UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: April 8, 2026

CBCA 8301

TOP LEVEL CONSTRUCTION COMPANY,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Khaybar Ziarmal, President of Top Level Construction Company, Kabul, Afghanistan, appearing for Appellant.

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

Before Judges **LESTER**, **O'ROURKE**, and **KANG**.

KANG, Board Judge.

Appellant, Top Level Construction Company (Top Level), seeks payment in connection with two purchase orders (POs) awarded by respondent, the Department of State (DOS), for performance of construction in Afghanistan. Top Level contends that it is entitled to recover costs for equipment, materials, and bank guarantees it states were lost when the United States Government withdrew from Afghanistan in August 2021. The parties submitted the case on the written record without a hearing, pursuant to Board Rule 19 (48 CFR 6101.19 (2024)). We grant the appeal in part.

Background

I. Purchase Order Awards and Performance

A. Purchase Order 0382

In May 2021, DOS awarded Top Level purchase order 19AF2021P0382 (PO 0382) for removal of an existing gate and installation of an automated gate at the DOS facility at Camp Alvarado in Kabul, Afghanistan. Appeal File, Exhibit 8 at 50.[1] The purchase order was awarded for a fixed price of $89,928.75. *Id.* The purchase order identified the following scope of work:

> The Contractor shall complete all work, including furnishing all labor, material, equipment, and services required under this purchase order for the following firm fixed price and within the time specified. This price shall include all labor, materials, all insurances, overhead and profit.

Exhibit 4 at 6.

PO 0382 required Top Level to provide and obtain insurance for its equipment and materials and to indemnify DOS, as follows:

> G.2.0 INSURANCE–The Contractor is required by [Federal Acquisition Regulation (FAR)] 52.228-5, "Insurance–Work on a Government Installation" to provide whatever insurance is legally necessary.
>
> . . . .
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> G.2.3 The Contractor agrees that the Government shall not be responsible for personal injuries or for damages to any property of the Contractor, its officers, agents, servants, and employees, or any other person, arising from and incident to the Contractor's performance of this contract. The Contractor shall hold harmless and indemnify the Government from any and all claims arising therefrom, except in the instance of gross negligence on the part of the Government.

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

> G.2.4 The Contractor shall obtain adequate insurance for damage to, or theft of, materials and equipment in insurance coverage for loose transit to the site or in storage on or off the site.

Exhibit 8 at 13-14. PO 0382 incorporated by reference two FAR clauses that required Top Level to obtain and maintain insurance: (1) FAR 52.228-4, Workers' Compensation and War-Hazard Insurance Overseas (APR 1984) (48 CFR 52.228-4 (2020)), which references the requirements of the Defense Base Act, 42 U.S.C. §§ 1651–1655 (2018); and (2) FAR 52.228-5, Insurance–Work on a Government Installation (JAN 1997). Exhibit 8 at 19.

PO 0382 required Top Level to submit a bank guarantee letter of an "amount equal to 20% of the contract price in [United States] dollars during the period ending with the date of final acceptance and 10% of the contract price during contract guaranty period." Exhibit 8 at 28. PO 0382 provided that the contracting officer would issue the notice to proceed "[a]fter receiving and accepting any bonds or evidence of insurance" but that "[i]t is possible that the Contracting Officer may elect to issue the Notice to Proceed before receipt and acceptance of any bonds or evidence of insurance." *Id*. at 10. In either case, "[i]ssuance of a Notice to Proceed by the Government before receipt of the required bonds or insurance certificates or policies shall not be a waiver of the requirement to furnish these documents." *Id.*

PO 0382 included FAR 52.236-10, Operations and Storage Areas (APR 1984), Exhibit 8 at 20, which states, "The Contractor shall confine all operations (including storage of materials) on Government premises to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance."

B. Purchase Order 0423

Also in May 2021, DOS awarded Top Level purchase order 19AF2021P0423 (PO 0423) for installation of concrete at four locations in Camp Alvarado. Exhibit 2 at 2. The PO was awarded for a fixed price of $91,024.50. *Id.* The purchase order was a two-page contract and did not include or incorporate any FAR clauses. *See id.* at 2-3. The PO also did not include the provisions in PO 0382 regarding equipment, materials, or insurance. *See id.*

C. Performance of the Purchase Orders

In June 2021, prior to the notice to proceed, the parties exchanged emails concerning the bank guarantees. Exhibit 50 at 199. By email, Top Level provided DOS with scanned

copies of two bank guarantee letters for PO 0382, each for ten percent of the purchase order value. *Id.* As discussed below, the parties dispute whether Top Level also provided DOS with original bank letters.

DOS issued a notice to proceed for PO 0382 in late June 2021 with performance required to commence on July 5, 2021. Exhibit 10 at 55. The record does not show when the notice to proceed was issued for PO 0423 or when performance commenced. Top Level states, and DOS does not specifically dispute, that Top Level was authorized by DOS to leave equipment and materials at specific worksite locations at Camp Alvarado during the performance of the purchase orders. Complaint at 2.

On August 15, 2021, the Taliban entered Kabul, Afghanistan, and the Government of the Islamic Republic of Afghanistan collapsed. DOS's Rule 19 Response (Oct. 23, 2025) (DOS's Response) at 1. The United States Government "evacuated its personnel from the United States Embassy and surrounding properties on extremely short notice" and subsequently suspended Embassy operations on August 31, 2021. *Id.* at 1-2.

Top Level states, and DOS does not specifically dispute, that it was not allowed by DOS to access Camp Alvarado after August 15, 2021. Top Level's Rule 19 Reply (Nov. 6, 2025) (Reply) at 2.[2] Top Level further states that it was unable to access the site "for nearly two years," at which time its representatives "confirmed that all materials and equipment had gone missing." Exhibit 61 at 226.

II. Invoices and Claims

In November 2021, Top Level submitted an invoice for payment of the total value, $89,928.75, of PO 0382. Exhibit 19 at 75. Also in November 2021, Top Level submitted an invoice for $37,804.50 for payment of partially completed work under PO 0423. Exhibit 22 at 78. In January 2022, Top Level submitted invoices seeking payment under POs 0382 and 0423 for equipment and materials it stated were left behind at Camp Alvarado after the August 2021 withdrawal of the United States Government. Exhibits 11 at 56, 14 at 63-64.

In October 2022, DOS advised Top Level that payment for PO 0382 was approved in the amount of $36,091.08, based on the information provided and the amount of work completed. Exhibit 17 at 70. DOS also advised that payment was approved for PO 0423 for

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[2] Citations to party filings without page numbers are cited to the page numbers following the cover pages.

$37,804.50. *Id.* In response to inquiries from Top Level, DOS confirmed in May 2023 that payment was approved for PO 0423 but that updated bank information was required. Exhibit 35 at 129. DOS also advised that payment would only be made for PO 0382 in the previously approved amount of $36,091.08. *Id.*

In correspondence from May through June 2024, Top Level resubmitted invoices to DOS seeking additional payments for POs 0382 and 0423, styling these requests as claims. Exhibits 37 at 140, 40 at 148, 41 at 158, 44 at 166. Top Level requested payment of the following amounts: (1) the full award value of PO 0382, that is, the $53,837.67 difference between the award value of PO 0382 ($89,928.75) and the amount approved by DOS for partial performance of the order ($36,091.08); (2) $17,986 for performance bank guarantees for PO 0382 because, Top Level asserts, DOS did not return the original guarantee letters, thereby precluding recovery by Top Level; (3) $63,330 for equipment and materials left at the work site in connection with PO 0382;[3] and (4) $114,900 for equipment and materials left at the work site in connection with PO 0423. Exhibits 8 at 41, 38 at 143, 39 at 146, 42 at 113.

On August 15, 2024, the contracting officer issued a final decision denying the claims for full payment under PO 0382. Exhibit 47 at 174. The decision did not address the claims for equipment and materials or bank guarantees under PO 0382 and did not address any claims regarding PO 0423.[4] *See id.*

III. Proceedings Before the Board

On December 23, 2024, Top Level filed a notice of appeal with the Board. The appeal requested payment of the four items listed above in connection with POs 0382 and 0423. Notice of Appeal at 1-2. Pursuant to Rule 6(a) (48 CFR 6101.6(a) (2024)), the Board designated the notice of appeal as the complaint.

In March 2025, the Board granted DOS's request to file a motion to dismiss the appeal in lieu of its answer pursuant to Rule 6(d). DOS initially argued that the appeal relating to

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[3] During this appeal, Top Level submitted a revised invoice for $64,540 which corrected mathematical mistakes and increased certain prices. Exhibit 63 at 165. These revisions do not affect the outcome of this decision or the amounts we find Top Level is entitled to recover.

[4] The record is unclear as to when or whether DOS paid Top Level the amount of $36,091.08 for PO 0382 and $37,804.50 for PO 0423. As the appeal does not seek reimbursement of these amounts, we do not address them further.

POs 0382 and 0423 was untimely filed with the Board, but DOS subsequently withdrew its argument that the appeal relating to PO 0423 was untimely. *See* DOS's Response to Order to Show Cause (Apr. 3, 2025) at 4. DOS also argued that the Board lacked jurisdiction to hear the appeal regarding PO 0423 because the claim exceeded $100,000 and the certification provided by Top Level was so deficient that it effectively amounted to no certification at all.

In April 2025, the Board issued an order directing Top Level to correct the certification of its claim for PO 0423, consistent with FAR 33.207. Top Level filed its corrected certification on April 14, 2025.

On May 8, 2025, the Board, after considering DOS's motion to dismiss for lack of jurisdiction, issued a decision dismissing as untimely Top Level's claim for full payment of the award value of PO 0382. *See Top Level Construction Co. v. Department of State*, CBCA 8301, 25-1 BCA ¶ 38,815, at 188,815. The Board denied DOS's request for dismissal of the remainder of the appeal, finding that Top Level had timely appealed the deemed denial of its claim relating to PO 0423 and that the claim was properly certified. *Id.* at 188,815-16. Following the issuance of the decision, the Board granted DOS's request to file an answer regarding the remaining claims. The parties elected to resolve the appeal under Rule 19, which provides for submission of an appeal for a decision on the record without a hearing.

Discussion

I. The Board's Jurisdiction and Standard of Review

The Board's jurisdiction to entertain contract disputes arises from, and is defined by, the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109. *Rashid El Malik v. Department of Veterans Affairs*, CBCA 6600, 20-1 BCA ¶ 37,536, at 182,275. The CDA applies to all express or implied contracts entered into by an executive agency for the procurement of property other than real property; the procurement of services; the procurement of construction, alteration, repair, or maintenance of real property; or the disposal of personal property. 41 U.S.C. § 7102(a).

When electing judgment under Rule 19, the parties may include in the written record "(1) any relevant documents or other tangible things they wish the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party's positions and defenses." Rule 19(a). Based on the parties' submissions, the Board is authorized to make findings of fact, even if such findings require "credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved," and can decide issues of law based on those factual findings. *Sylvan B. Orr, v. Department of Agriculture*, CBCA 5299,

17-1 BCA ¶ 36,863, at 179,613 (quoting *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967). Submission on the record under Rule 19 does not alter the rules as to burden of proof or relieve parties from the necessity of proving the facts supporting their allegations or defenses. *Id.* (citation omitted). "'While [the Board] can make inferences from th[e] evidence and either accept or deny the probative value of documents, statements or other extrinsic evidence, in order for us to find for a party, that party's evidence must establish,' by a preponderance of the evidence, 'that it is entitled to relief.'" *Id.* (quoting *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551).

Because Top Level is representing itself in this appeal (a pro se litigant), we have granted it "greater procedural latitude . . . than we give to parties represented by lawyers." *1-A Construction*, 15-1 BCA at 175,551-52. "Nevertheless, 'this more lenient standard for interpreting pleadings does not change a pro se litigant's burden of proof or our weighing of the factual record.'" *Id.* (quoting *House of Joy Transitional Programs v. Social Security Administration*, CBCA 2535, 12-1 BCA ¶ 34,991, at 171,974).

II. Claims Under POs 0382 and 0423 for Loss of Equipment and Materials

Top Level raises two primary arguments regarding the loss of its equipment and materials that occurred when the United States Government withdrew from Afghanistan and the Taliban took control of Kabul. First, Top Level argues DOS was obligated to safeguard its equipment and materials and to indemnify it against any loss. Because our jurisdiction is limited to claims arising from contracts, we understand this first argument to allege that DOS breached obligations under the purchase orders. Second, Top Level argues that DOS constructively terminated the purchase orders for the convenience of the Government, thereby entitling it to recover termination costs.

A. DOS Did Not Breach Any Obligations Under the Purchase Orders

1. Plain Language of the Purchase Orders

A claim for breach of contract contains four elements: "(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach." *San Carlos Irrigation & Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). 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). Further, we must "give the words of the agreement their ordinary meaning unless the parties mutually intended and agreed to an alternative meaning." *Harris v. Department of Veterans Affairs*, 142 F.3d 1463, 1467 (Fed. Cir.1998). 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).

Top Level contends that DOS was responsible under the terms of POs 0382 and 0423 for the loss of equipment and materials that were stored at Camp Alvarado during contract performance and, according to Top Level, were lost when the United States Government withdrew from Afghanistan. The Armed Services Board of Contract Appeals (ASBCA) addressed a similar situation in an appeal regarding performance of a contract in Afghanistan, finding that the United States Government was not required to safeguard a contractor's equipment or materials, absent a specific contract provision. *Targe Logistic Services Co.*, ASBCA 63282, 24-1 BCA ¶ 38,653, at 187,894; *see Bizhan Niazi Logistic Services Co.*, ASBCA 59205, 14-1 BCA ¶ 35,703, at 174,828 ("Nor can we award compensation for loss of life or even loss of a vehicle unless there is a contractual basis for doing so."). We find the ASBCA's reasoning, while not binding on us, persuasive.

Neither PO 0382 nor PO 0423 stated that DOS was required to safeguard Top Level's equipment and materials from loss caused by third parties or to indemnify Top Level from such loss. Top Level does not identify any express terms in either purchase order concerning an obligation on the part of DOS that could give rise to a breach of contract claim regarding equipment and materials.

Top Level notes that FAR provisions regarding Government-furnished property provide that "[g]enerally, contractors are not held liable for loss of Government property under" certain types of contracts. FAR 45.104(a). Top Level contends that "[b]y parity, when contractor-owned property is placed under Government custody at a secure facility, loss due to Government action or denial of access must be compensated." Top Level's Rule 19 Initial Brief (Initial Brief) at 3. The FAR provision cited by Top Level does not apply here because it pertains to Government-furnished property and does not apply to contractor property. Moreover, nothing in the provision supports the assertion that there is "parity" between Government-furnished property and contractor-owned property that obligates DOS to pay for Top Level's equipment and materials.

In addition, PO 0382 required Top Level to obtain insurance for all tools and equipment stored at the worksite and to provide evidence of such to the contracting officer.[5]

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[5] The record does not show whether Top Level provided evidence of insurance to the contacting officer. The purchase order stated, however, that "[i]ssuance of a Notice to Proceed by the Government before receipt of the required bonds or insurance certificates

Top Level's Initial Brief at 10, 14. During discovery, DOS served Top Level with the following interrogatory: "Identify any insurance policies maintained by Top Level covering the equipment used on PO 0382 and PO 0423, and whether Top Level has submitted any claims or recovered any costs for equipment through insurance providers." Exhibit 61 at 225. Top Level replied indirectly to the question, stating only that "[w]e did not recover[] any costs of equipment through insurance providers." *Id.*

PO 0382 placed the risk of loss of equipment and materials on Top Level, requiring it to obtain and maintain insurance against such losses and expressly providing that DOS would not be responsible for such losses. Exhibit 4 at 13-14. While PO 0423 did not include specific terms placing the risk of loss on Top Level, the absence of such terms did not create an affirmative contractual obligation on DOS. Instead, as discussed, neither purchase order included an express obligation on the part of DOS regarding equipment or materials.

Top Level does not specifically dispute the terms of the contract. Under the plain language of the purchase orders, DOS had no obligations to safeguard Top Level's equipment or identify it against loss, and DOS therefore did not breach any obligation under those orders.[6]

2. Permission to Leave Equipment and Materials at Camp Alvarado

Top Level contends that DOS gave it permission to leave equipment and materials at Camp Alvarado and that, by exercising control over how and where to store the equipment and materials, DOS accepted responsibility for safeguarding it and indemnifying Top Level from any loss. As discussed, PO 0382 required Top Level to "confine all operations (including storage of materials) on Government premises to areas authorized or approved by the Contracting Officer" but also provided that "[t]he Contractor shall hold and save the

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or policies shall not be a waiver of the requirement to furnish these documents." Exhibit 4 at 10.

[6] Top Level also argues that DOS has been unjustly enriched by its failure to compensate Top Level for the loss of the equipment. *See* Top Level's Initial Brief at 3. A claim for unjust enrichment applies to "situations where the rights and remedies of the parties are not defined in a valid contract" and where "justice requires that we create an obligation of a contractual nature for the sake of providing a remedy." *Arcadis U.S., Inc. v. Department of the Interior*, CBCA 918, 08-1 BCA ¶ 33,807, at 167,353-54. Here, there were valid contracts between the parties under POs 0382 and 0423—they simply did not set forth the rights and obligations argued by Top Level. Top Level therefore cannot recover the costs it seeks through a claim of unjust enrichment.

Government, its officers and agents, free and harmless from liability of any nature occasioned by the Contractor's performance." FAR 52.236-10. PO 0423 did not have similar provisions.

DOS acknowledges that it allowed Top Level to leave equipment and materials at Camp Alvarado during performance of the two purchase orders, as well as other contracts unrelated to this appeal. *See* DOS's Response at 19. DOS also does not dispute that it specified the locations where Top Level could leave its equipment. DOS states that although only PO 0382 specifically addressed equipment and materials, it understood that Top Level was storing equipment for multiple contracts—including PO 0423—at those locations. *Id.* at 20. DOS denies, however, that it required Top Level to store its equipment at Camp Alvarado or prohibited Top Level from removing its equipment from Camp Alvarado on a daily basis. *Id*. at 19-21. Rather, it contends that Top Level elected to leave its equipment and materials on site as a matter of efficiency. *Id.* at 20. For these reasons, DOS argues that the equipment and materials were not under its control in a manner that obligated it to protect them against loss from third parties or to indemnify Top Level for such losses.

Top Level does not provide details of exchanges with DOS regarding permission to leave equipment, such as the individuals involved or the dates of exchanges or conversations, nor does Top Level contend that there was any written correspondence concerning this matter. While Top Level states that moving equipment and materials in and out of Camp Alvarado on a daily basis was impractical and that all movements required approval from DOS, *see* Top Level's Reply at 2-3, 10-11, Top Level does not allege or otherwise demonstrate that DOS required Top Level to leave its equipment and materials at Camp Alvarado as a condition of contract performance. Moreover, Top Level does not contend or otherwise demonstrate that DOS expressly agreed to safeguard the equipment and materials or to indemnify Top Level against loss.

At best, Top Level's contentions reflect that DOS authorized Top Level to leave its equipment and materials at specific locations at Camp Alvarado, consistent with the provisions of PO 0382. DOS's authorization for Top Level to leave its equipment and materials at designated locations did not modify the provisions of PO 0382, nor create any new obligations under POs 0382 or 0423 wherein DOS expressly accepted responsibility for those items. *See, e.g.*, *Ysasi v. Rivkind*, 856 F.2d 1520, 1525 (Fed. Cir. 1988) (finding that a plaintiff must establish "facts that would 'evidence a promise, representation or statement by any authorized government official' that [plaintiff's property] would be returned to him" damage-free to show Government responsibility for damages to third-party property in its possession (quoting *Shaw v. United States*, 8 Cl. Ct. 796, 799 (1985))); *Alde, S.A. v. United States*, 28 Fed. Cl. 26, 31 (1993) ("At some point the court must find that an offer to guarantee the safety of the seized property was extended by the [agency] and that plaintiff

accepted this offer freely."). In sum, Top Level does not establish that DOS had any contractual obligations to protect Top Level's equipment or materials or indemnify Top Level against loss.

B. Termination for Convenience

1. General Principles

Top Level argues that DOS terminated its contract for the convenience of the Government, which entitled Top Level to recover the costs of its lost equipment and materials.[7] DOS did not issue a formal termination notice. However, in its answer to Top Level's complaint, DOS effectively acknowledges that it terminated POs 0382 and 0423 on August 15, 2021. *See* Answer at 5 ("[T]he Government admits that all work being performed at the U.S. Embassy in Kabul, Afghanistan was halted on August 15, 2021, due to the evacuation of the Embassy.").

PO 0382 incorporated by reference FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price) (APR 2012) Alternate I (SEPT 1996). Exhibit 4 at 21. PO 0423 did not include a termination for convenience clause or any provisions regarding termination.

It is well established that when a contract omits a required termination for convenience clause, it may be read into the contract as a matter of law. *G.L. Christian and Associates v. United States*, 320 F.2d 345, 350 (Ct. Cl. 1963). In essence, the so-called *Christian* doctrine allows the Government to terminate a contract for its convenience, even where the contract does not expressly provide that right, thereby avoiding a breach of contract. *CSI Aviation, Inc. v. General Services Administration*, CBCA 6543, 20-1 BCA ¶ 37,580, at 182,481. We conclude that the termination for convenience clause incorporated into PO 0382 is also incorporated into PO 0423 by operation of law.

The termination for convenience of a non-commercial items contract effectively converts a fixed-price contract into a cost-reimbursement contract, which permits the contractor "to recover its allowable costs incurred in performance of the contract." *Williams*

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[7] "Although appellant's claim did not expressly seek recovery on a 'constructive convenience termination' basis, a contractor may advance a legal theory on appeal that was not expressly raised in the claim if it relates to the same set of operative facts as the claim, which is the case here." *Lockheed Martin Corp.*, ASBCA 53798, 03-2 BCA ¶ 32,279, at 159,708.

Building Co. v. Department of State, CBCA 7147, 24-1 BCA ¶ 38,540, at 187,342 (quoting *Anlagen-und Sanierungstechnik GmbH*, ASBCA 37878, 91-3 BCA ¶ 24,128, at 120,753). The contractor bears the burden of establishing the costs that it incurred in performing its contract. *Id.* The FAR provides that the cost principles in FAR part 31 shall be used in determining allowable settlement costs, subject to the general principles in FAR 49.201. In this regard, the FAR provides:

> A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

FAR 49.201(a). The cost principles in FAR part 31 permit recovery of "allowable" costs that comply with all of the following requirements: (1) reasonableness; (2) allocability; (3) the Cost Accounting Standards or generally accepted accounting principles and practices; (4) contract terms; and (5) any enumerated limitations. FAR 31.201-2.

2. Necessity of a Termination Settlement Proposal

Normally, once the Government terminates a contract for convenience, the contractor is required to submit a termination settlement proposal (TSP) to the contracting officer, "in the form and with the certification prescribed by the Contracting Officer," within one year of the termination for the purpose of negotiating a settlement. FAR 52.249-2(e). The TSP cannot ripen into a "claim" that obligates the contracting officer to issue a final decision until the parties' "negotiations reach[] an impasse." *James M. Ellett Construction Co. v. United States*, 93 F.3d 1537, 1544 (Fed. Cir. 1996); *see Triad Mechanical, Inc.*, ASBCA 57971, 12-1 BCA ¶ 35,015, at 172,059. A contractor "cannot bootstrap itself prematurely into the CDA procedures by simply designating its termination settlement proposal as also a 'certified claim to you for payment' when submitting the proposal to the contracting officer under the Termination clause." *Triad Mechanical*, 12-1 BCA at 172,059. "[N]o claim for payment arising from the termination of a contract for convenience and the review of a contractor's settlement proposal accrues prior to the parties having reached an impasse." *Thorpe See-Op Corp.*, ASBCA 58960, et al., 15-1 BCA ¶ 35,833, at 175,246 (2014).

It is unclear whether the FAR's requirement for a TSP applies to a *constructive* termination for convenience, as the FAR clauses that create the contractor's obligation to submit a settlement proposal appear to tie that obligation to the issuance of a formal

termination notice. *See, e.g.*, FAR 52.249-2(b), (e). At least one other board of contract appeals has awarded termination settlement costs to a contractor who successfully established as part of a certified claim that its contract was constructively terminated for convenience, even though the contractor never submitted a TSP. *See Guardian Safety & Supply LLC*, ASBCA 61932, 19-1 BCA ¶ 37,333, at 181,563. However, in other circumstances, contractors have voluntarily submitted termination settlement proposals in response to alleged constructive convenience terminations. *See, e.g.*, *W.H. Kruger*, ASBCA 33081, 88-3 BCA ¶ 21,043, at 106,289, *amended on other grounds*, 89-1 BCA ¶ 21,442 (1988).

We need not resolve here whether a TSP is required before a contractor can pursue a claim for costs for a constructive termination for convenience because, even if we were to impose such a requirement, the invoices that Top Level submitted to the agency in November 2021 and January 2022 (less than a year after the constructive termination), although not titled TSPs, effectively served the same purpose, seeking the same damages that would be available through a termination settlement. We treat them, in effect, as settlement proposals. When Top Level subsequently submitted the claims underlying this appeal, the parties were already at an impasse in their negotiations on those invoiced costs.

3. Identification of Equipment and Materials

As an initial matter, Top Level's claim lists what appears to be equipment such as trucks, wheelbarrows, and drills, as well as materials such as rebar, plastic sheeting, and wooden plates. The Board requested that Top Level distinguish between durable equipment and materials incorporated or intended to be incorporated into the construction work. Top Level did not directly respond to the inquiry by distinguishing between equipment and materials and instead stated that "[a]ll items reflected in the referenced invoices constitute materials and supplies that were incorporated into the construction work performed under the subject contract." Top Level's Response to the Board's Order (Feb. 12, 2026) (Top Level's Response) at 31 (emphasis omitted). In this regard, Top Level represented that "[n]one of the invoiced items represent tools or equipment that were retained by Appellant for general or future use" and that "each item was purchased specifically for, and directly utilized in, the execution and completion of the contractual construction activities." *Id.*

Because Top Level did not distinguish between equipment and materials, we will categorize these items based on their description. In this regard, items with names that are reasonably described as durable equipment that would be expected to have use on a different contract are distinguished from items that are reasonably described as materials that would be incorporated into the concrete installation work under PO 0423.

4. Costs for Equipment

Top Level seeks the cost of equipment that it states it had left at Camp Alvarado at the time the contract was effectively terminated. In essence, Top Level seeks to recover the full purchase price of its equipment as a direct cost under the contract. Neither PO 0382 nor PO 0423, however, provided that the PO price included direct costs for equipment or required that Top Level deliver equipment to DOS. *See* Exhibits 2, 4 at 6.

Further, Top Level does not demonstrate that the claimed equipment costs were for equipment purchased specifically for POs 0382 or 0423 or that the equipment was of such a specialized nature that it had no value apart from those orders. Top Level contends that "each item was purchased specifically for, and directly utilized in, the execution and completion of the contractual construction activities." Top Level's Response at 31. However, Top Level also acknowledges that most of the equipment for which it seeks payment was used in multiple contracts, with some having been bought years before.[8] *See* Exhibit 61 at 224. For example, Top Level provided receipts showing that a Stonex total station survey device was purchased in 2019, two years before the award of POs 0382 and 0423. *Id*. On this record, Top Level does not demonstrate that any of the costs for equipment are allowable.[9]

5. Costs for Materials

Top Level's invoices included materials that it represents were purchased for use in POs 0382 and 0423. Bearing in mind the general principles under the termination for convenience provisions of FAR part 49, we find it reasonable for Top Level to recover the costs of the materials it can demonstrate that it purchased for use in POs 0382 and 0423 and for which it was not paid due to the early termination of those purchase orders.

Top Level provided receipts that appear to support its claims for certain items that appear to be materials purchased for POs 0382 and 0423. Although many of the receipts are not in English, Top Level provided a crosswalk between the receipts and the claimed items

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[8] We also note that Top Level's claim is based on the purchase price of the equipment, some of which Top Level acknowledges was purchased years before the purchase orders were awarded. Costs under a termination settlement must reflect their actual value, including any depreciation.

[9] Top Level stated that some of the equipment for which it seeks payment was leased. *See* Exhibit 44 at 166. Top Level did not, however, identify which items were leased nor did it provide any evidence of the lease costs or terms.

in the English language invoices, as well as specific translations for certain items. *See* Appellant's Supplemental Response (Feb. 12, 2026); Appellant's Supplemental Response (March 4, 2026). Because these crosswalks reflect quantities and dollar amounts, and because DOS does not challenge Top Level's crosswalk of the claim and receipts, we conclude that these receipts adequately document the following items.

For PO 0382, Top Level includes a $200 cost for one-inch water pipe, for which a receipt is provided. Exhibit 62 at 230. Top Level also claims a $5400 cost for "wooden plate" but acknowledges that it does not have a receipt or evidence for this item. Top Level's Response at 2. On this record, we find that Top Level has identified $200 in allowable costs for PO 0382.

For PO 0423, Top Level has identified the following material costs, which are supported by receipts, as supplemented by translations:

- $300 for plastic—three rolls at $100/roll. Exhibit 62 at 236.
- $9000 for wooden plate—two hundred units at $45/unit. *Id.* at 229.
- $3000 for bags for concrete covering—two hundred units at $15/unit. Appellant's Supplemental Response (March 4, 2026) at 2.
- $200 for one-inch water pipe—one hundred meters at $2/meter. *Id.* at 4.
- $5600 for 12mm rebar 12mm—five tons at $1120/ton. Exhibit 62 at 231.
- $8400 for 14mm rebar—five tons at $1680/ton. *Id.*
- $700 for 1mm rebar—twenty bundles at $35/bundle. *Id.*

On this record, we find that Top Level has identified $27,200 in allowable costs for PO 0423.

Our identification of allowable material costs does not end our review. DOS argued that Top Level did not substantiate what materials were at Camp Alvarado at the time contract performance was suspended on August 15, 2021. DOS's Response at 36. Top Level did not directly respond to DOS's arguments. Moreover, Top Level seeks costs based on the amounts listed in the receipts provided—that is, the full quantities purchased. Top

Level, therefore, does not explain how much of the materials were used in the partial performance of POs 0382 or 0423, for which it was paid. Here again, we follow the guidance of FAR 49.201(a) that fair compensation cannot always be precisely measured and therefore reduce the recoverable amount to reflect the percentage of work performed by Top Level and approved for payment by DOS, thereby approximating the amount of materials remaining.

The award price of PO 0382 was $89,928.75, and DOS approved payment of $36,091.08 for partial performance, amounting to forty percent of the award value. Assuming that sixty percent of the work was not completed, Top Level is entitled to sixty percent of the $200 documented cost of materials, which is $120. The award price of PO 0423 was $91,024.50, and DOS approved payment of $37,804.50 for partial performance, amounting to forty-two percent of the award value. Assuming that fifty-eight percent of the work was not completed, Top Level is entitled to fifty-eight percent of the $27,200 documented cost of materials, which is $15,776. In sum, Top Level is entitled to recover $15,896 for the allowable cost of materials.

III. Claim for Bank Guarantee Letters Under PO 0382

Top Level contends that it is entitled to recover the value of two original bank guarantee letters it obtained in connection with PO 0382, which totaled $17,986. Top Level states that it provided the original letters to DOS, which did not return them despite Top Level's request to do so. Top Level further states that it was unable to obtain the return of the value of the guarantees from the issuing bank without the original letters.[10]

On June 28, 2021, Top Level and DOS exchanged emails regarding the notice to proceed and the bank guarantee.[11] Top Level emailed DOS contracting officer's representative Erik Nelson to inquire about the bank guarantee, stating, "We have Bank Guarantee letter to submit you as a hard copy, can you please tell me when and whom we can

[10] Top Level does not specifically characterize its claim regarding the bank guarantee letters as a breach of contract or a termination settlement cost. Because, as discussed below, we conclude that Top Level does not support its factual allegations, we need not resolve this matter.

[11] The times indicated on the emails appear to reflect differing time zones, and therefore it is not clear exactly when each message was sent. However, based on the sequence of messages and replies, it is clear that the messages were sent in the sequence outlined herein.

submit it?" Exhibit 50 at 199. Mr. Nelson replied, "Please submit and email a scanned copy to [DOS Procurement Supervisor, Mansoor Zaki]." *Id.*

Mr. Nelson wrote Mr. Zaki, stating as follows: "As you can see below, [the president of] Top Level has been trying to contact you regarding the bank guarantee. I have instructed him to email you a scanned copy of the guarantee. Please let Top Level know if you need anything else." Exhibit 49 at 196. Mr. Zaki responded: "At the moment the scan copy is enough to issue the [notice to proceed], I will schedule a date to receive the original one." *Id.*

In response to Mr. Nelson's email, Top Level emailed Mr. Zaki, advising, "Please have attached [sic] Scanned copy of Bank Guarantee Letters, we have attached 2 each 10% [bank guarantee] which is total 20% of contract amount, if you have any question[s] please let us know." Exhibit 50 at 199. Mr. Zaki then provided Top Level a notice to proceed. Exhibit 9 at 52.

Top Level does not contend that it received specific directions from DOS regarding how to submit the original bank guarantee letters, and the record does not contain any additional documents regarding this matter. Top Level represents that it submitted the bank guarantee original letters to the Embassy the same day it transmitted the scanned copies via email: "Accordingly, I submitted the hardcopy at the Embassy Gate through my General Manager, Mr. Halim Sadat, and also emailed the scanned copy to Mr. Zaki as well. So I submitted both hard and softcopy to embassy on 28 June 2021." Top Level's Reply at 8.

PO 0382 did not require Top Level to submit the original bank guarantee letter. *See* Exhibit 4 at 28. DOS states that it "has been unable to locate any documentation confirming that the original performance bank guarantees were provided to DOS for [PO 0382]." DOS's Response at 7.

Even assuming the June 28, 2021, correspondence could be reasonably understood to instruct Top Level to submit original bank guarantee letters, in neither of its emails did Top Level specifically state that it actually submitted the original letters. Further, DOS did not acknowledge receipt of original guarantee letters in any of the email exchanges or any other correspondence in the record. To the extent Top Level states that its representative provided original guarantee letters to the Embassy gate, it does not provide any statement from the individual who purportedly made the submission or any other evidence regarding the alleged submission.

In sum, Top Level was not required under the terms of PO 0382 to provide original bank guarantee letters to DOS, and Top Level does not provide evidence establishing that

it actually did so. Top Level is therefore not entitled to recover the value of the bank guarantee letters from DOS.

Decision

For the foregoing reasons, Top Level's appeal is **GRANTED IN PART**.[12] DOS shall pay Top Level $15,896 for the cost of materials under POs 0382 and 0423, plus CDA interest running from April 14, 2025 (the date that the DOS contracting officer received Top Level's corrected certified claim).

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

We concur:

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

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

[12] The parties each raise other collateral arguments. Although we have not addressed every argument, we reviewed them all and find that none provides a basis for a different conclusion in this decision.