



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DENIED: February 22, 2024

CBCA 7598

KING ROX LLC,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Hammad Daniyal, Digital Marketer of King Rox LLC, Claymont, DE, appearing for Appellant.

Alexandra N. Wilson, Office of the Legal Adviser for Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

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

**LESTER**, Board Judge.

Respondent, the Department of State (DOS), seeks summary judgment in its favor on a contractor claim seeking payment for fuel tanks that appellant, King Rox LLC (King Rox), delivered to the United States Embassy in Freetown, Sierra Leone. The contracting officer for the Embassy rejected the tanks after discovering, upon inspection, that they were single-walled, rather than double-walled (as required by the purchase order), and did not satisfy Underwriters Laboratories (UL) 142, a national standard for above-ground tanks that are designed to hold flammable and combustible materials. King Rox asserts that, after award of the purchase order, it submitted drawings to DOS that showed neither double-walled tanks nor UL-142 compliance and that, because the Embassy did not object to the drawings, the

requirements of the purchase order were effectively changed. For the reasons discussed below, we grant the agency's motion and deny the appeal.

### Statement of Uncontested Facts<sup>1</sup>

#### The Solicitation Process

DOS issued solicitation no. PR10708775 in May 2022 for the purchase of fuel tanks for residential generators at the United States Embassy in Freetown, Sierra Leone. The solicitation indicated in line item 001 that the Embassy was seeking to purchase three double-wall UL-142 tanks each of which would have a 1000-gallon capacity, as follows:

Requested Specification: Above ground Horizontal UL-142 Tanks Capacity: 1,000 US Gallons / 3,000 Liters Specifications: Double-wall tanks consist of a primary steel tank wrapped by an exterior steel shell that may be in direct contact with the primary tank creating a full 360° double-wall tank. The interstice can be monitored for an unlikely leak using the 2" monitoring pipe. Both inner and outer tanks are supplied with emergency vent fittings. Saddles S addles [sic] are used to support the tank, maintain the tank's position and elevation and provide clearance for visual inspection of the underside. Highland manufacture s [sic] in accordance with UL-142. Only two saddles per tank are required. Standard Construction Features • Flat-flanged heads • Continuous exterior fillet welds on all joints • Lifting Lugs • UL-142 label • 5 psi factory air test and seam inspection. • Primer coating

Seller Line Item Details:

**Manufacturer:** .

**Part Number:** .

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<sup>1</sup> Although King Rox did not file a statement of genuine issues in response to DOS's statement of undisputed material facts, as required by Board Rule 8(f)(2) (48 CFR 6101.8(f)(2) (2022)), we have not insisted on strict adherence to our procedural rules in light of King Rox's self-represented status. Reviewing the parties' submissions in this appeal, however, it is clear that, with one exception that we discuss below, there is no dispute about the facts in this case. The statement of uncontested facts identified in this decision is based upon the evidence in the record and the Board's comparison of DOS's statement of undisputed material facts to the allegations in King Rox's notice of appeal, complaint, and summary judgment responses. To the extent that the parties have factual disagreements, they are noted where applicable but ultimately are not material to the resolution of this appeal.

**Description:** Above ground Horizontal Tank Capacity: 1,000 US Gallons / 3,000 Liters

Exhibit 2 at 000005.<sup>2</sup> In line items 002 and 003, DOS used virtually identical language in describing requirements for three double-wall UL-142 tanks with a 500-gallon capacity and two double-wall UL-142 tanks with a 1500-gallon capacity. *Id.*

DOS indicated in the solicitation that its award would be made to the lowest-price technically-acceptable (LPTA) bidder. Exhibit 2 at 000006. DOS also stated that the contract clause in Federal Acquisition Regulation (FAR) 52.212-4, Contract Terms and Conditions – Commercial Items, applied to the acquisition. *Id.* at 000012.<sup>3</sup> That clause contains the following provisions regarding acceptance of items under the contract, changes, and payment:

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. If repair/replacement or reperformance will not correct the defects or is not possible, the Government may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

....

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

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<sup>2</sup> Unless otherwise indicated, all exhibits referenced in this decision are contained in the appeal file. The page numbers cited are the Bates numbers on the exhibits.

<sup>3</sup> Although the solicitation referred to the title of the clause at FAR 52.212-4 as “Contract Terms and Conditions—Commercial Items,” that title was amended in the FAR to read “Contract Terms and Conditions—Commercial Products and Commercial Services (NOV 2021)” before the solicitation was issued in May 2022. *See* 86 Fed. Reg. 61017, 61033 (Nov. 4, 2021). The version of FAR 52.212-4 in effect when the solicitation was issued and the purchase order was awarded in 2022 applies to King Rox’s purchase order.

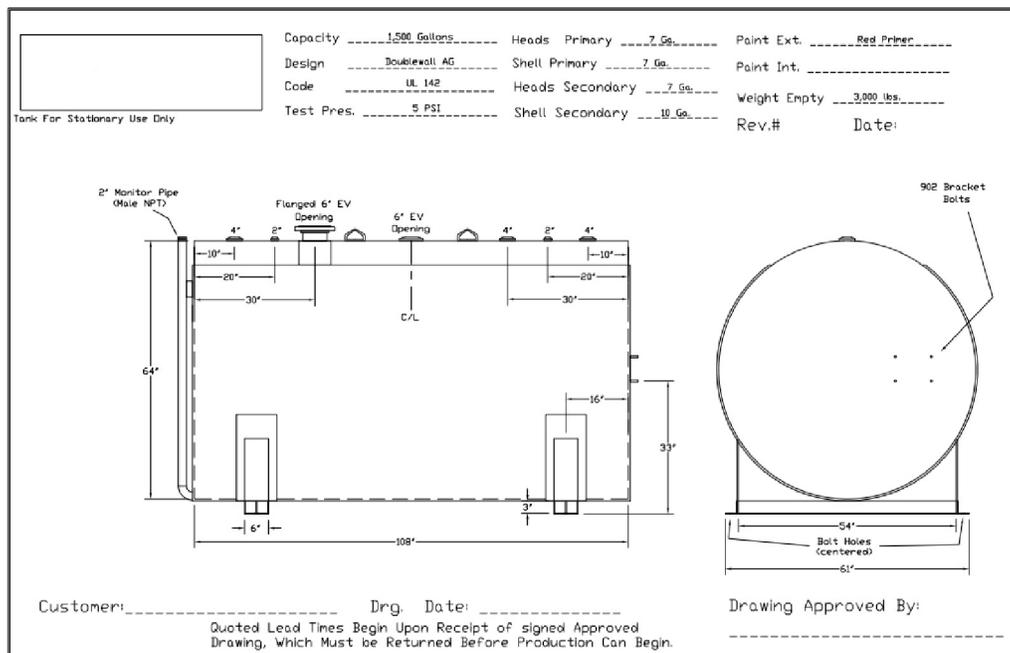
.....

(i) Payment. — (1) Items accepted. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract.

48 CFR 52.212-4 (2022) (FAR 52.212-4).

On May 9, 2022, King Rox submitted a quote to complete line item 001 for \$46,570.50, line item 002 for \$55,884.60, and line item 003 for \$41,396.00, with (inclusive of \$21,732.90 in shipping) a total price of \$165,584. Exhibit 2 at 000005-06. After receiving the quote, the Embassy's procurement supervisor notified King Rox by email that "the cost for the bid is way above the estimated budget for this buy, please advise if price can be negotiated, and that you are able to send a revised quotation." Exhibit 4 at 000016.

King Rox responded with a revised quote on June 2, 2022, reducing the amounts for line items 001, 002, and 003 to \$36,000, \$21,000, and \$28,000, respectively, plus shipping costs. Exhibit 5. King Rox's quote contained a pricing section, a photograph of a tank, and a schematic drawing of the 1500-gallon tank that King Rox was quoting. The schematic drawing identified "Doublewall AG" as the design and a code of "UL 142," indicating that the quote was for a UL-142-compliant double-wall fuel tank, as shown below:



*Id.*

The Embassy's procurement supervisor informed King Rox by email on June 8, 2022, that the amount of the quote was "still above the available budget" but that the Embassy was seeking additional funding to cover the costs. Exhibit 6 at 000019. On July 14, 2022, having apparently obtained the additional funding, the procurement supervisor informed King Rox by email that the Embassy "would like to proceed" with the purchase "upon your confirmation of the validity of your revised quotation." *Id.* She required that King Rox "confirm the revised offer as stated in the [June 2, 2022,] quotation by return email." *Id.* She attached a copy of the June 2, 2022, quote, including the schematic drawing identifying a "Doublewall AG" UL-142 fuel tank, to her email. *See* Exhibit 8 at 000024-25; Respondent's Statement of Undisputed Material Facts, Exhibit 1, Appellant's Response to Respondent's Request for Admission No. 2 (Oct. 5, 2023); *id.*, Exhibit 2, Deposition of Kareem Ahmad (Aug. 11, 2023) at 19-20; *id.*, Exhibit 5, Declaration of Mani RA Kaifineh (Oct. 13, 2023) ¶ 14. In a follow-on email that same day, the Embassy's facilities engineer, with a copy to the Embassy's procurement supervisor, requested that King Rox, "in addition, kindly send us the final brochure of your proposal." Exhibit 44 a 000134.

By email on July 14, 2022, a representative of King Rox responded to the procurement supervisor's email, stating by email that, "I hereby confirm that our quote is still valid. Please proceed with further processing." Exhibit 8 at 000024. The procurement supervisor then requested the brand name of the tanks, and King Rox identified Henan Bebon as the manufacturer and King Rox as the brand name. Exhibit 12 at 000034-35. In response to the facilities engineer's separate email from earlier that same day, King Rox responded, with a copy to the procurement supervisor, that it "will send you the final drawing of the tanks soon, I am working with our engineering team." Exhibit 44 at 000134.

#### Award of the Purchase Order

On July 18, 2022, the Embassy awarded purchase order no. 19SL2022P0552 to King Rox "in accordance with the technical and price factors established in the solicitation for U.S. Embassy Freetown Residential Generators Fuel Tanks." Exhibit 10 at 000030. The specifications for the purchase order were the same as in the solicitation, requiring delivery of "Above ground Horizontal UL-142 Tanks" that were "Double-wall." Exhibit 11 at 000032-33.

#### King Rox's Subsequent Submission of Drawings

Later on July 18, 2022, King Rox submitted a schematic drawing of the 1000-gallon tank to the Embassy's procurement supervisor by email and indicated that it was the "final drawing" for that tank. Exhibits 12 at 000034, 13 at 000035. Although that drawing did not

contain either the “Design” field or the “Doublewall AG” language from the drawing that had accompanied King Rox’s June 2, 2022, quote, nothing on the new drawing plainly showed that the tank was a single-wall rather than a double-wall tank or did not comply with UL 142:

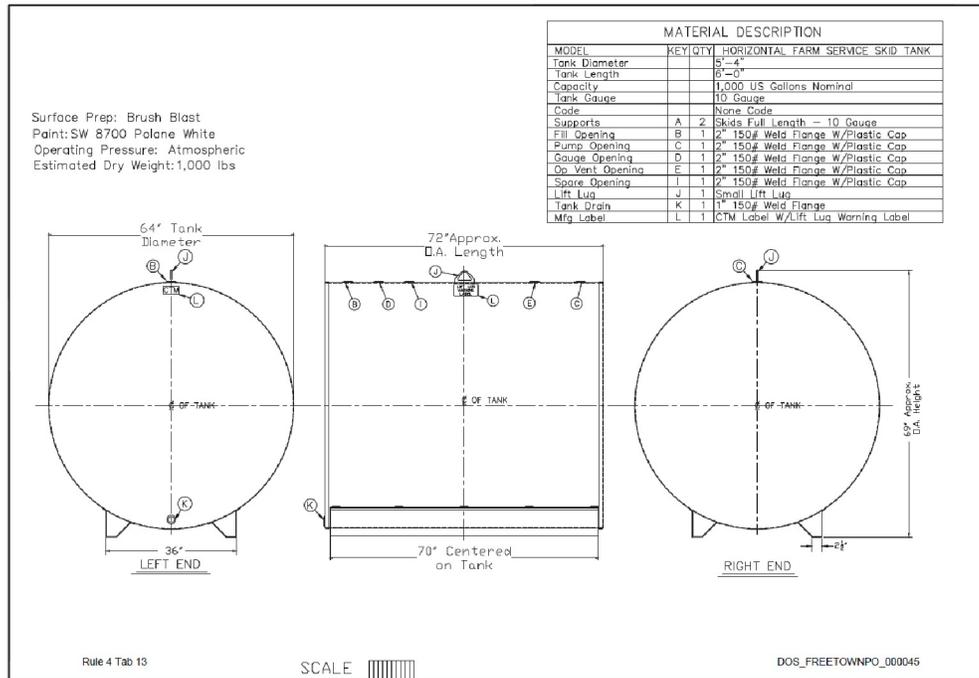


Exhibit 13 at 000045. Similarly, King Rox’s July 18, 2022, email forwarding the final drawing did not mention any change from the purchase order specifications and, instead, asked the Embassy to “check the attached final drawing and let [King Rox] know if it needs any changes.” See Exhibit 12 at 000034. By responsive email, the procurement specialist thanked King Rox for sending the drawing and, copying a facilities engineer and general services officer for the Embassy, asked for input on whether any changes to the drawing were necessary. Exhibit 45 at 000141. Internally, the general services officer raised questions about how the tank would be calibrated and whether it would have access from the top but otherwise identified no issues. *Id.* at 000140. The record does not reflect whether those questions were forwarded to King Rox.

On July 26, 2022, King Rox emailed the Embassy’s procurement supervisor drawings of the 550-gallon and 1500-gallon tanks and resubmitted the 1000-gallon tank drawing, along with a tank calibration chart. Exhibits 17-21. None of these drawings contained the “Design” field or the “Doublewall AG” or UL-142 language from the drawing accompanying King Rox’s June 2, 2022, quote, *see* Exhibits 18-19, 21, but nothing expressly indicated a switch from double-wall to single-wall tanks or away from UL-142 compliance.

### Delivery and Rejection of the Tanks

King Rox notified the Embassy on September 13, 2022, that manufacturing of the tanks was complete and that the tanks were ready for delivery. Exhibits 46-48. The tanks were delivered to the Embassy on Saturday, November 19, 2022. Exhibit 54 at 000162; Appellant's Complaint at 1.

The contracting officer requested that the facilities engineer for the Embassy inspect the tanks to determine whether they met the requirements of the purchase order. Exhibit 54 at 000161-62. During that inspection on November 22, 2022, the engineer discovered that the tanks were neither double-walled nor UL-142 compliant. *Id.* at 000161. She also discovered other quality issues with the tanks:

No test reports/results were submitted prior to delivery or accompanying the deliveries. I went on further to dive into the interior of the tanks capturing some photographs . . . . It's shocking as the interior of the tank is not coated with any products to protect it with exposure of the fuel elements. The welds done to stiffen the bulk head at a glance its [sic] not welded properly.

*Id.*

On November 23, 2022, the contracting officer notified King Rox that "[t]he fuel tanks that were delivered in this order do not meet the specifications in the Purchase Order" and asked that King Rox "remedy this and complete the supply of fuel tanks that meet the specifications of the purchase order." Exhibit 24 at 000076. He represented that "[t]hese tanks are not usable for our purposes and we are not able to accept them in their current state." *Id.*

King Rox replied later that day, stating that "[i]t looks like we are not on the same page"; that its "original bid was revised and resubmitted per [an] email exchange" with the Embassy's procurement supervisor; that, "[p]rior to production, [King Rox] submitted a set of drawings for approval, and the drawings got approved";<sup>4</sup> and that King Rox "deliver[ed]

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<sup>4</sup> The final drawing "approval" to which King Rox refers appears to relate to an alleged approval through the Embassy's silence. When King Rox sent its first "final" drawing to the Embassy's procurement supervisor on July 18, 2022, the supervisor acknowledged receipt, Exhibit 45 at 000140-41, but the record does not identify any further response or that the Embassy forwarded any questions about or comments on the drawing. Similarly, the record does not show whether the Embassy responded to King Rox's July 26, 2022, email forwarding its "final drawings" to the Embassy's procurement supervisor.

exactly according to [its] revised bid and approved drawings.” Exhibit 28 at 000086. In a subsequent email, King Rox represented that, when it sent its revised “offer” on June 2, 2022, the drawing accompanying that “offer” did not mention double-wall tanks or UL-142 compliance. Exhibit 37 at 000114. This representation was incorrect, and, during this appeal, the King Rox employee who submitted the June 2, 2022, quote acknowledged in his deposition that the drawing accompanying the quote actually showed a double-wall tank and UL-142 compliance. *See Ahmad Deposition at 17, 63-64.* King Rox argues, however, that it sent that drawing by mistake and that the Government should have understood that it was a mistake, apparently because King Rox’s price was so low.

### King Rox’s Claim

On November 25, 2022, King Rox sent an email to the contracting officer described as “Request for Final Decision PO# 19SL2022PO552.” Exhibit 37 at 000114. In it, King Rox demanded payment of \$96,000, the purchase order price. *Id.* In the recitation of facts in its email, King Rox asserted that, in its June 2, 2022, quote, it had not “mentioned double-wall tanks with UL.” *Id.* It stated that “[i]f you still think this is our mistake” and that it was not entitled to payment, “please submit the final decision so that we can go ahead with an appeal.” *Id.*

By email dated November 28, 2022, the contracting officer notified King Rox that, in light of King Rox’s failure to provide fuel tanks that complied with the requirements of the purchase order and seeming inability to do so in the future, the Embassy was prepared to cancel the order and allow King Rox to retrieve its tanks, as follows:

Throughout the communications, it was never conveyed to the procurement team that the tanks would not be double-walled or that they would not have a UL certificate. These are material requirements of the purchase order. All indications were that King Rox accepted the terms and specifications laid out in the purchase order. None of the drawings, pictures, quotes, or communications from King Rox indicated that you would be unable to meet the requirements in the [purchase order] or in the solicitation . . . .

. . . .

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Nevertheless, the record also contains no evidence indicating that Embassy employees recognized from the “final” drawings that King Rox did not intend to provide double-wall UL-142 fuel tanks.

I understand the message below as indication that King Rox will be unable to supply products with specifications requested in [the purchase order]. If you agree the order should be cancelled, we will move forward with a bilateral cancellation of the order. The nonconforming products are currently stored at the U.S. Embassy in Freetown. We are more than willing to work with you so that you may reclaim the nonconforming products.

Exhibit 38 at 000115. When King Rox asked whether the contracting officer's response was a final decision denying its appeal, the contracting officer responded that it was. Exhibit 42 at 000126.

### King Rox's Appeal

King Rox filed its notice of appeal with the Board on November 30, 2022. In the notice, King Rox acknowledged that its June 2, 2022, revised quote "include[d] a set of drawings – a drawing pointing to double-wall tanks, 2" Monitor pipe, UL & Weight 3000 lbs." Notice of Appeal at 1 (emphasis omitted). King Rox alleged, however, that it informed the Embassy facilities engineer on July 14, 2022, that it would provide final drawings of the tanks "soon" and that, on July 26, 2022, it provided those final drawings, which were "totally different than what we provided with our quotation before," and that, "[i]n the final drawing[,] we removed the double-wall tanks, 2" Monitor pipe, UL & Weight 3000 lbs." *Id.* at 2 (emphasis omitted). King Rox alleged that, because it "did not get a rejection of the final drawing," King Rox "started tanks production" and then delivered the tanks on November 19, 2022, for which, it alleges, it is entitled to be paid. *Id.* at 3.

King Rox filed its complaint on December 19, 2022, repeating the factual allegations that it had made in its notice of appeal, and DOS filed an answer on January 20, 2023. The parties engaged in discovery, which concluded on August 14, 2023. On October 13, 2023, DOS filed a motion for summary judgment to which DOS attached a copy of the deposition of one of King Rox's employees, as well as declarations from the Embassy's contracting officer, the Embassy's procurement supervisor, and the facilities engineer who inspected King Rox's fuel tanks after they were delivered.

In her declaration, the facilities engineer avowed that "nothing in the information included in the drawings" that King Rox delivered after award of the purchase order indicated to her "that King Rox intended to provide single-walled fuel tanks instead of the double-walled fuel tanks identified in the specifications," that she "did not accept or approve any changes to the requirements for the fuel tanks identified in the [purchase order] specifications," and that she, in fact, lacked contracting authority to approve any deviations from the specifications. Respondent's Statement of Undisputed Material Facts, Exhibit 2, Declaration of Leslie C.N. Decker (Oct. 13, 2023) ¶ 11. Similarly, the Embassy contracting

officer avowed in his declaration that, before he notified King Rox that the fuel tanks delivered were not compliant with the specifications, King Rox had “never informed [him] that it intended to deliver single-walled fuel tanks that diverged from the requirements listed in the specifications” in the purchase order. *Id.*, Exhibit 3, Declaration of Thad B. Ball (Oct. 13, 2023) ¶ 7. The contracting officer further stated he was not informed that “the final drawings that were submitted by King Rox were for a different product than what was submitted in King Rox’s quotation, that the drawings deviated from the requirements in the specifications or that King Rox did not intend to comply with the specifications in [the purchase order].” *Id.* ¶ 11.

On October 31, 2023, in what it called a “Clarification: Tank Specifications” in response to the summary judgment motion, King Rox changed one of the factual allegations in its notice of appeal and its complaint. Namely, King Rox alleged that, with its June 2, 2022, revised quotation of \$96,000, it provided a drawing of the tank that “notably excluded the ‘Doublewall’ and ‘UL’ attributes” and that “the [June 2, 2022,] revised quotation of \$96,000 never claimed or insinuated the inclusion of Double-wall Fuel Tanks with UL specifications.” Appellant’s Response (Oct. 31, 2023) at 1 & Exhibit C. King Rox then alleged that, because the Embassy awarded the purchase order with full knowledge that King Rox’s tanks would be single-walled and not UL-142 compliant, it was entitled to be paid the full purchase price of \$96,000. King Rox repeated this allegation in its response to DOS’s summary judgment motion, which it filed on November 17, 2023.

## Discussion

### I. The Board’s Role in Considering Summary Judgment

“Our role in deciding a motion for summary judgment is to determine whether a genuine triable issue of material fact exists.” *Record Steel & Construction, Inc.*, VABCA 5966, 00-2 BCA ¶ 30,940, at 152,720 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In evaluating such a motion, “we initially determine if there are material facts in dispute; we will weigh neither facts nor evidence. Only when there are no material facts in dispute do we look at whether the movant is entitled to judgment as a matter of law.” *Id.*

A party responding to a summary judgment motion has an obligation to “establish the existence of a genuine, triable issue of material fact.” *Record Steel*, 00-2 BCA at 152,720. It cannot do that “simply by challenging a fact or by an unsupported conclusion. [It] must present sufficient evidence, by pointing to some part of the record or other evidence, indicating that the facts differ significantly from the way the movant has presented them and upon which a reasonable fact finder, drawing inferences in favor of the nonmovant, could decide in favor of the nonmovant.” *Id.*; see *JAAT Technical Services, LLC*, ASBCA 61792, et al., 21-1 BCA ¶ 37,878, at 183,971 (“Merely suggesting conflicting facts without more

will not defeat summary judgment.”). The mere fact that, as here, an appellant has elected to represent itself, without the assistance of an attorney, does not eliminate this obligation. *See Rebish v. United States*, 134 Fed. Cl. 308, 318 (2017) (Although a self-represented litigant “is given greater leeway, . . . ‘a pro se party’s “bald assertion,” completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment.” (quoting *Lee v. Coughlin*, 902 F. Supp. 424, 429 (S.D.N.Y. 1995) (Sotomayor, J.)); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 50 (2d Cir. 2003) (pro se status does not relieve party of the burden of supplying the evidence required to defeat a summary judgment motion).

## II. The Plain Language of the Purchase Order

DOS argues that the language of the purchase order is crystal clear: it calls for fuel tanks that were both double-walled and UL-142 compliant. Reviewing the plain language of the purchase order and reading the purchase order as a whole, as we must, *see McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996), there is no question that DOS is correct. King Rox does not really appear to take issue with or challenge DOS’s interpretation of what the purchase order says. Instead, King Rox believes that, *despite* the language of the purchase order, DOS’s failure to respond to or complain about the fuel tank drawings that King Rox submitted, which King Rox says show that it would be delivering noncompliant tanks, changed the purchase order requirements.

## III. Alleged Pre-Award Disclosure and Mistake

Over the course of this appeal, King Rox has modified and presented two conflicting stories about when it first presented the Embassy with drawings allegedly showing noncompliance with the purchase order requirements. Initially, in its notice of appeal and its complaint, King Rox stated that, by mistake, it did not present the Embassy with those drawings until after award of the purchase order. In its summary judgment responses, however, King Rox now alleges that it actually presented the Embassy with those drawings *before* the purchase order was awarded and that, as a result, the Embassy should have been aware that it would receive single-wall non-UL-142 tanks when it made the award. We address both alleged scenarios below.

As for King Rox’s allegation that it attached to its June 2, 2022, quote a drawing that eliminated double walls and UL-142 compliance (weeks before the Embassy awarded the purchase order), we need not examine the legal effect of such a pre-award submission because, based on the record before us, there is no evidence in the record to support it. King Rox first raised this position in its responses to DOS’s summary judgment motion, which conflicts with King Rox’s acknowledgment in its notice of appeal and complaint that the drawing accompanying its June 2 quote showed a double-wall UL-142 tank. The copy of the

June 2 quote that King Rox itself provided the Board includes the drawing showing a double-wall UL-142 tank. Further, DOS has presented the sworn deposition testimony of the King Rox employee responsible for the June 2 quote, who testified that the drawing which he submitted with the June 2 quote showed compliance with the purchase order requirements. Because King Rox failed to identify any evidentiary support for its contention that it effectively told the Embassy before the purchase order was awarded that it would only deliver single-wall non-UL-142 fuel tanks, it has not established a material dispute of fact that would provide a basis for challenging DOS's motion for summary judgment.

In King Rox's early submissions to the Board in which it acknowledged attaching to its June 2 quote the drawing showing a double-wall UL-142 tank, King Rox alleged that the submission of the double-wall UL-142 tank drawing with the quote was a mistake (a mistake that was compounded when King Rox confirmed its quote on July 14, 2022) and that it had meant to submit a different drawing without those required features. To the extent that King Rox's mistake theory, which was not included in its claim to the contracting officer, is properly before us, *see Miami-Dade Aviation Department v. General Services Administration*, CBCA 6689, 20-1 BCA ¶ 37,727, at 183,124 (finding that, where appellant did not allege unilateral mistake or the operative facts of such a theory in its claim to the contracting officer, the Board lacked jurisdiction on appeal to entertain it as a defense to the Government's summary judgment motion), King Rox's alleged mistaken inclusion of the drawing is not the type of "mistake" that entitles a contractor to monetary relief. Unilateral mistakes are potentially actionable only if the contractor proves that the mistake resulted from a "clear cut clerical or arithmetical error, or a misreading of the specifications." *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1046 (Fed. Cir. 1983) (quoting *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970)).<sup>5</sup> The only possible remedy for a unilateral mistake, other than rescission of the contract (which King Rox is not seeking here), is to reform the contract price to reflect what the contractor would have offered, and the Government would have been willing to pay, without the mistake. *Taylor & Sons Equipment Co.*, ASBCA 34675, 89-2 BCA ¶ 21,584, at 108,678-80, *aff'd*, 887 F.2d 1094 (Fed Cir. 1989) (table); John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., *Administration of Government Contracts* 314-15 (5th ed. 2016). To "reform" the purchase order to reflect what King Rox says was its true intent, we would not be reforming the *price* in the purchase order. Instead, we would have to "reform" the purchase order's *specifications* to require the

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<sup>5</sup> A remedy for unilateral mistake is available only if the contractor proves, among other things, that the Government knew or should have known of the mistake when it awarded the purchase order. *Chernick v. United States*, 372 F.3d 492, 496 (Ct. Cl. 1967). There is no evidence that the Embassy knew or should have known King Rox made a "mistake" in attaching a drawing to its quote showing a fuel tank actually satisfying the requirements of the purchase order.

Embassy to accept single-wall non-UL-142 fuel tanks. That we cannot do. The evidence that DOS has included in the record clearly shows that the Embassy was seeking double-wall UL-142 tanks to address perceived dangers of possible leaks and contamination from single-wall tanks. *See* Respondent’s Statement of Undisputed Material Facts ¶ 1. We have no authority to “wr[i]te new and different contracts . . . for the parties, which they had not agreed to,” *American President Lines, Inc. v. United States*, 821 F.2d 1571, 1582 (Fed. Cir. 1987), or to force the Embassy to accept fuel tanks different from those that it believes it needs. King Rox cannot use the unilateral mistake legal theory for that purpose.

#### IV. Alleged Post-Award Disclosure

As for King Rox’s allegation that, after award of the purchase order on July 18, 2022, it submitted drawings to the Embassy showing noncompliant fuel tanks, nothing in those drawings or any communications accompanying their submission actually says that the tanks to be delivered would not comply with the purchase order requirements. It is true that, while the drawing delivered with King Rox’s June 2, 2022, quote expressly identified the tanks as “Doublewall AG” and compliant with UL 142, the “final drawings” submitted after award did not include those representations. However, these “final drawings” also did not expressly indicate that those requirements would *not* be met. DOS has presented un rebutted declarations from its witnesses averring that Embassy employees did not recognize any problems in the “final drawings” that King Rox presented on July 18 and 26, 2022, or any indication that King Rox did not intend to provide double-wall UL-142 tanks. The Board, having independently reviewed those “final drawings,” similarly cannot find any notification of King Rox’s intent to deliver nonconforming goods. The mere fact that King Rox did not include the words “double-wall” or “UL 142” on the “final drawings,” without more, does not clearly indicate—contrary to the representations in its quote and the requirements of the purchase order—that King Rox intended to deliver tanks that did not meet the specifications.

As a result, we reject King Rox’s argument that, because neither the Embassy’s procurement supervisor nor its facilities engineer contacted it after King Rox submitted its “final drawings” on July 26, 2022, they, through their silence, agreed to nonconforming tanks and effectively modified the purchase order specifications. The minor possible clues in the drawings to which King Rox cites of its intent are simply too inconsequential to constitute “notice.” To “impute to the government knowledge of the mistakes and inconsistencies contained in all the paperwork that it receives” from a contractor after contract award and “[t]o impose . . . a requirement on the government” to bring them to the contractor’s attention “would create a boundless duty, and a facile means for contractors . . . to escape liability for their inexcusable blunders.” *Giesler v. United States*, 232 F.3d 864, 875-76 (Fed. Cir. 2000). Further, King Rox has not cited any purchase order provision that required a response or approval from the procurement supervisor or facilities engineer.

In any event, once King Rox's purchase order was executed, which occurred before King Rox submitted what it called the "final drawings," the Government became entitled to strict compliance with its requirements, *TEG-Paradigm Environmental, Inc. v. United States*, 465 F.3d 1329, 1342 (Fed. Cir. 2006), and the procurement supervisor lacked authority to change the purchase order specifications. The Changes clause incorporated by reference into the contract clearly stated that "[c]hanges in the terms and conditions of this contract may be made only by written agreement of the parties." FAR 52.212-4(c). Only the Embassy contracting officer had authority to change the contract terms, and "[s]ilence in and of itself is not sufficient to establish a demonstrated acceptance' of a contractual change by a Contracting Officer." *Bell/Heery v. United States*, 739 F.3d 1324, 1334 (Fed. Cir. 2014) (quoting *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998)). Had King Rox truly wanted permission to deliver fuel tanks that differed from what the purchase order specifications required, it could have provided clear notice of that fact to the Embassy contracting officer and attempted to negotiate a modification to the purchase order specifications to allow for that change. It did not. "[I]t is not within the province of a contractor to substitute its judgment by determining that something different" than what the contract requires "is suitable and will be furnished." *D.E.W., Inc.* ASBCA 17030, 72-2 BCA ¶ 9494, at 44,228 (citing *Farwell Co. v. United States*, 148 F. Supp 947 (Ct. Cl. 1957)). King Rox has no basis for claiming that it effected a change to the specifications without the express written agreement of the contracting officer.

#### V. The Contracting Officer's Rejection of the Fuel Tanks

When a contractor does not strictly comply with contract specifications, the Government has the option of either (1) rejecting the nonconforming supplies and requiring replacement, or (2) accepting the nonconforming supplies at a reduced price. FAR 52.212-4(a). Here, the contracting officer properly acted within the Government's rights to reject King Rox's nonconforming fuel tanks and ask King Rox to retrieve them. Further, King Rox is only entitled to payment "for items accepted by the Government." *Id.* 52.212-4(i)(1); see *Ponderosa Packing Corp. v. General Services Administration*, GSBCA 13843, 97-2 BCA ¶ 29,248, at 145,495 ("The agency is not contractually obligated to pay for non-conforming goods."). King Rox is not entitled to payment of the \$96,000 purchase order price following the contracting officer's rejection of the tanks. "A contrary result would mean that a contractor could produce non-compliant goods which an agency is bound to accept; that is, the contractor would establish its own sole-source contract for different goods. Such is not the law." *Ponderosa Packing*, 97-2 BCA at 145,495.

King Rox suggests that the Embassy's rejection of the nonconforming tanks, four days after delivery, came too late and that, having "accepted" the delivery, the Embassy is now obligated to keep and pay for them. Contractor delivery is not the same as government acceptance. The Government has a right to inspect supplies, which is "the primary means

of ensuring that the government receives that for which it bargained,” John Cibinic, James F. Nagle & Ralph C. Nash, Jr., *supra*, at 698, before accepting them. FAR 52.212-4(a) gives the Government “a reasonable time after the defect was discovered or should have been discovered” to reject supplies as long as the rejection occurs “before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.” Here, King Rox’s fuel tanks were delivered to the Embassy on Saturday, November 19, 2022; the facilities engineer inspected them on Tuesday, November 22, and the contracting officer notified King Rox in writing of the rejection on Wednesday, November 23. Nothing in the record supports King Rox’s argument that the timing of the inspection was inappropriate or indicates that King Rox was prejudiced by the timing of the inspection.

Decision

For the foregoing reasons, the Government’s motion for summary judgment is granted. King Rox’s appeal is **DENIED**.

*Harold D. Lester, Jr.*

HAROLD D. LESTER, JR.

Board Judge

We concur:

*Patricia J. Sheridan*

PATRICIA J. SHERIDAN

Board Judge

*Kyle Chadwick*

KYLE CHADWICK

Board Judge