UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT DENIED: August 22, 2025

CBCA 8156

GEOTECH ENVIRONMENTAL SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

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

Anastasia Snyderman and Tami Hagberg, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **SHERIDAN**, **KULLBERG**, and **VOLK**.

KULLBERG, Board Judge.

Geotech Environmental Services, Inc. (Geotech) appeals the contracting officer's (CO's) denial of its claim for costs related to the termination for convenience of its contract with the Indian Health Service (IHS), an agency within the Department of Health and Human Services (HHS). IHS awarded to Geotech a contract for the drilling of two wells, and Geotech submitted a termination settlement proposal (TSP) for its costs, which IHS partially reimbursed. Geotech claims costs for additional casing and drilling, legal services, and other contract-related work performed before termination of the contract. In lieu of filing its answer, HHS filed a motion for summary judgment and a statement of undisputed material facts (SUMF). Geotech filed its opposition to HHS' motion, its response to HHS' SUMF,

and an affidavit from its project manager (PM), which was dated November 5, 2024, (PM Affidavit). Subsequently, HHS filed its reply to Geotech's opposition to HHS' motion for summary judgment (reply), and Geotech then filed its surresponse to HHS' reply.[1] Geotech's surresponse included the PM's second affidavit (PM Second Affidavit), which was dated January 3, 2025. For the reasons stated below, the Board denies the motion.

Findings of Fact

The Contract

1. On August 30, 2022, IHS awarded contract 75H70122C00012, Tsoo-Yess Water Wells, (contract), in the amount of $299,780, to Geotech for the drilling of two community water wells on the Makah Indian Reservation in the state of Washington. Exhibit 002 at 0016-20, 0055.[2] The summary of work stated the following:

> The Government seeks to complete an [sic] 12-inch diameter well in a moderately deep alluvial aquifer. Well drilling equipment must be capable to drilling for a 12-inch casing. The capacity goal of the well is 100 gallons per minute. The anticipated screening depth is 140-feet and a finished well depth of less than 150-feet. The well will be installed with a blank section of casing below the well screen.

Id. at 55.[3] The summary of work indicated that "[t]wo wells in the vicinity of the proposed location have depths of 140-feet and 133-feet." *Id*. at 56. Solicitation number 75H70122R00057 provided that same information. Exhibit 3 at 195. The solicitation and contract also included well logs for both wells that showed information about subsurface conditions. Exhibits 2 at 106-07; 3 at 245-46. Geotech has alleged that the referenced wells were two to five miles from the site of the wells to be drilled under the contract. Amended Complaint ¶ 5. According to Geotech "no test wells were drilled prior to preparing the design specifications and bid package, no site subsurface data was provided." PM Affidavit at 5.

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[1] A surresponse is "[a] second response by someone who opposes a motion." *Surreponse*, Black's Law Dictionary (12th ed. 2024).

[2] All exhibits are in the appeal file unless otherwise noted. Subsequent cites to exhibits and page numbers will be simplified with extraneous zeros removed.

[3] The summary of work paragraph inexplicably refers to the two wells to be drilled in the singular rather than the plural.

2. The contract plans showed the locations of the two new wells on sheets T-2 and W-1. Exhibit 2 at 103-04. The contract performance period was 120 days from the date of the notice to proceed (NTP). *Id*. at 16. The contract included Geotech's schedule of prices for specified tasks. *Id.* at 22. Geotech provided unit prices for quantities that included the following: well drilling for twelve-inch casing (two wells estimated at 150 feet) for a total quantity of 300 feet; twelve-inch casing for a total quantity of 280 feet; stainless steel screen, eight-inch, for a total quantity of thirty feet; gravel pack for a total quantity of sixty feet; well casing, eight-inch, for a total quantity of eighty feet; and sanitary grout for a total quantity of fifty feet. *Id*.

3. Section B.2 of the contract provided that "[t]he contractor shall not furnish quantities in excess of the specified amount without prior written consent from the [CO]." Exhibit 2 at 23. Additionally, "[u]nder no circumstances will any oral statements made be binding upon the Government unless such statements or agreements are issued in writing by the [CO]." *Id*. at 24. Section G.1 of the contract stated that the "[CO] is the only person authorized to make or approve any changes in any of the requirements of this contract." *Id*. at 29. "In the event that the contractor makes any changes at the direction of any person other than the [CO], the change will be considered to have been made without authority and no adjustment will be made in the contract terms and conditions, including price." *Id*. Section G.2 of the contract provided for the appointment of the CO's representative (COR), who was responsible for the technical aspects of the contract and served as a liaison with the contractor. *Id*. The COR, however, was "not authorized to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, terms or conditions." *Id*. The contract incorporated by reference Federal Acquisition Regulation (FAR) clauses: Disputes Alternate I (DEC 1991), 48 CFR 52.233-1 (2022) (FAR 52.233-1); Differing Site Conditions (APR 1984), FAR 52.236-2; Site Investigation and Conditions Affecting the Work (APR 1984), FAR 52.236-3; Changes (JUN 2007), FAR 52.243-4; and Termination for Convenience of the Government (Fixed-Price) Alternate I (SEP 1996), FAR 52.249-2. *Id*. at 42.

4. Section 01270 of the contract, price and payment, provided the following:

> Well Drilling for 12-inch Casing
>
> . . . .
>
> Basis for Payment: Payment shall be full compensation for drilling, sampling, well log, and all other necessary items required for well drilling. No payment will be made for any quantity deeper than authorized by the Project Engineer.

Exhibit 2 at 58.[4] With regard to twelve-inch well casing, that section provided that "[n]o payment shall be made for large diameter surface casing used as temporary construction aid." *Id*. That section also provided for "[p]ayment . . . in connection with installation of the temporary well cap and disinfection." *Id*. at 62.

5. Section 02520 of the contract, community well drilling, provided that "[t]he Government shall provide hydrogeological services to observe well drilling operation, collect aquifer samples for grain size distribution analysis, design the well screen size and length, observe completion and development, and oversee the final pumping test." Exhibit 2 at 81. Part 3 of that section provided that "[e]xpected final yield of 100 gallons per minute is being sought, however, the well should always be developed to its maximum yield." *Id*. at 86. That part also instructed the contractor to "[d]rill wells no deeper than the depth specified, unless approved by the Project Engineer." *Id*. Additionally, "[a] well screen shall be installed if the aquifer encountered is an unconsolidated sand or gravel formation, and the contractor is so directed by the Project Engineer." *Id*. at 88.

6. Section 02520 of the contract also set forth requirements for disinfection and chemical and bacteriological analysis of the wells. Exhibit 2 at 93-94. Additionally, that section required installation of a "temporary lid with [two-inch] capped sampling port to the top of casing." *Id*. at 94. If a well was not accepted, it would be decommissioned, and the contractor would be reimbursed if not at fault. *Id*. at 95-96.

Contract Performance

7. On September 29, 2022, Geotech met with IHS for a post-award conference (conference) at which the CO, contract specialist (CS), and COR were introduced, but the issuance of a NTP was deferred until a later date. Exhibit 9 at 295-96. The conference agenda stated that "[t]he CO is the only person with authority to authorize any change to the price, terms, and/or conditions of the contract." *Id*. at 295. Additionally, the conference agenda stated that the "COR handles the day to day and technical matters, inspection, and acceptance." *Id*. at 296. The COR also had the title "senior environmental engineer." *Id*. at 295. Representatives of Tetra Tech, an IHS contractor,[5] were also present at the

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[4] HHS referenced that same section of the contract in its statement of undisputed material facts and acknowledged that "[t]he term 'Project Engineer' is interchangeable with 'Contracting Officer's Representative.'" SUMF ¶ 29 n.2. The Board, accordingly, deems references in the record to either the COR or project engineer (PE) to mean the same person.

[5] HHS stated in its motion that Tetra Tech was Geotech's subcontractor. Respondent's Motion for Summary Judgment at 3 (citing SUMF ¶ 61). HHS repeated the

conference. *Id*. at 296. By letter dated January 13, 2023, IHS issued to Geotech a NTP with an effective date of January 23, 2023. Exhibit 11 at 303.

8. On April 24, 2023, Geotech started work at the site. Exhibit 18 at 323. By email that same day, Geotech's PM informed the COR, with a copy to the CS, of work on the first well as follows:

> We started drilling . . . . We needed to install 16-inch steel casing approximately 20 [feet] deep due to the unforeseen geologic condition encountered. Unfortunately, we encountered water at shallow depth of 9 [feet], possibly due to a small stream passing through in the drilling area. We drilled through the 16-inch casing and installed 12-inch casing to a depth of approximately 40 [feet]. . . . We will continue drilling and install 12-inch casing to the target depth of approximately 150 [feet].

Id. Geotech's PM stated that the April 24, 2023, email was a "recap after a phone conversation . . . informing the COR of the subsurface stream encountered during drilling of well #1." PM Affidavit at 14-15. Additionally, Geotech's PM stated that the "COR said to proceed with drilling and asked to email him the cost for the installation of 16-inch steel casing." *Id*. at 15.

9. In an email to the COR, with a copy to the CS, which was dated April 25, 2023, Geotech's PM stated the following:

> As I talked to you, we would like to request for modification for installing 16-inch steel casing. We have encountered water stream at a depth of 9 [feet] as we didn't anticipate water at such shallow depth. The area well logs . . . attached to the [statement of work (SOW)] didn't indicate the water will be encountered at 9 [feet] depth. Due to this unforeseen geologic formation encountered, [we] needed installation of 16-inch steel well casing to drill and

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same contention that Tetra Tech was Geotech's subcontractor elsewhere in its statement of undisputed material facts. SUMF ¶¶ 62, 68-70. However, Geotech's response to HHS' motion for summary judgment stated that Tetra Tech was not Geotech's subcontractor. Appellant's Opposition to Respondent's Motion for Summary Judgment at 11. HHS, in reply, then acknowledged that "[Tetra Tech] was an IHS contractor." Respondent's Reply at 3-4.

> install the 12-inch steel well casing to the target depth of 150 [feet]. This 16-inch steel casing is not used as surface casing or as [a temporary] construction aid.

Exhibit 24 at 379. In response, the COR, with a copy to the CS, advised Geotech's PM in an email, which was dated April 26, 2023, that "[i]t seems that the installation of the 16[-inch] casing to the depth of 20-feet should be covered by the contract." *Id*. at 378. The COR added "[i]f the 16[-inch] casing needs to remain in place due to the geologic conditions encountered in order to protect the well from groundwater intrusion, then there may be a possibility of a modification to pay for the casing drive shoe material costs." *Id*. Geotech's PM explained that "[t]he 16-inch steel casing was not a temporary construction aid. It was needed to hold [off] water from the unforeseen subsurface stream." PM Affidavit at 20.

10. In an email dated April 27, 2023, the project hydrologist for Tetra Tech advised IHS and Geotech personnel, including the COR and the CS, of the following:

> The current drilled depth is approximately 127 [feet] below measuring point (bmp) (conductor casing with approximately 18[-inch] stick up). The formation so far consists of silts and clays, with a clay-cemented sandy gravel layer from approximately 50-80 feet bmp. Thus far, the lithology doesn't appear to produce much water, though all intervals are saturated. The silts have a high dilatancy and have started to heave into the hole a bit, requiring the driller to push casing ahead of the cutting shoe and load the hole with water.
>
> Tomorrow the crew should reach the proposed TD of 140 feet and will hopefully encounter some coarser lithologies that will allow us to continue open-hole to 145 or 150 [feet].

Exhibit 20 at 326-27. In response to Tetra Tech, the COR's April 28, 2023, email stated the following:

> The well drilling contract has provisions [for] 280-feet of 12-inch casing and 80-feet of 8-inch casing. It was anticipated we may need to drop to an 8-inch boring if the[re] was refusal of the advancement of the 12-inch.
>
> The diameter of the screen assembly was not specified for the same reason, so there is some flexibility built into the contract for the final well design.

> So recommendations to proceed with these parameters would be already under the contract.

Id. at 325-26. Geotech responded to the COR in a May 1, 2023, email that stated the following:

> According to the project specifications "The completed well shall be of single cased construction". If you would like to change the well design to dual well casing construction, we can give you the cost for that. The dual well casing design will be higher cost than doing the 12-inch single case to approximately 160 [feet] in very silty sticky clay formation. If you want to advance 8-inch casing, we would have to do it from surface and down to target depth of 160 [feet] and the cost will be higher. Please let me know at the earliest as we are on standby.

Id. at 325.

11. By an email dated May 1, 2023, Geotech advised the COR, with a copy to the CS, of the following:

> We have drilled to a total depth of 141 [feet], we see some gravel/water. If this geologic formation stays for a least 20 [feet,] we can anticipate [a] good amount of water. If we can get [the CS'] verbal approval to go ahead and drill deeper that will work. Our drilling cost for deeper than 150 [feet] for this large diameter well will be [$]1,239/[foot]. We need an additional approximately 10 [feet] of drilling. Installation costs for approximately 20 [feet] of larger diameter 12-inch well casing for deeper than 140 [feet] is $495/[foot].

Exhibit 21 at 331. In an email that same day, the CS repeated Geotech's email text and inserted his answer for each of the following:

> 1. We have drilled to a total depth of 141 [feet], we see some gravel/water. If this geologic formation stays for a least 20 [feet,] we can anticipate [a] good amount of water. If we can get [the CS'] verbal approval to go ahead and drill deeper that will work. Our drilling cost for deeper than 150 [feet] for this large diameter well will be [$]1,239/[foot].
>
> a. **Answer:** The contract price for [contract line item number (CLIN)] 2 is $310 for an estimated 300 [feet].

> 2. We need an additional approximately 10 [feet] of drilling. Installation costs for approximately 20 [feet] of larger diameter 12-inch well casing for deeper than 140 [feet] is $495/[foot]. Additional shipping/handling/mobilization costs will be $3,800.
>
> a. **Answer**: The contract price for CLIN 3 is $166.00 for an estimated 280 [feet] adding that to the price of CLIN 2, we are talking **$476 per [foot].**
>
> 3. We need at least one week to drill to a depth of 160 [feet] due to the unforeseen conditions as drilling is going very slow. Casing advancement in the sticky silty hard clay formation will be extremely difficult. Please let me know today as soon as possible as we are just on standby until I get [the CS'] verbal approval.
>
> a. **Answer:** The site conditions are as they were [to] be expected as described in page four of Attachment 2.

Id. at 330 (emphasis in original). The CS indicated a willingness for further discussion and ended the email by saying "[p]lease continue performing." *Id*. In another email dated May 1, 2023, Geotech advised the CS that it had left a voice message and text and asked for "a good time to reach you." Exhibit 25 at 381. In response, the CS stated in a May 2, 2023, email: "Continue performing. The contract has remedies for dealing with th[is] type of disagreement." *Id*. Geotech's PM understood that "'[c]ontinue performing' on May 2, 2023, is clear written authorization by [the] CO to proceed with drilling operations beyond 141 feet and CO does not direct Geotech to stop drilling at a particular depth." PM Affidavit at 17.

12. In an email dated May 9, 2023, Geotech submitted to the CO a request for a contract modification for the additional cost of the sixteen-inch well casing, which totaled $18,800. Exhibit 26 at 382. Additionally, Geotech sought the cost of drilling ten more feet and installing thirteen feet of twelve-inch casing. *Id*. In response, the CO informed Geotech on May 11, 2023, of receipt of its request for a modification, and "[p]er [the CS'] email sent on May 2[,] we are directing you to continue performance." Exhibit 36 at 419.

13. On May 11, 2023, Tetra Tech's project hydrogeologist "recommended that we target 140-150 [feet] with the screened casing." Exhibit 27 at 385. By email that same day, the COR approved "the recommended screen size and length." *Id*. at 384. Geotech's PM represented the following:

> In the email dated May 11, 2023, Exhibit 027-0384, COR said to proceed with the screen size and length, after the recommendation from Tetra Tech (IHS

> contractor) for the screen interval of 140 [feet] to 150 [feet]. Again, this email by COR approves and acknowledges the recommended screen interval. As a result, there needs to be a 10 [foot] steel casing sump according to project design specifications and drawing W-2. The total depth of the well must be 160 [feet]. . . . Tetra Tech is not Geotech's subcontractor, Tetra Tech is a contractor of IHS. Therefore[,] any statements, recommendations, etc. made by Tetra Tech are the total responsibility of the [IHS].

PM Affidavit at 18.

14. By email dated May 17, 2023, Geotech advised the CO, COR, and CS of the work on both the first and second wells:

> We have drilled up to 50 [feet] depth so far and encountered similar geologic formation as Well #1. Unfortunately, at 13 [feet] depth we encountered a water stream at the Well #2 location, an unforeseen and differing site condition. Again, we had to install 16-inch large diameter steel casing and welded on new 16-inch shoe. As before, we need the 16-inch larger diameter casing to keep the large drill hole open and stable so that we can drill and drive the 12-inch well casing. Otherwise, we risk losing the 12-inch well casing into the unstable hole as we try to weld on another section of 12-inch. Once we complete the drilling to the target depth of approximately 160 [feet] depth, we will try to retrieve the 16-inch casing. If we are not able to retrieve it, then we will leave it in the ground. At Well #1, we were able to successfully retrieve the 16-inch casing.

Exhibit 37 at 420. Geotech's PM has represented that the "COR was told during the many conversations that Geotech will move to well #2 since we are waiting for the ordered screen for well #1 to arrive from the supplier." PM Affidavit at 20.

15. On May 19, 2023, the CO denied Geotech's request for equitable adjustment (REA). Exhibit 39 at 423-24. In an email dated May 21, 2023, the COR advised Geotech that "[a]s we are approaching the amount of drilling and casing authorized in the contract, any additional drilling and casing will need to be authorized by the Contracting Officer." Exhibit 50 at 448. In its email dated May 22, 2023, Geotech advised the COR, CS, and CO of the following:

> We have resumed drilling today for well #2[,] and I will keep you updated as I did for well #1. According to the bid schedule and the project well drawing attached, each well is 150 [feet] and [the] total for two wells is 300 [feet].

> Total depth of casing is 140 [feet] for each well and total casing depth for two wells is 280 [feet] and our bid price was accordingly. If the well goes over the estimated or anticipated depth of 150 [feet] at each location, that will be additional cost. Please refer to our conference call notes from April 28th, with [the CS], contracting, and yourself, we were at 140 [feet] depth for well #1[,] and there was no water encountered and we did not have 12-inch casing over the bid quantity at well #1 location. We had shut down the site work and we were on standby waiting for an answer from [the CS], contracting. At the end of our conference call, [the CS], contracting, said "it's lunch time now but we will get back to you with an offer[."] On May 2nd, [the CS] emailed to continue drilling. So, we continued drilling to approximately 160 [feet] and cased 153 [feet]. We gave the additional cost for drilling beyond 150 [feet] depth on May 1st, for one week of additional labor, material, per diem and transportation. Based on the formation of well #1, we may be encountering [a] confining layer silty clay between 160 [feet] to 170 [feet] depth for well #2.

Exhibit 42 at 427-28. In his response that same day, the CS advised Geotech that "[t]here was an apparent misunderstanding about me getting back to you with an offer . . . what I said was that I would get back to you with an answer, and I did." Exhibit 42 at 427.

16. On May 25, 2023, the CS requested that Geotech "provide a proposal for drilling an additional 40 feet on the 2nd well with a full breakdown of labor, material, and other items as needed." Exhibit 44 at 432. On that same day, Geotech responded to the CS and referenced its May 1, 2023, email. *Id*. at 431-32. The CS requested further clarification, and Geotech stated "[t]his is for additional work, 42 [feet] casing and drilling 39 [feet]." *Id*. at 430. On May 31, 2023, the CS advised Geotech of the following:

> This is one more attempt at negotiating a fair and reasonable price.
>
> The Government is considering terminating the contract because the offered prices per foot to continue the work are almost three times what was originally offered and the contract work is not finished. The [NTP] was issued on 01/23/2023 with a [period of performance (POP)] of 120 days, so the [POP] ended 05/22/2023.
>
> The contract required the drilling of two wells, pump test, video survey, and water sampling and testing but, to this date, only one well is finished and Geotech Environmental Services is asking what the Government considers unreasonable prices to finish the other well and proceed to the other unfinished work.

Id. at 430.

17. On June 1, 2023, Geotech sent an email to the CS, with copies to the COR and CO, that stated the following:

> Drilling of well #1 was completed to a depth of 160 [feet] and cased with 12-inch larger diameter well casing to a depth of 153 [feet]. (above the contract specified depth). After sieve analysis was received, we have placed a prepaid special order for well screen, pump assembly for the pump test and procured lab for water analysis. We are waiting to receive the screen to install and complete well #1.
>
> . . . .
>
> Drilling of well #2 is completed to [a] depth of 170 [feet,] which is beyond the contract specified depth of 150 [feet] and large diameter 12-inch well casing was installed to a depth of 167 [feet]. Still, we have silty/hard clay and no water has been encountered.
>
> . . . .
>
> If it takes one additional week for drilling deeper each of the large diameter wells, we can't have the same unit cost because of additional two week per diem costs, fuel costs for drilling rig and other supporting equipment, and transportation of additional [miscellaneous] material. These costs are included in line item 1 of our original bid. . . . To accommodate these costs, each well site is [an] additional $13,448, [these are] fair and reasonable costs for [an] additional one week.
>
> We have performed work at both wells very professionally and diligently even though there [was a] change in scope of work and we have encountered unforeseen conditions. Government is aware there were no test wells done before drilling these large diameter high-capacity wells as it is always done. The test wells are then converted to the large diameter wells. This way[,] formation, drilling depth and yield is known for the large diameter wells and the wells are planned and designed.

Exhibit 45 at 434-35. Geotech claimed costs for an additional thirty feet of drilling a large diameter hole for twelve-inch casing, $22,500, an additional forty-two feet of twelve-inch

casing, $14,868, and costs for transportation of materials, $5800. *Id*. at 435. In response, the CS informed Geotech of the following:

> The additional work was not authorized. Reference the email trail below where the COR wrote on 05/21/2023:
>
> *"As we are approaching the amount of drilling and casing authorized in the contract, any additional drilling and casing will need to be authorized by the Contracting Officer."*
>
> Reference the attached email trail. We are engaged in negotiations because you have insisted on raising the prices on a competed contract. I look forward to your updated offer no later than 10:00 AM today.

Id. at 435. Geotech's PM stated that the "email [was] vague and does not say stop drilling. The CO is copied on this email and does not respond or give direction, [the] CO stays silent." PM Affidavit at 23.

18. An email dated June 6, 2023, from Geotech to the CS, with copies to the COR and CO, stated the following:

> As I talk to you today, we are still waiting for CO/COR decision on whether to continue drilling. We have drilled deeper than the contract specified depth and no water was encountered and it's a dry hole at the depth of 170 [feet]. We have been idle and on standby since May 26th. As we were approaching the amount of drilling and casing authorized in the contract, I emailed on May 22nd requesting a decision whether to drill further, but have not received a decision or a solution as of yet. Our equipment/crew is idle and on standby.

Exhibit 56 at 465. In response, the CS requested in a June 7, 2023, email that Geotech provide its offer to "cap well #2 at the current depth and continue with the remaining scope on well #1." *Id.* The CS added that the Government would either "extend the period of performance or [pursue] a termination." *Id*. Geotech's PM then represented the following:

> Well #2 was drilled and the hole was dry at the depth of 170 [feet]. [The] COR sent a vague email on Sunday night, May 21, 2023, at 7:41 pm, but did not specify a direction or resolution for the contractor and did not say stop drilling at [a] particular depth, Exhibit 050-0448. On Monday night, May 22, 2023, Geotech emailed the COR/CO/CS updating the progress and asking for

> a decision whether to continue drilling. COR/CO/CS emailed on May 23, 2023, saying IHS procurement team will meet and discuss a course of action.

PM Affidavit at 13.

19. On June 5, 2023, the COR advised the CS that "IHS did drill a well in the Tsoo-Yess watershed (near the site of the current well drilling) to a depth of 250 feet. No water was encountered in the 110-250 zone." Exhibit 65 at 496. The COR advised against further drilling with the second well. *Id*. In an email dated June 8, 2023, to the CS, with copies to the CO and COR, Geotech stated that "[a]s per our conference call yesterday, [the COR] stated he did not want to proceed with drilling deeper well #2 as a nearby well was also a dry hole and he did not want to take the risk." Exhibit 56 at 464. Geotech's PM stated the following:

> Our drill team and equipment were waiting idle on standby until June 9, 2023. After making several phone calls asking [them] to give their decision, the COR, in a telephone conversation on June 8, 2023, revealed that there was another well drilled near well #2 previously and it came out dry at a depth of 250 [feet]. This is a crucial piece of site information that was concealed and omitted from the project specifications. Hence, the COR did not want to move forward with drilling well #2 further.

PM Affidavit at 13.

20. On June 9, 2023, the CS informed Geotech that "[t]he Government is processing the contract termination paperwork per [FAR] 52.249-2; stop all further work on this contract." Exhibit 57 at 468. By email that same day, Geotech advised the CS that "we have already capped well #1 for safety." *Id*. at 467. Additionally, Geotech advised the CS that "we will also be capping well #2 for safety." *Id*. The caps on the wells, which were removable, were only a temporary measure, and the permanent plugging and decommissioning of the wells would have involved much more extensive work. PM Affidavit at 9-10. "Geotech did not permanently plug well #1 or well #2." *Id*. at 24.

21. The CS drafted a memorandum for record (MFR), which was dated August 11, 2023, that summarized the events related to the contract up to that date. Exhibit 65 at 490-98. The MFR stated that on or about June 5, 2023, the CS had requested "input" from the COR and CO regarding the following:

> 1. Stop working on Well #2 and get [Geotech] to finish the other work requirements.

> 2. If the intent is to finish Well #2 and contract with a different firm, the Government could agree to pay for the unauthorized work at the established contract price of $476 per foot since there would be a benefit to the Government; otherwise pay for the authorized work only.
>
> 3. Contract with a different firm to finish Well #2 (this might be a simplified acquisition.)
>
> 4. Contract with a different firm to finish Well #2 and to also finish the other work requirements.
>
> 5. Some other solution.

Id. at 496. The CS noted that the COR had previously represented the following:

> 06/05/2023, The COR replied:
>
> "IHS did drill a well in the Tsoo-Yess watershed (near the site of the current well drilling) to a depth of 250 feet. No water was encountered in the 110-250 zone, so I do not recommend continued well drilling on well #2. I recommend capping well #2 at the current depth and continue with the remaining scope on well #1."

Id. In the analysis section of the MFR, the CS noted that "[t]he bulk of the work is already done but [Geotech's] insistence in asking for additional fees and higher prices places undue risk to the Government." *Id*. at 498.

22. On August 11, 2023, the CS forwarded to Geotech contract modification P00001 (modification) that terminated the contract for convenience. Exhibits 66 at 501, 67 at 502. The modification referenced the CO's June 9, 2023, direction to Geotech to stop all further work on the contract. Exhibit 67 at 503. Additionally, the modification directed Geotech to submit its termination settlement proposal (TSP) within one year of the date of the modification. *Id*.

23. On September 26, 2023, Geotech submitted its TSP, which requested a total payment in the amount of $137,464. Exhibit 69 at 518. Geotech included in that amount its unpaid invoiced costs, $81,937; its REA, $37,600; and settlement expenses, $18,467. *Id*. at 508. The unpaid invoiced costs included an additional thirty feet of drilling and forty-two feet of twelve-inch casing along with related expenses. *Id*. at 527. The REA included the costs of installing and retrieving sixteen-inch casing at both wells. *Id*. at 533. On January

10, 2024, the CO issued unilateral contract modification P00002 that partially settled Geotech's TSP in the amount of $16,143.18. Exhibits 75 at 574, 76 at 577. That amount consisted of: "wind down" costs, $9860; fee for compiling the TSP, $3676.18; and settlement expense, $2607. Exhibit 102 at 889. On January 19, 2024, Geotech filed its first appeal with the Board, which was docketed on January 22, 2023, and shortly thereafter dismissed without prejudice at the request of the parties. *Geotech Environmental Services, Inc. v. Department of Health & Human Services*, CBCA 7998, 2024 WL 378648 (Jan. 30, 2024).

24. On March 14, 2024, Geotech submitted to the CO its "amended termination claim for equitable adjustment" (claim) in the amount of $123,281. Exhibit 109 at 910. Geotech's claim consisted of the following cost items: equitable adjustments, $97,346; legal expenses for settlement, $7884; and costs to be paid by invoice, $18,051. *Id*. The equitable adjustments included: additional mobilization and demobilization, $9724; sixteen-inch casing, $37,600; additional drilling, $9300; additional twelve-inch casing, $6972; and additional standby, $33,750. *Id*. at 911-13. Finally, Geotech claimed the costs of unpaid contract work that included: mechanical well development, $1800; authorized rig work, $3520; authorized stand by shop time, $3680; test pumping, $2400; water analysis, $4251; and temporary well cap, $2400. *Id*. at 914.

25. On March 15, 2024, the CO requested that Geotech provide "all invoices, receipts, emails, and payment records from Geotech's standard record keeping system that Geotech would like considered for the final decision on its claim." Exhibit 110 at 941. By email dated March 25, 2024, Geotech forwarded additional information in support of its claim as requested by the CO. Exhibits 111, 112. In its March 25, 2024, letter to the CO, Geotech's counsel explained that Geotech had "provided a revised TSP requesting compensation for costs expended by Geotech, but were not recovered in the original settlement for solely termination costs." Exhibit 112 at 944. The counsel's letter also noted that "[w]hile it is a termination claim, the ultimate purpose is for the parties to continue[] with negotiations." *Id*. at 946. Geotech provided invoices for legal fees for services rendered on various dates from February 1 to March 15, 2024. *Id*. at 951-60. Additionally, Geotech provided supporting documents for its equitable adjustment and the cost of its unpaid work. *Id*. at 961-77.

26. The CO's final decision (COFD), which was dated May 10, 2024, denied Geotech's claim for its additional costs related to the termination for convenience. Exhibit 1 at 10-12. The COFD rejected Geotech's contention that the contract specifications were defective or that Geotech encountered a differing site condition. *Id*. Regarding legal fees, the COFD denied those costs because Geotech had submitted a certified claim, and those costs were in dispute. *Id*. at 12. Finally, the COFD denied Geotech's claim for the cost of work performed before contract termination, which totaled $18,051. *Id*. The COFD stated

that IHS had directed Geotech to perform no additional work after June 9, 2025, but Geotech "capped" the wells contrary to that direction. *Id*. The Board subsequently docketed Geotech's appeal, and HHS filed its motion for summary judgment.

Discussion

At issue is whether HHS has shown grounds for summary judgment with regard to all or part of Geotech's claim. The Board's authority is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018). In ruling upon a motion for summary judgment, the Board recognizes the following:

> Summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*. It is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id*. at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id*. at 255.
>
> The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "'[A]llegations without support are not evidence.'" *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845).

Optimum Services, Inc. v. Department of Interior, CBCA 4968, 19-1 BCA ¶ 37,383, at 181,734, *aff'd mem.*, *Optimum Services, Inc. v. Secretary of the Interior*, 829 F. App'x. 527 (Fed. Cir. 2020). "It is well established that a tribunal should deny summary judgment until the facts have sufficiently developed to enable it to reasonably apply the law." *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821, at 167,404 (quoting *GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306).

Both parties have filed lengthy submissions and responses. HHS' motion addresses, as an initial matter, whether Geotech has properly claimed allowable costs with regard to the termination for convenience. HHS then addresses the three parts of Geotech's claim:

equitable adjustments; legal fees related to the TSP; and uncompensated contract work. The Board discusses, in turn, those parts of HHS' motion.

1. Allowable Costs in a Termination for Convenience

HHS argues in its motion that Geotech incorrectly alleges that it "is entitled to all of its allowable costs, even when the costs do not comply in all respects to the contract requirements." Respondent's Motion for Summary Judgment at 10 (quoting Amended Complaint at ¶ 14(a)). Consequently, HHS contends that a contractor "may recover its actual and allowable costs of work prior to the termination, limited to the total contract price, plus settlement costs." *Id*. (quoting *CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,947) (emphasis omitted). HHS further asserts that "[t]he 'fair compensation concept' still requires the Contractor to prove 'entitlement, causation, and quantum with regard to claims.'" *Id*. (quoting *CTA I*, 22-1 BCA at 184,948). HHS contends that "Geotech has not proven 'entitlement, causation, and quantum' under the terms and conditions of the Contract." *Id*. at 11. Additionally, HHS argues that "[p]ermitting Geotech to recover costs that would otherwise be unallowable under the terms and conditions of the Contract simply because the Contract was terminated for convenience would render the Contract's express terms and conditions meaningless." *Id*. at 12. Appellant, in response, argues that "[e]quitable adjustments claims normally are merged into the pricing provisions of the termination for convenience clause, and determining specific costs attributable to such claims is superfluous, unless a 'loss contract' is [alleged or an increase in contract price is] sought." Appellant's Opposition to Respondent's Motion for Summary Judgment at 2 (quoting *Durette, GmbH*, ASBCA 34072, 91-2 BCA ¶ 23,756, at 118,972).

All of the costs claimed by Geotech in its TSP are properly before the Board in this appeal. A termination for convenience "effectively converts . . . [a] fixed-price contract into a cost reimbursement contract for work . . . performed before termination." *Williams Building Co. v. Department of State*, CBCA 6650, et al., 23-BCA ¶ 38,328, at 186,122, *aff'd, Williams Building Co. v. Secretary of State*, No. 2023-2337, 2025 WL 2057994 (Fed. Cir. July 23, 2025). The Board has recognized the following:

> When a contractor submits a termination settlement proposal, it is for the purpose of negotiation, not for a contracting officer's decision. A settlement proposal is just that: a proposal.
>
> . . . .
>
> Once negotiations reached an impasse, the proposal, by the terms of the FAR and contract, was submitted[,] it became a claim. In other words, in

> accordance with the contract's prescribed method of compensating [the contractor] for a convenience termination, a request that the contracting officer issue a decision in the event the parties were unable to agree on a settlement was implicit in [the contractor's] proposal.

ePlus Technology, Inc. v. Federal Communications Commission, CBCA 2573, 12-2 BCA ¶ 35,114, at 172,435 (quoting *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1543-44 (Fed. Cir. 1996)). Additionally, the Board in *ePlus* noted that it found "no applicable precedent prohibiting a contractor from presenting its termination for convenience settlement proposal and at the same time fashioning the proposal as a CDA claim." *Id*. at 172,435.

HHS errs in suggesting that the Board cannot hear an appeal regarding Geotech's TSP because it includes claims for the cost of additional drilling and casing that exceeded the quantities set forth in the contract. Although the Board dismissed Geotech's first appeal, Geotech then submitted its revised TSP and claim for additional costs to the CO for a COFD, which has been appealed to the Board. Findings 22, 23, 24. The additional costs that Geotech claims are properly before the Board. In the event of a hearing of this appeal, the Board would hold Geotech "to the usual burdens of proof of entitlement, causation, and quantum with regard to claims that, if granted, would increase the price." *CTA I, LLC*, 22-1 BCA at 184,948.

2. Equitable Adjustments

A. Sixteen-Inch Casing

HHS contends that installation of the sixteen-inch casing was performed without notice to IHS or written authorization, and Geotech is not entitled to recover the costs of that work or related site costs, which include mobilization, demobilization, and standby. Respondent's Motion for Summary Judgment at 13-17. With regard to Geotech's claim that it encountered a differing site condition (DSC) that necessitated the sixteen-inch casing, HHS argues that Geotech failed to give notice of the existence of the DSC, which were the subsurface streams. *Id*. at 16. Geotech, in response, contended that it "informed the COR that [the sixteen-inch] casing was not a construction aid nor was it used to prevent contaminants. It was necessary to hold off the unexpected subsurface stream filling up the drill hole." Appellant's Opposition to Respondent's Motion for Summary Judgment at 12 (citing PM Affidavit at 9) (emphasis omitted). HHS, however, argues that Geotech cannot show that such subsurface streams were a DSC. Respondent's Reply at 34-38. Geotech responded that the contract included "two drilling well logs . . . with depths of 133 [feet] and 140 [feet]." Appellant's Surresponse at 9. Additionally, Geotech argues that "[t]he reason

why these two geological drilling well logs to the project specifications [were] attached was to indicate to the potential contractor the lithology and geological/hydrogeological information of the site that would be encountered." *Id*. at 9-10.

At issue is whether HHS has established as an undisputed material fact that Geotech failed to give the CO notice of a DSC as required under the terms of the contract. The contract's DSC clause stated the following:

> The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of
>
> (1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or
>
> (2) Unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

FAR 52.236-2(a). The first subparagraph of that clause defines a type one DSC, and the second paragraph defines a type two DSC. *See Balfour Beatty Construction, LLC v. General Services Administration*, CBCA 6750, 23-1 BCA ¶ 38,380, at 186,473-74, *aff'd in part, vacated in part*, *Balfour Beatty Construction, LLC v. Administrator of the General Services Administration*, No. 2023-2229, 2025 WL 798865 (Mar. 13, 2025).

Although FAR 52.236-2 requires that a contractor give the CO written notice of either a type one or type two DSC, a contractor's claim regarding a differing site condition is not necessarily barred because of a lack of such written notice. "[A]ctual notice is sufficient and can be imputed to the Contracting Officer, where Government contracting officials are aware or should be aware of the facts giving rise to a claim." *Eichberger Enterprises, Inc.*, VABCA 3923, 95-2 BCA ¶ 27,693, at 138,070. "We will not enforce the technicalities of the notice provisions unless the Government can show that its position was prejudiced by the lack of formal notice." *Id*.

The Board's finding that the CO never received written notice of a DSC, as an undisputed material fact, requires addressing not only the CO's actual knowledge but also, whether the COR's or CS' knowledge can be imputed to the CO. For both wells, Geotech notified both the COR and CS of the subsurface streams and its proposed installation of sixteen-inch casing. Findings 8, 9, 14. Upon receiving notice of the need for sixteen-inch casing for the first well, the COR advised Geotech to "proceed" and requested that Geotech

send an email regarding the cost. Finding 8. The CS indicated in an April 26, 2023, email to Geotech that the sixteen-inch casing "should be covered by the contract." Finding 9. The Board finds that a material issue of fact exists as to whether knowledge of those communications between Geotech and the COR and CS regarding subsurface streams and the use of sixteen-inch casing can be imputed to the CO.

HHS argues, however, that "[u]nder the express terms and conditions of the Contract, failure to comply with the notice and written authorization requirements . . . bars an equitable adjustment on the basis of differing site conditions." Respondent's Motion for Summary Judgment at 16. Even when a contractor performs unauthorized work, the Board has recognized the following:

> [I]n cases in which a Government official, though lacking in authority, enters into an agreement with a contractor to provide something of value that the Government needs and receives as a benefit, and either an authorized CO knew or should have known about it . . . or the non-authorized Government official who entered the agreement was a senior or high level official . . . then the Government is liable to compensate the contractor.

Americom Government Services, Inc. v. General Services Administration, CBCA 2294, 16-1 BCA ¶ 36,320, at 177,080 (quoting *Healthcare Practice Enhancement Network, Inc.*, VABCA 5864, 01-1 BCA ¶ 31,383, at 154,987). Geotech has stated that the sixteen-inch casing was necessary as a temporary construction aid. Finding 9. Accordingly, there is a material issue of fact as to whether the installation of the sixteen-inch casing was something of value that benefitted the Government to the extent that drilling could not be accomplished without it.

HHS also contends that "Geotech cannot establish that there was either a Type I or Type II differing site condition." Respondent's Motion for Summary Judgment at 28. As discussed above, in ruling on HHS' motion, the Board cannot weigh evidence, and all "justifiable inferences and presumptions" must be resolved in Geotech's favor. *Optimum*, 19-1 BCA at 181,734. In response to Geotech's contention that it "encountered 'water . . . at shallow depth[,]'" HHS contends that Geotech "has not pointed to anything in the Contract that specifies what conditions Geotech would encounter." Respondent's Motion for Summary Judgment at 31. Geotech, however, argues that "[HHS] has failed to provide any evidence . . . 1) as to how Geotech should have known that the streams existed, giv[en] the documentation that was provided and/or 2) that this sort of occurrence was common." Appellant's Surresponse at 11. The Board finds that a material issue of fact exists as to the existence of either a type one or two DSC. The contract specifications are written in a technical language that requires an explanation from those knowledgeable in that area of

expertise, and the Board has nothing more than the conflicting allegations of the parties as to whether the presence of subsurface streams was a condition that a contractor could reasonably encounter based upon either the contract or knowledge of the site. At this stage of the proceedings, the Board is unable to find that Geotech cannot show the existence of either a type one or two DSC. *JITA Contracting, Inc. v. Department of Transportation*, CBCA 7269, et al., 25-1 BCA ¶ 38,778, at 188,501 ("[S]ummary judgment is inappropriate if the factual record is insufficient to allow [us] to determine the salient legal issues.").

B. Additional Drilling for Wells One and Two

HHS contends that "Geotech proceeded with extra-contractual drilling without written authorization from the Contracting Officer and therefore performed extra-contractual work at [its] risk." Respondent's Motion for Summary Judgment at 18. Geotech has alleged the following:

> The 150 [feet] drilling estimate was included as a Line Item in the Solicitation/Contract and was relied on by Appellant in its pricing. However, water was not discovered at 150 [feet] at either well site. With IHS's approval, Geotech drilled approximately an additional 10 feet at Well #1 before water was reached and drilled approximately an additional 20 feet at Well #2, with no water being reached. As a result of the IHS's faulty estimate/documentation, Geotech drilled a total additional, [extra-contractual] amount of 30 [feet] for which it has the right to be fully compensated.

Amended Complaint ¶ 12.b. In response, HHS argues that any direction for Geotech to continue contract performance did not include exceeding contract requirements. Respondent's Reply at 17. However, Geotech contends that the contract provided for the PE to direct installation of well screen and approve drilling beyond specified depth, and "these changes were not part of the contract requirements but were approved by the COR and performed by Geotech and for which they had the right to be fully compensated." Appellant's Surresponse at 14.

A material issue of fact exists as to whether Geotech was directed by IHS in accordance with the terms of the contract to drill both wells in excess of the specified depth. HHS is correct that the contract does require the CO to approve in writing "quantities in excess of the specified amount." Finding 3. However, section 02520 of the contract stated that the contractor was to drill no deeper than the depth specified unless "approved by the Project Engineer." Finding 5. That section also provided that the contractor was required to install screen, under certain circumstances, at the direction of the PE. *Id*. HHS has represented that the project engineer and the COR were the same person. Finding 4, n.4.

The contract does not, as HHS suggests, give the CO exclusive control over the depth of drilling or the installation of screens, and there is an issue of fact as to whether the COR, who was also the PE, directed Geotech to perform additional drilling beyond the depth specified for the two wells.

With regard to well number one, the record shows that Geotech advised the COR in a May 1, 2023, email that it would be drilling to a depth greater than 150 feet. Finding 11. The CS directed Geotech to keep performing in a May 2, 2023, email. *Id*. In a May 9, 2023, email to the CO, Geotech sought a contract modification for the additional ten feet of drilling, and the CO reiterated the CS' previous direction "to continue performance." Finding 12. Geotech, consequently, made the COR, CS, and CO aware of the need for additional drilling, and the CS and CO told Geotech to continue performance. *Id*. Although HHS argues that the Board should find that the direction to continue performance did not include additional drilling beyond the specified depth of 150 feet, the meaning of the CS' direction "to continue performance" is, apparently, subject to conflicting interpretations. In ruling on a summary judgment motion, the Board cannot weigh evidence to determine the intent of the CS and Geotech's understanding of such direction. *See, e.g.*, *JITA Contracting*, 25-1 BCA at 188,501.

Additionally, Geotech has argued that drilling well number one an extra ten feet was necessary for the operation of the well. Geotech's PM has explained that drilling the first well required an additional ten feet of steel casing stump to a total depth of 160 feet in order to meet contract requirements, and such work was performed at the recommendation of Tetra Tech, an IHS contractor. Finding 13. As stated above, resolving such an allegation would require further development of the facts in this appeal, and summary judgment would not be appropriate. *See Navigant SatoTravel*, 08-1 BCA at 167,404.

With regard to well number two, the Board finds an issue of material fact as to whether Geotech received direction from either the COR or CO to drill beyond 150 feet. By May 17, 2023, Geotech advised the CO, CS, and COR that work on well number two had begun. Finding 14. The COR advised Geotech in a May 21, 2023, email that "any additional drilling or casing will need to be authorized by the contracting officer." Finding 15. Geotech's PM stated in his affidavit that the COR's May 21, 2023, email was vague and did not state whether Geotech should stop drilling. Finding 18. The PM also indicated that no decision was reached as of May 22 or 23. *Id*. On May 25, 2023, the CS requested that Geotech provide a proposal for an additional forty feet of drilling. Finding 16. However, Geotech stopped work as of May 26, 2023. Finding 18. The COR's June 6, 2023, email to the CS is the first indication that a previous attempt to drill another well near well number two had failed after drilling to a depth of 250 feet. Finding 19. The COR recommended against further drilling. *Id*. IHS ordered Geotech to stop work on June 9, 2023. Finding 20.

The Board finds that the record shows an issue of material fact as to whether IHS directed Geotech to drill well number two in excess of 150 feet, and the absence of a specific written direction by the CO does not necessarily preclude recovery. As discussed above, the Board has recognized that the Government may still be liable to a contractor where such formality is lacking. *Americom Government Services*, 16-1 BCA at 177,080. The record shows that IHS was willing to negotiate an additional forty feet of drilling, and IHS only directed Geotech to stop work after the COR determined that further drilling might be unsuccessful in light of an earlier failed attempt to drill a well at a nearby location. Findings 19, 21. Although HHS argues that Geotech continued drilling without authorization from the CO, the record shows that the CO, COR, and CS were aware of Geotech's continued work at the site. The issue of whether Geotech had such authorization to continue drilling in excess of the specified depth of 150 feet can only be resolved with a fully developed record. *See Navigant SatoTravel*, 08-1 BCA at 167,404.

The Board, accordingly, denies HHS' motion for summary judgment as it applies to Geotech's claim for the costs of sixteen-inch casing and the additional thirty feet of drilling for the two wells. Geotech has also alleged that "extra-contractual work was done because of the Respondent's actions and inactions, such as withholding superior knowledge, failing to cooperate with the Appellant, and a basic lack of an understanding of the technical requirements of the project." Appellant's Opposition to Respondent's Motion for Summary Judgment at 3. HHS suggests, generally, that such allegations are unsupported. Respondent's Reply at 1-2. The record is not fully developed to the extent that the Board can address Geotech's allegations. Although HHS suggests that Geotech's allegations are without support in the record, the Board cannot make such a finding. Finally, this appeal presents technical issues related to the adequacy of the specifications and site conditions, and the Board cannot make such findings without a thoroughly developed record. *See Navigant SatoTravel*, 08-1 BCA at 167,404.

3. Legal Fees.

Geotech seeks "attorney fees incurred in compiling the revised termination proposal/claim for purposes of settlement in the amount of $7,884.00" Amended Complaint ¶ 12.f. HHS contends that Geotech's claim for settlement expenses includes legal fees for pursuing a CDA claim and such a claim is not reimbursable. Respondent's Motion for Summary Judgment at 35-36. Additionally, HHS notes that "Geotech began incurring these fees . . . on February 2, 2024, after the Board dismissed Geotech's premature appeal." *Id.* at 37. Geotech, citing *Acme Process Equipment Co. v. United States*, 347 F.2d 538 (Ct. Cl. 1965), *rev'd*, 385 U.S. 138 (1966), argues that "[i]t has been held that settlement negotiations can continue after the appeal and the costs are legitimately expended in settlement negotiations." Appellant's Opposition to Respondent's Motion for Summary Judgment at

23-24. Additionally, Geotech represents that after receipt of the COFD, "there [were] numerous correspondence between the attorneys, including offers and counteroffers being made[,] . . . [and] negotiations were ongoing up to the date of the Notice of Appeal." *Id*. at 24. In its reply, HHS contends that "Geotech made clear that negotiations . . . were over on January 22, 2024." Respondent's Reply at 42.

At issue is whether, as a matter of undisputed material fact, after Geotech filed its first appeal or the Board dismissed that appeal, Geotech incurred legal expenses only for the purpose of prosecuting its claim. The FAR provides that a contract termination allows a contractor to recover "[s]ettlement expenses, including . . . [a]ccounting, legal, clerical and similar costs reasonably necessary for–[t]he preparation and presentation, including supporting data, of settlement claims to the contracting officer." FAR 31.205-42(g). The General Services Board of Contract Appeals (GSBCA) recognized that when "evaluating whether attorney fees incurred are allowable under a termination for convenience settlement, 'it is the nature and form of the legal activities, rather than when costs for legal services were incurred, which provide the proper focus of inquiry.'" *Richerson Construction, Inc. v. General Services Administration*, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,713 (1992) (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1305 (Ct. Cl. 1976)), *reconsideration granted and decision modified on other grounds*, 93-3 BCA ¶ 26,206. Additionally, the GSBCA noted the following:

> [T]he dividing line has been drawn between (1) all settlement costs and (2) "legal . . . services and related expenses incurred by a prime contractor . . . in any formal appeal." The contract and regulations do not say that all legal services rendered subsequent to the filing of an appeal are to be disallowed *ipso facto*, for purely chronological reasons. Instead, an attorney's services are allowable costs to the extent they consist of settlement negotiations with the contracting officer, in contrast to activities bearing directly on the appeal proceedings (such as preparation and filing of pleadings and briefs).

Id. (quoting *Acme Process Equipment*, 347 F.2d at 545). In its reconsideration, the GSBCA noted that "[t]iming is not the critical factor." 93-3 BCA at 130,439.

The Board cannot determine on the basis of the date of Geotech's first appeal or its dismissal that the legal expenses it subsequently incurred were only for the purpose of prosecuting its claim. Instead, the Board would have to inquire into whether negotiations were taking place as Geotech prepared and submitted additional documents to the CO. After submitting its claim on March 14, 2024, Geotech provided additional information the next day at the CO's request. Finding 25. In support of its claim, Geotech has represented that it was still in negotiations. HHS argues, however, that Geotech had stopped negotiations

after its first appeal with the Board. As discussed above, the filing of an appeal, by itself, is not sufficient to determine that a contractor has ceased negotiations with a CO. The present record does not enable the Board to make such a determination, and further development of the record will be necessary to resolve this issue. *See Navigant SatoTravel*, 08-1 BCA at 167,404.

HHS suggests in its reply that Geotech's reliance upon *Acme Process Equipment* is misplaced because "the ACME case was decided before the CDA was enacted in 1978, [and] the Court of Claims' holding in ACME is inapposite to the Federal Circuit's holding in *Bill Strong Enterprises*[*, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995)], which the Board has applied in recent caselaw." Respondent's Reply at 42 (citing *Balfour*, 23-1 BCA at 186,478 (quoting *Bill Strong*, 49 F.3d at1550)).[6] The Federal Circuit's decision in *Bill Strong*, however, did not involve a termination for convenience, and the court recognized the following regarding a TSP:

> We note that this holding does not pertain to consulting costs incurred in settlement of claims made when a contract is terminated for convenience of the Government. Such situations are governed by a separate regulation and separate case law, under which such costs are generally allowable. See 48 C.F.R. § 31.205-42(g) (1987); *Acme Process Equip*[*ment*] *Co. v. United States*, [347 F.2d at 544-45]; *Baifield Indus*[*tries, Division of A-T-O, Inc.*, ASBCA 20006], 76-2 BCA ¶ 12,096, at 58,102-04 [1976]; *see also* [Melvin] Rishe, [*Government Contract Costs*,] note 5, at 6-57, 20-10, 20-15 [(1st ed. 1983)].

49 F.3d at 1549 n.6. HHS' reliance on *Bill Strong* is, consequently, misplaced. Geotech's appeal before the Board is an appeal of the CO's denial of its revised TSP, and the Federal Circuit's decision in *Bill Strong* recognized the applicability of *Acme Process Equipment* to the settlement of a claim for consulting costs when a contract is terminated for convenience. *Id*. As noted above, the GSBCA, one of the Board's predecessors, followed *Acme Process Equipment* in *Richerson Construction*, and the Board follows that precedent as well as *Bill Strong*. *See Business Management Research Associates, Inc. v. General Services Administration*, CBCA 464, 07-1 BCA ¶ 33,486, at 165,989 ("[T]he holdings of the

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[6] The Board's decision in *Balfour* stated that appellant was "entitled to recover the amount of such fees for the purpose of 'furthering the negotiation process.'" 23-1 BCA at 186,478 (citing *Bill Strong*, 49 F.3d at 1550). The Board's decision in *Balfour* concerned claims that appellant lettered from A to S, but a claim for termination for convenience costs was not among them. 23-1 BCA at 186,483.

Court of Appeals for the Federal Circuit are binding on us, of course[,] . . . [and] the holdings of our predecessor boards [are] binding as precedent in this Board.").

4. Uncompensated Contract Work.

HHS contends that Geotech is not entitled to payment of $18,051 for certain contract work it performed because "Geotech is seeking reimbursement for extra-contractual work completed at risk without authorization." Respondent's Motion for Summary Judgment at 39. Citing the COR's May 21, 2023, email, HHS contends that the COR advised Geotech that "any additional drilling casing will need to be authorized by the [CO]." *Id*. Additionally, HHS argues that "Geotech was also explicitly directed to seek the [COR's] approval before doing any drilling at well #2." Respondent's Reply at 45. In its reply, Geotech explains that the "costs requested were for close-out work for Well #1, which was required by the Contract and as it was included in the contract cost schedule." Appellant's Surresponse at 14. Geotech's PM explains in his January 3, 2025, affidavit that "[t]he money being claimed for deals solely for work that was required by the contract for well #1." PM Second Affidavit at 10-11. "These were close-out functions that were required for Well #1 and Well #2. But none of the costs were related to Well #2 because it was dry at 170 [feet] and was not completed." *Id*. at 11. Geotech's PM also indicated in his first affidavit that only temporary caps were placed on the two wells as a safety measure, and Geotech did not permanently plug the wells. PM Affidavit at 9-10.

The Board finds that there is an issue of material fact as to the contract costs claimed by Geotech that cannot be resolved in a motion for summary judgment. HHS and Geotech offer conflicting statements as to whether the claimed cost of $18,051 relates to both well number one or well number two. Additionally, there is an issue as to the manner in which Geotech capped the wells and whether such work was contrary to direction from IHS. The Board cannot make such findings without further development of the record. *See Navigant SatoTravel*, 08-1 BCA at 167,404.

Decision

Respondent's motion for summary judgment is **DENIED**.

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Daniel B. Volk
DANIEL B. VOLK
Board Judge