UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
GRANTED IN PART: March 5, 2026

CBCA 8353

VSS INTERNATIONAL,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Douglas P. Hibshman and Keeley A. McCarty of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

Rayann L. Speakman, Office of Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **ZISCHKAU**, **SULLIVAN**, and **KANG**.

KANG, Board Judge.

Appellant, VSS International (VSS), appeals a final decision by a contracting officer of respondent, Department of Transportation, Federal Highway Administration (FHWA), which denied VSS's claim arising from a pavement preservation contract. FHWA filed a motion seeking summary judgment on all four counts of VSS's complaint: (I) breach of contract; (II) changes; (III) differing site conditions; and (IV) breach of the duty of good faith and fair dealing. We grant the motion with regard to count III but otherwise deny the motion.

Background

I. Contract Award and Terms

In November 2023, FHWA awarded a contract[1] to VSS for pavement preservation in Pinnacles National Park in California. Appeal File, Exhibit 1 at 1.[2] The award value of the contract was $1,893,120. Complaint ¶ 5. The contract required VSS to perform asphalt patching, sealing, and micro-surfacing work on various routes throughout the park. Exhibit 2 at 339. The routes were comprised of roads, campgrounds, parking areas, and other paved surfaces. *Id.* at 339-40.

The contract contained a "Coordination of Contract Documents" clause, which set forth this order of precedence for interpreting the contract:

> The contract documents govern in the following order:
>
> (a) Federal Acquisition Regulations [(FAR)];
> (b) Transportation Acquisition Regulations;
> (c) Basic IDIQ Contract;
> (d) Special Contract Requirements (SCRs);
> (e) Plans; and
> (f) Standard specifications.

Exhibit 1 at 257-58.

Relevant here, the contract required VSS to make two types of asphalt patches: type 1 and type 2. Type 1 patches were to be ten inches in depth and include a stabilization geogrid reinforcing layer, with an estimated quantity of two-hundred-and-seven square yards (sq. yd.). Exhibit 2 at 334, 337. The requirements for type 1 patches were listed in standard specification Federal Project (FP)-14, as follows:

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[1] FHWA issued VSS a task order under a multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contract. Although this appeal concerns a task order, the parties primarily refer to that agreement as a contract. For the sake of consistency, and because it has no effect on the merits of the issues here, we adopt the parties' terminology and refer to the agreement as a contract.

[2] All exhibits are found in the appeal file unless otherwise noted. Page citations to exhibits in the appeal file are to the bates numbers added by the agency.

> **418.03 Asphalt Pavement, Base, and Subgrade Full Depth Patch, Type 1 (FDP-1).**
>
> > **(a) Patch areas**. Extend the repair area 12 inches (300 millimeters) beyond the distressed area. If patch limits are within 24 inches (600 millimeters) of the pavement edge, extend the patch limit to the pavement edge. Make the minimum transverse dimension of the patch half of the travel lane width and the minimum longitudinal dimension of the patch 36 inches (900 millimeters).

Exhibit 3 at 733.

Type 2 patches were to be four inches in depth, with an estimated quantity of 2470 sq. yd. Exhibit 2 at 334, 337. The requirements for type 2 patches were also listed in standard specification FP-14 but were amended in the SCR, as follows:

> **418.04 Asphalt Pavement Full Depth Patch, Type 2 (FDP-2)**. Amend as follows:
>
> > **(a) Patch areas**. Delete the text of this paragraph and substitute the following:
> >
> > Extend the repair area 12 inches (300 millimeters) beyond the distressed area. If patch limits are within 24 inches (600 millimeters) of the pavement edge, extend the limit to the pavement edge. Make the minimum length and width of the patch 24 inches (600 millimeters).

Exhibit 1 at 310.

A drawing in the contract plans, titled "Asphalt Concrete Pavement Patch Type 1 & 2 Details," stated that the "[e]xtent of patch [was] to be determined by the [contracting officer (CO)] based on conditions encountered at time of construction." Exhibit 2 at 337.

II. Contract Performance and Claims

VSS entered into a subcontract with Martin Brothers Construction (MBC) for performance of the asphalt repair work. Complaint ¶ 3. In April 2024, MBC met with the contracting officer's representative (COR) to discuss markings on the routes where the patches were to be made. Complaint ¶ 27; Exhibit 5 at 1156. After the meeting, MBC

submitted to the CO a request for information (RFI) that noted the conversation with the COR and argued that the patches marked by FHWA were not in conformance with the contract requirement to "[e]xtend the repair 12 inches beyond the distressed area." Exhibit 7 at 1322. MBC stated in the RFI that, during the discussion with the COR, they were advised the following: "When we asked why [the COR] was not extending the markings twelve inches beyond the distressed area and only laying out [a] 2-foot width, he told us on previous contracts, the contractors determined it to be more cost effective to mill and pave at 4 feet." *Id.* Based on this alleged statement, MBC contended that "[i]t appears that FHWA is trying to have additional work performed without paying for the work in accordance with the contract documents." *Id.* MBC argued that the patches marked by the COR did not comply with the contract and, therefore, FHWA's performance directions constituted a change order, differing site conditions, and a breach of the duty of good faith and fair dealing with regard to FHWA's undisclosed "superior knowledge" regarding performance by prior contractors. *Id.*

The COR responded to the RFI, stating that the asphalt patches were marked in conformance with the contract and that there were no changes to the work or differing site conditions. Exhibit 7 at 1323. The COR further stated that MBC was to "[f]ollow the contract specifications and SCR, and as directed by the CO." *Id.*

III. VSS's Claim and Proceedings Before the Board

In June 2024, MBC submitted a certified claim to VSS seeking payment of $163,693.02 for increased costs incurred to perform the asphalt repair work. Exhibit 5 at 1154. MBC argued that the patches marked by FHWA did not comply with the contract because they did not extend twelve inches beyond the distressed pavement area. *Id.* As a consequence, MBC argued that the "the repair areas were smaller and more numerous than they should have been," which caused the work to take longer, resulting in higher costs than anticipated. *Id.* In August 2024, VSS submitted a certified claim to FHWA seeking payment for various claims, including MBC's pass-through claim for the asphalt repair work. *Id.* at 1153.

In November 2024, the CO issued a final decision denying the claim. Exhibit 6 at 1319. With regard to the asphalt repair work, the CO found that the type 1 and 2 patches "do not violate the specified minimum dimensions" dimensions for each type. *Id.* at 1318. The CO also found that there were no differing site conditions because VSS's allegations concerned the marking of the patches, rather than the conditions of the project routes, themselves. *Id.*

VSS filed its appeal with the Board in February 2025 seeking payment of $163,693.02 for increased costs arising from the asphalt repair work. In November 2025, FHWA filed this motion for summary judgment.

Discussion

I. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see* Rule 8(f) (48 CFR 6101.8(f) (2024)). Genuine issues of material fact exist where a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). We must view all inferences in the light most favorable to the party opposing summary judgment. *Id.* at 587-88. The party opposing summary judgment, however, "must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *Edgewater Construction Services, LLC v. Department of Veterans Affairs*, CBCA 7399, 24-1 BCA ¶ 38,506, at 187,154; *see M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004).

II. Breach of Contract (Count I) and Changes (Count II)

VSS argues that FHWA marked the asphalt patches in a manner that did not comply with the contract's twelve-inch extension provision, thereby making the patches smaller than required. Appellant's Opposition to Respondent's Motion for Summary Judgment (Opposition) at 2. Because each patch was smaller than what was required by the contract, VSS contends that FHWA was able to order patches at "more numerous repair areas than VSS could have reasonably anticipated based on the condition of the asphalt," which "made VSS's repair work less efficient, taking days longer to complete than expected and requiring more and different equipment." *Id.* VSS contends that FHWA marked the patches in a manner that breached the contract and constituted a change that increased VSS's costs of performance. FHWA contends the patches were marked consistently with the plain language of the contract and that FHWA is therefore entitled to summary judgment as a matter of law with regard to counts I (breach of contract) and II (changes) of the complaint.

A. FHWA's Interpretation of the Contract is Unreasonable

To resolve an issue of contract interpretation, we must look first to the plain language of the contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). Where a contract "is unambiguous, we follow the plain meaning without considering extrinsic evidence or related arguments." *Purple Heart Heroes LLC v. Department of Veterans Affairs*, CBCA 7186, 22-1 BCA ¶ 38,063, at 184,805 (quoting *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d. 1030, 1033 (Fed. Cir. 2021)). When interpreting a contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Three contract provisions concerning the patches are relevant to the parties' arguments. First, the contract plans stated that the "[e]xtent of patch [was] to be determined by the CO based on conditions encountered at time of construction." Exhibit 2 at 337. Second, for the type 1 and type 2 patches, standard specification FP-14 and the SCRs stated: "Extend the repair area 12 inches (300 millimeters) beyond the distressed area. If patch limits are within 24 inches (600 millimeters) of the pavement edge, extend the patch limit to the pavement edge." Exhibit 3 at 733; *see* Exhibit 1 at 310. Third, the minimum size for the type 1 patches was as follows: "Make the minimum transverse dimension of the patch half of the travel lane width and the minimum longitudinal dimension of the patch 36 inches (900 millimeters)." Exhibit 3 at 733. The minimum size for the type 2 patches was as follows: "Make the minimum length and width of the patch 24 inches (600 millimeters)." Exhibit 1 at 310.

FHWA argues that the plain language of the contract provided the CO with discretion to determine the size of the patches, "limited only" by the minimum size for each patch. Respondent's Motion for Summary Judgment (Motion) at 8, 9-10. The minimum size provisions cited by FHWA relate to the twenty-four-inch and thirty-six-inch dimensions in the specifications. *See id.* at 9. FHWA emphasizes that the contract's Coordination of Contract Documents clause "indicates that a requirement in one document is binding as occurring in all contract documents, and the contract documents are intended to be complimentary." *Id.* at 8. In light of the coordination of document clause, FHWA argues that the contract provision regarding the CO's discretion must be "given great weight in interpretation the contract as a whole." *Id.*

FHWA acknowledges that, for each patch, the contract instructed to "[e]xtend the repair area 12 inches (300 millimeters) beyond the distressed area" with the further instruction to extend the patch to the pavement edge if within twenty-four inches. FHWA notes, however, that the term distressed area was not defined in the contract and further represents that there is not an industry standard for this term. Motion at 9-10. FHWA contends that, because the contract had a specified area for each type of patch that could be ordered, applying the twelve-inch provision in the literal manner argued by VSS "could require the contract's full asphalt patching quantity to be used on repaving a single project route (roadway) full-width, at the exclusion on maintaining other problem areas throughout the project." Motion at 10. FHWA further argues that VSS's interpretation would, in effect, require "replacement of all cracked pavement on each project route" and that this "would require replacement of the majority or entirety of each route—which is wholly beyond the scope of the contract." *Id.*

Based on what FHWA contends is the importance of the contract's provision regarding the CO's discretion, and the potential effects of applying the twelve-inch extension provision as VSS interprets, FHWA argues that the contract must be interpreted to grant the CO discretion with regard to the size and location of the patches, restricted only by the minimum size provisions. Under this interpretation, FHWA contends that all of the patches as marked complied with the contract because each exceeded the relevant minimum size of for type 1 and type 2 patches (twenty-four and thirty-six inches, respectively). Motion at 11.

FHWA's interpretation is inconsistent with the plain language of the contract and the fundamental rules of contract interpretation. Most significantly, FHWA's interpretation of the CO discretion provision effectively eliminates the requirement to extend the patch twelve inches beyond the distressed area. FHWA does not attempt to define the term "distressed area" and, instead, cites the lack of a definition as a basis to disregard the twelve-inch extension provision altogether.

While FHWA argues that VSS's interpretation of the contract—which includes the twelve-inch extension provision—could result in a requirement to patch all cracked pavement on every route, FHWA does not substantiate this claim with any specific explanations or examples. Moreover, in neither its claim nor its complaint did VSS argue that all cracks had to be patched or that the entirety of all of the routes needed to be replaced. Rather, VSS argues that the CO had discretion to mark the patches, provided that each patch met the requirements of the contract, including the minimum size and twelve-inch extension provisions. *See* Opposition at 4-5.

FHWA does not identify any direct conflicts between the twelve-inch extension provision and any other provision of the contract, nor does FHWA argue that the provision

is impossible to perform with regard to any particular patch. In the absence of a direct conflict between the contract provisions, there is no reason why all parts of the contract cannot be given meaning and read together. *See Air-Sea Forwarders, Inc. v. United States*, 166 F.3d 1170, 1172 (Fed.Cir.1999) ("[A]n agreement is not to be read in a way that places its provisions in conflict, when it is reasonable to read the provisions in harmony.").

We find the plain meaning of the contract provisions regarding patches to be as follows: (1) the extent of patches was to be determined by the CO based on conditions encountered at time of construction; (2) each type 1 patch had to be a minimum of thirty-six inches (longitudinal dimension) and half the travel lane width (transverse dimension), and each type 2 patch had to be a minimum of twenty-four inches (length and width); and (3) each patch had to extend twelve inches beyond the distressed area, with the further requirement that if the patch limit was within twenty-four inches of the pavement edge, it must extend to the pavement edge. This interpretation gives meaning to all parts of the contract, harmonizes them, and does not ignore or make superfluous the twelve-inch extension provision in the manner argued by FHWA. Because FHWA's motion is based on its unreasonable interpretation of the contract, FHWA is not entitled to summary judgment as a matter of law with regard to the counts I and II of the complaint.

B. There Are Genuine Issues of Material Fact

FHWA argues that all of the patches exceeded the contract's minimum size requirements and that no material facts exist as to the size of those patches. Motion at 11. FHWA does not contend, however, that the patches all complied with the twelve-inch extension provision. Because FHWA's arguments rely on the contract's minimum size provisions, without considering the twelve-inch extension provision, there remain material issues of fact as to whether the patches as marked satisfied the correct interpretation of the patch size requirements discussed above.

FHWA also contends that VSS has not alleged with specificity which patches did not comply with the contract requirements and that FHWA is therefore entitled to summary judgment. The burden to demonstrate a lack of any genuine material issues of fact rests with FHWA as the moving party. *JITA Contracting, Inc. v. Department of Transportation*, CBCA 7269, et al., 25-1 BCA ¶ 38,778, at 188,505 (citing *Mingus Constructors*, 812 F.2d at 1390).

As for patch identification, VSS's responses to FHWA's interrogatories did not identify with specificity each patch that it contends did not comply with the contract. *See* Motion, Exhibit C at 4-5. VSS did, however, identify patches in its Statement of Genuine Issues that it alleges did not conform to contract requirements. *See* Appellant's Statement

Genuine Issues at 1-2. In light of our conclusion that FHWA's interpretation of the contract requirements for patch sizes is unreasonable and VSS's allegations that certain patches did not meet the contract requirements, we conclude that there are issues of material fact that remain regarding the degree of nonconformity for certain patches. For this additional reason, FHWA is not entitled to summary judgment as a matter of law with regard to counts I and II of the complaint.

III. Differing Site Conditions (Count III)

VSS contends that it is entitled to an equitable adjustment under FAR clause 52.236-2, Differing Site Conditions (APR 1984) (48 CFR 52.236-2 (2023)), because the asphalt patches marked by FHWA "differed materially from what was listed on the Contract's tabulation of surfacing quantities sheet, and thus differed materially from the Contract Documents." Complaint ¶ 51. FHWA argues that VSS does not allege facts that could support a differing site conditions claim and that FHWA is entitled to summary judgment as a matter of law with regard to count III of the complaint.

FAR clause 52.236-2 identifies two types of differing site conditions: type I concerns "subsurface or latent physical conditions at the site which differ materially from those indicated in this contract," and type II concerns "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." 48 CFR 52.236-2(a).

A contractor "is not eligible for an equitable adjustment for a Type I differing site condition unless the contract indicated what that condition would be." *Comtrol, Inc. v. United States*, 294 F.3d 1357, 1363 (Fed. Cir. 2002) (citing *P.J. Maffei Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984)). VSS does not contend that subsurface or latent physical conditions that existed were different from those specified in the contract or that the worksite had unknown physical conditions of an unusual nature that differed materially from what would be ordinarily encountered.[3] Rather, VSS argues that there was a difference between the contract's specifications and the FHWA's directions with regard to the size of the asphalt patches. The contract provisions cited by VSS concern the manner in which the work would be directed, rather than specific physical conditions at the worksite.

[3] Although neither the claim nor the complaint specify the type of differing site condition alleged, VSS's arguments generally correspond to a type I differing site condition because it contends that the contract represented specific conditions at the worksite.

In fact, the contract specified that the extent of the patches would be determined by the CO "based on conditions encountered at time of construction." Exhibit 2 at 337.

Rather than alleging facts that support a differing site conditions claim, VSS's complaint and opposition to the motion, in essence, merely repeat its breach of contract and changes arguments. FHWA is entitled to summary judgment as a matter of law regarding count III of the complaint.

IV. Good Faith and Fair Dealing (Count IV)

VSS argues that FHWA breached the duty of good faith and fair dealing by directing contract performance that did not comply with the terms of the contract. Complaint ¶ 57. VSS further contends that FHWA, in its response to VSS's RFI, unreasonably "claimed to be confused by VSS's questions and declined to clarify its conflicting instructions." *Id.* ¶ 58.

FHWA contends that it is entitled to summary judgment because its directions regarding the patches, and its response to the RFI, were consistent with the contract's minimum size provisions. *See* Motion at 14. As discussed, FHWA's interpretation of the contract is unreasonable with regard to the minimum patch size provisions. Additionally, VSS has identified material issues of fact regarding whether FHWA intentionally directed performance in a manner other than what was specified in the contract, based on its knowledge of how prior contractors had performed. *See* Complaint ¶ 27; Opposition at 9. FHWA is not entitled to summary judgment regarding count IV of the complaint.

Decision

FHWA's motion is **GRANTED IN PART**. We grant FHWA's motion for summary judgment with regard to count III of the complaint regarding differing site conditions. FHWA's motion is otherwise denied. The Board will schedule further proceedings by separate order.

Jonathan L. Kang

JONATHAN L. KANG
Board Judge

We concur:

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge