated May 27, 2020, directed WBC immediately to provide OBO a detailed breakdown of each category of cost that WBC was continuing to claim in CBCA 6650 and to identify the total dollar amount that it was seeking within each category, along with a brief explanation as to why WBC was entitled to recover that category of cost. The Board also directed that, to the extent that claimed costs related to work that was to be performed in the future (which OBO suspected were a part of WBC's cost calculation), WBC should briefly explain the reasons that it was entitled to that recovery in light of the contract's convenience termination and that, to the extent that WBC was seeking costs that could arguably be tied to time-related delay costs, it should briefly explain why those costs were not encompassed within the settlement into which WBC entered through mod-20.

The Board, in its May 27, 2020, order, also required WBC to prepare and produce to OBO, no later than October 16, 2020, a thorough and detailed schedule of *all* costs that WBC was seeking to recover in CBCA 6650, a computation showing how each cost item and cost component was derived, and an identification of all documents upon which WBC intended to rely at the hearing to support each of its cost claims. The Board ordered that, "[i]f the cost item is based on an estimate," WBC must provide "a detailed explanation of how the estimate was prepared, including the identification of any cost estimating guide used, and inclusion of the page(s) of that guide upon which appellant relies." The Board also ordered that WBC identify "each witness who will be called to testify with respect to each and every claimed item of cost" and further ordered that WBC's "identification of documentary support for its cost claims shall encompass all documents upon which [WBC] intends to rely at the hearing, and, at the hearing, the Board will limit [WBC's] cost support to those documents that it has identified with specificity in and appended to the schedule of costs that it provides to the Board and respondent on October 16, 2020." The Board directed that "[n]o other documentary support will be admitted into the record at the hearing of this appeal."

In an initial response to the Board's order, WBC represented on June 26, 2020, that, because its contract was terminated for convenience, its fixed-price contract was essentially converted into a cost-reimbursable contract that merged its breach claim into the termination, such that "the breach costs and the termination for convenience costs are one and the same." Based upon that theory, WBC identified a list of costs to which it was entitled, totaling $8,754,863.48 and including legal fees incurred after termination, potential lawsuit costs with

its subcontractor, estimated settlement legal fees, and a 20% profit on all costs that it was seeking.

On July 13, 2020, OBO filed a motion to compel, to strike, and for sanctions, based upon WBC's alleged failure to comply in good faith with the initial portion of the Board's May 27 order. OBO asserted that it had "repeatedly sought to understand the scope and bases of the instant appeal . . . and the respective amounts in controversy" but that WBC had responded by providing no detail about its claimed damages and asserting entitlement to termination costs that had nothing to do with the claim underlying the appeal. In response to OBO's request to compel and for sanctions, WBC initially asserted that it was entitled, as it had done, to assert a total cost claim seeking reimbursement of all costs that it incurred on the project and that, because the claim underlying CBCA 6650 had merged with its right to submit a TSP, it should be allowed to raise its termination costs with the Board in CBCA 6650. Subsequently, however, on August 28, 2020, WBC submitted another cost breakdown that excluded convenience termination settlement costs and that totaled $1,694,771.75, all of which allegedly were sought in or are related to the original May 9, 2019, cardinal change claim. WBC acknowledged that two categories of claimed costs were not expressly identified or included in the original May 9, 2019, claim submissions—$143,427.18 for the estimated additional time incurred by its president, Tim Williams (but that WBC asserted was not time- or delay-related), and $24,672.90 in estimated travel costs for Mr. Williams (allegedly not part of time-related costs). WBC asserted that both categories were properly before the Board and had resulted from defective specifications and OBO's lack of cooperation during contract performance.

After reviewing WBC's revised damages disclosure, OBO filed another motion on September 10, 2020, asking the Board to strike, or dismiss for lack of jurisdiction, WBC's claimed costs for Mr. Williams' estimated additional time and travel, as well as associated G&A expense, profit, and bonding cost markups that WBC applied to them, because they were not included in WBC's May 9, 2019, claims. After a status conference with the parties, the Board notified the parties by order dated September 24, 2020, that it was holding consideration of OBO's motions in abeyance pending the October 16, 2020, receipt of WBC's response to the Board's schedule of costs order. The Board anticipated that the documentation accompanying the schedule of costs might shed light on, among other things, the scope of costs that WBC is seeking in CBCA 6650, the extent to which those costs may overlap with WBC's now-settled time-delay claim, and the extent to which the claimed costs have evidentiary support, all of which could assist in evaluating OBO's pending motions.

WBC submitted what it titled its "statement of costs" on October 16, 2020, detailing its quantum support for each of the cost categories within the $1,694,771.75 amount that it was seeking. OBO was then provided an opportunity to take discovery and prepare its response to WBC's statement of costs, which OBO produced on February 18, 2021. As part

of its response, OBO provided copies of reports by its expert witnesses analyzing WBC's identified costs. Along with its response, OBO renewed and added to its prior motions to dismiss, to strike, and for sanctions, stating that it "contests all quantum-related issues" that WBC identified in its statement of costs and arguing that none of them were supported by adequate cost data.

By order dated March 30, 2021, the Board denied OBO's request to strike and to compel. The Board also denied OBO's request that the Board dismiss the entirety of the appeal as a sanction against WBC for providing what OBO viewed as inadequate support for its claimed costs. The Board viewed OBO's motion as "read[ing] more as though OBO is setting up a request for summary judgment on quantum" than a request for sanctions. Order at 2 (Mar. 30, 2021). The Board indicated that, if OBO believed that "WBC's schedule of costs provides insufficient support to allow for entry of judgment in WBC's favor on a particular cost claim, OBO is entitled to seek summary judgment regarding that cost category," given the Board's prior direction that the evidence upon which WBC could rely at the hearing to support claimed costs would be limited to that which it included in its response to the Board's schedule of costs order. *Id.*

The parties completed both fact and expert witness depositions. Discovery in CBCA 6650, inclusive of fact and expert witness depositions, concluded on June 30, 2021. Order at 2 (Apr. 12, 2021).

WBC's Appeal Seeking Termination Expenses (CBCA 7147)

On June 15, 2021, WBC appealed the contracting officer's "deemed denial" of the TSP that it had submitted, seeking to recover $8,754,863 in settlement expenses and other costs following the termination of the contract. The Board docketed that appeal as CBCA 7147. WBC indicated that the TSP incorporated, but also added to, the costs that WBC was seeking in CBCA 6650. Proceedings in CBCA 7147 have continued to develop as WBC filed a complaint, OBO filed an answer, and the parties submitted documents for inclusion in the appeal file.

Additional Proceedings in CBCA 6650

On June 30, 2021, two weeks after WBC filed CBCA 7147, OBO filed its motion for summary judgment in CBCA 6650, seeking resolution of various damages issues in that case. It argued that some cost claims were barred by the parties' prior settlement agreements, others failed for lack of adequate documentary support, and others failed because WBC could not establish that the costs incurred were related to any action that OBO took under the contract. At the same time, WBC filed its own motion for partial summary judgment in CBCA 6650, arguing that, through the language in mod-20, OBO had agreed to waive the

releases in mod-07 and mod-08 and to pay WBC for the cardinal change that it had alleged. Each party responded to the opposing party's motion on July 30, 2021, and each party filed its reply on August 16, 2021.

The Board addressed WBC's motion for partial summary judgment in CBCA 6650 on April 29, 2022, finding that OBO had not, through the language in mod-20, somehow conceded liability for a cardinal change and that WBC would be required to prove the breach to establish entitlement. *Williams Building Co. v. Department of State*, CBCA 6650, 22-1 BCA ¶ 38,120, at 185,181.

Consolidated Proceedings in CBCA 6650 and 7147

By order dated May 4, 2022, the Board consolidated CBCA 6650 and 7147. At the same time, the Board asked OBO to address questions about the extent to which the contract termination and dealings involving WBC's TSP might have affected any issues in CBCA 6650. OBO provided its response on May 23, 2022. The Board ordered WBC to submit a schedule of costs for CBCA 7147, detailing the costs that it was seeking as part of its TSP and providing a detailed breakdown of each category of cost that it is claiming. WBC produced its statement of costs in response to that order on March 17, 2023. OBO's current motion for summary judgment, however, remains limited to CBCA 6650 and the costs being claimed in that appeal.

Discussion

I. Whether The Convenience Termination Moots The Government's Motion

WBC argues that the Board should deny OBO's motion and require OBO to refile a revised motion later as part of OBO's challenge to the WBC's TSP in CBCA 7147.

WBC submitted the monetary claim at issue in CBCA 6650 on May 9, 2019, when it was still obligated to perform its contract. Under the CDA, interest runs on any judgment in WBC's favor on that claim from the date of the contracting officer's receipt of the claim. 41 U.S.C. § 7109(a)(1). Because of issues associated with COVID-19, OBO later terminated WBC's contract for convenience. That termination effectively converts WBC's fixed-price contract into a cost reimbursement contract for work that WBC performed before termination. *See, e.g.*, *Best Foam Fabricators, Inc. v. United States*, 38 Fed. Cl. 627, 638 (1997); *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,947; *Harold Walters Professional Engineering, Inc. v. General Services Administration*, GSBCA 12746, 94-3 BCA ¶ 27,069, at 134,897; *Pennsylvania Drilling Co.*, IBCA 1187-4-78, 82-1 BCA ¶ 15,697, at 77,633. Citing to the Armed Services Board of Contract Appeals decision in *Worsham Construction Co.*, ASBCA 25907, 85-2 BCA

¶ 18,016, WBC tells us that, because the standards and burdens of proof applicable to WBC's requests for increased costs have changed as a result of the convenience termination, the CBCA 6650 monetary claims have been subsumed within WBC's TSP, which is pending before the Board in CBCA 7147, rendering OBO's motion for summary judgment in CBCA 6650 premature and effectively moot.

Were it not for the CDA, WBC might have some support for its position.[4] Nevertheless, in *James E. Ellett Construction Co. v. United States*, 93 F.3d 1537 (Fed. Cir. 1996), the Federal Circuit rejected the argument that WBC has made as it applies to situations in which the contractor's monetary claim is subject to the CDA. The Court held that the contractor's entitlement to interest on a successful claim precludes merging previously submitted monetary claims into the contractor's later-submitted TSP. *Id.* at 1546-47; *see RBW & Associates*, AGBCA 96-205-R, 96-2 BCA ¶ 28,616, at 142,880 (recognizing that, under *Ellett*, "an equitable adjustment claim is independent of a termination settlement proposal"); *Military Aircraft Parts*, ASBCA 60290, 16-1 BCA ¶ 36,257, at 176,884-85 (applying *Ellett*). Because CDA interest runs from the date of a claim's submission to the contracting officer, the tribunal reviewing the claim must determine entitlement, without regard to the subsequent termination, to ensure that, if the claim has merit, the contractor receives a proper interest award. *See Ellett*, 93 F.3d at 1546-47. Here, because WBC would be entitled to CDA interest running back to the date of its original monetary claim submissions if it prevails in CBCA 6650, and because WBC has not waived its request for payment of interest from the date of its claim submissions, those claims were not subsumed within WBC's later-submitted TSP, even though it incorporates, and adds to, the original monetary claims. Accordingly, we must address the merits of OBO's motion for summary judgment on the CBCA 6650 claims.

II. The Effect of WBC's Statement of Genuine Issues

A tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As part of summary judgment briefing before the Board, the moving party is required to submit a statement of undisputed material facts, Board

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[4] Prior to the enactment of the CDA, and even for some time afterwards, several boards held that, when a contract is terminated for convenience, all contractor claims arising from the contract "merge into the settlement provisions of the 'Termination for Convenience' clause of the contract insofar as they do not, in the aggregate amount, exceed the contract price." *H&J Construction Co.*, ASBCA 18521, 76-1 BCA ¶ 11,903, at 57,082; *see RBW & Associates*, AGBCA 95-208-1, 96-2 BCA ¶ 28,416, at 141,935, *vacated*, AGBCA 96-205-R, 96-2 BCA ¶ 28,616; *Worsham Construction*, 85-2 BCA at 90,369.

Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2021)), and the responding party must file a statement of genuine issues in which it responds by identifying "material facts in genuine dispute, citing appeal file exhibits, admissions in pleadings, and/or evidence filed with the opposition." Rule 8(f)(2). By the Board's count, WBC fully or partially disputes thirty-eight of OBO's fifty-one proposed undisputed material facts.

The mere fact that WBC has stated that it disputes so many of OBO's proposed facts does not automatically preclude summary judgment. "The nonmoving party's opposition . . . must consist of more than mere unsupported allegations or denials and must be supported by affidavits, declarations, or other competent evidence, setting forth specific facts showing that there is a genuine issue for trial." *Dreiband v. Nielsen*, 319 F. Supp. 3d 314, 319 (D.D.C. 2019). The tribunal should "review carefully both statements of material facts and statements of genuine issues and the headings contained therein and . . . eliminate from consideration any argument, conclusions, and assertions unsupported by the documented evidence of record offered in support of the statement." *Mayes v. City of Hammond, Indiana*, 442 F. Supp. 2d 587, 596 (N.D. Ind. 2006). A party "cannot create a triable issue of fact by simply making unsupported, conclusory allegations." *Weston Chemical, Inc. v. Diamond Fertiliser & Chemical Co.*, No. B-87-537, 1990 WL 128235, at *4 n.1 (D. Conn. July 2, 1990); *see Siska Construction Co.*, VABCA 3470, 92-1 BCA ¶ 24,578, at 122,606 (1991) ("Simple assertion that genuine issues of material fact exist or mere statements or conclusions concerning such facts or issues are not sufficient to prevent entry of summary judgment.").

Here, the parties do not dispute the actual language of the contract modifications to which they agreed. WBC's complaints about OBO's proposed findings largely involve challenges to OBO's interpretations of the meaning of those contract modifications. The Board interprets contract language as a matter of law, *M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205 (Fed. Cir. 2004), and WBC's disagreements with OBO's *legal* interpretation of documents does not create factual disputes that preclude summary judgment. Similarly, WBC's citation to documents in the record that do not actually support its opposition provide no basis for denying summary judgment.

III. Count I of WBC's Complaint

A. The Preclusive Effect of Mod-07 and Mod-08

As indicated by the title of count I of WBC's complaint in CBCA 6650, "Defective Plans & Specifications/Cardinal Change," WSC alleges that it is entitled to damages for OBO's alleged cardinal change to its contract. A cardinal change "occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Allied*

Materials & Equipment Co. v. United States, 569 F.2d 562, 563-64 (Ct. Cl. 1978). It "is so profound that it is not redressable under the contract, and thus renders the government in breach." *Id.* at 564.

In alleging cardinal change, WBC details how, during the 2015 solicitation process for the contract that it was eventually awarded, OBO issued nearly seventy-five changes to the original IFC set and how OBO continued to make design changes until March 16, 2018, when the parties executed mod-07, which formally substituted new IFC drawings for the originals. WBC alleges that, "[w]hen the Government issues drawings and specifications for use on a Contract, they carry with them an implied warranty that they are suitable for their intended purpose," Complaint ¶ 22; that "OBO modified the Project so drastically from what was intended, that it ceased to be the same work that WBC bargained for when it bid on the Contract," *id.* ¶ 25; that "OBO breached its implied warranty . . . by the issuance of a defective set of plans and specifications," *id.* ¶ 27; and that "[t]he scope and magnitude of these changes" was a "cardinal change to the Contract." *Id.* ¶ 28.

The problem for WBC is that it executed a bilateral modification, mod-07, in which, in exchange for a monetary payment of $1.975 million, it agreed to the substitution of the new IFC documents for the original IFC set. As part of that modification, WBC provided OBO with a broad release of all claims for direct costs, overhead, and profit arising from the circumstances giving rise to the substitution. Three months later, WBC executed another bilateral modification, mod-08, agreeing, in exchange for an additional payment of $1,864,968, to a new expedited construction schedule based upon the new IFC documents, and WBC provided another broad release, this time of all claims for time extensions or delay costs arising out of the facts or circumstances giving rise to that modification.

OBO argues that it is entitled to summary judgment because WBC's cardinal change argument is barred by mod-07 and mod-08. We agree. A cardinal change, unlike a constructive change, is viewed as a direction by the Government that is extra-contractual or beyond the scope of the contract. *Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1032-33 (Ct. Cl. 1969). By agreeing to a change through a bilateral modification, the change actually becomes a part of the contract, precluding any argument by the contractor[5] that the change is somehow *outside* the contract's scope. The Court of Federal Claims recognized just that in *Amertex Enterprises, Inc. v. United States*, No. 90-684C, et al., 1995 WL 925961

[5] In some circumstances, a third party might be able to protest a contract modification as a cardinal change, arguing that work awarded through the modification should have been competitively procured, *see AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201, 1204 (Fed. Cir. 1993), but WBC, as the party that agreed to the contract modification, has no standing to complain about or challenge its own behavior.

(Dec. 15, 1995), *aff'd*, 108 F.3d 1394 (Fed. Cir. 1997) (table), where, rejecting an argument similar to WBC's, the court held that, because the contractor had agreed through bilateral modifications to add the allegedly objectionable work to its contract, it could not rely upon a cardinal change theory to seek additional damages:

> Notwithstanding the evidence supporting plaintiff's plausible and potentially convincing cardinal change assertion, plaintiff's position on this issue is fatally undercut by the bilateral modifications made to the delivery schedule in 1988. . . . In essence, Amertex promised to produce the modified chempro suit . . . on a schedule contemplating half the pace as the original contract. Because of plaintiff's agreement [through a bilateral modification] to produce the modified suits, we find no cardinal change.

Id. at *61. On appeal, the Federal Circuit upheld the trial court's decision, finding that the contractor "waived its cardinal change claim by entering into bilateral modifications." *Amertex Enterprises, Ltd. v. United States*, No. 96-5070, 1997 WL 73789, at *1 (Fed. Cir. Feb. 24, 1997) (unpublished). It found that "the bilateral modifications are enforceable contracts which replace the parallel provisions of the original contract." *Id.* at *2. It held that, "[b]y agreeing to these modifications, Amertex implicitly agreed to a changed specification and added costs it accrued thereby." *Id.*; *see* John Cibinic, Ralph C. Nash, Jr., & James F. Nagle, *Administration of Government Contracts* 396 (4th ed. 2006) ("If a contractor accepts a change and performs the changed work without reservation, it cannot subsequently claim that the change was beyond the scope of the contract for purposes of claiming breach of contract.").[6]

In addition, WBC expressly released OBO from further liability for errors in the original IFC set and their replacement with new IFC documents. "A release executed by a contractor will normally bar any existing claims except those reserved within the terms of the release." *Siska Construction Co.*, VABCA 3470, 92-1 BCA ¶ 24,578, at 122,607 (1991).

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[6] For decisions holding similarly to *Amertex*, *see Eads Corp.*, HUD BCA 76-128-C22, 80-2 BCA ¶ 14,690, at 72,438 n.1 ("When the contractor accepts a change" through a bilateral contract modification, "he can not subsequently claim that the change was beyond the scope of the contract for the purpose of claiming [a cardinal change] breach of contract."); *AGH Industries, Inc.*, ASBCA 25848, et al., 85-1 BCA ¶ 17,784, at 88,845 (1984) ("[A] contractor who agrees to a bilateral modification cannot subsequently claim that the change was beyond the scope of the contract for the purpose of claiming breach of contract."); *New England Tank Industries of New Hampshire, Inc.*, ASBCA 9692, 66-1 BCA ¶ 5484, at 25,718 ("[A]cceptance of a cardinal change by the contractor waives any objection thereto as going beyond the scope of the contract.").

Unless the contractor expressly excludes cardinal changes from the terms of its release, there is no exception to the release's enforceability simply because the changes affected by the release might also be characterized as a "cardinal change." *See, e.g.*, *Siska Construction Co.*, VABCA 3470, et al., 92-3 BCA ¶ 25,150, at 125,373, 125,375. Having signed broad releases in mod-07 and mod-08, WBC did not retain any right to seek additional funds for the matters covered by those releases by recharacterizing the changes as a "cardinal change."[7]

B. WBC's Release Waiver Argument

WBC argues that, even if it released its cardinal change claim through mod-07 and mod-08, OBO waived that release when, in mod-20, OBO agreed that "[a]dditional funding to settle the Breach of Contract claims will be requested when additional funds are available." Appellant's Opposition at 9. In an earlier decision issued in CBCA 6650, we rejected an argument, raised by WBC, that OBO, through that mod-20 language, had obligated itself to pay WBC's cardinal change claim. *Williams Building Co.*, 22-1 BCA at 185,181.

WBC suggests that the contracting officer's alleged post-release consideration of the merits of WBC's claim in and of itself waives the release, but such waivers can exist only in situations in which it is clear that neither party ever "construe[d] the release as an abandonment or forfeiture of [a] pending claim." *Sam Bonk Uniform & Civilian Cap Co. v. United States*, 230 Ct. Cl. 926, 928 (1982) (quoting *Winn-Senter Construction Co. v. United States*, 75 F. Supp. 255, 260 (Ct. Cl. 1948)). If "the entire course of action on [a more recently asserted] claim took place well after both the execution and effective date of the release," there can be no waiver of the release, even if "the contracting officer erroneously believed that the release did not apply" when considering the new claim. *Id.* at 928-29. "The release [still] means what it says, and the failure of the contracting officer . . . to consider it . . . does not preclude [the tribunal's] consideration and reliance on it." *Id.* at 929.

Here, the releases in mod-07 and mod-08 were executed and effective months before WBC, on November 29, 2018, began submitting the series of REAs and claims that culminated in WBC's May 9, 2019, breach of contract claim that underlies count I of its complaint. Unlike the situations in *Winn-Senter Construction* and *England v. Sherman R. Smoot Corp.*, 388 F.3d 844 (Fed. Cir. 2004), WBC's submission of its cardinal change claim did not "straddle"—that is, was not submitted prior to—the execution of the releases. Further, as OBO discusses in its briefing, WBC's claim, although labeled a "cardinal change" claim, contains more than just allegations of a cardinal change—specifically, it also seeks

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[7] Having found that the releases bar count I of WBC's complaint, we need not consider any additional accord-and-satisfaction implications of mod-07 and mod-08.

an equitable adjustment for alleged delays in responding to RFIs (a claim that WBC included in count II of its complaint) and alleged interference with WBC's subcontractor, Huashi (a claim that WBC included in count III). Even if OBO could be viewed as having "considered" what WBC called its "cardinal change/breach of contract" claim, WBC has presented nothing to show that OBO's consideration related to anything other than WBC's untested Huashi claim. WBC also presents no evidence that the OBO contracting officer ever believed that the mod-07 and mod-08 releases did not bar additional damages for the substitution of IFC documents. WBC has no basis for arguing that OBO waived the mod-07 and mod-08 releases.

C. WBC's Complaint About Changes Made After Mod-07 And Mod-08

WBC argues that, even if the release language in mod-07 and mod-08 precludes looking back at problems with the original IFC set, the release does "not cover all of the additional time and effort claimed by [WBC's] personnel addressing defects, ambiguities, etc., in the *new* IFC documents." Appellant's Opposition at 6 (emphasis added). That is, it asserts that its complaint alleged that the cardinal change was based not only on defects in the original IFC set, but also on defects in the replacement IFC set added to the contract through mod-07 and mod-08. *See id.* at 2, 6. Alas, WBC's assertion is simply untrue—count I of the complaint contains no allegations about post-modification defects in the replacement IFC set. More importantly, there are no complaints about post-modification defects in the substitute IFC documents in WBC's May 9, 2019, breach of contract claim to the contracting officer. *See* Exhibit 63. We lack jurisdiction to entertain issues based upon operative facts not alleged in the written claim itself. *Lee's Ford Dock Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369-70 (Fed. Cir. 2017). WBC cannot salvage its cardinal change claim by creating a new set of factual allegations untethered from the written claim.

To the extent that WBC has included any allegations about activities unrelated to the IFC documents that post-date mod-07 and mod-08 as part of its cardinal change claim,[8] it is

[8] In its cardinal change/breach of contract claim, WBC references a series of changes that OBO ordered after execution of mod-07 and mod-08, which it listed in the claim as additional problems that added to OBO's alleged breach of contract. *See* Exhibit 63 at 1092-93. Yet, those changes were addressed in bilateral modifications, mod-14 and mod-15, that contained the same kind of release language as mod-07 and mod-08. For the same reasons that mod-07 and mod-08 preclude WBC from complaining that the substitution of a new IFC set for the original was a cardinal change, WBC cannot rely on changes covered by mod-14 and mod-15 to support a cardinal change or breach of contract claim. WBC also refers to OBO interference with WBC's subcontractor, Huashi, but WBC has used that allegation as the basis for count III of its complaint, which we address below.

clear that, without the change in IFC documents, they could not, either individually or collectively, rise to the level of a cardinal change. As previously discussed, a cardinal change is a change that so drastically modifies the original work that it is viewed as extra-contractual or beyond the scope of the contract. *Air-A-Plane Corp.*, 408 F.2d at 1032-33. It is "so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." *Allied Materials*, 569 F.2d at 563-64. We recognize that "[t]he existence of a cardinal change is principally a question of fact, requiring that each case be analyzed individually in light of the totality of circumstances." *Id.* at 565. Yet, here, even on summary judgment, it is clear that, devoid of allegations about changes in the IFC documents, the remaining allegations regarding post-modification OBO actions do not, by themselves, fall outside the scope of the contract. In fact, in its cardinal change claim, WBC does not present them as such. The cardinal change in the claim, as alleged, is the collective whole of *all* of OBO's alleged bad acts, including the issues that led to mod-07 and mod-08. In its original November 29, 2018, breach of contract REA, even WBC recognized that "[t]he most significant change made by OBO to the Contract design" supporting its cardinal change claim was the change "which eventually led to the issuance of Modification P00007." Exhibit 36 at 377. Without that IFC set substitution change, there is no arguable cardinal change claim for WBC to pursue here.

IV. Count II of WBC's Complaint

A. Complaints About RFIs Through March 16, 2018

In count II of its complaint, WBC alleged that "OBO has failed to respond in a timely manner, or in some cases respond at all, to WBC's numerous requests for information (RFIs) and submittals." Complaint ¶ 31. WBC alleges that a provision in its contract required OBO to respond to submittals and RFIs within fourteen calendar days. In its November 29, 2018, REA, WBC identified seven "notices of delay" that it had sent the OBO contracting officer between July 12, 2017, and July 25, 2018, complaining about RFI and submittal response delays. Exhibit 36 at 383-86. The RFIs identified in that REA form the basis of count II.

OBO seeks summary judgment on count II, arguing that WBC's RFI response time claim is barred by the releases in mod-07, mod-08, and mod-20. WBC makes clear in its response to OBO's motion that count II "is not a 'time-related delay claim'" but instead "relate[s] to its 'increased scope of work' submitting and re-submitting excessive RFIs, submittals, and related correspondence," for which WBC seeks to recover direct cost damages—that is, the labor time of its employees. Appellant's Opposition at 11. Accordingly, it asserts, it is not a part of WBC's delay claim settlements, and WBC is entitled to pursue the issue before the Board.

The first five "notices of delay" about which WBC complains were issued between July 12, 2017, and February 22, 2018, *see* Exhibit 36 at 383-84, and addressed questions about the first set of IFC documents and changes and revisions to those documents that were being made. WBC settled its complaints relating to problems with those documents in mod-07 and settled, at least through February 22, 2018, any disputes relating to damages caused by delays relating to those documents in mod-08. Those modifications, taken together, were not limited to time delays. Through those modifications, WBC waived any claims for additional monies arising out of the first five "notices of delay" that it submitted.

The sixth "notice of delay" about which WBC complains was dated March 16, 2018, and addresses RFIs that raised questions pre-dating the agreement to the IFC set substitution. Exhibits 36 at 385-86, 152 at 4420-24. The same day that WBC issued this "notice of delay," WBC executed mod-07, through which the parties agreed to replace the original IFC documents with a new IFC set and settled all direct costs associated with the issues giving rise to that modification, rendering the RFIs irrelevant. Mod-07 and the release within it, which did not contain the February 22, 2018, limitation, preclude WBC's recovery on the delays identified in this notice.

Accordingly, we grant OBO's motion for summary judgment on WBC's complaints about RFI response times identified in "notices of delay" from July 12, 2017, through March 16, 2018.

B. The July 25, 2018 Notice of Delay

The only other "notice of delay" to which WBC cites in its May 9, 2019, breach of contract claim is dated July 25, 2018, Exhibit 36 at 386, which post-dates the releases in mod-07 and mod-08. In that "notice of delay," WBC complained that the fourteen-day deadline for responding to eight submittals (submitted between May and July 2018) had passed (or would soon pass) without an answer and that two RFIs (nos. 252 and 253) remained unanswered.[7] Exhibits 36 at 386, 152 at 4426-29. OBO argues that WBC's complaint about these delayed responses is barred by mod-20, which addressed WBC's time-

[7] WBC's July 25, 2018, "notice of delay" was somewhat misleading in that the two "unanswered" RFIs identified therein, nos. 252 and 253, had only been submitted on July 23 and 24, 2018, respectively, and OBO's responses to those RFIs and at least one of the eight submittals that WBC cited were not yet due. Exhibit 152 at 4428-29; Appellant's Exhibit 311 at 6104-05. Although we cannot tell from the record whether OBO eventually responded to that one submittal within the fourteen-day window, WBC elsewhere acknowledges that OBO timely responded to RFI nos. 252 and 253 on July 25 and 29, 2018, respectively. *See* Exhibit 311 at 6104-05.

related delay claims. The mod-20 release, by its express terms, only covers claims that were originally raised in PCO 075, Exhibit 22 at 315, which WBC had submitted to OBO on November 28, 2018. The delayed RFI response time issue was raised in the breach of contract REA submitted on November 29, 2018, not in PCO 075. Accordingly, the release in mod-20 does not cover WBC's complaints about OBO's response times to RFIs identified in the July 25, 2018, notice of delay.

Nevertheless, WBC cannot prevail on this claim because, as OBO has shown, WBC has not identified and cannot identify any damages attributable to these allegedly slow RFI responses. The Board's schedule of costs order required WBC to provide OBO with "a detailed schedule of all costs that appellant claims are due and owing in this appeal," broken down by "each claim being pursued as part of this appeal." Order at 2 (May 27, 2020). It required WBC to list "each individual component of each cost item separately" and provide "[a] computation showing how each cost item and cost component was derived." *Id.* at 3. The Board's order specifically directed that the record of WBC's damages at any hearing in CBCA 6650 would be limited to costs and cost support identified in WBC's response to the schedule of costs order:

> Appellant's identification of documentary support for its cost claims shall encompass all documents upon which appellant intends to rely at the hearing, and, at the hearing, the Board will limit appellant's cost support to those documents that it has identified with specificity in and appended to the schedule of costs that it provides to the Board and respondent on October 16, 2020. No other documentary support will be admitted into the record at the hearing of this appeal.

Id. at 4.

WBC's statement of costs, submitted in response to that order, says nothing about issues related to late RFI responses. The only reference to RFIs or submittals in that statement of costs addresses compensation for "[e]stimated added labor costs for RFIs due to government defective specifications," Appellant's Statement of Costs ¶ 2 (Oct. 16, 2020), which WBC describes as involving "an excessive number of RFIs based on the new IFC Contract documents [issued March 3, 2017,] seeking clarification." *Id.* at 3. As support for its estimated costs, WBC refers to "Exhibit 19" of its original November 29, 2018, REA, *id.*, which is a letter dated October 12, 2017, that, along with its attachments, addresses RFIs involving alleged problems with the March 3, 2017, IFC set, *see* Exhibit 152 at 4231-79, that were plainly resolved through mod-07 and mod-08.

The claim at issue here is about OBO's alleged delays in responding to RFIs and submittals that OBO received between May and July 2018, not that RFIs were needed to

address allegedly defective specifications back in 2017. Nothing in WBC's statement of costs or the support to which it refers says anything about costs associated with slow RFI response times. Before the Board considers the merits of a claim, "there must be *some* evidence of damage" to ensure "that the issue of liability is not purely academic." *Cosmos Corp. v. United States*, 451 F.2d 602, 605-06 (Ct. Cl. 1971); *see Puritan Associates v. United States*, 215 Ct. Cl. 976, 978 (1977) ("[E]ven if, . . . , the assessment of damages is reserved for the quantum phase of the case, the plaintiff as part of its proof of entitlement, must show it was damaged to some extent, by defendant's derelictions."). Ultimately, the contractor seeking a monetary recovery "has an affirmative burden to show that it suffered actual damage from the Government acts of which it complains." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,974. If the contractor's response to the Board's schedule of costs order shows that the contractor will not be able to present evidence of damage, it indicates that a hearing on the issue is unnecessary, and the Board may enter summary judgment against the appellant. *See, e.g.*, *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5698, 19-1 BCA ¶ 37,428, at 181,915-16; *see also Corban Industries, Inc. v. United States*, 24 Cl. Ct. 284, 288 (1991) (plaintiff forfeited its ability to support claimed materials costs by not providing records within the deadline established by the court); *ASW Associates, Inc. v. Environmental Protection Agency*, CBCA 2326, 18-1 BCA¶ 36,983, at 180,142 (granting summary judgment to agency because contractor failed to provide proof or factual detail supporting monetary claim).

Here, WBC presented no cost support for its claim alleging delayed responses to the RFIs and submittals identified in the July 25, 2018, notice of delay. That means that WBC will not be allowed to present any damages evidence on this issue at the hearing. Accordingly, we grant OBO's request for summary judgment on count II.

V. Count III of WBC's Complaint

A. Summary Judgment on Whether a Breach Occurred

In count III of its complaint, WBC alleges a breach of the implied duty of good faith and fair dealing and duty to cooperate through OBO's interference with WBC's relationship with its subcontractor, Huashi. It alleges that OBO's interference led directly to labor unrest by Huashi's workers, the unjustified expulsion of WBC personnel from the project, and the need for WBC to hire new subcontractors to replace Huashi. OBO seeks summary judgment on this count, arguing that it did not interfere with Huashi's work and that Huashi and WBC are at fault for the problems that Huashi experienced. We deny OBO's request for summary judgment on the factual issue of whether OBO improperly interfered with Huashi. WBC has responded to OBO's motion with factual information that creates a genuine dispute of material fact, requiring denial of OBO's motion.

B. Summary Judgment on Count III Damages

1. Employees' Labor Hours

OBO also seeks summary judgment on WBC's inability to prove any damage as a result of the alleged breach. OBO's motion is based upon WBC's response to the Board's order directing WBC to provide a schedule of costs detailing all of its cost support for this claim. In its statement of costs, WBC identified "[e]stimated added labor costs associated with Government interference with [the] Huashi subcontract" incurred by three individuals—two employees, Randy Collette and Robert Prescott, and a contractor, Taz Barrass—and indicated that "WBC management" estimated that each had worked 200 hours on the Huashi interference issue (a total of 600 hours). In support, it provided Mr. Collette's time sheets for the weeks ending June 18, 2016, through June 10, 2018 (Exhibit 74); Mr. Prescott's time sheets for the weeks ending June 19, 2016, through June 10, 2018 (Exhibit 74); and Mr. Barrass' invoices for the weeks ending January 22, 2017, through June 10, 2018 (Exhibit 75).[8] Reviewing these time sheets, each individual was paid a set amount for each day that he worked. Although the daily amount increased periodically over time, never is there any overtime paid for a particular day or variation in the hours worked on a day. The time sheets provide only bare-bone descriptions of work performed: Mr. Collette's time on the Wuhan project is always described as only "Project Management" or "Project Management, Saturday/Sunday"; Mr. Prescott's as "Project Review," "Project Progression," or, between January 8 and June 18, 2017, "Project Review, Precon"; and Mr. Barrass's as "Labor Services." Further, in its statement of costs, WBC does not tie any particular portions of the time sheets to its Huashi claim nor identify when, within the two-year period identified in the time sheets, these three individuals were devoting time to OBO's alleged inappropriate interference with Huashi. WBC's expert, William Perry, testified in his deposition that WBC staff developed those estimates "based on their recollection of what they performed," creating numbers that he "would have no way to confirm or refute." Deposition of William Perry (June 15, 2021) at 144-45.

Important to WBC's claimed labor hours damages is its prior settlement and release of time-related delay costs through mod-20. Under a fixed-price construction contract, like the one here, a contractor may obtain an equitable adjustment if changes to contract work increase the contractor's costs. FAR 52.243-4(d); *see George Sollitt Construction Co. v.*

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[8] As part of the appeal file for CBCA 7147, WBC provided additional time sheets for Messrs. Collette, Prescott, and Barrass, through and including December 27, 2020; April 26, 2020; and March 17, 2019, respectively. *See* Exhibits (CBCA 7147) 294–97, 299. The entries there are not noticeably different from or more detailed than those that WBC provided in support of its CBCA 6650 costs.

United States, 64 Fed. Cl. 229, 244-45 (2005). "Since change orders/modifications are reimbursed on the basis of an increase in cost, it follows that there must be some showing that an increase in cost has actually occurred." *M.A. Mortenson Co.*, ASBCA 40750, et al., 97-1 BCA ¶ 28,623, at 142,918 (1996). Here, WBC cannot seek labor cost increases for extra days of work because WBC already settled its delay costs. To recover any labor costs, it would have to show that it paid increased costs, separate and apart from its delay costs. The time sheets for Messrs. Collette and Prescott, who were salaried employees of WBC, and Mr. Barrass, a contract employee, provide no evidence of overtime pay or even extra daily hours. WBC has failed to show that it incurred any increased costs, separate and apart from delay costs, for labor because of the alleged Huashi interference. WBC has not established, and as a result of the Board's schedule of costs order will not be able to establish at a hearing, any increases in labor hour costs under count III.[9]

2. Time Charges for WBC's President

WBC includes in its statement of costs a request for payment of $143,427.18 in estimated time charges for its president, Tim Williams. OBO argues that, because WBC did not mention this item of damage in the November 29, 2018, REA or the May 9, 2019, breach of contract claim that incorporated it, we lack jurisdiction to consider these damages. *See* Respondent's Reply to Appellant's Revised Breakdown of Costs at 3-5 (Sept. 10, 2020). Although a contractor cannot raise new claims in an appeal that were not previously presented and certified to the contracting officer, *Tarheel Specialties, Inc. v. Department of Homeland Security*, CBCA 1159, 09-1 BCA ¶ 34,120, at 168,714, a contractor can modify the amount of a claim on appeal from that originally certified in the claim as long as the revised amount is "not based upon new issues arising out of different operative facts than the claim submitted to the contracting officer." *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 18-1 BCA ¶ 36,998, at 180,177. Although WBC acknowledges that it did not include these estimated time costs in its May 9, 2019, certified claim, its claim sought relief for time that its employees allegedly expended because of government

[9] Further, in our schedule of costs order, we provided that, "[i]f [a] cost item [being claimed] is based on an estimate," WBC had to provide "a detailed explanation of how the estimate was prepared, including the identification of any cost estimating guide used," and it had to identify each witness who would be called to testify in support of the cost. WBC said only that "WBC management" made the allocations, without identifying who will testify about them or how they were prepared. Generally, "the mere expression of an estimate . . . with nothing to support it will not establish the fundamental fact of resultant injury nor provide a sufficient basis for making a reasonably correct approximation of damages." *Luria Brothers & Co. v. United States*, 369 F.2d 701, 713 (Ct. Cl. 1966). WBC's statement of costs provides no such support.

interference with Huashi. Because these cost categories arise out of the same operative facts as WBC's original claim, they are properly before us in CBCA 6650.

Nevertheless, WBC has failed to provide any admissible evidence of such costs. To support its alleged time costs for Mr. Williams, WBC relies on Exhibit 77, which is a summary of Mr. Williams' hours over the course of two-and-a-half years. WBC says that, to create Exhibit 77, it listed all of the time that Mr. Williams expended on the Wuhan project from January 24, 2017, to May 8, 2019 (allegedly taken from records that are not a part of the Board's record), assigned an hourly rate,[10] and then adjusted "[t]he time charged to the Breach claim under this appeal . . . to 75% of the hours, to account for any base contract work" and to create a cost estimate for recovery in CBCA 6650. Exhibit 77. Yet, nothing in Exhibit 77, which contains the list of Mr. Williams' hours, describes any work that Mr. Williams was doing—the chart that WBC provides simply identifies a number of hours for each identified day. WBC provided no contemporaneous support, such as daily reports, time sheets, or even calendar entries, for the referenced hours to show that work was performed each day. In fact, OBO could not find in its audit of WBC's claim any recorded time for Mr. Williams in WBC's project cost reports. Exhibit 283 at 24582-84. In addition, the identified estimates are for costs allegedly incurred not just in dealing with government interference with Huashi but also for WBC's now-denied cardinal change and RFI response time claims, and there is no way to isolate in WBC's statement of costs how much time Mr. Williams spent, or how much time WBC thinks that Mr. Williams spent, on the government interference issue itself (as opposed to the cardinal change or RFI response time issues)—no such estimate limited to the government interference issue is provided.

The Board's schedule of costs order made clear that WBC was required to provide records supporting its claimed costs. "[T]he [Federal Rules of Evidence] permit the introduction of summaries of records, but only if the records from which the summaries were prepared are admissible and are made available to the opposing party for examination or copying." *Conoco Inc. v. Department of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1996) (citing Fed. R. Evid. 1006); *see United States v. Pelullo*, 964 F.2d 193, 204 (3d Cir. 1992) ("[S]ummary evidence is admissible under Rule 1006 only if the underlying materials upon which the summary is based are admissible."). Although the Board is technically not bound by the Federal Rules of Evidence, *Peter Kiewet Sons' Co.*, IBCA 3535-95, et al., 00-2 BCA ¶ 31,044, at 153,307, "the purpose of the requirement that the proponent of a summary make the underlying documents available to the opposing side is so that the opponent can ensure the accuracy of the summary and, if necessary, oppose the admission of the summary,

[10] Nothing in the record supports the $208-an-hour rate that WBC applied to Mr. Williams' time, and OBO's expert consultant, Mark J. Malengo from FTI Consulting, could find none during his quantum review. Exhibit 283 at 18.

cross-examine the foundational witness, or otherwise rebut the summary with appropriate evidence." *Bath Iron Works Corp. v. United States*, 34 Fed. Cl. 218, 233 (1995). OBO completed discovery without those documents. Without them, it is only fair that the summaries not be admissible as evidence. *Conoco*, 99 F.3d at 393-94. Under the Board's schedule of costs order, it is too late now for WBC to provide such support.

Further, WBC provides no contemporaneous documentation to support its estimate that 75% of Mr. Williams' time should be attributed to OBO-created issues and does not take into account the impact of WBC's many settlements. "[T]he mere expression of an estimate . . . with nothing to support it will not establish the fundamental fact of resultant injury nor provide a sufficient basis for making a reasonably correct approximation of damages." *Luria Brothers & Co. v. United States*, 369 F.2d 701, 713 (Ct. Cl. 1966). The explanation that WBC provided for how it developed its estimate shows that it lacks adequate justification and support. Further, the estimates that WBC provides involve a lump sum for all of the issues in CBCA 6650 as a whole. WBC, contrary to the direction in the Board's order, does not even attempt in its statement of costs to identify which costs apply specifically to WBC's government interference claim.

OBO is entitled to summary judgment on the absence of adequate documentary support for Mr. Williams' time. *See Bannum, Inc. v. United States*, 151 Fed. Cl. 755, 767-69 (2021) (granting summary judgment on plaintiff's inability to prove costs where plaintiff had failed to produce supporting documentation for summaries despite repeated requests).[11]

3. Travel Costs for WBC's President

WBC includes in its statement of costs a request for payment of $24,672.90 in estimated travel costs for Mr. Williams. For the same reasons as discussed in response to WBC's claim for Mr. Williams' time, we cannot dismiss this alleged damage for lack of jurisdiction. Nevertheless, like its claim for Mr. Williams' time, the identified estimates are for costs allegedly incurred not just in dealing with government interference with Huashi but also for WBC's cardinal change, RFI response time problems, and potentially other issues. Although WBC provides receipts supporting Mr. Williams' travel costs (Exhibit 78), those receipts show only that Mr. Williams traveled a few times between China and his home base in Massachusetts and several times between Washington, D.C., and Massachusetts in 2018

[11] We also note OBO's concern that WBC is charging Mr. Williams' time as a direct cost under this contract when it also appears to have included Mr. Williams' time in its overhead pools and as part of its G&A markups. Because the record on this point is not well-developed, and because resolution is unnecessary to the result, we do not explore it further here.

and 2019. *See* Exhibit 78.[12] Contrary to the Board's schedule of costs order, nowhere are the travel costs segregated between various claims or tied to count III, and no estimate for how much of the travel costs are attributable to the governmental interference claim is provided. There are no contemporaneous records identifying the purpose for any of the trips. If Mr. Williams truly had traveled specifically to deal with issues involving OBO's interference with Huashi, WBC should have created a contemporaneous record of that fact. *See Dawco Construction, Inc. v. United States*, 930 F.2d 872, 881 (Fed. Cir. 1991) (Awareness of a change "should signal to the prudent contractor that it must maintain records detailing any additional work."), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995)). Particularly in light of all of WBC's other settlements of alleged problems and delays on this contract, WBC's creation of an estimate attempting to tie its president's travel costs to non-settled issues, without any contemporaneous support showing why the travel was undertaken, is insufficient to withstand OBO's request for summary judgment.

4. Costs First Identified in WBC's Summary Judgment Response

In its response to OBO's summary judgment motion, WBC included an affidavit from Mr. Williams in which he identifies more than $800,000 in materials costs, supported by receipts, that he avows were incurred because of the issues raised in WBC's May 9, 2019, breach of contract claim. It is not clear whether WBC is relying upon this affidavit or the documents it cites to support damages. WBC does not mention these costs in the body of its brief, and it cites the affidavit only to support an unrelated factual argument. Nevertheless, if WBC included the affidavit in its summary judgment opposition to support damages, a review of WBC's October 2020 statement of costs shows that these alleged damages were not mentioned there. Discovery in CBCA 6650 concluded on June 30, 2021, Order at 2 (Apr. 12, 2021), and OBO had already completed fact and expert witness depositions and prepared expert reports before WBC disclosed these materials costs in its summary judgment opposition on July 30, 2021. The Board's schedule of costs order barred reliance on any cost documents not included in WBC's statement of costs. WBC's disclosure of these costs as part of its summary judgment opposition was untimely, and the costs cannot be pursued in CBCA 6650.

[12] Some of the receipts forming the basis of WBC's travel cost estimate appear to involve travel to other locations, such as Paris and Amsterdam, with other individuals (including family members), *see* Exhibit 78, but we need not attempt to digest at this time whether some receipts might have been improvidently included in WBC's cost support.

VI. WBC's Claim for Scheduling Costs

In its statement of costs, WBC includes a request for recovery of $133,931.50 that it attributes to "[a]dditional Scheduling costs incurred from Perry Associates LLC," and it refers to invoices contained in Exhibit 80 in support. In an introductory paragraph to Exhibit 80, WBC explains that the invoices from Perry Associates are "for additional scheduling costs incurred by WBC due to the government's Breach of Contract" and that the costs "were never negotiated as part of or incorporated into Modification P00008 or P00020 for extended costs caused by the government." Exhibit 80 at 1. Contrary to WBC's representation, the invoices in the record that support WBC's "outside scheduling" claim in CBCA 6650 are the very same invoices that were *also* included in WBC's May 9, 2019, time-related claim. *Compare* Exhibit 80 at 2-127 (containing Perry Associates invoice nos. 1208, 1240, 1261, 1276, 1286, 1308, 1332, 1349, 1365, 1378, 1390, 1416, 1440, 1450, 1457, 1467, 1478, 1491, 1499, 1510, 1518, 1540, 1554, 1556, 1558, 1573, and 1589) *with* Exhibit 62 at 908-1032, 1081 (containing the same Perry Associates invoices).[13] WBC settled the May 9, 2019, time-related claim through bilateral mod-20, which included a broad release. Exhibit 22 at 315. Nothing in mod-20 indicates that WBC excepted out of the mod-20 release some unidentified portions of the Perry Associates billings and preserved them for future litigation. WBC's request for payment on the Perry Associates invoices identified in its statement of costs is barred by mod-20.

VI. WBC's Additional Damages Requests

In its motion for summary judgment, OBO asks that the Board grant summary judgment on WBC's requests to recover REA preparation costs and for profit, G&A, and bond markups on any damages award. Because WBC has not identified any cognizable breaches of its contract by OBO, WBC did not need to prepare its REA and cannot transfer the costs of preparing the REA onto OBO. Because we are not awarding WBC any damages in CBCA 6650, there is no need to analyze WBC's requests for markups.

VII. Effect on WBC's Recovery in CBCA 7147

As previously discussed, WBC's challenge to the contracting officer's "deemed denial" of its TSP is pending before the Board in CBCA 7147. The Board, in this decision, makes no determinations regarding the extent to which resolution of any issues in CBCA 6650 affects issues in CBCA 7147. The parties may address the application of this decision to issues in CBCA 7147 in future proceedings.

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[13] They are also the same invoices that accompanied PCO 075, which the May 9, 2019, time-related claim replaced. *See* Exhibit 140 at 3364-483, 3487.

Decision

For the foregoing reasons, we grant OBO's motion for summary judgment in CBCA 6650 on counts I, II, and III of WBC's complaint; on WBC's requests for reimbursement of outside scheduling costs incurred by Perry Associates and of REA preparation costs; and on WBC's requests for profit, G&A, and bond markups. Accordingly, we **DENY** WBC's appeal in CBCA 6650.

Proceedings in CBCA 7147 will continue in accordance with the Board's prior scheduling orders.

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

I concur:

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge

VERGILIO, Board Judge, concurring.

I would grant the agency's motion for summary judgment and deny the appeal in CBCA 6650. A review of each claim and the undisputed material facts permit a resolution with only limited explanations, particularly in light of the suggestion by the contractor that this appeal is moot because it seeks to recover costs under its termination settlement proposal at issue in CBCA 7147.

The standards for treatment of a motion for summary judgment are not at issue. *See RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, et al., 22-1 BCA ¶ 38,041, at 184,737-38. In its underlying certified claim, the contractor sought a 341-calendar-day time extension and $3,203,679, said to result from and reflect the compensable time extension sought. In its complaint, the contractor provides a bit more detail, relying upon the breakdown of the claim in the contracting officer's decision of denial.

In count one, the contractor alleges that defective plans and specifications amounted to cardinal changes. The complaint attributes no dollar amount to this count, but states that the contractor has been damaged in an amount to be determined at a hearing before the Board. Under bilateral modifications 7, 8, and 20, the parties resolved the dispute regarding what the contractor attempts to raise again in this count. Because of a release, the contractor may not pursue this count of its complaint. Beyond that, the contractor would not prevail because it has failed to identify the dollars sought for this count and has provided inadequate support at this stage to proceed.

In count two, the contractor alleges an agency breach of an implied duty of good faith and fair dealing, and a failure to cooperate. The breach is said to have arisen from the length of time the agency took to respond to contractor submittals and requests for information. As with count one, the claim and complaint associate no specific dollars with this count. The contractor overstates the obligations of the agency; specifically, although the agency must act in good faith, deal fairly, and cooperate, the agency is not required to do whatever is necessary to enable the contractor to successfully perform the contract. The contractor errs when it attempts to expand contractual obligations of the agency. At the summary judgment stage, the contractor has not raised with support facts in dispute that would support its position against what the agency has submitted. That is, bilateral modifications have addressed and resolved aspects of the claimed delay arising from actions and inactions, while remaining aspects lack proof positive from the contractor in terms of delay and actual costs attributable to alleged delays. That is, the contractor has not linked dollars sought to periods of alleged delays.

In count three, the contractor alleges an agency breach of an implied duty of good faith and fair dealing, and a failure to cooperate with respect to dealings with a subcontractor, ultimately adversely affecting the contract and contractor. While the contractor has supported its contention with record references, sufficient to defeat a motion for summary judgment, it has not identified dollars and supporting material for this count (again, the contractor simply states that the amount is to be determined at a hearing before the Board). Accordingly, summary judgment is appropriate, as the contractor is obligated to develop the record and provide the agency with information in response to discovery and Board orders to support both aspects of a claim, entitlement and dollars.

Regarding the claim and three related counts of the complaint, I conclude that the record supports summary judgment for the agency. Suggestions by the contractor that it is entitled to other costs not identified specifically in its claim at issue or complaint do not alter this conclusion, because such a request falls outside of the claim, sum certain, and complaint aspects of developing a record within the jurisdiction of the Board. Those other attempts for relief fall outside of the claim and appeal. Finally, as the contractor notes, a denial of this

appeal does not preclude the contractor from pursuing relief under its termination settlement proposal, which is at issue in CBCA 7147.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge