UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 9, 2026

CBCA 8385

LIBERTY TECHNICAL SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Lee Dougherty and Esna Milhail of Effectus PLLC, Washington, DC, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Bend, OR, counsel for Respondent.

Before Board Judges **GOODMAN** and **CHADWICK**.

GOODMAN, Board Judge.

Liberty Technical Services, LLC (Liberty or LTS) entered into a contract to provide water treatment supplies and services at three Department of Veterans Affairs (VA) medical centers (VAMCs) in Texas. Liberty submitted a certified claim to VA's contracting officer (CO) seeking compensation for providing certain equipment it alleges was not specified in the contract and for VA's use of equipment left in place during a transition period after the contract expired. The CO issued a final decision (COFD) denying the certified claim, and Liberty has appealed that decision. Liberty elected disposition of this appeal by two Board judges under the accelerated procedure in Board Rule 53 (48 CFR 6101.53 (2024)), and the parties submitted the case on the written record under Rule 19. We deny the claim.

Findings of Fact

Solicitation and Contract

On May 3, 2023, VA issued a solicitation[1] for "Boiler/Chiller Chemical Water Treatment Supplies and Services" at three VAMCs, located in Dallas, Garland, and Bonham, Texas, under a commercial items and services contract for a firm, fixed price. Exhibit 1.[2] The solicited statement of work (SOW) described the requirement as "all supplies and technical support services for chemical treatment of boiler plant water, steam, and condensate systems throughout [each] medical center/campus." *Id*. at 5.

VA offered prospective contractors the opportunity to visit the Dallas and Bonham sites, but Liberty did not attend either site visit. *See* Exhibits 2, 3; Declaration of DeMarcus W. Stokes (Aug. 13, 2025) ¶¶ 8–9.[3] Had Liberty visited either site, it would have been able to see the incumbent contractor's logo and other identifying information on electronic controllers[4] that were in operation in both treatment systems, as the controllers were provided by that contractor and were not owned by VA. *Id*. ¶¶ 8–9.

VA amended the solicitation twice. Exhibits 4, 5. The second amendment, issued in early June 2023, added separate contract line items (CLINs) for unexpected maintenance at each of the three locations. Exhibit 5. A Liberty vice president posed a question via email

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[1] Page 1 of the solicitation, standard form 1449, box 14, identified the solicitation method as a request for quotations (RFQ). Exhibit 1 at 1. However, the acquisition did not proceed by RFQ. The solicitation called for binding "offers" rather than quotations, Exhibit 1 at 38–39, and VA's award message congratulated Liberty on VA's "acceptance of [Liberty's] offer." Exhibit 7; *see* 48 CFR 13.004(a) (2022) ("A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract."). The parties' arguments do not depend on the solicitation type.

[2] Numbered exhibits are in the appeal file. Respondent's declarations and exhibits designated by submitting party and letter were submitted with the briefs.

[3] VA submitted declarations of Mr. Stokes, who was appointed the contracting officer's representative (COR), and the CO, Sherine S. Brooks. Liberty did not submit any testimony.

[4] The record does not contain a specific definition of "controller" or a depiction of one. We understand the term from the context—including the parties' agreement—that the equipment required the use of *someone's* controllers to perform the contract work.

about the amendment. He asked whether VA anticipated that the work covered by the CLINs "would . . . only be on the water treatment equipment (small chemical pumps and controllers) or are you looking for repairs and maintenance on the chillers and boilers[?] Possibly such items as tube cleaning? Please clarify as the provided cost could be [$]10K or could be [$]100K." Appellant's Brief Seeking Judgment on the Written Record in Accordance with CBCA Rule 19 (Appellant's Rule 19 Brief), Exhibit A at 1. The contracting officer responded, "Just small chemical pumps/controllers and chemicals in case of chill water line ruptures. Any mishap out side [sic] the SOW." *Id*.

In mid-August 2023, the parties executed a contract under which VA ordered the solicited requirement from Liberty with an effective date of August 21, 2023. Exhibit 8 at 1.[5] The contract provided for a base year and up to four option years. For each year, the contract contained, for each VAMC, a fixed-price CLIN and a not-to-exceed CLIN, for a total of six CLINs. The fixed-price CLINs covered the water treatment work while the not-to-exceed CLINs were for unforeseen maintenance and repairs. The contract value for year one was $195,598. *Id*. at 1, 10–14.

The contract incorporated Federal Acquisition Regulation (FAR) 52.212-4 (48 CFR 52.212-4 (2023)), Contract Terms and Conditions—Commercial Products and Commercial Services (DEC 2022). Exhibit 8 at 1, 15. The clause provided 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).

The introduction to the SOW provided:

> 1. The contractor shall provide all supplies and technical support services for chemical treatment of boiler plant water, steam, and condensate systems throughout [each] medical center/campus to ensure compliance with [Veterans Health Administration] standards and requirements.
>
> 2. VAMC boiler plant employees will be responsible for continuous feeding of chemicals and performing water tests with oversight by the contractor.

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[5] On August 16, 2023, VA accepted Liberty's August 11 offer, effective as of August 21; awarded the contract (no. 36C25723P0624) to Liberty; and assigned a purchase order number (549C30568) for invoicing. Exhibit 8 at 1. Consistent with the solicitation, the contract, and the parties' briefs, we refer to the agreement as a contract rather than an order.

> 3. In addition, the contractor shall verify the proper operation of all water treatment systems which serve the boiler plant including feedwater deaerator, water softener, and continuous blowdown at least semiannually.
>
> 4. The goals are safety, reliability and longevity of the steam and condensate piping and equipment in the boiler plant, in the steam distribution system and in the various buildings of the VA facility.
>
> 5. The contractor shall provide "Unforeseen Repairs and Maintenance" as needed.

Exhibit 8 at 4.

The SOW included requirements for chemical testing supplies and services, and related maintenance and training, as well as performance (water quality) standards and contract administration requirements. Pertinent here, the SOW also included, under the heading "EQUIPMENT LIST," a table specifying boilers, steam generators, deaerator tanks, centrifugal chillers, air coolers, and cooling towers by make, model, capacity rating, and quantity at each location. Exhibit 8 at 4–5. We do not quote the equipment list, as the parties agree this dispute concerns items that were *not* on it. Controllers and pumps were not in the equipment list for any of the three locations. *See id*. However, pumps were specified as *supplies* in section F of the SOW discussed below.

The contract contained no explanation of the purpose of the equipment list and did not state that the contractor needed to *furnish* the listed equipment (a term used elsewhere in the SOW), rather than, for example, to *know* simply how to operate and maintain the listed equipment at the three sites. The contract did not indicate whether VA expected the contractor to furnish any ancillary equipment that might be needed to operate the listed equipment but that VA had elected not to specify.

SOW section F was titled "CHEMICALS AND TESTING SUPPLIES." Exhibit 8 at 6. Sections F.8 and F.9 set forth additional requirements for contractor-supplied equipment, as follows:

> 8. Furnish on site chemical storage containers with secondary containment. Provide bulk delivery service which delivers the chemicals directly into the on-site storage containers with no assistance necessary from VA employees other than to provide access.

9. Provide chemical metering pumps as required, plus one spare.
   a. DA Tank–one pump
   b. Boiler 1–one pump for each chemical being added to the boiler.
   c. Boiler 2–one pump for each chemical being added to the boiler.
   d. Boiler 3–one pump for each chemical being added to the boiler.
   e. Boiler 4–one pump for each chemical being added to the boiler.
   f. Steam line treatment–one pump for each injection point. *Steam line treatment may require remote injection points on a large campus*.
   g. All boilers will have an extra injection point for laying up a boiler wet. *Boiler treatments must go to the individual boilers, it is impossible to control the chemistry of two boilers with one common chemical injection point*.

Id.

Post-Award Communications About Controllers, Tanks, and Pumps

Soon after the August 2023 contract award (neither party gives an exact date), the parties held a start-up meeting. During the meeting, VA told Liberty that VA expected Liberty to furnish all of the equipment needed to provide the water treatment services, including controllers. "The required equipment was the same type of equipment that had been used by the previous contractor . . . and which *remained in place* for Liberty's temporary use." Declaration of Sherine S. Brooks (Aug. 13, 2025) ¶ 8 (emphasis added); *see* Appellant's Rule 19 Reply Brief at 6 (contending "Liberty [at first] relied on the prior contractor's equipment at VA's direction, not at its own intention or plan").

VA's declarants testified (using virtually identical wording) that "it is not unusual in this industry for [departing] contractors to leave their installed equipment in place for a short period of time, maybe a few weeks, to allow a new contractor's equipment to arrive on-site and be installed." Stokes Declaration ¶ 11; *see* Brooks Declaration ¶ 11. We see no evidence in the declarations or elsewhere, however, that the VA declarants possess knowledge of practices in "the industry" generally. Neither declarant states, for example, how many such contracts he or she has been involved with nor their locations.

Liberty's position in its claim and in the appeal has been that it was surprised to be expected to furnish equipment not specified in the contract. However, there is no indication that Liberty expressed surprise at the start-up meeting when VA advised that it expected controllers to be provided. In an interrogatory response in this case, Liberty asserted that "[h]istorically, equipment [such as controllers] at customer sites is government-owned. Equipment replacement occurs only when contractually stated with sufficient technical and functional detail." Brooks Declaration, Exhibit A at 3. Again, there is no evidence in the record that Liberty stated this position in, or promptly after, the start-up meeting.

On August 29, 2023, eight days into the contract term (and apparently after the start-up meeting), VA's COR asked Liberty by email for "dates o[f] deliveries of tanks/pumps and chemicals." Exhibit 13 at 1. Liberty's representative replied in full, "Tanks, testing equipment, controllers have been ordered. I don't have the lead time in front of me. Will obtain and get back to you." *Id*. There was no indication that Liberty considered this equipment to be outside the contract scope.

There follows a gap in the record as to correspondence between the parties of more than three months. On December 6, 2023, Liberty provided the contracting officer a "requested summary of services to date," raising for the first time the issue of controllers being within the contract scope. Appellant's Exhibit B at 1–2. Liberty stated, in relevant part:

> Gov[ernment] at Dallas mentioned that we needed controllers on the boiler side and they can[']t be connected with extension cords. Controllers were not identified in the contract nor was any electrical work to install controllers on the boiler side. Statement of work i[mpli]ed by not specifying them that there were already controllers there in a usable state. We can provide a quote for new boiler side controllers. These controllers should be hard wired in so as to avoid use of extension cords. The pumps will need to be connected to controllers to maintain proper boiler feeds.
>
> . . . .
>
> Even though controllers were not required per the contract on the chiller side, we had a few spares in the shop and are providing one at the steamers[6] and one at Garland at no cost to the Government.

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6 This appears to refer to steam boilers at the Dallas VAMC.

. . . .

> We did order single walled tanks and were going to utilize containment pallets. [VA] did not like these and asked us to remove them from the site. Contract does not specify tank specifications, beyond code regulations. However, we will remove these single walled tanks and have ordered double walled tanks which should be in by the end of next week. Even though the contract says "chemical storage tanks with secondary containment." It does not say "double walled tanks."

Id. at 2.

Less than two weeks later, on December 18, 2023, VA issued a contract discrepancy report (CDR). Exhibit 10. The cited discrepancies included multiple items of equipment that Liberty had not furnished but that VA said were required by the contract. The CDR directed Liberty to submit a corrective action plan by December 21, 2023. *Id*. at 1.

Liberty timely responded. Exhibit 11. We quote VA's pertinent comments from the December 18 CDR, followed by Liberty's responses from its December 21 response, where the parties' respective positions are set forth in sequence:

> 2. [Discrepancy] Per [SOW] section F.8[:] Furnish on site chemical storage containers with secondary containment. Provide bulk delivery service which delivers the chemicals directly into the on-site storage containers with no assistance necessary from VA employees other than to provide access.
>
> - Contractor has delivered chemicals to each site in barrels. Contractor is waiting on tanks, pumps, and controls. We are having to use the old company equipment from the previous contractor . . . and they are asking for the return of their equipment.
>
> **CONTRACTOR RESPONSE:**
> - Tanks–All have been ordered. Based on delivery tanks . . . will be installed on next scheduled visit(s).
> - Pumps–delivery for Dallas has been made, they will be installed on next scheduled visit(s).
> - Controllers–contract does not specify controller requirements; our technician was informed that boiler controllers in place were

Government-owned and that the electrical would be hard piped in as previous extension cords are no longer allowed.

3. [Discrepancy] Per [SOW] section F.9[:] Provide chemical metering pumps as required, plus one spare.
   - Contractor has not provided tanks, pumps, or controllers.

CONTRACTOR RESPONSE:
- Per above, pumps have been ordered and/or delivered.
- Tank status: Tanks for Dallas and Garland have been delivered; Bonham are in-process. Uninstalled tanks shall be installed in service visit(s) following their delivery.
- Controllers–see response to item #10.

. . . .

10. [Discrepancy] There have been two Teams meetings with the CO, CORs, Contractors o[n] this contract to get everything on track. The contractor has ordered and installed tanks at the Dallas location and has the tanks on order for the other two sites. Pumps are on order also. There is an issue with how the system will be controlled without controllers being install[ed] from the contractor because the contractor is stating that controllers were not specified in the contract to be provided by the contractor. However, you cannot execute all other terms of this contract without providing controllers specific to the equipment being purchased/installed under this contract.

CONTRACTOR RESPONSE:
- **Tanks and pumps are specifically stated in the contract**. **Controllers are not cited at all**. Based on 8 Dec[ember] meeting, CO indicated that VA would consult with legal for disposition on controller requirements. We are awaiting the outcome of that inquiry.

Id. at 1–3 (VA bulleted comments and discrepancy no. 10 in red in originals; emphasis added to Liberty response to no. 10). At this point, Liberty was not asserting that tanks and pumps were outside the contract scope.

VA replied with an evaluation and partial acceptance of Liberty's CDR response. Exhibit 12. The VA document bears no date but appears to be from January 2024. Pertinent here, VA directed Liberty to provide "specific dates for when pumps were ordered, expected

delivery date, and anticipated date of installment" and stated that Liberty's response as to the status of controllers was "[n]ot accepted." *Id*. at 5. VA explained:

> Controllers, though not specifically mentioned in the contract, are required to complete the terms and conditions of the contract. Without controllers, the contractor cannot monitor conductivity of the water which tells the system to add or remove water, in order to properly release the amount of steam to heat the buildings in the winter or provide [air conditioning (AC)] in the summer. If the proper amount of water is not added or removed, this will damage the tubing and cause corrosion, which will allow the systems to malfunction and not provide critical heat and/or AC when needed. In a previous email to the COR on 8/21/2023, the contractor stated, "controllers were ordered". Additionally, during the technical questions portion of the solicitation, the question "if controllers are to be provided by the Government" was never asked because standard industry practice is that controllers ensure the device maintains the correct temperatures.

Id.

The parties agree that Liberty eventually obtained and installed the equipment that VA wanted. The record does not show when that happened. A spreadsheet of unresolved discrepancies and a corrective action plan summary, dated January 24, and 25, 2024, respectively, indicate that Liberty had just placed orders for equipment to resolve discrepancies 2, 3, and 10, quoted above, on January 24. Exhibits 14, 15. VA states, without citing evidence, that "controllers, pumps, and tanks" were installed in or about February 2024, approximately six months into the base year. Respondent's Rule 19 Brief at 10 n.1. Liberty cites evidence of "orders for pumps/tanks in late 2023 and controllers in early 2024" but cites no delivery or installation dates. Appellant's Rule 19 Brief at 4 (citing Exhibit 14). We cannot determine from the record the dates on which the specific pumps, tanks, or controllers for which Liberty seeks compensation came into service.

Removal of Liberty's Equipment

On August 10, 2024, a Liberty officer advised the contracting officer that Liberty intended to remove its equipment on August 21 or 22, after the contract expired. Exhibit 16 at 3. He added,

> If the Government indicates a requirement for equipment to remain in place beyond the [period of performance], the fee is $500.00 per day until such time that the equipment is available for our technicians to uninstall and remove

> from VA sites. To maintain adequate chain of custody and serviceability of our equipment, all LTS-owned equipment may only be uninstalled and removed by LTS-approved personnel.

Id. The contracting officer asked for "a transition period of up to 30 days . . . to allow the new contractor to come in and set up their equipment," which she suggested was "fair," given Liberty's delay in installing the equipment. She declined to agree to pay $500 per day. *Id*. at 2. Liberty replied, "Thank you for your reply. We will follow the contract. Please inform us when all equipment is ready for our technicians to remove." *Id*. at 1.

The record does not reflect the date or dates on which Liberty retrieved its equipment. No evidence of further communication on the topic is in the record.

Claim and COFD

In December 2024, Liberty submitted a certified claim to the VA contracting officer for $97,098.74 in compensation for constructive changes. Exhibit 18. Liberty asserted in the claim that, as a result of the December 2023 CDR, it "was required to install equipment, including controllers, pumps, tanks, and a flow switch manifold, that w[as] out of the scope of the contract. . . . [In addition], the Government required LTS to install equipment for the Chiller plant when the contract only required such equipment to be added to the Boiler." *Id*. at 3. Included within the $97,098.74 claim total was $9975, representing $285 per day for thirty-five days after the end of the contract (August 21 to September 25, 2024) during which VA allegedly retained the equipment Liberty had used in performance.

Liberty's certified claim included a table of alleged "out-of-scope equipment," with eighteen individual types of equipment, described by type, manufacturer, size, quantity, and price. The table listed fifteen controllers, $43,360.15; one flow switch manifold, $5942.60; fifteen chemical pumps, $21,603.67; ten chemical tanks, $16,217.33; and equipment left in place for thirty-five days at $285 per day, $9975.00. The total claim was $97,098.74.

The CO issued a COFD in January 2025 denying the claim, finding that "controllers, flow switch manifolds, and chemical pumps" were within the scope of the contract and that VA "did not deny [Liberty] the opportunity to retrieve its equipment" after the contract ended. Exhibit 19 at 3.

Appeal and Board Proceedings

Liberty filed this appeal in March 2025 and elected the Rule 53 accelerated procedure the following month. Briefing under Rule 19 was completed in September 2025, and the record was closed.

During the appeal proceedings, Liberty submitted documentation in support of its claimed costs. Appellant's Exhibit G (hereinafter, simply Exhibit G). Liberty asserts that it has provided the Board with "the job ledger, invoices, and proofs tying each line item to VA's directives." Appellant's Rule 19 Reply at 6. The documents are less probative than Liberty suggests, as Liberty did not submit written testimony to authenticate or explain its cost documentation, nor did Liberty discuss the individual documents in its briefs. While we deny entitlement below, we offer the following analysis of Liberty's quantum submission to illustrate its lack of probative value.

We see no "job ledger." Liberty is apparently referring to a table it submitted for the Rule 19 record titled "Additional Equipment Detail[,] VA Claim[,] Contract 36C25723P0624." Exhibit G at 1. This exhibit is an expanded version of the quantum table from Liberty's December 2024 certified claim, quoted above. It lists the same equipment as did the claim but includes additional columns for location of installation, serial number(s), unit price, item subtotal price, freight, tax, total material cost, and installation cost. Nothing in the record indicates that this exhibit is a business record or that it was generated from Liberty's accounting system. As such, we view the exhibit only as a summary of Liberty's contentions—that is, as an illustrative aid rather than as a summary of substantive evidence. *Compare* Fed. R. Evid. 107 (Illustrative Aids) *with* Fed. R. Evid. 1006 (Summaries to Prove Content); *see* Fed. R. Evid. 107 advisory committee's note to 2024 amendment ("An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. 'Demonstrative evidence' is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact."); *Automated Management Systems, Inc. v. Rappaport Hertz Cherson Rosenthal, P.C.*, No. 16-CV-04762-LTS-JW, 2024 WL 4987018, at *7 n.6 (S.D.N.Y. Dec. 4, 2024).

As for invoices, the record contains just two. Neither invoice appears to have been issued to the appellant. Both were issued to Liberty Chemtron RiverBend, an entity that Liberty does not mention in its briefs but which the record suggests was acting as a buyer on Liberty's behalf. One invoice, dated February 27, 2024, is in the amount of $58,730.86 for a single line item of one unit of "Chemical Equipment for Dallas VA Locatio[n]," with

shipping to a Liberty address in Dallas. Exhibit G at 5.[7] This invoice appears to correspond with front and back images of an uncancelled Liberty check dated August 8, 2024 (162 days after the date on the invoice) made out to "Chemtron" for the same amount, $58,730.86, and bearing an endorsement by Chemtron Supply LLC. *Id*. at 7. The memorandum line of the August check includes the number of the February invoice. *Id*.

The second invoice, dated July 18, 2024, is for $4983 for a single line item of one unit of "Sample Line for Cooling Tower" shipped to a Liberty address in Bonham. *Id*. at 6. We do not see how this invoice could be relevant to the case. Liberty does not claim compensation for purchasing a sample line or anything with a price of $4983.

Liberty also included in the record a quotation issued to "Chemtron Supply Corp/River Bend Labs" by AccentPDIR—another company that Liberty does not mention in its briefs—dated January 25, 2024, and valid for one month. Exhibit G at 8–11. This quotation lists a total of nineteen items of equipment on three pages under the headings "Dallas site," "Garland site," and "Bonham site," plus one optional pallet skid, with a total quoted price, including a $2015 "expedite fee," of $42,997.67. Shipping is quoted as "PPD/ADD," which we understand to mean prepaid and added (i.e., included in the quotation). The record contains no evidence that a Chemtron entity ordered the quoted equipment from AccentPDIR or that Chemtron paid AccentPDIR anything. If, by grouping the documents together, Liberty means to imply that the $58,730.86 it paid Chemtron in August 2024 was connected somehow to the January 2024 quotation by AccentPDIR issued to the Chemtron entity totaling $42,997.67, we see no evidence of such a link in the record. Liberty's exhibits include emails between Liberty and Chemtron Riverbend that appear to relate to ordering equipment for this contract but do not mention specific dollar amounts.

VA demonstrates in detail, moreover, that the January 2024 AccentPDIR quotation lends weak support, at best, to Liberty's quantum calculation. Respondent's Responsive Brief Seeking Judgment on the Written Record in Accordance with Rule 19 (Respondent's Response Brief) at 23–28. Of the eighteen types of equipment for which Liberty claims compensation in its expanded table, only eight appear both in the AccentPDIR quotation and in Liberty's Exhibit G claim summary with the same number of units and at the same unit price. *Id*. at 26–27.

To trace but one example, Liberty claims $5260.64 as the total installed price of four LMI PD051-832SI chemical pumps. In the illustrative aid, Liberty shows these items at

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[7] Liberty's pagination of the exhibit includes the heading Document Responses and leading zeroes, which we omit.

$486.75 per unit, for a total equipment cost of $1947. Exhibit G at 1. The AccentPDIR quotation does not include any chemical pumps at $486.75 per unit. Moreover, whereas Liberty indicates in the illustrative aid that these four pumps were for the Bonham VAMC, the AccentPDIR quotation does not list any pumps in the Bonham portion of the quotation. *See* Exhibit G at 1, 10. The AccentPDIR quotation does, however, list three LMI PD051-832SI pumps for the Garland VAMC at $518.10 each, for a total cost of $1554.30 ($392.70 less than the equipment subtotal net of freight, tax, and installation shown in the illustrative aid). *Id*. at 8. VA points out similar inconsistencies between the AccentPDIR quotation and the illustrative aid for nine other types of equipment. Respondent's Response Brief at 23–26.

Liberty also submitted unauthenticated statements of work from four solicitations for water treatment services issued in 2025. Appellant's Exhibits C, D, E, F. Assuming they are authentic, the statements of work were issued by VA, the Federal Bureau of Prisons, and the University of Pittsburgh. In each instance, the soliciting entity sought a "complete" water treatment system, including "all necessary equipment" or words to that effect. In what appears to be the solicitation for the follow-on contract to the contract at issue in this appeal, issued in April 2024, VA defined its requirement of "[a]ll equipment" to include "Controllers, double wall tanks, metering pump devices," other specific equipment, and "any necessary unit to complete work. All equipment will be VA own [sic] property after contract ***base year ends***." Appellant's Exhibit C at 5. We do not find this information relevant to the resolution of this appeal. Rather, we interpret the contract at issue, reading it as a whole and considering the parties' actions during performance.

Discussion

At issue is what, if anything, VA owes Liberty for (1) equipment not specified in the contract and (2) use of equipment left in place post-contract. The parties elected to submit the case under Rule 19, foregoing live testimony. In the Rule 19 proceedings, the Board makes factual findings based on the written record created by the parties and bases its legal rulings on such findings. *See Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (citing *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967). Just as in a live hearing, the party bearing the burden of proof must ensure that the Board possesses evidence the party needs in order to prevail. *E.g., Crystal Clear Maintenance v. General Services Administration*, CBCA 7547, 25-1 BCA ¶ 38,776, at 188,491 & n.10. The parties had an ample opportunity to create the record. We therefore take the record as we find it.

Liberty argues that "VA constructively changed the contract by requiring boiler-side controllers and other equipment not specified in the contract." Appellant's Rule 19 Brief

at 2; *see also id*. at 5–10. To recover for constructive change, Liberty bears the burden to "show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government." *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014); *see Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636, at 170,696 (2010), *aff'd*, 449 F. App'x 945 (Fed. Cir. 2011). VA maintains that Liberty properly acknowledged at the start of performance that it was responsible for supplying necessary but unspecified controllers, tanks, and pumps and that Liberty simply provided, without VA's direction, what the contract required. *E.g.*, Respondent's Rule 19 Brief at 34–35. Both sides argue that the contract is clear and unambiguous when read in the proper context and with the appropriate background knowledge. However, both parties rely on background premises that neither party places before us in the form of persuasive evidence.

To determine what the contract required, we must construe it to the extent possible according to its plain meaning, *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996), adopting the point of view of a reasonably intelligent person acquainted with the surrounding circumstances. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). We must read the document as a whole, giving reasonable meaning to all of its parts and avoiding, if we can, readings that result in useless, inexplicable, void, or superfluous terms. *McAbee*, 97 F.3d 1431, 1434–35; *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). Generally, we may consider parol evidence and other extrinsic aids to interpretation only upon finding the contract ambiguous. *See P.K. Management Group, Inc. v. Secretary of Housing and Urban Development*, 987 F.3d 1030, 1033 (Fed. Cir. 2021); *McAbee*, 97 F.3d at 1435. However, as discussed below, the parties' actions during performance in the form of written communication confirm the unambiguous, plain meaning. Evidence of trade custom or practice may inform our reading of a contract even absent an ambiguity but "only where a party makes a showing that it relied reasonably on [its] competing interpretation of the words when it entered into the contract." *Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 752 (Fed. Cir. 1999). Neither party has submitted sufficient evidence to establish a trade practice; rather, they have only alleged reliance on assumptions.

The Equipment Claim

Applying these principles to this contract, on this record, we find that Liberty has failed to prove entitlement to compensation for supplying equipment alleged to be outside of the contract scope—controllers, tanks, pumps and a manifold switch. The contract requires that "[t]he contractor shall provide all supplies and technical support services" to fulfill the contract requirements. When the contract is read as a whole, it supports VA's

position that the equipment for which Liberty claims additional compensation is within the scope of the contract and additional work was not ordered by VA.

While controllers are not in the equipment list, neither party denies that controllers were necessary for contract performance. This mutual interpretation of the parties shows that a reader of the contract with knowledge of the subject matter would have known that the equipment list did not include all of the equipment that the contractor would need. It was also reasonable to assume, therefore, that controllers were in place at the three sites before award, as this was a follow-on contract. Even so, Liberty did not attend a pre-bid site visit and, therefore, did not take the opportunity to assess who owned any existing controllers (whether the Government or the previous contractor) and whether the intent was to leave them in place. Neither party has sufficiently proved that "trade practice" would allow previously-supplied equipment to remain in place for the benefit of a follow-on contractor. There is no provision that states or implies that existing controllers would remain in place for the benefit of a follow-on contractor. Therefore, the reasonable conclusion is that controllers would have to be supplied by the follow-on contractor if not left in place.

Further, the contract does not distinguish between equipment and supplies. Even though the equipment list in the SOW did not include the controllers or other equipment for which Liberty seeks compensation, it does not appear to be an all-inclusive list. For instance, reading Section F of the SOW, various pumps are referred to as "supplies," while Liberty considers pumps to be equipment. When the contract is read as a whole, the SOW requirement of "all supplies and technical support services" encompasses all necessary equipment.

Liberty's actions during contract performance also do not support its later assertions that controllers were outside of the contract scope. Before award, a Liberty vice president posed a question about the second amendment to the solicitation in which he asked about repairs to controllers and chemical tanks. VA's response referenced the need for maintenance of these items. This exchange clearly indicates an understanding by both parties of the need for these items during contract performance. Liberty did not question how the controllers would be supplied.

Within eight days of starting performance of the contract, Liberty confirmed that it had purchased controllers and did not dispute at that time that controllers were included in the contract. Only later did Liberty assert that controllers were not within the scope of the contract. Additionally, Liberty makes the contradictory argument that "boiler-side controllers were not required," offering no explanation. This assertion implies that other controllers, not on the boiler side, would be required.

As to the claim for pumps and tanks, section F of the SOW, addressing chemicals and testing supplies, included pumps. Liberty confirmed that it had purchased pumps, tanks, and other testing equipment at the same time it confirmed purchase of the controllers, without disputing that these items were contract requirements. Liberty stated thereafter in December 2023, in response to a VA discrepancy report, that "[t]anks and pumps are specifically stated in the contract." Liberty's claim for these items is therefore contrary to its acknowledgment during performance that the items are contract requirements.

In summary, during contract performance, Liberty's actions indicate it had interpreted the contract to require equipment—for which it now claims additional compensation—to be within the contract scope. We find that Liberty is not entitled to compensation for the equipment claimed.

The Use of Equipment After Contract Expiration Claim

Liberty seeks $9975 for what it calls a reasonable rental value of VA's use of its water treatment equipment after the contract expired. Appellant's Rule 19 Brief at 9–11, 12. We have no basis to award entitlement or determine quantum for this claim.

Liberty cites no evidence that it left its equipment behind. Liberty cites the only communications in the record on this topic, which occurred before the contract's expiration date and ended with Liberty asking to be advised when it could retrieve the equipment. We have no evidence of what happened next. VA does not deny that the equipment remained at the VAMCs for some time. Indeed, VA argues, among other things, that it was an "industry practice" for water treatment contractors to leave their equipment for follow-on contractors' use during transition periods. Neither the CO in the COFD nor the VA declarants admit that any particular equipment remained behind for any particular length of time.

As to quantum, Liberty offers no basis for its daily rate. Liberty relies solely on the amount listed as a "late return" fee in its purported "claim ledger," which we explained above is merely illustrative of Liberty's allegations and is not evidence.

The claim for the rental value of equipment after contract expiration is denied.

Decision

The appeal is **DENIED**.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

I concur:

Kyle Chadwick
KYLE CHADWICK
Board Judge